

Invitation to Comment

<p>Title</p>	<p>Appellate Procedure: Habeas Corpus Proceedings (amend and renumber rule 8.386, adopt new rules 8.385 and 8.386, and amend rules 8.380 and 8.384)</p>
<p>Summary</p>	<p>This proposal would make several changes to the rules relating to habeas corpus proceedings in the Supreme Court and Courts of Appeal, including: (1) reorganizing the rules so that the provisions are in a more logical order; (2) clarifying that a memorandum filed by an attorney is subject to the same 14,000 word/50 page limit as for briefs in civil appeals; and (3) outlining the procedures that the court follows after a petition is filed and the procedures that are followed if the court issues an order to show cause.</p>
<p>Source</p>	<p>Appellate Advisory Committee Hon. Kathryn Doi Todd, Chair</p>
<p>Staff</p>	<p>Heather Anderson, Committee Counsel, 415-865-7691, heather.anderson@jud.ca.gov</p>
<p>Discussion</p>	<p><u>Reorganizing the Appellate Rules Relating to Habeas Petitions</u> Rules 8.380 and 8.384 address petitions for writs of habeas corpus filed in either the Supreme Court or Court of Appeal by self-represented parties and attorneys, respectively. Currently, rule 8.380 contains not only provisions relating to petitions filed by self-represented parties, but also provisions relating to the handling of any habeas corpus petition, whether filed by a self-represented party or an attorney, such as provisions relating to informal responses to petitions and petitions that are filed in an inappropriate court. These provisions are made applicable to petitions filed by attorneys through a cross-reference in rule 8.384(a).</p> <p>To make these rules clearer and easier to understand, this proposal would move the provisions relating to the handling of habeas corpus petitions out of rule 8.380 and into a new, separate rule 8.385 that addresses this topic. Moving these provisions would eliminate the need for the cross-reference to rule 8.380 in rule 8.384(a); that cross-reference therefore would be eliminated. The remaining provisions in rule 8.380 would focus only on requirements relating to the form, content, and filing of petitions for writs of habeas corpus by self-represented litigants.</p> <p>Proposed new rule 8.385 would include not only the provisions</p>

relating to the handling of habeas corpus petitions moved from rule 8.380, but also new provisions outlining the actions that a court may take when a petition is filed and specifically articulating the court's authority to issue an order to show cause. This latter provision is modeled on rule 4.551(c), which addresses petitions for writs of habeas corpus filed in the superior court.

#### Limit on the Length of Memoranda Filed by Attorneys

As noted above, rule 8.384 addresses petitions for writs of habeas corpus filed by attorneys. Currently, subdivision (b)(1) cross-references to rule 8.490(b)(6), which relates to the permissible length of petitions for writs of mandate, certiorari, and prohibition. Rule 8.490(b)(6), in turn, cross-references rule 8.204(c), relating to the length of briefs in civil appeals, which establishes a 14,000 word/50 page limit on the length of such briefs.

The committee believes that this length limit should apply to any memorandum filed by an attorney in support of a petition but should not apply to the petition itself. This proposal would eliminate the cross-reference to rule 8.490(b)(6) in the subdivision addressing petitions and add a new reference to the length limit in the subdivision addressing memoranda. In addition to these changes to rule 8.384, this proposal would further amend the subdivision addressing petitions filed by attorneys to clarify what format requirements apply when an attorney chooses to file a petition on *Petition for Writ of Habeas Corpus* (form MC-275). It would also add new subdivision headings to make it easier to find the provisions addressing supporting documents, the number of copies of petitions that must be filed, and noncomplying petitions.

#### Procedures Following Issuance of Order to Show Cause

Rule 4.551(c), which addresses petitions for writs of habeas corpus filed in the superior court, includes provisions that address the procedures followed by a court after it issues an order to show cause in a habeas corpus proceeding, including the filing of a return and denial and the holding of an evidentiary hearing. Currently, the appellate rules relating to habeas proceedings do not address these issues.

This proposal would fill this gap in the appellate rules by adding new rule 8.386 addressing the procedures that are followed after a reviewing court issues an order to show cause. This new rule is not intended to establish new procedures but simply to reflect the procedures that are currently being followed in the Supreme Court and Court of Appeal in habeas proceedings.

The language of new rule 8.386 is modeled primarily on language from rule 4.551(c) and from the description of appellate court procedures in habeas proceedings in the Supreme Court's opinion in *People v. Romero* (1994) 8 Cal.4th 728. Proposed new rule 8.386 contains provisions addressing the filing of a return and traverse and the holding of an evidentiary hearing in the reviewing court. However, rule 8.386 does not include provisions like those in 4.551(c), (d), and (e) concerning, respectively, the court's consideration of the factual allegations in the petition in determining whether the petitioner has made a prima facie showing of entitlement to relief, the relationship between factual allegations in the petition and the return, and the relationship between allegations in the return and the traverse. The committee would particularly appreciate comments on whether it would be helpful to include provisions similar to those in 4.551 (c), (d), and (e) in new rule 8.386, which would make the trial and appellate rules more consistent with each other.

In addition to the provisions described above, proposed new rule 8.386 includes provisions that address: (1) situations in which the reviewing court orders that the return be filed in the superior court; (2) the reviewing court's authority to appoint a referee to conduct an evidentiary hearing; (3) argument and decision in the Supreme Court and Court of Appeal; and (4) sanctions. The provisions on argument and decision, which cross-reference the rules on hearing and decision in civil appeals in the Court of Appeal and on petitions for review in the Supreme Court, are modeled on similar provisions relating to felony appeals in rules 8.366 and 8.368 and to juvenile appeals in rules 8.470 and 8.472. The provision on sanctions would apply the rule relating to sanctions in other writ proceedings in the Supreme Court and Court of Appeal. The committee would particularly appreciate comments on whether it is helpful to include such a sanction provision in the rule and whether the circumstances in which a court may impose sanctions in habeas proceedings should be the same as or more limited than those in other writ proceedings.

To accommodate new rule 8.386, current rule 8.386, which addresses remittitur in habeas proceedings, would be renumbered as rule 8.387. The current rule would also be amended to clarify the requirements applicable to issuance of remittitur by the Supreme Court in habeas proceedings.

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Attachments

Cal. Rules of Court, rule 8.386 would be amended and renumbered, new rules 8.385 and 8.386 would be adopted, and rules 8.380 and 8.384 would be amended, effective January 1, 2009, to read:

1 **Rule 8.380. Petition for writ of habeas corpus filed by petitioner not represented by**  
2 **an attorney**

3  
4 **(a) Required Judicial Council form**

5  
6 (1) A person who is not represented by an attorney and who petitions a reviewing  
7 court for writ of habeas corpus seeking release from, or modification of the  
8 conditions of, custody of a person confined in a state or local penal institution,  
9 hospital, narcotics treatment facility, or other institution must file the petition on  
10 *Petition for Writ of Habeas Corpus* (form MC-275). For good cause the court may  
11 permit the filing of a petition that is not on that form.  
12

13 **(b) Form and content**

14  
15 (2) A petition filed under (1)(a) need not comply with the provisions of rules 8.40,  
16 8.204, or 8.490 that prescribe the form and content of a petition and require the  
17 petition to be accompanied by a memorandum.  
18

19 **(c) Number of copies**

20  
21 (3) In the Court of Appeal, the petitioner must file the original of the petition under  
22 (1)(a) and one set of any supporting documents. In the Supreme Court, the petitioner  
23 must file an original and 10 copies of the petition and an original and 2 copies of  
24 any supporting document accompanying the petition unless the court orders  
25 otherwise.  
26

27 Revisers Note: Subdivisions (b)–(d) would be moved to rules 8.385 and 8.386.  
28

29 **(b) Record**

30  
31 ~~Before ruling on the petition, the court may order the custodian of any relevant~~  
32 ~~record to produce the record or a certified copy to be filed with the court.~~  
33

34 **(c) Informal response**

35  
36 (1) ~~The court may request an informal written response from the respondent, the~~  
37 ~~real party in interest, or an interested person. The court must send a copy of~~  
38 ~~any request to the petitioner.~~  
39

40 (2) ~~The response must be served and filed within 15 days or as the court specifies.~~

1  
2 (3) ~~If a response is filed, the court must notify the petitioner that a reply may be~~  
3 ~~served and filed within 15 days or as the court specifies. The court may not~~  
4 ~~deny the petition until that time has expired.~~

5  
6 **(d) Petition filed in an inappropriate court**

7  
8 (1) ~~A Court of Appeal may deny without prejudice a petition for writ of habeas~~  
9 ~~corpus that is based primarily on facts occurring outside the court's appellate~~  
10 ~~district, including petitions that question:~~

11  
12 (A) ~~The validity of judgments or orders of trial courts located outside the~~  
13 ~~district; or~~

14  
15 (B) ~~The conditions of confinement or conduct of correctional officials outside~~  
16 ~~the district.~~

17  
18 (2) ~~A Court of Appeal must deny without prejudice a petition for writ of habeas~~  
19 ~~corpus that challenges the denial of parole or the petitioner's suitability for~~  
20 ~~parole if the issue was not first adjudicated by the trial court that rendered the~~  
21 ~~underlying judgment.~~

22  
23 (3) ~~If the court denies a petition solely under (1), the order must state the basis of~~  
24 ~~the denial and must identify the appropriate court in which to file the petition.~~

25  
26 **Advisory Committee Comment**

27  
28 **Subdivision (d).** ~~Except for subdivision (d)(2), revised rule 8.380(d) restates former section 6.5 of the~~  
29 ~~Standards of Judicial Administration. New subdivision (d)(2) is based on the California Supreme Court~~  
30 ~~decision in *In re Roberts* (2005) 36 Cal.4th 575, which provides that petitions for writ of habeas corpus~~  
31 ~~challenging denial or suitability for parole are first to be adjudicated in the trial court that rendered the~~  
32 ~~underlying judgment.~~

33  
34  
35 **Rule 8.384. Petition for writ of habeas corpus filed by an attorney for a party**

36  
37 **(a) General application of rule 8.380**

38  
39 ~~Except as provided in this rule, rule 8.380 applies to any petition for a writ of~~  
40 ~~habeas corpus filed by an attorney.~~

41  
42 **(b) Special requirements for a petition filed by an attorney**

1  
2 **(a) Form and content of petition and memorandum**  
3

4 (1) A petition for habeas corpus filed by an attorney need not be filed on *Petition*  
5 *for Writ of Habeas Corpus* (form MC-275), but must contain the information  
6 requested in that form. All petitions filed by attorneys, whether or not on form  
7 MC-275, and must comply with this rule and rules 8.40(b)-(c)-(d), and  
8 8.204(a)(1)(A). A petition that is not on form MC-275 must also comply with  
9 the remainder of rule 8.204(a)- and 8.204(b), and 8.490(b)(6).

10  
11 (2) Any memorandum accompanying the petition must comply with rule 8.204(a)-  
12 ~~(b)(c)~~.

13  
14 ~~(6)(3)~~ (3) The petition and any memorandum must support any reference to a matter in  
15 the supporting documents by a citation to its index tab and page.

16  
17 **(b) Supporting documents**  
18

19 ~~(3)(1)~~ (1) The petition must be accompanied by a copy of any petition—excluding  
20 exhibits—pertaining to the same judgment and petitioner that was previously  
21 filed in any lower state court or any federal court. If such documents have  
22 previously been filed in the same Court of Appeal where the petition is filed or  
23 in the Supreme Court, and the petition need only so states and identifies the  
24 documents by case name and number, copies of these documents need not be  
25 included in the supporting documents.

26  
27 ~~(4)(2)~~ (2) If the petition asserts a claim that was the subject of an evidentiary hearing,  
28 the petition must be accompanied by a certified transcript of that hearing.

29  
30 ~~(5)(3)~~ (3) Any supporting documents accompanying the petition must comply with rule  
31 8.490(d).

32  
33 **(c) Number of copies**  
34

35 ~~(7)~~ (7) If the petition is filed in the Supreme Court, the attorney must file the number of  
36 copies of the petition and supporting documents required by rule 8.44(a). If the  
37 petition is filed in the Court of Appeal, the attorney must file the number of copies  
38 of the petition and supporting documents required by rule 8.44(b).  
39

1 **(d) Noncomplying petitions**

2  
3 (8) The clerk must file an attorney’s petition not complying with ~~(1)–(7)~~ ~~(a)–(c)~~ if it  
4 otherwise complies with the rules of court, but the court may notify the attorney that  
5 it may strike the petition or impose a lesser sanction if the petition is not brought  
6 into compliance within a stated reasonable time of not less than five days.  
7  
8

9 **Rule 8.385. Proceedings after the petition is filed**

10  
11 **(a) Court action in response to petition**

12  
13 The court may take one of the following actions when a petition for a writ of habeas  
14 corpus is filed:

- 15  
16 (1) Deny the petition summarily;  
17  
18 (2) Deny the petition without prejudice;  
19  
20 (3) Request an informal response under (c); or  
21  
22 (4) Issue an order to show cause under (e).  
23  
24

25 **~~Rule 8.380.~~ (b) Record**

26  
27 Before ruling on the petition, the court may order the custodian of any relevant  
28 record to produce the record or a certified copy to be filed with the court.  
29

30 **~~Rule 8.380.~~ (c) Informal response**

- 31  
32 (1) Before ruling on the petition, the court may request an informal written  
33 response from the respondent, the real party in interest, or an interested person.  
34 The court must send a copy of any request to the petitioner.  
35  
36 (2) The response must be served and filed within 15 days or as the court specifies.  
37  
38 (3) If a response is filed, the court must notify the petitioner that a reply may be  
39 served and filed within 15 days or as the court specifies. The court may not  
40 deny the petition until that time has expired.  
41

1 **Rule 8.380. (d) Petition filed in an inappropriate court**

2  
3 (1) A Court of Appeal may deny without prejudice a petition for writ of habeas  
4 corpus that is based primarily on facts occurring outside the court’s appellate  
5 district, including petitions that question:

6  
7 (A) The validity of judgments or orders of trial courts located outside the  
8 district; or

9  
10 (B) The conditions of confinement or the conduct of correctional officials  
11 outside the district.

12  
13 (2) A Court of Appeal must deny without prejudice a petition for writ of habeas  
14 corpus that challenges the denial of parole or the petitioner’s suitability for  
15 parole if the issue was not first adjudicated by the trial court that rendered the  
16 underlying judgment.

17  
18 (3) If the court denies a petition solely under (1), the order must state the basis of  
19 the denial and must identify the appropriate court in which to file the petition.  
20

21 **(e) Order to show cause**

22  
23 (1) If the petitioner has made a prima facie showing that he or she is entitled to  
24 relief, the court must issue an order to show cause.

25  
26 (2) An order to show cause is a determination that the petitioner has made a  
27 showing that he or she may be entitled to relief. It does not grant the relief  
28 sought in the petition.

29  
30 **Advisory Committee Comment**

31  
32 **Subdivision (d).** Except for subdivision (d)(2), ~~revised rule 8.380.385(d)~~ restates former section 6.5 of  
33 the Standards of Judicial Administration. ~~News~~Subdivision (d)(2) is based on the California Supreme  
34 Court decision in *In re Roberts* (2005) 36 Cal.4th 575, which provides that petitions for writ of habeas  
35 corpus challenging denial or suitability for parole are first to be adjudicated in the trial court that rendered  
36 the underlying judgment.

1 **Rule 8.386. Proceedings if the court issues an order to show cause**

2  
3 **(a) Return to the superior court**

4  
5 The reviewing court may order the respondent to file a return in the superior court.  
6 The order vests further jurisdiction over the cause in the superior court, which must  
7 proceed under rule 4.551.  
8

9 **(b) Return to the reviewing court**

10  
11 If the Supreme Court orders the return to be filed in that court or the Court of  
12 Appeal or if the Court of Appeal orders the return to be filed in that court, (c)–(h)  
13 apply and the court must appoint counsel for any unrepresented petitioner who  
14 desires but cannot afford counsel.  
15

16 **(c) Serving and filing return in the reviewing court**

17  
18 (1) Unless the court orders otherwise, the respondent must serve and file any  
19 return in the reviewing court within 30 days after the reviewing court issues the  
20 writ or the order to show cause under rule 8.385(e).  
21

22 (2) If the return is filed in the Supreme Court, the attorney must file the number of  
23 copies of the return and any supporting documents required by rule 8.44(a). If  
24 the return is filed in the Court of Appeal, the attorney must file the number of  
25 copies of the return and any supporting documents required by rule 8.44(b).  
26 Two copies of the return and any supporting documents must be served on the  
27 petitioner’s counsel, and if the return is to the Court of Appeal and the  
28 petitioner is not represented by privately-retained counsel, one copy must be  
29 served on the district appellate project.  
30

31 **(d) Form of return in the reviewing court**

32  
33 (1) The return must comply with Penal Code section 1480 and rules 8.40(b)–(c)  
34 and 8.204(a)–(c).  
35

36 (2) Any supporting documents accompanying the return must comply with rule  
37 8.490(d). The return must support any reference to a matter in the supporting  
38 documents by a citation to its index tab and page.  
39

1 **(e) Traverse in the reviewing court**

2  
3 (1) Unless the court orders otherwise, within 30 days after the respondent files a  
4 return, the petitioner may serve and file a traverse in the reviewing court. If the  
5 return is filed in the Supreme Court, the attorney must file the number of  
6 copies of the traverse required by rule 8.44(a). If the return is filed in the Court  
7 of Appeal, the attorney must file the number of copies of the traverse required  
8 by rule 8.44(b).

9  
10 (2) Any traverse must comply with Penal Code section 1484 and rules 8.40(b)–(c)  
11 and 8.204(a)–(c).

12  
13 **(f) Evidentiary hearing in the reviewing court**

14  
15 An evidentiary hearing is required if the petitioner’s entitlement to relief depends on  
16 the resolution of an issue of fact. The court may appoint a referee to conduct the  
17 hearing and make recommended findings of fact.

18  
19 **(g) Argument and decision in the reviewing court**

20  
21 Unless the court orders otherwise:

22  
23 (1) If the return is to the Court of Appeal, rules 8.252 through 8.268 govern  
24 argument and decision in the Court of Appeal.

25  
26 (2) If the return is to the Supreme Court, rules 8.524 through 8.536 govern  
27 argument and decision in the Supreme Court.

28  
29 **(h) Sanctions in the reviewing court**

30  
31 Rule 8.490(n) governs sanctions in habeas corpus proceedings.

32  
33 **Advisory Committee Comment**

34  
35 **Subdivision (g)(1).** Review of a Court of Appeal decision in a habeas corpus proceeding may be sought  
36 by way of a petition for review under rule 8.500.

37  
38  
39 **Rule 8.386, 8.387. Remittitur in habeas corpus proceedings**

40  
41 A Court of Appeal reviewing court must issue a remittitur in a habeas corpus proceeding  
42 under this chapter except when the court denies the petition without issuing an order to  
43 show cause or orders the return filed in the superior court. Rule 8.272(b)–(d) governs

- 1 issuance of a remittitur by a Court of Appeal in habeas corpus proceedings. Rule
- 2 8.272(c)–(d) governs issuance of a remittitur by the Supreme Court in habeas corpus
- 3 proceedings.

## Item SPR08-03 Response Form

**Title:** **Appellate Procedure: Habeas Corpus Proceedings** (amend and renumber Cal. Rules of Court, rule 8.386, adopt rules 8.385 and 8.386, amend rules 8.380 and 8.384)

- Agree** with proposed changes
- Agree** with proposed changes **if modified**
- Do not agree** with proposed changes

Comments: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**Name:** \_\_\_\_\_ **Title:** \_\_\_\_\_

**Organization:** \_\_\_\_\_

- Commenting on behalf of an organization**

**Address:** \_\_\_\_\_

**City, State, Zip:** \_\_\_\_\_

### **To Submit Comments**

Comments may be written on this form, prepared in a letter format, or submitted online. If you are *not* commenting directly on this form, please include the information requested above and the proposal number for identification purposes. Please submit your comments online or email, mail, or fax comments.

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**Email:** [invitations@jud.ca.gov](mailto:invitations@jud.ca.gov)

**Mail:** Ms. Camilla Kieliger  
Judicial Council, 455 Golden Gate Avenue  
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**Fax:** (415) 865-7664, Attn: Camilla Kieliger

<b>DEADLINE FOR COMMENT: 5:00 p.m., Friday, June 20, 2008</b>
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