

JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS
455 Golden Gate Avenue
San Francisco, California 94102-3688

Report

TO: Members of the Judicial Council

FROM: Appellate Advisory Committee
Hon. Kathryn Doi Todd, Chair
Heather Anderson, Senior Attorney, 415-865-7691,
heather.anderson@jud.ca.gov

DATE: September 3, 2008

SUBJECT: Appellate Procedure: Habeas Corpus Proceedings in the Supreme Court and Courts of Appeal (amend California Rules of Court, rules 8.380 and 8.384; amend and renumber rule 8.386 as rule 8.387; and adopt rules 8.385 and 8.386) (Action Required)

Issue Statement

This proposal addresses several issues relating to habeas corpus proceedings in the Supreme Court and Courts of Appeal.

Organization of the Appellate Rules Relating to Habeas Petitions

Rules 8.380 and 8.384 of the California Rules of Court address petitions for writs of habeas corpus filed by self-represented parties and attorneys, respectively, in either the Supreme Court or Court of Appeal. Currently, rule 8.380 contains not only provisions relating to petitions filed by self-represented parties, but also provisions relating to the general handling of any habeas corpus petition, whether filed by a self-represented party or an attorney, such as provisions relating to records, informal responses to petitions, and petitions that are filed in an inappropriate court. Some rule users may have difficulty locating these provisions in a rule that is generally about petitions filed by self-represented parties.

Form and Format of Documents Filed by Attorneys

Through a series of cross-references, rule 8.384, which addresses petitions for writs of habeas corpus filed by attorneys, establishes a 14,000-word/50-page limit on the length of petitions. The Appellate Advisory Committee believes that this limit should be applied to memoranda filed with such petitions, but not to the petitions themselves.

Rule 8.384 allows, but does not require, attorneys to file petitions for writs of habeas corpus on the Judicial Council's *Petition for Writ of Habeas Corpus* (form MC-275).

Rule 8.384 does not clearly specify, however, what format requirements apply when an attorney chooses to file a petition on this form.

Previous Petitions Filed in Same Matter

Rule 8.384(b)(3) currently provides that a habeas corpus petition filed by an attorney must be accompanied by a copy of any petition pertaining to the same judgment and petitioner that was previously filed in any lower state court or any federal court, but if such documents have previously been filed in the Supreme Court, the petition need only so state. Under this provision, a Court of Appeal considering a petition will not receive information about any previous petitions that were filed in a Court of Appeal. In addition, if a previously filed petition that is cited in the current petition is not properly identified, it may be difficult for a court to locate that petition.

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.

Rationale for Recommendation

The Appellate Advisory Committee recommends that the Judicial Council, effective January 1, 2009:

1. Amend rule 8.380, relating to petitions for writs of habeas corpus filed by unrepresented parties, to remove current subdivisions (b)–(d) which generally address records in habeas proceedings, informal responses, and petitions filed in an inappropriate court;
2. Amend rule 8.384, relating to petitions for writs of habeas corpus filed by attorneys, to:
 - a. Delete the cross-reference to rule 8.380;
 - b. Eliminate the limit on the length of petitions and, except in proceedings related to sentences of death, apply a 14,000-word/50-page limit to any memoranda filed by an attorney;
 - c. Specify that all petitions filed by attorneys, whether or not on *Petition for Writ of Habeas Corpus* (form MC-275), must be produced on a computer or typewritten and must comply with the requirements of rule 8.40(b) and (c) relating to document covers and rule 8.204(a)(1)(A) relating to tables of contents and authorities;

- d. Require attorneys to provide information about previous petitions concerning the same judgment and petitioner filed in any state court, rather than just those filed in a lower court or the Supreme Court. As with previous petitions filed in the Supreme Court, however, the rule would allow the petitioner to cite to, rather than attach copies of, any previous petitions filed in the same Court of Appeal and add provisions specifying how such previous petitions are to be cited; and
 - e. Add new subdivision headings to the provisions addressing supporting documents, the number of copies of petitions that must be filed, and noncomplying petitions;
3. Adopt new rule 8.385 to:
 - a. Encompass the provisions addressing records, informal responses, and petitions filed in an inappropriate court that were removed from rule 8.380;
 - b. Specify that the court must issue an order to show cause if the petitioner has made the required prima facie showing that he or she is entitled to relief;
 - c. Clarify that if the reviewing court orders the respondent to file the return in the superior court, the superior court then has jurisdiction in the matter; and
 - d. Provide that if the return is ordered to be filed in the Supreme Court or Court of Appeal, rule 8.386 applies and the court must appoint counsel for any unrepresented petitioner who wants but cannot afford counsel;
 4. Adopt new rule 8.386 to set out the procedures that are followed if the return is ordered to be filed in the Supreme Court or Court of Appeal; and
 5. Renumber current rule 8.386 as rule 8.387 and amend it to add provisions addressing filing, finality, rehearing, and modification of decisions in habeas corpus proceedings.

The text of the proposed rule amendments is attached at pages 15–23.

Organization of the Appellate Rules Relating to Habeas Petitions

Moving the provisions concerning records, informal responses, and petitions filed in an inappropriate court that apply to all petitions for writs of habeas corpus out of the rule on petitions filed by self-represented parties and into a new, separate rule will make these rules clearer and easier to understand. Moving these provisions also will eliminate the need for the cross-reference to rule 8.380 in rule 8.384(a), making rule 8.384 simpler. The provisions remaining in rule 8.380 will focus only on requirements relating to the form, content, and filing of petitions for writs of habeas corpus by self-represented litigants, making it easier for self-represented petitioners to find these provisions.

Creating a new, separate rule addressing proceedings after a petition is filed will make it clearer that these provisions apply to all habeas petitions, not just those filed by self-

represented persons. Proposed new rule 8.385 includes the provisions relating to the handling of habeas corpus petitions that would be removed from rule 8.380. In addition, new provisions would be added addressing the courts' authority to issue an order to show cause and to direct that the return be filed either in the superior court or in the reviewing court. An accompanying advisory committee comment, which is modeled in part on rule 4.551(c) from the rules on petitions for writs of habeas corpus filed in the superior court, would provide litigants with additional information about common actions courts may take on habeas petitions.

Form and Format of Documents Filed by Attorneys

Historically, no limit was placed on the length of petitions for writs of habeas corpus. The current limit on the length of petitions filed by attorneys in the appellate courts was placed in the rules in 2006 when the provisions relating to petitions filed by attorneys and self-represented petitions were first divided in separate rules. No limit is currently placed on the length of petitions filed in the superior court. In order to maintain consistency with the trial court rules, the committee recommends that the length limit on petitions for writs of habeas corpus in the appellate courts be eliminated.

The committee believes, however, that it is appropriate to place a limit on the length of memoranda that attorneys may file with these petitions. These memoranda are equivalent to appellate briefs, and the rules of court place length limits on such briefs. To establish a limit on the length of these memoranda, the committee recommends amending rule 8.384 (a)(2) to require that, except in capital cases, such memoranda comply with rule 8.204(c), which establishes a 14,000-word/50-page limit on briefs in unlimited civil cases. Length limits in capital cases could be set by the Supreme Court.

This proposal would also amend rule 8.384 to clarify what format requirements apply when an attorney chooses to file a petition on *Petition for Writ of Habeas Corpus* (form MC-275). These amendments would specify that all petitions filed by attorneys, whether or not on form MC-275, must be produced on a computer or typewritten and must comply with the requirements of rule 8.40(b) and (c) relating to document covers and 8.204(a)(1)(A) relating to tables of contents and authorities. If an attorney filed a petition that was not on form MC-275, that petition would also have to comply with the remainder of rule 8.204(a) and (b), which address the content and form of briefs.

Finally, to make it easier for rule users to find the relevant provisions, this proposal would amend rule 8.384 to add new subdivision headings for the provisions addressing supporting documents, the number of copies of petitions that must be filed, and noncomplying petitions.

Previous Petitions Filed in Same Matter

Because the superior courts, the Courts of Appeal, and the Supreme Court all have concurrent jurisdiction to consider petitions for writs of habeas corpus, a petitioner may file a petition concerning the same judgment in any of these courts. It is helpful for a court considering a petition for habeas corpus to know about any prior petitions filed by

the same petitioner concerning the same judgment. Rule 8.384 already requires that attorneys attach copies of any previous petitions filed in any lower state court or any federal court and also inform the court if a petition was filed in the Supreme Court. Under the current rule, however, a Court of Appeal considering a petition will not receive information about any previous petitions that were filed in a Court of Appeal.

To provide the appellate courts with complete information about other petitions filed by the same petitioner concerning the same judgment, this proposal would expand the current rule to require that attorneys provide information about any such petitions filed in any state court. To avoid unnecessary copying, however, as with previous petitions filed in the Supreme Court, the proposal would allow the petitioner to cite to, rather than attach copies of, any previous petitions filed in the same Court of Appeal. To ensure that a court can easily locate any previous petition that is cited, this proposal would require that such petitions be identified by their case name and number.

Procedures Following Issuance of Order to Show Cause

Unlike rule 4.551 in the superior court rules relating to habeas corpus proceedings, the appellate rules do not currently address what happens after a court issues an order to show cause. This leaves an important gap in the appellate rules, making it difficult for litigants, particularly self-represented litigants, to understand these proceedings.

Proposed new rules 8.385 and 8.386 would fill this gap in the appellate rules. Proposed new rule 8.385(e) clarifies what happens when the court orders the return filed in the superior court and 8.385(f) clarifies what rules apply when the return is ordered to be filed in either the Supreme Court or Court of Appeal. Proposed new rule 8.386 lays out the procedures followed when the return is ordered to be filed in the Supreme Court or Court of Appeal. This 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 after issuance of an order to show cause. The language of new rule 8.386 is modeled primarily on language from rule 4.551 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: (1) the filing of a return and traverse; (2) the holding of an evidentiary hearing and the reviewing court's authority to appoint a referee to conduct this hearing; and (3) judicial notice and argument in the Supreme Court and Court of Appeal.

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 expanded to address decisions in habeas matters. The provisions on decisions, which cross-reference the rules on decisions in civil appeals in the Court of Appeal and on petitions for review in the Supreme Court, are modeled in part 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. However, to provide greater guidance to rule users, this proposal would place

the provisions covering distinct topics, such as filing, finality, and modification of decisions, in separate subdivisions.

Alternative Actions Considered

As discussed more fully in the section below on comments from interested parties, the committee considered and sought public comment on alternative approaches to several issues. These included whether the appellate rules should include provisions like those in the trial court rules concerning 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. As discussed below, the committee concluded that most of these provisions should be included in the proposal. The committee also considered and sought comment on whether the rules should address sanctions in habeas corpus proceedings. Based on the comments received, the committee concluded that this topic should not be addressed in the proposed rules.

Comments From Interested Parties

These proposed amendments were circulated as part of the spring 2008 comment cycle. Fourteen individuals or organizations submitted comments on this proposal. Seven commentators agreed with the proposal and eight agreed with the proposal if amended. The major substantive comments are discussed below. The full text of all the comments received and the committee's responses is attached beginning on page 19.

Application of Rules to Habeas Corpus Proceedings in Capital Cases

Two commentators addressed the application of these rules to habeas corpus proceedings in capital cases. One commentator expressed specific concern about applying the length limit on memoranda in capital cases. The other commentator generally suggested that the committee consult with the Supreme Court about the application of these rules in capital cases. In response to these comments, and after consulting with Supreme Court staff, the committee revised the proposal to clarify that the length limits on memoranda, returns, and traverses does not apply in habeas corpus proceedings in capital cases.

Actions a Court Might Take on a Petition

In the proposal that was circulated for public comment, rule 8.385 included a proposed new subdivision (a) that listed actions a court might take on a petition for writ of habeas corpus. One commentator expressed concern that this provision might be read as limiting the actions a court is permitted to take on a petition. Proposed subdivision (a) was meant only to give parties information about possible court actions, not to require that a court take any particular action or to prohibit a court from taking actions not specifically listed in the rule. In response to the concerns raised by this commentator, the committee concluded that the intended informational purpose could be better served by an advisory committee comment. The committee therefore revised its proposal to delete subdivision (a) from rule 8.385 and has, instead, added an advisory committee comment that provides

rule users with examples of actions commonly taken by the courts on petitions for writs of habeas corpus.

Inclusion of Provisions From the Trial Court Rules on Habeas Corpus Proceedings

As noted above, proposed new rule 8.386, which lays out the procedures followed when the return is ordered to be filed in the Supreme Court or Court of Appeal, is modeled primarily on language from rule 4.551. However, in the proposal that was circulated for public comment, the proposed new rules did 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. In its invitation to comment, the committee specifically solicited comments on whether it would be helpful to include provisions similar to those in 4.551(c), (d), and (e) in the proposed appellate rules.

Six commentators responded to this question. Five of these commentators supported including provisions similar to those in 4.551(c), (d), and (e) in the proposed rules to promote consistent interpretation of appellate rules and the trial court rules relating to habeas proceedings. One of these commentators noted that some judges, attorneys, and litigants may not be familiar with the standards applicable in habeas corpus proceedings and therefore, without guidance, may mistakenly think that the standards applicable to the more familiar writ proceedings (mandate, prohibition, certiorari) apply. The commentator expressed the view that spelling out the applicable standards in the appellate court habeas rules will give rule users a valuable, convenient resource and help avoid misinterpretations. Based on these comments, the committee has revised its proposal to include provisions in rule 8.386 similar to those in 4.551(d), and (e). Also in response to comments and to increase the consistency between the appellate and trial court rules, the committee has modified its proposal to include in 8.386(f) language similar to that in rule 4.551(f) concerning the court's consideration of the petition, the return, any denial, any affidavits or declarations under penalty of perjury, and matters of which judicial notice may be taken in determining whether an evidentiary hearing is necessary.

The committee decided, however, not to include in the proposed rule text a provision like that in rule 4.551(c) stating that in determining whether the petitioner has made a prima facie showing of entitlement to relief, a court takes the petitioner's factual allegations as true and makes a preliminary assessment regarding whether the petitioner would be entitled to relief if his or her factual allegations were proved. Instead, the committee has revised its proposal to include an advisory committee comment that points rule users to case law establishing requirements concerning factual allegations in petitions for writs of habeas corpus and also clarifies that if a petition complies with these requirements, the court will treat the factual allegations as true in determining whether the petitioner has made a prima facie showing of entitlement to relief. The committee was concerned that, if additional information was not provided about case law concerning the factual allegations in the petition, rule users might mistakenly assume that any factual allegation

in a petition, even one that was conclusory and for which the petitioner provided no factual support, would be taken by the court as true. The committee believes that this approach will prevent potential misunderstanding while still providing information about the treatment of factual allegations in a petition that is consistent with the information contained in the trial court rules.

The committee also decided not to include a sentence similar to that in rule 4.551(f) concerning the presence of the petitioner at an evidentiary hearing. Members of the committee noted that there are different security concerns and challenges for the appellate courts than for the superior courts in terms of bringing prisoners to hearings. The committee concluded that these issues needed to more be fully explored through the public comment process and committee discussion before any language concerning the petitioner's presence was recommended for adoption by the council.

Hearing and Decision in Habeas Proceedings

Several commentators pointed out that the committee had failed to appropriately address the finality of a decision in a habeas corpus proceeding in these proposed rules. In a separate report to the council, the committee is proposing that rule 8.264, a rule in the chapter on civil appeals that currently addresses finality in all Court of Appeal proceedings, be amended to eliminate references to finality in proceedings other than civil appeals. However, the committee failed to copy relevant provisions relating to finality in habeas proceedings from that rule into these proposed habeas rules. The committee has revised its proposal to correct this error by adding a proposed new subdivision (b) to rule 8.387. This provision does not establish any new substantive requirements; it simply copies relevant provisions on finality from rule 8.264.

The committee also made some other nonsubstantive changes to the proposal to make it clearer what procedures apply in those relatively rare situations in which Supreme Court or Court of Appeal orders the return filed in an appellate court, rather than in the superior court. The committee moved the provisions concerning issuance of an order to show cause out of proposed 8.386 and into rule 8.385, so that rule 8.386 as recommended addresses only proceedings when a return is ordered filed in a reviewing court. The committee also modified the heading of rule 8.386 to clarify its application.

In the proposal that was circulated for public comment, the subject of argument and decision would have been addressed in rule 8.386 through a general cross-reference to the series of Court of Appeal and Supreme Court rules that address these subjects in civil appeals and petitions for review, respectively. One commentator suggested an alternative approach in which specific topics covered by these cross-referenced rules, such as judicial notice and filing and modification of decisions, would be addressed in separate rule subdivisions. This commentator also suggested that the provisions relating to decisions should be placed in rule 8.387, rather than in rule 8.386. The committee agreed with both of these suggestions. Covering the various aspects of hearing and decision in separate rule subdivisions will make it easier for rule users to find relevant requirements. This approach is also consistent with other changes the committee has made to clarify

what is covered by cross-referenced rules. Placing the provisions relating to filing, modification, finality, and rehearing in a rule 8.387, rather than rule 8.386, makes sense since these provisions address decisions made both before and after an order to show cause is issued. Rule 8.386, in contrast, only addresses proceedings in which the court has issued an order to show cause.

Finally, based on input from committee members, the committee revised the proposed amendments to the rule on remittitur in habeas proceedings – rule 8.386(f) – to eliminate the provision addressing remittitur in the Supreme Court. The current rule on remittitur in Supreme Court proceedings – rule 8.540 – does not call for remittitur to be issued in original proceedings filed in the Supreme Court and the committee did not intend to modify that current rule.

Sanctions

The proposal that was circulated for public comment included a provision, proposed rule 8.346(h), addressing sanctions in habeas corpus proceedings. The committee received several comments expressing concern about this provision and suggesting that it be deleted from the proposal. Commentators noted that sanctions in habeas corpus proceedings are and should be rare and suggested that including this provision in the rules could encourage sanctions and discourage the filing of potentially meritorious petitions. Based on these comments, the committee has revised its proposal to delete this provision from the rule. Courts have, without any rule addressing this subject, exercised their authority to impose sanctions in habeas proceedings in the rare circumstances in which they have determined that this is appropriate. The committee concluded that adopting a rule addressing sanctions is therefore not necessary and that the benefits of adopting such a rule are outweighed by the potential that it could have the unintended chilling effect suggested by commentators.

Implementation Requirements and Costs

The committee does not believe that there will be appreciable costs associated with implementing these amendments. Clarifying the procedures for habeas corpus proceedings in the appellate courts should reduce questions and problems associated with these proceedings, and thus reduce costs for both litigants and the courts.

Attachments

Cal. Rules of Court, rules 8.380 and 8.384 are amended, rule 8.386 is amended and renumbered as rule 8.387, and rules 8.385 and 8.386 are adopted, 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~~ 8.486 that prescribe the form and content of a petition and require
17 the 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 ~~**(b) Record**~~

28
29 ~~Before ruling on the petition, the court may order the custodian of any relevant~~
30 ~~record to produce the record or a certified copy to be filed with the court.~~
31

32 ~~**(e) Informal response**~~

33
34 ~~(1) The court may request an informal written response from the respondent, the~~
35 ~~real party in interest, or an interested person. The court must send a copy of~~
36 ~~any request to the petitioner.~~
37

38 ~~(2) The response must be served and filed within 15 days or as the court specifies.~~
39

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

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

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

10
11 (A) The validity of judgments or orders of trial courts located outside the
12 district; or

13
14 (B) The conditions of confinement or conduct of correctional officials outside
15 the district.
16

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

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

25 **Advisory Committee Comment**
26

27 **Subdivision (d).** Except for subdivision (d)(2), revised rule 8.380(d) restates former section 6.5 of the
28 Standards of Judicial Administration. New subdivision (d)(2) is based on the California Supreme Court
29 decision in *In re Roberts* (2005) 36 Cal.4th 575, which provides that petitions for writ of habeas corpus
30 challenging denial or suitability for parole are first to be adjudicated in the trial court that rendered the
31 underlying judgment.
32
33

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

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

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

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

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

- 3 (1) A petition for habeas corpus filed by an attorney need not be filed on *Petition*
4 *for Writ of Habeas Corpus* (form MC-275), but must contain the information
5 requested in that form. All petitions filed by attorneys, whether or not on form
6 MC-275, must be either typewritten or produced on a computer, and must
7 comply with this rule and rules 8.40(b)–(c)–(d) relating to document covers;
8 and 8.204(a)(1)(A) relating to tables of contents and authorities. A petition that
9 is not on form MC-275 must also comply with the remainder of rule 8.204(a)
10 and 8.204(b), and 8.490(b)(6).
11
12 (2) Any memorandum accompanying the petition must comply with rule 8.204(a)–
13 (b). Except in habeas corpus proceedings related to sentences of death, any
14 memorandum must also comply with the length limits in rule 8.204(c).
15
16 ~~(6)~~(3) The petition and any memorandum must support any reference to a matter in
17 the supporting documents by a citation to its index tab and page.
18

19 **(b) Supporting documents**
20

- 21 ~~(3)~~(1) The petition must be accompanied by a copy of any petition—excluding
22 exhibits—pertaining to the same judgment and petitioner that was previously
23 filed in any lower-state court or any federal court. If such documents have
24 previously been filed in the same Court of Appeal where the petition is filed or
25 in the Supreme Court, and the petition need only so states and identifies the
26 documents by case name and number, copies of these documents need not be
27 included in the supporting documents.
28
29 ~~(4)~~(2) If the petition asserts a claim that was the subject of an evidentiary hearing,
30 the petition must be accompanied by a certified transcript of that hearing.
31
32 ~~(5)~~(3) Rule 8.486(c)(1) and (2) govern the form of any supporting documents
33 accompanying the petition must comply with rule 8.490(d).
34

35 **(c) Number of copies**
36

- 37 ~~(7)~~ If the petition is filed in the Supreme Court, the attorney must file the number of
38 copies of the petition and supporting documents required by rule 8.44(a). If the
39 petition is filed in the Court of Appeal, the attorney must file the number of copies
40 of the petition and supporting documents required by rule 8.44(b).
41

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) Record**
12

13 Before ruling on the petition, the court may order the custodian of any relevant
14 record to produce the record or a certified copy to be filed with the court.
15

16 **(b) Informal response**
17

- 18 (1) Before ruling on the petition, the court may request an informal written
19 response from the respondent, the real party in interest, or an interested person.
20 The court must send a copy of any request to the petitioner.
21
22 (2) The response must be served and filed within 15 days or as the court specifies.
23
24 (3) If a response is filed, the court must notify the petitioner that a reply may be
25 served and filed within 15 days or as the court specifies. The court may not
26 deny the petition until that time has expired.
27

28 **(c) Petition filed in an inappropriate court**
29

- 30 (1) A Court of Appeal may deny without prejudice a petition for writ of habeas
31 corpus that is based primarily on facts occurring outside the court’s appellate
32 district, including petitions that question:
33
34 (A) The validity of judgments or orders of trial courts located outside the
35 district; or
36
37 (B) The conditions of confinement or the conduct of correctional officials
38 outside the district.
39
40 (2) A Court of Appeal must deny without prejudice a petition for writ of habeas
41 corpus that challenges the denial of parole or the petitioner’s suitability for
42 parole if the issue was not first adjudicated by the trial court that rendered the
43 underlying judgment.

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

4 **(d) Order to show cause**
5

6 If the petitioner has made the required prima facie showing that he or she is entitled
7 to relief, the court must issue an order to show cause. An order to show cause does
8 not grant the relief sought in the petition.
9

10 **(e) Return to the superior court**
11

12 The reviewing court may order the respondent to file a return in the superior court.
13 The order vests jurisdiction over the cause in the superior court, which must proceed
14 under rule 4.551.
15

16 **(f) Return to the reviewing court**
17

18 If the return is ordered to be filed in the Supreme Court or the Court of Appeal, rule
19 8.386 applies and the court in which the return is ordered filed must appoint counsel
20 for any unrepresented petitioner who desires but cannot afford counsel.
21

22 **Advisory Committee Comment**
23

24 **Subdivision (c).** Except for subdivision ~~(d)(c)(2)~~, revised rule 8.380 8.385~~(d)(c)~~ restates former section
25 6.5 of the Standards of Judicial Administration. New sSubdivision ~~(d)(c)(2)~~ is based on the California
26 Supreme Court decision in *In re Roberts* (2005) 36 Cal.4th 575, which provides that petitions for writ of
27 habeas corpus challenging denial or suitability for parole are first to be adjudicated in the trial court that
28 rendered the underlying judgment.
29

30 **Subdivision (d).** Case law establishes the specificity of the factual allegations and support for these
31 allegations required in a petition for a writ of habeas corpus (see, e.g., *People v. Duvall* (1995) 9 Cal.4th
32 464, 474–475, and *Ex parte Swain* (1949) 34 Cal.2d 300, 303–304). A court evaluating whether a petition
33 meeting these requirements makes a prima facie showing asks whether, assuming the petition’s factual
34 allegations are true, the petitioner would be entitled to relief (*People v. Duvall*, supra).
35

36 Issuing an order to show cause is just one of the actions a court might take on a petition for a writ of
37 habeas corpus. Examples of other actions that a court might take include denying the petition summarily,
38 requesting an informal response from the respondent under (b), or denying the petition without prejudice
39 under (c) because it is filed in an inappropriate court.
40

1 **Rule 8.386. Proceedings if the return is ordered to be filed in the reviewing court**

2
3 **(a) Application**

4
5 This rule applies if the Supreme Court orders the return to be filed in the Supreme
6 Court or the Court of Appeal or if the Court of Appeal orders the return to be filed
7 in the Court of Appeal.

8
9 **(b) Serving and filing return**

10
11 (1) Unless the court orders otherwise, any return must be served and filed within
12 30 days after the court issues the order to show cause.

13
14 (2) If the return is filed in the Supreme Court, the attorney must file the number of
15 copies of the return and any supporting documents required by rule 8.44(a). If
16 the return is filed in the Court of Appeal, the attorney must file the number of
17 copies of the return and any supporting documents required by rule 8.44(b).
18 Two copies of the return and any supporting documents must be served on the
19 petitioner's counsel, and if the return is to the Court of Appeal and the
20 petitioner is not represented by privately retained counsel, one copy must be
21 served on the district appellate project.

22
23 **(c) Form and content of return**

24
25 (1) The return must be either typewritten or produced on a computer and must
26 comply with Penal Code section 1480 and rules 8.40(b)–(c) and 8.204(a)–(b).
27 Except in habeas corpus proceedings related to sentences of death, any return
28 must also comply with the length limits in rule 8.204(c).

29
30 (2) Rule 8.486(c)(1) and (2) govern the form of any supporting documents
31 accompanying the return. The return must support any reference to a matter in
32 the supporting documents by a citation to its index tab and page.

33
34 (3) Any material allegation of the petition not controverted by the return is deemed
35 admitted for purposes of the proceeding.

36
37 **(d) Traverse**

38
39 (1) Unless the court orders otherwise, within 30 days after the respondent files a
40 return, the petitioner may serve and file a traverse.

41
42 (2) Any traverse must be either typewritten or produced on a computer and must
43 comply with Penal Code section 1484 and rules 8.40(b)–(c) and 8.204(a)–(b).

1 Except in habeas corpus proceedings related to sentences of death, any traverse
2 must also comply with the length limits in rule 8.204(c).

3
4 (3) Any material allegation of the return not denied in the traverse is deemed
5 admitted for purposes of the proceeding.

6
7 (4) If the return is filed in the Supreme Court, the attorney must file the number of
8 copies of the traverse required by rule 8.44(a). If the return is filed in the Court
9 of Appeal, the attorney must file the number of copies of the traverse required
10 by rule 8.44(b).

11
12 **(e) Judicial notice**

13
14 Rule 8.252(a) governs judicial notice in the reviewing court.

15
16 **(f) Evidentiary hearing ordered by the reviewing court**

17
18 (1) An evidentiary hearing is required if, after considering the verified petition, the
19 return, any traverse, any affidavits or declarations under penalty of perjury, and
20 matters of which judicial notice may be taken, the court finds there is a
21 reasonable likelihood that the petitioner may be entitled to relief and the
22 petitioner's entitlement to relief depends on the resolution of an issue of fact.

23
24 (2) The court may appoint a referee to conduct the hearing and make
25 recommended findings of fact.

26
27 **(g) Oral argument and submission of the cause**

28
29 Unless the court orders otherwise:

30
31 (1) Rule 8.256 governs oral argument and submission of the cause in the Court of
32 Appeal.

33
34 (2) Rule 8.524 governs oral argument and submission of the cause in the Supreme
35 Court.

36
37
38 **Rule 8.386. 8.387. Remittitur Decision in habeas corpus proceedings**

39
40 **(a) Filing the decision**

41
42 (1) Rule 8.264(a) governs the filing of the decision in the Court of Appeal.
43

1 (2) Rule 8.532(a) governs the filing of the decision in the Supreme Court.

2
3 **(b) Finality of decision in the Court of Appeal**

4
5 (1) General finality period

6
7 Except as otherwise provided in this rule, a Court of Appeal decision in a
8 habeas corpus proceeding is final in that court 30 days after filing.

9
10 (2) Denial of a petition for writ of habeas corpus without issuance of an order to
11 show cause

12
13 (A) Except as provided in (B), a Court of Appeal decision denying a petition
14 for writ of habeas corpus without issuance of an order to show cause is
15 final in the Court of Appeal upon filing.

16
17 (B) A Court of Appeal decision denying a petition for writ of habeas corpus
18 without issuing an order to show cause is final in that court on the same
19 day that its decision in a related appeal is final if the two decisions are
20 filed on the same day. If the Court of Appeal orders rehearing of the
21 decision in the appeal, its decision denying the petition for writ of habeas
22 corpus is final when its decision on rehearing is final.

23
24 (3) Decision in a habeas corpus proceeding after issuance of an order to show
25 cause

26
27 (A) If necessary to prevent mootness or frustration of the relief granted or to
28 otherwise promote the interests of justice, a Court of Appeal may order
29 early finality in that court of a decision in a habeas corpus proceeding
30 after issuing an order to show cause. The decision may provide for
31 finality in that court on filing or within a stated period of less than 30
32 days.

33
34 (B) If a Court of Appeal certifies its opinion for publication or partial
35 publication after filing its decision and before its decision becomes final
36 in that court, the finality period runs from the filing date of the order for
37 publication.

38
39 **(c) Finality of decision in the Supreme Court**

40
41 Rule 8.532(b) governs finality of a decision in the Supreme Court.

42

1 **(d) Modification of decision**
2

3 (1) A reviewing court may modify a decision until the decision is final in that
4 court. If the clerk’s office is closed on the date of finality, the court may
5 modify the decision on the next day the clerk’s office is open.
6

7 (2) An order modifying an opinion must state whether it changes the appellate
8 judgment. A modification that does not change the appellate judgment does not
9 extend the finality date of the decision. If a modification changes the appellate
10 judgment, the finality period runs from the filing date of the modification
11 order.
12

13 **(e) Rehearing**
14

15 (1) Rule 8.268 governs rehearing in the Court of Appeal.
16

17 (2) Rule 8.536 governs rehearing in the Supreme Court.
18

19 **(f) Remittitur**
20

21 A Court of Appeal must issue a remittitur in a habeas corpus proceeding under this
22 chapter except when the court denies the petition without issuing an order to show
23 cause or orders the return filed in the superior court. Rule 8.272(b)–(d) governs
24 issuance of a remittitur by a Court of Appeal in habeas corpus proceedings.
25

26 **Advisory Committee Comment**
27

28 A party may seek review of a Court of Appeal decision in a habeas corpus proceeding by way of a
29 petition for review in the Supreme Court under rule 8.500.
30

SPR08-03

Appellate Procedure: Habeas Corpus Proceedings (amend rules 8.380 and 8.384; amend and renumber Cal. Rules of Court, rule 8.386 as rule 8.387; and adopt rules 8.385 and 8.386)

All comments are verbatim unless indicated by an asterisk (*).

List of All Commentators, Overall Positions on the Proposal, and General Comments				
	Commentator	Position	Comment	Committee Response
1.	California District Attorneys Association W. Scott Thorpe Chief Executive Officer Sacramento	AM	See comments on specific provisions below.	
2.	Court of Appeal, Second Appellate District, Division Two Katherine Lynn Managing Attorney	AM	See comments on specific provisions below.	
3.	First District Appellate Project Matthew Zwerling Executive Director	AM	See comments on specific provisions below.	
4.	Dennis A. Fischer Law Offices of Dennis A. Fischer Santa Monica	AM	See comments on specific provisions below.	
5.	Los Angeles County District Attorney's Office Jennifer C. McDonald Deputy District Attorney	AM	See comments on specific provisions below.	
6.	Hon. Judith D. McConnell Administrative Presiding Justice Court of Appeal, Fourth Appellate District, Division One	AM	SPR08-03 proposes in part to reorganize the appellate rules relating to habeas petitions in a more logical order and outline the procedures that the court follows after a petition is filed and the procedures	

SPR08-03**Appellate Procedure: Habeas Corpus Proceedings** (amend rules 8.380 and 8.384; amend and renumber Cal. Rules of Court, rule 8.386 as rule 8.387; and adopt rules 8.385 and 8.386)

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List of All Commentators, Overall Positions on the Proposal, and General Comments				
	Commentator	Position	Comment	Committee Response
	San Diego		<p>that are followed if the court issues an order to show cause.¹</p> <p>This was truly a challenging task, given the varying processes and practices throughout the Appellate Districts. Consequently and perhaps inevitably, the proposed rules omit certain information and may leave the reader with the wrong impression.</p> <p>See comments on specific provisions below.</p>	
7.	Orange County Bar Association Cathrine Castaldi, President Newport Beach	A	No narrative comments submitted.	No response required.
8.	San Diego County Bar Association Appellate Court Committee Edward I. Silverman, Chair	AM	<p>We have several comments on the new rules governing habeas corpus in the reviewing court.</p> <p>See comments on specific provisions below.</p>	
9.	San Diego County District Attorney Craig Fisher Deputy District Attorney	AM	See comments on specific provisions below.	
10.	State Bar of California Committee on Appellate Courts Saul Bercovitch San Francisco	A	See comments on specific provisions below.	

¹ I note that throughout SPR08-03, proposed new rules fail to cite proposed new rule numbering and lettering of SPR08-02. For example, proposed rules 8.384(b)(3) and 8.386(d)(2) should refer to 8.490(e) rather than (d) and proposed rule 8.386(h) should refer to 8.492 instead of rule 8.490(n).

SPR08-03**Appellate Procedure: Habeas Corpus Proceedings** (amend rules 8.380 and 8.384; amend and renumber Cal. Rules of Court, rule 8.386 as rule 8.387; and adopt rules 8.385 and 8.386)

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List of All Commentators, Overall Positions on the Proposal, and General Comments				
	Commentator	Position	Comment	Committee Response
11.	Superior Court of Los Angeles County	A	No narrative comments submitted.	No response required.
12.	Superior Court of Riverside County David Gutknecht Principal Management Analyst	A	Reorganizing the rules so that the provisions are listed in a more logical order should make the rules clearer and easier to understand. See comments on specific provisions below.	
13.	Superior Court of San Diego County Michael M. Roddy Executive Officer	A	No narrative comments submitted.	No response required.
14.	Superior Court of Ventura County, Self-Help Legal Access Center Tina Rasnow Senior Attorney/Coordinator	A	To the extent the changes make it easier for self-represented litigants to navigate, this is a good thing.	No response required.

SPR08-03**Appellate Procedure: Habeas Corpus Proceedings** (amend rules 8.380 and 8.384; amend and renumber Cal. Rules of Court, rule 8.386 as rule 8.387; and adopt rules 8.385 and 8.386)

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Application of proposed rules to capital cases		
Commentator	Comment	Committee Response
Dennis A. Fischer Law Offices of Dennis A. Fischer Santa Monica	Changes of a substantive nature, in particular prescribing limits on length of memoranda as if one size fits a habeas petition with constitutional issues in a life or even death case as if it was a one issue CCP §170.6 pretrial mandate petition is highly objectionable for reasons too numerous and consequential to fit in this space. I shall request to appear and argue those points before the Judicial Council if that aspect of the amendments is not deleted.	In response to this comment and the comment of the San Diego County Bar Association Appellate Court Committee, below, the Appellate Advisory Committee modified its proposal to clarify that the page limits on memoranda, returns, and traverses does not apply in capital cases.
San Diego County Bar Association Appellate Court Committee Edward I. Silverman, Chair	<i>Death penalty cases:</i> The Supreme Court may have separate practices for capital habeas corpus proceedings. These are not currently specified in the rules. We suggest the committee inquire of the Supreme Court whether it wishes to add such provisions to the rules. Also, if the practices are different, the habeas corpus rules here should specify these are for “non-capital cases.”	The committee notes that many of the rules specify that the procedures outlined apply <i>unless otherwise ordered by the court</i> . This gives the court flexibility to tailor the procedures when needed to fit particular cases. In response to this comment and the comment of Mr. Dennis Fischer above, however, the committee has modified its proposal to clarify that the page limits on memoranda, returns, and traverses does not apply in capital cases.

SPR08-03

Appellate Procedure: Habeas Corpus Proceedings (amend rules 8.380 and 8.384; amend and renumber Cal. Rules of Court, rule 8.386 as rule 8.387; and adopt rules 8.385 and 8.386)

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Rule 8.384 – Form and content of petitions filed by attorneys

Commentator	Comment	Committee Response
<p>Court of Appeal, Second Appellate District, Division Two Katherine Lynn Managing Attorney</p>	<p>Rule 8.384 (Petition for writ of habeas corpus filed by an attorney) There is a redundant reference to the number of copies of supporting documents that must be filed. Subdivision (c) of the proposed rule, a separate provision entitled “Number of Copies,” specifically addresses the number of copies to be filed and refers the reader to rule 8.44. Subdivision (b)(3) of the proposed rule, under “Supporting documents,” refers the reader to rule 8.490(d) [covering other types of writs], which in turn, in (d)(3), refers the reader to rule 8.44.</p> <p>(a) It is recommended that proposed rule 8.384(b)(3) be modified to state “Any supporting documents accompanying the petition must comply with rule 8.486(c)(1-2).” This will eliminate the reference to former rule 8.490(d)(3) [proposed new rule 8.486(c)(3)], which is redundant given the separate subdivision in the proposed rule that expressly governs the number of copies of supporting documents to be filed.</p> <p>(b) In SPR08-02, the contents of current rule 8.490(d) have been placed into new rule 8.486(c) (“Form of supporting documents” for writs of mandate, certiorari and prohibition). Assuming the amendments set forth in SPR08-02 are adopted, references to rule 8.490 in proposed rule 8.384 should be renumbered as rule 8.486(c).</p> <p>Rule 8.384(a)(1) (Form and content of petition and memorandum): (a) Delete hyphen after 8.204(a) in the last line.</p> <p>(b) It is suggested that this rule require compliance with rule 8.40(a) [document must be produced on a computer or typewritten]</p>	<p>The commentator is correct that both subdivision (c) and subdivision (b)(3), through its cross-reference to 8.490(d), address the number of copies of supporting documents that must be provided and that the cross-references to rule 8.490 need to be updated to reflect the committee’s proposal to break rule 8.490 up into several shorter rules. The committee generally agrees with the revisions suggested by the commentator, but to provide additional guidance about the nature of the cross-referenced provisions, the committee has revised its proposed amendment to rule 8.384(b)(3) to provide that rule 8.486(c)(1) and (2) govern the format of any supporting documents accompanying the petition.</p> <p>The committee agrees with this suggestion and has corrected this error.</p> <p>The committee believes that petitions filed by attorneys, whether or not on form MC-275, should be</p>

SPR08-03**Appellate Procedure: Habeas Corpus Proceedings** (amend rules 8.380 and 8.384; amend and renumber Cal. Rules of Court, rule 8.386 as rule 8.387; and adopt rules 8.385 and 8.386)

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Rule 8.384 – Form and content of petitions filed by attorneys

Commentator	Comment	Committee Response
	for petitions by an attorney not filed on form MC-275. (The proposed rule already requires compliance with rule 8.40(b)-(c) [cover color & information].)	produced on a computer or typewritten. Rather than cross-referencing to rule 8.40(a), which also requires compliance with rule 8.204(b), however, the committee has modified its proposal to include in the text of the requirement that the petition be either produced on a computer or typewritten. In addition, to make the remaining cross-references easier to understand, the committee has added language describing what is covered by these cross-referenced provisions.
Superior Court of Riverside County David Gutknecht Principal Management Analyst	The clarification 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 elimination of the cross-reference to Rule 8.490(b)(6) should streamline the process.	No response required.

SPR08-03**Appellate Procedure: Habeas Corpus Proceedings** (amend rules 8.380 and 8.384; amend and renumber Cal. Rules of Court, rule 8.386 as rule 8.387; and adopt rules 8.385 and 8.386)

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Rule 8.385(a) [as circulated] – Actions on Petitions

Commentator	Comment	Committee Response
Hon. Judith D. McConnell Administrative Presiding Justice Court of Appeal, Fourth Appellate District, Division One San Diego	By way of example, proposed rule 8.385(a) states that the court may take only one of the following actions when a petition for writ of habeas corpus is filed—deny the petition summarily, deny the petition without prejudice, request an informal response or issue an order to show cause. This language suggests that the court may issue an OSC without first requesting an informal response, which this Court by practice never does. The rule also provides for summary denials when this Court routinely issues long-form denials. Granted, rule 8.385(a) is permissive in nature and not intended to be limiting; however, it nevertheless permits the inference that the reviewing court will take no other action than that described.	In response to this comment, the committee has deleted proposed subdivision (a) from rule 8.395 and has, instead, added an advisory committee comment that provides rule users with examples of actions commonly taken by the courts on petitions for writs of habeas corpus. Proposed subdivision (a) was meant only to give parties information about possible court actions, not to require that a court take any particular action. The committee concluded that this intended purpose could be better served by an advisory committee comment.

SPR08-03

Appellate Procedure: Habeas Corpus Proceedings (amend rules 8.380 and 8.384; amend and renumber Cal. Rules of Court, rule 8.386 as rule 8.387; and adopt rules 8.385 and 8.386)

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Rule 8.835(d) [circulated as Rule 8.385(e)] –Orders to show cause		
Commentator	Comment	Committee Response
Court of Appeal, Second Appellate District, Division Two Katherine Lynn Managing Attorney	<p>In response to the request for comment by the committee, it is recommended that, for the sake of consistency, the contents of the analogous rules governing habeas corpus proceedings in the superior court, rule 4.551, be added to the rules governing habeas corpus proceedings in the reviewing court.</p> <p>The following should therefore be added to rule 8.385(e)(1): “In doing so, the court takes petitioner’s factual allegations as true and makes a preliminary assessment regarding whether the petitioner would be entitled to relief if his or her factual allegations were proved. If so, the court must issue an order to show cause.” (See rule 4.551(c)(1).)</p>	<p>The committee considered this suggestion but ultimately decided not to include the suggested language in the text of the proposed rule. Instead, the committee is recommending that this issue be addressed in an advisory committee comment. The committee was concerned that rule users might mistakenly assume that, under such a rule provision, any factual allegation made in a petition, even one that was conclusory and for which the petitioner provided no factual support, would be taken by the court as true. The committee believed that it was important to alert rule users to the fact that there is case law that establishes requirements concerning the specificity of factual allegations in petitions for writs of habeas corpus and the factual support that must be provided for these allegations.</p> <p>The committee is recommending adding an advisory committee comment that points rule users to case law establishing requirements concerning factual allegations in petitions for writs of habeas corpus and also clarifies that if a petition complies with these requirements, the court will treat the factual allegations as true in determining whether the petitioner has made a prima facie showing of entitlement to relief. The committee believes that this approach will prevent potential misunderstanding while still providing information about the treatment of factual allegations in a petition that is consistent with the information contained in the trial court rules.</p>

SPR08-03

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Rule 8.835(d) [circulated as Rule 8.385(e)] –Orders to show cause		
Commentator	Comment	Committee Response
<p>First District Appellate Project Matthew Zwerling Executive Director San Francisco</p>	<p>Incorporation of Prima Facie Case Standard in Habeas Corpus Cases. Proposed rule 8.385 has as its purpose to provide an appellate analog to rule 4.551 which addresses post-filing procedures (informal response, OSC’s, etc.) in the superior court rule. The committee has indicated that it would particularly appreciate comments on whether it would be helpful to add a sentence to rule 8.385(d)(1) paralleling rule 4.551(c)(1). See SPR08-03, p. 3. Rule 4.551(c)(1) clarifies <i>how</i> the court is to make the prima facie case determination: “In doing so, the court takes petitioner’s factual allegations as true and makes a preliminary assessment whether the petitioner would be entitled to relief if his or her factual allegations were proved.” Rule 4.551(c)(1). (See <i>People v. Romero</i> (1994) 8 Cal.4th 728, 737; <i>People v. Duvall</i> (1995) 9 Cal.4th 464, 474-475.) Precisely because rule 4.551(c)(1) does explicitly direct superior courts to take a petition’s allegations as true at this preliminary stage, the conspicuous omission of a similar provision from rule 8.385(d)(1) could inadvertently suggest that this requirement does not apply to review of appellate habeas petitions. Accordingly, we strongly recommend that the rules be made consistent, either by incorporating the prima-facie-case standard in both rules or by omitting it from both rules.</p> <p>On one hand, an explanation of the prima facie case standard would provide valuable guidance to both courts and practitioners. It has become common for both petitioners and respondents to file substantial appellate briefs, sometimes accompanied by additional exhibits, during the “informal” briefing on a habeas petition. Due to their scale and thoroughness, it is easy to lose sight of the fact that these “informal” submissions are intended to serve only as a preliminary screening mechanism to weed out patently meritless petitions – i.e., claims which would not provide a basis for relief</p>	<p>Please see the committee’s response to the comments of the Court of Appeal, Second Appellate District, Division Two, above. As suggested by this commentator, the committee recommends that the prima facie standard be addressed in an advisory committee comment, rather than in the rule text.</p>

SPR08-03

Appellate Procedure: Habeas Corpus Proceedings (amend rules 8.380 and 8.384; amend and renumber Cal. Rules of Court, rule 8.386 as rule 8.387; and adopt rules 8.385 and 8.386)

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Rule 8.835(d) [circulated as Rule 8.385(e)] –Orders to show cause		
Commentator	Comment	Committee Response
	<p>even if the petitioner’s allegations were successfully proven. “Informal” briefing is not a substitute for the more rigorous pleading and issue-framing process, required for those petitions which do appear to raise substantial allegations which could potentially support relief. On the other hand, we also recognize that substantive legal standards are not typically stated in the rules. Accordingly, to balance these concerns we recommend that the committee at least include the prima facie standard in an Advisory Committee Comment, with citations to <i>Duvall</i> and <i>Romero</i>.</p> <p>Rephrasing the language of proposed rule 8.385(e): Proposed rule 8.385 (e) provides:</p> <p>(e) Order to show cause (1) If the petition has made a prima facie showing that he or she is entitled to relief, the court must issue an order to show cause. (2) An order to show cause is a determination that the petition has made a showing that he or she may be entitled to relief. It does not grant the relief sought in the petition.</p> <p>We suggest that the subsections (1) and (2) be combined. The statement in (1) (“is entitled to relief”) is accurate and precise. The first sentence of (2) seems to be an awkward rephrasing of the first clause of (1). If so, it’s redundant, but the difference in language is confusing. If not, it seems to contradict the statement in subsection (1). We suggest the following change to the rule:</p> <p>(e) Order to show cause If the petition has made a prima facie showing that he or she is entitled to relief, the court must issue an order to show cause. The order to show cause does not grant the relief sought in the petition.</p>	<p>The committee agrees with these comments and has revised its proposal to incorporate the changes suggested by the commentator.</p>

SPR08-03

Appellate Procedure: Habeas Corpus Proceedings (amend rules 8.380 and 8.384; amend and renumber Cal. Rules of Court, rule 8.386 as rule 8.387; and adopt rules 8.385 and 8.386)

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Rule 8.835(d) [circulated as Rule 8.385(e)] –Orders to show cause		
Commentator	Comment	Committee Response
San Diego County Bar Association Appellate Court Committee Edward I. Silverman, Chair	<p><i>Legal standards:</i> The invitation to comment solicited input on the desirability of including certain standards presently set forth in rule 4.551(c), (d), and (e)—namely, the rules by which courts must judge the sufficiency of a petition and the need to controvert factual allegations to avoid admitting them. We support the inclusion of these provisions. Judges, attorneys, and litigants not readily familiar with these standards may mistakenly think they are identical to those for prerogative writs (mandate, prohibition, certiorari). Spelling them out here gives users a valuable, convenient resource, obviating the need to research case and statutory law and helping to avoid misinterpretations. Accordingly, we suggest:</p> <p><u>Rule 8.385(e) (order to show cause).</u> Add a second sentence to subsection (1), based on rule 4.551(c)(1): “In reviewing the petition, the court takes the factual allegations of the petitioner as true and makes a preliminary determination whether the petitioner would be entitled to relief if his or her factual allegations were proved.”</p>	Please see the committee’s response to the comments of Court of Appeal, Second Appellate District, Division Two, above. The committee recommends that the prima facie standard be addressed in an advisory committee comment, rather than in the rule text.
San Diego County District Attorney Craig Fisher Deputy District Attorney	The committee solicited comments on whether to include additional provisions similar to those in rule 4.551(c), (d) & (e) in new rule 8.386. We do not believe such additional provisions are necessary or appropriate. We believe the appellate courts are well aware of the standards of review related to habeas petitions. When reviewing such petitions the appellate courts should have flexibility to look beyond the four corners of the petition and its allegation (such as to the entire available record, including any previous appeal record) when determining whether a habeas petitioner’s allegation have credibility and/or substantive merit worthy of granting an OSC or requiring an evidentiary hearing.	Based on the weight of other comments, in order to promote consistent interpretation of these rules and the trial court rules, the committee has revised its proposal to include an advisory committee comment that addresses the prima facie standard.

SPR08-03

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Rule 8.835(d) [circulated as Rule 8.385(e)] –Orders to show cause		
Commentator	Comment	Committee Response
State Bar of California Committee on Appellate Courts Saul Bercovitch San Francisco	<p>It was noted in the invitation to comment that in the proposed appellate versions of the habeas procedural rules, there is currently no mention of treatment of factual allegations, as found in subdivisions (c), (d), and (e) of Rule 4.551. Comments were specifically invited on whether such additions should be made to the proposed new rule 8.386 so that Title 8 rules would parallel the Title 4 rules. The Committee recommends that such additions be made to make the rules at all levels consistent, as follows:</p> <ul style="list-style-type: none"> • The second sentence of Rule 4.551(c)(1) should be added to new Rule 8.385(e)(1). 	<p>Please see the committee’s response to the comments of Court of Appeal, Second Appellate District, Division Two, above. The committee recommends that the prima facie standard be addressed in an advisory committee comment, rather than in the rule text.</p>

SPR08-03

Appellate Procedure: Habeas Corpus Proceedings (amend rules 8.380 and 8.384; amend and renumber Cal. Rules of Court, rule 8.386 as rule 8.387; and adopt rules 8.385 and 8.386)

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Rule 8.836 – General Comments		
Commentator	Comment	Committee Response
Hon. Judith D. McConnell Administrative Presiding Justice Court of Appeal, Fourth Appellate District, Division One San Diego	Rule 8.386 I have the same concerns about proposed rule 8.386 as I do about proposed rule 8.385—namely, concerns about the wisdom of a rule that purports to cover different procedures of the districts and Supreme Court in habeas proceedings and the potential danger of prohibiting a practice that is not specifically mentioned. Proposed rule 8.386 omits reference to practices of this court including the following: we appoint counsel for all unrepresented petitioners upon issuance of an OSC; we give appointed counsel an opportunity to supplement the petition before the return is filed; we let the parties stand on their informal pleadings rather than file a formal return; and, in some instances, if the petitioner’s entitlement to relief involves the resolution of an issue of fact, we order the return filed in superior court as opposed to appointing a referee to conduct an evidentiary hearing (see proposed rule 8.386(a) and (f)). ² Proposed rule 8.386 as it is presently drafted may be interpreted to prohibit these practices.	Some of the procedures noted by the commentator are provided for in proposed rules. For example, 8.385(e) provides for the court to order the return to be filed in the superior court and 8.385(f) provides that if the return is to be filed in the Supreme Court or Court of Appeal, the court must appoint counsel for any unrepresented petitioner who desires but cannot afford counsel. Rule 8.386(b) also builds in flexibility for local court practices by providing that “unless the court orders otherwise, any return must be served and filed . . .” Under their general rule-making authority, the Courts of Appeal can also adopt supplemental local rules that address aspects of procedures not covered by the proposed rules of court.
Superior Court of Riverside County David Gutknecht Principal Management Analyst	Proposed Rule 8.386 should be adopted as the rule simply reflects procedures currently in use in the Supreme Court and Court of Appeal in habeas proceedings.	No response required.

² The Appellate Advisory Committee notes that proposed rule 8.386 “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.”

SPR08-03

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Rule 8.386(b)–(d) [8.386(c)–(e) as circulated] – Form and content of return and traverse		
Commentator	Comment	Committee Response
<p>Court of Appeal, Second Appellate District, Division Two Katherine Lynn Managing Attorney</p>	<p>Rule 8.386(c), (d) (Return in the reviewing court) As was the case in proposed rule 3.384, there is a redundant reference to the number of copies of supporting documents that must be filed. Subdivision (c)(2) of proposed rule 8.386 specifically addresses the number of copies of the return and any supporting documents to be filed, and refers the reader to rule 8.44. Subdivision (d)(2) of the proposed rule, under “Form of return in reviewing court,” addressing supporting documents accompanying the return, refers the reader to rule 8.490(d), which in turn, in subdivision (d)(3), refers the reader to rule 8.44.</p> <p>(a) It is recommended that proposed rule 8.386(d)(2) be modified to state “Any supporting documents accompanying the return must comply with rule 8.486(c)(1)-(2). . . .” This will eliminate the reference to former rule 8.490(d)(3) [proposed new rule 8.486(c)(3)], which is redundant given the separate provision in the proposed rule expressly governing the number of copies of supporting documents to be filed.</p> <p>(b) In SPR08-02, the contents of current rule 8.490(d) have been placed into new rule 8.486(c). Assuming the proposed amendments in SPR08-02 are adopted, references to rule 8.490 in proposed rule 8.386 should be renumbered as rule 8.486(c).</p> <p>Rule 8.386(d)(1) (Form of return in reviewing court); 8.386(e)(2) (Traverse in the reviewing court) It is suggested that this rule require compliance with rule 8.40(a) [document must be produced on a computer or typewritten]. (The proposed rule already requires compliance with rule 8.40(b)-(c) [cover color & information].) These documents would not be prepared by a defendant in pro per: the return would be prepared by</p>	<p>As with rule 8.386, the commentator is correct that both subdivision (b)(2) [(c)(2) as circulated] and subdivision (c)(c) [(d)(2) as circulated], through its cross-reference to 8.490(d), address the number of copies of supporting documents that must be provided and that the cross-references to rule 8.490 need to be updated to reflect the committee’s proposal to break rule 8.490 up into several shorter rules. The committee generally agrees with the revisions suggested by the commentator, but to provide additional guidance about the nature of the cross-referenced provisions, the committee has revised its proposed amendment to rule 8.386(d)(2) to provide that rule 8.486(c)(1) and (2) govern the format of any supporting documents accompanying the petition.</p> <p>The committee agrees with this suggestion. Rather than cross-referencing to rule 8.40(a), which also requires compliance with rule 8.204(b), however, the committee has modified its proposal to include in the text of the rule the substance of the</p>

SPR08-03

Appellate Procedure: Habeas Corpus Proceedings (amend rules 8.380 and 8.384; amend and renumber Cal. Rules of Court, rule 8.386 as rule 8.387; and adopt rules 8.385 and 8.386)

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Rule 8.386(b)–(d) [8.386(c)–(e) as circulated] – Form and content of return and traverse		
Commentator	Comment	Committee Response
	a governmental entity, and if an OSC issued, counsel will have been appointed before the traverse is filed.	requirement that the return and traverse be either produced on a computer or typewritten.
Los Angeles County District Attorney’s Office Jennifer C. McDonald Deputy District Attorney	Addressing the word/page limit set forth in Rule 8.386, subdivision (d)(1), given the nature of many Habeas Corpus proceedings, a thorough return may greatly exceed 14,000 words. A comment in the use notes clarifying whether it is the judge to whom the return is to be filed who may grant leave to file in excess of 14,000 words, or if the application must be to the “presiding justice” as stated in Rule 8.204, subdivision (c)(5), is warranted.	Rule 8.386(c)(1) [(d)(1) as circulated] makes rule 8.204(c) applicable to returns. Under 8.204(c)(5), on application, the presiding justice can permit the filing of a document that exceeds the general length limits.

SPR08-03

Appellate Procedure: Habeas Corpus Proceedings (amend rules 8.380 and 8.384; amend and renumber Cal. Rules of Court, rule 8.386 as rule 8.387; and adopt rules 8.385 and 8.386)

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Rule 8.386(b) – (d) [8.386(c) – (e) as circulated] – Effect of return and traverse on factual allegations		
Commentator	Comment	Committee Response
<p>Court of Appeal, Second Appellate District, Division Two Katherine Lynn Managing Attorney</p>	<p>Rule 8.386 (Proceedings if the court issues an order to show cause) In response to the request for comment by the committee, it is recommended that, for the sake of consistency, the contents of the analogous rules governing habeas corpus proceedings in the superior court, rule 4.551, be added to the rules governing habeas corpus proceedings in the reviewing court.</p> <p>The following should therefore be added to rule 8.386(c)(1): “Any material allegation of the petition not controverted by the return is deemed admitted for purposes of the proceeding.” (See rule 4.551(d).)</p> <p>The following should therefore be added to rule 8.386(e)(1): “Any material allegation of the return not denied is deemed admitted for purposes of the proceeding.” (See rule 4.551(e).)</p>	<p>Based on this and other comments, in order to promote consistent interpretation of these rules and the trial court rules relating to habeas proceedings, the committee has revised its proposal to include provisions similar to 4.551(d) and (e) relating to how the court should view the factual allegations in the petition and return in proposed rule 8.386. However, the committee is recommending that the language from 4.551(d) be placed in a 8.386(c), rather than in (b) [(c) as circulated for comment].</p>
<p>San Diego County Bar Association Appellate Court Committee Edward I. Silverman, Chair</p>	<p><i>Legal standards:</i> The invitation to comment solicited input on the desirability of including certain standards presently set forth in rule 4.551(c), (d), and (e)—namely, the rules by which courts must judge the sufficiency of a petition and the need to controvert factual allegations to avoid admitting them. We support the inclusion of these provisions. Judges, attorneys, and litigants not readily familiar with these standards may mistakenly think they are identical to those for prerogative writs (mandate, prohibition, certiorari). Spelling them out here gives users a valuable, convenient resource, obviating the need to research case and statutory law and helping to avoid misinterpretations. Accordingly, we suggest:</p>	<p>Please see the committee’s response to the comments of Court of Appeal, Second Appellate District, Division Two, above.</p>

SPR08-03

Appellate Procedure: Habeas Corpus Proceedings (amend rules 8.380 and 8.384; amend and renumber Cal. Rules of Court, rule 8.386 as rule 8.387; and adopt rules 8.385 and 8.386)

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Rule 8.386(b) – (d) [8.386(c) – (e) as circulated] – Effect of return and traverse on factual allegations		
Commentator	Comment	Committee Response
	<p><u>Rule 8.386(c) (return)</u>. Add new subsection (3), based on rule 4.551(d): “Any material factual allegation of the petition not controverted by the petition is deemed admitted for purposes of the proceeding.”</p> <p><u>Rule 8.386(e) (traverse)</u>. Add new subdivision (3), based on rule 4.551(e): “Any material factual allegation of the return not controverted by the petition is deemed admitted for purposes of the proceeding.”</p>	
San Diego County District Attorney Craig Fisher Deputy District Attorney	The committee solicited comments on whether to include additional provisions similar to those in rule 4.551(c), (d) & (e) in new rule 8.386. We do not believe such additional provisions are necessary or appropriate. We believe the appellate courts are well aware of the standards of review related to habeas petitions. When reviewing such petitions the appellate courts should have flexibility to look beyond the four corners of the petition and its allegation (such as to the entire available record, including any previous appeal record) when determining whether a habeas petitioner’s allegation have credibility and/or substantive merit worthy of granting an OSC or requiring an evidentiary hearing.	Based on the weight of other comments, in order to promote consistent interpretation of these rules and the trial court rules, the committee has revised its proposal to include provisions similar to 4.551(d) and (e) relating to how the court should view the factual allegations in the petition and return in rule 8.386.
State Bar of California Committee on Appellate Courts Saul Bercovitch San Francisco	It was noted in the invitation to comment that in the proposed appellate versions of the habeas procedural rules, there is currently no mention of treatment of factual allegations, as found in subdivisions (c), (d), and (e) of Rule 4.551. Comments were specifically invited on whether such additions should be made to the proposed new rule 8.386 so that Title 8 rules would parallel the Title 4 rules. The Committee recommends that such additions be made to make the rules at all levels consistent, as follows:	Please see the committee’s response to the comments of Court of Appeal, Second Appellate District, Division Two, above.

SPR08-03

Appellate Procedure: Habeas Corpus Proceedings (amend rules 8.380 and 8.384; amend and renumber Cal. Rules of Court, rule 8.386 as rule 8.387; and adopt rules 8.385 and 8.386)

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Rule 8.386(b) – (d) [8.386(c) – (e) as circulated] – Effect of return and traverse on factual allegations		
Commentator	Comment	Committee Response
	<ul style="list-style-type: none">• The second sentence of Rule 4.551(d) should be added to new Rule 8.386(c)(1).• The second sentence of Rule 4.551(e) should be added to new Rule 8.386(e)(1) as the second sentence.	

SPR08-03

Appellate Procedure: Habeas Corpus Proceedings (amend rules 8.380 and 8.384; amend and renumber Cal. Rules of Court, rule 8.386 as rule 8.387; and adopt rules 8.385 and 8.386)

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Rule 8.386(f) – Evidentiary hearings		
Commentator	Comment	Committee Response
<p>California District Attorneys Association W. Scott Thorpe Chief Executive Officer Sacramento</p>	<p>Subdivision (f) of the proposed new Rule 8.386 states the conditions under which an evidentiary hearing in the reviewing court will be required: “An evidentiary hearing is required if the petitioner’s entitlement to relief depends on the resolution of an issue of fact. The court may appoint a referee to conduct the hearing and make recommended findings of fact.”</p> <p>This is unlike the procedure set forth in existing Rule. 4.551, which specifies that such a hearing is only required if:</p> <p>“[A]fter considering the verified petition, the return, any denial, any affidavits or declarations under penalty of perjury, and matters of which judicial notice may be taken, the court finds there is a reasonable likelihood that the petitioner may be entitled to relief and the petitioner’s entitlement to relief depends on the resolution of an issue of fact.” [Rule 4.551(f).]</p> <p>Thus the new rule substantially changes the standard for when an evidentiary hearing is to be held by eliminating the requirement that the court first determine whether there is a reasonable likelihood that the petitioner may be entitled to relief. Often asserted issues of fact can be resolved based on the court’s review of the documents, persuading the court that there is no reasonable likelihood the facts are as the petitioner asserts. The new rule seems to require a hearing any time a “fact”—as opposed to a pure question of law—is involved, no matter how unlikely the asserted fact appears.</p> <p>The Judicial Council’s “Discussion” to the proposed rule change notes:</p> <p>“[R]ule 8.386 does <u>not</u> include provisions like those in 4.551(c), (d),</p>	<p>Based on this and other comments, to promote consistent interpretation of these rules and the trial court rules relating to habeas corpus proceedings, the committee has modified its proposal to include in 8.386(f) language similar to that in rule 4.551(f) concerning the court’s consideration of the petition, the return, any denial, any affidavits or declarations under penalty of perjury, and matters of which judicial notice may be taken in determining whether an evidentiary hearing is necessary.</p>

SPR08-03

Appellate Procedure: Habeas Corpus Proceedings (amend rules 8.380 and 8.384; amend and renumber Cal. Rules of Court, rule 8.386 as rule 8.387; and adopt rules 8.385 and 8.386)

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Rule 8.386(f) – Evidentiary hearings

Commentator	Comment	Committee Response
	<p>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.” [Emphasis added.]</p> <p>CDAА believes such provisions are <u>essential</u> to prevent unnecessary evidentiary hearings based on the assertion of unreasonable factual scenarios by petitioners. An evidentiary hearing is unnecessary if consideration of the pleadings and matters of record persuade the court the contentions in the petition lack merit. [<i>People v. Romero</i> (1994) 8 Cal.4th 728,739–740; <i>see e.g., People v. Karis</i> (1988) 46 Cal.3d 612, 653–657; Cal. Rules of Court, Rule 4.551, subd. (f).] Subdivision (f) of proposed Rule 8.386, as currently written, will not prevent unnecessary hearings. The proposed rule should be amended to provide clearly and unambiguously for review procedures akin to those in Rule 4.551 that eliminate the possibility of patently frivolous yet burdensome evidentiary hearings triggered by the petitioner’s mere assertion of facts.</p> <p>Moreover, SPR08-03 does not provide for the appearance of the petitioner at the evidentiary hearing, or for directing otherwise on good cause. Both of these provisions are contained in Rule 4.551(f).</p>	<p>The committee considered this suggestion, but ultimately decided not to include a provision concerning the presence of the petitioner at the evidentiary hearing in the proposal. Members of the committee noted that there are different security</p>

SPR08-03

Appellate Procedure: Habeas Corpus Proceedings (amend rules 8.380 and 8.384; amend and renumber Cal. Rules of Court, rule 8.386 as rule 8.387; and adopt rules 8.385 and 8.386)

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Rule 8.386(f) – Evidentiary hearings		
Commentator	Comment	Committee Response
		concerns and challenges for the appellate courts than for the superior courts in terms of bringing prisoners to hearings. The committee concluded that these issues needed to more be fully explored through the public comment process and committee discussion before any language concerning the petitioner’s presence was recommended for adoption by the council.
Court of Appeal, Second Appellate District, Division Two Katherine Lynn Managing Attorney	<p>Rule 8.386 (Proceedings if the court issues an order to show cause) In response to the request for comment by the committee, it is recommended that, for the sake of consistency, the contents of the analogous rules governing habeas corpus proceedings in the superior court, rule 4.551, be added to the rules governing habeas corpus proceedings in the reviewing court.</p> <p>Rule 8.386(f) (Evidentiary hearing in the reviewing court): (a) For clarification of the proposed new rule and its heading, the following is recommended:</p> <p>(f) Evidentiary hearing in ordered by the reviewing court An evidentiary hearing is required after the court’s review of the petition, return and traverse, if any, if the petitioner’s entitlement to relief depends on the resolution of a disputed issue of fact. The court may appoint a referee to conduct the hearing and make recommended findings of fact.</p> <p>(b) In conformity with the requirements of rule 4.551(f) [evidentiary hearings in superior court habeas corpus proceedings], this rule should provide that, in the case where the reviewing court</p>	<p>Please see the committee’s response to the comments of California District Attorneys Association above.</p> <p>The committee agrees with this suggestion and has modified its proposal to incorporate the suggested change.</p> <p>Please see the committee’s response to the comments of California District Attorneys Association above.</p>

SPR08-03

Appellate Procedure: Habeas Corpus Proceedings (amend rules 8.380 and 8.384; amend and renumber Cal. Rules of Court, rule 8.386 as rule 8.387; and adopt rules 8.385 and 8.386)

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Rule 8.386(f) – Evidentiary hearings		
Commentator	Comment	Committee Response
	<p>appoints a referee to conduct an evidentiary hearing (which in most, if not all, cases, will take place in the superior court) the petitioner must be produced at the evidentiary hearing unless the court, for good cause, directs otherwise.</p> <p>It is recommended that the following be added at the end of proposed rule 8.386(f): The petitioner must be produced at the evidentiary hearing unless the court, for good cause, directs otherwise.</p>	
<p>San Diego County Bar Association Appellate Court Committee Edward I. Silverman, Chair</p>	<p><i>Evidentiary hearing:</i> We suggest some minor changes in rule 8.386(f) on evidentiary hearing (proposed changes in <i>bold italics</i>):</p> <p>One change would be to the heading: “Evidentiary hearing <i>in</i> <i>ordered by</i> the reviewing court.” Most often any hearing will be held before a referee “in” the superior court, even though the reviewing court retains jurisdiction and is the ultimate finder of fact. (E.g., <i>In re Sakarias</i> (2005) 35 Cal.4th 140, 151; <i>In re Hamilton</i> (1999) 20 Cal.4th 273, 296-297.)</p> <p>Another change would be to the first sentence: “<i>The reviewing court may order</i> an evidentiary hearing <i>is required</i> if the petitioner’s entitlement to relief depends on the resolution of an issue of fact.” Sometimes factual issues can be resolved by production of further documents and will not require a hearing.</p>	<p>The committee agrees with this suggestion and has modified its proposal to incorporate the suggested change.</p> <p>The committee considered but ultimately decided not to recommend this change. The language “an evidentiary hearing is required” is modeled on rule 4.551(f) and, as noted in response to other comments, the committee believes that it is important to use consistent language in these rules and the trial court rules relating to habeas corpus proceedings in order to promote consistent interpretation of both sets of rules.</p>

SPR08-03

Appellate Procedure: Habeas Corpus Proceedings (amend rules 8.380 and 8.384; amend and renumber Cal. Rules of Court, rule 8.386 as rule 8.387; and adopt rules 8.385 and 8.386)

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Rules 8.386(g) and 3.847 – Hearing and decision		
Commentator	Comment	Committee Response
<p>San Diego County Bar Association Appellate Court Committee Edward I. Silverman, Chair</p>	<p><i>Argument and decision in the reviewing court:</i> Rule 8.386(g), which incorporates other rules by reference, poses a few difficulties.</p> <p>***</p> <p>We suggest that each matter be identified in a separate subsection—such as judicial notice, rehearing, sanctions, etc.—and not lumped together in one subsection with a broad reference to “[A]rgument and decision.”</p> <p>Because listing all of those matters would tend to make rule 8.386(g) long and unwieldy, we suggest that 8.386 include only judicial notice, oral argument, and sanctions as (g), (h), and (i), ***</p> <p>Accordingly, the resulting rules might read as follows (proposed changes in <i>bold italics</i>):</p> <p><u>Rule 8.386. Proceedings if the court issues an order to show cause</u></p> <p>* * *</p> <p>(g) <u><i>Argument and decision in the reviewing court</i></u></p> <p><u>Unless the court orders otherwise:</u></p> <p>(1) <u>***</u></p>	<p>The committee agrees with these suggestions. Addressing each of the topics covered by the cross-referenced rules in separate subdivisions is consistent with other changes the committee has made in this and other proposals to clarify what is covered under such cross-references. Placing the provisions relating to filing, modification, finality, rehearing, in a rule 8.387 rather than in rule 8.386 also makes sense, since these provisions address decisions made both before and after an order to show cause is issued while rule 8.386 addresses only proceedings after the court issues an order to show cause.</p>

SPR08-03

Appellate Procedure: Habeas Corpus Proceedings (amend rules 8.380 and 8.384; amend and renumber Cal. Rules of Court, rule 8.386 as rule 8.387; and adopt rules 8.385 and 8.386)

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Rules 8.386(g) and 3.847 – Hearing and decision		
Commentator	Comment	Committee Response
	<p>(2) * * *</p> <p><u>(g)</u> <i>Judicial notice</i></p> <p><i>Judicial notice is governed by rule 8.252(a).</i></p> <p><u>(h)</u> <i>Oral argument and submission of the cause</i></p> <p><i>Unless the court orders otherwise:</i></p> <p><u>(1)</u> <i>Rule 8.256 governs oral argument and submission of the cause in the Court of Appeal.</i></p> <p><u>(2)</u> <i>Rule 8.524 governs oral argument and submission of the cause in the Supreme Court.</i></p> <p>(h- i) <i>Sanctions in the reviewing court</i></p> <p><i>Rule 8.490(n) 8.492 governs sanctions in habeas corpus proceedings.</i></p>	

SPR08-03

Appellate Procedure: Habeas Corpus Proceedings (amend rules 8.380 and 8.384; amend and renumber Cal. Rules of Court, rule 8.386 as rule 8.387; and adopt rules 8.385 and 8.386)

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Rule 8.386(h) – Sanctions		
Commentator	Comment	Committee Response
<p>Court of Appeal, Second Appellate District, Division Two Katherine Lynn Managing Attorney</p>	<p>Rule 8.386(h) (Sanctions) (a) In response to the request for comment by the committee, it is recommended that the provision for sanctions be made applicable to habeas corpus petitions but only as to those petitions filed by attorneys, with the imposition of sanctions limited to the attorney filing the petition and not to his client. It is not believed that a defendant/inmate should be subject to sanctions. No other limitation on the imposition of sanctions seems necessary.</p> <p>If sanctions are limited to attorneys filing habeas corpus petitions, the sanctions provision in rule 8.386 should be moved to the end of rule 8.384 (petition for writ of habeas corpus filed by an attorney).</p> <p>(b) Consistent with the changes proposed in SPR08-02, change “Rule 8.490(n) governs sanctions in habeas corpus proceedings” to “Rule 8.492 governs sanctions in habeas corpus proceedings.”</p>	<p>In response to other comments, the committee has modified its proposal to delete the provision relating to sanctions. Please the committee’s response to the comments of Administrative Presiding Justice Judith D. McConnell below.</p>
<p>First District Appellate Project Matthew Zwerling Executive Director San Francisco</p>	<p>Habeas Sanctions. Proposed rule 8.386(h) states that sanctions in habeas proceedings would be governed by rule 8.490(n). (SPR08-03 at 10.) Two comments are in order. First, because rule 8.490(n) is to be renumbered 8.492, the cross-reference should be to 8.492. (SPR08-02 at 14.) Second, and more substantively, the application of sanctions in habeas proceedings in the court of appeal should mirror their application in criminal appeals. Habeas cases are more like criminal cases than they are like civil writs, in terms of what is at stake in such cases: the defendant’s liberty, if not his life. There is also a need to preserve issues for federal court review which state courts might view as frivolous. For these reasons, the habeas sanctions rule should more closely track the criminal appeal sanctions rule, than the civil writ sanctions rule. In criminal</p>	<p>In response to other comments, the committee has modified its proposal to delete the provision relating to sanctions. Please the committee’s response to the comments of Administrative Presiding Justice Judith D. McConnell below.</p>

SPR08-03

Appellate Procedure: Habeas Corpus Proceedings (amend rules 8.380 and 8.384; amend and renumber Cal. Rules of Court, rule 8.386 as rule 8.387; and adopt rules 8.385 and 8.386)

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Rule 8.386(h) – Sanctions		
Commentator	Comment	Committee Response
	appeals, sanctions may not be imposed for “[t]aking a frivolous appeal or appealing solely to cause delay.” (Rules 8.276(a) and 8.366 (“Except for (a)(1), rule 8.276 also applies in criminal appeals”).) To be consistent with the rules governing criminal appeals, we recommend that the cross reference in proposed rule 8.386(h) to rule 8.490(n) [proposed new number 8.492] not include subdivision (a)(1) of renumbered rule 8.492, which permits sanctions for filing a frivolous petition or filing it solely to cause delay. Although sanctions have been imposed in habeas cases, ³ for consistency reasons and for the policy considerations noted above, we recommend rule 8.386(h) state: “Except for subdivision (a)(1), rule 8.492 governs sanctions in habeas corpus proceedings.”	
Hon. Judith D. McConnell Administrative Presiding Justice Court of Appeal, Fourth Appellate District, Division One San Diego	Finally, proposed rule 8.386(h) addresses sanctions in the reviewing court and refers to current rule 8.490(n), now proposed rule 8.492, as governing sanctions in habeas corpus proceedings. Granted, the inclusion of proposed rule 8.386(h) is supported by <i>In re White</i> (2004) 121 Cal.App.4th 1453, 1479-1489. However, the Third District recognized in its opinion: “Courts must be careful not to deter, for fear of personal liability, an attorney’s vigorous assertion of an inmate’s rights. (<i>In re Marriage of Flaherty</i> [1982] 31 Cal.3d [637,] 647.) Thus, sanctions should be imposed sparingly, in only the most egregious cases, so as not to discourage use of the Great Writ. And we are mindful it is not easy to obtain a writ of habeas corpus. Particularly when a criminal conviction has been affirmed on appeal, the petitioner faces a steep uphill battle in collaterally attacking that judgment. The petitioner has the burden of stating a prima facie case for relief,	Based on this and other comments, the committee has modified its proposal to delete the provision relating to sanctions. As shown in <i>In re White</i> , without a rule addressing this subject, courts have exercised their authority to impose sanctions in habeas proceedings in the rare circumstances in which they have determined that this is appropriate. The committee has concluded that adopting a rule addressing sanctions is therefore not necessary and that the benefits of adopting such a rule are outweighed by the potential that it could have the unintended chilling effect suggested by this and other commentators.

³ *In re White* (2004) 121 Cal.App.4th 1453, 1479-1480.

SPR08-03

Appellate Procedure: Habeas Corpus Proceedings (amend rules 8.380 and 8.384; amend and renumber Cal. Rules of Court, rule 8.386 as rule 8.387; and adopt rules 8.385 and 8.386)

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Rule 8.386(h) – Sanctions		
Commentator	Comment	Committee Response
	and the burden of proving the facts upon which the claim is based. [Citation omitted.] Moreover, a contention may be barred procedurally because it is untimely, repetitive, or raises issues that were, or could have been, raised on direct appeal. [Citations omitted.] Hence, we do not necessarily equate the failure to obtain habeas corpus relief with frivolousness, or with incompetence of the attorney representing the petitioner.” (<i>In re White, supra</i> , 121 Cal.App.4th at p. 1480.) Inclusion of this provision in the rules will encourage and promote the imposition of sanctions in habeas corpus proceedings. As acknowledged in <i>In re White, supra</i> , sanctions in habeas corpus proceedings should be the rare exception, imposed sparingly and only under the most egregious circumstances. Accordingly, in order to avoid the potential chilling effect on an inmate's rights by including the provision, I suggest that proposed rule 8.386(h) be deleted.	
San Diego County District Attorney Craig Fisher Deputy District Attorney	We object to subdivision (h) of new rule 8.386. We do not believe it appropriate for courts to issue sanctions in habeas matters related to criminal matters. Monetary sanctions such as awarding costs are generally reserved for abuses in civil matters and we do not believe they should be introduced into the criminal arena. Except for the occasional pro per prisoner, we have not seen many obviously abusive uses of habeas petitions. And the appellate courts seem to do a good job of quickly screening out frivolous petitions. The threat of sanctions would not deter the few habeas abusers. But this threat could discourage the filing of petitions which, despite some “unreasonable violation of the rules” has potential merit. If the committee does think the ability to impose sanctions should be included in this rule, we would recommend it be in more limited circumstances than those in other writ proceedings and that it be on the court’s own motion only (not on motion of a party). It should	In response to this and other comments, the committee has modified its proposal to delete the provision relating to sanctions. Please the committee’s response to the comments of Administrative Presiding Justice Judith D. McConnell below.

SPR08-03

Appellate Procedure: Habeas Corpus Proceedings (amend rules 8.380 and 8.384; amend and renumber Cal. Rules of Court, rule 8.386 as rule 8.387; and adopt rules 8.385 and 8.386)

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Rule 8.386(h) – Sanctions		
Commentator	Comment	Committee Response
	also be clear that the sanction of awarding/denying costs, as in rule 9.490(m), not apply to habeas in criminal, juvenile or other proceedings in which a party is entitled to court appointed counsel.	

SPR08-03

Appellate Procedure: Habeas Corpus Proceedings (amend rules 8.380 and 8.384; amend and renumber Cal. Rules of Court, rule 8.386 as rule 8.387; and adopt rules 8.385 and 8.386)

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Rule 8.387 – Finality		
Commentator	Comment	Committee Response
<p>Court of Appeal, Second Appellate District, Division Two Katherine Lynn Managing Attorney</p>	<p>Rule 8.387 (Remittitur)/Finality provision for habeas corpus decisions Rule 8.264 will be amended (see SPR08-02) to move the finality provisions for criminal appeals and civil writs to their own respective chapters (see proposed rule 8.366(b) [under criminal appeals, chapter 3]; proposed rule 8.490(a) [under civil writs, chapter 7]). However, proposed rule 8.485(b) provides that the rules in new Chapter 7 on civil writs, which include the provisions for finality in amended rule 8.490, generally do not apply to habeas corpus petitions, and it does not appear that any finality provisions have been moved or added to the habeas corpus provisions in chapter 4, with the sole exception of the situation where an OSC is ordered returnable to the Court of Appeal.</p> <p>Finality of the following types of writ decisions are currently governed by existing rule 8.264(b):</p> <ol style="list-style-type: none"> 1. Rule 8.264(b)(1) currently states that except as otherwise provided in that rule, a decision is final 30 days after filing. 2. Rule 8.264(b)(2)(A) currently states that a decision denying a petition for a writ without issuance of an alternate writ or OSC is final upon filing. 3. Rule 8.264(b)(3) currently provides for early finality to prevent mootness or frustration of the relief granted. 4. Rule 8.264(b)(4) currently provides for finality of a decision denying a petition for writ of habeas corpus without issuance of an OSC where a decision in a related appeal is filed on the same day. 5. Rule 8.264(b)(5) currently provides for finality where a Court of Appeal certifies its opinion for publication after the decision is filed. 	

SPR08-03

Appellate Procedure: Habeas Corpus Proceedings (amend rules 8.380 and 8.384; amend and renumber Cal. Rules of Court, rule 8.386 as rule 8.387; and adopt rules 8.385 and 8.386)

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Rule 8.387 – Finality		
Commentator	Comment	Committee Response
	<p>However, under the proposed amendment to rule 8.264, the second, third and fourth provisions set forth above will be deleted from rule 8.264. There is no cross-reference to the first or last provisions, rule 8.264(b)(1) and current (b)(5), in the habeas corpus section except in the following situation: These provisions would apply to habeas corpus petitions through new rule 8.386(g) [Argument and decision if the court orders an OSC] by reference to rules 8.252 through 8.268, but only in those cases in which an OSC is returnable to the Court of Appeal.</p> <p>It is recommended that the contents of current rules 8.264(b)(1), 8.264(b)(2)(A), 8.264(b)(3), 8.264(b)(4) and 8.264(b)(5) be placed in amended rule 8.387 (Remittitur) as follows:⁴</p> <p>Rule 8.387 (a) Finality of decision (1) Except as otherwise provided in this rule, a Court of Appeal decision in a habeas corpus proceeding is final in that court 30 days after filing. (2) The denial of a petition for a writ of habeas corpus without issuance of an alternative writ or order to show cause is final in the Court of Appeal on filing. (3) The denial of a petition for writ of habeas corpus without issuance of an order to show cause is final in the Court of Appeal on the same day that the court’s decision in a related appeal is final if the two decisions are filed on the same day. If the Court of Appeal orders rehearing of the decision in the appeal, its decision denying the petition for writ of habeas corpus is final</p>	<p>The committee agrees with this suggestion and has corrected this oversight by amending its proposal to incorporate into rule 8.387 the existing provisions of rule 8.264 that apply to finality in writ proceedings.</p>

⁴ Placing these rules in the remittitur rule would make the finality rule for habeas corpus proceedings consistent with the rule for finality of other decisions in writ proceedings, which has been placed in amended rule 8.490 on finality and remittitur, and with the rule for finality of decisions granting transfer from the appellate division to the Court of Appeal, which has been placed in amended rule 8.1018 on finality and remittitur in those proceedings.

SPR08-03

Appellate Procedure: Habeas Corpus Proceedings (amend rules 8.380 and 8.384; amend and renumber Cal. Rules of Court, rule 8.386 as rule 8.387; and adopt rules 8.385 and 8.386)

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Rule 8.387 – Finality		
Commentator	Comment	Committee Response
	<p>when its decision on rehearing is final.</p> <p>(4) If necessary to prevent mootness or frustration of the relief granted or to otherwise promote the interests of justice, the Court of Appeal may order early finality in that court of a decision granting a petition for a writ of habeas corpus or denying such a petition after issuing an order to show cause. The decision may provide for finality in that court on filing or within a stated period of less than 30 days.</p> <p>(5) If a Court of Appeal certifies its opinion for publication or partial publication after filing its decision and before its decision becomes final in that court, the finality period runs from the filing date of the order for publication.</p> <p>(b) Remittitur</p> <p>In addition, Advisory Committee Comment to rule 8.264 should add the following: “See rule 8.366 for provisions addressing the finality of proceedings under chapter 3, relating to criminal appeals, rule 8.387 for provisions addressing the finality of proceedings under chapter 4, relating to habeas corpus appeals and writs, and rule 8.490”</p>	
<p>First District Appellate Project Matthew Zwerling Executive Director San Francisco</p>	<p>We agree with the proposed reorganizing of the current rules regarding habeas and writs, changing those rules into several smaller and more focused rules which will make for easier reading. However, in the process of doing so, some important substantive and procedural items appear to have fallen through the cracks and, we assume inadvertently, have not made it into the revised smaller rules.</p> <p>Finality of Habeas Corpus Cases. A significant item regarding</p>	<p>Please see committee’s response to the comments of the Court of Appeal, Second Appellate District, Division Two, above concerning rule 8.387 and finality.</p>

SPR08-03

Appellate Procedure: Habeas Corpus Proceedings (amend rules 8.380 and 8.384; amend and renumber Cal. Rules of Court, rule 8.386 as rule 8.387; and adopt rules 8.385 and 8.386)

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Rule 8.387 – Finality		
Commentator	Comment	Committee Response
	<p>finality appears to have been inadvertently omitted. Current rule 8.264 governs finality of all court of appeal decisions. Proposal SPR08-02 would break up this rule, such that 8.264 would govern finality of civil cases, new subdivision (b) of rule 8.366 would govern finality of criminal appeals, and new subdivision (a) of 8.490 would govern finality in writ proceedings. It appears that lost in all this is the special rule governing finality in habeas corpus cases. In particular, current rule 8.264(b)(4) provides that a decision denying a habeas corpus petition without an order to show cause (OSC) is final on the same day the decision in the related appeal is final, if both decisions are filed on the same day. Under SPR08-02, this subdivision (b)(4) is deleted from rule 8.264, and, unless we have somehow missed it, we do not see it added anywhere else.⁵ Therefore, we recommend that the current language being deleted in rule 8.264(b)(4) be added to the habeas remittitur rule (proposed rule 8.387; current rule 8.386; SPR08-03 at p. 10-11).</p>	
<p>Hon. Judith D. McConnell Administrative Presiding Justice Court of Appeal, Fourth Appellate District, Division One San Diego</p>	<p>As I explained above, proposed rule 8.264(b) as revised in SPR08-02 no longer addresses finality within the context of writ proceedings. Proposed rule 8490(a) only addresses finality of decision as to writs of mandate, certiorari, and prohibition. However, SPR08-03 (Habeas Corpus Proceedings) fails to provide any rule governing finality of decision in habeas corpus proceedings, simply referring to current rule 8.264 in proposed rule 8.386(g)(1). I suggest the following additional language (see italics) to proposed rule 8.387 to remedy the oversight:</p> <p><i>Rule 8.387. Finality and remittitur in habeas corpus proceedings</i></p>	<p>Please see committee’s response to the comments of the Court of Appeal, Second Appellate District, Division Two, above concerning rule 8.387 and finality.</p>

⁵ The proposed amendment to the Advisory Committee Comment to rule 8.264 contains the new cross-references on finality rules, but there is no reference to habeas proceedings. And the reconfiguring of the habeas rules in SPR08-03 does not appear to include a new finality rule. SPR08-02 adds a finality subdivision for writs to the remittitur rule for writs: proposed rule 8.490(a) (see SPR08-02 at p. 13).

SPR08-03

Appellate Procedure: Habeas Corpus Proceedings (amend rules 8.380 and 8.384; amend and renumber Cal. Rules of Court, rule 8.386 as rule 8.387; and adopt rules 8.385 and 8.386)

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Rule 8.387 – Finality		
Commentator	Comment	Committee Response
	<p><i>(a) Finality</i></p> <p><i>(1) The denial of a petition for a writ of habeas corpus without issuance of an order to show cause is final in that court when filed.</i></p> <p><i>(2) The dismissal of a writ at the request of petitioner or by stipulation of the parties is final when filed.</i></p> <p><i>(3) Except as otherwise provided in this rule, a decision in a habeas proceeding, including an order dismissing a writ petition involuntarily, is final 30 days after the decision is filed.</i></p> <p><i>(4) If necessary to prevent mootness or frustration of the relief granted or to otherwise promote the interests of justice, the court may order early finality in that court of the decision in a habeas corpus proceeding after issuing an order to show cause. The decision may provide for finality in that court on filing or within a stated period of less than 30 days.</i></p> <p><i>(5) A Court of Appeal decision denying a petition for writ of habeas corpus without issuing an order to show cause is final in that court on the same date that its decision in a related appeal is final if the two decisions are filed on the same day. If the Court of Appeal orders rehearing of the decision in the appeal, its decision denying the petition for writ of habeas corpus is final when its decision on rehearing is final.</i></p> <p><i>(6) If a Court of Appeal certifies its opinion for publication or partial publication after filing its decision and before its decision becomes final in that court, the finality period runs from the filing date of the order for publication.</i></p>	

SPR08-03

Appellate Procedure: Habeas Corpus Proceedings (amend rules 8.380 and 8.384; amend and renumber Cal. Rules of Court, rule 8.386 as rule 8.387; and adopt rules 8.385 and 8.386)

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Rule 8.387 – Finality		
Commentator	Comment	Committee Response
	<i>(b) Remittitur</i>	
San Diego County Bar Association Appellate Court Committee Edward I. Silverman, Chair	<p>The incorporation by reference of rule 8.264 on finality creates a problem if the proposed revision to rule 8.264 is adopted, because that revision eliminates the former reference to habeas corpus decisions. The provisions on finality are unique to habeas corpus in some ways and should be spelled out in the habeas rules.</p> <p>We suggest that *** topics dealing with decisions (filing, modification, finality, rehearing, remittitur) be made part of new rule 8.387, “Decision in the reviewing court.”</p> <p>Accordingly, the resulting rules might read as follows (proposed changes in bold italics):</p> <p><u>Rule 8.387. Remittitur in the reviewing court Decision in the reviewing court</u></p> <p><u>(a) Filing of decision</u></p> <p><u>(1) Rule 8.264(a) governs the filing of the decision in the Court of Appeal.</u></p> <p><u>(2) Rule 8.532(a) governs the filing of the decision in the Supreme Court.</u></p> <p><u>(b) Modification of decision</u></p> <p><u>Rule 8.264(c)(1) governs modification of the decision in the Court of Appeal and the Supreme Court.</u></p>	<p>As noted in response to the bar committee’s comments concerning hearing and decision under rule 8.386, the committee agrees with the suggestion that each of the topics covered by the proposed cross-references to the rules on hearing and decision in the Court of Appeal and Supreme Court be addressed in a separate subdivision. This approach is consistent with other changes the committee has made in this and other proposals to clarify what is covered under such cross-references. The committee also agrees with the suggestion that the provisions relating to filing, modification, finality, and rehearing be placed in rule 8.387, which currently addresses only remittitur. These provisions address decisions made both before and after an order to show cause is issued and so it is preferable that they not be in a rule that is only addressing proceedings if the court issues an order to show cause. In addition shorter rules are typically easier to read and understand. The committee has therefore modified its proposal to incorporate the changes suggested by this commentator, with minor modifications.</p>

SPR08-03

Appellate Procedure: Habeas Corpus Proceedings (amend rules 8.380 and 8.384; amend and renumber Cal. Rules of Court, rule 8.386 as rule 8.387; and adopt rules 8.385 and 8.386)

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Rule 8.387 – Finality		
Commentator	Comment	Committee Response
	<p><u>(c) Finality of decision in the Court of Appeal</u></p> <p><u>(1) Except as provided in (4), the denial of a petition for writ of habeas corpus without issuance of an order to show cause is final in the Court of Appeal upon filing.</u></p> <p><u>(2) Except as provided in (3), (5), and (6), a decision of the Court of Appeal in a habeas corpus proceeding after issuance of an order to show cause is final in that court 30 days after filing.</u></p> <p><u>(3) If necessary to prevent mootness or frustration of the relief granted or to otherwise promote the interests of justice, a Court of Appeal may order early finality in that court of a decision in a habeas corpus proceeding after issuing an order to show cause. The decision may provide for finality in that court on filing or within a stated period of less than 30 days.</u></p> <p><u>(4) A Court of Appeal decision denying a petition for writ of habeas corpus without issuing an order to show cause is final in that court on the same day that its decision in a related appeal is final if the two decisions are filed on the same day. If the Court of Appeal orders rehearing of the decision in the appeal, its decision denying the petition for writ of habeas corpus is final when its decision on rehearing is final.</u></p> <p><u>(5) If a Court of Appeal certifies its opinion for publication or partial publication after filing its decision and before its decision becomes final in that court, the finality period runs from the filing date of the order for publication.</u></p>	

SPR08-03

Appellate Procedure: Habeas Corpus Proceedings (amend rules 8.380 and 8.384; amend and renumber Cal. Rules of Court, rule 8.386 as rule 8.387; and adopt rules 8.385 and 8.386)

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Rule 8.387 – Finality		
Commentator	Comment	Committee Response
	<p><u><i>(6) Finality after modification of a decision is governed by rule 8.264(c)(2).</i></u></p> <p><u><i>(d) Finality of decision in the Supreme Court</i></u></p> <p><u><i>(1) The denial of a petition for writ of habeas corpus without issuance of an order to show cause is final in the Supreme Court upon filing.</i></u></p> <p><u><i>(2) A decision in a habeas corpus proceeding after issuance of an order to show cause is final 30 days after filing unless:</i></u></p> <p><u><i>(A) The court orders a shorter period; or</i></u></p> <p><u><i>(B) Before the 30-day period or any extension expires, the court orders one or more extensions, not to exceed a total of 60 additional days.</i></u></p> <p><u><i>(C) The court in modifying an opinion changes the judgment, in which case the finality period runs from the filing date of the modification order.</i></u></p> <p><u><i>(e) Rehearing</i></u></p> <p><u><i>(1) Rule 8.268 governs rehearing in the Court of Appeal.</i></u></p> <p><u><i>(2) Rule 8.536 governs rehearing in the Supreme Court.</i></u></p> <p><u><i>(f) Remittitur</i></u></p>	

SPR08-03

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Rule 8.387 – Finality		
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	<p><u><i>A reviewing court must issue a remittitur in a habeas corpus proceeding under this chapter except when the court denies the petition without issuing an order to show cause or orders the return filed in the superior court. Rule 8.272(b)–(d) governs issuance of a remittitur by a Court of Appeal and the Supreme Court in habeas corpus proceedings.</i></u></p>	<p>Based on input from committee members, the committee revised proposed 8.386(f) to eliminate the provision addressing remittitur in the Supreme Court. The current rule on remittitur in Supreme Court proceedings – rule 8.540 – does not call for remittitur to be issued in original proceedings filed in the Supreme Court and the committee did not intend to modify that current rule.</p>

SPR08-03

Appellate Procedure: Habeas Corpus Proceedings (amend rules 8.380 and 8.384; amend and renumber Cal. Rules of Court, rule 8.386 as rule 8.387; and adopt rules 8.385 and 8.386)

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Cross-References		
Commentator	Comment	Committee Response
First District Appellate Project Matthew Zwerling Executive Director San Francisco	<p>Cross-References. In a somewhat dizzying attempt to check all new cross-references, it appears to us that certain cross-references now need to be changed or added. We will describe here some of the cross-referencing we believe needs to be done, but we may have missed some items and we suggest the committee do a thorough cross-referencing review. We noted the following:</p> <p>SPR08-02 breaks up current rule 8.490 governing writs (except habeas) into several smaller rules. Some of the revisions to the habeas rules contain references to current rule 8.490 and, thus, do not reflect the renumbering of the general writs rules. For instance, under the current rule for non-habeas writs, the form of supporting documents is governed by rule 8.490(d). Under proposal SPR08-02, it is moved to 8.486(c). (SPR08- 02 at 7-8.) Accordingly, the proposed revisions to the habeas rules (SPR08-03) should include an amendment to current rule 8.384(b)(5), which is to be renumbered 8.384(b)(3), replacing the cross-reference to 8.490(d) with a cross-reference to 8.486(c). (See SPR08- 03 at 6.) Similarly, the new provision for returns filed in the court of appeal should cross-reference 8.486(c), instead of 8.490(d). (See proposed rule 8.386(d)(2); SPR08-03 at 9.) As already mentioned, proposed rule 8.386(h) states that sanctions in habeas proceedings would be governed by rule 8.490(n). (SPR08-03 at 10.) But 8.490(n) is to be renumbered 8.492. (SPR08-02 at 14.)</p>	The committee has revised both this proposal and the proposal relating to other writ proceedings to correct cross-references to former rule 8.490.
San Diego County Bar Association Appellate Court Committee Edward I. Silverman, Chair	All cross-references to other rules should be checked for current correctness. This is especially important for references to such rules as 8.264 and 8.490 that are proposed to be amended.	The committee has revised both this proposal and the proposal relating to other writ proceedings to correct cross-references to former rule 8.490.