

CHAPTER 19: POST-DECISION MOTIONS—APPELLATE

A. Introduction.

Once an appellate court makes a decision, it will issue a written ruling, also known as the court's "opinion" or "decision." The appellate court's ruling may be written in a "published opinion," which explains the reasons for the appellate court's decision, or it may be written only as an order, which affirms the decision of the lower tribunal without explanation. Such an order, which only affirms (or reverses) the decision of the lower tribunal without explaining the appellate court's reasoning, is known as a *per curiam* affirmance (or "PCA"), or a "per curiam" reversal (or "PCR").

In a civil case, after the appellate court issues its opinion or decision, the losing party may have the right to ask the appellate court for rehearing or clarification of the court's decision. Also, if the decision was "per curiam" without a written opinion, the losing party may, in limited circumstances, be able to ask the court to write an opinion. In some cases, the losing party may also have the right to seek further review of a written opinion by a higher court through a request for "certification." In very rare cases, a party may be able to ask for "rehearing en banc," meaning rehearing by all of the judges on that appellate court, not just the judges that decided the case. Motions for rehearing, clarification, certification, written opinion, and rehearing en banc are the main types of post-decision motions. *See* Florida Rules of Appellate Procedure 9.330 and 9.331.

A party who is unhappy with an appellate court's decision or order can usually file a motion for rehearing and/or a motion for clarification, as long as certain requirements are met. However, an order of the Florida Supreme Court that grants or denies discretionary review under Florida Rule of Appellate Procedure 9.120 ordinarily cannot be challenged by a rehearing or other motion.

A party who wants to file a motion for rehearing, clarification, certification, written opinion, or rehearing en banc generally must do so within 15 days of the appellate decision or order. If a party files a post-decision motion, then the other party is generally allowed 10 days to serve a response in which he or she can explain to the appellate court why its decision or opinion should stand and why the other party's post-decision motion should be denied. Ordinarily, no further reply to such a response is permitted by the party that originally filed the post-decision motion, unless the appellate court orders it.

Unless the case is in the Florida Supreme Court, there are generally five post-decision motions that a party may be able to use. These motions are listed in Florida Rules of Appellate Procedure 9.330 and 9.331. They are:

- a motion for rehearing
- a motion for clarification
- a motion for a written opinion, if there wasn't one and the party believes it would provide a valid basis for review by the Florida Supreme Court;
- a motion for certification; and
- a motion for rehearing en banc.

A party is generally limited to one post-decision motion for rehearing or clarification, and one motion for certification. This means that if a party wants to request both rehearing and clarification, he or she should do so in the same motion. This also means a motion for rehearing and/or clarification should raise and explain all of the reasons the party is asking the court for rehearing and/or clarification. A party is also limited to filing only one motion for certification. Similarly, more than one motion for rehearing en banc is generally not allowed.

There are some exceptions to this rule. For example, if a new opinion, resulting from a first rehearing motion, changes the original opinion, then a party may file a second rehearing

motion to discuss that change. This Chapter describes the basics of how and when to begin the post-decision motion process.

B. What, Where, and When to File Post-Decision Motions and What to Expect.

Before filing a post-decision motion, a party should first carefully review and research the issues presented by the appellate court's opinion. A party should also consider several important questions, honestly thinking about what the appellate court's answers would be:

- Is the opinion a written opinion as opposed to a per curiam decision?
- Does the opinion refer to cases not cited by the parties?
- Does the opinion fail to mention truly important cases that the losing party cited in his or her appellate brief(s)?
- Does the opinion refer to facts that the parties did not cite?
- Does the opinion fail to mention truly important facts that the losing party cited in its appellate brief(s)?
- Does the opinion directly conflict with the decisions of another district court?
- Does the opinion pass on a question of great public importance?
- Does the opinion clearly conflict with prior decisions of the same court?

If none of these questions can be answered "yes," then no post-decision motion probably should be filed. But even if the answer to one or more of those questions is "yes," a party still may be better off not filing a post-decision motion. Caution and good judgment should be exercised.

1. Motions for Rehearing, Clarification, and Certification, and Request for Written Opinion Under Rule 9.330.
 - a. Motion for Rehearing.

The purpose of a motion for rehearing is very limited. Under Florida Rule of Appellate Procedure 9.330(a), a motion for rehearing cannot simply reargue the issues raised in the appellate

briefs. The only grounds for a motion for rehearing are to point out specific facts or specific legal issues the court may have missed or misunderstood, also known as facts or issues which the court has “overlooked or misapprehended.” The motion for rehearing is not a chance for a party to complain about the appellate court or to tell the court how much it disagrees with the decision or how unfair it thinks the court is.

If a party cannot point to specific facts or law already brought to the appellate court’s attention to show why the appellate decision is wrong, then there are generally no grounds to file a motion for rehearing. Florida Rule of Appellate Procedure 9.410 gives the appellate court the ability to sanction a party who files a motion for rehearing that is without any basis or is insulting or disrespectful to the court or the opposing party.

b. Motion for Clarification.

A motion for clarification is used to clarify something in a written opinion. For example, if the appellate panel stated its opinion, but missed a key fact, a party may want to file a motion for clarification. If the appellate court only partially explained the reason for its decision, then a party may want to file a motion for clarification. A party must follow the same procedures and standards in preparing a motion for clarification as when preparing a motion for rehearing. A party must also point to specific facts or legal issues that it believes need to be clarified.

c. Motion for Certification.

A motion for certification asks the appellate court that decided the appeal to send the case to the Florida Supreme Court based on a specific and important question which needs to be answered or based on a conflict among the appellate courts.

If certification is sought based on an important question, that question must be an issue which has great importance from the appellate court’s outlook, not the party’s, and which could have a great impact on the general public. So, before filing a motion for certification, a party must

honestly ask whether the issue it would like to have certified to the Florida Supreme Court is an issue that is not just important to the party, but is important to most, if not all, Florida citizens or a specific group of citizens.

For example, a breach of contract question may only be important to the parties in that case, but not important to all Florida citizens. On the other hand, whether or not any person should get a hearing before having his or her property taken away by someone who said he breached a contract, may be a question of greater importance to all Florida citizens. As another example, getting a speeding ticket may be very important to the person who gets the ticket, but not important to all Florida citizens. On the other hand, the fact that one person was part of a specific group of people who were given speeding tickets while not even in a car may be important to more than just that one person, and, thus, it might also be an issue of great importance to all Florida citizens.

A party may also ask the appellate court to certify that its decision is in “direct conflict” with a decision of another district court of appeal.

A party must follow the same general procedures and standards in preparing a motion for certification as when preparing a motion for rehearing. A party must explain the specific question of great public importance and/or the direct conflict it is asking the district court to certify to the Florida Supreme Court.

d. Motion Requesting That the Appellate Court Issue a Written Opinion.

When the appellate court issues a decision without a written opinion, a party can file a motion asking the appellate court to write an opinion explaining its reasoning. However, to make that request, the motion must explain why the party believes that a written opinion would provide a basis for seeking Florida Supreme Court review. A party must follow the same general procedures and standards for this type of motion as when preparing a motion for rehearing.

2. Motions for Rehearing En Banc Under Rule 9.331.

The appellate courts of Florida are divided into five districts covering specific counties: the First District Court of Appeal, Second District Court of Appeal, Third District Court of Appeal, Fourth District Court of Appeal, and Fifth District Court of Appeal. Imagine how frustrating it would be for a party and for lower tribunal judges if the appellate court reviewing the lower tribunal's decisions decided a breach of contract case one way, and then, the next day, decided an almost identical breach of contract case in a different way. To avoid that confusion and to help everyone to know what should happen in future cases, each district court of appeal works to ensure that its opinions are consistent with its earlier decisions. In that way, the lower tribunals that are located in an area controlled by that particular district court of appeal are given clear guidance on what their decisions should be at the lower tribunal level in future cases. That is why the Florida Rules of Appellate Procedure have what are called "motions for rehearing en banc." "En banc" means "the full court."

A motion for rehearing en banc is filed under Florida Rule of Appellate Procedure 9.331(d). It asks the full court – meaning all appellate judges serving on that appellate court, not just the three judges who decided the case – to review the opinion and consider it, as a full court. There are two grounds upon which a party can ask the appellate court to do this: (1) because the issue is one of "exceptional importance," or (2) because it is necessary to "maintain uniformity in the court's decisions," meaning because the opinion in the case conflicts with other opinions of the same appellate court on the same issue. If a motion for rehearing en banc is not based on one or both of these two grounds, it will be stricken by the court.

A motion for rehearing en banc asks the entire appellate court to take the highly unusual step of reviewing the opinion and comparing it with previous decisions of that same appellate court. For that reason, a motion for rehearing en banc should only be filed after careful study of the current opinion and the law and facts controlling it. Good judgment must be used.

A motion for rehearing en banc must be filed within 15 days of the challenged decision or order. If a party wants to file such a motion, it is often advisable to combine the motion for rehearing en banc with a regular rehearing motion (for example, a “motion for rehearing and/or rehearing en banc”). This is because, as a matter of courtesy and common sense, before going to the entire court, the judges who issued the decision should first be given the opportunity to reconsider their own decision. Those judges are most familiar with the facts and legal issues of the appeal. Therefore, those judges would be the best place to start when trying to get a problem corrected.

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