

POST-DECISION PRACTICE **INFORMATION SHEET**

The purpose of this information sheet is to provide information about practice after a final order has been entered in a case.

For cases decided by merits panels, a Notice of Judgment or Notice of Order form will be issued. That form will specify the date on which judgment or the Court's dispositive order was entered. For cases decided by motions panel, post-decision deadlines are calculated from the date listed on the order closing the case.

In 28 U.S.C. § 2244 cases, by statute, rehearing petitions are not allowed.

(1) **PETITIONS FOR REHEARING** (Rules 35 and 40, Federal Rules of Appellate Procedure, LAR 35 and IOP Chapter 9).

(A) Criteria for Rehearing En Banc

Rehearing by the Court en banc pursuant to Rule 40, Federal Rules of Appellate Procedure, is not favored. See Third Circuit Local Appellate Rules (LAR) 35.4. In regard to the criteria as to when rehearing by the court en banc might be granted, your attention is specifically directed to the following provisions of Third Circuit Internal Operating Procedures (IOP) Chapter 9:

IOP 9.3 Criteria for Rehearing En Banc.

IOP 9.3.1 This court strictly follows the precept of Rule 35(b), Federal Rules of Appellate Procedure, that rehearing en banc is not favored and will not be ordered unless consideration by the full court is necessary to secure or maintain uniformity of its decisions or the proceeding involves a question of exceptional importance.

IOP 9.3.2 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.

IOP 9.3.3 Rehearing en banc is ordinarily not granted when the only issue presented is one of state law.

(B) Presumption That Both Panel Rehearing and Rehearing En Banc Are Requested

Unless otherwise specified it is presumed pursuant to IOP Chapter 9.5.1 that a petition for rehearing seeks both panel rehearing and rehearing en banc. IOP Chapter 9.5.1 states:

IOP 9.5.1 It is presumed that a petition for rehearing before the panel or suggestion for en banc that both rehearing filed by a party as provided by panel and Rule 35(b) or 40(a), Federal Rules of Appellate Procedure, requests both panel rehearing and rehearing en banc, unless the petition for panel rehearing under Rule 40(a) states explicitly that it does not request en banc rehearing under Rule 35(b).

If both panel rehearing and rehearing en banc are requested the Court prefers that a single petition be filed. If separate petitions requesting panel rehearing and rehearing en banc are filed, they will be treated as a single document and will be subject to a combined 15 page size limit. Rules 35(b)(2) and (3), Federal Rules of Appellate Procedure.

(C) Required Statement in Petitions for Rehearing En Banc

Rule 35(b)(1), Federal Rules of Appellate Procedure requires a statement in a petition for rehearing en banc:

Rule 35(b)(1). When rehearing en banc is requested, the petition must begin with a statement that either:

(A) the panel decision conflicts with a decision of the United States Supreme Court or of [the Third Circuit] (with citation to citation to the cases or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decision: or

(B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.

If the statement required by Rule 35(b) is made by counsel in a case, pursuant to LAR 35.1, the statement required by the Federal Rules of Appellate Procedure must be prefaced by a representation of counsel specifically stating, "I express a belief, based on a reasoned and professional judgment that [either the language of Rule 35(b)(1) or (2)]..."

In addition LAR 35.1 also requires that:

If the statement is made pursuant to Rule 35(b)(1)(B), or the grounds that a question of exceptional importance is presented, the statement setting forth the issued of exceptional importance shall be limited to one sentence. LAR 35.1.

(D) Additional Requirement Concerning Contents of Petitions for Panel Rehearing

A petition seeking panel rehearing, "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." Rule 40(a)(2), Federal Rules of Appellate Procedure.

(E) Caveat

The filing of petitions for rehearing or rehearing en banc is not favored. Rule 35, Federal Rules of Appellate Procedure and LAR 35.4. Counsel are reminded that a duty is owed to the Court commensurate with that owed to their clients not to file petitions for rehearing en banc which do not meet the rigorous requirements of Rule 35, Federal Rules of Appellate Procedure and LAR 35.1.

(F) Attachments

Pursuant to LAR 32.3(b) and 35.2 attached to each petition for rehearing must be a copy of the judgment, order or decision of the Court as to which rehearing is sought and any memorandum or opinion of the court stating the reasons therefor. *No other attachments will be allowed unless leave has been granted by the Court.* Such leave must be obtained by filing a formal motion.

(G) Filing Deadline

A petition for rehearing may be filed within 14 days of the date the Court's judgment or final decision was entered on the docket unless the appeal is a civil case in which the United States is a party. Rule 40(a), Federal Rules of Appellate Procedure.

In a civil case in which the United States is a party, any petition for rehearing must be filed within 45 days of entry of the Court's final judgment or decision. Id. These filing

deadlines are calculated from the date the Notice of Judgment or Notice of Order form is dated. The petition must be received in the Clerk's office within the time permitted for filing a petition. A petition is filed as of the date of receipt and **not** of mailing.

Pursuant to Rule 35(c), Federal Rules of Appellate Procedure, any request for rehearing en banc must be filed at the same time that a petition for panel rehearing is filed. Neither the Court's LARs nor its IOPs allow a process by which a subsequent request for rehearing en banc is filed after a petition for panel rehearing has been denied.

(H) Form, Answer, Service

The 15 page limit of Rule 35(b)(2), Federal Rules of Appellate Procedure, will be strictly enforced. Although the Court prefers that requests for panel rehearing and rehearing en banc be made in a single document, if separate documents are filed the combined total number of pages in both documents may not exceed 15 pages. Rule 35(b)(3), Federal Rules of Appellate Procedure. The 15 page limit will also apply to any answer to a petition requested by the Court.

No answer to a petition for rehearing is permitted unless requested by the Court. Rules 35(e) and 40(a)(3), Federal Rules of Appellate Procedure. Ordinarily rehearing will not be granted without an answer having been requested. Id. Oral argument in support of the petition is not permitted. Rule 40(2), Federal Rules of Appellate Procedure.

All petitions for rehearing and answers thereto must comply with the form requirements of Rule 32. Federal Rules of Appellate Procedure. Copies of petitions and answers must be served and filed as specified by Rule 31, Federal Rules of Appellate Procedure. See Rule 40(b). Federal Rules of Appellate Procedure.

(I) Number of Copies

An original and 14 copies of any petition requesting requests both panel rehearing and rehearing en banc, or only rehearing en banc, an original and 14 copies are required. If separate petitions requesting panel rehearing and rehearing en banc are filed, an original and 14 copies of both petitions must be filed.

If a petition specified that panel rehearing only is requested, an original and 3 copies must be filed.

(J) Filing by Incarcerated or Institutionalized Individuals

In addition to including a certificate of service, all litigants who are currently

institutionalized or incarcerated should include the following statement on all documents to be filed with this Court:

I certify that this document was given to prison officials on [date] for forwarding to the Court of Appeals. I certify under penalty of perjury that the foregoing is true and correct. 28 U.S.C. Sec. 1746.

(3) BILLS OF COSTS (Rule 39, Federal Rules of Appellate Procedure, and LAR 39)

(A) Filing Time

A party to whom costs are allowed, who desires taxation of costs, shall file a bill of costs within 14 days after judgment. Rule 39(d)(1), Federal Rules of Appellate Procedure. The bill of costs must be **received** in the Clerk's office within the 14 day period.

(B) Form

A party who has been granted costs in the Court's judgment must request the taxation of cost on the form provided by the Clerk and must include either an itemized statement from a printer or an affidavit of counsel, as required by the clerk's bill of costs form. LAR 39.4. Proof of service of the bill must be attached.

(C) Allowable Costs (LAR 39.3)

The cost of printing or otherwise reproducing necessary copies of briefs and appendices shall be taxable according to LAR 39.3. That rule establishes specific amounts which will be allowed as costs for various services and the number of copies for which costs will be allowed. Costs are allowed only for the services specified in the rule.

(4) MANDATE (Rule 41, Federal Rules of Appellate Procedure)

(A) Time for Issuance

The mandate, or certified judgment or order in lieu of formal mandate, is issued 7 days after the time for filing a petition for rehearing has expired. Rule 41(a). Federal Rules of Appellate Procedure. In the absence of the filing of a petition for rehearing, the mandate will issue 21 days after entry of the Court's final judgment or decision. However, where the United States is a party in a civil case and in the absence of a timely filed petition for rehearing, the mandate will issue 52 days after entry of the Court's final judgment or decision. Id.

If issuance of the mandate has been stayed pending disposition of a petition for

writ of certiorari, the mandate is issued immediately when the Supreme Court notifies this Court that the petition has been denied or the judgment of this Court is affirmed. See Rule 41(2)(D), Federal Rules of Appellate Procedure.

(B) Mandate Effective Date

Pursuant to Rule 41(c), Federal Rules of Appellate Procedure, the Court's mandate is effective when issued. In accordance with Rule 41(c), the Court's normal practice is to issue a certified copy of its judgment, with any opinion attached, in lieu of issuing a formal mandate in a separate document.

(5) STAY OF MANDATE

(A) Automatic Stay Upon the Filing of A Petition for Rehearing

The timely filing of a petition for rehearing stays the issuance of mandate. Rule 41(d), Federal Rules of Appellate Procedure. If the petition is denied, the mandate is issued 7 days after the issuance of the Rehearing order denying the petition. Rule 41(b), Federal Rules of Appellate Procedure.

(B) Motion to Stay Issuance of the Mandate

The filing of a motion to stay issuance of the mandate is not a prerequisite for filing a petition for writ of certiorari. Such a motion is to be filed only where issuance of the mandate will have a substantive effect. IOP Chapter 10.8.2. If issuance of the mandate will have a **substantive** effect, a motion to stay the mandate shall be filed promptly.

The motion must be served on all parties and must demonstrate that a petition for writ of certiorari would present a substantial question and that there is good cause for a stay. Rule 41(d)(2)(A), Federal Rules of Appellate Procedure. The stay may not exceed 90 days unless either: 1) the stay is extended for good cause shown; or, 2) a petition for writ of certiorari is filed during the stay period. Rule 41(2), Federal Rules of Appellate Procedure.

7) Supreme Court:

The address for the Supreme Court of the United States is:

Office of the Clerk
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543-0001
Telephone: 202-479-3011

All questions concerning the filing of a petition for writ of certiorari or other questions about practice in that Court should be addressed to the Supreme Court's Clerk's office.