



# Judicial Council of California

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## REPORT TO THE JUDICIAL COUNCIL

*Item No.: 23-149*

For business meeting on September 19, 2023

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**Title**

Appellate Procedure: Attachment of Trial  
Court Order to Petition for Review of  
Summary Denial of Writ Petition

**Agenda Item Type**

Action Required

**Effective Date**

January 1, 2024

**Rules, Forms, Standards, or Statutes Affected**

Amend Cal. Rules of Court, rule 8.504

**Date of Report**

August 24, 2023

**Recommended by**

Appellate Advisory Committee  
Hon. Louis R. Mauro, Chair

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### Executive Summary

The Appellate Advisory Committee recommends amending the rule of court governing petitions for review in the Supreme Court to provide for attachment of the entire trial court order when the petitioner seeks review of a Court of Appeal summary denial of a writ petition. This change will facilitate review on the merits and streamline procedures. When the Court of Appeal summarily denies a writ petition, the underlying trial court order is necessary to identify the issues in dispute. Under the current rule, however, a petitioner cannot attach a trial court order that exceeds 10 pages to a petition for review without first requesting and obtaining the permission of the Chief Justice.

### Recommendation

The Appellate Advisory Committee recommends that the Judicial Council, effective January 1, 2024, amend California Rules of Court, rule 8.504, to require that if a petition for review seeks review of a Court of Appeal order summarily denying a writ petition, a copy of the underlying

trial court order challenged in the Court of Appeal writ proceeding must be attached to the petition for review.

The proposed amended rule is attached at page 5.

### **Relevant Previous Council Action**

The Judicial Council adopted the predecessor to rule 8.504, which addresses the contents of petitions for review, effective September 1, 1928, as part of the original Rules for the Supreme Court and District Courts of Appeal. The original rule required that a petition be accompanied by a copy of the relevant Court of Appeal opinion. Since 1928, the council has amended and renumbered the rule on numerous occasions. As of July 1, 1988, permissible attachments included the Court of Appeal opinion, any trial court order as to which relief was sought, and any evidentiary exhibit or order of a trial court that counsel considered of unusual significance and that did not exceed 10 pages. Effective January 1, 2003, as part of an overall revision to the appellate rules, these provisions were consolidated into a single sentence providing: “No attachments are permitted except an opinion or order from which the party seeks relief and exhibits or orders of a trial court or Court of Appeal that the party considers unusually significant and do not exceed a total of 10 pages.”

The January 2003 amendment has been interpreted as applying the 10-page limitation to all attachments to petitions for review. Effective January 1, 2009, the Judicial Council amended the rule to require that, if the petition for review challenges an order of the Court of Appeal, that order must be attached to the petition. The council also amended the rule to make clear that a Court of Appeal opinion or order required to be attached to the petition is not subject to the 10-page limit on attachments. The most recent amendments, in 2011 and 2016, have no bearing on this proposal.

### **Analysis/Rationale**

If a petition seeks review of a Court of Appeal opinion or order, that opinion or order must be attached to the petition. (California Rules of Court, rule 8.504(b)(4), (5) & (e)(1)(A).)<sup>1</sup> In addition, rule 8.504 permits attachment of “[e]xhibits or orders of a trial court or Court of Appeal that the party considers unusually significant.” (Rule 8.504(e)(1)(B).)<sup>2</sup> However, the permissible attachments other than the Court of Appeal opinion or order “must not exceed a combined total of 10 pages.” (Rule 8.504(e)(2).) “On application and for good cause, the Chief Justice may permit a longer . . . attachment.” (Rule 8.504(d)(4).)

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<sup>1</sup> This and all subsequent rule references are to the California Rules of Court.

<sup>2</sup> The rule also provides for attaching “[c]opies of relevant . . . regulations or rules, out-of-state statutes, or other similar citable materials that are not readily accessible” and an unpublished opinion that is “required to be attached under rule 8.1115(c).” (Rule 8.504(e)(1)(C), (D).)

The Appellate Advisory Committee recommends amending rule 8.504 to provide for the attachment of the trial court order, regardless of its length, to a petition for review of a Court of Appeal order summarily denying a writ petition. When a Court of Appeal summarily denies a writ petition, it does not issue an opinion or address the merits of the trial court's order. Rather, a summary denial is just that—a brief order indicating that the petition is denied. Currently, the rule requires a party seeking Supreme Court review of a summary denial to attach the Court of Appeal order and permits attachment of the trial court's order only if it does not exceed 10 pages. However, the Supreme Court's review of the matter would focus on the trial court's reasoning and decision. Attachment of the complete trial court order would assist the Supreme Court in addressing the merits of the petition for review. It would also assist both the court and parties in expediting the matter, eliminating the need for an application to the Chief Justice to allow attachment of a trial court order exceeding 10 pages.

Specifically, the committee proposes a new subdivision (b)(6):

If the petition seeks review of a Court of Appeal order summarily denying a writ petition, a copy of the underlying trial court order that was the subject of the writ proceeding in the Court of Appeal showing the date it was entered must be bound at the back of the original petition and each copy filed in the Supreme Court or, if the petition is not filed in paper form, attached.

This language mirrors the provisions of subdivisions (b)(4) and (5) providing for attachment of the Court of Appeal opinion or order that is the subject of the petition.

### **Policy Implications**

There are no direct policy implications. These revisions will help ensure that the Supreme Court has easy access to sufficient information to assess petitions for review where the Court of Appeal has summarily denied a writ petition. These revisions are therefore consistent with the *Strategic Plan for California's Judicial Branch*, specifically the goals of Modernization of Management and Administration (Goal III) and Quality of Justice and Service to the Public (Goal IV).

### **Comments**

This proposal was circulated for public comment from March 31 to May 12, 2023, as part of the regular spring comment cycle. Seven comments were received: one from the California Attorney General's Office, five from committees or other organizations of appellate attorneys, and one from a bar association. All seven of the commentors indicated that they agreed with the proposal. A chart with the full text of the comments received and the committee's responses is attached at pages 6–12.

A member of the committee also suggested some possible changes to the proposal as circulated for public comment. In response to these suggestions, the committee recommends adding language to clarify that it is the underlying trial court order *that was the subject of the writ proceeding in the Court of Appeal* that must be attached to the petition for review (italics added for emphasis).

**Alternatives considered**

The committee considered whether the rule should *require* attachment of the trial court's order or merely permit it. Based on the benefits of including the complete order, including facilitating the Supreme Court's review and streamlining procedures for the court and litigants, the committee concluded that requiring attachment was the better option. Requiring attachment of the trial court order is consistent with the rule's requirement that the Court of Appeal opinion or order under review be attached. In circumstances other than a summary denial of a writ petition, that Court of Appeal opinion or order may contain the trial court's analysis and reasoning; review of a summary denial instead requires the Supreme Court to consider the trial court's order.

The committee also considered taking no action but concluded there were clear benefits to amending the rule.

**Fiscal and Operational Impacts**

Other than training for court staff to advise them of the rule change, the committee anticipates no fiscal or operational impacts. Several commentators expressed the view that the proposed amendment will save time and resources for both the court and practitioners by ensuring that the trial court order at issue is attached without the need for the petitioner to file or the court to consider an application to permit a longer attachment.

**Attachments and Links**

1. Cal. Rules of Court, rule 8.504, at page 5
2. Chart of comments, at pages 6–12

Rule 8.504 of the California Rules of Court is amended, effective January 1, 2024, to read:

**Rule 8.504. Form and contents of petition, answer, and reply**

**(a) \* \* \***

**(b) Contents of a petition**

~~(1)–(5)~~ \* \* \*

(6) If the petition seeks review of a Court of Appeal order summarily denying a writ petition, a copy of the underlying trial court order that was the subject of the writ proceeding in the Court of Appeal showing the date it was entered must be bound at the back of the original petition and each copy filed in the Supreme Court or, if the petition is not filed in paper form, attached.

~~(6)(7)~~ The title of the case and designation of the parties on the cover of the petition must be identical to the title and designation in the Court of Appeal opinion or order that is the subject of the petition.

~~(7)(8)~~ Rule 8.508 governs the form and content of a petition for review filed by the defendant in a criminal case for the sole purpose of exhausting state remedies before seeking federal habeas corpus review.

**~~(c)–(d)~~ \* \* \***

**(e) Attachments and incorporation by reference**

(1) No attachments are permitted except:

(A) An opinion or order required to be attached under ~~(b)(4) or (5)(4)–(6);~~

~~(B)–(D)~~ \* \* \*

(2) The attachments under ~~(1)(B)–(C)~~(B) and (C) must not exceed a combined total of 10 pages.

(3) \* \* \*

**SPR23-05****Appellate Procedure: Attachment of Trial Court Order to Petition for Review of Summary Denial of Writ Petition**  
(Amend Cal. Rules of Court, rule 8.504)

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

	<b>Commenter</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
1.	California Academy of Appellate Lawyers by Wendy Cole Lascher, Rules Commentary Chair	A	The California Academy of Appellate Lawyers (“CAAL”) is devoted to promoting and encouraging reforms in appellate practice that ensure effective representation of litigants and more efficient administration of justice.	The committee appreciates this comment and acknowledges the commenter’s support for the proposal.
2.	California Appellate Defense Counsel by Rebecca P. Jones, Vice President	A	<p>On behalf of California Appellate Defense Counsel (CADC), I would like to submit the following comment in support of the proposed change to Rule 8.504, which would require litigants to attach a copy of a trial court ruling on a writ to a petition for review of an appellate court order summarily denying the petition.</p> <p>CADC is a voluntary statewide professional association of attorneys who handle indigent appeals by court appointment in criminal and dependency matters. Our members regularly litigate petitions for writs of habeas corpus and petitions for writs of mandamus in the Courts of Appeal and, less frequently, in the superior courts. In our experience, it is not at all uncommon that a superior court addressing a petition will issue a reasoned order on the petition but the Court of Appeal will summarily deny any “appeal” of that order, pursued through a newly filed petition. Once the Court of Appeal denies the petition, counsel has two options for seeking review in the Supreme Court: They may file a petition for review, as relevant to this rule, or they may file a new petition in the Supreme Court. We have been told that the preferred mechanism is a petition for review.</p>	The committee appreciates this comment and acknowledges the commenter’s support for the proposal.

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			<p>As this proposed new rule implicitly recognizes, when a petition for review is filed challenging a Court of Appeal summary denial of a petition, the Supreme Court would have some difficulty discerning the basis for a summary denial or the issues presented by petition. By requiring the petitioner to attach a reasoned superior court order to the petition for review, the amendment to this rule would give the Supreme Court much more context for understanding the basis for the petition for review. Furthermore, by making attachment of the superior court order mandatory rather than optional, the rule provides helpful clarity to practitioners who might otherwise feel like they need to guess at the best way to make their case to the Supreme Court.</p> <p>Because this rule provides helpful clarity for our practice, and because it will make writ practice in the Supreme Court more efficient, CADC urges adoption of this proposed amendment.</p>	
3.	California Department of Justice by Michael J. Mongan, Solicitor General	A	<p>On behalf of the Office of the Attorney General at the California Department of Justice, I submit the following comment regarding Item Number SPR23-05, “Appellate Procedure: Attachment of Trial Court’s Order to Petition for Review of Summary Denial of Writ Petition”:</p> <p>The Office of the Attorney General supports this proposed rule change. We further agree that attachment of the underlying trial court order should be mandatory rather than permissive. The Attorney</p>	The committee appreciates this comment and acknowledges the commenter’s support for the proposal.

## SPR23-05

### Appellate Procedure: Attachment of Trial Court Order to Petition for Review of Summary Denial of Writ Petition (Amend Cal. Rules of Court, rule 8.504)

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			<p>General is frequently in the position of responding to petitions for review under extremely tight deadlines. Often, when the petition for review challenges a Court of Appeal's summary denial of a writ, we have made no appearance in the lower courts and lack immediate access to relevant records. We anticipate that attachment of the underlying trial court order to the petition for review in such cases would save valuable time and resources and improve our ability to prepare a response that would be of most assistance to the Court.</p> <p>Please let me know if you need any additional information or if there is anything else we can do to be of assistance.</p>	
4.	California Lawyers Association by Kelly Woodruff, Chair, Litigation Section, Committee on Appellate Courts	A	<p>Invitation to Comment SPR23-05 sets forth a proposal allowing for a full trial court order to be attached to a petition for review of a summary denial of a writ petition. The new California Rule of Court, rule 8.504(b)(6) is meant to patch a hole in the current rule, which permits the petitioner to attach only the applicable appellate court order and attachments up to 10 pages, unless the presiding justice permits additional pages to be attached upon good cause.</p> <p>The CAC agrees with this proposal. When the appellate court summarily denies a writ petition, it does not issue any orders addressing the underlying issues. In that case, the order on review would be the underlying trial court order. But under the current rule, if the trial court order exceeds 10 pages, the petitioning party must apply to the presiding justice for leave to file additional</p>	The committee appreciates this comment and acknowledges the commenter's support for the proposal.



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	<b>Commenter</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
			<p>page attachments. This additional step would waste the court's (and the petitioner's) time and resources.</p> <p>The proposed amendment would eliminate this unnecessary procedure. Under amended Rule 8.504(b), when a writ petition is summarily denied, the underlying trial court order would be treated the same as an appellate court order—as a required attachment. Because amended Rule 8.504(b) would ease administrative burdens and eliminate an unnecessary procedure, the CAC urges its adoption.</p>	
5.	The Los Angeles County Bar Association, Appellate Courts Section by John A. Taylor, Jr., Executive Committee Member	A	<p>The Appellate Courts Section of the Los Angeles County Bar Association (LACBA-ACS) supports SPR23-05. The proposed rule requires the attachment of trial court order when the petitioner seeks review of a Court of Appeal summary denial of a writ petition, even when the underlying trial court order exceeds 10 pages. The practice would roughly parallel the rule requiring that a Court of Appeal opinion be attached to a petition for review, and LACBA-ACS agrees with this statement in the Invitation to Comment:</p> <p>“Attachment of the complete trial court order would assist the Supreme Court in addressing the merits of the petition for review. It would also assist both the court and parties in expediting the matter, eliminating the need for an application or motion to allow attachment of a trial court order exceeding 10 pages.”</p>	The committee appreciates this comment and acknowledges the commenter's support for the proposal.
6.	Orange County Bar Association by Michael Gregg, President	A	*The proposal appropriately addresses the stated purpose.	The committee appreciates this comment and acknowledges the commenter's support for the proposal.

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	<b>Commenter</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
7.	San Diego County Bar Association Appellate Practice Section by Lisa Cannon, Chair	A	<p>The Appellate Practice Section of the San Diego County Bar Association (APS) supports a requirement that trial courts' orders be attached to petitions for review of Court of Appeal orders summarily denying writ petitions. Such a requirement would facilitate the work of the central staff of the Supreme Court in preparing conference memoranda and the consideration of such petitions by the justices. Proposed rule 8.504(b)(6) should be adopted as drafted.</p> <p>The Supreme Court has recognized that upon occasion certain cases involve "instances of such grave nature or of such significant legal impact" that the Court is "compelled to intervene through issuance of an extraordinary writ." (Babb v. Superior Court (1971) 3 Cal.3d 841, 851 [rulings on pleadings].) For example, the writs of mandate are properly used in discovery matters "to review questions of first impression that are of general importance to the trial courts and to the profession, and where general guidelines can be laid down for future cases." (Daly v. Superior Court (1977) 19 Cal.3d 132, 140 (superseded by statute on unrelated grounds) [discovery matters].) Indeed, "the need for the availability of prerogative writs in discovery cases where an order of the trial court granting discovery allegedly violates a privilege of the party against whom discovery is granted, is obvious." (Roberts v. Superior Court (1973) 9 Cal.3d 330, 336.) In such cases, mandate is appropriate for "immediate review of a question of statewide importance so that lower decisions in other cases will be uniform." (Hogya v. Superior Court (1977) 75 Cal.App.3d 122, 129.)</p>	The committee appreciates this comment and acknowledges the commenter's support for the proposal.

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			<p>Appellate courts have broad discretion in deciding whether to intervene by writ. (Hogya v. Superior Court (1977) 75 Cal.App.3d 122, 128–130.) Whether writ review should have been granted cannot be known without understanding how the trial court adjudicated the disputed issue. The Court of Appeal may have acted well within its discretion in determining that appeal from a final judgment would be an adequate legal remedy. (Ibid.) On the other hand, its discretion may have been abused if the petitioner was seeking review of a trial court order compelling discovery over a legitimate and important claim of privilege or confidentiality. (Roberts, supra, 9 Cal.3d at p. 336.)</p> <p>Petitions seeking Supreme Court review of orders summarily denying writ petitions may often be denied and may rarely result in plenary Supreme Court review. However, these petitions sometimes result in grant and transfer orders directing the Court of Appeal to issue an order to show cause or alternative writ. “This practice commonly occurs when the court of appeal summarily denied a writ petition, but the supreme court feels an opinion by the court of appeal is warranted—either for the benefit of the parties or so that the supreme court may have the benefit of the court of appeal’s reasoning.” (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2021) ¶ 13:125.1, p. 13-32.) As a practical matter, determining the merits of such petitions always requires analyses of the underlying issues and the trial court’s adjudications, which the mandatory attachment of trial court orders</p>	

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	Commenter	Position	Comment	Committee Response
			<p>would facilitate.</p> <p>With electronic filing, the burden of attaching the trial court's order to a petition for review is very minimal. And any ethical petitioner should want to assist the Supreme Court's consideration of the petition by attachment of the underlying trial court order.</p> <p>It is APS's position that the Judicial Council's proposal appropriately addresses the stated purpose of the proposed rule. There are clear administrative benefits to proposed rule 8.504(b)(6). And those administrative benefits would only be diminished if the attachment of trial court orders were optional.</p>	