

**RULE 9.331 | DETERMINATION OF CAUSES IN A DISTRICT COURT OF APPEAL EN BANC**

**(a) En Banc Proceedings; Generally.** A majority of the participating judges of a district court of appeal may order that a proceeding pending before the court be determined en banc. If a majority of the participating judges order that a proceeding will be determined en banc, the district court of appeal shall promptly notify the parties that the proceeding will be determined en banc. A district court of appeal en banc shall consist of the judges in regular active service on the court. En banc hearings and rehearings shall not be ordered unless the case or issue is of exceptional importance or unless necessary to maintain uniformity in the court's decisions. The en banc decision shall be by a majority of the active judges actually participating and voting on the case. In the event of a tie vote, the panel decision of the district court of appeal shall stand as the decision of the court. If there is no panel decision, a tie vote will affirm the trial court decision.

**(b) En Banc Proceedings by Divisions.** If a district court of appeal chooses to sit in subject-matter divisions as approved by the supreme court, en banc determinations shall be limited to those regular active judges within the division to which the case is assigned, unless the chief judge determines that the case involves matters of general application and that en banc determination should be made by all regular active judges. However, in the absence of such determination by the chief judge, the full court may determine by an affirmative vote of three-fifths of the active judges that the case involves matters that should be heard and decided by the full court, in which event en banc determination on the merits of the case shall be made by an affirmative vote of a majority of the regular active judges participating.

**(c) Hearings En Banc.** A hearing en banc may be ordered only by a district court of appeal on its own motion. A party may not request an en banc hearing. A motion seeking the hearing shall be stricken.

**(d) Rehearings En Banc.**

(1) Generally. A rehearing en banc may be ordered by a district court of appeal on its own motion or on motion of a party. Within the time prescribed by rule 9.330, a



party may move for an en banc rehearing solely on the grounds that the case or issue is of exceptional importance or that such consideration is necessary to maintain uniformity in the court's decisions. A motion based on any other ground shall be stricken. A response may be served within 15 days of service of the motion. A vote will not be taken on the motion unless requested by a judge on the panel that heard the proceeding, or by any judge in regular active service on the court. Judges who did not sit on the panel are under no obligation to consider the motion unless a vote is requested.

(2) Required Statement for Rehearing En Banc. A rehearing en banc is an extraordinary proceeding. In every case the duty of counsel is discharged without filing a motion for rehearing en banc unless 1 of the grounds set forth in (d)(1) is clearly met. If filed by an attorney, the motion shall contain either or both of the following statements:

I express a belief, based on a reasoned and studied professional judgment, that the case or issue is of exceptional importance.

Or

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).

(3) Disposition of Motion for Rehearing En Banc. A motion for rehearing en banc shall be disposed of by order. If rehearing en banc is granted, the court may limit the issues to be reheard, require the filing of additional briefs, require additional argument, or any combination of those options.

### Committee Notes

**1982 Amendment.** This rule is patterned in part after the en banc rule of the United States Court of Appeals for the Fifth and Eleventh Circuits. The rule is an essential part of the philosophy of our present appellate structure because the supreme court no longer has jurisdiction to review intra-district conflict. The new appellate structural scheme requires the district courts of appeal to



resolve conflict within their respective districts through the en banc process. By so doing, this should result in a clear statement of the law applicable to that particular district.

Subdivision (a) provides that a majority vote of the active and participating members of the district court is necessary to set a case for hearing en banc or rehearing en banc. The issues on the merits will be decided by a simple majority of the judges actually participating in the en banc process, without regard to recusals or a judge's absence for illness. All judges in regular active service, not excluded for cause, will constitute the en banc panel. Counsel are reminded that en banc proceedings are extraordinary and will be ordered only in the enumerated circumstances. The ground, maintenance of uniformity in the court's decisions, is the equivalent of decisional conflict as developed by supreme court precedent in the exercise of its conflict jurisdiction. The district courts are free, however, to develop their own concept of decisional uniformity. The effect of an en banc tie vote is self-explanatory, but such a vote does suggest that the matter is one that should be certified to the supreme court for resolution.

Subdivision (b) provides that hearings en banc may not be sought by the litigants; such hearings may be ordered only by the district court sua sponte.

Subdivision (c)(1) governs rehearings en banc. A litigant may apply for an en banc rehearing only on the ground that intradistrict conflict of decisions exists, and then only in conjunction with a timely filed motion for rehearing under rule 9.330. The en banc rule does not allow for a separate motion for an en banc rehearing nor does it require the district court to enter a separate order on such request. Once a timely motion for rehearing en banc is filed in conjunction with a traditional petition for rehearing, the 3 judges on the initial panel must consider the motion. A vote of the entire court may be initiated by any single judge on the panel. Any other judge on the court may also trigger a vote by the entire court. Nonpanel judges are not required to review petitions for rehearing en banc until a vote is requested by another judge, although all petitions for rehearing en banc should be circulated to nonpanel judges. The court may on its own motion order a rehearing en banc.

Subdivision (c)(2) requires a signed statement of counsel certifying a bona fide belief that an en banc hearing is necessary to ensure decisional harmony within the district.

Subdivision (c)(3) is intended to prevent baseless motions for en banc rehearings from absorbing excessive judicial time and labor. The district courts will not enter orders denying motions for en banc rehearings. If a rehearing en banc is granted, the court may order briefs from the parties and set the case for oral argument.

**1992 Amendment.** Subdivision (c)(3) was amended to correct a linguistic error found in the original subdivision.

### **Court Commentary**

**1994 Amendment.** The intent of this amendment is to authorize courts sitting in subject-matter divisions to have cases that are assigned to a division decided en banc by that division without participation by the regular active judges assigned to another division. The presumption is that en banc consideration will usually be limited to the division in which the case is pending. However, recognizing that in exceptional instances it may be preferable for the matter under review to be considered by the whole court, the case can be brought before all regular active judges by the chief judge or by an affirmative vote of three-fifths of the regular active judges on the whole



court. Once the matter is before the whole court en banc, a vote on the merits will be by a majority of the regular active judges as now provided in rule 9.331.

