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AMERICAN IMMIGRATION COUNCIL

**PRACTICE ADVISORY<sup>1</sup>**

**Updated April 29, 2011**

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

By Beth Werlin

After a court of appeals renders a decision, the parties may ask the court to reconsider its decision by filing a petition for rehearing.<sup>2</sup> 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. In addition, the parties may petition for initial hearing en banc (that is, before the panel has made a decision) as long as the petition is filed before the appellee's brief is due.<sup>3</sup> It is important to note that the courts only rarely rehear cases and/or undertake en banc review.

**STANDARDS AND INITIAL CONSIDERATIONS**

**Standards for En Banc Review and Panel Rehearing**

The courts will consider a case en banc only when:

- (1) it is necessary to secure or maintain uniformity of the court's decisions. This means that the court's decision conflicts with a decision of the Supreme Court or there is an intra-circuit conflict; or
- (2) the case involves a question of exceptional importance. As an example, a case may present a question of exceptional importance where there is an inter-circuit conflict.<sup>4</sup>

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<sup>2</sup> See Federal Rules of Appellate Procedure (FRAP) 35 and 40.

<sup>3</sup> FRAP 35(c).

<sup>4</sup> FRAP 35(a).

The standard for when a panel may rehear a case is less stringent. The rules indicate that panel rehearing may be appropriate where the panel has overlooked or misapprehended points of law and/or fact.<sup>5</sup>

### **Should My Client Seek Rehearing En Banc?**

When advising your client about whether to seek rehearing en banc, one important factor to take into account is that the chances of success are very slim. The courts of appeals only grant rehearing en banc petitions in a very small number of cases. In FY 2010, several thousand petitions were filed, but the courts issued only 44 en banc decisions. Of these 44, most were not immigration-related cases.

Despite the small number of cases, a review of the immigration cases the courts have considered en banc offers insight into the types of cases the courts are more likely to hear en banc and provides guidance in drafting a petition.

- *There is an intra-circuit conflict.* Many of the cases heard en banc involve intra-circuit conflicts, i.e., where panels within the circuit have reached contrary results or adopted irreconcilable positions.<sup>6</sup> (Although unpublished decisions are not binding, they may demonstrate that en banc review is needed to ensure uniformity within the circuit.<sup>7</sup>)
- *There was a dissent or a concurrence in the underlying opinion.* In recent years, most of the immigration-related en banc decisions involve situations where there was a divided panel below.<sup>8</sup> Not only does a dissent or concurrence indicate that one or more of the judges may be predisposed to rehearing the case, but a strong, well-reasoned dissent or concurrence may help persuade other judges in the circuit that the panel reached the wrong result and that rehearing en banc is needed.
- *There is an inter-circuit conflict.* Some of the cases heard en banc involve inter-circuit conflicts, i.e., where another circuit has reached contrary results or adopted irreconcilable positions.<sup>9</sup> Just as a strong, well-reasoned dissent or concurrence may be persuasive, strong decisions from other circuits may influence the court's decision whether to hear a case en banc.

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<sup>5</sup> FRAP 40(a)(2).

<sup>6</sup> See, e.g., *Castellanos-Contreras v. Decatur Hotels, LLC*, 622 F.3d 393 (5th Cir. 2010); *Sanchez v. Holder*, 560 F.3d 1028 (9th Cir. 2009).

<sup>7</sup> See FRAP 32.1 and local rules regarding citation of unpublished decisions.

<sup>8</sup> See, e.g., *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009); *Aronov v. Napolitano*, 562 F.3d 84 (1st Cir. 2009); *Sanchez v. Holder*, 560 F.3d 1028 (9th Cir. 2009); *Lin Zheng v. Atty. Gen.*, 557 F.3d 147 (3d Cir. 2009); *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008); *Tamenut v. Mukasey*, 521 F.3d 1000 (8th Cir. 2008).

<sup>9</sup> See, e.g., *Lin Zheng v. Atty. Gen.*, 557 F.3d 147 (3d Cir. 2009); *Abebe v. Mukasey*, 554 F.3d 1203 (9th Cir. 2009).

- *The case involves a legal issue.* The courts generally only hear cases en banc to resolve legal issues.<sup>10</sup> In addition, typically, the legal issue is one that is recurring and thus impacts a large number of people. To the extent you can show that the issue has a significant effect, this may support your petition.

In addition to assessing the strength of the petition, there are practical considerations to take into account:

- 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.<sup>11</sup>)

### **Should My Client Seek Initial Hearing En Banc?**

As with rehearing petitions, the courts rarely grant petitions for initial hearing en banc. In fact, none of the immigration cases the courts heard en banc over the last few years involved 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”).<sup>12</sup> Therefore, you may be in a situation where you will be able to obtain a favorable decision only by seeking en banc review.

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<sup>10</sup> See, e.g., *Abebe v. Mukasey*, 554 F.3d 1203 (9th Cir. 2009) (eligibility for 212(c) waiver); *Tamenut v. Mukasey*, 521 F.3d 1000 (8th Cir. 2008) (court’s jurisdiction).

<sup>11</sup> FRAP 41(d)(1).

<sup>12</sup> 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).

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.<sup>13</sup>

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.

### **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 the en banc petition in the same document entitled petition for rehearing or rehearing en banc. 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.

However, 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.

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<sup>13</sup> *Williams v. Ashland Eng'g Co.*, 45 F.3d 588, 592 (1st Cir. 1995). *See also Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (“where the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority,” panel is bound by the later and controlling authority); *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”).

## 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.

### 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.”<sup>14</sup>

#### *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.<sup>15</sup> 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.<sup>16</sup> Petitioners may move for extensions of time in which to file a petition.<sup>17</sup> The parties may file petitions for rehearing even if the person has been deported or departed voluntarily.

#### *Length*

A petition for rehearing must not exceed 15 pages unless the petitioner receives the court’s permission or a local rule provides otherwise.<sup>18</sup> Many courts have adopted alternative length limitations based on the word count. 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.<sup>19</sup>

#### *Number of Copies*

Copies of a petition for rehearing must be served and filed pursuant to FRAP 31.<sup>20</sup> 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. In addition, the courts generally require electronic filing under FRAP 25(a)(D), so be sure to consult local rules regarding this requirement.

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<sup>14</sup> FRAP 40(a)(2).

<sup>15</sup> FRAP 40(a)(1).

<sup>16</sup> FRAP 25(a)(2)(A).

<sup>17</sup> FRAP 26(b); 40(a)(1).

<sup>18</sup> FRAP 40(b).

<sup>19</sup> FRAP 35(b)(3).

<sup>20</sup> FRAP 40(b).

### ***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).<sup>21</sup> 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.”<sup>22</sup> Petitions for rehearing typically 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.”<sup>23</sup> 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.”

### **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.<sup>24</sup> 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.)<sup>25</sup>

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

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<sup>21</sup> FRAP 32(c)(2); 40(b).

<sup>22</sup> FRAP 32(a)(3).

<sup>23</sup> FRAP 40(a)(3).

<sup>24</sup> FRAP 35(a).

<sup>25</sup> FRAP 35(b).

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.<sup>26</sup> 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.<sup>27</sup> Petitioners may move for extensions of time in which to file a petition.<sup>28</sup> 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.<sup>29</sup> Many courts have adopted alternative length limitations based on the word count. 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.<sup>30</sup>

### ***Number of Copies***

Each court of appeals shall prescribe the number of copies of a petition for rehearing en banc.<sup>31</sup> In addition, the courts generally require electronic filing under FRAP 25(a)(D), so be sure to consult local rules regarding this requirement.

### ***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).<sup>32</sup> 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."<sup>33</sup> Petitions for rehearing en banc typically are not bound like briefs, but are stapled in the upper left corner.

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<sup>26</sup> FRAP 35(c); 40(a)(1).

<sup>27</sup> FRAP 25(a)(2)(A).

<sup>28</sup> FRAP 26(b).

<sup>29</sup> FRAP 35(b)(2).

<sup>30</sup> FRAP 35(b)(3).

<sup>31</sup> FRAP 35(d).

<sup>32</sup> FRAP 32(c)(2).

<sup>33</sup> FRAP 32(a)(3).

### ***Response***

No response may be filed unless the court requests a response.<sup>34</sup> 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***

The court will hear a case en banc where the majority of the circuit judges who are in regular active service and who are not disqualified vote to hear the case.<sup>35</sup> However, “[a] vote need not be taken to determine whether the case will be ... reheard en banc unless a judge calls for a vote.”<sup>36</sup>

## **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.<sup>37</sup> 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.)<sup>38</sup>

### ***Filing Deadline***

A petition for hearing en banc must be filed by the date when the *appellee’s* brief is due.<sup>39</sup> 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.<sup>40</sup> 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.<sup>41</sup> Many courts have adopted alternative length limitations based on the word count.

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<sup>34</sup> FRAP 35(e).

<sup>35</sup> FRAP 35(a).

<sup>36</sup> FRAP 35(f).

<sup>37</sup> FRAP 35(a).

<sup>38</sup> FRAP 35(b).

<sup>39</sup> FRAP 35(c).

<sup>40</sup> FRAP 25(a)(2)(A).

<sup>41</sup> FRAP 35(b)(2).

### ***Number of Copies***

Each court of appeals shall prescribe the number of copies of a petition for hearing en banc.<sup>42</sup> In addition, the courts generally require electronic filing under FRAP 25(a)(D), so be sure to consult local rules regarding this requirement.

### ***Cover and Binding***

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### ***Response***

No response may be filed unless the court requests a response.<sup>45</sup>

### ***Call for a Vote***

The court will hear a case en banc where the majority of the circuit judges who are in regular active service and who are not disqualified vote to hear the case.<sup>46</sup> However, “[a] vote need not be taken to determine whether the case will be ... reheard en banc unless a judge calls for a vote.”<sup>47</sup>

## **STAY 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.<sup>48</sup> Although the stay of the mandate does not automatically stay a person’s removal from the United States, if the court already granted a stay of removal, the stay of removal remains intact until the court issues the mandate.<sup>49</sup>

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<sup>42</sup> FRAP 35(d).

<sup>43</sup> FRAP 32(c)(2).

<sup>44</sup> FRAP 32(a)(3).

<sup>45</sup> FRAP 35(e).

<sup>46</sup> FRAP 35(a).

<sup>47</sup> FRAP 35(f).

<sup>48</sup> FRAP 41(d)(1).

<sup>49</sup> 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).