

COLUMBUS BAR

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Amended Appellate Rules to Allow En Banc Rehearings

By Glen Pritchard

The twelve district courts of appeals in Ohio comprise as many as twelve judges. It is not uncommon for different three judge panels within the same district to reach different conclusions about the same legal issue. No procedural device currently exists in Ohio for resolving these intra-district conflicts. That may change starting on July 1, 2010.

The Supreme Court Commission on rules of Practice and Procedure has recommended amendments to the Ohio Appellate Rules of Procedure to implement a process for appellate courts to sit en banc¹ to resolve intra-district conflicts. The amendments to Rules 14, 15, 22, 25, 26, and 30 of the Rules of Appellate Procedure are responsive to the Ohio Supreme Court's 2008 decision in *McFadden v. Cleveland State Univ.*² holding that "if judges of a court of appeals determine that two or more decisions of the court on which they sit are in conflict, they must convene en banc to resolve the conflict."

Availability of En Banc Review

Under the proposed rule amendments, the majority of a court of appeals judges may sua sponte order an en banc rehearing³ or a party may apply to the court for rehearing en banc.⁴ Unlike Federal Appellate Rule 35, nothing in the proposed rule permits a court to conduct the initial hearing en banc.

The proposed rule makes clear that en banc rehearing is "not favored and will not be ordered unless en banc consideration is necessary to secure or maintain uniformity of decisions within the district on an issue that is dispositive in the case in which the application is filed."⁵ The appellate court's decision with respect to an application for en banc rehearing will be subject to an abuse of discretion standard.⁶

En Banc Procedure

A party seeking en banc rehearing is subject to the same timing requirements governing motions for reconsideration, and an application for reconsideration must be filed in the same document as an application for rehearing en banc.⁷ The party seeking reconsideration or rehearing en banc must file an application with the court within ten days after the announcement of the court's decision. The application for rehearing must explain how the panel's decision conflicts with a prior panel's decision on a dispositive issue and why consideration by the court en banc is necessary to secure and maintain uniformity of the court's decisions.⁸

The opposing party must file an opposing brief within ten days of service of the application, and a reply brief may be filed within seven days of service of the opposing brief.⁹

Impact on Appeals to the Ohio Supreme Court?

Under the current rules, the filing of a motion for reconsideration does not extend the time for filing a notice of appeal in the Ohio Supreme Court.¹⁰ Indeed, the current rules require appellate courts to rule upon applications for reconsideration within 45 days of filing so as not to interfere with the timing of Ohio Supreme Court filings.¹¹ An application for reconsideration, rehearing en banc, or both, under the proposed amended rules, however, will extend the time for appeal. This is accomplished by amendment to App. R. 22(A) which requires the appellate court to issue its written opinion, but defer entry of judgment until after the court of appeals rules on a timely filed application for reconsideration or rehearing en banc.

Likewise, the proposed amendments modify App. R. 25 by requiring a party to file a motion to certify a conflict to the Ohio Supreme Court under Article IV, Section 3(B)(4) of the Ohio Constitution within ten days after the judgment or order of the court has been filed with the clerk for journalization. The amended rule eliminates the "announcement of the court's decision" as a trigger for the deadline to file a motion to certify a conflict.

Constitutional Considerations

The Ohio Supreme Court paved the way for the proposed rule changes in *McFadden v. Cleveland State Univ.* In *McFadden*, the Tenth District Court of Appeals held that the two-year statute of limitations governs employment-discrimination claims against the state of Ohio, consistent with its earlier decision in *McCoy v. Toledo Corr. Inst.*¹² A 1994 decision by the Tenth District Court, however, held that the a six-year statute of limitations applied to such claims. In dealing with the conflict, the Tenth District panel in *McFadden* concluded that its 1994 decision was "an aberration" and explicitly overruled it.

The plaintiff in *McFadden*, filed a motion for reconsideration, arguing that the court of appeals' decision was invalid because the court resolved the intra-district conflict without an en banc proceeding.¹³

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Written Rules

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The Tenth District Court of Appeals denied the plaintiff's motion for reconsideration, finding that en banc proceedings violated Section 3(A), Article IV of the Ohio Constitution which provides for three judge panels as follows:

The state shall be divided by law into compact appellate districts in each of which there shall be a court of appeals consisting of three judges. Laws may be passed increasing the number of judges in any district wherein the volume of business may require such additional judge or judges. In districts having additional judges, three judges shall participate in the hearing and disposition of each case. [Emphasis added.]

The Ohio Supreme Court reversed, finding that the Ohio Constitution's reference to three judge panels is a quorum requirement and does not prevent consideration by a larger appellate panel when warranted by extraordinary circumstances.

The new en banc rule is available for public comment until November 18, 2009,¹⁴ and must be submitted to the Ohio General Assembly by January 15, 2010. Proposed rule amendments will then be republished for a second comment period and may be further revised prior to May 1, 2010. Rule amendments filed with the General Assembly in January and not withdrawn prior to May 1, 2010, will take effect on July 1, 2010, in the absence of a concurrent resolution of disapproval adopted by the General Assembly prior to that date.

⁸. Proposed App. R. 26(A)(2)(b)

⁹. Proposed App. R. 26(A)(1)(b)

¹⁰. App. R. 26(A)(1)(a)

¹¹. App. R. 26(C)

¹². Franklin App. No. 04AP-1098, 2005-Ohio-1848.

¹³. The plaintiff relied upon *In re J.J.*, 111 Ohio St. 3d 205, 2006-Ohio-5484 ("Appellate courts are duty-bound to resolve conflicts within their respective appellate districts through en banc proceedings.")

¹⁴. The proposed rule is available for inspection at the Ohio Supreme Court's website:
www.sconet.state.oh.us/RuleAmendments/



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¹. En banc is defined as "[w]ith all judges present and participating; in full court." *Black's Law Dictionary* (8th Ed. 2004) 568.

². 120 Ohio St. 3d 54, 2008-Ohio-4914, syllabus ¶ 2.

³. Proposed App. R. 26(A)(2)(a)

⁴. Proposed App. R. 26(A)(2)(b)

⁵. Proposed App. R. 26(A)(2)(a)

⁶. *McFadden*, supra. at syllabus ¶ 2.

⁷. Proposed App. R. 26(A)(2)(c)



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