

Consolidation of Tenth Circuit Rules 35 and 40

With the consolidation of Federal Rules of Appellate Procedure 35 and 40, Tenth Circuit Rules 35 and 40 have also been consolidated into the proposed Tenth Circuit Rule 40 below. Given the extensive revisions necessary to consolidate the rules, a redline is not useful, but the current versions of Rules 35 and 40 are included for reference in reviewing the proposed consolidated Rule 40.

Proposed Tenth Circuit Rule 40

40.1 Generally.

- (A) **Panel rehearing is not routine.** A petition for panel rehearing should not be filed routinely. Panel rehearing will be granted only if a significant issue has been overlooked or misconstrued by the court.
- (B) **En banc consideration is extraordinary.** A request for en banc consideration is disfavored. Before seeking rehearing en banc litigants should be aware and take account of the fact that, before any published panel opinion issues, it is generally circulated to the full court and every judge on the court is given an opportunity to comment. En banc review is an extraordinary procedure intended to focus the entire court on an issue of exceptional public importance or on a panel decision that conflicts with a decision of the United States Supreme Court or of this court.
- (C) **Petition for writ of certiorari to Supreme Court.** Filing a petition for panel rehearing or for rehearing en banc is not required before filing a petition for a writ of certiorari in the United States Supreme Court.
- (D) **Sanctions.** If a petition for panel rehearing or for rehearing en banc is found to be frivolous, vexatious, or filed for delay, the court may impose a monetary penalty. Counsel may be required to personally pay the penalty to the opposing party. See 28 U.S.C. § 1927.

40.2 Petition for rehearing en banc.

- (A) **Cover.** The cover page and title of a petition requesting en banc consideration must clearly indicate that en banc consideration is sought.
- (B) **Attachments.** A copy of the panel decision that is the subject of a request for rehearing en banc must be attached to the petition. No other documents may be attached unless the petition is accompanied by a motion for leave to attach additional documents, which identifies the attachments with particularity and states the reason(s) why they are necessary for the court's consideration of the petition.
- (C) **Untimely request.** Untimely en banc requests will be transmitted to the full court only upon express order of the hearing panel.

- (D) **Who may vote; en banc panel.** A majority of the active judges who are not disqualified may order rehearing en banc. When en banc rehearing is granted, the en banc panel consists of this court's active judges who are not disqualified and any senior judge who was a member of the hearing panel, unless he or she elects not to sit.
- (E) **Effect of rehearing en banc.** The grant of rehearing en banc vacates the judgment, stays the mandate, and restores the case on the docket as a pending appeal. The panel decision is not vacated unless the court so orders.
- (F) **Matters not considered en banc.** The en banc court does not consider procedural and interim orders. These include, but are not limited to, stay orders; injunctions pending appeal; and denials of appointment of counsel, leave to appeal in forma pauperis, and leave to appeal from a nonfinal order. En banc requests from these rulings are referred to the judge or panel that entered the order, in the same manner as a petition for panel rehearing.

40.3 Hard copies not required.

Hard copies of petitions for panel rehearing or for initial or rehearing en banc are not required.

40.4 No successive petitions/no reconsideration.

- (A) **No successive petitions.** The court will accept only one petition for panel rehearing or for rehearing en banc from any party to an appeal.
- (B) **No reconsideration.** No motion to reconsider the court's ruling on a petition for panel rehearing or for rehearing en banc may be filed.

Current Tenth Circuit Rule 35

35.1 En banc consideration.

- (A) **Extraordinary procedure.** A request for en banc consideration is disfavored. Before seeking rehearing en banc litigants should be aware and take account of the fact that, before any published panel opinion issues, it is generally circulated to the full court and every judge on the court is given an opportunity to comment. En banc review is an extraordinary procedure intended to focus the entire court on an issue of exceptional public importance or on a panel decision that conflicts with a decision of the United States Supreme Court or of this court.
- (B) **Petition not required.** Filing a petition for rehearing or for rehearing en banc is not required before filing a petition for certiorari in the United States Supreme Court.

- (C) **No reconsideration.** The court will not reconsider either the denial of an en banc petition or an en banc disposition.

35.2 Request in petition for rehearing.

- (A) **Cover.** The request for en banc consideration must appear on the cover page and in the title of the document requesting rehearing.
- (B) **Form of request.** A copy of the opinion or order and judgment that is the subject of a request for rehearing en banc must be attached to every copy of the petition. See 10th Cir. R. 40.2. No other attachments may be included unless the petition is accompanied by a motion seeking permission which identifies the attachments with particularity and the reason for their inclusion.

35.3 Untimely request.

Untimely en banc requests will be transmitted to the full court only upon express order of the hearing panel.

35.4 Hard copies.

Hard copies of petitions for en banc consideration are not required.

35.5 Who may vote; en banc panel.

A majority of the active judges who are not disqualified may order rehearing en banc. The en banc panel consists of this court's active judges who are not disqualified and any senior judge who was a member of the hearing panel, unless he or she elects not to sit.

35.6 Effect of rehearing en banc.

The grant of rehearing en banc vacates the judgment, stays the mandate, and restores the case on the docket as a pending appeal. The panel decision is not vacated unless the court so orders.

35.7 Matters not considered en banc.

The en banc court does not consider procedural and interim orders. These include, but are not limited to, stay orders; injunctions pending appeal; and denials of appointment of counsel, leave to appeal in forma pauperis, and leave to appeal from a nonfinal order. En banc requests from these rulings are referred to the judge or panel that entered the order, in the same manner as a petition for rehearing.

Current Tenth Circuit Rule 40

40.1 Reasons for petition.

- (A) **Not routine.** A petition for rehearing should not be filed routinely. Rehearing will be granted only if a significant issue has been overlooked or misconstrued by the court.

(B) Sanctions. If a petition for rehearing is found to be frivolous, vexatious, or filed for delay, the court may impose a money penalty of up to \$500. Counsel may be required to pay the penalty personally to the opposing party. See 28 U.S.C. § 1927.

40.2 Form; copies and attachments.

Hard copies of petitions for rehearing are not required.

If the petition for panel rehearing also seeks en banc review, a copy of the opinion or order and judgment must be attached. No other attachments may be included unless the petition is accompanied by a motion seeking permission which identifies the attachments with particularity and the reason for their inclusion.

For information regarding filing petitions for panel rehearing and rehearing en banc, please see the CM/ECF User Manual at Section III(K). See www.ca10.uscourts.gov.

40.3 Successive petitions.

The court will accept only one petition for rehearing from any party to an appeal. No motion to reconsider the court's ruling on a petition for rehearing may be filed.