

Motions For Rehearing: An Often Overlooked Preservation Requirement

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Judges and jurists alike champion the notion that rehearings should be used sparingly and only when the conditions are just right. A lesser known concept is that sometimes a motion for rehearing is absolutely necessary to preserve a winning issue for appeal. Occasionally, a jurisdiction's rules will expressly require a motion for rehearing in order to preserve an issue for appellate review. For example, a Florida rule of civil procedure directs that, if the trial court fails to provide its reasoning on the record, a party cannot raise that failure on appeal unless the party first raises that issue in a motion for rehearing in the trial court.^[1] That particular preservation requirement falls into a more general and far-reaching requirement that often does not appear in a written set of civil or appellate rules. Depending on the jurisdiction, *any* error that appears for the first time on the face of the final order or judgment must first be brought to the trial court's attention in a motion for rehearing, or the issue is waived. If the issue is not properly preserved, the party may be left having to climb the steep hill of arguing that the error is fundamental. Unfortunately, it is not always clear when an issue can be considered to have appeared "for the first time" on the face of a final order. Moreover, case law addressing this issue is often sparse. As a result, the safest route generally is to move for rehearing even if it is only arguable that the error appeared for the first time in the final order.

^[1] Fla. R. Civ. P. 1.530(a).

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