

- (5) in civil cases, except for motions for rehearing and motions for en banc reconsideration of panel decisions, contain or be accompanied by a certificate stating that the filing party conferred or made a reasonable attempt to confer with other parties about the merits of the motion and whether those parties oppose the motion.

10.2 Evidence on Motions. A motion need not be verified unless it depends on the following types of facts, in which case the motion must be supported by affidavit or other satisfactory evidence. The types of facts requiring proof are those that are:

- (a) not in the record;
- (b) not within the court's knowledge in its official capacity; or and
- (c) not within the personal knowledge of the attorney signing the motion.

Comment to 2008 change: It is presumed that non-movants will oppose the relief sought in motions for rehearing and motions for en banc reconsideration. To encourage consistent application of the certificate-of-conference requirement, Rule 10.1(a)(5) is amended—and Rule 49.11 is added—to exempt those motions from the certificate requirement.

Rule 19. Plenary Power of the Courts of Appeals and Expiration of Term

19.1 Plenary Power of Courts of Appeals. A court of appeals' plenary power over its judgment expires:

- (a) 60 days after judgment if no timely filed ~~motion to extend time or~~ motion for rehearing, timely filed motion for en banc reconsideration, or timely filed motion to extend time to file a motion for rehearing or for en banc reconsideration is then pending.
- (b) 30 days after the court overrules all timely filed motions for rehearing, including all timely filed motions for en banc reconsideration of a panel's decision under Rule 49.76, and all timely motions to extend time to file a motion for rehearing or a motion for en banc reconsideration.

Comment to 2008 change: The provisions of Rule 19 governing the courts of appeals' plenary power are revised in conjunction with the amendments to Rules 49 and 53.7 concerning motions for en banc reconsideration.

Comment to 2008 changes: Effective January 1, 2003, Rule 47 was amended to discontinue in civil cases, on a prospective basis, the practice of allowing courts of appeals to designate opinions as either “published” or “unpublished.” Rule 47.7 was amended to eliminate the prior prohibition against citing unpublished opinions and to clarify that, in civil cases, only unpublished opinions issued prior to the 2003 amendment would lack precedential value, because following the 2003 amendment such cases were not to be designated either as published or unpublished. But the phrase “opinions not designated for publication,” which was intended to apply only to opinions affirmatively designated “do not publish,” could be misread as suggesting that all opinions in civil cases published after 2002—none of which should be affirmatively designated for publication—lack precedential value. The 2008 amendments clarify that, with respect to civil cases, only opinions issued prior to the 2003 amendment and affirmatively designated “do not publish” should be considered “unpublished” cases lacking precedential value. The provisions governing citation of unpublished opinions in criminal cases are substantively unchanged; Rules 47.2 and 47.7. are amended to clarify that memorandum opinions are subject to those rules.

Rule 49. ~~Motion and Further Motion for Rehearing and En Banc Reconsideration~~

49.1 Motion for Rehearing. A motion for rehearing may be filed within 15 days after the court of appeals’ judgment or order is rendered. The motion must clearly state the points relied on for the rehearing. After a motion for rehearing is decided, another motion for rehearing may be filed within 15 days of the court’s action only if the court:

- (a) modifies its judgment;
- (b) vacates its judgment and renders a new judgment; or
- (c) issues an opinion in overruling a motion for rehearing.

49.5 ~~Further Motion for Rehearing.~~ ~~After a motion for rehearing is decided, a further motion for rehearing may be filed within 15 days of the court’s action if the court:~~

- ~~(a) — modifies its judgment;~~
- ~~(b) — vacates its judgment and renders a new judgment; or~~
- ~~(c) — issues an opinion in overruling a motion for rehearing.~~

49.65 Amendments. A motion for rehearing or a motion for en banc reconsideration may be amended as a matter of right anytime before the 15-day period allowed for filing the motion expires, and with leave of the court, anytime before the court of appeals decides the motion.

49.76 En Banc Reconsideration. A party may file a motion for en banc reconsideration, as a separate motion, with or without filing a motion for

rehearing, within 15 days after the court of appeals' judgment or order is rendered. Alternatively, a motion for en banc reconsideration may be filed by a party no later than 15 days after the overruling of the same party's last timely filed motion for rehearing. While the court has plenary power, as provided in Rule 19, a majority of the en banc court may, with or without a motion, order en banc reconsideration of a panel's decision. If a majority orders reconsideration, the panel's judgment or order does not become final, and the case will be resubmitted to the court for en banc review and disposition.

49.87 Extension of Time. A court of appeals may extend the time for filing a motion for rehearing or a further motion for rehearing motion for en banc reconsideration if a party files a motion complying with Rule 10.5(b) no later than 15 days after the last date for filing the motion.

49.98 Not Required for Review. A motion for rehearing is not required to preserve error and is not a prerequisite to filing:

- (a) a motion for en banc reconsideration as provided by Rule 49.6;
- (b) a petition for review in the Supreme Court; or
- (c) a petition for discretionary review in to the Court of Criminal Appeals nor is it required to preserve error.

49.109 Length of Motion and Response. A motion or response must be no longer than 15 pages.

49.10 Relationship to Petition for Review. A party may not file a motion for rehearing in the court of appeals after that party has filed a petition for review in the Supreme Court unless the court of appeals modifies its opinion or judgment after the petition for review is filed. The filing of a petition for review does not preclude another party from filing a motion for rehearing or the court of appeals from ruling on the motion. If a motion for rehearing is timely filed after a petition for review is filed, the petitioner must immediately notify the Supreme Court clerk of the filing of the motion, and must notify the clerk when the last timely filed motion is overruled by the court of appeals.

49.11 Certificate of Conference Not Required. A certificate of conference is not required for a motion for rehearing or for a motion for en banc reconsideration of a panel's decision.

Comment to 2008 changes: Rule 49 is revised in several respects. Former Rule 49.5 is relocated to Rule 49.1, which omits the former rule's "further" motion language but retains its provisions limiting the circumstances in which another rehearing motion can be filed. Former Rule 49.7, now Rule 49.6, is amended to include procedures governing the filing a motion for en banc reconsideration. New Rule 49.10 consists of those provisions of former Rule 53.7(b) that address motions for rehearing; the provisions of Rule 53.7(b) that address petitions for review are

retained. New Rule 49.11 mirrors Rule 10.1(a)(5)'s new provision exempting motions for rehearing and motions for en banc reconsideration from the certificate-of-conference requirement.

Rule 50. Reconsideration on Petition for Discretionary Review

Within ~~60~~ 30 days after a petition for discretionary review is ~~has been~~ filed with the clerk of the court of appeals that delivered the decision, ~~a majority of~~ the justices who participated in the decision may, as provided by subsection (a), summarily reconsider and correct or modify the court's opinion or judgment. Within the same period of time, any of the justices who participated in the decision may issue a concurring or dissenting opinion.

- (a) If the court's original opinion or judgment is corrected or modified, ~~that the original opinion or judgment is must be~~ withdrawn and the modified or corrected opinion or judgment ~~is must be~~ substituted as the opinion or judgment of the court. No further opinions may be issued by the court of appeals. The original petition for discretionary review is not dismissed by operation of law, unless the filing party files a new petition in the court of appeals. In the alternative, the petitioning party shall submit to the court of appeals copies of the corrected or modified opinion or judgment as an amendment to the original petition.
- (b) Any party may then file with the court of appeals a new petition for discretionary review seeking review of the corrected or modified opinion or judgment, including any dissents or concurrences, under Rule 68.2.

Rule 52. Original Proceedings

52.3 Form and Contents of Petition. ~~All factual statements in the petition must be verified by affidavit made on personal knowledge by an affiant competent to testify to the matters stated.~~ The petition must, under appropriate headings and in the order here indicated, contain the following:

- (d) *Statement of the Case.* The petition must contain a statement of the case that should seldom exceed one page and should not discuss the facts. The statement must contain the following:
 - (5) if the petition is filed in the Supreme Court after a petition requesting the same relief was filed in the court of appeals:
 - (D) the citation of the court's opinion, ~~if available, or a statement that the opinion was unpublished;~~
- (g) *Statement of Facts.* The petition must state concisely and without argument the facts pertinent to the issues or points presented. Every statement of fact in the petition must be supported by citation to competent

evidence included in ~~The statement must be supported by references to the~~
appendix or record.

- (j) Certification. The person filing the petition must certify that he or she has reviewed the petition and concluded that every factual statement in the petition is supported by competent evidence included in the appendix or record.

(j)(k) Appendix. (no change to rule text)

- 52.6 Length of Petition, Response, and Reply.** Excluding those pages containing the identity of parties and counsel, the table of contents, the index of authorities, the statement of the case, the statement of jurisdiction, the issues presented, the signature, the proof of service, the certification, and the appendix, the petition and response must not exceed 50 pages each if filed in the court of appeals, or 15 pages each if filed in the Supreme Court. A reply may be no longer than 25 pages if filed in the court of appeals or 8 pages if filed in the Supreme Court, exclusive of the items stated above. The court may, on motion, permit a longer petition, response, or reply.

Comment to 2008 changes: Rule 47 was amended effective January 1, 2003 to eliminate in civil cases, on a prospective basis, the former distinction between “published” and “unpublished” decisions. Rule 52.3(d)(5)(D) is now amended to recognize that an opinion in a civil appeal decided after 2002 should not be described as “unpublished” in the statement of the case even if the opinion was not published in the South Western Reporter, because Rule 47 no longer authorizes the courts of appeals to designate an opinion in a civil appeal either as “published” or “unpublished.” If no South Western Reporter citation is available, a LEXIS or Westlaw citation may be provided.

Rule 52.3 is further amended to delete the requirement of verifying all factual statements by affidavit. Instead, the filer must certify that all factual statements are supported by citation to competent evidence in the appendix or record.

Rule 53. Petition for Review

53.2 Contents of Petition

- (d) *Statement of the Case.* The petition must contain a statement of the case that should seldom exceed one page and should not discuss the facts. The statement must contain the following:
- (8) the citation for the court of appeals’ opinion, ~~if available, or a statement that the opinion was unpublished;~~ and
 - (9) the disposition of the case by the court of appeals, including the court’s disposition of any motions for rehearing or motions for en banc reconsideration. If any motions for rehearing or motions for

en banc reconsideration are pending in the court of appeals at the time the petition for review is filed, that information also must be included in the statement of the case.

53.7 Time and Place of Filing

- (a) *Petition.* Unless the Supreme Court for good cause orders an earlier filing deadline, the petition must be filed with the Supreme Court within 45 days after the following:
- (1) the date the court of appeals rendered judgment, if no motion for rehearing or motion for en banc reconsideration is timely filed; or
 - (2) the date of the court of appeals' last ruling on all timely filed motions for rehearing and all timely filed motions for en banc reconsideration.
- (b) *Premature filing.* ~~A party may not file a motion for rehearing in the court of appeals after that party has filed a petition for review in the Supreme Court unless the court of appeals modifies its opinion or judgment after the petition for review is filed. The filing of a petition for review does not preclude another party from filing a motion for rehearing or the court of appeals from ruling on the motion. If a motion for rehearing is timely filed after a petition for review is filed, the petitioner must immediately notify the Supreme Court clerk of the filing of the motion, and must notify the clerk when the last timely filed motion is overruled by the court of appeals. A petition filed before the last ruling on all timely filed motions for rehearing and motions for en banc reconsideration is treated as having been filed on the date of, but after, the last ruling on any such motion. If a party files a petition for review while a motion for rehearing or motion for en banc reconsideration is pending in the court of appeals, the party must include that information in its petition for review, as required by Rule 53.2(d)(9).~~

Comment to 2008 change: Rule 53.7(a) is amended to clarify that (1) the Supreme Court may shorten the time for filing a petition for review, and (2) the timely filing of a motion for en banc reconsideration tolls the commencement of the 45-day period for filing a petition for review until the motion is overruled. Rule 53.2(d)(9) is amended to require a party that prematurely files a petition for review to notify the Supreme Court of any panel rehearing or en banc reconsideration motions still pending in the court of appeals. Rule 53.7(b) is revised to reference this new requirement and to relocate to new Rule 49.10 those provisions governing motions for rehearing. Rule 53.2(d)(8) is amended to delete the outdated reference to unpublished opinions in civil cases, similar to the change made to Rule 52.3(d)(5)(D).