

LITIGATION A Special Report

A Judicial Hole in One

Scoring an *en banc* rehearing after losing an appeal is rare, but it happens.



By RONALD RAUCHBERG

To lose a case in a federal court of appeals and then proceed to gain a victory via an *en banc* rehearing is one of the legal world's rarer occurrences, the judicial equivalent of a hole in one.

Just how rare are *en banc* hearings? Look at the U.S. Court of Appeals for the 9th Circuit, widely regarded as one of the appeals courts most likely to grant an *en banc* rehearing. In 2003, 972 petitions for *en banc* hearings were filed in the 9th Circuit. Of those, the court agreed to hear only 12. Many other circuits grant even fewer.

We recently obtained a successful reversal in the 9th Circuit through an *en banc* rehearing on behalf of Sony Pictures Entertainment in a copyright infringement case—*Silvers v. Sony Pictures Entertainment*. The case illustrates how *en banc* rehearsals can succeed, provided one fully understands the process and how to navigate it.

A party who has been defeated in a federal court of appeals has two remaining avenues of recourse before deciding whether or not to turn to the Supreme Court. The party may seek a panel rehearing, which is granted or denied by the same panel that disposed of the appeal, and which is available to correct an error as a result of the panel having, according to the Federal Rules of Appellate Procedure, "overlooked or misapprehended" a "point of law or fact." Such errors are rare; admissions of those errors even rarer. Alternatively, the party may seek an *en banc* rehearing: a determination of the issues on appeal by all (or in the 9th Circuit, 11) of the active members of that circuit.

IN THE BEGINNING

Rehearings *en banc* are particularly rare in certain courts, such as the 2nd Circuit. But even circuits that rehear cases *en banc* more frequently grant only between 1 and 1.5 percent of the petitions for such rehearing, as was the case in the 9th Circuit. As 7th Circuit Judge Richard Posner said in *Roberts v. Sears, Roebuck & Co.*, "the basic reason for this parsimony is that a rehearing *en banc* imposes a heavy burden on an already overburdened court."

The standard for granting an *en banc* rehearing is specified in Rule 35 of the Federal Rules of Appellate Procedure: An *en banc* rehearing "is not favored and ordinarily will not be ordered unless (1) *en banc* consideration is necessary to secure or maintain uniformity of the court's decisions or (2) the proceeding involves a question of exceptional importance."

Even if the panel decided the case incorrectly, an *en banc* rehearing is not necessarily warranted. The rules of the 11th Circuit, for example, state, "alleged errors in a panel's determination of state law, or in the facts of the case (including sufficiency of the evidence), or error asserted in the panel's misapplication of correct precedent to the facts of the case, are matters for rehearing before the panel but not for *en banc* consideration."

Writing in the *Brooklyn Law Review*, Senior Judge Jon O. Newman of the 2nd Circuit said that some have suggested, perhaps facetiously, that no case is truly appropriate for *en banc* rehearing because "it is either so unimportant as to fail to meet the criteria of Rule 35(b) or so important that the Supreme Court will surely grant certiorari!"

Nor will *en banc* rehearing be granted because the judges think their sense of what justice requires for these appellate parties is any keener than that of their colleagues on the panel. In fact, whether the panel decided the case correctly is not even technically relevant to the standard for granting an *en banc* rehearing. Rather, an *en banc* rehearing is generally granted because the issues at stake reach far beyond that particular case.

DEMONSTRATE THE ERROR

That said, a petitioner seeking rehearing *en banc* should always demonstrate the error in the panel's decision. After all, it is difficult to establish the "exceptional importance" of rehearing a question that has already been disposed of correctly. Indeed, according to Judge Newman, an appeals court judge who believes a case should be reheard *en banc* will request that his colleagues be polled on that question and will usually support the request with a memorandum arguing "both the significance of the issue and the incorrectness of the panel decision sought to be reheard." This is precisely what the petitioner should argue as well.

Conflicts in the decisional law within a circuit provide good ground for *en banc* review. But the conflict must be a true one. Suppose your case establishes an exception to a general rule. Prior cases recited the general rule, without noting the exception, before going on to discuss a particular issue under that rule not presented in your case. Will rehearing *en banc* be granted because the exception in your case and the prior cases stating the unqualified general rule are in conflict? No. The general language, to the extent it goes beyond the issues addressed, does not create a true conflict. As Judge Newman has noted, “The occasions when an objective observer would consider a panel decision to be inconsistent with the law of our circuit are rare.”

Cases raising novel issues of potentially far-reaching importance and cases decided in conflict with the decisions of other circuits are, at least outside the 2nd Circuit, reasonable *en banc* candidates. Two other cases we successfully argued *en banc*—*Parker v. MetLife* (6th Cir. 1997) and *Princeton University Press v. Michigan Document Service* (6th Cir. 1996)—fall into these categories. Also, many circuits hold that *en banc* consideration is necessary to overrule existing precedent in that circuit, such as the 6th Circuit did this year in *United States v. Yoon*, and the Federal Circuit did in 2004 in *El-Shifa Pharmaceutical Industries Co. v. United States*.

The task of the opponent of the petitioner, if the court has requested a response, is to show that the panel’s decision is just one more garden-variety court of appeals opinion, consistent with the case law, not of special importance (words counsel may regret, ironically, when petitioning for certiorari if the case is heard *en banc* and comes out the other way), and in any event correct.

According to the Federal Rules of Appellate Procedure, filing a petition for *en banc* rehearing automatically stays the appellate court’s mandate. The rules also state: the petition must be filed with the court of appeals within 14 days after entry of judgment (or within 45 days of entry of judgment if the United States is a party to the appeal), unless the time frame had been modified by order or local rule; the petition may not exceed 15 pages except by permission of the court or as specified by local rule; and, where one party files a petition, the other party may not file a response unless ordered to do so by the court.

A party may petition for a panel and an *en banc* rehearing concurrently and, in most circuits, must do so in a single document. At a time when only the petition for panel rehearing stayed issuance of the mandate, it was not uncommon to see a combined petition heavily dedicated to the party’s request for an *en banc* rehearing, with perhaps only a single paragraph pertaining to the party’s request for a panel rehearing. The circuit courts had not been critical of this approach, and the two petitions were virtually always considered simultaneously.

Counsel should bear in mind the two audiences of this petition: the panel and the rest of the court. While a panel member will likely be most interested to know whether a party is merely claiming the decision was incorrect, the rest of the court will be interested to know whether there was anything extraordinary about the appeal or the panel’s opinion.

HANDLING A REHEARING

When rehearing *en banc* is granted, the court may decide the case on the existing briefs or invite further briefing by the parties. Generally, an order granting a rehearing *en banc* automatically vacates the panel’s prior judgment; thus, technically, the rehearing is a review of the district court’s judgment rather than of the panel’s deci-

sion. Any further briefing and the oral argument should nevertheless address the panel’s decision because, as a practical matter, the issue is whether it is correct.

It is critical that the petitioner maintain a high level of respect for the panel—even more so than an appellant would maintain for a district judge whose decision is being appealed—if only because the active court members of the panel will be sitting in judgment once again. Moreover, it is difficult enough to convince the judges essentially to overturn their colleagues’ decision; displaying even a slight disrespect only risks making the rest of the court members feel defensive on behalf of their colleagues.

Once *en banc* review is granted, the task of writing a brief, if further briefing is ordered, is not very different from writing any other appellate brief. Counsel should tell a story that explains why basic fairness and justice require that the counsel’s client win. However, *en banc* briefs should also speak to the greater effects of the outcome on behavior and on other current and future cases in that circuit. *En banc* review was not granted solely to do justice between the parties.

Oral argument at an *en banc* rehearing is very different from other federal court of appeals arguments. First, the judges, presumably, already believe that the case is of exceptional importance. Their preparation will have extended not only to the facts of the case and precedent but also to thinking about the possible impact of the decision in different contexts. Hypothetical questions seem to be more common in *en banc* rehearings.

Second, the larger number of judges necessarily gives rise to a larger number of questions. Counsel will have no hope of delivering even a brief prepared argument or following a planned outline of points. The argument will be controlled by the court’s questions; the most counsel can do is identify two or three essential points and hope to be nimble enough to work them into the responses.

Third, the bench is nearly certain to be divided because sitting among the court members are both the active members of the panel who initially decided the appeal and judges who voted for *en banc* rehearing who presumably disagree. When a panel member who has already voted against arguing counsel’s position begins to fire questions, the aim is usually to convince the other members of the court of that judge’s views, rather than to gain new information. Counsel’s answers should similarly be aimed at the other members of the court, and not the judge who already reached the “wrong” conclusion.

Questions during an *en banc* rehearing to both sides are often more pointed and argumentative. They often seem designed to expose a flaw in counsel’s position rather than make inquiry. Counsel will need to meet the point implied in the question quickly, without an elaborate windup, as the next question is not far behind.

Finally, the nature of an *en banc* rehearing is such that in all circuits, except the 9th, counsel knows, well in advance of oral argument, which judges will sit. This is often not the case in appellate arguments; some circuits do not reveal the members of the panel until one week before oral argument.

Therefore, counsel generally has plenty of time to research any prior opinions that might signal the judges’ positions. Counsel is usually best-served by aiming the oral argument at the “undecideds” on the bench, if any can be identified.

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