

## NINTH CIRCUIT EN BANC PROCESS

Congress has also authorized the court of appeals to hear or rehear cases before the court *en banc*. 28 U.S.C. § 46. Although in other circuits the en banc court consists of all active judges, the Ninth Circuit convenes a “limited en banc court” composed of the Chief Judge Kozinski and ten other judges selected at random for each case. 28 U.S.C. § 46(c); 9th Cir. R. 35-3.<sup>1</sup> Pursuant to Ninth Circuit Rule 35-3, in the absence of Chief Judge Kozinski, an 11th active judge will be drawn by lot, and the most senior active judge on the panel shall preside.

To initiate the process that can lead to rehearing by a limited en banc court:

- (1) a party can petition for rehearing or rehearing en banc; or
- (2) a judge may *sua sponte* call for a vote on rehearing or rehearing en banc.

The Ninth Circuit rules for en banc procedures are located in Chapter V of the [Ninth Circuit General Orders](#).

### **I. PARTY PETITION**

After the three-judge panel publishes its decision, unless an extension for time has been granted, the losing party has **14 days** to file a petition for rehearing or rehearing en banc. Fed. R. App. P. 35(c); Fed. R. App. P. 40(a)(1).

If a timely petition for rehearing or rehearing en banc is filed, the petition will be circulated to all active judges and any senior judge who has chosen to participate in en banc. G.O. 5.4(a). At this time, the panel *may* order the opposing party to respond to the petition and brief whether the court should rehear the case. *See* G.O. 5.4(b)(2).

After a petition is filed, any judge may “stop the clock.” This will provide the judges with a **14 day** extension in the en banc process so as to determine how to move forward. G.O. 5.4(e). It is a one-time only extension. G. O. 5.4(e).

#### A. 5.4(b) Notice Request

If an off-panel judge takes interest in the case, he or she can request a “5.4(b) Notice” from the panel if it is within **21 days** of the circulation of the party’s petition. G.O. 5.4(b)(1). This request requires the panel judges to inform the rest of the active judges on the circuit whether they vote to rehear or rehear en banc the case. G.O. 5.4(b)(1).

---

<sup>1</sup> A party can petition or a judge can make a sua sponte call for a rehearing en banc **before the full court**. G.O. 5.8(a)-(b). After a petition or a sua sponte call is made, it is subject to the same time line for a limited en banc discussed in this memorandum.

If an off-panel judge requests a 5.4(b) Notice, the original panel *should* respond as soon as possible to the request, but can wait to respond any time within **90 days** of the 5.4(b) request or within **90 days** of the petition for rehearing, whichever is later. G.O. 5.4(b)(2).

#### B. Amicus Curiae Briefs

An amicus curiae may be permitted to file a brief when the Ninth Circuit is considering a petition for panel or en banc rehearing. Ninth Cir. Rule 29-2(a).

If amicus is submitting a brief to support or oppose a petition for rehearing, it must file its brief along with any necessary motion no later than **10 days** after the petition or response of the party the amicus wishes to support is filed or due. Ninth Cir. Rule 29-2(e)(1).

An amicus brief that does not support either party must be served along with any necessary motion no later than **10 days** after the petition is filed. *Id.* Motions for extension of time to file an amicus curiae brief submitted under this rule are disfavored. *Id.*

#### C. Stop the Clock, Request Call for En Banc Vote, or Do Nothing

After receipt of the panel's 5.4(b) Notice, any off-panel judge—senior or active—can either “stop the clock” (if clock has not been stopped before), request an en banc vote, or do nothing.

If no judge has “stopped the clock” before, any judge may do so to have a **14 day** extension in the time limit for calling an en banc vote. G.O. 5.4(e).

If an off-panel judge wants a case to be reheard or reheard en banc, regardless of the panel's denial, he or she can request a call for an en banc vote. G.O. 5.4(b)(2). This request must be made either within **14 days** after receipt of the 5.4(b) Notice; within **21 days** after the circulation of the last-filed petition for rehearing or rehearing en banc; or if a response to the petition for rehearing en banc has been requested, within **14 days** after the circulation of the response, whichever is later. G.O. 5.4(b)(2).

Any judge, active or senior, can also call for an en banc vote. However, this rarely ever occurs. Instead,

If no off-panel judge “stops the clock” or requests or gives notice of an intention to request en banc vote within **21 days** of the receipt of the rehearing or rehearing en banc petition, the panel will enter an order rejecting the petition for rehearing or rehearing en banc. G.O. 5.4(b)(1).

#### D. En Banc Vote Memorandum, Supplemental Briefing, & Judge Memoranda

If any judge timely requests a call for en banc vote after receipt of the panel's 5.4(b)

Notice, he or she must forward a memorandum to the panel and members of the court setting forth the reasons for the rehearing or rehearing en banc either within **14 days** of the date the judges' en banc call was distributed; or **14 days** after the circulation of the response to the petition for rehearing or rehearing en banc, whichever is later. G.O. 5.4(c)(1).

Once a judge makes a call for an en banc vote in response to a 5.4(b) Notice, if no response to the petition has been previously filed, the author of the panel opinion or the Clerk of Court, upon request of the En Banc Coordinator,<sup>2</sup> shall ordinarily enter an order directing counsel to file within **21 days** of the date of the order a response to the petition for rehearing en banc. G.O. 5.4(c)(2).

Any judge may circulate memoranda in response to an *en banc* call **within 21 days** after the response is filed or after the date the En Banc Coordinator determines that no response will be filed. G.O. 5.5(a); G.O. 5.4(c)(3).

When the exchange of memoranda has been completed, the En Banc Coordinator shall notify all active judges to vote. G.O. 5.5(b).

## **II. SUA SPONTE CALL FOR EN BANC VOTE**

If the losing party does not file a petition for rehearing or rehearing en banc, a judge may call for an en banc vote *sua sponte* so long as it is within **7 days** of the expiration of the party's time for filing a petition for rehearing or rehearing en banc. G.O. 5.4(c)(3). This means that the *sua sponte* call must ordinarily be made within **21 days** of the filing of the panel's decision. G.O.5.4(c)(3).<sup>3</sup> But when the panel grants a party an extension of time to file a petition for rehearing or rehearing en banc, the time to make a *sua sponte* call will extend for **7 days** after the petition is due. G.O. 5.4(c)(3).

### **A. Simultaneous Briefs & Sua Sponte Memorandum**

Upon receipt of a timely *sua sponte* en banc call, the author of the panel opinion or the Clerk of Court upon the request of the En Banc Coordinator shall ordinarily enter an order directing the parties to file simultaneous briefs within **21 days** setting forth their respective positions on whether the matter should be reheard en banc. G.O. 5.4(c)(3). If the En Banc Coordinator orders that no supplemental briefing will be filed, the parties will be notified of the *sua sponte* en banc call. G.O. 5.4(c)(3).

---

<sup>2</sup> The En Banc Coordinator is the active or senior judge appointed by the Chief Judge to supervise the en banc process. G.O. 5.1(b)(2). The current En Banc Coordinator is **Judge Sidney Runyan Thomas**.

<sup>3</sup> For civil cases in which the United States is a party, a call must ordinarily be made within 52 days of the filing of the panel's decision. G.O. 5.4(c)(3); *See* FRAP 40(a).

If a judge makes a *sua sponte* call for en banc vote, he or she must forward a memorandum setting forth reasons for the en banc rehearing within **7 days** after the circulation of the simultaneous briefing filed by the parties, if they were filed. If not, within **14 days** of the date the *sua sponte* call was distributed. G.O. 5.4(c)(1).

#### B. Judge Memoranda

Any judge may circulate memoranda in response to an *en banc* call **within 21 days** after the simultaneous briefs are circulated by the Clerk's Office or the date the En Banc Coordinator determines that no supplemental briefs will be filed. G.O. 5.5(a); 5.4(c)(3).

When the exchange of memoranda has been completed, the En Banc Coordinator must notify all active judges to vote. G.O. 5.5(b)

### IV. EN BANC VOTING & AMICUS CURIAE PENDING REHEARING

After the time for the judges to exchange memoranda is complete, the En Banc Coordinator notifies the **active** judges to vote. G.O. 5.5(b). Unless otherwise ordered, each judge must cast a vote **within 14 days** of the notice. G.O. 5.5(b). Upon the expiration of the voting period, the En Banc Coordinator shall notify the judges of the result and the vote tally. G.O. 5.5(b).

If the vote fails to obtain a majority, the panel shall resume control of the case and no further en banc action is required. G.O. 5.5(c). The panel will enter an order rejecting the petition for rehearing or rehearing en banc. G.O. 5.4(b)(1).

If a majority of the judges vote in favor of rehearing or rehearing en banc, the Chief Judge shall enter an order taking the case en banc pursuant to Circuit Rule 35-3. G.O. 5.5(d). Currently, Ninth Circuit has **27 active judges**. Thus, a majority would require 14 votes in favor of rehearing en banc. *See* G.O. 5.5(d).

An amicus curiae may be permitted to file a brief when the Ninth Circuit has granted rehearing. Ninth Cir. Rule 29-2(a). If the petition for rehearing or rehearing en banc is granted, amicus curiae in support of the petitioning party or not supporting either party must serve its brief, along with any necessary motion, no later than **21 days** after the petition for rehearing is granted. Ninth Cir. Rule 29-2(e)(2). But if an amicus curiae supports the position of the responding party, the brief, along with any necessary motion, must be served no later than **35 days** after the petition for panel or en banc rehearing is granted. *Id.*

### V. OTHER CONSIDERATIONS

#### A. En Banc Coordinator Discretion

The En Banc Coordinator can “for good cause, extend, suspend, or compress the time schedules provided” in the General Orders. G.O. 5.1(b)(2). The exercise of this discretion most often involves time, including suspending or holding in abeyance the en banc process. Stephen L. Wasby, “A Watchdog for the Good of the Order”: *The Ninth Circuit’s En Banc Coordinator*, 12 J. App. Prac. & Process 91, 126-27 (2011). To avoid problems, the En Banc Coordinator can defer the voting process or hold it in abeyance if it is likely to be affected by a case then in the en banc process. *Id.* In addition, the En Banc Coordinator can also suspended en banc activity until after he or she heard from two panels with related cases, both of which had post-panel activity. *Id.* But note, the En Banc Coordinator can also delay the process to accommodate the judges’ schedules. G.O. 5.1(b)(5).

#### B. Majority of En Banc Process is Internal

Most of the Ninth Circuit en banc procedure occurs internally. The only times the parties are notified is when the Court requests responsive or simultaneous briefs. While the General Orders provide the rules the Court must follow when considering to rehear a case en banc, the exact status of the case’s consideration is mostly unknown to the public and can only be speculated on with rough estimates.

#### C. Amendment of Disposition

In addition, the original Ninth Circuit panel can amend its disposition. Pursuant to Ninth Circuit General Order 5.3(b), any active or senior judge may, before an en banc call is made or before the time for calling for en banc expires, propose to the panel that it amend its disposition. Any proposal to amend shall be accompanied by the text of the proposed amendment. Such a request does not suspend en banc procedures.

If a panel amends its disposition, General Order 5.3(a) requires the panel set forth in its amended disposition or separate order: (1) the ruling on the petition for rehearing or petition for rehearing en banc; (2) whether subsequent petitions for rehearing or rehearing en banc may be filed; and (3) the status of any pending petitions for rehearing or rehearing en banc not ruled on. If the panel *substantively* amends its disposition, any off-panel judge may, within **7 days** of the filing of the amended disposition, notify the panel and the other members of the court that he or she is considering making an en banc call on the basis of the substantive amendment. The judge who makes such notification must, in writing or by e-mail, direct the Clerk of Court or any person the Clerk may designate to stay the mandate. Such notification shall extend the time to make an en banc call by **14 days**. Thereafter, the same *sua sponte* process discussed above applies.

#### D. Supreme Court Review

A petition for *certiorari* is due 90 days from the date of the decision or 90 days from the order denying a petition for rehearing/rehearing *en banc* (whichever is later). U.S. Sup. Ct. R. 13. The Supreme Court does not require a party to seek rehearing or rehearing *en banc* before filing

a petition for writ of certiorari. A rehearing will toll the time to file a petition for writ of certiorari with the Supreme Court. U.S. Sup. Ct. R. 13.3.

U.S. Supreme Court Rule 13.3 provides that the time for petitioning for certiorari is tolled not only by the filing of a timely petition for rehearing, but also if the lower court “appropriately entertains an untimely petition for rehearing or *sua sponte* considers rehearing.”

If a petition for rehearing or rehearing en banc is pending, “there is no ‘judgment’ to be reviewed” by the United States Supreme Court. *Missouri v. Jenkins*, 495 U.S. 33, 46 (1990). This is true even with respect to cases where finality is not a prerequisite for invoking the Supreme Court jurisdiction, such as interlocutory judgments of the federal courts of appeals. Only if there is certainty that the judgment below will not be altered can the judgment properly be made the subject of petition for certiorari. Accordingly, the time for petitioning for certiorari commences on the date when certainty and finality attach to the action taken by the lower court. When rehearing has been sought, that date is the one on which rehearing was denied.

There is no information available on whether a petition for a writ of certiorari will prohibit a judge from starting the en banc process through a *sua sponte* call for vote on rehearing or rehearing en banc. But one law review article suggests that it is possible for judges to consider hearing en banc even when a petition for writ of certiorari has been filed: “Another judge’s ‘hesitancy in joining in suggesting that we en banc’ a case, he said ‘rests on my hope that the Supreme Court grants certiorari,’ with the petition already having been filed.” Stephen L. Wasby, *Why Sit En Banc?*, 63 *Hastings L.J.* 747, 791-92 (2012).