

## Alabama Rules of Appellate Procedure

### Rule 40.

#### Applications for rehearing.

(a) *Who may file.* A party who has not prevailed may apply for a rehearing by filing an application for rehearing.

- (1) BRIEF IN SUPPORT OF APPLICATION. The party filing the application for rehearing must, when the application is filed, file a brief in support with the application.
- (2) BRIEF ON ORIGINAL SUBMISSION PREREQUISITE TO APPLICATION FOR REHEARING. No party can, as a matter of right, apply for a rehearing unless, on original submission, a brief was filed with the clerk as provided by the rules.
- (3) SECOND APPLICATION FOR REHEARING. No second application for rehearing will be considered unless in response to the first application the court reversed or substantially modified the original decision of the court.

(b) *Content of the application and the brief in support.* The application for rehearing must state with particularity the points of law or the facts the applicant believes the court overlooked or misapprehended. The brief in support of the application must contain any arguments in support of the application the petitioner desires to present.

(c) *Time for filing.* An application for rehearing and the brief in support of the application must be filed with the clerk of the appropriate appellate court within 14 days (2 weeks) of the date the decision being questioned is issued, except that in the case of a rehearing application in a pretrial appeal by the state in a criminal case, the application, with the supporting brief, must be filed with the clerk within 7 days (1 week) after the release of the decision.

(d) *Application for rehearing as a prerequisite to certiorari review by the Supreme Court.*

- (1) CRIMINAL. In all criminal cases except pretrial appeals by the state, the filing of an application for rehearing in the Alabama Court of Criminal Appeals is a prerequisite to certiorari review by the Alabama Supreme Court.

- (2) CIVIL. The filing of an application for rehearing with the Court of Civil Appeals is not a prerequisite for certiorari review by the Supreme Court.
- (3) PETITIONS FOR WRIT OF MANDAMUS. An application for rehearing is not a prerequisite to review by the Supreme Court of a decision by a court of appeals on an original petition for a writ of mandamus filed pursuant to Rule 21(e), Alabama Rules of Appellate Procedure. See Rule 21(e). If, however, the petitioner filed an application for rehearing in the court of appeals, that application must have complied with Rule 40(e).

(e) *Statement of facts to be contained in application for rehearing.* If a court of appeals issues an opinion or an unpublished memorandum containing a statement of facts and a party applying for rehearing is not satisfied with that court's statement of the facts, the party applying for rehearing may present in the application for rehearing a proposed additional or corrected statement of facts or the applicant's own statement of facts. If the applicant is not satisfied with the facts stated in the main opinion or the unpublished memorandum of the court of appeals, but the applicant is satisfied with the facts as stated in a dissent or a special writing by a judge or judges of the court of appeals, the applicant shall indicate those facts with which the applicant is in agreement and indicate in which part of the dissent or special writing the facts are found. If the applicant does not present in the application an additional or corrected statement of facts or the applicant's own statement of facts, it will be presumed that the applicant is satisfied with the facts as stated in the court of appeals' main opinion or unpublished memorandum. If a court of appeals issues a "no-opinion" decision pursuant to Rule 53 or issues an opinion or an unpublished memorandum that does not contain a statement of facts, the applicant shall include a statement of facts in the application for rehearing. See Rule 39(d)(5).

(f) *Brief opposing application for rehearing.* No brief opposing the application is required, but if the opposing party wishes to file a brief, the brief must be filed within 14 days (2 weeks) – or, in the case of a pretrial appeal by the state in a criminal case, within 7 days (1 week) – after the filing of the application and the brief in support of the application. Any brief in opposition to the application for rehearing shall not exceed 15 pages (see Rule 28(j)(5)), unless that page limitation is extended by the court pursuant to Rule 28(j)(3), if applicable. The brief in opposition shall contain a table of contents, a table of authorities, a summary of the argument, an argument and conclusion, and a certificate of service. No reply brief to a brief in opposition to an application for rehearing is permitted.

(g) *Form of application; color of brief; length of argument.* Except in criminal cases in which the death penalty is imposed, the application shall not exceed 15 pages. The application for rehearing may be a separate document or may be included at the beginning of the applicant's brief. The brief shall be in a

form prescribed by Rules 28 and 32(a), except that because the statement of facts is included in the application for rehearing, a statement of facts will not be included in the brief. Except in criminal cases in which the death penalty is imposed, the brief in support of the application for rehearing shall not exceed 15 pages, unless that page limitation is extended by the court pursuant to Rule 28(j)(3). Copies of the brief shall be served and filed as prescribed by Rule 31 for the service and filing of briefs. The cover of the brief in support of the application for rehearing shall be white. The application, or a brief in support of an application for rehearing, shall be governed by Rule 32(b)(1).<sup>1</sup>

[Amended 2-6-84, eff. 4-1-84; Amended 6-12-90, eff. 8-1-90; Amended 11-17-93, eff. 2-1-94; Amended eff. 8-1-2000; Amended 11-20-2001, eff. 6-1-2002; Amended 5-7-2015, eff 8-1-2015.]

<sup>1</sup> Ordered August 30, 2000, in the Supreme Court of Alabama:

“The order of this Court issued on May 19, 2000, amending Rule 40, Alabama Rules of Appellate Procedure, provided that the amendment to Rule 40 was effective August 1, 2000. IT IS ORDERED that that provision shall be interpreted to mean that Rule 40, as amended, is effective to cases in which the lower appellate court releases its decision on or after August 1, 2000.”

### **Committee Comments on 1975 Adoption**

This rule is based upon former Supreme Court Rule 17, with certain modifications. References to “terms of court” have been eliminated inasmuch as the court no longer is concerned with such terms.

The rule specifically provides that an applicant for rehearing must file a new brief, and prohibits an application for rehearing by any party who did not submit an original brief. This would ordinarily have application only to an appellee in civil cases, or to both parties in criminal cases.

No answer to an application is permitted in the sense of a pleading. Reply briefs may be filed.

The rule provides for service of the application for rehearing and the accompanying brief in accordance with the general provisions of service in these rules. The former requirement that the application and brief must be physically delivered to the office of opposing counsel within the former 15-day period is no longer required by this rule.

The rule makes explicit the prohibition against two applications for rehearing by the same party. This would not operate to prevent a party who prevailed in the initial decision and lost on the rehearing from asking for a second rehearing.

It is contemplated that execution of the judgment will be suspended routinely by the court in accordance with this rule.

For a discussion of the minimum standards which a brief in support of an application for rehearing must meet in order to be adequate, see *DeGraaf v. State*, 34 Ala.App. 137, 37 So.2d 130. See also Rules 31 and 32 for the standards which briefs in general must meet with respect to form and number. It will be permissible hereunder to combine the application for rehearing and the brief in support thereof.

**Court Comment to Amendment  
Effective April 1, 1984**

Temporary Rule 17, A.R.Crim.P., allowing for certain pre-trial appeals by the state in criminal cases, became effective on April 1, 1984. Rule 40 was amended at that time to include the reference to these pre-trial appeals and, in such appeals, to shorten the time to seven days for filing applications and briefs.

**Committee Comment to Amendment to Rule 40  
Effective February 1, 1994**

This amendment adds references to Rules 53 and 54, which became effective January 1, 1993.

**Court Comment to Amendment to Rule 40  
Effective August 1, 2000**

The amendment completely revises Rule 40. The most significant change in Rule 40 is that a party need not file an application for rehearing with the Court of Civil Appeals in order to obtain review by certiorari in the Supreme Court of a decision of the Court of Civil Appeals. If, however, an application for rehearing is filed with the Court of Civil Appeals, the application must comply with Rule 40(e).

An application for rehearing remains a prerequisite to review by the Supreme Court of a decision of the Court of Criminal Appeals, except in the case of a pretrial appeal by the State. An application for rehearing is not a prerequisite for review of a decision of either appeals court on a petition for a writ of mandamus. See Rule 21. If, however, an application for rehearing of a decision on a mandamus petition is filed, the party must then file a petition for a writ of certiorari with the Supreme Court, rather than a petition for a writ of mandamus, in order to obtain review.

If a party applies for rehearing to one of the courts of appeals, the party should read Rule 39 in conjunction with Rule 40, in the event review by certiorari is sought in the Alabama Supreme Court. If the court of appeals has not included a statement of facts in its decision, whether because it issued a “no-opinion” decision pursuant to Rule 53, or issued an opinion or a memorandum that does not contain a statement of facts, the applicant must include in the application for rehearing a proposed statement of facts. The purpose of this requirement is similar to an objection made at the trial level—it brings to the attention of the appellate court the applicant’s understanding of the facts of the case and gives that court the opportunity, upon rehearing, to state or restate the facts. If the court of appeals issues a decision that includes a statement of facts and the party is not satisfied with that statement of the facts, the party applying for rehearing may, in the application, present to the court of appeals a proposed or corrected statement of the facts or the applicant’s own statement of the facts. See also Rule 39(d)(5).

A brief in support of the application for rehearing must be filed and must comply with Rule 32(a), except that because the statement of facts will be included in the application, a statement of facts should not be included in the brief in support of the application. The parties can refer in the argument section of the brief to the facts stated in the application.

If the court of appeals denies the application or does not include the applicant’s statement of facts in its opinion, the applicant has, by including its statement of facts in the application, preserved the facts for inclusion in its petition for a writ of certiorari, should one be filed.

**Court Comment to Amendment to Rule 40(g)  
Effective June 1, 2002**

This amendment to Rule 40(g) provides that the 15-page limitation for an application for a rehearing and a brief in support of the application includes the same items listed in Rule 32(a)(6)(A) and also provides that permission to exceed the page limitation must be sought as provided in Rule 32(a)(6)(C).

**Committee Comments to Amendment to Rule 40(g)  
Effective June 1, 2005**

The amendment to Rule 40(g) clarifies that in all cases except death-penalty cases the page limitation for the application for rehearing itself is 15 pages and the page limitation for the brief in support of the application is 15 pages.

**Court Comment to Amendment to  
Rule 40(e) Effective September 15, 2008**

At times, the applicant may not agree with the facts as stated in the court of appeals' main opinion but agrees with the facts stated in a dissent or a special writing. The amendment to Rule 40(e) provides that, in such a case, the applicant shall indicate in the applicant's statement of facts which part of the facts in the dissent or special writing the applicant agrees with and indicate in which part of the dissent or special writing those facts can be found.

**Committee Comments to Amendment to Rule 40(f)**  
**Effective August 1, 2015**

Rule 40(f) has been amended to include here the page limits for briefs filed in opposition to an application for rehearing and to explicitly set out the contents of such a brief. Rule 40(f) was previously silent as to these matters. A sentence has also been added indicating that no reply brief to a brief in opposition to an application for rehearing is permitted.

**Note from the reporter of decisions:** The order amending Rule 40, effective August 1, 2000, is published in that volume of *Alabama Reporter* that contains Alabama cases from 755 So.2d.

**Note from the reporter of decisions:** The order amending Rule 5, Rule 21(d), Rule 27(d), Rule 28, Rule 32, Rule 39(d), Rule 39(f), Rule 39(h), and Rule 40(g), effective June 1, 2002, is published in that volume of *Alabama Reporter* that contains Alabama cases from 798 So.2d.

**Note from the reporter of decisions:** The order amending Rule 21(a), Rule 28, Rule 31(b), Rule 32(a) and (b), Rule 34(a), Rule 39, and Rule 40(g), effective June 1, 2005, and adopting Rule 25A, effective June 1, 2005, is published in that volume of *Alabama Reporter* that contains Alabama cases from 890 So. 2d.

**Note from the reporter of decisions:** The order amending Rule 39(d)(5)(A) and (C) and the introductory paragraph in Rule 39(d)(5), and Rule 40(e) and Rule 40(g), Alabama Rules of Appellate Procedure, and adopting the Court Comment to Amendments to Rule 39(d)(5) Effective September 15, 2008, and the Court Comment to Amendment to Rule 40(e) Effective September 15, 2008, is published in that volume of *Alabama Reporter* that contains Alabama cases from 994 So. 2d.

**Note from the reporter of decisions:** The order amending Rule 22, Rule 28(a)(5), Rule 32(a)(7), and Rule 40(f), effective August 1, 2015, and adopting the Committee Comments to those amendments to Rule 28(a)(5), Rule 32(a)(7), and Rule 40(f) is published in that volume of *Alabama Reporter* that contains Alabama cases from \_\_\_\_ So. 3d.