UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CHAMBERS OF
MICHAEL BOUDIN
CHIEF JUDGE

JOHN JOSEPH MOAKLEY
UNITED STATES COURTHOUSE
1 COURTHOUSE WAY, SUITE 7710
BOSTON, MA 02210
(617) 748 - 4431

October 10, 2003

03-AP-009

Peter McCabe, Secretary
Committee of Rules of Practice and Procedure
One Columbus Circle, N.E.
Thurgood Marshall Judicial Building
Washington, D.C. 20544

Re: Proposed Amendment to Fed. R. App. P. 35(a)

Dear Mr. McCabe:

My court is currently publishing for comment a proposed local rule change that would amend our local rule on en bancs. That rule currently provides that an absolute majority of the active judges must vote in favor of hearing or rehearing en banc. The proposed new rule would permit a majority of the unrecused active judges to order a hearing or rehearing en banc so long as the unrecused judges represented a majority of all active judges in the circuit. A copy of each version is attached.

Under our present rule, our circuit which has six active judges could not--in a case in which one judge was recused--order a rehearing en banc by a three-to-two vote; but if the rule were altered as proposed, a three-to-two vote in favor of rehearing en banc would prevail. However, because of the quorum proviso in our proposed rule, a rehearing en banc could not be authorized unless at least four active judges were unrecused; accordingly, if three judges were recused, a two to one vote in favor of rehearing en banc would not be permitted.

The basic choice--to use a case rather than an absolute majority approach--accords with your own proposed rule, and my court's present inclination (our proposed rule is subject to public comment) thus supports your proposed rule in principal part. My own court previously had a decision en banc to the effect that the absolute majority approach was required by 46 U.S.C. § 46(c); but on reflection, the active judges now take the view that the statute permits a case majority approach; quite probably Congress never thought about the issue. A uniform rule among circuits has much to be said in its favor, and your proposed rule would achieve that end as well as make certain that the approach we would like to take is clearly authorized.

One concern remains. The Advisory Committee, we are told, debated the question whether to endorse the case majority rule without more or also to include a quorum requirement. My own court is disposed to adopt a quorum requirement;* but after drafting the language to this end, I concluded that something like this quorum is arguably required by 28 U.S.C. § 46(d), whether or not embodied in the rule. Indeed, in the end it may be we will omit the proviso language as unnecessary in light of section 46(d).

Your proposed rule does not have a quorum requirement and, to me, this is not a problem so long as the committee notes to any such proposal, as ultimately adopted, make clear that the unqualified rule you propose is not intended to override any existing quorum requirement embodied in section 46(d) or--if I have misread that section--any quorum requirement that a court of appeals might reasonably adopt. Whatever may be true of large circuits, in my circuit the possibility of having several active judges recused is not trivial and for obvious policy reasons, we would not care to be in a situation in which someone could argue that we were compelled to entertain petitions for rehearing en banc if favored by two out of three eligible judges.

I am sure the committee had no such aim for its rule, but it would be desirable to have this non-preemptive intent spelled out at least in the notes. Accordingly, the active judges of my court support the committee approach but with the clarification in the notes just suggested.

Sincerely yours,

Michael Boudin

Attachments

*As described in the committee note, the quorum rule apparently considered by the committee provided that the case could not be heard en banc unless "a majority of all active judges--disqualified or non-disqualified--are eligible to participate in the case"--a qualification that looks as if it is directed to the en banc merits decision. Our own concern is instead with the question of what constitutes a quorum for purposes of the initial determination whether or not to hear a case en banc.

Proposed Amended Local Rule 35(a)

(Additions in *italics*; deletions in ~~strike-out~~ print)

Local Rule 35. En Banc Determination

(a) Who May Vote; Composition of En Banc Court. The decision whether a case should be heard or reheard en banc is made solely by the circuit judges of this circuit who are in regular active service. ~~For the purposes of determining a majority under 28 U.S.C. § 46(c) and Fed. R. App. P. 35(a), the term "majority" means more than one-half of all the judges of the Court in regular active service, without regard to whether a judge is disqualified. See United States v. Leichter, 167 F.3d 667 (1st Cir. 1999) (order of court denying petition for rehearing en banc in United States v. Leichter, 160 F.3d 33 (1st Cir.1998)).~~ *Rehearing en banc shall be ordered only upon the affirmative votes of a majority of the judges of this court in regular active service who are not disqualified, provided that the judges who are not disqualified constitute a majority of the judges who are in regular active service.* A court en banc consists solely of the circuit judges of this circuit in regular active service except that any senior circuit judge of this circuit shall be eligible to participate, at that judge's election, in the circumstances specified in 28 U.S.C. § 46(c).

(3) For purposes of the page limit in Rule 35(b)(2), if a party files both a petition for panel rehearing and a petition for rehearing en banc, they are considered a single document even if they are filed separately, unless separate filing is required by local rule.

(c) **Time for Petition for Hearing or Rehearing En Banc.** A petition that an appeal be heard initially en banc must be filed by the date when the appellee's brief is due. A petition for a rehearing en banc must be filed within the time prescribed by Rule 40 for filing a petition for rehearing.

(d) **Number of Copies.** The number of copies to be filed must be prescribed by local rule and may be altered by order in a particular case.

(e) **Response.** No response may be filed to a petition for an en banc consideration unless the court orders a response.

(f) **Call for a Vote.** A vote need not be taken to determine whether the case will be heard or reheard en banc unless a judge calls for a vote.

Local Rule 35. En Banc Determination

*(a) **Who May Vote; Composition of En Banc Court.** The decision whether a case should be heard or reheard en banc is made solely by the circuit judges of this circuit who are in regular active service. For the purposes of determining a majority under 28 U.S.C. § 46(c) and Fed. R. App. P. 35(a), the term "majority" means more than one-half of all the judges of the Court in regular active service, without regard to whether a judge is disqualified. See United States v. Leichter, 167 F.3d 667 (1st Cir. 1999) (order of court denying petition for rehearing en banc in United States v. Leichter, 160 F.3d 33 (1st Cir. 1998)). A court en banc consists solely of the circuit judges of this circuit in regular active service except that any senior circuit judge of this circuit shall be eligible to participate, at that judge's election, in the circumstances specified in 28 U.S.C. § 46(c).*

*(b) **Petitions for Panel Hearing or Rehearing En Banc.** If a petitioner files a petition for panel rehearing and a petition for rehearing en banc addressed to the same decisions or order of the court, the two petitions must be combined into a single document and the document is subject to the 15-page limitation contained in Fed. R. App. P. 35 (b)(2), (3). However, the page limit may be enlarged on motion for good cause shown.*

*(c) **Sanctions.** If a petition for rehearing or for rehearing en banc is found on its face to be wholly without merit, vexatious, multifarious, or filed principally for delay, the court may tax a sum not exceeding $250 as additional costs, payable to the clerk of the court or the opposing party, as the court may direct. At the court's order, counsel may be required personally to pay all or any part of these costs.*

*(d) **Number of Copies.** Pursuant to Fed. R. App. P. 35(d), ten copies of a petition for a panel rehearing, rehearing en banc, or combined Fed. R. App. P. 35(b)(3) document must be filed with the clerk, including one copy on a computer generated disk. The disk must be filed regardless of page length but otherwise in accordance with Local Rule 32.*