# Third Circuit Civil Appeals: Oral Argument, Disposition, and Rehearing

STEPHEN M. ORLOFSKY AND ADRIENNE C. ROGOVE, BLANK ROME LLP, WITH PRACTICAL LAW LITIGATION



A Practice Note explaining how oral argument is conducted in civil appeals to the US Court of Appeals for the Third Circuit. This Note also explains how the Third Circuit disposes of appeals and the process for seeking rehearing or rehearing en banc.

The parties to an appeal before the US Court of Appeals for the Third Circuit may have an opportunity to present oral argument to the three-judge panel deciding the appeal after briefing is complete. With the benefit of the briefs and argument, the court issues a written disposition. Most appeals end this way. Counsel occasionally may have grounds to ask the same panel to consider something that they missed the first time around. In even rarer cases, a party may have grounds to ask the full Third Circuit to address a particularly important issue or a conflict with controlling precedent.

This Note explains oral argument, disposition of an appeal, panel rehearing, and rehearing *en banc* in the Third Circuit.

## ORAL ARGUMENT

Oral argument allows the parties to emphasize and clarify the arguments in their briefs and answer any questions the three-judge panel may have about the appeal.

### AVAILABILITY OF ORAL ARGUMENT

The Third Circuit typically grants a party's request for oral argument (see Requesting Oral Argument). The Third Circuit may reject an oral argument request if the panel unanimously concludes that oral argument is not needed after reading the briefs and appendices (FRAP 34(a)(2); 3d Cir. L.A.R. 34.1). Oral argument is unnecessary if the panel concludes that:

- The appeal is frivolous.
- The dispositive issue on the appeal has already been authoritatively decided.
- Oral argument would not significantly aid the court because the facts and legal arguments are adequately presented in the briefs and record.

(FRAP 34(a)(2).) By contrast, the court typically hears oral argument if:

- The appeal presents a substantial and novel legal issue.
- The issue presented is of institutional or precedential value.
- A panel member seeks clarification on an important legal, factual, or procedural point.
- A intervening decision, legislation, or event may significantly bear on the case.
- The appeal may affect an important public interest.

(3d Cir. Internal Operating Procedures ("I.O.P.") 2.4.2.)

The Court may order oral argument even if no party requests it and may deny a request for oral argument even if all parties want it (FRAP 34(a)(2), (f); 3d Cir. L.A.R. 34.1).

### REQUESTING ORAL ARGUMENT

A party seeking oral argument must serve and file an oral argument statement no later than seven days after the appellee files its brief:

- Explaining why the court should hear oral argument.
- Stating the amount of time requested for argument.

(3d Cir. L.A.R. 34.1(b).)

Counsel should not use the statement to further argue the merits of the appeal. The statement regarding oral argument should not be lengthy or particularly argumentative. When explaining why the court should hear oral argument, a party may note:

- The complexity of the issues.
- The importance of the case (for example, the amount of money in controversy).
- The unsettled law.
- The lengthy record.
- Any other explanation for how oral argument may aid the court's decision-making process.

The Third Circuit typically holds oral argument in Philadelphia, Pennsylvania. However, the parties may request oral argument by video-conference by filing a joint motion using the court's case management/electronic case filing (CM/ECF) system (see Notice of Availability of Video-Argument).

Counsel must request oral argument by video-conference as soon as possible after counsel knows that a video-conference is needed, and they typically do so after receiving notice that the appeal has been calendared (3d Cir. L.A.R. 34.1(e)). If granted, the court allows the parties to argue the appeal from the Third Circuit's locations in Newark, New Jersey; Pittsburgh, Pennsylvania; or district courts within the Third Circuit that have compatible videoconferencing equipment. Video-argument is at the panel's discretion and depends on the availability of equipment and staff (see Notice of Availability of Video-Argument).

## SCHEDULING ORAL ARGUMENT

The panel assigned to a case decides:

- Whether to grant an oral argument request or to schedule oral argument *sua sponte*.
- How much argument time to grant each side.

(3d Cir. I.O.P. 2.1.) If the court grants an oral argument request, it typically allots 15 minutes per side (3d Cir. I.O.P. 2.1). A majority of the panel assigned to the case rules on any request for more than 20 minutes per side (3d Cir. I.O.P. 2.1).

The Third Circuit clerk's office typically notifies counsel that a case has been calendared for argument or submission approximately six to eight weeks before the argument or submission date. Counsel must file an Acknowledgement and Designation of Arguing Counsel within seven days after receiving the clerk's notice. Only members of the Third Circuit bar may present oral argument.

The panel hearing the appeal notifies the clerk it will hear oral argument at least 11 calendar days before the first day of the panel sitting (3d Cir. I.O.P. 2.1). The clerk then informs counsel if the court will hear argument (and if so, the panel members' identities) no later than ten calendar days before the first day of the panel sitting (3d Cir. I.O.P. 2.5). In certain appeals, the clerk also may inform the parties of a particular issue or issues the panel wants the parties to address (3d Cir. L.A.R. 34.1(c)).

Counsel must provide the clerk's office notice of any substitution of counsel at least 24 hours in advance of the argument (see Instructions for Oral Argument in the Third Circuit).

If more than one attorney presents argument for a party, the attorneys must determine among themselves how to divide the allotted time. Counsel arguing for multiple parties on each side must submit to the clerk's office the proposed order of argument for each attorney and the division of time among counsel using a form available on the court's website.

The Court grants a motion to reschedule the argument only if the moving party can show extraordinary circumstances (3d Cir. L.A.R. 34.1(d)). Any stipulation to adjourn or continue a case is not binding on the court (3d Cir. L.A.R. 34.2).

## PREPARING FOR ORAL ARGUMENT

Counsel should prepare to answer questions about the facts, the procedural history, and the legal arguments. Counsel may also wish to prepare some short opening remarks as the panel may allow attorneys to speak briefly before asking questions.

Counsel should expect a substantial number of questions during oral argument. The judges generally permit counsel some brief opening remarks without interruption, but questions, answers, and follow-up questions commonly take up the bulk of an argument. Counsel should not expect to deliver lengthy prepared statements.

Counsel should master the record before argument. Although judges understand how the law works, they may not understand the details of the record. Counsel therefore should be prepared to answer questions about the record's contents.

The panel's identity is a key factor in preparing for oral argument. The Third Circuit clerk's office notifies counsel of the panel members' names no later than ten calendar days before the first day of the panel sitting (3d Cir. I.O.P. 2.5). Counsel can then research the panel and adjust their preparation as necessary. For example, counsel may research whether any judge on the panel previously authored an opinion addressing the issues on appeal.

## ARGUING THE APPEAL

The Third Circuit typically holds oral argument at the James A. Byrne United States Courthouse, in Philadelphia, Pennsylvania. The courthouse has three courtrooms: the Maris and Seitz Courtrooms are located on the 19th floor, and the Ceremonial Courtroom is located on the first floor.

Counsel should appear and register for argument at least 30 minutes before the argument session begins. Before court is in session, counsel must register with the court crier for the designated courtroom. After court is in session, counsel must register with the clerk's office on the 21st floor.

At the outset of the argument, counsel should state "May it please the Court," and then state:

- Counsel's name.
- The party counsel represents.
- The amount of rebuttal time reserved if representing the appellant.

The podium in each of the Third Circuit's courtrooms has a series of three lights:

- The green light signals the beginning of each party's opening argument and is displayed for 80% of counsel's argument time. For example, if the court allotted 15 minutes for oral argument, the green light displays for 12 minutes.
- The yellow light signals that 20% of counsel's argument time remains. Using the above example, the yellow light displays for three minutes.
- The red light signals that time has expired. Although the panel may continue asking questions after time has expired, counsel should expect to bring the argument to a close when the light turns red.

(See Instructions for Oral Argument in the Third Circuit.) At the conclusion of argument, the Third Circuit reserves decision and takes the case under submission.

### POST-ARGUMENT ISSUES

If counsel learns of significant new case law after the party's last brief has been filed or after oral argument, counsel may submit those authorities to the court's attention in a letter under FRAP 28(j). For example, counsel may alert the court of a recent Supreme Court decision that affects the appeal and direct the court to the issue the decision impacts.

The letter may not exceed 350 words including footnotes. If a new decision is not reported, counsel should attach a copy to the letter. (See Practice Note, Third Circuit Civil Appeals: Appellee's Brief, Reply Brief, and Cross-Appeals: Submitting Supplemental Authorities (W-012-3358)).

Counsel may not file supplemental briefs without the court's permission. After an appeal is argued or submitted, however, the court may call for supplemental briefs on specific issues.

## DISPOSITION OF AN APPEAL

### OPINIONS

Decisions in the Third Circuit generally take the form of opinions.

After the panel members conference and state their tentative votes, the presiding judge assigns a panel member to serve as the authoring judge. The authoring judge drafts the opinion reflecting the panel's decision and the supporting reasons (3d Cir. I.O.P. 5.5.1). The court aims to complete the first draft of the opinion within 60 days after the authoring judge is assigned to write the opinion (3d Cir. I.O.P. 5.5.3(a)). The authoring judge then circulates the draft opinion to the other panel members with a request for approval or suggestions for revisions (3d Cir. I.O.P. 5.5.2).

The other panel members communicate their approval or disapproval and alterations within eight calendar days (3d Cir. I.O.P. 5.5.2). If the non-authoring judges would like to draft a concurring or dissenting opinion, they notify the authoring judge and submit the concurrence or dissent within 45 days (3d Cir. I.O.P. 5.5.3(b)).

After the panel approves the draft opinion (and any concurrences or dissents have been submitted), the panel may circulate the decision to non-panel active judges for *en banc* consideration, depending on whether a majority of the panel designates the opinion as:

- **Precedential.** An opinion is precedential when it has precedential or institutional value (3d Cir. I.O.P. 5.2). The panel always circulates draft precedential opinions to non-panel judges (3d Cir. I.O.P. 5.5.4).
- **Not precedential.** An opinion is not precedential when it appears to have value only to the trial court or the specific parties as opposed to the general public or future litigants (3d Cir. I.O.P. 5.3; see *Cooper Univ. Hosp. v. Sebelius*, 636 F.3d 44 (3d Cir. 2010)). Not precedential decisions are not binding precedent and may be cited only as persuasive authority (3d Cir. I.O.P. 5.3; 3d Cir. I.O.P. 5.7). The Third Circuit does not cite to its not precedential opinions as authority (3d Cir. I.O.P. 5.7). The panel typically only circulates a draft not precedential opinion to non-panel judges if one or more panel member:
  - dissents; or
  - concurs, and a member of the panel requests that the opinion be circulated to non-panel judges.

(3d Cir. I.O.P. 5.5.4.)

(3d Cir. I.O.P. 5.1; 3d Cir. I.O.P. 5.5.4.)

If the panel circulates the draft opinion to non-panel active judges, the non-panel active judges must notify the authoring judge within eight calendar days if they desire *en banc* consideration (3d Cir. I.O.P. 5.5.4). If after eight calendar days the panel receives insufficient votes for rehearing, the authoring judge and the authors of any separate opinions transmit the opinion to the clerk for filing (3d Cir. I.O.P. 5.6; see Disposition of the Petition).

After the court issues an opinion, the clerk mails a copy to counsel and releases the opinion to the press and public at the clerk's office and at the circuit libraries. The clerk's office serves opinions via CM/ECF on registered filers who have appeared in the appeal. Opinions also are available on the court's website (3d Cir. L.A.R. 36.1).

Although rare, the court may *sua sponte* decide to rehear the case *en banc*. During the circulation of draft opinions, if most the court's active judges vote to consider the case *en banc*, the Chief Judge enters an order for rehearing *en banc* (3d Cir. I.O.P. 9.4.1; see Disposition of the Petition).

### THE JUDGMENT

The Third Circuit must enter a judgment to formally dispose of an appeal. Formal disposition of an appeal requires entry of a judgment.

If the court issues an opinion, the Third Circuit Clerk prepares and enters a separate judgment (FRAP 36(a)). The Clerk notifies the parties by CM/ECF when the court enters the decision and judgment (FRAP 36(b)).

The court sometimes enters a judgment order to terminate an appeal (without any accompanying opinion). This occurs when the panel unanimously determines:

- To either affirm the district court's judgment or order or to dismiss the appeal or petition for review.
- That a written opinion will have no precedential or institutional value.

(3d Cir. I.O.P. 6.1; 3d Cir. I.O.P. 6.2.1.)

The court may use a judgment order when:

- The district court's judgment or order is based on findings of fact that are not clearly erroneous.
- Sufficient evidence supports a jury verdict.
- No error of law appears.
- The district court did not abuse its discretion.
- The Third Circuit lacks jurisdiction over the appeal.

(3d Cir. I.O.P. 6.2.2.) The judgment order must state that the case is affirmed by reference to the district court's opinion (3d Cir. I.O.P. 6.3.2).

## THE MANDATE

The Third Circuit must issue a mandate to formally terminate its jurisdiction and transfer jurisdiction back to the district court. Unless the court directs the issuance of a formal mandate, the mandate comprises the opinion, the judgment, and any costs order (FRAP 41(a)).

The Third Circuit issues the mandate seven days after the latest of:

- The time to petition for rehearing expires, if no party files a petition.
- Entry of an order denying rehearing, if a party petitions for rehearing.
- Entry of an order denying a motion to stay issuance of the mandate, if a party moves for a stay.

(FRAP 41(b).)

Counsel receive notice by CM/ECF when the Third Circuit issues the mandate.

If the Third Circuit modifies or reverses the district court's order or judgment and directs entry of a money judgment, the mandate must include instructions on whether interest is allowed (FRAP 37(b)). If the Third Circuit affirms a district court's money judgment, any interest is calculated from the date the district court entered judgment unless the law provides otherwise (FRAP 37(a)).

## STAYING THE MANDATE

A timely motion to stay the mandate or a timely petition for panel rehearing or rehearing *en banc* automatically stays issuance of the mandate until the court decides the motion or petition, unless the court orders otherwise (FRAP 41(d)(1)).

If a party anticipates petitioning the Supreme Court for *certiorari*, it may move the Third Circuit to stay issuance of the mandate. The motion must comply with all the rules generally applicable to Third Circuit motions and must demonstrate that

- The petition would present a substantial question.
- There is good cause for a stay.

(FRAP 41(d)(2).)

If the Third Circuit grants a stay, the stay should not exceed 90 days without good cause. If the movant petitions the Supreme Court for *certiorari* within that time and notifies the Third Circuit of the petition, the stay remains in effect until final disposition by the Supreme Court (FRAP 41(d)(2)(B)).

The Third Circuit may condition a stay on the filing of a bond or other security (FRAP 41(d)(2)(C)). If the Third Circuit grants a stay and the Supreme Court later denies *certiorari*, the Third Circuit must issue the mandate immediately (FRAP 41(d)(2)(D)).

## COSTS

The prevailing party is generally entitled to recover its costs on appeal.

### Prevailing Party

Unless the court provides otherwise:

- The appellant is liable for the appellee's costs if the Third Circuit:
  - dismisses the appeal; or
  - affirms the district court's order or judgment.
- The appellee is liable for the appellant's costs if the Third Circuit reverses the district court's order or judgment.
- Costs are taxed as the court directs if a judgment is affirmed in part, reversed in part, modified, or vacated.

(FRAP 39(a).) Costs may be awarded for or against the US only if a statute so provides (FRAP 39(b)).

### Recovering Costs in the Third Circuit

In the Third Circuit, a prevailing party may recover the costs of printing and binding briefs and the appendix (FRAP 39(c); 3d Cir. L.A.R. 39.3).

For briefs, the prevailing party may recover costs for the printing or production of:

- Ten copies filed with the court.
- Two copies for the prevailing party.
- One copy served on each other separately represented party.

(3d Cir. L.A.R. 39.3(a).)

For appendices, the prevailing party may recover costs for the printing or production of:

- Four copies filed with the court.
- One copy served on each separately represented party.

(3d Cir. L.A.R. 39.3(b).)

The prevailing party may **not** obtain costs:

- For correcting deficiencies in the brief or appendix.
- Associated with typing, word processing, electronic filing, or preparing the tables of contents and authorities.

(3d Cir. L.A.R. 39.3(c)(3), 3d Cir. L.A.R. 39.3(d).)

The clerk taxes costs for printing or photocopying at the lesser of the actual cost or the applicable rate set by the court's local rules (3d Cir. L.A.R. 39.3(c); see Instructions for Filing a Bill of Costs).

A prevailing party seeking costs must serve and file a verified bill of costs (with proof of service) within 14 days after entry of judgment (FRAP 39(d)(1); 3d Cir. L.A.R. 39.4(b)). Counsel should use the Third Circuit's bill of costs form, which is available on the court's website. Counsel should include any invoices and printers' bills with the bill of costs.

Counsel should file the bill of costs with the court using CM/ECF. If any party is exempt from CM/ECF, counsel must serve it by paper means and file proof of service with the bill of costs. Acceptable methods of paper service include:

- Personal delivery.
- First-class mail.
- Third-party commercial carrier for delivery within three days.

(FRAP 25(c)(1).)

The court denies untimely bills of costs unless counsel includes with the bill of costs a motion showing good cause for delay (3d Cir. L.A.R. 39.4(a)).

Any party may object to the prevailing party's bill of costs by serving and filing written objections within 14 days after service of the bill

of costs (FRAP 39(d)(2)). The prevailing party may reply to any objections within 14 days of the service of the objections (3d Cir. L.A.R. 39.4(c)).

After receiving the bill of costs, any objections, and any replies, the Third Circuit determines the amount of costs recoverable for printing and reproducing the briefs and appendix. The clerk prepares an itemized statement of costs recoverable in the Third Circuit for inclusion in the mandate. If the mandate already issued, the Third Circuit clerk must request the district court clerk to include the costs in the mandate. The district court clerk must then amend the mandate. (FRAP 39(d)(3).)

#### Recovering Costs in the District Court

In the district court, a prevailing party may recover the costs of preparing and transmitting the record, preparing the district court transcript, posting a bond, and the fee for filing the notice of appeal (FRAP 39(e); FRCP 54(d)(1)).

Under FRCP 54(d)(1), a district court may tax costs against the losing party on 14 days' notice.

Counsel should consult the FRCP, the district court's local rules, and any individual rules of the presiding judge when seeking to recover costs in the district court. For more information about recovering costs in the district court, see Practice Note, Enforcing Federal Court Judgments: Enforcement Procedures: Collecting Costs on a Federal Court Judgment (4-531-6993).

## PANEL REHEARING

If a losing party believes that the court overlooked or misapprehended a point of law or a material fact in deciding an appeal, it may ask for a rehearing from the three-judge panel that issued the decision (FRAP 40).

### PETITIONING FOR PANEL REHEARING

A party requests rehearing by petitioning the same panel that initially heard the appeal. Unless the petition explicitly states otherwise, the court presumes that a petition for panel rehearing also seeks rehearing *en banc* (3d Cir. I.O.P. 9.5.1). If a party seeks both panel rehearing and rehearing *en banc*, the court prefers that counsel file a single petition.

#### Time to Petition

A party generally must file a petition for panel rehearing within 14 days after entry of the Third Circuit's judgment. Any party has 45 days to petition for panel rehearing in cases where the US (including an officer or agency of the US) is a party (FRAP 40(a)(1)).

#### Contents of the Petition

A petition for panel rehearing must explain with particularity what legal or factual material the panel overlooked or misapprehended (FRAP 40(a)(2)). Counsel should not request rehearing to reargue previously presented issues.

The petition must include:

- A certificate of compliance within the word limit if the petitioner prepared the petition using a computer (FRAP 32(g) and 41(b); 3d Cir. L.A.R. 31.1(c)).
- A certificate of service (FRAP 25(d)).
- A copy of the panel's judgment, order, and opinion for which rehearing is being sought (3d Cir. L.A.R. 40.1(a)).

#### Formatting the Petition

Rehearing petitions must conform to the following formatting requirements:

- **Page size and margins.** Petitions must be prepared on 8.5" by 11" pages. Margins must be at least one inch on the left and right sides of the page, and at least three-quarters of an inch on the top and bottom of each page. No text other than page numbers may appear in the margins. Pages should be numbered. Any paper copies must be printed single-sided. (FRAP 32(a)(1), (4); 3d Cir. L.A.R. 32.1(b).)
- **Font.** Petitions should use black type and a plain, roman-style font. Petitions may occasionally use italics or boldface for emphasis. Case names must appear italicized or underlined. Petitions may use either a proportionally spaced font (for example, Times New Roman) or a monospaced font (for example, Courier). The font size depends on whether counsel use:
  - **a proportionally spaced font.** A petition written in a proportionally spaced font must use at least a 14-point font size. This font must include serifs (for example, Century includes serifs). However, headings and captions may appear in sans-serif type (that is, a font without serifs, like Arial or Helvetica); or
  - **a monospaced font.** A petition written in a monospaced font may not contain more than 10.5 characters per inch. This roughly translates to 12-point Courier font.

  (FRAP 32(a)(1), (5), and (6); see Third Circuit Font and Page Length Requirements for Filing Briefs.)
- **Line spacing.** The text of a petition must be double spaced, except that single spacing may be used for:
  - quotations more than two lines long (which should be indented on both sides);
  - headings; and
  - footnotes.

  (FRAP 32(a)(4).)
- **Length limits.** Except by the court's permission, a rehearing petition may not exceed 3,900 words if prepared on a computer or 15 pages if prepared on a typewriter or by hand, excluding the items listed in FRAP 32(f) (FRAP 40(b)). If a party also petitions for rehearing *en banc*, the combined documents may not exceed 3,900 words or 15 pages, whether or not the petitions are combined in a single document (FRAP 35(b)(3)). Counsel may rely on the word or line count provided by the word processing software used to draft the petition (FRAP 32(g)(1)).
- **Signature.** A petition must include a signature from at least one of the petitioner's counsel. For electronically filed documents, counsel need not manually sign the petition because the filing attorney's CM/ECF login and password constitute the required signature for all purposes. (FRAP 32(d); 3d Cir. L.A.R. 28.4; 3d Cir. L.A.R. 46.4; 3d Cir. L.A.R. 113.9(a).) The filing attorney must type "s/[ATTORNEY'S NAME]" on the signature line to signify that the document is signed. The Third Circuit also allows counsel to apply

an electronic signature, but the use of an "s/" is the more common method of signing documents. (3d Cir. L.A.R. 28.4; 3d Cir. L.A.R. 113.9(b).) Counsel also must include a signature block directly below the signature line, including the filing attorney's:

- name;
- state bar number;
- business address; and
- telephone number.

(3d Cir. L.A.R. 28.4.)

- **Covers.** A cover is not necessary, but if counsel uses one, it must be white (FRAP 32(c)(2)).
- **Binding.** If paper copies of a petition are necessary, counsel must bind the petition along the left margin in a way that:
  - is secure;
  - does not obscure the text; and
  - permits the petition to lie reasonably flat when open.
- (FRAP 32(a)(3); see Filing and Serving the Petition.) Counsel may use velo or spiral binding but may not use backbones or spines. Any metal fasteners or staples must have smooth edges and be covered. (3d Cir. L.A.R. 32.1(a).)

#### Filing and Serving the Petition

Counsel must use CM/ECF to serve and file the petition. Unless the Third Circuit clerk orders otherwise, counsel does not need to file paper copies. (3d Cir. L.A.R. 40.1(a).) If a *pro se* party has not registered to use CM/ECF or the opposing party has not yet filed a notice of appearance, counsel must use an alternate method of service. Acceptable methods of paper service include:

- Personal delivery.
- First-class mail.
- Third-party commercial carrier for delivery within three days.

(FRAP 25(c)(1).)

### RESPONDING TO THE PETITION

A party may not file and serve a response to a rehearing petition unless and until the Third Circuit requests a response. The court does not ordinarily grant a petition without requesting a response. (FRAP 40(a)(3).) If the panel requests a response, counsel must serve and file the response within 14 days of the request (3d Cir. I.O.P. 8.2).

A response is subject to the same formatting, filing, and service requirements as a petition (see Formatting the Petition). The rules do not provide for a reply. Any party who wants to file a reply should file a motion for leave to do so, or the court likely will reject the reply.

An *amicus curiae* that wants to support a petition for panel rehearing (or that does not support either party) must file its brief and motion within seven days after the petitioner files its petition (FRAP 29(b)(5)). An amicus that wants to oppose a rehearing petition must file its brief and motion no later than the date the court sets for any response (FRAP 29(b)(5)). No party may respond to the motion unless the court directs otherwise.

A proposed amicus brief must state:

- The movant's interest.
- The reason why an amicus brief is desirable.
- Why the matters asserted are relevant to the disposition of the case.

(FRAP 29(a)(3), (b)(3).) An amicus brief filed in connection with a rehearing petition may not exceed 2,600 words and otherwise must comply with the content and formatting requirements of an amicus brief filed during consideration of the case on the merits (FRAP 29(a), (b)(4)).

For more on amicus curiae briefs in the Third Circuit, see Practice Note, Third Circuit Civil Appeals: Amicus Curiae Briefs (W-012-9759).

### DISPOSITION OF THE PETITION

The Third Circuit does not hear oral argument on petitions for panel rehearing (FRAP 40(a)(2)).

If two members of the panel vote for rehearing, the panel's opinion and judgment is vacated and the court notifies the parties of the rehearing. If the petition for panel rehearing is denied, the judge who authored the opinion enters an order denying the petition (3d Cir. I.O.P. 8.3.1).

If the court grants a petition for panel rehearing, it may:

- Decide the appeal without further argument or briefing.
- Request further argument or briefing.
- Make any other appropriate order.

(FRAP 40(a)(4).)

## REHEARING EN BANC

A losing party that believes the panel's opinion conflicts with controlling precedent or presents an extraordinarily important issue may request rehearing *en banc*.

### STANDARD FOR REHEARING EN BANC

A petition for rehearing *en banc* should bring to the entire court's attention either:

- A precedent-setting error of exceptional importance.
- An opinion that directly conflicts with Supreme Court or Third Circuit precedent.

(FRAP 35(a).)

Rehearing *en banc* is exceedingly rare and is strongly disfavored in the Third Circuit (3d Cir. L.A.R. 35.4). The Third Circuit ordinarily does not grant rehearing *en banc* when:

- The panel's statement of the law is correct, and the only issue turns on the application of the law to the facts of the case.
- The petition only presents an issue of state law.

(3d Cir. I.O.P. 9.3.2; 3d Cir. I.O.P. 9.3.3.)

### PETITIONING FOR REHEARING EN BANC

A party requests rehearing *en banc* by petitioning the full Third Circuit. If a party seeks both panel rehearing and rehearing *en banc*, the court prefers that counsel file a single petition.

### Time to Petition

A party generally must file a petition for rehearing *en banc* within 14 days after entry of the Third Circuit's judgment. Any party has 45 days to petition for rehearing *en banc* in cases where the US (including an officer or agency of the US) is a party (FRAP 35(c) and 40(a)(1)).

### Contents of the Petition

A petition for rehearing *en banc* must explain with particularity what legal or factual material the panel overlooked or misapprehended (FRAP 40(a)(2)).

The petition must include:

- A statement regarding rehearing *en banc* demonstrating that:
  - the panel decision conflicts with precedent from the Supreme Court or the Third Circuit requiring consideration by the full Third Circuit to secure and maintain uniformity of the court's decisions or compliance with the Supreme Court's decisions (FRAP 35(b)(1)(A)); or
  - the proceeding involves a question of exceptional importance, such as a conflict between the panel decision and precedent from other federal courts of appeals (FRAP 35(b)(1)(B)).
- (3d Cir. L.A.R. 35.1.) If counsel assert that there is a conflict with precedent, the petition must cite each conflicting precedent (FRAP 35(b)(1)(A)). If counsel assert that there are questions of exceptional importance, the petition must concisely state each question (FRAP 35(b)(1)(B)).
- A certificate of compliance within the word limit if the petitioner prepared the petition using a computer (FRAP 32(g)).
- A certificate of service (FRAP 25).
- A copy of the panel's judgment, order, and opinion (3d Cir. L.A.R. 35.2).

### Formatting the Petition

Petitions for rehearing *en banc* must conform to the following formatting requirements:

- **Page size and margins.** Petitions must be prepared on 8.5" by 11" pages. Margins must be at least one inch on the left and right sides of the page, and at least three-quarters of an inch on the top and bottom of each page. No text other than page numbers may appear in the margins. Pages should be numbered. Any paper copies must be printed single-sided. (FRAP 32(a)(1), (4); 3d Cir. L.A.R. 32.1(b).)
- **Font.** Petitions should use black type and a plain, roman-style font. Petitions may occasionally use italics or boldface for emphasis. Case names must appear italicized or underlined. Petitions may use either a proportionally spaced font (for example, Times New Roman) or a monospaced font (for example, Courier). The font size depends on whether counsel use:
  - **a proportionally spaced font.** A petition written in a proportionally spaced font must use at least a 14-point font size. This font must include serifs (for example, Century includes serifs). However, headings and captions may appear in sans-serif type (that is, a font without serifs, like Arial or Helvetica); or
  - **a monospaced font.** A petition written in a monospaced font may not contain more than 10.5 characters per inch. This roughly translates to 12-point Courier font.
- (FRAP 32(a)(1), (5), and (6); see Third Circuit Font and Page Length Requirements for Filing Briefs.)
- **Line spacing.** The text of a petition must be double spaced, except that single spacing may be used for:
  - quotations more than two lines long (which should be indented on both sides);
  - headings; and
  - footnotes.

  (FRAP 32(a)(4).)
- **Length limits.** Except by the court's permission, a rehearing petition may not exceed 3,900 words if prepared on a computer or 15 pages if prepared on a typewriter or by hand, excluding the items listed in FRAP 32(f) (FRAP 35(b)(2)). If a party also petitions for panel rehearing, the combined documents may not exceed 3,900 words or 15 pages, whether or not the petitions are combined in a single document (FRAP 35(b)(3)). Counsel may rely on the word or line count provided by the word processing software used to draft the petition (FRAP 32(g)(1)).
- **Signature.** A petition must include a signature from at least one of the petitioner's counsel. For electronically filed documents, counsel need not manually sign the petition because the filing attorney's CM/ECF login and password constitute the required signature for all purposes. (FRAP 32(d); 3d Cir. L.A.R. 28.4; 3d Cir. L.A.R. 46.4; 3d Cir. L.A.R. 113.9(a).) The filing attorney must type "s/[ATTORNEY'S NAME]" on the signature line to signify that the document is signed. The Third Circuit also allows counsel to apply an electronic signature, but the use of an "s/" is the more common method of signing documents. (3d Cir. L.A.R. 28.4; 3d Cir. L.A.R. 113.9(b).) Counsel also must include a signature block directly below the signature line, including the filing attorney's:
  - name;
  - state bar number;
  - business address; and
  - telephone number.

  (3d Cir. L.A.R. 28.4.)
- **Covers.** A cover is not necessary, but if counsel uses one, it must be white (FRAP 32(c)(2)).
- **Binding.** If paper copies of a petition are necessary, counsel must bind the petition along the left margin in a way that:
  - is secure;
  - does not obscure the text; and
  - permits the petition to lie reasonably flat when open.
- (FRAP 32(a)(3); see Filing and Serving the Petition.) Counsel may use velo or spiral binding but may not use backbones or spines. Any metal fasteners or staples must have smooth edges and be covered. (3d Cir. L.A.R. 32.1(a).)

### Filing and Serving the Petition

Counsel must use CM/ECF to serve and file the petition. Unless the Third Circuit clerk orders otherwise, counsel does not need file paper copies. (3d Cir. L.A.R. 35.2.) If a *pro se* party has not registered to use CM/ECF or the opposing party has not yet filed a notice of appearance, counsel must use an alternate method of service. Acceptable methods of paper service include:

- Personal delivery.
- First-class mail.
- Third-party commercial carrier for delivery within three days.

(FRAP 25(c)(1).)

## RESPONDING TO THE PETITION

A party may not file and serve a response to a petition for rehearing *en banc* unless and until the Third Circuit requests a response (FRAP 36(e)). The court requests a response if at least four active judges vote either:

- To request a response to the petition.
- For rehearing *en banc* and there is at least one vote for an answer.

(3d Cir. I.O.P. 9.5.6.) If the court requests a response, counsel must serve and file the response within 14 days of the request (3d Cir. I.O.P. 9.5.6).

A response is subject to the same formatting, filing, and service requirements as a petition (see Formatting the Petition). The rules do not provide for a reply. Any party who wants to file a reply should file a motion for leave to do so, or else the court likely will reject the reply.

An *amicus curiae* that wants to support a petition for rehearing *en banc* (or that does not support either party) must file its brief and motion within seven days after the petitioner files its petition (FRAP 29(b)(5)). An amicus that wants to oppose a rehearing petition must file its brief and motion no later than the date the court sets for any response (FRAP 29(b)(5)). No party may respond to the motion unless the court directs otherwise.

A proposed amicus brief must state:

- The movant's interest.
- The reason why an amicus brief is desirable.
- Why the matters asserted are relevant to the disposition of the case.

(FRAP 29(a)(3), (b)(3).) An amicus brief filed in connection with a rehearing petition may not exceed 2,600 words and otherwise must comply with the content and formatting requirements of an amicus brief filed during consideration of the case on the merits (FRAP 29(a), (b)(4)).

For more on amicus curiae briefs in the Third Circuit, see Practice Note, Third Circuit Civil Appeals: Amicus Curiae Briefs (W-012-9759).

## DISPOSITION OF THE PETITION

The Third Circuit does not hear oral argument on petitions for rehearing *en banc*. After a party petitions for rehearing *en banc*, the clerk transmits the petition to the original panel members and to the other active judges on the court, with a request that they respond to the authoring judge within ten calendar days if they desire rehearing or a response (3d Cir. I.O.P. 9.5.2).

The court orders rehearing *en banc* based on the affirmative votes of a majority of active judges who are not disqualified (3d Cir. I.O.P. 9.5.3; 3d Cir. L.A.R. 35.3). Any judge who does not respond to the call for votes is presumed to vote to deny the petition (3d Cir. I.O.P. 9.5.4).

If a majority of the court's active judges votes for rehearing *en banc*, the Chief Judge enters an order vacating the panel's opinion in full or in part and assigning the case to the calendar for a rehearing on one or more of the issues (3d Cir. I.O.P. 9.5.9). When requested by a majority of the *en banc* court, the clerk advises counsel to submit supplemental briefs on specific issues or to be prepared to discuss specific issues at oral argument (3d Cir. I.O.P. 9.6.3).

## REHEARING BEFORE THE EN BANC COURT

The court holds an *en banc* hearing only at a regularly scheduled *en banc* session of the court unless a majority of the active judges vote to expedite consideration (3d Cir. I.O.P. 9.6.2).

The Third Circuit ordinarily decides an *en banc* rehearing with an opinion.

## INITIAL HEARING EN BANC

A party may request the court to initially hear an appeal *en banc* without first having a three-judge panel consider the appeal and issue a decision. The procedure for an initial hearing *en banc* follows that for a rehearing *en banc* except that a petition for initial hearing *en banc* is due by the date when the appellee's brief is due (FRAP 35(c)). Initial *en banc* consideration is extraordinary and the Third Circuit rarely grants such a petition (3d Cir. I.O.P. 9.2).

Initial hearing *en banc* is only granted when a majority of the active judges who are not disqualified determines that the case is both:

- Controlled by a prior decision of the court that should be reconsidered.
- Of such immediate importance that exigent circumstances require initial consideration by the full court.

(3d Cir. I.O.P. 9.2.)



09-18