by Carol M. Rooney

If at First You Don't Succeed, Should You Try Again? Motions for Rehearing on Appeal

Litigating a case through trial and appeal is time consuming and costly. After months — or more often, years — spent on this effort, delivering an adverse opinion from the appellate court to the client is unquestionably a difficult and often emotional task. Invariably, the disappointed client asks if anything can be done to fix the situation, and motions for rehearing on appeal are discussed. This article provides guidance to attorneys faced with the task of answering the client's questions and exploring whether a motion for rehearing is an option when the appellate court's opinion is not what you or your client hoped to receive.

Although the primary focus will be on motions for rehearing in Florida's state appellate courts, petitions for rehearing in the U.S. Court of Appeals for the 11th Circuit will also be addressed. Appellate motions for clarification and motions for certification are beyond the scope of this article.

Appellate Motions for Rehearing Generally

In Florida's state appellate courts, motions for rehearing are governed by Fla. R. App. P. 9.330. Rule 9.330 sets forth the time for filing a motion for rehearing, as well as the required contents and available grounds for such a motion. The following discussion will address each of these elements. Motions for rehearing en banc will also be discussed, as well as the potential for sanctions for failure to comply with the applicable rules.

• *Time for Filing the Motion* — Motions for rehearing under Rule 9.330 must be filed in the appellate court within 15 days of the order upon which rehearing is sought "or within such other time set by the appellate court."[1] Conceivably, under the quoted language, the court could increase or decrease the time for rehearing. Motions not filed within 15 days, or such other time set by the court, will ordinarily be stricken. The time limits for appellate motions for rehearing are not jurisdictional. If a satisfactory explanation for the tardiness is given, the court has the discretion to entertain an untimely motion for rehearing on the merits.[2] The court may not exercise that discretion, however, so practitioners should treat the deadline for rehearing as mandatory and advise their clients accordingly.

When a motion for rehearing on appeal is filed, Rule 9.330 affords the opposing side an opportunity to respond. The response, if any, must be served within 10 days of the date the motion for rehearing was served.[3]

At this point, it is worth noting that only one motion for rehearing is permitted. The general rule is that a party cannot file more than one motion for rehearing of a decision.[4] Moreover, if the appellate court grants rehearing, a subsequent motion for rehearing of that decision will not be entertained. An exception may be made where the appellate court's decision on rehearing changes the substance or effect of the original opinion.[5]

• *Contents of the Motion* — Rule 9.330 sets forth the necessary contents for a rehearing motion as follows: "A motion for rehearing shall state with particularity the points of law or fact that, in the opinion of the movant, the court has overlooked or misapprehended in its decision, and shall not present issues not previously raised in the proceeding."[6] Thus, the motion must state the particular factual or legal basis for the rehearing. It must not contain new issues, and it must avoid rearguing the merits of the appellate court's decision.[7]

• *Grounds for the Motion* — The required contents of a rehearing motion are directly related to the available grounds for the motion. In short, the grounds for rehearing are limited to points of law and fact the court misapprehended or overlooked in its original decision. The reason for the limited grounds available is rooted in the limited purpose of rehearing.

Rehearing is not a forum for expressing disagreement with the appellate court's decision,[8] nor is it an opportunity to interject new issues or evidence not previously considered in the proceedings.[9] Moreover, a rehearing is not a reconsideration. The language of Rule 9.330 does not authorize a motion that attempts to reargue issues already considered and determined by the appellate court.[10] Rather, the motion must be based on specific points of law or fact that the appellate court "overlooked" or "misapprehended" in its decision.[11] The purpose of rehearing is solely to correct these types of errors. Thus, a proper motion for rehearing is demonstrative and contains only limited argument. In other words, it points out to the appellate court an issue of fact or law that it "missed" in making its decision. Although easily stated, this distinction can be tricky in practice (and even trickier to explain to your client).

Perhaps the best way to understand

the distinction is to consider the cases in which the appellate courts have found proper grounds and granted motions for rehearing. The reasoning behind the appellate court's decision granting the motion for rehearing is often not fully explained in the opinion. Instead, the appellate court simply grants the motion and substitutes the new opinion for the old one. However, the new opinion typically will refer to some portion of the record or legal issue the court apparently missed initially that justifies a rehearing.

For example, a rehearing may be granted when there has been an intervening change in the law. In *State v. Bennett*, 53 So. 3d 368 (Fla. 3d DCA 2011), a criminal case, the appellate court granted the appellee-defendant's motion for rehearing in a two-sentence opinion that simply cited a recent opinion of the Florida Supreme Court as the basis for its decision to grant rehearing. Significantly, the referenced court decision was released the day after the *Bennett* opinion was filed.

A rehearing may also be granted when an opinion makes clear that key evidence that was considered by the trial court was omitted from the record on appeal. In *Kubernac v. Reid,* 656 So. 2d 930 (Fla. 1st DCA 1994), the First District Court of Appeal granted a local sheriff's motion to supplement the record and motion for rehearing in a forfeiture action. The appellate court had initially reversed the trial court's order allowing the forfeiture because the sheriff had "wholly failed to establish that any of [the] property was closely related to the commission of the felony . . . ."[12] The sheriff moved for rehearing and to supplement the record with a videotape that showed a clump of marijuana buds on the front seat of one of the vehicles sought to be forfeited. Having granted the motion to supplement and reviewed the videotape, the appellate court additionally granted the motion for rehearing, but only insofar as it pertained to the forfeiture of the vehicle in the video. Presumably, the videotape was considered by the trial court in rendering the original forfeiture order, but was not included in or transmitted with the record on appeal, since new issues and evidence typically cannot be considered for the first time on rehearing.

This point is best illustrated by *Goter v. Brown*, 682 So. 2d 155 (Fla. 4th DCA 1996), in which the appellate court acknowledged that a certain document would have changed its decision, but declined to grant rehearing on that basis since the document was not presented as evidence in the trial court. In contrast, the moving party in *Surf Club v. Tatem Surf Club, Inc.*, 10 So. 2d 554, 557-61 (Fla. 1942), prevailed in obtaining rehearing because it was able to direct the court's attention both to a controlling statute that changed the result and to the portions of the record and briefs where the statute was argued below.[13]

Advisability of Filing the Motion

The foregoing demonstrates the strict requirements of Rule 9.330 governing rehearing. Rehearing will be granted rarely and only when the limited grounds set forth by the rule are presented and established.[14] A motion for rehearing should have a reasonable chance of success if the moving party can identify a critical fact the court overlooked or misunderstood in reaching its original decision, or if the moving party can direct the court's attention to a recent or controlling statute or case the court may have overlooked.[15] An appellate court's decision to grant a rehearing is generally based on something that was missed by the appellate court — not by the attorneys or parties — in determining its original opinion. However, there will likely be few cases in which the appellate court actually "overlooks" critical record evidence or "misapprehends" a point of law. Thus, there are likely few cases in which a motion for rehearing will be granted. This should not discourage attorneys from filing a motion for rehearing if the appropriate grounds exist, but it certainly should be kept in mind when discussing with a client the advisability of filing a motion for rehearing.

Rehearing En Banc

Rehearings en banc are governed by Fla. R. App. P. 9.331. Florida's district courts of appeal generally sit in panels of three judges.[16] A district court of appeal en banc consists of all the judges in regular active service on the court.[17] Not surprisingly, the standard for obtaining a rehearing by a panel of all of a district court's active judges is exceedingly high. Under Rule 9.331, a party seeking rehearing en banc is limited to two grounds. Specifically, the movant must be able to argue and establish that: 1) the case is of exceptional importance, or 2) en banc consideration is necessary to maintain uniformity within the court's decisions.[18] Because rehearing en banc is an extraordinary proceeding, a motion for rehearing en banc filed by an attorney is required to contain a statement that, based on counsel's "reasoned and studied professional judgment," one of the two grounds for rehearing en banc is met.[19] A motion for rehearing en banc must be filed within the time limits set forth in Rule 9.330. It must also be filed in conjunction with a motion for rehearing.[20]

Rehearings en banc are rarely granted. In some instances, the appellate court may treat the motion for rehearing en banc as including a motion for rehearing, deny the motion for rehearing en banc, but grant rehearing. In *Lykins v. State,* 894 So. 2d 302 (Fla. 3d DCA 2005), the appellate court did just that in order to allow the trial court to strike an illegal condition of the defendant's sentence.

Avoiding Sanctions: What Not to Do

The appellate courts will not hesitate to impose sanctions for filing motions for rehearing that do not comport with the requirements of Rule 9.330, particularly when the motion serves only as a vehicle for the litigant to complain about various aspects of the appellate opinion. Counsel can be ordered to appear before the appellate court to justify the motion and explain why sanctions should not be entered. Referrals to The Florida Bar for such improper motions may also be made by the appellate courts as deemed appropriate.[21] Thus, it is imperative that counsel carefully evaluate the advisability of proceeding with an appellate motion for rehearing and refrain from filing a motion that does not meet the standards set forth

in Rule 9.330. A motion that reargues issues already considered, raises new or unpreserved issues, or fails to identify a factual or legal issue *the appellate court* (not the litigant) missed, is not only going to be denied, it may also lead to sanctions, which would only further aggravate you and your already disappointed client.

Petitions for Rehearing in the 11th Circuit

Rehearing on appeal in the federal courts is sought by petition. Petitions for rehearing are governed by Fed. R. App. P. 40 and the local rules of the applicable U.S. court of appeal. In Florida, appeals from the U.S. district courts are heard by the 11th Circuit Court of Appeals.

Rule 40 requires that the petition for rehearing be filed within 14 days after entry of the judgment unless the time is shortened or extended by order or local rule. In a civil case, if one of the parties is the United States or its officer or agency, any party may seek rehearing within 45 days after the entry of the judgment, unless an order shortens or extends the time. The 11th Circuit has extended the deadline for filing a petition to 21 days by local rule; however, the same 45-day deadline applies when one of the parties is a U.S. officer or agency.[22]

Similar to a motion for rehearing in the state appellate courts, a petition for rehearing in the 11th Circuit "must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition."[23] Although the federal rule requires the motion contain an argument, the careful practitioner will limit the argument to persuading the 11th Circuit that it has overlooked specific facts or legal issues in rendering its opinion.[24] The standards and requirements for obtaining a rehearing in the 11th Circuit are essentially the same as in a Florida appellate court, including the prohibitions on rearguing issues previously presented or raising entirely new issues not included in the briefs or record on appeal.[25]

In addition, a frivolous or unsupported petition for rehearing in the 11th Circuit can result in sanctions. Under local Rule 27-4, the 11th Circuit may, on its own motion or motion of a party, impose an appropriate sanction, including monetary sanctions, on counsel and/or the party for filing a frivolous motion.[26] Attorneys' fees and costs may be awarded to the prevailing party on a motion for sanctions under the rule. To date, it appears from the reported decisions that the 11th Circuit has not imposed sanctions under local Rule 27-4 for a frivolous petition for rehearing. Counsel should avoid being the first.

Conclusion

Motions for rehearing should be used sparingly whether in state or federal court. The motions are rarely granted; judges do not like them; and sanctions are a definite possibility. Although it may be appropriate to seek rehearing of an unfavorable appellate decision in cases in which the requirements for rehearing are clearly met, more often it will be better to advise your client not to seek rehearing. Unfortunately, when it comes to rehearing on appeal, it is not axiomatic that if at first you don't succeed, you should try again.❑

[1] Fla. R. App. P. 9.330(a) (2011).

[2] *See Zielke v. State*, 839 So. 2d 911 (Fla. 5th D.C.A. 2003).

[3] *See* Fla. R. App. P. 9.330(a).

[4] Fla. R. App. P. 9.330(b).

[5] *See 3299 N. Fed. Highway, Inc. v. Bd. of County Comm'rs*, 646 So. 2d 215, 228-29 (Fla. 4th D.C.A. 1994); *Dade Fed. Sav. & Loan Assoc.*, 403 So. 2d 995, 999 (Fla. 1st D.C.A. 1981).

[6] Fla. R. App. P. 9.330(a).

[7] *See Cleveland v. State*, 887 So. 2d 362, 264 (Fla. 5th D.C.A. 2004); *Lawyers Title Ins. Corp. v. Reitzes*, 631 So. 2d 1100, 1100-01 (Fla. 4th D.C.A. 1993).

[8] *See Whipple v. State*, 431 So. 2d 1011, 1013 (Fla. 2d D.C.A. 1983).

[9] *See Price Wise Buying Group v. Nazum*, 343 So. 2d 115, 117 (Fla. 1st D.C.A. 1977); *Fla. First Nat'l Bank v. Fryd Constr. Corp.*, 245 So. 2d 883 (Fla. 3d D.C.A. 1971).

[10] *See Reitzes*, 631 So. 2d at 1100-01.

[11] Although it seems elementary, the common definitions of "overlook" and "misapprehend" should be considered in analyzing whether a motion for rehearing is warranted and proper in your case. "Overlook" means fail to notice, miss, neglect, or disregard. "Misapprehend" means to misunderstand. The Oxford Desk Dictionary and Thesaurus, 505, 562 (Oxford Univ. Press, Am. Ed. 1997).

[12] *Kubernac*, 656 So. 2d at 930.

[13] Rarely will a motion for rehearing raising a new issue, or otherwise failing to comply with Rule 9.330, ever be granted. In one such case, the appellate court granted rehearing "in the interests of justice," notwithstanding the failure to comply with Rule 9.330. *See Barnes v. Lincoln Nat'l Life Ins. Co.*, 330 So. 2d 119 (Fla. 1st D.C.A. 1975). Obviously, it is not advisable to depend on a potential "interests of justice" exception when deciding whether to file a motion for rehearing.

[14] Given this standard, it goes without saying that a motion for rehearing directed at a per curiam affirmance is even less likely to be granted. *See Whipple*, 431 So. 2d at 1015-16; *see also* Robert Alfert, Jr., *Appellate Motions for Rehearing: When is Enough Really Enough?*, 73 Fla. Bar J. 76 (April 1999).

[15] *See Kubernac*, 656 So. 2d at 930; *Bennett*, 53 So. 2d at 369.

[16] *See* Fla. Const. art. V, §4(a); *see also* Fla. R. Jud. Admin. 2.210(a)(1).

[17] Fla. R. App. P. 9.331(a).

[18] Fla. R. App. P. 9.331(d)(1).

[19] Fla. R. App. P. 9.331(d)(2).

[20] *See* Fla. R. App. P. 9.331; *Romero v. State*, 870 So. 2d 816, 818 (Fla. 2004).

[21] *See Ayala v. Gonzalez*, 984 So. 2d 523 (Fla. 5th D.C.A. 2008); *Banderas v. Advance Petroleum, Inc.*, 716 So. 2d 876 (Fla. 3d D.C.A. 1998); *Elliott v. Elliott*, 648 So. 2d. 135 (Fla. 4th D.C.A. 1994).

[22] *See* 11th Cir. R. 40-3. The 45-day requirement cannot be changed by local rule, but only by court order. *See* Fed. R. App. P. 40(a)(1).

[23] Fed. R. App. P. 40(a)(2).

[24] "'The chances of obtaining a rehearing are greatest if you can convince that panel that it overlooked or misunderstood something important, or that it interjected a point on its own that was not thoroughly argued by the parties or analyzed by the court.'" 16A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* §3986.1 n.1 (4th ed. 2010) (quoting David G. Knibb, *Fed. Ct. App. Manual* §34:7 (5th ed.)).

[25] *See United States v. Levy*, 416 F. 3d 1273, 1279-80 (11th Cir. 2005).

[26] A motion is frivolous if: a) it has no legal merit and cannot be supported by a reasonable argument to extend, modify, or reverse existing law, or establish new law; b) it contains assertions of material fact that are either false or lacking in record support; c) it is presented for an improper purpose such as harassment or unnecessary delay. 11th Cir. R. 27-4.

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