



AMERICAN IMMIGRATION LAW FOUNDATION

PRACTICE ADVISORY¹

HOW TO FILE A PETITION FOR REHEARING, REHEARING EN BANC AND HEARING EN BANC IN AN IMMIGRATION CASE

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I. INTRODUCTION

After a court of appeals renders a decision, any of the parties may ask the court to reconsider its decision by filing a petition for rehearing. *See* Federal Rules of Appellate Procedure (FRAP) 35 and 40. The courts rarely rehear cases. Parties can seek panel rehearing, rehearing en banc, or both panel and en banc rehearing. Panel rehearing means that only the panel of three judges that issued the original decision reconsiders the case. Rehearing en banc means that the full court (or an en banc panel) reconsiders the case.

Rehearing en banc is not the sole mechanism for bringing a case before the entire court. The parties may petition for initial hearing en banc as long as the petition is filed before the appellee's brief is due. FRAP 35(c). The courts will grant petitions for hearing en banc only when it is necessary to secure or maintain uniformity of the court's decisions or when the case involves a question of exceptional importance. FRAP 35(a).

Should my client seek rehearing?

When advising your client about whether to seek panel rehearing or rehearing en banc, one important fact to consider is that the courts rarely grant petitions for panel rehearing or en banc review. In addition, you may consider the following questions when considering a petition for rehearing:

- How strong are the merits of a petition for rehearing? Is there an error of fact or law in the opinion or did the court overlook an important argument?

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- Are there other circuits or other panels in this circuit that have reached contrary results in similar cases? Was there a dissent in your client’s case?
- Does the decision in this case have a significant impact on other cases?
- What are the financial costs of litigating the petition? Can your client afford these costs?
- Do you have the time and resources necessary to litigate the petition for rehearing?
- Are there reasons why your client would not want to prolong litigation? Is your client detained, and will he or she likely remain detained while a petition is pending?
- Are there additional benefits to staying the mandate? (The filing of a petition for rehearing stays the mandate. FRAP 41(d)(1).)

Should my client seek initial hearing en banc?

As with rehearing petitions, the courts rarely grant petitions for initial hearing en banc. Nonetheless, there are certain situations where it may be advisable to seek initial hearing en banc. In addition to the questions presented above, you may want to consider:

- Are you presenting an argument that arguably conflicts with a precedent decision in the circuit? The general rule is that panels are bound by prior precedent decisions directly on point and only an en banc decision can overrule a precedent (“prior panel precedent rule”).² Therefore, you may be in a situation where you will be able to obtain a favorable decision only by seeking en banc review.

Importantly, there are exceptions to the prior panel precedent rule:

1. A panel decision may be undermined by controlling authority, subsequently announced, such as the opinion of the Supreme Court, an en banc opinion of the circuit court, or a statutory overruling.
2. A panel decision may be undermined by an authority postdating the original decision that, although not directly controlling, nevertheless offers a sound reason for believing that the former panel, in light of fresh developments, would change its collective mind.

² See, e.g., *Charlesbank Equity Fund II v. Blinds to Go, Inc.*, 370 F.3d 151, 160 (1st Cir. 2004); *Zervos v. Verizon New York, Inc.*, 252 F.3d 163, 171-72 (2d Cir. 2001); *Reich v. D.M. Sabia Company*, 90 F.3d 854, 855 & n.2, 858 (3d Cir. 1996); *Loudon Leasing Dev. Co. v. Ford Motor Credit Co.*, 128 F.3d 203, 206 n.1 (4th Cir. 1997); *FDIC v. Abraham*, 137 F.3d 264, 268-69 (5th Cir. 1998); *Sam & Ali, Inc. v. Ohio Dep’t of Liquor Control*, 158 F.3d 397, 405 (6th Cir. 1998); *United States v. Mosby*, 101 F.3d 1278, 1279 n.3 (8th Cir. 1996); *United States IRS v. Osborne*, 76 F.3d 306, 309 (9th Cir. 1996); *United States v. Meyers*, 200 F.3d 715, 720-21 (10th Cir. 2000); *United States v. Steele*, 147 F.3d 1316, 1317-18 (11th Cir. 1998).

Williams v. Ashland Eng'g Co., 45 F.3d 588, 592 (1st Cir. 1995).³ In cases where there are arguments that either a prior precedent is not on point or an exception to the prior panel precedent rule applies, petitioners may prefer to have the case decided by a panel. If the panel reaches an adverse decision, and/or finds that prior precedent applies, the petitioner still has the option of seeking rehearing en banc.

- Have various panels in your circuit reached contradictory results in cases similar to your case? Although unpublished decisions are not binding, they may demonstrate that en banc review is needed to ensure uniformity within the circuit. If you are citing an unpublished decision, see FRAP 32.1 and local rules regarding citation of unpublished decisions. FRAP 32.1 allows citation of unpublished decisions issued on or after January 1, 2007. Citation of earlier decisions is governed by local rule. In some situations, you may have to attach copies of the unpublished decisions or orders to the petition.

II. PETITION REQUIREMENTS

The petition requirements described below are governed by FRAP. The courts, however, have adopted local rules regarding petitions for rehearing, rehearing en banc, and hearing en banc, so be sure to consult with the local rules as well as FRAP. The courts all post their local rules on their web pages.

A. Panel Rehearing – FRAP 40 and local rules

Standards and Contents

Petitions for 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.” FRAP 40(a)(2).

Filing Deadline

Although the general rule is that petitions for rehearing must be filed within 14 days after the entry of judgment, in cases where the United States or its officer or agency is a party, petitions may be filed within *45 days* after entry of a judgment. FRAP 40(a)(1). Thus, in immigration cases, where the government is always a party, petitions for rehearing must be filed within 45 days after entry of the judgment. A petition is deemed to be filed on the date on which the circuit court *receives* the petition, not on the date which it is mailed. FRAP 25(a)(2)(A). Petitioners may move for extensions of time in which to file a petition. FRAP 26(b); 40(a)(1). The parties may file petitions for rehearing even if the person has been deported or departed voluntarily.

Length

³ See also *FDIC*, 137 F.3d at 269 & n.19 (panel required to follow prior panel’s interpretation of state law unless a subsequent state court decision makes the prior panel’s decision clearly wrong); *Reich v. D.M. Sabia Co.*, 90 F.3d at 858 (panel can reevaluate prior panel precedent in light of intervening authority and amendments to statutes or regulations); *Landreth v. Comm’r of Internal Revenue Serv.*, 859 F.2d 643, 648 (9th Cir. 1988) (same). But see *Smith v. GTE Corp.*, 236 F.3d 1292, 1303 (11th Cir. 2001) (rejecting any exception to the prior panel precedent rule “based upon a perceived defect in the prior panel’s reasoning or analysis as it relates to the law in existence at that time”).

A petition for rehearing must not exceed 15 pages unless the petitioner receives the court's permission or a local rule provides otherwise. FRAP 40(b). If a party files a petition for panel rehearing and a petition for rehearing en banc, even if they are filed separately, the court considers them one document for the purpose of the petition length, unless the local rules require separate filing. FRAP 35(b)(3).

Number of Copies

Copies of a petition for rehearing must be served and filed pursuant to FRAP 31. FRAP 40(b). Rule 31 prescribes that twenty-five copies of each petition must be filed with the clerk and two copies served on each unrepresented party and on counsel for each separately represented party. However, most courts have local rules that specify different numbers of copies.

Cover and Binding

A petition for rehearing does not need a cover as long as the caption and signature page contains the information specified in FRAP 32(a)(2). FRAP 32(c)(2); 40(b). The petition may be bound using any method as long as the brief is secure, the binding does not obscure the text, and the brief lies "reasonably flat when open." FRAP 32(a)(3). Petitions for rehearing generally are not bound like briefs, but are stapled in the upper left corner.

Answer

Under FRAP 40(a)(3), no party may respond to a petition for rehearing unless the court requests a response. "But ordinarily rehearing will not be granted in the absence of such a request." FRAP 40(a)(3). This means that the party who won the panel decision does not have an automatic opportunity to respond, but the court will "ordinarily" not grant the petition for rehearing without asking for a response.

Action by the Court

Under FRAP 40(a)(4), if the court grants a petition, it may:

1. make a final determination on the case without re-argument;
2. order that the case be re-argued or resubmitted; or
3. "issue any other appropriate order."

B. Rehearing En Banc – FRAP 35 and local rules

Standards and Contents

Petitions for rehearing en banc will only be granted when it is necessary to secure or maintain uniformity of the court's decisions or when the case involves a question of exceptional importance. FRAP 35(a). The petition must begin with a statement that either:

1. the panel decision conflicts with a decision of the U.S. Supreme Court or of the court to which the petition is filed (with citation/s to the conflicting case/s) and consideration by the full court is necessary to ensure the uniformity of the court's decisions; or

2. the proceeding involves at least one “question of exceptional importance,” which must be succinctly stated. (An example of a question of exceptional importance may be an issue on which the panel decision is inconsistent with the binding decisions of other circuit courts that have ruled on the issue.)

FRAP 35(b).

Some circuit courts will automatically treat a petition for rehearing en banc as a petition for panel rehearing as well, even if not specified. Many circuit courts permit or require the petitioner to file a petition for rehearing and rehearing en banc in one document. At least one court, the Fifth Circuit, requires separate petitions for rehearing and petitions for rehearing en banc. Be sure to consult local rules.

Filing Deadline

Although the general rule is that petitions for rehearing en banc must be filed within 14 days after the entry of judgment, in cases where the United States or its officer or agency is a party, petitions may be filed within *45 days* after entry of a judgment. FRAP 35(c); 40(a)(1). Thus, in immigration cases, where the government is always a party, petitions for rehearing en banc must be filed within 45 days after entry of the judgment. A petition is deemed to be filed on the date on which the circuit court *receives* the petition, not on the date which it is mailed. FRAP 25(a)(2)(A). Petitioners may move for extensions of time in which to file a petition. FRAP 26(b). The parties may file petitions for rehearing en banc even if the person has been deported or departed voluntarily.

Length of Petition

A petition for rehearing en banc must not exceed 15 pages unless the petitioner receives the court’s permission or a local rule provides otherwise. FRAP 35(b)(2). If a party files a petition for panel rehearing and a petition for rehearing en banc, even if they are filed separately, the court considers them one document for the purpose of the petition length, unless the local rules require separate filing. FRAP 35(b)(3).

Number of Copies

Each court of appeals shall prescribe the number of copies of a petition for rehearing en banc. FRAP 35(d).

Cover and Binding

A petition for rehearing en banc does not need a cover as long as the caption and signature page contains the information specified in FRAP 32(a)(2). FRAP 32(c)(2). The petition may be bound using any method as long as the brief is secure, the binding does not obscure the text, and the brief lies “reasonably flat when open.” FRAP 32(a)(3). Petitions for rehearing en banc generally are not bound like briefs, but are stapled in the upper left corner.

Response

No response may be filed unless the court requests a response. FRAP 35(e). This means that the party who won the panel decision does not have an automatic opportunity to respond, but the court often will ask for a response if it is giving serious consideration the petition for rehearing.

Call for a Vote

“A vote need not be taken to determine whether the case will be ... reheard en banc unless a judge calls for a vote.” FRAP 35(f).

C. Hearing En Banc – FRAP 35 and local rules

Standards and Contents

Petitions for hearing en banc will only be granted when it is necessary to secure or maintain uniformity of the court’s decisions or when the case involves a question of exceptional importance. FRAP 35(a). The petition must begin with a statement that either:

1. the panel decision conflicts with a decision of the U.S. Supreme Court or of the court to which the petition is filed (with citation/s to the conflicting case/s) and consideration by the full court is necessary to ensure the uniformity of the court’s decisions; or
2. the proceeding involves at least one “question of exceptional importance,” which must be succinctly stated. (An example of a question of exceptional importance may be an issue on which the panel decision is inconsistent with the binding decisions of other circuit courts that have ruled on the issue.)

FRAP 35(b).

Filing Deadline

A petition for hearing en banc must be filed by the date when the *appellee’s* brief is due. FRAP 35(c). A petition is deemed to be filed on the date on which the circuit court *receives* the petition, not on the date which it is mailed. FRAP 25(a)(2)(A). Nothing in this rule affects the briefing schedule set by the court.

Length of Petition

A petition for hearing en banc must not exceed 15 pages unless the petitioner receives the court’s permission or a local rule provides otherwise. FRAP 35(b)(2).

Number of Copies

Each court of appeals shall prescribe the number of copies of a petition for hearing en banc. FRAP 35(d).

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Response

No response may be filed unless the court requests a response. FRAP 35(e).

Call for a Vote

“A vote need not be taken to determine whether the case will be heard ... en banc unless a judge calls for a vote.” FRAP 35(f).

III. STAYING OF THE MANDATE

The timely filing of a petition for rehearing or rehearing en banc stays the mandate until the court decides the motion, unless the court orders otherwise. FRAP 41(d)(1). A stay of the mandate, however, does not automatically stay a person’s removal from the United States.

If the court granted a stay of removal, the stay of removal remains intact until the court issues the mandate. *See, e.g., Rife v. Ashcroft*, 374 F.3d 606, 617 (8th Cir. 2004), *Nwakanma v. Ashcroft*, 352 F.3d 325, 328 (6th Cir. 2003). Furthermore, in courts that exercise equitable power to stay the voluntary departure period, the stay of voluntary departure remains intact until the court issues the mandate. *See Rife*, 374 F.3d at 617; *Desta v. Ashcroft*, 365 F.3d 741, 750 (9th Cir. 2004); *Nwakanma*, 352 F.3d at 328.

IV. PRACTICAL CONSIDERATIONS

The following are tips for strengthening your petition for panel rehearing, rehearing en banc, or hearing en banc:

- Highlight circuit splits.
- Highlight intra-circuit conflicts, even if the decisions are unpublished. Although unpublished decisions are not binding, they may demonstrate that en banc review is needed to ensure uniformity within the circuit. See FRAP 32.1 and local rules regarding citation of unpublished decisions. FRAP 32.1 allows citation of unpublished decisions issued on or after January 1, 2007. Citation of earlier decisions is governed by local rule. In some situations, you may have to attach copies of the unpublished decisions or orders to the petition.
- If you are seeking reversal of a precedent decision, identify the precedent you want reversed and clearly delineate the errors in the panel’s reasoning.
- Cite favorable dissents. A strong, well-reasoned dissent may help persuade other judges in the circuit that the panel reached the wrong result and that rehearing en banc is needed.
- Briefly explain the impact that this decision will have on other cases.

Panel rehearing vs. rehearing en banc

In most cases, a party seeking rehearing will petition for both panel rehearing and rehearing en banc. Many of the circuits permit or require the petitioner to file a petition for panel rehearing or rehearing en banc in the same document. Some courts automatically treat a petition for rehearing en banc as a petition for panel rehearing, even if the petitioner does not expressly seek panel rehearing. Except for the expense of making additional copies, there are relatively few additional financial costs to seeking both panel rehearing and rehearing en banc.

Nonetheless, there may be situations where a party would prefer to petition for panel rehearing only. In determining whether panel rehearing is the best option in your case, it is important to know the court's history and the judges on your panel. Consider whether your case would fare better before the panel than the other judges in the court. For example, in cases where the panel overlooked an important fact, it may be advisable to seek only panel rehearing if the panel is good and the case is in a circuit that rarely rules in favor of noncitizens.

V. SUMMARY

A petition for rehearing or rehearing en banc brings the panel's attention to errors or omissions of fact or law. Petitions for rehearing and rehearing en banc must be filed no later than 45 days after entry of judgment. A petition is considered filed on the day it is received at the clerk's office and not on the day it is mailed. Filing a petition for rehearing or rehearing en banc stays the mandate until the court makes a determination on the petition, unless the court orders otherwise. Filing a petition for rehearing does not stay the petitioner's removal from the United States (unless a stay already is in place).

Parties also may file a petition for initial hearing en banc. The courts only grant hearing en banc when it is necessary to secure or maintain uniformity of the court's decisions or when the case involves a question of exceptional importance. A petition for initial hearing en banc must be filed by the date on which the appellee's brief is due.