

April 2, 2024

Honorable Mike Johnson  
Speaker, United States House of Representatives  
Washington, DC 20515

Dear Mr. Speaker:

I have the honor to submit to the Congress amendments to the Federal Rules of Appellate Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying the amended rules are the following materials that were submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code: a transmittal letter to the Court dated October 23, 2023; a blackline version of the rules with committee notes; an excerpt from the September 2023 report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and an excerpt from the May 2023 report of the Advisory Committee on Appellate Rules.

Sincerely,

/s/ John G. Roberts, Jr.

April 2, 2024

Honorable Kamala D. Harris  
President, United States Senate  
Washington, DC 20510

Dear Madam President:

I have the honor to submit to the Congress amendments to the Federal Rules of Appellate Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying the amended rules are the following materials that were submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code: a transmittal letter to the Court dated October 23, 2023; a blackline version of the rules with committee notes; an excerpt from the September 2023 report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and an excerpt from the May 2023 report of the Advisory Committee on Appellate Rules.

Sincerely,

/s/ John G. Roberts, Jr.

April 2, 2024

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. The Federal Rules of Appellate Procedure are amended to include amendments to Rules 32, 35, and 40, and the Appendix of Length Limits.

[*See infra* pp. — — —.]

2. The foregoing amendments to the Federal Rules of Appellate Procedure shall take effect on December 1, 2024, and shall govern in all proceedings in appellate cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. THE CHIEF JUSTICE is authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Appellate Procedure in accordance with the provisions of Section 2074 of Title 28, United States Code.

**PROPOSED AMENDMENTS TO THE  
FEDERAL RULES OF APPELLATE PROCEDURE**

**Rule 32. Form of Briefs, Appendices, and Other Papers**

\* \* \* \* \*

**(g) Certificate of Compliance.**

**(1) Briefs and Papers That Require a**

**Certificate.** A brief submitted under Rules 28.1(e)(2), 29(b)(4), or 32(a)(7)(B)—and a paper submitted under Rules 5(c)(1), 21(d)(1), 27(d)(2)(A), 27(d)(2)(C), or 40(d)(3)(A)—must include a certificate by the attorney, or an unrepresented party, that the document complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the document. The certificate must

2 FEDERAL RULES OF APPELLATE PROCEDURE

state the number of words—or the number of lines of monospaced type—in the document.

- (2) **Acceptable Form.** Form 6 in the Appendix of Forms meets the requirements for a certificate of compliance.

**Rule 35.** (Transferred to Rule 40)

**Rule 40. Panel Rehearing; En Banc Determination**

**(a) A Party's Options.** A party may seek rehearing of a decision through a petition for panel rehearing, a petition for rehearing en banc, or both. Unless a local rule provides otherwise, a party seeking both forms of rehearing must file the petitions as a single document. Panel rehearing is the ordinary means of reconsidering a panel decision; rehearing en banc is not favored.

**(b) Content of a Petition.**

**(1) Petition for Panel Rehearing.** A petition for panel rehearing must:

- (A)** state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended; and
- (B)** argue in support of the petition.

(2) **Petition for Rehearing En Banc.** A petition for rehearing en banc must begin with a statement that:

- (A) the panel decision conflicts with a decision of the court to which the petition is addressed (with citation to the conflicting case or cases) and the full court's consideration is therefore necessary to secure or maintain uniformity of the court's decisions;
- (B) the panel decision conflicts with a decision of the United States Supreme Court (with citation to the conflicting case or cases);
- (C) the panel decision conflicts with an authoritative decision of another United States court of appeals (with



citation to the conflicting case or cases); or

- (D) the proceeding involves one or more questions of exceptional importance, each concisely stated.

**(c) When Rehearing En Banc May Be Ordered.** On their own or in response to a party's petition, a majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be reheard en banc. Unless a judge calls for a vote, a vote need not be taken to determine whether the case will be so reheard. Rehearing en banc is not favored and ordinarily will be allowed only if one of the criteria in Rule 40(b)(2)(A)-(D) is met.

**(d) Time to File; Form; Length; Response; Oral Argument.**

- (1) **Time.** Unless the time is shortened or extended by order or local rule, any petition for panel rehearing or rehearing en banc must be filed within 14 days after judgment is entered—or, if the panel later amends its decision (on rehearing or otherwise), within 14 days after the amended decision is entered. But in a civil case, unless an order shortens or extends the time, the petition may be filed by any party within 45 days after entry of judgment or of an amended decision if one of the parties is:
  - (A) the United States;
  - (B) a United States agency;

(C) a United States officer or employee sued in an official capacity; or

(D) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf— including all instances in which the United States represents that person when the court of appeals' judgment is entered or files that person's petition.

(2) **Form of the Petition.** The petition must comply in form with Rule 32.

Copies must be filed and served as Rule 31 prescribes, except that the number of filed copies may be prescribed by local rule or altered by order in a particular case.

- (3) **Length.** Unless the court or a local rule allows otherwise, the petition (or a single document containing a petition for panel rehearing and a petition for rehearing en banc) must not exceed:
  - (A) 3,900 words if produced using a computer; or
  - (B) 15 pages if handwritten or typewritten.
- (4) **Response.** Unless the court so requests, no response to the petition is permitted. Ordinarily, the petition

will not be granted without such a request. If a response is requested, the requirements of Rule 40(d)(2)-(3) apply to the response.

(5) **Oral Argument.** Oral argument on whether to grant the petition is not permitted.

(e) **If a Petition Is Granted.** If a petition for panel rehearing or rehearing en banc is granted, the court may:

(1) dispose of the case without further briefing or argument;

(2) order additional briefing or argument;

or

(3) issue any other appropriate order.

(f) **Panel’s Authority After a Petition for Rehearing En Banc.** The filing of a petition for rehearing en banc does not limit the

panel's authority to take action described in Rule 40(e).

- (g) Initial Hearing En Banc.** On its own or in response to a party's petition, a court may hear an appeal or other proceeding initially en banc. A party's petition must be filed no later than the date when its principal brief is due. The provisions of Rule 40(b)(2), (c), and (d)(2)-(5) apply to an initial hearing en banc. But initial hearing en banc is not favored and ordinarily will not be ordered.

**Appendix:  
Length Limits Stated in the  
Federal Rules of Appellate Procedure**

This chart summarizes the length limits stated in the Federal Rules of Appellate Procedure. Please refer to the rules for precise requirements, and bear in mind the following:

- In computing these limits, you can exclude the items listed in Rule 32(f).
- If you use a word limit or a line limit (other than the word limit in Rule 28(j)), you must file the certificate required by Rule 32(g).
- For the limits in Rules 5, 21, 27, and 40:

\* \* \* \* \*

	<b>Rule</b>	<b>Document type</b>	<b>Word limit</b>	<b>Page limit</b>	<b>Line limit</b>
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\* \* \* \* \*

<b>Rehearing and en banc filings</b>	40(d)(3)	<ul style="list-style-type: none"> <li>• Petition for initial hearing en banc</li> <li>• Petition for panel rehearing; petition for rehearing en banc</li> <li>• Response if requested by the court</li> </ul>	3,900	15	Not applicable
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JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE  
OF THE UNITED STATES  
*Presiding*

HONORABLE ROSLYNN R. MAUSKOPF  
*Secretary*

October 23, 2023

MEMORANDUM

To: Chief Justice of the United States  
Associate Justices of the Supreme Court

From: Judge Roslynn R. Mauskopf *Roslynn R. Mauskopf*  
Secretary

RE: TRANSMITTAL OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF  
APPELLATE PROCEDURE

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit for the Court's consideration proposed amendments to Rules 32, 35, and 40, and the Appendix of Length Limits of the Federal Rules of Appellate Procedure, which have been approved by the Judicial Conference. The Judicial Conference recommends that the amendments be adopted by the Court and transmitted to Congress pursuant to law.

For your assistance in considering the proposed amendments, I am transmitting (i) clean and blackline copies of the amended rules along with committee notes; (ii) an excerpt from the September 2023 report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iii) an excerpt from the May 2023 report of the Advisory Committee on Appellate Rules.

Attachments



**PROPOSED AMENDMENTS TO THE  
FEDERAL RULES OF APPELLATE PROCEDURE<sup>1</sup>**

1 **Rule 32. Form of Briefs, Appendices, and Other**  
2 **Papers**

3 \* \* \* \* \*

4 **(g) Certificate of Compliance.**

5 (1) **Briefs and Papers That Require a**  
6 **Certificate.** A brief submitted under Rules  
7 28.1(e)(2), 29(b)(4), or 32(a)(7)(B)—and a  
8 paper submitted under Rules 5(c)(1),  
9 21(d)(1), 27(d)(2)(A), 27(d)(2)(C),  
10 ~~35(b)(2)(A), or 40(b)(1)–40(d)(3)(A)~~—must  
11 include a certificate by the attorney, or an  
12 unrepresented party, that the document  
13 complies with the type-volume limitation.  
14 The person preparing the certificate may rely

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<sup>1</sup> New material is underlined; matter to be omitted is lined through.

15                   on the word or line count of the word-  
16                   processing system used to prepare the  
17                   document. The certificate must state the  
18                   number of words—or the number of lines of  
19                   monospaced type—in the document.

20           (2)   **Acceptable Form.** Form 6 in the Appendix  
21                   of Forms meets the requirements for a  
22                   certificate of compliance.

**Committee Note**

Changes to subdivision (g) reflect the consolidation  
of Rules 35 and 40.

1 **Rule 35. ~~En Banc Determination~~**  
2 **(Transferred to Rule 40)**

3 **~~(a) — When Hearing or Rehearing En Banc May Be~~**

4 **~~Ordered.~~** A majority of the circuit judges who are in  
5 regular active service and who are not disqualified  
6 may order that an appeal or other proceeding be  
7 heard or reheard by the court of appeals en banc. An  
8 en banc hearing or rehearing is not favored and  
9 ordinarily will not be ordered unless:

10 ~~(1) — en banc consideration is necessary to~~  
11 ~~secure or maintain uniformity of the~~  
12 ~~court's decisions; or~~

13 ~~(2) — the proceeding involves a question of~~  
14 ~~exceptional importance.~~

15 **~~(b) — Petition for Hearing or Rehearing En~~**

16 **~~Banc.~~** A party may petition for a hearing or  
17 rehearing en banc.

18 ~~(1) — The petition must begin with a~~  
19 ~~statement that either:~~

20                   ~~(A) the panel decision conflicts~~  
21                                 ~~with a decision of the United~~  
22                                 ~~States Supreme Court or of~~  
23                                 ~~the court to which the petition~~  
24                                 ~~is addressed (with citation to~~  
25                                 ~~the conflicting case or cases)~~  
26                                 ~~and consideration by the full~~  
27                                 ~~court is therefore necessary to~~  
28                                 ~~secure and maintain~~  
29                                 ~~uniformity of the court's~~  
30                                 ~~decisions; or~~  
31                   ~~(B) the proceeding involves one~~  
32                                 ~~or more questions of~~  
33                                 ~~exceptional importance, each~~  
34                                 ~~of which must be concisely~~  
35                                 ~~stated; for example, a petition~~  
36                                 ~~may assert that a proceeding~~  
37                                 ~~presents a question of~~

38                    ~~exceptional importance if it~~  
39                    ~~involves an issue on which the~~  
40                    ~~panel decision conflicts with~~  
41                    ~~the authoritative decisions of~~  
42                    ~~other United States Courts of~~  
43                    ~~Appeals that have addressed~~  
44                    ~~the issue.~~

45                    ~~(2) — Except by the court's permission:~~

46                    ~~(A) — a petition for an en banc~~  
47                    ~~hearing or rehearing produced~~  
48                    ~~using a computer must not~~  
49                    ~~exceed 3,900 words; and~~

50                    ~~(B) — a handwritten or typewritten~~  
51                    ~~petition for an en banc hearing~~  
52                    ~~or rehearing must not exceed~~  
53                    ~~15 pages.~~

54                    ~~(3) — For purposes of the limits in Rule~~  
55                    ~~35(b)(2), if a party files both a~~

56                    ~~petition for panel rehearing and a~~  
57                    ~~petition for rehearing en banc, they~~  
58                    ~~are considered a single document~~  
59                    ~~even if they are filed separately,~~  
60                    ~~unless separate filing is required by~~  
61                    ~~local rule.~~

62     ~~(c) — **Time for Petition for Hearing or**~~  
63                    ~~**Rehearing En Banc.** A petition that an~~  
64                    ~~appeal be heard initially en banc must be filed~~  
65                    ~~by the date when the appellee's brief is due.~~  
66                    ~~A petition for a rehearing en banc must be~~  
67                    ~~filed within the time prescribed by Rule 40~~  
68                    ~~for filing a petition for rehearing.~~

69     ~~(d) — **Number of Copies.** The number of copies to~~  
70                    ~~be filed must be prescribed by local rule and~~  
71                    ~~may be altered by order in a particular case.~~

72     ~~(e) — **Response.** No response may be filed to a~~  
73                    ~~petition for an en banc consideration unless~~

74           ~~the court orders a response. The length limits~~  
75           ~~in Rule 35(b)(2) apply to a response.~~  
76    ~~(f) — **Call for a Vote.** A vote need not be taken to~~  
77           ~~determine whether the case will be heard or~~  
78           ~~reheard en banc unless a judge calls for a~~  
79           ~~vote.~~

#### Committee Note

For the convenience of parties and counsel, the amendment addresses panel rehearing and rehearing en banc together in a single rule, consolidating what had been separate, overlapping, and duplicative provisions of Rule 35 (hearing and rehearing en banc) and Rule 40 (panel rehearing). The contents of Rule 35 are transferred to Rule 40, which is expanded to address both panel rehearing and en banc determination.

1 **Rule 40. Petition for Panel Rehearing; En Banc**  
2 **Determination**

3 (a) ~~Time to File; Contents; Response; Action by the~~  
4 ~~Court if Granted.~~ **A Party's Options.** A party may  
5 seek rehearing of a decision through a petition for  
6 panel rehearing, a petition for rehearing en banc, or  
7 both. Unless a local rule provides otherwise, a party  
8 seeking both forms of rehearing must file the  
9 petitions as a single document. Panel rehearing is the  
10 ordinary means of reconsidering a panel decision;  
11 rehearing en banc is not favored.

12 ~~(1) **Time.** Unless the time is shortened or~~  
13 ~~extended by order or local rule, a petition for~~  
14 ~~panel rehearing may be filed within 14 days~~  
15 ~~after entry of judgment. But in a civil case,~~  
16 ~~unless an order shortens or extends the time,~~  
17 ~~the petition may be filed by any party within~~  
18 ~~45 days after entry of judgment if one of the~~  
19 ~~parties is:~~



- 20                   (A) ~~the United States;~~
- 21                   (B) ~~a United States agency;~~
- 22                   (C) ~~a United States officer or employee~~  
23                         ~~sued in an official capacity; or~~
- 24                   (D) ~~a current or former United States~~  
25                         ~~officer or employee sued in an~~  
26                         ~~individual capacity for an act or~~  
27                         ~~omission occurring in connection~~  
28                         ~~with duties performed on the United~~  
29                         ~~States' behalf including all~~  
30                         ~~instances in which the United States~~  
31                         ~~represents that person when the court~~  
32                         ~~of appeals' judgment is entered or~~  
33                         ~~files the petition for that person.~~
- 34                   (2) ~~Contents.~~ The petition must state with  
35                         particularity each point of law or fact that the  
36                         petitioner believes the court has overlooked  
37                         or misapprehended and must argue in support

38                   of the petition. Oral argument is not  
39                   permitted.

40           (3) ~~Response.~~ Unless the court requests, no  
41           response to a petition for panel rehearing is  
42           permitted. Ordinarily, rehearing will not be  
43           granted in the absence of such a request. If a  
44           response is requested, the requirements of  
45           Rule 40(b) apply to the response.

46           (4) ~~Action by the Court.~~ If a petition for panel  
47           rehearing is granted, the court may do any of  
48           the following:

49                   (A) ~~make a final disposition of the case~~  
50                   without reargument;

51                   (B) ~~restore the case to the calendar for~~  
52                   reargument or resubmission; or

53                   (C) ~~issue any other appropriate order.~~

54   (b) ~~Form of Petition; Length.~~ **Content of a Petition.**

55           The petition must comply in form with Rule 32.

56           ~~Copies must be served and filed as Rule 31~~  
57           ~~prescribes. Except by the court's permission:~~

58           (1)   ~~a petition for panel rehearing produced using~~  
59           ~~a computer must not exceed 3,900 words; and~~

60           **Petition for Panel Rehearing.** A petition for  
61           panel rehearing must:

62           (A)   state with particularity each point of  
63           law or fact that the petitioner believes  
64           the court has overlooked or  
65           misapprehended; and

66           (B)   argue in support of the petition.

67           (2)   ~~a handwritten or typewritten petition for~~  
68           ~~panel rehearing must not exceed 15 pages.~~

69           **Petition for Rehearing En Banc.** A petition  
70           for rehearing en banc must begin with a  
71           statement that:

72           (A)   the panel decision conflicts with a  
73           decision of the court to which the

74                   petition is addressed (with citation to  
75                   the conflicting case or cases) and the  
76                   full court’s consideration is therefore  
77                   necessary to secure or maintain  
78                   uniformity of the court’s decisions;  
79                   (B) the panel decision conflicts with a  
80                   decision of the United States Supreme  
81                   Court (with citation to the conflicting  
82                   case or cases);  
83                   (C) the panel decision conflicts with an  
84                   authoritative decision of another  
85                   United States court of appeals (with  
86                   citation to the conflicting case or  
87                   cases); or  
88                   (D) the proceeding involves one or more  
89                   questions of exceptional importance,  
90                   each concisely stated.

91 **(c) When Rehearing En Banc May Be Ordered.** On  
92 their own or in response to a party's petition, a  
93 majority of the circuit judges who are in regular  
94 active service and who are not disqualified may order  
95 that an appeal or other proceeding be reheard en  
96 banc. Unless a judge calls for a vote, a vote need not  
97 be taken to determine whether the case will be so  
98 reheard. Rehearing en banc is not favored and  
99 ordinarily will be allowed only if one of the criteria  
100 in Rule 40(b)(2)(A)-(D) is met.

101 **(d) Time to File; Form; Length; Response; Oral**  
102 **Argument.**

103 (1) Time. Unless the time is shortened or  
104 extended by order or local rule, any  
105 petition for panel rehearing or  
106 rehearing en banc must be filed  
107 within 14 days after judgment is  
108 entered—or, if the panel later amends

109                   its decision (on rehearing or  
110                   otherwise), within 14 days after the  
111                   amended decision is entered. But in a  
112                   civil case, unless an order shortens or  
113                   extends the time, the petition may be  
114                   filed by any party within 45 days after  
115                   entry of judgment or of an amended  
116                   decision if one of the parties is:  
117                   (A) the United States;  
118                   (B) a United States agency;  
119                   (C) a United States officer or  
120                   employee sued in an official  
121                   capacity; or  
122                   (D) a current or former United  
123                   States officer or employee  
124                   sued in an individual capacity  
125                   for an act or omission  
126                   occurring in connection with

127 duties performed on the  
128 United States' behalf—  
129 including all instances in  
130 which the United States  
131 represents that person when  
132 the court of appeals' judgment  
133 is entered or files that person's  
134 petition.

135 **(2) Form of the Petition.** The petition  
136 must comply in form with Rule 32.  
137 Copies must be filed and served as  
138 Rule 31 prescribes, except that the  
139 number of filed copies may be  
140 prescribed by local rule or altered by  
141 order in a particular case.

142 **(3) Length.** Unless the court or a local  
143 rule allows otherwise, the petition (or  
144 a single document containing a

145 petition for panel rehearing and a  
146 petition for rehearing en banc) must  
147 not exceed:

148 (A) 3,900 words if produced using  
149 a computer; or

150 (B) 15 pages if handwritten or  
151 typewritten.

152 (4) **Response.** Unless the court so  
153 requests, no response to the petition is  
154 permitted. Ordinarily, the petition  
155 will not be granted without such a  
156 request. If a response is requested, the  
157 requirements of Rule 40(d)(2)-(3)  
158 apply to the response.

159 (5) **Oral Argument.** Oral argument on  
160 whether to grant the petition is not  
161 permitted.



162 **(e) If a Petition Is Granted.** If a petition for  
163 panel rehearing or rehearing en banc is  
164 granted, the court may:

165 (1) dispose of the case without further  
166 briefing or argument;

167 (2) order additional briefing or argument;

168 or

169 (3) issue any other appropriate order.

170 **(f) Panel's Authority After a Petition for**  
171 **Rehearing En Banc.** The filing of a petition  
172 for rehearing en banc does not limit the  
173 panel's authority to take action described in  
174 Rule 40(e).

175 **(g) Initial Hearing En Banc.** On its own or in  
176 response to a party's petition, a court may  
177 hear an appeal or other proceeding initially en  
178 banc. A party's petition must be filed no later  
179 than the date when its principal brief is due.

180           The provisions of Rule 40(b)(2), (c), and  
181           (d)(2)-(5) apply to an initial hearing en banc.  
182           But initial hearing en banc is not favored and  
183           ordinarily will not be ordered.

#### Committee Note

For the convenience of parties and counsel, the amendment addresses panel rehearing and rehearing en banc together in a single rule, consolidating what had been separate, overlapping, and duplicative provisions of Rule 35 (hearing and rehearing en banc) and Rule 40 (panel rehearing). The contents of Rule 35 are transferred to Rule 40, which is expanded to address both panel rehearing and en banc determination.

**Subdivision (a).** The amendment makes clear that parties may seek panel rehearing, rehearing en banc, or both. It emphasizes that rehearing en banc is not favored and that rehearing by the panel is the ordinary means of reconsidering a panel decision. This description of panel rehearing is by no means designed to encourage petitions for panel rehearing or to suggest that they should in any way be routine, but merely to stress the extraordinary nature of rehearing en banc. Furthermore, the amendment's discussion of rehearing petitions is not intended to diminish the court's existing power to order rehearing sua sponte, without any petition having been filed. The amendment also preserves a party's ability to seek both forms of rehearing, requiring that both petitions be filed as a single document, but preserving the court's power (previously found in Rule 35(b)(3)) to provide otherwise by local rule.

**Subdivision (b).** Panel rehearing and rehearing en banc are designed to deal with different circumstances. The amendment clarifies the distinction by contrasting the required content of a petition for panel rehearing (preserved from Rule 40(a)(2)) with that of a petition for rehearing en banc (preserved from Rule 35(b)(1)).

**Subdivision (c).** The amendment preserves the existing criteria and voting protocols for ordering rehearing en banc, including that no vote need be taken unless a judge calls for a vote (previously found in Rule 35(a) and (f)).

**Subdivision (d).** The amendment establishes uniform time, form, and length requirements for petitions for panel rehearing and rehearing en banc, as well as uniform provisions for responses to the petition and oral argument.

*Time.* The amended Rule 40(d)(1) preserves the existing time limit, after the initial entry of judgment, for filing a petition for panel rehearing (previously found in Rule 40(a)(1)) or a petition for rehearing en banc (previously found in Rule 35(c)). It adds new language extending the same time limit to a petition filed after a panel amends its decision, on rehearing or otherwise.

*Form of the Petition.* The amended Rule 40(d)(2) preserves the existing form, service, and filing requirements for a petition for panel rehearing (previously found in Rule 40(b)), and it extends these same requirements to a petition for rehearing en banc. The amended rule also preserves the court's existing power (previously found in Rule 35(d)) to determine the required number of copies of a petition for rehearing en banc by local rule or by order in a particular case, and it extends this power to petitions for panel rehearing.

*Length.* The amended Rule 40(d)(3) preserves the existing length requirements for a petition for panel rehearing (previously found in Rule 40(b)) and for a petition for rehearing en banc (previously found in Rule 35(b)(2)). It also preserves the court's power (previously found in Rule 35(b)(3)) to provide by local rule for other length limits on combined petitions filed as a single document, and it extends this authority to petitions generally.

*Response.* The amended Rule 40(d)(4) preserves the existing requirements for a response to a petition for panel rehearing (previously found in Rule 40(a)(3)) or to a petition for rehearing en banc (previously found in Rule 35(e)). Unsolicited responses to rehearing petitions remain prohibited, and the length and form requirements for petitions and responses remain identical. The amended rule also extends to rehearing en banc the existing statement (previously found in Rule 40(a)(3)) that a petition for panel rehearing will ordinarily not be granted without a request for a response. The use of the word "ordinarily" recognizes that there may be circumstances where the need for rehearing is sufficiently clear to the court that no response is needed. But before granting rehearing without requesting a response, the court should consider that a response might raise points relevant to whether rehearing is warranted or appropriate that could otherwise be overlooked. For example, a responding party may point out that an argument raised in a rehearing petition had been waived or forfeited, or it might point to other relevant aspects of the record that had not previously been brought specifically to the court's attention.

*Oral argument.* The amended Rule 40(d)(5) extends to rehearing en banc the existing prohibition (previously found in Rule 40(a)(2)) on oral argument on whether to grant a petition for panel rehearing.

**Subdivision (e).** The amendment clarifies the existing provisions empowering a court to act after granting a petition for panel rehearing (previously found in Rule 40(a)(4)), extending these provisions to rehearing en banc as well. The amended language alerts counsel that, if a petition is granted, the court might call for additional briefing or argument, or it might decide the case without additional briefing or argument. *Cf.* Supreme Court Rule 16.1 (advising counsel that an order disposing of a petition for certiorari “may be a summary disposition on the merits”).

**Subdivision (f).** The amendment adds a new provision concerning the authority of a panel to act while a petition for rehearing en banc is pending.

Sometimes, a panel may conclude that it can fix the problem identified in a petition for rehearing en banc by, for example, amending its decision. The amendment makes clear that the panel is free to do so, and that the filing of a petition for rehearing en banc does not limit the panel’s authority.

A party, however, may not agree that the panel’s action has fixed the problem, or a party may think that the panel has created a new problem. If the panel amends its decision while a petition for rehearing en banc is pending, the en banc petition remains pending until its disposition by the court, and the amended Rule 40(d)(1) specifies the time during which a new rehearing petition may be filed from the amended decision. In some cases, however, there may be reasons not to allow further delay. In such cases, the court might shorten the time for filing a new petition under the amended Rule 40(d)(1), or it might shorten the time for issuance of the mandate or might order the immediate issuance of the mandate under Rule 41. In addition, in some cases, it may be clear that any additional petition for panel

rehearing would be futile and would serve only to delay the proceedings. In such cases, the court might use Rule 2 to suspend the ability to file a new petition for panel rehearing. Before doing so, however, the court ought to consider the difficulty of predicting what a party filing a new petition might say.

**Subdivision (g).** The amended Rule 40 largely preserves the existing requirements concerning the rarely invoked initial hearing en banc (previously found in Rule 35). The time for filing a petition for initial hearing en banc (previously found in Rule 35(c)) is shortened, for an appellant, to the time for filing its principal brief. The other requirements and voting protocols, which were identical as to hearing and rehearing en banc, are incorporated by reference. The amendment adds new language to remind parties that initial hearing en banc is not favored and ordinarily will not be ordered.

**Appendix:  
Length Limits Stated in the  
Federal Rules of Appellate Procedure**

This chart summarizes the length limits stated in the Federal Rules of Appellate Procedure. Please refer to the rules for precise requirements, and bear in mind the following:

- In computing these limits, you can exclude the items listed in Rule 32(f).
- If you use a word limit or a line limit (other than the word limit in Rule 28(j)), you must file the certificate required by Rule 32(g).
- For the limits in Rules 5, 21, 27, ~~35~~, and 40:

\* \* \* \* \*

	Rule	Document type	Word limit	Page limit	Line limit
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\* \* \* \* \*

<b>Rehearing and en banc filings</b>	<del>35(b)(2)</del> & <del>40(b)</del>  <u>40(d)(3)</u>	<ul style="list-style-type: none"> <li>• Petition for <u>initial</u> hearing en banc</li> <li>• Petition for panel rehearing; petition for rehearing en banc</li> <li>• <u>Response if requested by the court</u></li> </ul>	3,900	15	Not applicable
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**REPORT OF THE JUDICIAL CONFERENCE**

**COMMITTEE ON RULES OF PRACTICE AND PROCEDURE**

**TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE  
JUDICIAL CONFERENCE OF THE UNITED STATES:**

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on June 6, 2023. All members participated.

\* \* \* \* \*

**FEDERAL RULES OF APPELLATE PROCEDURE**

***Rules Recommended for Approval and Transmission***

The Advisory Committee on Appellate Rules recommended for final approval proposed amendments to Appellate Rules 32, 35, and 40, and the Appendix of Length Limits. The Standing Committee unanimously approved the Advisory Committee's recommendations.

Rule 32 (Form of Briefs, Appendices, and Other Papers), Rule 35 (En Banc Determination), Rule 40 (Petition for Panel Rehearing), and Appendix of Length Limits

The Advisory Committee completed a comprehensive review of the rules governing panel and en banc rehearing, resulting in proposed amendments transferring the content of Rule 35 to Rule 40, bringing together in one place the relevant provisions dealing with rehearing. The proposed amendments to Rule 40 would clarify the distinct criteria for rehearing en banc and panel rehearing, and would eliminate redundancy. Rule 32 and the Appendix of Length Limits would be amended to reflect the transfer of the contents of Rule 35 to Rule 40. The proposed amendments were published in August 2022. The Advisory Committee reviewed the public comments and made no changes.

**NOTICE**

**NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE  
UNLESS APPROVED BY THE CONFERENCE ITSELF.**



**Recommendation:** That the Judicial Conference approve the proposed amendments to Appellate Rules 32, 35, and 40, and the Appendix of Length Limits as set forth in Appendix A, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

\* \* \* \* \*

Respectfully submitted,



John D. Bates, Chair

Paul Barbadoro	Lisa O. Monaco
Elizabeth J. Cabraser	Andrew J. Pincus
Robert J. Giuffra, Jr.	Gene E.K. Pratter
William J. Kayatta, Jr.	D. Brooks Smith
Carolyn B. Kuhl	Kosta Stojilkovic
Troy A. McKenzie	Jennifer G. Zipps
Patricia Ann Millett	

\* \* \* \* \*

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE  
OF THE  
JUDICIAL CONFERENCE OF THE UNITED STATES  
WASHINGTON, D.C. 20544

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JAMES C. DEVER III  
CRIMINAL RULES

PATRICK J. SCHILTZ  
EVIDENCE RULES

MEMORANDUM

**TO:** Hon. John D. Bates, Chair  
Committee on Rules of Practice and Procedure

**FROM:** Judge Jay Bybee, Chair  
Advisory Committee on Appellate Rules

**RE:** Report of the Advisory Committee on Appellate Rules

**DATE:** May 11, 2023

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**I. Introduction**

The Advisory Committee on Appellate Rules met on Wednesday, March 29, 2023, in West Palm Beach, Florida. \* \* \*

The Advisory Committee seeks final approval of proposed amendments to Rules 35 and 40 dealing with rehearing, along with conforming amendments to Rule 32 and the Appendix on Length Limits. (Part II of this report.)

\* \* \* \* \*

## II. Action Item for Final Approval—Rules 35 and 40 (18-AP-A)

The Advisory Committee began a comprehensive review of Rule 35, dealing with hearing and rehearing en banc, and Rule 40, dealing with panel rehearing, in the spring of 2018. In the spring of 2021, the Advisory Committee approved a modest set of proposed changes to those Rules and asked the Standing Committee to publish them for public comment. At the June 2021 meeting of the Standing Committee, however, members of the Standing Committee asked about several provisions of those Rules. The Advisory Committee's defense of most of the questioned provisions was that they were in the existing Rules and that the Advisory Committee was attempting to minimize the changes proposed.

The Standing Committee remanded the matter to the Advisory Committee with instructions to take a freer hand in improving the Rules. The Advisory Committee did so, producing proposed amendments transferring the content of Rule 35 to Rule 40, thereby bringing together in one place the relevant provisions dealing with rehearing. These proposed amendments clarify the distinct criteria for rehearing en banc and panel rehearing and eliminate much redundancy.

In January of 2022, the Standing Committee approved the comprehensive revision for publication, and in June of 2022, it also approved a minor correction for publication. The comprehensive revision, as corrected, was published in the summer of 2022 \* \* \*. The Advisory Committee reviewed the public comments and unanimously recommends final approval without change.

The Advisory Committee received five formal comments. Three comments broadly critique basic aspects of en banc process. They object that rehearing en banc should be widely available, should not be disfavored, and that oral argument should be allowed on the question whether to grant a petition.

Two other comments are more substantial. First, a comment submitted by J. Krell expresses concern that the published Rule would allow a second bite at the apple after a panel decision is amended, no matter how minor the amendment. This comment suggests that a court of appeals should be allowed, without invoking Rule 2, to order that no further petitions for rehearing will be entertained, perhaps with a caution that this should only be done if the amendment is so minor that any subsequent petition would be obviously frivolous or dilatory.

One of the earliest concerns with which this project started was that courts were inappropriately foreclosing subsequent petitions. The Advisory Committee decided not to broadly endorse the very power that was the target of concern in the first place. At earlier stages in this multi-year process, the Advisory Committee struggled with the issue of drawing a line between the kinds of amendments that would permit a new petition and those that would not. It was never comfortable with a place to draw the line and decided, as the committee note explains, to rely on the ability of a court to easily deny frivolous petitions, to shorten the time to file a petition or the time to issue the mandate, and, when necessary, to invoke Rule 2. The good sense of litigants and counsel will prevent most rehearing petitions when the amendment to the panel decision is trivial, particularly with the stringent criteria for both forms of rehearing specified together in the amended rule. Courts can readily reject frivolous rehearing petitions without calling for a response, and no vote need be taken on a petition for rehearing en banc unless a judge calls for one.

## Excerpt from the May 11, 2023, Report of the Advisory Committee on Appellate Rules

The Advisory Committee considered the possibility that a party might abuse the rule to gain additional time to seek certiorari. But it concluded that this is a remote risk. The time to seek certiorari is already 90 days and can be extended an additional 60 days by a Circuit Justice. A more substantial concern is that a party who secured an injunction in the trial court but saw that injunction vacated by the court of appeals might seek to delay issuance of the mandate to have the benefit of the injunction as long as possible. But the ability to shorten the time to issue the mandate takes care of this problem.

The rule as amended would not foreclose a court from ordering that no further petitions for rehearing will be entertained; it remains subject to the power to suspend the rules under Rule 2. But the subcommittee hopes that the need to suspend the rules to bar petitions for rehearing will lead courts of appeals to think twice about doing so, bearing in mind the difficulty of knowing what a party might have to say about an amended decision.

Second, a comment submitted by the National Association of Criminal Defense Lawyers, which supports the overall proposal, suggests that the same local flexibility written into 40(d)(3) dealing with length limits and 40(d)(1) dealing with time limits should also be written into 40(d)(2) dealing with the form of the petition.

The Advisory Committee concluded that this change is unnecessary. While Rule 32(a) requires that a brief bear a cover, Rule 32(c)(2) governs other papers, “including a petition for panel rehearing and a petition for hearing or rehearing en banc,” and specifically states that a “cover is not necessary if the caption and signature page of the paper together contain the information required by Rule 32(a)(2).” Rule 32(c)(2)(A). In addition, Rule 32(e) explicitly permits local variation. Thus while amended Rule 40(d)(2) does not itself contain a local option provision, the rule that it incorporates—Rule 32(a)—does contain one.

For these reasons, the Advisory Committee unanimously recommends final approval of these amendments as published.

The following is to be added after the text of Rule 32 and its Committee Note as published:

### **Changes Made After Publication and Comment**

None.

The following is to be added after the text of Rule 35 and its Committee Note as published:

### **Changes Made After Publication and Comment**

None.

### **Summary of Public Comment**

See Rule 40.

The following is to be added after the text of Rule 40 and its Committee Note as published:

**Changes Made After Publication and Comment**

None.

**Summary of Public Comment**

Claudi Barber (AP-2022-0001-0003): The rule should not provide that rehearing en banc is not favored. Petitions for rehearing should be freely granted when something unjust appears in the record.

Andrew Straw (AP-2022-0001-0004): There should be no discretion. Every petition for en banc review should have a merits decision.

Anonymous (AP-2022-0001-0008): It is somewhat unprofessional for an appellate court to determine that a certain type of hearing is unfavorable. It would be prudent to allow oral argument on whether or not to grant a petition.

J. Krell (AP-2021-0001-0005): The proposed amendments are minor and largely unobjectionable. Combining Rules 35 and 40 seems appropriate given the degree to which petitions for panel rehearing and for rehearing en banc have become intertwined, and others seem reasonable. But the rules should codify the practice of the simultaneously amending the opinion, denying rehearing en banc, and ordering that no further petitions for panel or en banc rehearing will be entertained, perhaps a caution that this should be done only if the amendment is so minor that any subsequent petition would be obviously frivolous or dilatory.

National Association of Criminal Defense Lawyers (AP-2022-0001-0009): The NACDL supports the proposed amendments, with one suggestion for improvement. Local flexibility regarding the physical presentation of rehearing petitions should be permitted, similar to the local flexibility for length and time limits.

\* \* \* \* \*