

§3.E.01 | CORRECTING OR MODIFYING APPELLATE DECISIONS – REHEARING¹¹¹

The proper method of advising the court of an error affecting its decision is to file a motion for rehearing. Rule 9.330(a) of the Florida Rules of Appellate Procedure provides that a motion for rehearing “shall state with particularity the points of law or fact that in the opinion of the movant the court has overlooked or misapprehended.”¹¹² There is no other ground that properly can be used to support a request for rehearing of an appellate decision.

Rule 9.330(a) once included a statement that rehearing “shall not re-argue the merits of the court’s order.”¹¹³ This prohibition was difficult to follow and even more difficult to enforce. Some lawyers used the opportunity to correct an oversight or omission as a routine step in the process of advocating their position. Appellate judges observed that rehearing motions were often nothing more than a restatement of the arguments presented in the briefs.¹¹⁴

In the 2000 revision of Rule 9.330(a), the Supreme Court deleted the prohibition against reargument of a case.¹¹⁵ Under the present version of the Rule, an attorney may argue a point decided by the court. However, it is still improper to use a motion for rehearing to voice disagreement with the court. The essential purpose of a motion for rehearing has not changed; it is still used to bring to the attention of the court a point that was overlooked or misapprehended.

Rule 9.300(a) now states that a motion for rehearing “shall not present issues not previously raised in the proceeding.”¹¹⁶ This addition, also made in 2000, incorporates a principle that had been established in the case law. An appellate court is not required to consider a point presented for the first time in a motion for rehearing, even if the point is one that might have changed the result of the case.¹¹⁷ A motion for rehearing must address some error or omission in the resolution of an issue previously presented in the main argument. Allowing consideration of new issues after a case has been decided would be inconsistent with the general purpose of Rule 9.330(a); that is, to enable the court to address matters that were overlooked or misunderstood.

It is not appropriate in any circumstance to file a motion for rehearing to attack the court or opposing counsel. The court is not likely to tolerate a motion for rehearing that is written to express disappointment or to satisfy the emotions of the



unsuccessful party. Rule 9.410 authorizes the appellate court to impose sanctions for the filing of any motion that is frivolous or in bad faith.¹¹⁸ The courts have used this general authority to impose sanctions for abuses of the rehearing procedure.¹¹⁹

A motion for rehearing may be directed to a decision that is not supported by an opinion, but it would be difficult to argue that the appellate court overlooked or misunderstood something about the case if there has been no written opinion and, therefore, no indication of the basis of the court's decision. Some appellate courts have discouraged rehearing motions that are directed to decisions without opinions.¹²⁰

Generally, a party may file only one motion for rehearing in a single case.¹²¹ However, in exceptional situations the courts have allowed a second motion to be filed. For example, successive rehearing motions were allowed in a case in which the court's opinion on the first rehearing was so different from its initial opinion that it amounted to a totally new decision.¹²² The court reasoned that it would be fair to allow the unsuccessful party another opportunity for rehearing. If a second motion for rehearing is to be filed, counsel should recognize the provisions of Rule 9.330(b) in the motion and explain the reasons the court should allow an exception to the Rule.

While an appellate decision generally is subject to only one motion for rehearing or clarification, Rule 9.330(b) expressly authorizes the filing of both a motion for rehearing and a motion for certification.¹²³ Rehearing and certification are remedies that may be pursued separately or in conjunction with each other.

Rule 9.330(a) provides that a motion for rehearing, clarification, or certification must be filed within fifteen days from the date of the decision of the appellate court.¹²⁴ However, the time for filing a motion for rehearing is not jurisdictional.¹²⁵ The appellate court has authority to enlarge or reduce the time before it expires.¹²⁶ Moreover, the court has authority to accept a motion for rehearing filed beyond the time allowed by the Rule, even though the party filing the motion has no right to reconsideration on the merits. Of course, it would not be wise to rely on the court's authority to consider a belated motion for rehearing. The only safe way to ensure that a motion for rehearing will be considered is to file the motion within the applicable time period.

The time allotted for filing a motion for rehearing is the same for each party to the proceeding in the appellate court, and the

time available to one party is not affected by the actions of another. ¹²⁷ For example, the filing of a notice to invoke discretionary jurisdiction of the Florida Supreme Court before the expiration of time for filing a motion for rehearing in the district court does not cut off the rights of other parties to seek rehearing or clarification in the district court. If time remains, any other party to the proceeding in the district court has a right to seek rehearing or clarification.

A party may oppose a motion for rehearing by serving a response within ten days of service of the motion to which it is directed. ¹²⁸ However, a response often is unnecessary. If the motion is nothing more than a second effort to present an argument that was fully considered and rejected, the response will not be of much value. In this situation, the response merely will add to the time the court will be required to spend in disposing of the motion. Counsel for the prevailing party may safely assume that the court will reject an improper rehearing motion on its own, without the need for a response. ¹²⁹ In contrast, if the motion for rehearing does raise a matter that was overlooked or misapprehended, it is advisable to file a response to persuade the appellate court to adhere to its original decision.

Preparing an effective motion for rehearing requires a different form of advocacy from that employed in writing an appellate brief. Once a decision has been made, the client's objective can be accomplished only by considering the need for rehearing from the appellate court's point of view. For that reason, the emphasis of the motion should be to show why the court should reconsider its decision, and not to explain why the client should have prevailed.

Appellate counsel must carefully and objectively consider whether there is a need for a rehearing and whether a valid ground exists. The courts increasingly have expressed intolerance of rehearing motions that amount to no more than a reargument of the issues addressed in the briefs. ¹³⁰ If the appellate court has not overlooked or misunderstood some important aspect of the case, the motion should not be filed.

If a valid reason exists to justify filing a motion for rehearing, the motion should describe the reason without restating the argument on the merits of the case. It is not appropriate to express disagreement with the court, but that does not mean that the attorney must relinquish his or her role as an advocate. To the contrary, the focus of the advocacy merely shifts from demonstrating the merits of a position to revealing an error or

omission worthy of the court's reconsideration. The argument should be designed to convince the court that it missed an important point, and not to reestablish the position of the unsuccessful party by more persuasive advocacy.

Rule 9.330 requires a statement of particularity regarding the points of law or fact that were overlooked or misapprehended by the court,¹³¹ but this does not mean that a motion for rehearing should be lengthy or exhaustive. As a practical matter, a concise, yet adequately detailed motion, will stand a much better chance of success. A motion for rehearing that is too long is more likely to be viewed as an attempt to reargue the matters addressed in the brief.

A party may request that a panel decision be reconsidered by all judges serving on a district court of appeal by filing a motion for rehearing en banc. However, this is an exceptional remedy that can be employed in only limited circumstances. The motion must be based on a claim that en banc review is necessary to maintain uniformity of the court's decisions or that the case is one of exceptional importance.¹³²

There are strict procedural requirements that must be met when filing a motion for rehearing en banc. First, the motion must be timely filed in conjunction with a motion for rehearing directed to the panel.¹³³ If the en banc motion is not accompanied by a motion for rehearing, it will be ineffective as a basis for any relief and it will be disregarded by the court.¹³⁴ The requirement that the en banc motion be filed in conjunction with a motion for rehearing ensures that the assigned panel will have an opportunity to evaluate the need for rehearing before the request is presented to the entire court.

A second essential requirement is that the attorney filing the motion include a statement certifying the existence of a proper ground for en banc consideration.¹³⁵ Depending on the ground asserted, Rule 9.331(d)(2) requires that the motion contain one of the following two certificates:

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is of exceptional importance.

[o]r

I express a belief, based on a reasoned and studied professional judgment that the panel decision is

contrary to the following decision(s) of this court and that a consideration by the full court is necessary to maintain uniformity of decisions in this court (citing specifically the case or cases).¹³⁶

A motion for rehearing en banc will not be put to a vote unless requested by at least one judge on the court.¹³⁷ The request for a vote on the en banc motion need not be made by a judge on the original panel, but a judge who was not on the panel may be unaware that such a motion has been filed. As explained in the committee note to Rule 9.331(d), “non-panel judges” have no obligation to review a motion for rehearing en banc until a vote is requested by another judge.¹³⁸ Hence, it is possible that a motion for rehearing en banc will not be considered by all of the judges on the court.

If the panel denies the motion for rehearing submitted in conjunction with the motion for rehearing en banc, that denial is considered as a denial of the en banc motion as well.¹³⁹ A separate order on a motion for rehearing en banc is required only if the motion is granted. In that event, the district court may require the parties to submit additional briefs or limit the issues for en banc consideration.¹⁴⁰

To prevail on a motion for rehearing en banc, the moving party must persuade a majority of those active judges participating and voting on the motion about the merits of the case. If there is a tie vote, the panel decision stands as the decision of the court; if there is no panel decision, a tie vote will affirm the action of the trial court.¹⁴¹ If the en banc proceeding is based on intra-district conflict, the panel decision that becomes the decision of the court as a result of a tie vote is the decision of the panel in the previous case before the district court of appeal.¹⁴²

Rehearing en banc is regarded by the appellate courts as an extraordinary proceeding, and appellate attorneys should treat it as such. A great deal of credibility could be lost by using the rehearing en banc procedure as a routine step in the appellate process. In contrast, an attorney who employs the remedy sparingly is more likely to be successful in a case that presents a genuine ground for en banc consideration.

(Stetson Law Review © 2002 // Volume 32, Issue 2, Article 4 // Phillip J. Padovano)



Footnotes

¹¹¹. See Padovano, *supra* n. 1, at ch. 19 for the source of the material that is adapted in this Subsection.

¹¹². Fla. R. App. P. 9.330(a).

¹¹³. Id. 9.330(a) comm. nn. 2000 amend. (quoting the former language of the Rule).

¹¹⁴. The prior version of Rule 9.330(a) contained an express prohibition against reargument of the merits on rehearing. *Barnes v. State*, 743 S.2d 1105, 1113 (Fla. Dist. App. 4th 1999). In *Whipple v. State*, 431 S.2d 1011, 1012–1016 (Fla. Dist. App. 2d 1983), the court wrote a detailed opinion explaining the rehearing process and warning attorneys against the use of rehearing motions to reargue the merits of a case. After reviewing statistics on the number of rehearing motions filed, the *Whipple* court noted that most attorneys have the mistaken belief that a motion for rehearing is “a routine step in appellate practice.” Id. at 1013. Similarly, in *Jackson v. United States Aviation Underwriters, Incorporated*, 466 S.2d 1119, 1119–1120 (Fla. Dist. App. 2d 1985), the court concluded that the rehearing motion was a “paradigm” of abuse, and that each time the rule is abused “the time and effort of three judges is wasted.” The motion for rehearing in *Gainesville Coca-Cola v. Young*, 632 S.2d 83, 84 (Fla. Dist. App. 1st 1993), consisted of an eight-page restatement of the law and facts contained in the appellees’ brief. The court denied the motion on the ground that it contained an improper reargument of the case. Id.; e.g. *Jacobs v. Wainwright*, 450 S.2d 200, 201 (Fla. 1984); *Parker v. Baker*, 499 S.2d 843, 847–848 (Fla. Dist. App. 2d 1986); *Seslow v. Seslow*, 625 S.2d 1248, 1248 (Fla. Dist. App. 4th 1993).

¹¹⁵. Fla. R. App. P. 9.330(a) comm. nn. 2000 amend.

¹¹⁶. Id. 9.330(a).

¹¹⁷. *Blinn v. Fla. Dept. of Transp.*, 781 S.2d 1103, 1110 (Fla. Dist. App. 1st 2000); *Ayer v. Bush*, 775 S.2d 368, 370 (Fla. Dist. App. 4th 2000); see *Taylor v. Johnson*, 581 S.2d 1333, 1338 (Fla. Dist. App. 1st 1990) (declining to consider a new issue raised for the first time in a motion for rehearing); *Sag Harbour Marine, Inc. v. Fickett*, 484 S.2d 1250, 1256 (Fla. Dist. App. 1st 1985) (denying rehearing because the matter was not previously presented in the brief in a meaningful way); *Fiesta Fashions, Inc. v. Capin*, 450 S.2d 1128, 1129 (Fla. Dist. App. 1st 1984) (denying a motion for rehearing when appellants raised issues not contained in their brief); *Alvarado v. State*, 466 S.2d 335, 338 (Fla. Dist. App. 2d 1985) (denying a motion for rehearing because “[t]he question of affirmative selection was not presented . . . on direct appeal”); *E. Airlines, Inc. v. King*, 561 S.2d 1220, 1221 (Fla. Dist. App. 3d 1990) (holding that an issue that was not presented in the briefs cannot be presented for the first time on rehearing); *Araujo v. State*, 452 S.2d 54, 58 (Fla. Dist. App. 3d 1984) (rejecting a claim made for the first time on rehearing and scolding the attorney for having the “effrontery” to say that the point was overlooked or misapprehended by the court); *Polyglycoat Corp. v. Hirsch Distributors, Inc.*, 442 S.2d 958, 960 (Fla. Dist. App. 4th 1983) (rejecting a meritorious contention on rehearing that the appellant had failed to make a timely objection in the lower tribunal because the argument had been presented for the first time on rehearing). A district court does not have jurisdiction on rehearing to challenge an order that was

not appealed or cross-appealed. *Rety v. Green*, 546 S.2d 410, 426 (Fla. Dist. App. 3d 1989). However, in *Ratley v. Batchelor*, 599 S.2d 1298, 1303–1304 (Fla. Dist. App. 1st 1991), the court addressed a new argument on rehearing to provide guidance for the parties and the trial court on remand. The court acknowledged the general rule that an appellate court will not consider an argument that is made for the first time in a motion for rehearing. *Id.* at 1303. However, courts have discretion to consider a point made for the first time on rehearing. See *Perez v. State*, 717 S.2d 605, 606 (Fla. Dist. App. 3d 1998) (diverting from general practice to “consider[] an argument where” there were “recent developments in the law”); *Jaworski v. State*, 804 S.2d 415, 419 (Fla. Dist. App. 4th 2001) (acknowledging the general rule but evaluating an argument made for the first time in the appellee’s motion for rehearing, based on the principle that the court must consider any basis to affirm).

¹¹⁸ Fla. R. App. P. 9.410.

¹¹⁹ In *Elliott v. Elliott*, 648 S.2d 135, 135–136 (Fla. Dist. App. 4th 1994), the court denied an argumentative motion for rehearing that simply expressed displeasure with the court and counsel. Because the rule is clear and because there are many warnings in the case law about the limited scope of a motion for rehearing, the court entered an order directing the movant’s attorney to show cause why sanctions should not be imposed. *Id.* at 136. In *Patton v. State Department of Health and Rehabilitative Services Office of Child Support Enforcement*, 597 S.2d 302, 302–304 (Fla. Dist. App. 2d 1991), the court denied a motion for rehearing on the ground that it was an attempt to reargue the case. Unprofessional accusations in the motion also prompted the court to refer the lawyer to The Florida Bar. *Id.* at 303–304. In *Lawyers Title Insurance Corporation v. Reitzes*, 631 S.2d 1100, 1100–1101 (Fla. Dist. App. 4th 1993), the court expressed its displeasure with the inordinate number of rehearing motions filed to re-argue the merits of the case. The court issued an order to show cause why sanctions should not be imposed for improper reargument. *Id.* at 1101.

¹²⁰ E.g. *Snell v. State*, 522 S.2d 407, 407 (Fla. Dist. App. 5th 1988) (holding that a motion for rehearing of an affirmance without opinion was an abuse of the rehearing procedure, particularly because the motion merely restated the arguments in the initial brief); contra *Sinkfield v. State*, 592 S.2d 322, 322 (Fla. Dist. App. 1st 1992) (granting a motion for rehearing directed to a per curiam affirmance without an opinion because there had been an intervening decision of the same court to the contrary); *Patton*, 597 S.2d at 303 (suggesting that it is proper to file a motion for rehearing directed to a per curiam affirmance without opinion).

¹²¹ Fla. R. App. P. 9.330(b).

¹²² In *Dade Federal Savings & Loan Association v. Smith*, 403 S.2d 995, 999 (Fla. Dist. App. 1st 1981), the court allowed a second rehearing motion notwithstanding the provisions of Rule 9.330(b). The opinion on the first motion for rehearing changed the entire basis of the court’s decision. *Id.* Therefore, the court reasoned that it was like a new opinion and held that it was subject to another rehearing motion. *Id.* Ordinarily a party may file only one motion for rehearing and one motion for certification and the motions must be filed within fifteen days of the decision to be certified. Fla. R. App. P. 9.330(b). However, in *DeBiasi v. Snaith*, 732 S.2d 14, 17 (Fla. Dist.

App. 4th 1999), the court stated in dicta that it would entertain a subsequent motion for certification if a motion for rehearing resulted in a new opinion.

^{123.} Fla. R. App. P. 9.330(b). Rule 9.330(b) provides that “[a] party shall not file more than [one] motion for rehearing or for clarification of decision and [one] motion for certification with respect to a particular decision.”

^{124.} *Id.* 9.330(a).

^{125.} *Thompson v. Singletary*, 659 S.2d 435, 436 (Fla. Dist. App. 4th 1995); *Maffea v. Moe*, 483 S.2d 829, 831 (Fla. Dist. App. 4th 1986). Consequently, the appellate courts may consider belated rehearing motions. While the rule authorizes the appellate court to consider a motion out of time, a request to do so must be accompanied by a showing of good cause. *Pinecrest Lakes, Inc. v. Shidel*, 802 S.2d 486, 489 (Fla. Dist. App. 4th 2001). It should be noted, however, that an appellate court does not have jurisdiction to consider an untimely motion for rehearing filed after the expiration of the term of court in which the decision was made. *Orange Fed. Sav. & Loan Assn. v. Dykes*, 444 S.2d 1152, 1152–1153 (Fla. Dist. App. 5th 1984).

^{126.} Fla. R. App. P. 9.330(a). Rule 9.330(a) states that “[a] motion for rehearing, clarification, or certification may be filed with [fifteen] days of an order or within such other time set by the court.” Implicit in this statement is the authority of the appellate court to enlarge or reduce the fifteen-day time period. Rule 9.330(c) contains a similar statement implying that the court has authority to reduce or enlarge the ten-day period for filing a motion for rehearing in bond validation proceedings. A party has fifteen days to file a motion for rehearing or clarification. *Hoenstine v. State Farm Fire & Cas. Co.*, 742 S.2d 853, 854 (Fla. Dist. App. 5th 1999) (stating that a motion for rehearing must be filed within fifteen days pursuant to Rule 9.330(a)).

^{127.} In *Portu v. State*, 654 S.2d 169, 169 (Fla. Dist. App. 3d 1995), the State filed a notice of intent to seek discretionary review in the Supreme Court before the time for filing a motion for rehearing expired. The defendant filed a motion for clarification, which the court granted. *Id.* The court held that the early filing of a notice of intent to seek discretionary review does not cut off the rights of another party to file a timely motion for rehearing. *Id.* at 170.

^{128.} Fla. R. App. P. 9.330(a). Rule 9.330(a) provides that “[a] response may be served within ten days of service of the motion.”

^{129.} Appellate courts are aware of the fact that many attorneys file rehearing motions inappropriately. See *Whipple*, 431 S.2d at 1013 (stating that “motions for rehearing were filed in about one out of every four cases . . . heard on the merits”); *Araujo*, 452 S.2d at 58 (criticizing the Assistant Attorney General for making an argument for the first time in a motion for rehearing). In light of these cases, the prevailing party should have some degree of confidence that an improper rehearing motion will be rejected by the appellate court without the need for a response.

^{130.} *Supra* nn. 114, 117, 119.

^{131.} Fla. R. App. P. 9.330(a).



¹³². Rule 9.331(a) sets forth the grounds for hearings and rehearings en banc. Examples of cases in which courts granted en banc rehearing to resolve intradistrict conflict include *Jones v. State*, 790 S.2d 1194, 1196 (Fla. Dist. App. 1st 2001), *Palm Bay Towers Corporation v. Brooks*, 466 S.2d 1071, 1074 (Fla. Dist. App. 3d 1984), *Jaris v. Tucker*, 414 S.2d 1164, 1165 (Fla. Dist. App. 3d 1982), and *Puga v. Suave Shoe Corporation*, 417 S.2d 678, 678 (Fla. Dist. App. 3d 1982). In contrast, the First District denied en banc consideration in *Walker v. State*, 442 S.2d 977, 978 (Fla. Dist. App. 1st 1983), because the panel decision did not conflict with the court's prior decisions. For a discussion of Florida district courts' authority to sit en banc, see Harvey J. Sepler, *En Banc Review in Florida Appellate Courts*, 62 Fla. B.J. 37, 37–39 (May 1988). Exceptional importance and uniformity of decisions were both cited as reasons for granting rehearing en banc in *Felts v. State*, 537 S.2d 995, 1004 (Fla. Dist. App. 1st 1988). The uniformity ground was based on several inconsistent panel decisions that had not yet been released. Id.

¹³³. The motion must be filed “within the time prescribed by [R]ule 9.330,” which is fifteen days from the date of the decision. Fla. R. App. P. 9.331(d)(1).

¹³⁴. *State v. Kilpatrick*, 420 S.2d 868, 869 (Fla. 1982) (holding that a motion for en banc review, which was filed separate from a motion for rehearing, was impermissible under Rule 9.331(c)); *La Grande v. B & L Servs., Inc.*, 436 S.2d 337, 337 (Fla. Dist. App. 1st 1983) (holding a motion for en banc review null and void because it was not filed “in conjunction with a Rule 9.330(a) motion for rehearing”).

¹³⁵. A motion for rehearing en banc must contain the required statement of counsel. In *Gainesville Coca-Cola*, the court questioned the propriety of the certificate in support of a motion for rehearing en banc. 632 S.2d at 84. The lawyer certified “‘based on a reasoned and studied professional judgment, that the panel decision in this case is of exceptional importance,’” but the court concluded that certification was made only to meet the requirements of Rule 9.331(d)(2). Id. (quoting the appellee's Motion for Rehearing En Banc).

The opinion was a two-paragraph per curiam decision reversing on the ground that the order was not supported by competent, substantial evidence. Id. There was nothing about the case that could add to the jurisprudence of the state on the subject matter of the case. Id. Moreover, there was no explanation why counsel believed that the case was one of exceptional importance. Id. Although the motion was in proper form, it was totally without merit. Id. The court published the opinion to deter improper motions for rehearing en banc. Id.

A motion for rehearing en banc was denied in *Havener v. Havener*, 473 S.2d 708, 708 (Fla. Dist. App. 2d 1985), because it did not contain the required statement of counsel. The court treated the en banc motion as a motion for rehearing. Id. For another example of a case in which the court treated an en banc motion as a motion for rehearing, see *Thompson v. State*, 483 S.2d 1, 1 (Fla. Dist. App. 2d 1985).

¹³⁶. Fla. R. App. P. 9.331(d)(2).

¹³⁷. Id. 9.331(d)(1) (stating that a vote will not be taken on the merits of a motion for rehearing en banc “unless requested by a judge on the panel that heard the proceeding, or by any judge in regular active service on the court”).

¹³⁸. Id. 9.331 comm. nn. 1994 amend. Rule 9.331(d)(1) provides that “[j]udges who did not sit on the panel are under no obligation to consider the motion [for rehearing en banc] unless a vote is requested.”

¹³⁹. The district courts of appeal can effectively deny a motion for rehearing en banc without a formal order on the motion. Under the provisions of Rule 9.331(d)(3), the denial of rehearing or the grant of rehearing without en banc consideration shall be deemed as a denial of the motion for rehearing en banc.

¹⁴⁰. The district court can require additional briefs on a motion for rehearing en banc. *Regency Inn v. Johnson*, 422 S.2d 870, 874 (Fla. Dist. App. 1st 1982) (mentioning that additional briefs were requested in connection with a motion for rehearing en banc).

¹⁴¹. Fla. R. App. P. 9.331(a); e.g. *State v. Falls Chase Spec. Taxing Dist.*, 424 S.2d 787, 819 (Fla. Dist. App. 1st 1982); *State v. Bankowski*, 570 S.2d 1152, 1153 (Fla. Dist. App. 4th 1990); *O’Brien v. State*, 478 S.2d 497, 499 (Fla. Dist. App. 5th 1985). A tie vote on a motion for rehearing en banc does not suggest that the issue is one that should be certified to the Supreme Court for resolution. Fla. R. App. P. 9.331 comm. nn. 1982 amend.

¹⁴². *O’Brien*, 478 S.2d at 499.