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INVITATION TO COMMENT SPR13-10

Title	Action Requested
Appellate Procedure: Writ Proceedings	Review and submit comments by June 19, 2013
Proposed Rules, Forms, Standards, or Statutes	Proposed Effective Date
Amend Cal. Rules of Court, rules 8.386, 8.387, 8.485, 8.486, 8.487, 8.490, 8.931, 8.933, and 8.935	January 1, 2014
Proposed by	Contact
Appellate Advisory Committee Hon. Raymond J. Ikola, Chair	Heather Anderson, heather.anderson@jud.ca.gov , 415-865-7691

Executive Summary and Origin

This proposal would make a number of clarifying changes to the rules relating to writ proceedings that are intended to improve the administration in those proceedings in the Supreme Court, Court of Appeal, and the superior court appellate division, including: (1) clarifying when the appellate projects must be served with a return in a habeas corpus proceeding; (2) clarifying that the rules on proceedings for writs of mandate, certiorari, and prohibition do not apply to proceedings for writs under Welfare and Institutions Code sections 366.26 and 366.28 or for writs under rules 8.450–8.456; (3) clarifying the finality of orders dismissing a writ petition and when remittitur must issue; and (4) modifying rule provisions that refer just to attorneys or unnecessarily refer separately to attorneys and self-represented parties. This proposal originated from suggestions submitted by members of the Appellate Advisory Committee and a superior court.

Background

California Rules of Court, rules 8.380–8.388 address petitions for writs of habeas corpus and related proceedings. Currently, rule 8.386(b) requires that a copy of a return in a habeas proceeding be served on the district appellate project (the project that assists the particular Court of Appeal district with the appointment of counsel) whenever a petitioner is not represented by privately retained counsel. There are some circumstances in which such service on the district appellate project is not appropriate. First, if the return is filed in the Supreme Court, a project assisting a Court of Appeal would not be involved in the case; depending on the circumstances, the California Appellate Project that assists the Supreme Court with appointment of counsel in capital cases might be involved. Second, if either the State Public Defender's Office or Habeas

The proposals have not been approved by the Judicial Council and are not intended to represent the views of the council, its Rules and Projects Committee, or its Policy Coordination and Liaison Committee. These proposals are circulated for comment purposes only.

Corpus Resource Center is representing the petitioner, a district appellate project would not be involved in the case.

Rule 8.384 addresses petitions for writs of habeas corpus filed by an attorney. In 2009, this rule was amended to remove a provision requiring the petition to comply with the length limit for briefs and to add a provision requiring any memorandum accompanying such a petition to comply with that length limit. Rule 8.386 addresses, among other things, the form of returns and traverses when the return in a habeas proceeding is ordered to be filed in the reviewing court. Rule 8.386 currently applies the length limit for briefs to both the return and traverse.

Rules 8.485–8.493 address petitions for writs of mandate, certiorari, and prohibition in the Supreme Court and Court of Appeal. Rule 8.485(b) currently provides that these rules generally do not govern certain types of writ proceedings that are governed by separate rules. There are other writ proceedings in juvenile and California Environmental Quality Act (CEQA) cases and writs of review from certain agencies that are also governed by separate rules.

Rules 8.930–8.936 address petitions for writs of mandate, certiorari, and prohibition in the superior court appellate division. Rule 8.931(b) addresses the contents of supporting documents accompanying such petitions. Among other things, this subdivision requires that the supporting documents include a reporter’s transcript or electronic recording of the oral proceedings that resulted in the ruling under review. Depending on the length of the oral proceedings, an electronic recording may be difficult to use for this purpose; transcripts of electronic recordings are often prepared and can serve as the record of the electronically recorded proceedings.

Rules 8.490 and 8.935 address the finality of decisions in proceedings for writs of mandate, certiorari, and prohibition in, respectively, the Supreme Court and Court of Appeal and the superior court appellate division. Currently, these rules do not address when a decision dismissing a writ petition is final or whether remittitur should issue in such situations. In addition, these rules do not cover situations involving writs of certiorari or review in which the court issues a writ directing the preparation and transmission of the record.

Several of the rules relating to proceedings for writs of habeas corpus and writs of mandate, certiorari, and prohibition include references to acts that must be performed by attorneys or refer separately to attorneys and self-represented litigants.

The Proposal

This proposal would make a number of clarifying changes to the rules relating to writ proceedings, including:

- **Service on appellate projects:** Amending rule 8.386(b) to require that a copy of a return in a habeas proceeding be served on the *applicable* appellate project whenever a petitioner is represented by appointed counsel other than the State Public Defender’s Office or Habeas Corpus Resource Center;

- **Length of return and traverse:** Amending rule 8.386(c) and (d) to remove the provisions requiring the return and traverse filed in the reviewing court to comply with the length limit for briefs and to instead add a provision requiring any memorandum accompanying such a return or traverse to comply with that length limit;
- **Application of rules:** Amending rule 8.485 to provide that that the rules on proceedings for writs of mandate, certiorari, and prohibition in the Supreme Court and Court of Appeal do not apply to proceedings for writs to review orders setting a hearing under Welfare and Institutions Code section 366.26, for writs under Welfare and Institutions Code section 366.28 to review orders designating or denying a specific placement of a dependent child after termination of parental rights, or for writs under rules 8.450–8.456, relating to certain CEQA cases and certain agency decisions;
- **Electronic recordings:** Amending rule 8.931(b) to provide that the record of the oral proceedings that resulted in the ruling under review included in the supporting documents accompanying a petition for a writ of mandate, certiorari, and prohibition in the superior court appellate division may be in the form of a transcript of electronic recordings and that the electronic recording itself may only be used if the court has a local rule permitting this;
- **Finality:** Amending rules 8.490 and 8.935 to provide that, unless otherwise ordered by the court, orders denying or dismissing a petition for a writ of mandate, certiorari, or prohibition without issuance of an alternative writ, order to show cause, or writ of review or denying or dismissing such a petition as moot after issuance of an alternative writ, order to show cause, or writ of review are final on filing. In rule 8.935, provisions relating to filing of decisions, parallel to those in rule 8.887 relating to decisions in appeals to the appellate division, would also be added.
- **Remittitur:** Further amending rules 8.490 and 8.935 to provide that a court must issue a remittitur in a proceeding for a writ of mandate, certiorari, or prohibition when the court issues any decision that is not final immediately and to add a provision to the advisory committee comment accompanying both these rules and rule 8.387, relating to habeas corpus proceedings, clarifying that when remittitur is issued in these writ proceedings, it serves as notice that the proceedings have concluded.
- **Attorneys and self-represented litigants:** Amending the rules relating to writ proceedings to eliminate unnecessary references to attorneys and separate references to attorneys and self-represented parties; and
- **Other changes:** Making other clarifying changes to the rules relating to writ proceedings.

Alternatives Considered

The committee considered not proposing any amendments to these rules at this time. The committee concluded, however, that clarifying amendments would improve the rules on writ proceedings without imposing any significant burden on the courts.

Implementation Requirements, Costs, and Operational Impacts

This proposal should not impose significant implementation burdens on either the superior or appellate courts.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal reasonably achieve the stated purpose?
- Would this proposal have an impact on public's access to the courts? If a positive impact, please describe. If a negative impact, what changes might lessen the impact?

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide costs savings? If so, please quantify. If not, what changes might be made that would provide savings, or greater savings?
- What would the implementation requirements be for courts? For example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems.
- Would two months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- If this proposal would be cumbersome or difficult to implement in a court of your size, what changes would allow the proposal to be implemented more easily or simply in a court of your size?

Rules 8.386, 8.387, 8.485, 8.486, 8.487, 8.490, 8.931, 8.933, and 8.935 of the California Rules of Court would be amended to read:

Title 8. Appellate Rules

Division 1. Rules Relating to the Supreme Court and Courts of Appeal

Chapter 4. Habeas Corpus Appeals and Writs

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

(a) * * *

(b) Serving and filing return

- (1) Unless the court orders otherwise, any return must be served and filed within 30 days after the court issues the order to show cause.
- (2) If the return is filed in the Supreme Court, the ~~attorney~~ respondent must file the number of copies of the return and any supporting documents required by rule 8.44(a). If the return is filed in the Court of Appeal, the ~~attorney~~ respondent must file the number of copies of the return and any supporting documents required by rule 8.44(b).
- (3) Two copies of the return and any supporting documents must be served on the petitioner’s counsel, and if the ~~return is to the Court of Appeal and the petitioner is not represented by privately retained~~ for the habeas corpus proceeding by court-appointed counsel other than the State Public Defender’s Office or Habeas Corpus Resource Center, one copy must be served on the ~~district~~ applicable appellate project.

(c) Form and content of return

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

(2)–(3) * * *

(d) Traverse

- (1) * * *
- (2) Any traverse must be either typewritten or produced on a computer and must comply with Penal Code section 1484 and rules 8.40(b)–(c) and 8.204(a)–(b). Except in

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

3
4 (3) Rule 8.486(c)(1) and (2) govern the form of any supporting documents
5 accompanying the traverse.

6
7 ~~(3)~~(4) * * *

8
9 ~~(4)~~(5) * * *

10
11 (e)–(g) * * *

12
13
14 **Rule 8.387. Decision in habeas corpus proceedings**

15
16 (a)–(e) * * *

17
18 **(f) Remittitur**

19
20 (1) A Court of Appeal must issue a remittitur in a habeas corpus proceeding under this
21 chapter except when the court denies the petition without issuing an order to show
22 cause or orders the return filed in the superior court.

23
24 (2) A Court of Appeal must also issue a remittitur if the Supreme Court issues a
25 remittitur to the Court of Appeal.

26
27 (3) Rule 8.272(b)–(d) governs issuance of a remittitur by a Court of Appeal in habeas
28 corpus proceedings, including the clerk’s duties, immediate issuance, stay, and recall
29 of remittitur, and notice of issuance.

30
31 **Advisory Committee Comment**

32
33 A party may seek review of a Court of Appeal decision in a habeas corpus proceeding by way of a
34 petition for review in the Supreme Court under rule 8.500.

35
36 **Subdivision (f).** Under this rule, a remittitur serves as notice that the habeas corpus proceedings have
37 concluded.

1 (3) If a transcript under (1)(D) is unavailable, the record must include a declaration by
2 counsel or, if the petitioner is unrepresented, the petitioner:

3
4 (A) Explaining why the transcript is unavailable and fairly summarizing the
5 proceedings, including the parties' arguments and any statement by the court
6 supporting its ruling. This declaration may omit a full summary of the
7 proceedings if part of the relief sought is an order to prepare a transcript for use
8 by an indigent criminal defendant in support of the petition and if the
9 declaration demonstrates the petitioner's need for and entitlement to the
10 transcript; or

11
12 (B) Stating that the transcript has been ordered, the date it was ordered, and the
13 date it is expected to be filed, which must be a date before any action requested
14 of the reviewing court other than issuance of a temporary stay supported by
15 other parts of the record.

16
17 (4) If the petitioner does not submit include the required record or explanations or does
18 not present facts sufficient to excuse the failure to submit them, the court may
19 summarily deny a stay request, the petition, or both.

20
21 (c)–(e) * * *

22
23
24
25 **Rule 8.487. Opposition and Attorney General amicus briefs**

26
27 (a)–(b) * * *

28
29 **(c) Form of supporting documents**

30
31 Any supporting documents accompanying a preliminary opposition, return or opposition,
32 or reply must comply with rule 8.486(c)–(d).

33
34 ~~(e)~~(d) * * *

35
36
37
38 **Rule 8.490. Filing, finality, and modification of decisions; rehearing; remittitur**

39
40 **(a) Filing and modification of decisions**

41
42 Rule 8.264(a) and (c) govern the filing and modification of decisions in writ proceedings.
43
44

1 **(b) Finality of decision**

2
3 (1) Except as otherwise ordered by the court, the denial of a following decisions
4 regarding petitions for a writs within the court's original jurisdiction are final in the
5 issuing court when filed:

6
7 (A) An order denying or dismissing such a petition without issuance of an
8 alternative writ, or order to show cause is final in that court when filed, or writ
9 of review; and

10
11 (B) An order denying or dismissing such a petition as moot after issuance of an
12 alternative writ, order to show cause, or writ of review.

13
14 (2) Except as otherwise provided in ~~this rule (1), and (3)–(5)~~, a decision in a writ
15 proceeding is final 30 days after the decision is filed.

16
17 (3) If necessary to prevent mootness or frustration of the relief granted or to otherwise
18 promote the interests of justice, the court may order early finality in that court of a
19 decision granting a petition for a writ within its original jurisdiction or denying such
20 a petition after issuing an alternative writ, ~~or~~ order to show cause, or writ of review.

21
22 (4) If a Court of Appeal certifies its opinion for publication or partial publication after
23 filing ~~its~~ a decision covered by (2) and before ~~its~~ the decision becomes final in that
24 court, the finality period runs from the filing date of the order for publication.

25
26 (5) If an order modifying ~~an opinion~~ a decision covered by (2) changes the appellate
27 judgment, the finality period runs from the filing date of the modification order.

28
29 **(c) Rehearing**

30
31 (1) Rule 8.268 governs rehearing in the Court of Appeal.

32
33 (2) Rule 8.536 governs rehearing in the Supreme Court.

34
35 **(~~e~~)(d) Remittitur**

36
37 A Court of Appeal must issue a remittitur in a writ proceeding under this chapter except
38 when the court ~~denies the petition without issuing an alternative writ or order to show~~
39 ~~cause~~ issues one of the orders listed in (b)(1). Rule 8.272(b)–(d) governs issuance of a
40 remittitur by a Court of Appeal in writ proceedings under this chapter.

1 (3) If a transcript or electronic recording under (1)(D) is unavailable, the record must
2 include a declaration ~~by the petitioner~~:

3
4 (A) Explaining why the transcript or electronic recording is unavailable and fairly
5 summarizing the proceedings, including the ~~petitioner's~~ parties' arguments and
6 any statement by the court supporting its ruling. This declaration may omit a
7 full summary of the proceedings if part of the relief sought is an order to
8 prepare a transcript for use by an indigent criminal defendant in support of the
9 petition and if the declaration demonstrates the ~~petitioner's~~ need for and
10 entitlement to the transcript; or

11
12 (B) Stating that the transcript or electronic recording has been ordered, the date it
13 was ordered, and the date it is expected to be filed, which must be a date before
14 any action requested of the appellate division other than issuance of a
15 temporary stay supported by other parts of the record.

16
17 (4) If the ~~petitioner~~ petition does not ~~submit~~ include the required record or explanations
18 or does not present facts sufficient to excuse the failure to submit them, the court
19 may summarily deny a stay request, the petition, or both.
20

21 (c)–(d) * * *

22 **Advisory Committee Comment**

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24
25 **Subdivision (a).** *Petition for Writ (Misdemeanor, Infraction, or Limited Civil Case)* (form APP-151) is
26 available at any courthouse or county law library or online at ~~www.courtinfo.ca.gov/forms~~
27 www.courts.ca.gov/forms.htm.

28
29 **Subdivision (b).** Rule 2.952 addresses the use of electronic recordings and transcripts of such recordings
30 as the official record of proceedings.

31
32 **Subdivision (d).** * * *

33 34 35 **Rule 8.933. Opposition**

36
37
38 (a)–(b) * * *

39
40 (c) **Form of preliminary opposition, return, or opposition**

41
42 Any preliminary opposition, return, or opposition must comply with rule 8.931(c). If it is
43 filed by an attorney, it must also comply with rule 8.932(b)(3)–(7).
44

1
2
3 **Rule 8.935. Filing, finality, and modification of decisions; rehearing; remittitur**
4

5 **(a) Filing of decision**
6

- 7 (1) The appellate division clerk must promptly file all opinions and orders of the court
8 and promptly send copies showing the filing date to the parties and, when relevant,
9 to the trial court.
10
11 (2) A decision must identify the participating judges, including the author of any
12 majority opinion and of any concurring or dissenting opinion, or the judges
13 participating in a “by the court” decision.
14

15 **(a)(b) Finality of decision**
16

- 17 (1) Except as otherwise ordered by the court, the following appellate division decisions
18 regarding petitions for writs within the court’s original jurisdiction are final in the
19 issuing court when filed:
20

21 (A) An order denying or dismissing such a petition without issuance of an
22 alternative writ, order to show cause, or writ of review; and
23

24 (B) An order denying or dismissing such a petition as moot after issuance of an
25 alternative writ, order to show cause, or writ of review.
26

- 27 ~~(1)(2)~~ Except as otherwise provided in this rule (1) and (3), an appellate division decision
28 in a writ proceeding is final 30 days after the decision is filed.
29

30 ~~(2) — The denial of a petition for a writ within the appellate division’s original jurisdiction~~
31 ~~without issuance of an alternative writ or order to show cause is final in that court~~
32 ~~when filed.~~
33

- 34 (3) If necessary to prevent mootness or frustration of the relief granted or to otherwise
35 promote the interests of justice, an appellate division may order early finality in that
36 court of a decision granting a petition for a writ within its original jurisdiction or
37 denying such a petition after issuing an alternative writ, ~~or~~ order to show cause, or
38 writ of review. The decision may provide for finality in that court on filing or within
39 a stated period of less than 30 days.
40

41 **(c) Modification of decisions**
42

43 Rule 8.888(b) governs the modification of appellate division decisions in writ proceedings.
44

1 **(d) Rehearing**

2
3 Rule 8.889 governs rehearing in writ proceedings in the appellate division.

4
5 **(b)(e) Remittitur**

6
7 Except as provided in rule 8.1018 for cases transferred to the Court of Appeal, the
8 appellate division must issue a remittitur after the court issues a decision in a writ
9 proceeding, ~~denies the petition without issuing an alternative writ or order to show cause~~
10 except when issues the court issues one of the orders listed in (b)(1). Rule 8.890(b)-(d)
11 governs issuance of a remittitur in these proceedings, including the clerk's duties,
12 immediate issuance, stay, and recall of remittitur, and notice of issuance.

13
14 **Advisory Committee Comment**

15
16 **Subdivision (b).** This provision addresses the finality of decisions in proceedings relating to writs of
17 mandate, certiorari, and prohibition. See rule 8.888(a) for provisions addressing the finality of decisions
18 in appeals.

19
20 **Subdivision (b)(1).** Examples of situations in which the appellate division may issue an order dismissing
21 a writ petition include when the petitioner fails to comply with an order of the court or when the petition
22 becomes moot.

23
24 **Subdivision (d).** Under this rule, a remittitur serves as notice that the writ proceedings have concluded.
25
26