

**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. Joyce L. Kennard, Chair
Heather Anderson, Senior Attorney, 415-865-7691

DATE: September 27, 2005

SUBJECT: Appellate Procedure: Petitions for Writs of Habeas Corpus and Copies of Applications to Extend Time (adopt Cal. Rules of Court, rule 60.5, and amend rules 44, 56, and 60) (Action Required)

Issue Statement

This proposal addresses two separate issues.

Petitions for writs of habeas corpus and supporting documents

Rule 44(b) (2) of the California Rules of Court provides that an original and four copies of a petition must be filed in the Court of Appeal. If, however, the supporting documents to such a petition are separately bound, the petitioner is only required to file one set of these documents. Many petitions for writs of habeas corpus are filed by prisoners who are not represented by counsel. Given the prison copying facilities and other factors, it is difficult for prisoners to get the required copies of their petitions and supporting documents.

Applications to extend time—additional copies

Rule 44(b)(2) identifies the number of copies of documents that must be filed with the Court of Appeal. Current section (D) provides that for those documents not otherwise specified in the rule, including applications to extend time, only an original and one copy must be filed with the court. In practice, courts often endorse their order regarding an extension of time on the application itself and send copies of this order to all the parties. Currently, the courts must make the extra copies of this application that are endorsed and sent to the parties.

Recommendation

The Appellate Advisory Committee recommends that the Judicial Council, effective January 1, 2006:

1. Amend rules 44, 56, and 60 of the California Rules of Court to:
 - a. Provide that persons filing petitions for writs of habeas corpus who are not represented by an attorney need file only the original of a petition for writ of habeas corpus and one set of supporting documents in the Court of Appeal;
 - b. Clarify the provisions of rule 44 establishing the number of copies of supporting documents that must be filed in the Supreme Court and Courts of Appeal and incorporate references to those provisions in rule 56;
 - c. Exempt persons filing petitions for writs of habeas corpus who are not represented by an attorney from the form-and-format requirements not only in rule 56 but also in rules 14 and 44;
 - d. Eliminate outdated references in rule 60 to other original proceedings that may be used for the same purpose as a habeas petition;
 - e. Require that a party filing an application to extend time provide the Court of Appeal with sufficient copies of the application for all parties; and
 - f. Make other nonsubstantive changes to conform the rules to current rule format.
2. Adopt rule 60.5 of the California Rules of Court to separate out and clarify the requirements applicable to petitions for writs of habeas corpus filed by attorneys on behalf of a party.

The text of the new and amended rules is attached at pages 6–12.

Rationale for Recommendation

Petitions for writs of habeas corpus and supporting documents

As noted above, prisoners, as well as other petitioners who are not represented by attorneys, often face difficulties in trying to get the required number of copies of their petitions and supporting documents. As a result, regardless of the current rules, most unrepresented petitioners filing petitions for writs of habeas corpus file only the original petition and one set of supporting documents or four copies of everything. The Courts of Appeal recognize the difficulties that prisoners typically face in making copies of documents and have traditionally accepted petitions from unrepresented petitioners even when they have not provided the copies required under rule 44.

Rather than have a rule that cannot be complied with in the majority of cases, the committee proposes that the rule be amended to eliminate the requirement that petitioners

who are not represented by attorney file any copies of petitions for writs of habeas corpus or supporting documents. This change will eliminate the copying difficulties faced by these unrepresented petitioners. To the extent that the Courts of Appeal are already accepting only the original petition and a single set of supporting documents from such petitioners, this rule change would conform the rules to actual practice. To the extent that Courts of Appeal are receiving multiple copies of supporting documents that, if they were separately bound, the petitioner would not need to file, this rule change would save the time and public expense associated with copying and mailing these extra copies of supporting documents, which are often voluminous. While the committee recognizes that in those cases in which the courts are now receiving the required four copies of the petition, this rule change would place a new burden on the Courts of Appeal to make necessary additional copies of those petitions, the committee believes that the benefits of making this change outweigh its costs.

The committee also believes that the rules relating to petitions for writs of habeas corpus could be improved by clarifying the requirements applicable to petitions filed by unrepresented and represented petitioners and that the rules regarding supporting documents could be improved by clarifying the number of copies of these documents that must be filed in the Supreme Court and Courts of Appeal.

Applications to extend time—additional copies

As noted above, the committee understands that, in practice, when a party files an application for an extension of time, courts often simply endorse their order on that application. In fact, the new Judicial Council form APP-006, *Application for Extension of Time to File Brief (Civil Case)*, specifically includes an area at the bottom of the application that the court can use to make the order. The committee is proposing that rule 44(b) be amended to require that a party provide the Court of Appeal with enough copies of the application for all separately represented or unrepresented parties. The court can then simply endorse the order on these copies of the application and mail them to the parties. Rule 43 already requires that the parties provide envelopes for mailing all parties copies of an order granting or denying an extension of time.

Alternative Actions Considered

The committee considered retaining the current requirement of four copies of petitions and supporting documents or requiring unrepresented parties filing petitions for writs of habeas corpus to file an original and one copy of the petition and supporting documents. The committee ultimately concluded that unrepresented parties filing petitions for writs of habeas corpus should be required only to file the original petition and supporting documents. In the majority of cases, the original is all that is currently being received by the Courts of Appeal. Even if the rule were to require only one additional copy, most unrepresented petitioners would still only be able to provide the original.

Comments From Interested Parties

These proposed amendments were circulated as part of the spring 2005 comment cycle. Nine individuals or organizations submitted comments on this proposal. Six commentators agreed with the proposal, one agreed with the proposal only if it is modified, and two did not agree with the proposal.

Two commentators opposed the proposal to permit unrepresented parties filing petitions for writs of habeas corpus to file only the original petition and supporting documents. Justice Boren, the Administrative Presiding Justice of the Second Appellate District, opposed this proposal on two grounds: (1) that the reviewing process will be slowed if only the original petition and supporting documents are required; and (2) the proposal will shift copying responsibility to the Courts of Appeal, causing delays. Ms. Mozee, the supervising deputy clerk for Division 2 of the Fourth Appellate District, also expressed concern about the burden placed on the court personnel and resources to make copies of habeas corpus petitions. While she acknowledged that the court seldom receives the required four copies of these petitions despite the current rules, she strongly recommended that petitioners be required to provide an original and one copy of the supporting documents.

As discussed above, the committee recognizes that in those cases in which the courts are now receiving the required four copies of the petition itself, this rule change will place a new burden on the Courts of Appeal to make additional copies of those petitions. Nevertheless, the committee believes that the benefits of the change outweigh this burden. Information provided by the Courts of Appeal indicates that in most courts the proportion of cases in which unrepresented litigants are unable to provide the required copies is considerably larger than the proportion of cases in which copies are now being provided. In addition, the MC-275 petition for writ of habeas corpus form used by these litigants is only six pages long, not including additional pages the petitioner may attach if necessary. Thus, if additional copies of petitions are needed, the number of pages that must be copied is typically not likely to be large.

The Appellate Courts Committee of the San Diego County Bar Association generally agreed with the proposal but expressed concern that, as circulated, rule 44 did not contain any indication that unrepresented parties filing habeas corpus petitions would only be required to file the original and one set of supporting documents. The committee agreed with this comment and has revised its proposed amendment to rule 44 to address this concern.

A chart of the comments and the committee's responses are attached on pages 13–17.

Implementation Requirements and Costs

As noted above, implementing this proposal will impose some additional costs on the Courts of Appeal to make necessary additional copies of petitions for writs of habeas corpus in those cases in which the petitioner would otherwise have provided copies.

Attachments

Rules 44, 56, and 60 of the California Rules of Court are amended, and rule 60.5 is adopted, effective January 1, 2006, to read:

Rule 44. Form, number, and cover of documents filed in the reviewing court

(a) ***

(b) Number of copies

Except as these rules provide otherwise, the following number of copies must be filed of every brief, petition, motion, or other document, except the record, filed in a reviewing court:

(1) If filed in the Supreme Court:

(A) Except as provided in (D), an original and 13 copies of a petition for review, an answer, a reply, a brief on the merits, an amicus curiae brief, an answer to an amicus curiae brief, a petition for rehearing, or an answer to a petition for rehearing;

(B) Unless the court orders otherwise, an original and 10 copies of a petition for a writ within the court's original jurisdiction, an opposition or other response to the petition, or a reply;

(C) Unless the court orders otherwise, an original and 2 copies of any supporting document accompanying a petition for writ of habeas corpus, an opposition or other response to the petition, or a reply;

(D) An original and 8 copies of a petition for review to exhaust state remedies under rule 33.3, an answer, or a reply, or an amicus curiae letter under rule 28(g);

(E) An original and 8 copies of a motion or an opposition or other response to a motion; and

(F) An original and 1 copy of an application, including an application to extend time, or any other document.

(2) If filed in a Court of Appeal:

(A) An original and 4 copies of a brief, an amicus curiae brief, or an answer to an amicus curiae brief, and, in civil appeals, proof of delivery of 4 copies to the Supreme Court;

1
2 (B) An original of a petition for writ of habeas corpus filed under rule 60 by a
3 person who is not represented by an attorney and one set of any
4 supporting documents;

5
6 ~~(B)~~(C) An original and 4 copies of any other petition, an answer, opposition or
7 other response to a petition, or a reply;

8
9 ~~(C)~~(D) An original and 3 copies of a motion or an opposition or other response
10 to a motion; and

11
12 (E) Unless the court orders otherwise by local rule or in the specific case, 1
13 set of any separately bound supporting documents accompanying a
14 document filed under (C) or (D);

15
16 ~~(D)~~(F) An original and 1 copy of an any application, including other than an
17 application to extend time, or any other document.; and

18
19 (G) An original and 1 copy of an application to extend time. In addition, 1
20 copy for each separately represented or unrepresented party must be
21 provided to the court.

22
23 ~~(3) Unless the court orders otherwise by local rule or in the specific case, only one~~
24 ~~set of any separately bound supporting documents accompanying a document~~
25 ~~filed under (2)(B) or (C) need be filed.~~

26
27 (c) ***

28
29 (d) ***

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32 **Rule 56. Original proceedings**

33
34 (a) **Application**

35
36 (1) ***

37
38 (2) This rule does not apply to petitions for writs of habeas corpus, except as
39 provided in rule ~~60~~ 60.5, or to petitions for writs of review under rules 57–59.

40
41 (b) **Petition**

42
43 (1)–(2) ***

1 (3) If the petition seeks review of trial court proceedings that are also the subject
2 of a pending appeal, the notice "Related Appeal Pending" must appear on the
3 cover of the petition and the first paragraph of the petition must state:
4

5 (A) The appeal's title, trial court docket number, and any reviewing court
6 docket number, and
7

8 (B) If the petition is filed under Penal Code section 1238.5, the date the notice
9 of appeal was filed.
10

11 (4)–(7) ***
12

13 **(c) Contents of supporting documents**
14

15 (1) A petition that seeks review of a trial court ruling must be accompanied by an
16 adequate record, including copies of:
17

18 (A) The ruling from which the petition seeks relief;
19

20 (B) All documents and exhibits submitted to the trial court supporting and
21 opposing the petitioner's position;
22

23 (C) Any other documents or portions of documents submitted to the trial
24 court that are necessary for a complete understanding of the case and the
25 ruling under review; and
26

27 (D) A reporter's transcript of the oral proceedings that resulted in the ruling
28 under review.
29

30 (2) If a transcript under (1)(D) is unavailable, the record must include a declaration
31 by counsel:
32

33 (A) Explaining why the transcript is unavailable and fairly summarizing the
34 proceedings, including counsel's arguments and any statement by the
35 court supporting its ruling; or
36

37 (B) Stating that the transcript has been ordered, the date it was ordered, and
38 the date it is expected to be filed, which must be a date prior to any action
39 requested of the reviewing court other than issuance of a temporary stay
40 supported by other parts of the record.
41

42 (3)–(5) ***
43

1 **(d) Form of supporting documents**

2
3 (1)–(2) ***

4
5 (3) Rule ~~44(b)(3)~~ 44(b)(1) governs the number of copies of supporting
6 documents to be filed in the Supreme Court; rule 44(b)(2) governs the
7 number of copies of supporting documents to be filed in the Court of Appeal.
8

9 **(e)–(l) *****

10
11
12 **Rule 60. Petition for writ of habeas corpus filed by petitioner not represented by an**
13 **attorney**

14
15 **(a) Required Judicial Council form**

16
17 (1) A person who is not represented by an attorney and who A petitions to a
18 reviewing court for a writ of habeas corpus—~~or other writ within its original~~
19 jurisdiction—that seeks seeking release from, or modification of the conditions
20 of, custody of a person confined in a state or local penal institution, hospital,
21 narcotics treatment facility, or other institution, must be filed file the petition
22 on Judicial Council form MC-275, *Petition for Writ of Habeas Corpus*. For
23 good cause the court may permit the filing of a petition that is not on form
24 MC-275.
25

26 (2) A petition ~~on form MC-275~~ filed under (1) need not comply with the
27 provisions of rules 14, 44, or 56 that prescribe the form and content of a
28 petition and require the petition to be accompanied by points and authorities.
29

30 (3) In the Court of Appeal, the petitioner must file the original of the petition
31 under (1) and one set of any supporting documents. In the Supreme Court, the
32 petitioner must file an original and 10 copies of the petition and an original and
33 2 copies of any supporting document accompanying the petition unless the
34 court orders otherwise.
35

36 ~~(b)—Petition filed by attorney~~

37
38 ~~If the petition is filed by an attorney:~~

39
40 ~~(1)—The petition need not be filed on form MC-275 but must contain the~~
41 ~~information requested in that form and must comply with rule 14(a)–(b).~~
42

- 1 ~~(2) Any memorandum of points and authorities accompanying the petition must~~
2 ~~comply with rule 14(a) (b).~~
3
4 ~~(3) The petition must be accompanied by a copy of any petition—excluding~~
5 ~~exhibits—pertaining to the same judgment and petitioner that was previously~~
6 ~~filed in any lower state court or any federal court. If such documents have~~
7 ~~previously been filed in the Supreme Court, the petition need only so state.~~
8
9 ~~(4) Any supporting documents accompanying the petition must comply with rules~~
10 ~~44(b)(1)(C) and 56(d).~~
11
12 ~~(5) The petition and any memorandum of points and authorities must support any~~
13 ~~reference to a matter in the supporting documents by a citation to its index tab~~
14 ~~and page.~~
15
16 ~~(6) If the petition asserts a claim that was the subject of an evidentiary hearing, the~~
17 ~~petition must be accompanied by a certified transcript of that hearing.~~
18
19 ~~(7) The clerk must file an attorney’s petition not complying with (1) (6) if it~~
20 ~~otherwise complies with the rules of court, but the court may notify the~~
21 ~~attorney that it may strike the petition or impose a lesser sanction if the petition~~
22 ~~is not brought into compliance within a stated reasonable time of not less than~~
23 ~~five days.~~

24
25 **~~(e)~~ (b) Record**

26
27 ***

28
29 **~~(d)~~ (c) Informal response**

30
31 ***

32
33 **~~(e)~~ (d) Petition unrelated to appellate district**

- 34
35 (1) A Court of Appeal may deny without prejudice a petition for writ of habeas
36 corpus that is based primarily on facts occurring outside the court’s appellate
37 district, including petitions that question:
38
39 (A) The validity of judgments or orders of trial courts located outside the
40 district;₂ or
41
42 (B) The conditions of confinement or conduct of correctional officials outside
43 the district.

1 (2) ***
2
3

4 **Rule 60.5. Petition for writ of habeas corpus filed by an attorney for a party**
5

6 **(a) General application of rule 60**
7

8 Except as provided in this rule, rule 60 applies to any petition for a writ of habeas
9 corpus filed by an attorney.
10

11 **(b) Special requirements for petition filed by attorney**
12

13 (1) A petition for a writ of habeas corpus filed by an attorney need not be on form
14 MC-275 but must contain the information requested in that form and must
15 comply with rules 14(a)–(b), 44(c)–(d), and 56(b)(6).
16

17 (2) Any memorandum of points and authorities accompanying the petition must
18 comply with rule 14(a)–(b).
19

20 (3) The petition must be accompanied by a copy of any petition—excluding
21 exhibits—pertaining to the same judgment and petitioner that was previously
22 filed in any lower state court or any federal court. If such documents have
23 previously been filed in the Supreme Court, the petition need only so state.
24

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

28 (5) Any supporting documents accompanying the petition must comply with rule
29 56(d).
30

31 (6) The petition and any memorandum of points and authorities must support any
32 reference to a matter in the supporting documents by a citation to its index tab
33 and page.
34

35 (7) If the petition is filed in the Supreme Court, the attorney must file the number
36 of copies of the petition and supporting documents required by rule 44(b)(1).
37 If the petition is filed in the Court of Appeal, the attorney must file the number
38 of copies of the petition and supporting documents required by rule 44(b)(2).
39

40 (8) The clerk must file an attorney’s petition not complying with (1)–(7) if it
41 otherwise complies with the rules of court, but the court may notify the
42 attorney that it may strike the petition or impose a lesser sanction if the petition

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is not brought into compliance within a stated reasonable time of not less than five days.

SPR05-04

Appellate Procedure: Petitions for writs of habeas corpus and copies of applications to extend time
(adopt Cal. Rules of Court, rule 60.5; amend rules 44, 56, and 60)

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
1.	Mr. Saul Bercovitch Committee on Appellate Courts State Bar of California San Francisco	A		The Committee supports this proposal. The proposed amendments to rules 44, 56, and 60 of the California Rules of Court, and proposed new rule 60.5, would achieve two changes: (1) they would permit a pro per habeas petitioner to file only the original (and no copies) of the petition in the Court of Appeal; and (2) they would require that parties to an appeal provide the Court of Appeal with enough extra copies of an application to extend time for all parties in the action, so that the court can endorse its order directly on the application and use the extra copies to mail the order to all parties.	No response needed.
2.	Hon. Roger W. Boren Administrative Presiding Justice Court of Appeal, Second Appellate District Los Angeles	N	N	Do not agree with proposed changes. 1. By reducing petition or exhibit packages to one copy, the reviewing process is slowed down and made more difficult. 2. The effect may also be to shift copying costs to the court with uncomitant delays.	While the committee recognizes, that in those cases in which the courts are now receiving the required four copies of the petition itself, this rule change would place a new burden on the Courts of Appeal to make necessary additional copies of those petitions, the committee believes that the benefits of making the change outweigh this burden.
3.	Ms. Deborah Decker Administrative Analyst	A	N	Agree with proposed changes.	No response needed.

SPR05-04

Appellate Precedure: Petitions for writs of habeas corpus and copies of applications to extend time
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	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
	Superior Court of Butte County Oroville				
4.	Ms. Linda Gorham Court Manager Superior Court of San Francisco County San Francisco	A	N	Agree with proposed changes.	No response needed.
5.	Mr. Stephen V. Love Executive Officer Superior Court of San Diego County San Diego	A	N	Agree with proposed changes; no additional comments.	No response needed.
6.	Mr. Madeline Mozee Supervising Deputy Clerk Fourth Appellate District, Division Two Riverside	N	N	In spite of the current rules, this court seldom receives four copies of a petition much less of the supporting documents. Ideally, we should receive an original and one copy of each. The petitions are seldom served (the court is usually listed on the proof of service) and if this court requests a response, copies of the petition and supporting documents must be made for the District Attorney or Attorney General. It is incorrect to assume that the extra copies ARE NOT NEEDED, as stated in the DISCUSSION. In fact, we often get a single copy of a petition in which the petitioner DEMANDS that since he can't make copies, that we not only make copies, but serve them and make him a conformed copy as well.	While the committee recognizes, that in those cases in which the courts are now receiving the required four copies of the petition itself, this rule change would place a new burden on the Courts of Appeal to make necessary additional copies of those petitions, the committee believes that the benefits of making the change outweigh this burden.

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Appellate Procedure: Petitions for writs of habeas corpus and copies of applications to extend time
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	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				<p>The change in the rule will be a great imposition on personnel and resources. As it is, we make numerous copies of Petitions for the Attorney General. On June 15, 2005, this court received a request for copies of 11 petitions which the Attorney General said they needed because they were responding to Federal Habeas Corpus petitions and had not been served with a copy from the petitioners. This court does not reject petitions for service. It is not cost effective to do so, when so many petitions are denied on the merits.</p> <p>This court's policy is to rule on pro per habeas corpus petitions on the merits and not on filing defects. It is strongly suggested that an original and one copy of the petition and supporting documents be provided, which is the minimum required copies needed for filing.</p>	
7.	Hon. Kathleen R. O'Connor Judge Superior Court of Yuba County Marysville	A	N	Agree with proposed changes. I think this revision is appropriate.	No response needed.
8.	Mr. Brian P. Worthington Chair, Appellate Court Committee San Diego County Bar Association San Diego	AM	Y	The current rule for Court of Appeal habeas filings provides for <u>four</u> copies of the petition (rule 44(b)(2)(B)) and <u>one</u> copy of the exhibits (rule 44(b)(3)). The proposal would effectively	The committee agrees with this suggestion and has revised the proposal accordingly.

SPR05-04

Appellate Procedure: Petitions for writs of habeas corpus and copies of applications to extend time
(adopt Cal. Rules of Court, rule 60.5; amend rules 44, 56, and 60)

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				<p>provide that a pro per petitioner using form MC-275 need file only the <u>original of both</u>. As noted by the Appellate Advisory Committee, many petitions for writs of habeas corpus are filed by prisoners who are not represented by counsel and have limited, if any, access to copying machines. Historically, the Courts of Appeal have been understanding of the challenges faced by an unrepresented inmate and have not held the inmates to the copying requirements of rule 44. The adoption of rule 60.5, and the amendments to rules 44, 56, and 60, conform the rules to the current practice and would clarify the filing requirements.</p> <p>However, we are concerned that an unrepresented petitioner checking the rules for the number of copies may go to rule 44, rather than to rule 60, and would be unaware that unrepresented petitioners have different filing requirements. To avoid the possibility that an unrepresented petitioner could be misled, we recommend including a reference to rule 60 within rule 44(b)(2)(B):</p> <p>44(b)(2)(B) <u>Except for a habeas corpus petition filed by an unrepresented party under rule 60(a)(3)</u>, an original and four copies of a petition, an answer, opposition, or other response to a petition, or a reply....</p>	
9.	Mr. Dean Zipser	A	Y	Agree with proposed changes.	No response needed.

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Appellate Precedure: Petitions for writs of habeas corpus and copies of applications to extend time
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	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
	President Orange County Bar Association Irvine				