

HABEAS CORPUS FREQUENTLY ASKED QUESTIONS

Do I have to use the District Court's form?

Yes. Rule 2(c) of the Rules Governing § 2254 Petitions. The Court *might* excuse a pro se petitioner's failure to use the form, but it certainly won't excuse counsel's failure to use it.

How do I fill out the civil cover sheet and the civil category form?

Don't worry about it too much. Just do the best you can. These are just forms to help the Clerk collect case statistics. Your petition will not be dismissed for failure to accurately fill out these forms.

My description of the claims and the facts don't fit on the form. Can't I just say "See attached memo"?

No. The Attorney General's office may very well move to dismiss the petition as not complying with Rule 2(c) of the 2254 Rules. Instead, use up the space that is on the form and only then should you proceed to use attachments.

Who signs the petition?

The client. 28 USC § 2242. You should sign, too. But the client's signature is what is important. If the client does not sign, the court is not required to entertain the petition.

Can the \$5 filing fee be waived?

Yes. You can ask for "Leave to Proceed Without Prepayment of Fees". Many attorneys choose to simply pay the filing fee to avoid the delay and aggravation of preparing the necessary motion and affidavit. That is fine. However, it is important that such a motion be allowed before proceeding to the Court of Appeals because the filing fee there is substantial (currently \$455).

When do I submit my memorandum in support of the petition?

There is no explicit rule about this. In Massachusetts, most counsel submit the memorandum at the same time as the petition itself. Other attorneys, pressed for time, file only the petition (to make sure that it is timely filed) and then file the memorandum as soon as possible afterwards. One reason for doing this is to make sure that the petition makes it past the court's "Rule 4 screening" which provides for summary dismissal of frivolous petitions without requiring the Attorney General to answer. On the other hand, some attorneys feel that it is strategically better to wait for the Commonwealth's answer to file the memorandum because at that point you have some idea of what their defenses will be.

How many copies do I submit?

Three. Rule 3(a) of the 2254 Rules.

On whom do I serve the petition?

No one. The Court serves the petition on the respondent if it determines that the petition requires an answer.

What are the requirements for the form of the memorandum in support?

There are no explicit formal requirements. Therefore, feel free to use your preferred font (Courier New or Times New Roman are the normal choices) and font size (normally 12 or 14 point). There is no margin requirement, but at least a one-inch margin is recommended. You are not required to prepare a table of contents or table of authorities. However, these may be useful if you are filing a longer memorandum.

What is the page limit for the memorandum in support?

There is no explicit page length for the memorandum in support. The Federal Rules of Civil Procedure limit memoranda in support of “motions” to 20 pages in length, but this is a memorandum in support of a petition, not a motion.

Must I file an appendix or other attachments to the memorandum?

No. Nevertheless, you should consider attaching any reasonably-sized portions of the record that will help the court understand the claims and rule in your favor. Rule 5 of the 2254 Rules requires the Commonwealth to file a “Supplemental Answer” which includes the pleadings below. They will not normally file the transcripts. You should ask that the transcripts be produced.

How long does the Commonwealth have to answer?

The Court will issue an order that specifies the time the Commonwealth has to answer. The Commonwealth will very frequently ask for an extension of time. It will be granted, regardless of whether you oppose it.

Why is the Commonwealth always calling me and asking me to assent to their motions?

They have to. And so do you. Local Rule 7.1(a)(2) requires that “no motion shall be filed unless counsel certify that they have conferred and have attempted in good faith to resolve or narrow the issue.” You should become familiar with Local Rule 7.1 because it controls the most important aspects of motion practice (timing, page limits, etc.).

Must I use the federal court’s “e-filing” system?

You may file your first set of documents (the petition and any accompanying documents) in paper form. After that, you should expect that any further filings will have to be filed electronically. Electronic filing requires that you file documents in PDF file format.

Will I get oral argument?

There is no right to oral argument on a habeas petition. You must explicitly ask for it. Even then, you might not get it.

I’m totally confused. Is there a good treatise to explain habeas corpus practice?

YES! Liebman & Herz, *Federal Habeas Corpus Practice* is an indispensable resource.