

DATE: October 1, 2015

SUBJECT: HEARING AND REHEARING EN BANC - DISSOLUTION OF EN BANC

In accordance with Fed. R. App. P. 26(a)(1), which states that its provisions apply in computing any period of time specified in a local rule, one must “[e]xclude the day of the act, event, or default that begins the period.” Thus, for example, when a voting deadline is seven working days in this IOP, the day that the clerk distributes the petition is excluded from the seven-day count. Judges who are recused or disqualified from participating in an en banc case are not counted as “active” or “regular active” judges for purposes of this IOP. For example, under paragraph 5 governing polling, recused or disqualified judges are not counted when determining whether a majority has voted to defer voting pending a conference or voted to hear or rehear a case en banc.

1. Petitions for hearing en banc.

(a) The clerk shall send petitions for hearing en banc to the active judges of the court promptly upon filing, allowing ten working days for any judge to request a response.

(b) If no judge requests a response, the clerk will enter an order for the court denying the petition for hearing en banc.

(c) If a response is requested, the clerk will thereafter send the response (or a notice that none was filed) to the judges, allowing ten working days for any judge to initiate a poll in accordance with paragraph 5 of this procedure to determine whether the appeal or other matter should be heard en banc.

(d) If no poll is initiated, the clerk will enter an order for the court denying the petition for hearing en banc.

(e) If a poll is initiated and the petition for hearing en banc is granted, a committee of judges selected by the chief judge, which shall normally include the judge who initiated the poll, shall within ten working days transmit on a vote sheet to the judges who will sit en banc a draft order setting forth any questions proposed to be addressed by the court en banc. The clerk will enter the order for the court granting the petition for hearing en banc and setting forth the schedule for additional briefing, if any, by the parties and by amici curiae, and for oral argument, and any questions the court may wish the parties and amici to address.

(f) If a poll is initiated and the petition for hearing en banc is denied, and there are no dissenting votes or a judge votes to dissent without opinion, the clerk will enter an order for the court:

- (i) Advising that a poll was conducted, and
- (ii) Denying the petition for hearing en banc, noting thereon any dissenting votes that may have been directed.

If a judge indicates on an en banc poll sheet that he or she intends to file a separate opinion regarding the denial of an en banc action, then within six working days after the poll deadline ends, the judge will transmit his or her opinion to the other judges. Six working days after such transmittal, the clerk will enter an order for the court:

- (i) Advising that a poll was conducted,
- (ii) Denying the petition for hearing en banc, and
- (iii) Attaching the opinion.

If no opinion is transmitted within six working days after the poll deadline ends, then the clerk, unless otherwise ordered by the chief judge, will enter an order for the court:

- (i) Advising that a poll was conducted,
- (ii) Denying the petition for hearing en banc, and
- (iii) Advising that an opinion will follow.

2. Petitions for rehearing en banc.

(a) Action on a petition for rehearing en banc that is part of a combined petition for panel rehearing and rehearing en banc will be deferred until the panel has acted on the petition for rehearing. A petition for rehearing en banc that is not combined with a petition for panel rehearing will be presumed to request relief that can be granted by the panel that heard the appeal; consequently, the clerk will send the petition for rehearing en banc promptly upon filing first to the panel in accordance with IOP #12, paragraph 1(b), and action on the petition for rehearing en banc will be deferred until the panel has had the opportunity to grant the relief requested. If the panel either takes no action or grants less than all of the relief requested, the clerk shall send both the combined petition and any response considered by the panel to the active judges of the court and to any judge who was a member of the panel that heard the appeal or other matter but is not an active judge of the court, allowing ten working days for any of these judges to request a response to the petition for rehearing en banc. If the panel affirmatively determines to take no action on the petition before the review period has expired, the panel may notify the clerk that the petition may be sent to the full court for its review without waiting for the ten working days to pass.

(b) If no judge requests a response, the clerk will enter an order for the court denying the petition for rehearing en banc.

(c) When a response is requested and filed or the time for filing the requested response has passed without one having been filed, the clerk will send the response or a notice that none was filed to the judges, allowing ten working days for any active or panel

judge to initiate a poll in accordance with paragraph 5 of this IOP to determine whether the appeal or other matter should be reheard en banc.

(d) If no judge initiates a poll, the clerk will enter an order for the court denying the petition for rehearing en banc.

(e) At any time before a majority of the active judges who are eligible to participate vote to grant a petition for rehearing en banc, a majority of the panel members may inform the en banc court that the panel wishes to take the petition back for action. The panel shall inform the full court of any action on the petition, and if the panel grants less than all of the relief requested, any judge may request a response to the petition for rehearing en banc or a poll within 10 business days of the panel's notification to the full court.

(f) If a poll is initiated and the petition for rehearing en banc is granted, a committee of judges appointed by the chief judge, which normally will include the judge who initiated the poll, shall within ten working days transmit on a vote sheet to the judges who will sit en banc an order setting forth the questions proposed to be addressed by the court en banc. The clerk will enter the order for the court granting the petition for rehearing en banc and setting forth the schedule for additional briefing by the parties and by amici curiae and for additional oral argument, if any, and any questions the court may wish the parties and amici to address. Notice shall be given that the court en banc shall consist of all circuit judges in regular active service who are not recused or disqualified and any senior circuit judge of the court who participated in the decision of the panel and elects to sit, in accordance with the provisions of 28 U.S.C. § 46(c).

(g) If a poll is initiated and the petition for rehearing en banc is denied, and there are no dissenting votes or a judge votes to dissent without opinion, the clerk will enter an order for the court:

(i) Advising that a poll was conducted, and

- (ii) Denying the petition for rehearing en banc, noting thereon any dissenting votes that may have been directed.

If a judge indicates on an en banc poll sheet that he or she intends to file a separate opinion regarding the denial of an en banc action, then within six working days after the poll deadline ends, the judge will transmit his or her opinion to the other judges. Six working days after such transmittal, the clerk will enter an order for the court:

- (i) Advising that a poll was conducted,
- (ii) Denying the petition for rehearing en banc, and
- (iii) Attaching the opinion.

If no opinion is transmitted within six working days after the poll deadline ends, then the clerk, unless otherwise ordered by the chief judge, will enter an order for the court:

- (i) Advising that a poll was conducted,
- (ii) Denying the petition for rehearing en banc, and
- (iii) Advising that an opinion will follow.

3. Sua sponte requests for hearing en banc.

Hearing en banc following hearing by a panel of judges, but before the entry of judgment and opinion(s) by the panel, may be ordered sua sponte.

(a) During the circulation period to the court before precedential opinions are issued, any active judge may initiate a poll in accordance with paragraph 5 of this IOP. The request for a poll should ordinarily be accompanied by a memorandum of reasons supporting the sua sponte request for hearing en banc or adopting the dissenting or concurring opinion of a judge on the panel.

(b) During the time for polling or awaiting a conference, the panel judgment and opinion(s) shall automatically be withheld for filing.

(c) If the sua sponte request for hearing en banc is granted, a committee of judges appointed by the chief judge, which normally shall include the judge who initiated the poll, shall within ten working days transmit on a vote sheet to the judges who will sit en banc an order setting forth the questions proposed to be addressed by the court en banc. The clerk shall provide notice that a majority of the judges in regular service has acted under 28 U.S.C. § 46 and Fed. R. App. P. 35(a) to order the appeal to be heard en banc, and indicate any questions the court may wish the parties and amici to address. Notice shall be given that the court en banc shall consist of all circuit judges in regular active service who are not recused or disqualified. Additional briefing and oral argument will be ordered as appropriate. If the sua sponte request for hearing en banc is not granted, no order will issue on the sua sponte request and the panel's opinion may be issued in due course.

4. Sua sponte requests for rehearing en banc.

Rehearing en banc following issuance of a precedential opinion may be ordered sua sponte in the absence of a petition for rehearing en banc filed by a party.

(a) When no petition for rehearing en banc has been filed in an appeal that has been decided in a precedential opinion, within four working days after the time allowed by the rules for filing a petition for panel rehearing any active judge may initiate a poll in accordance with paragraph 5 of this IOP. The request for a poll ordinarily should be accompanied by a memorandum of reasons supporting the sua sponte request for rehearing en banc or adopting the dissenting or concurring opinion of a judge on the panel. The mandate shall not issue until after the sua sponte request is denied or until after any en banc action is completed.

(b) If the sua sponte request for rehearing en banc is granted, a committee of judges appointed by the chief judge, which normally shall include the judge who initiated

the poll, shall within ten working days transmit on a vote sheet to the judges who will sit en banc an order setting forth the questions proposed to be addressed by the court en banc. The clerk shall provide notice that a majority of the judges in regular active service has acted under 28 U.S.C. § 46(c) and Fed. R. App. P. 35(a) to order the appeal to be heard en banc, enter an order for the court vacating the judgment and withdrawing the opinion(s) filed by the panel that heard the appeal, and indicate any questions the court may wish the parties and amici to address. Notice shall be given that the en banc panel

shall include all circuit judges in regular active service who are not recused or disqualified and any senior circuit judge of the circuit who participated in the decision of the panel and elects to sit, in accordance with the provisions of 28 U.S.C. § 46(c). Additional briefing and oral argument will be ordered as appropriate.

(c) If a sua sponte request for rehearing en banc is denied, and there are no dissenting votes or a judge votes to dissent without opinion, the clerk will enter an order for the court advising that a poll of judges in regular active service whether to rehear the appeal was conducted at the request of an active judge, but failed of a majority, noting thereon any dissenting votes that may have been directed. If a judge indicates on an en banc poll sheet that he or she intends to file a separate opinion regarding the denial of an en banc action, then within six working days after the poll deadline ends, the judge will transmit his or her opinion to the other judges. Six working days after such transmittal, the clerk will enter an order for the court:

- (i) Advising that a poll was conducted,
- (ii) Denying the request for rehearing en banc, and
- (iii) Attaching the opinion.

If no opinion is transmitted within six working days after the poll deadline ends, then the

clerk, unless otherwise ordered by the chief judge, will enter an order for the court:

- (i) Advising that a poll was conducted,
- (ii) Denying the request for rehearing en banc, and
- (iii) Advising that an opinion will follow.

5. Poll.

(a) A poll is initiated by a judge or a panel of judges requesting the chief judge to poll the active judges on a petition for hearing or rehearing en banc of a party or sua sponte. When a poll is requested, the chief judge shall distribute an en banc ballot containing these choices:

- (i) To deny en banc review.
- (ii) To hear or rehear the appeal en banc.
- (iii) To defer voting pending a conference of the judges.

For sua sponte suggestions, the chief judge also will distribute any memoranda accompanying a judge's request for a poll. Copies of the certificates of interest filed in the matter shall accompany the distribution if they have not previously been circulated with the en banc suggestion of a party.

If the chief judge fails to distribute the ballots within six working days following the request for a poll, the requesting judge may conduct the poll.

(b) The judges will adhere strictly to the period for polling. The polling shall end at 5:30 p.m. on the tenth working day following the date of distribution of the ballot, and ballots received in the office of the chief judge thereafter shall not be counted.

(c) The poll results shall be tallied and announced. When the time for balloting closes, the chief judge shall promptly tally the ballots and notify the court of the results of the poll. If a majority either votes against en banc review or fails to vote, the poll fails

and the petition, if any, is denied. If a majority votes to hear or rehear the appeal en banc, the poll passes and the petition, if any, is granted. If a majority votes to defer voting pending a conference of judges, the chief judge shall schedule a conference. If less than a majority vote to hear or rehear the appeal en banc or to defer voting pending a conference, but together those votes constitute a majority, the chief judge shall schedule a conference. A judge voting for or against en banc hearing or rehearing may indicate that the vote also shall be counted in the event a post-conference poll is conducted.

(d) A post-conference poll may be conducted. If a conference is called, and a poll is not conducted at the conference, promptly following the conference the chief judge shall distribute a ballot containing these choices:

- (i) To deny en banc review.
- (ii) To hear or rehear the appeal en banc.

If the chief judge fails to distribute the ballots within four working days following the conference, the requesting judge may conduct the poll.

(e) The judges will adhere strictly to the period for post-conference polling. The post-conference polling shall end at 5:30 p.m. on the fourth working day following the date of distribution of the ballot, and ballots received in the office of the chief judge thereafter shall not be counted.

(f) The post-conference poll results shall be tallied and announced. When the time for balloting closes, the chief judge shall promptly tally the ballots (including those votes to be carried over from the preconference poll) and notify the court of the results of the post-conference poll. If a majority votes to hear or rehear the appeal en banc, the post-conference poll passes and the petition, if any, is granted; otherwise, the poll fails and the petition, if any, is denied.

(g) Multiple polls will not be taken. The initiation of a poll by a judge or judges terminates the period for requesting a poll. Thereafter, other judges may circulate memoranda supporting or opposing en banc hearing or rehearing during the balloting period.

6. Extension of six working days upon request.

A judge entitled to request or to participate in an en banc or dissolution poll may extend any time set forth in this procedure, except for the deadline in paragraph 4(a) of this procedure by six working days upon sending a notice to the chief judge received before 5:30 p.m. on the final day for action, with copies to other participating judges. The notice extends that time for all judges. Only one such extension is permitted for any period of action.

7. Composition of en banc court

In any case in which en banc hearing or rehearing is granted, and subject to any recusal or disqualification, pursuant to 28 U.S.C. § 46(c) the en banc court shall consist of all active judges, except that a senior judge shall be eligible to participate as a member of an en banc court reviewing a decision of a panel of which that judge was a member. Additionally, pursuant to 28 U.S.C. § 46(c) a senior judge may continue to participate in the decision of a case that was heard or reheard by the court en banc at the time when that judge was in regular active service. Any new judge joining the court after a case is heard or reheard en banc, but before issuance of the en banc decision, shall be eligible to participate in the decision as a member of the en banc court. A judge joining the court after a case is heard or reheard en banc but before issuance of the en banc decision shall promptly inform the members of the en banc court of his or her choice whether to participate in the court's en banc decision.

8. Petitions to hear or rehear motions or other non-merits matters en banc.

A petition that a motion or other matter not involving the merits of the case should be determined by the court en banc will not be circulated to the judges in regular active service until the underlying motion or matter has been acted upon by a motions or merits panel, as appropriate, but if the panel grants the entire relief requested, the petition shall be deemed moot.

9. Sua sponte petitions for dissolution of en banc status.

a. Dissolution of en banc status may be ordered any time before filing or entry of a judgment and opinion(s) by the en banc court or, in the case of a remand by the Supreme Court to the en banc court, any time before filing or entry of a judgment and opinion(s) after remand.

b. Any active judge who voted to grant a petition for hearing or rehearing en banc may initiate a dissolution poll by transmitting a request for dissolution of the en banc poll to the chief judge. The request for a dissolution poll should ordinarily be accompanied by a memorandum of reasons supporting the petition for dissolution of en banc status.

c. After a judge has initiated a dissolution poll, the en banc judgment and opinion(s) will automatically be withheld for filing or entry until the petition for dissolution of en banc status is granted or denied.

d. When a poll is requested, the chief judge will distribute to all of the judges in regular active service a dissolution poll ballot containing these choices:

- i. To retain en banc status;
- ii. To dissolve the en banc court and refer the case to a panel; or
- iii. To defer voting pending a conference of judges.

If the chief judge fails to distribute the ballots within six working days following the request for a poll, the requesting judge may conduct the poll. Any judge may circulate memoranda supporting or opposing dissolution during the balloting period.

e. The polling period ends at 5:30 p.m. on the tenth working day following the date of distribution of the ballot, and ballots received in the office of the chief judge after that time will not be counted.

f. When the time for balloting closes, the chief judge will promptly tally the ballots and notify the court of the results of the poll. If a majority either votes against dissolution or fails to vote, the poll fails and the petition is denied. If a majority votes to dissolve, the poll passes and the petition for dissolution of en banc status is granted. If a majority votes to defer voting pending a conference of judges, the chief judge will promptly schedule a conference. If less than a majority vote to dissolve and less than a majority vote to defer voting pending a conference, but the votes to dissolve and to defer voting together constitute a majority of votes, the chief judge will schedule a conference.

g. If a conference is called, and the court does not vote at the conference on the petition, promptly following the conference the chief judge will conduct a post-conference poll. The chief judge will distribute a ballot containing these choices:

- i. To retain en banc status; or
- ii. To dissolve the en banc court and to refer the case to a panel.

If the chief judge fails to distribute the ballots within four working days following the conference, the requesting judge may request the poll.

h. A post-conference polling period ends at 5:30 p.m. on the fourth working day following the date of distribution of the ballot, and ballots received in the office of the chief judge after that time will not be counted.

i. When the time for balloting closes, the chief judge will promptly tally the ballots and notify the court of the results of any post-conference poll. If a majority votes to dissolve the en banc court, the post-conference poll passes and the petition for dissolution of en banc status is granted; otherwise the poll fails and the petition is denied.

j. Multiple polls may not be requested or taken. The initiation of a dissolution poll by a judge terminates the period for requesting a poll.

k. If the sua sponte petition for dissolution of en banc status is granted, the chief judge will distribute to all of the judges in regular active service a vote sheet containing these choices:

i. To refer the case to the panel that was initially assigned to the case, if any (or if the original panel cannot be reconstituted, to the remaining judge or judges of that panel and one or two newly selected judges); or

ii. To refer the case to a newly selected three-judge panel.

The voting period will end at 5:30 p.m. on the sixth working day following the distribution of the vote sheet, and votes received in the office of the chief judge after that time will not be counted. A majority of votes received will determine the issue.

l. After these procedures are completed and if the en banc court has determined to dissolve its en banc status, the chief judge will direct the clerk to issue an order giving notice thereof.

10. Recusal.

A judge wishing to recuse shall upon receiving a petition for hearing or rehearing en banc or upon receiving a ballot for a sua sponte en banc poll or a dissolution poll promptly notify the court of his or her recusal.

11. Remands to Panel.

If the en banc court returns the case to the panel to address additional issues, the court may enter the en banc opinion and any panel opinion simultaneously, or it may enter the en banc opinion separately, before the panel addresses the additional issues. The Clerk's Office at that time shall enter the en banc opinion without a judgment, and the Office shall return the case to the panel for further action. In such a situation, judgment shall be entered when the panel's subsequent opinion is issued.