

RULE 40A. PETITION FOR EN BANC RECONSIDERATION OF A SUPREME COURT PANEL DECISION

(a) Grounds for En Banc Reconsideration. En banc reconsideration of a decision of a ~~[panel of the]~~ Supreme Court panel is not favored and ordinarily will not be ordered except when:

(1) reconsideration by the full court is necessary to secure or maintain uniformity of decisions of the Supreme Court or Court of Appeals, or

(2) the proceeding involves a substantial precedential, constitutional, or public policy issue. ~~[The court considers a decision of a panel of the court resolving a claim of error in a criminal case, including a claim for postconviction relief, to be final for purposes of exhaustion of state remedies in subsequent federal proceedings. En banc reconsideration is available only under the limited circumstances set forth in Rule 40A(a). Petitions for en banc reconsideration in criminal cases filed on the pretext of exhausting state remedies may result in the imposition of sanctions under Rule 40A(g).]~~

(b) Content of Petition. A petition based on grounds that full court reconsideration is necessary to secure and maintain uniformity of the decisions of the Supreme Court or Court of Appeals must demonstrate that the panel's decision is contrary to prior, published opinions of the Supreme Court or Court of Appeals and must include specific citations to those cases. A petition based on grounds that the proceeding involves a substantial precedential, constitutional, or public policy issue must concisely set forth the issue, must specify the nature of the issue, and must demonstrate the impact of the panel's decision beyond the litigants involved. The petition must be supported by points and authorities and must contain argument in support of these points. Except as necessary to establish the grounds for reconsideration set forth in

Rule 40A(a), matters presented in the briefs and oral arguments may not be reargued in the petition, and no point may be raised for the first time. Oral argument in support of the petition will not be permitted.

~~[(b)] (c) Time for Filing; Effect of Filing on Finality of Judgment].~~ Unless the time is shortened or enlarged by order, [A]any party may petition for en banc reconsideration of a Supreme Court panel's decision within 14 days after [written entry] the filing of the panel's decision under Rule 36 or, if the party timely filed a petition for rehearing, within 14 days after the filing of the panel's decision to deny rehearing. A petition for en banc reconsideration may not be filed while a petition for rehearing is pending before the panel. The 3-day mailing period set forth in Rule 26(c) does not apply to the time limits set by this Rule. No petition for en banc reconsideration of a Supreme Court panel's decision to grant rehearing is allowed; however, if a panel grants rehearing, any party may petition for en banc reconsideration of the panel's decision on rehearing within 14 days after ~~[written entry]~~ the filing of the decision. ~~[If no petition for rehearing of the Supreme Court panel's decision is filed, then no petition for en banc reconsideration is allowed.]~~

~~[(e) Content of Petition. A petition based on grounds that full court reconsideration is necessary to secure and maintain uniformity of the decisions of the Supreme Court or Court of Appeals shall demonstrate that the panel's decision is contrary to prior, published opinions of the Supreme Court or Court of Appeals and shall include specific citations to those cases. If the petition is based on grounds that the proceeding involves a substantial precedential, constitutional or public policy issue, the petition shall concisely set forth the issue, shall specify the nature of the issue, and shall~~

~~demonstrate the impact of the panel's decision beyond the litigants involved. The petition shall be supported by points and authorities and shall contain such argument in support of the petition as the petitioner desires to present. Matters presented in the briefs and oral arguments may not be reargued in the petition, and no point may be raised for the first time.]~~

(d) Response to Petition and Reply. No response to a petition for en banc reconsideration may be filed unless requested by the court. The response to a petition for en banc reconsideration must be filed within 14 days after entry of the order requesting the response, unless otherwise directed by the court. A petition for en banc reconsideration will ordinarily not be granted in the absence of a request for a response. If a response to the petition is ordered, the petitioner may file a reply within 7 days after service of the response. A reply must not present matters that do not relate to the response.

~~[(d)] (e) Form of Petition, [and Answer] Response, and Reply; Number of Copies; [Length;] Certificate of Compliance.~~ A petition for en banc reconsideration of a Supreme Court panel's decision, ~~[or an answer]~~ a response to such a petition, or a reply must ~~[shall]~~ comply in form with Rule 32, and unless e-filed, [an] the original [and 8 copies shall] must be filed with the clerk. ~~[unless the court by order in a particular case shall direct a different number.]~~ One copy ~~[shall] must~~ be served on counsel for each party separately represented. The petition, response, or reply must include the certification required by Rule 40(f) and must be substantially similar to the Certificate of Compliance for Rules 40, 40A, and 40B Form on the Nevada Supreme Court website. [Except by permission of the court, a petition for en banc reconsideration, or an answer to such a petition, shall not exceed 10 pages. Alternatively, the petition or answer is

~~acceptable if it contains no more than 4,667 words, or if it uses a monospaced typeface, and contains no more than 433 lines of text. The petition or answer shall include the certification required by NRAP 40(b)(4) in substantially the form suggested in Form 16 of the Appendix of Forms.]~~

(f) Length of Petition, Response, and Reply. Except by permission of the court, a petition for en banc reconsideration, or a response to such a petition, may not exceed 10 pages or 4,667 words or, if it uses a monospaced typeface, 433 lines of text. Any reply may not exceed one half of the page or type-volume limitation of the petition.

~~[(e) Answer and Reply. No answer to a petition for en banc reconsideration or reply to an answer shall be filed unless requested by the court. Unless otherwise ordered by the court, the answer to a petition for en banc reconsideration shall be filed within 14 days after entry of the order requesting the answer. A petition for en banc reconsideration will ordinarily not be granted in the absence of a request for an answer.]~~

(g) Decision by Supreme Court. Any two justices may compel the court to grant a petition for en banc reconsideration. The Supreme Court's decision to grant or deny a petition for en banc reconsideration is final and not subject to further requests for rehearing or reconsideration.

~~[(f)]~~ (h) Action by Supreme Court ~~[(if)]~~ When Petition Granted. ~~[Any two justices may compel the court to grant a petition for en banc reconsideration.]~~ If a petition for en banc reconsideration is granted, the court may make a final disposition of the cause without ~~[(re)]~~ argument or may place it on the en banc calendar for ~~[(re)]~~ argument or resubmission or may make

such other orders as are deemed appropriate under the circumstances of the particular case.

~~[(g) Frivolous Petitions; Costs Assessed. Unless a case meets the rigid standards of Rule 40A(a), the duty of counsel is discharged without filing a petition for en banc reconsideration of a panel decision. Counsel filing a frivolous petition shall be deemed to have multiplied the proceedings in the case and to have increased costs unreasonably and vexatiously. At the discretion of the court, counsel personally may be required to pay an appropriate sanction, including costs and attorney fees, to the opposing party.]~~

~~[(h) (i) Untimely Petition[s; Unrequested Answer or Reply]. A petition for en banc reconsideration is timely if e-filed, mailed, or sent by commercial carrier to the clerk within the time fixed for filing. The clerk ~~[shall] must~~ not receive or file an untimely petition, but ~~[shall] must~~ return the petition unfiled or, if the petition was e-filed, must reject the petition. ~~[The clerk shall return unfiled any answer or reply submitted for filing in the absence of an order requesting the same.]~~~~

(j) Unrequested Response. Absent an order requesting a response, the clerk must not receive or file a response, but must return it unfiled or, if the response was e-filed, must reject it.

(k) Petition in Criminal Appeals; Exhaustion of State Remedies. A decision of a Supreme Court panel resolving a claim of error in a criminal case, including a claim for postconviction relief, is final for purposes of exhaustion of state remedies in subsequent federal proceedings. En banc reconsideration is available only under the limited circumstances set forth in Rule 40A(a).

REVIEWING NOTE

The proposed amendments to this Rule are both stylistic and substantive. Initially, the NRAP Commission sought to bring NRAP 40, 40A, and 40B into harmony with one another, by utilizing similar structure and language throughout all three rules. Like the analogous federal rule (FRAP 35), subdivision (c) allows a party to file a petition for en banc reconsideration without first filing a petition for rehearing under Rule 40. However, a petition for en banc reconsideration may not be filed while a petition for rehearing is pending before the panel. The “answer” to a petition for en banc reconsideration is now referred to as the “response” throughout Rule 40A, in conformity with the federal rules. In the event the court orders a response to a petition for en banc reconsideration, subdivision (d) now expressly provides for the filing of a reply within 7 days after service of the response.