Justice Eileen C. Moore
FOURTH DISTRICT COURT OF APPEAL, DIVISION THREE

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Seeking extraordinary relief by filing a writ petition

WRIT PRACTICE MADE SIMPLE, SO YOU CAN QUICKLY MAKE THE DECISION ON WHETHER TO FILE THE WRIT PETITION

You're in the midst of battle and the court makes a ruling you think is wrong. What's to be done? What exactly is a writ anyway? This article presents the basics for writs of mandate and prohibition.

The difference between a writ of mandate and a writ of prohibition

Writs of *mandate* are issued to correct an abuse of discretion or to compel the performance of a lower court for a nondiscretionary duty to act. Writs of *prohibition* are issued to prevent a threatened judicial act in excess of a court's jurisdiction. A writ petition is not a motion for reconsideration.

The difference between a writ and an appeal

A writ is different from an appeal: An *appeal* is a petition to a higher court by a party who seeks to overturn a lower court's ruling. A *writ* is a directive from a higher court that orders a lower court to take action in accordance with the law.

Parties have the right to appeal judgments and orders specified in Code of Civil Procedure section 904.1. Courts of Appeal are obligated to provide a reasoned opinion deciding appeals. Whether to issue writ relief is almost wholly discretionary. A Court of Appeal may, and usually does, dispose of a writ petition by way of a one-sentence order.

Deciding whether to file a writ petition

There is no way to predict with certainty which writ petition will receive favorable treatment. But consideration of the below factors may affect the odds.

Writs are usually denied when there is an adequate remedy at law: The reality of writ petitions is that a party is asking to cut in line. That is, there are many appeals on file waiting to be heard, but a writ petitioner asks the court to hear petitioner's case before those appeals are heard. Appellate courts sometimes realize the trial court may have erred, yet do not step in when a writ is filed because the issue can be heard in due course on appeal. In other words, the matter can wait to be heard since there's no urgency.

Writs are rarely granted in discovery issues: Writs are not issued to control the exercise of discretion of the lower court. Thus, writs are rarely granted in discovery issues – but see the following:

- In *Pomona Valley Hospital Medical Center v. Superior Court* (2012) 209 Cal.App.4th 687, the trial court ordered a hospital to answer interrogatories and provide documents that were part of the hospital's Peer Review Board proceedings and exempt from discovery pursuant to Evidence Code section 1157. The Court of Appeal ordered the lower court to vacate its order.
- In *Getz v. Superior Court* (2021) 72 Cal.App.5th 637, privileged information was involved. A county refused to comply with a public record request for five years of emails between the county and four domain addresses, contending the burden was too great to go through its records to sort out which documents might be privileged. The Superior Court agreed with the county that the request was too burdensome. In granting a petition for writ of mandate, the Court of Appeal stated: "An agency cannot resist disclosure based on the burden stemming from actions needed to assuage an abstract fear of improvident disclosure, a fear that could be avoided by simply setting privileged documents apart."

Writs are often issued when there is some urgency: In many ways, the writ process is like the emergency room of the appellate courts. If made to wait in line to appeal the issue, it may be too late.

They knew months ago

In the personal-injury case of *Fantica v. Superior Court* (2002) 99 Cal.App.4th 350, plaintiff's treating doctor, who was to be called as the only expert physician, admitted during his deposition that he had not yet reviewed any of the plaintiff's records of prior medical treatment. He meant to do so but had not because he was too busy. The defense did not stop the deposition or seek the court's assistance, but instead continued with and completed the deposition.

On the day of trial, the defense moved in limine to prohibit the doctor from testifying due to his failure to review plaintiff's past medical records. The trial court deferred the ruling on the motion until the second day of trial, and then ruled the doctor would not be permitted to testify as an expert.

The Court of Appeal ordered a stay of the trial and thereafter issued a writ of mandate directing the trial court to vacate its order, stating: "This trial court's apparent rush to preclude petitioners from presenting critical expert opinion testimony is alarming. Instead of gutting petitioners' case (for what was, at best, a minor infraction that was correctable), there were reasonable alternatives. For example, to the extent the order may reflect the trial court's belief [the doctor] 'sandbagged' defendant's counsel by not being fully prepared for his deposition, the court could have (and may still) order [the doctor] to submit to a further deposition on such terms and conditions (but not sanctions) as are appropriate."

Designation of rebuttal experts

In a designation-of-expert situation, the defense was taken by surprise when the plaintiff listed seven experts expected to be called at trial. Thus, the defendant's list was expanded. The trial court struck four of the five newly listed experts, and the defendant sought extraordinary relief. In issuing a peremptory writ of mandate and reversing in *Du-All Safety, LLC v. Superior Court* (2019) 32 Cal.App.5th 485, the appellate court stated: "[Defendant] disclosed the experts it expected to call at trial. Then, when plaintiffs disclosed five other experts, and, it must be emphasized, also produced a life care

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plan, [defendant] retained and designated experts to rebut plaintiffs' position, including its own life care plan. This is the precise reason why the Legislature codified the right to designate rebuttal experts."

Immediate attention to a discrete issue

Writs are frequently granted when there is an error of law and the matter needs immediate attention: In *1550 Laurel Owner's Association, INC. v. Appellate Division of the Superior Court of Los Angeles* (2018) 28 Cal.App.5th 1146, an appellate division of a superior court ordered the limited jurisdiction trial court to rule on the merits of an anti-SLAPP motion brought against a homeowner association (HOA) pursuant to Code of Civil Procedure, section 425.16. The HOA petitioned the Court of Appeal for a writ of mandate, arguing that such a motion may not be pursued in a limited civil action. In granting extraordinary relief, the appellate court stated: "We conclude the restrictive language of [Code of Civil Procedure] section 92(d), which limits the type of motions to strike that may be brought in a limited civil case, precludes the filing of a special motion to strike in such a case."

Only the discrete issue is taken under review: When a party asks for extraordinary relief, the Court of Appeal will not take the whole case under review, just the discrete issue that needs immediate attention.

Peremptory challenge to an assigned judge

Issues involving a peremptory challenge of an assigned judge pursuant to Code of Civil Procedure section 170.6 are not uncommon. Unless the appellate court steps in right away, it will be too late to make any difference. In *Entente Design v. Superior Court* (2013) 214 Cal.App.4th 385, the case was about to go to trial, and the judge assigned for all purposes advised counsel the case was being sent to another judge for trial. Within the next hour after leaving court, counsel filed a challenge to the newly assigned judge. The newly assigned judge denied the section 170.6 challenge. The appellate court issued a stay and then a writ of mandate, ordering that the case was to be assigned to a different judge for trial. Thus, the appellate court did not involve itself with the case as a whole. It just tended to the emergency and allowed the case to continue in the trial court.

The decision whether to petition for a writ must be made quickly

Timing to file a writ petition: Be very careful here. There is no clear and simple time limit. Many times, the offending order will be pursuant to a statute that contains the specific time limit for filing a writ. Thus, the first order of business is to read the statute under which the court made the order and determine if it dictates the timing for a writ procedure. Even if there is no deadline, undue delay signals to the court that the matter is not urgent and therefore does not require extraordinary relief.

Also, some statutes provide that the only appellate remedy is by writ petition. For example, the grant or denial of a motion to expunge a lis pendens, as set forth in Code of Civil Procedure section 405.39, or the grant or denial of motion for change of venue as set forth in section 400. The summary judgment statute, Code of Civil Procedure section 437c, specifically states that, even though the grant or denial of summary judgment is appealable, a writ petition challenging an order short of summary judgment must be filed within 20 days after service of written notice of entry of the order.

The time limit for filing a common law writ petition is controlled by the doctrine of laches, usually interpreted as 60 days from the date of the ruling. (*Peterson v. Superior Court* (1982) 31 Cal.3d 147; 163; *Popelka Allard, McCowan & Jones v. Superior Court* (1980) 107 Cal.App.3d 496,499; *Volkswagen of America, Inc. v. Superior Court* (2001) 94 Cal.App.4th 695, 701.) But counsel should not assume that waiting until the 59th day to file the petition for a writ will suffice. Courts of Appeal must drop what they are doing to tend to a writ, and if a party places the court in a time bind, the appeals court may find it was not timely filed. Remember, when seeking immediate action from the Court of Appeal, the petition must be filed in time for the court to consider, act and notify the trial court of its action.

Sometimes an issue can be forfeited if no writ is sought: In some situations, seeking a writ is the only relief path available. In *Oak Springs v. Advanced Truss* (2012) 206 Cal.App.4th 1304, the trial court approved a condominium developer's motion for a determination of a good-faith settlement, and another defendant filed an appeal from the trial court's order. The Court of Appeal dismissed the appeal, holding it was taken from a nonappealable interlocutory order. However, Code of Civil Procedure section 877.6 permits review by writ of mandate within 20 days, but 20 days had already expired when the appeal was filed. Thus, the issue was waived because the party sat on its rights.

Preparing a writ petition

Contents of a writ petition: If the petition names as respondent a judge, court, board, or other officer acting in a public capacity, it must disclose the name of any real party in interest. (Cal. Rules of Court, rule 8.486 (a)(2).) The real party in interest is the party who prevailed on the issue in the trial court. In a typical case, if the plaintiff in the action is the petitioner, the real party in interest will be the defendant, and vice versa.

A writ petition must be verified and must be accompanied by a memorandum of points and authorities, which need not repeat the facts set forth in the petition itself. (Cal. Rules of Court, rule 8.486 (a)(4)(5).) A brief produced on a computer must not exceed 14,000 words, and counsel must provide a certificate of the word count. Consult California Rules of Court, rules 8.204(c) and 8.486 (a)(6), for what may be excluded from the word count.

If the petition requests a temporary stay, it must explain the urgency: The cover of the writ petition must prominently display

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the notice "STAY REQUESTED" and identify the nature and date of the proceeding or act sought to be stayed. It is also essential the trial court, department involved, and the name and telephone number of the trial judge whose order the request seeks to stay must appear either on the cover or at the beginning of the text. (Cal. Rules of Court, rule 8.486 (a)(7).) All of this information is important, because, when a stay is granted, the Court of Appeal will notify the trial court of the stay.

A Certificate of Interested Entities or Persons is required in civil cases other than family, juvenile, guardianship or conservatorship cases: The petitioner's certificate must be included in the petition. (Cal. Rules of Court, rule 8.488 (a).) The Judicial Council adopted form APP-008 titled "Certificate of Interested Entities or Persons" for optional use.

An adequate record must accompany the writ petition: That includes the ruling from which the petition seeks relief, all documents and exhibits submitted to the trial court supporting and opposing the writ petitioner's position, all other documents submitted to the trial court that are necessary for a complete understanding of the case and the ruling under review, and the reporter's transcript of the oral proceedings that resulted in the ruling under review. (Cal. Rules of Court, rule 8.486 (b)(1).)

Exigent circumstance: If there are exigent circumstances, the writ petition may be filed without documents or exhibits submitted to the trial court. However, the petition must be accompanied by a declaration that explains the urgency and the circumstances making the documents unavailable and fairly summarizes their substance. (Cal. Rules of Court, rule 8.486 (b)(2).)

No reporter's transcript: If a reporter's transcript is unavailable, the record must include a declaration explaining why the transcript is unavailable and fairly summarizing the proceedings, including the parties' arguments and any statement by the court supporting its ruling. Or, the declaration may state the transcript has been ordered, the date it was ordered, and the date it is expected to be filed. (Cal. Rules of Court, rule 8.486 (b)(3).)

Paper documents: California Rules of Court, rule 8.486 (c), sets forth the requirements for the form of paper documents submitted in a writ petition and record. California Rules of Court, rules 8.45-8.476 (b)(1)(2), provide the rules governing sealed and confidential records.

Filing and service: The general requirements for filing and service are found in California Rules of Court, rule 8.25. In addition, the proof of service must give the telephone number of each attorney served. If the respondent is the superior court or a judge of that court, the petition and one set of supporting documents must be served on any named real party in interest, but only the petition must be served on the respondent. (Cal. Rules of Court, rule 8.486 (e).)

Opposing a writ opposition

Preliminary opposition: Another name for a preliminary opposition is "informal response." Writs are expensive and opposing parties must pay a filing fee for the party's initial filing. The cost of a writ is $775 and the cost of a response is $390. Counsel might want to refrain from filing an informal response or preliminary opposition not solicited by the court for a few reasons. First, the appellate court might, and often does, deny the petition without any opposition. Second, some Courts of Appeal have a rule where no filing fee needs to be paid if the court solicits a preliminary opposition. To assist in deciding whether or not to file a preliminary opposition, consult the local rules, not only for the appellate district, but also for the appellate division within that district where the writ will be considered.

If the decision has been made to file a preliminary opposition, it may be filed within ten days after the petition is filed. A preliminary opposition must contain a memorandum and a statement of any material fact(s) not included in the petition. Then, within ten days after a preliminary opposition is filed, the petitioner may serve and file a reply. The court may rule or grant a stay, whether or not any opposition is filed. (Cal. Rules of Court, rule 8.487 (a).)

Formal opposition: If the court issues an alternative writ or order to show cause, the respondent, or any real party in interest separately or jointly, may serve and file a return by demurrer, verified answer, or both. If the court notifies the parties that it is considering issuing a peremptory writ in the first instance, the respondent or any real party in interest may serve and file an opposition. (Cal. Rules of Court, rule 8.487 (b)(1).)

The rule refers to a return: The "return" is the formal response; it is the pleading. The petitioner will have an opportunity to file a reply, which is also a formal pleading.

Unless the court orders otherwise, the return or opposition must be served and filed within 30 days after the court issues the alternative writ or order to show cause or notifies the parties that it is considering issuing a peremptory writ in the first instance. Unless the court orders otherwise, the petitioner may serve and file a reply within 15 days after the return or opposition is filed. (Cal. Rules of Court, rule 8.487 (b)(2), (3).)

A Certificate of Interested Entities or Persons must be filed by all parties to a writ proceeding. It must appear after the cover and before the tables in an opposition. (Cal. Rules of Court, rule 8.488 (b), (c).)

What the Court of Appeal may do when a writ petition is filed

If a writ or order issues, the reviewing court clerk must promptly send a certified copy of the writ or order to the person or entity to whom it is addressed. If the writ or order stays or prohibits proceedings set to occur within seven days or requires action within seven days, or in any other urgent situation, the reviewing court clerk must make a reasonable effort to notify the clerk of the respondent court by

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telephone or email. The clerk of the respondent court must then notify the judge or officer most directly concerned. The clerk need not give telephonic or email notice of the summary denial of a writ, whether or not a stay was previously issued. (Cal. Rules of Court, rule 8.489 (a-b).)

All decisions by the Court of Appeal, other than summarily denying or dismissing a writ petition, are final 30 days after the decision is filed. However, the appeals court may order early finality to prevent mootness, frustration of the relief granted, or in the interests of justice. (Cal. Rules of Court, rule 8.489 (b).)

Summary denial: What happens most of the time is the writ petition will be unceremoniously denied. Courts of Appeal do not want to be breathing down the neck of the trial judge. The appeals court prefers to sit back and wait and see if the matter will resolve itself. Most of the time, if there is no urgency involved, the appellate court will await an appeal.

Alternative writ: An alternative writ is an order directing the trial court either to do what the petitioner has requested in the petition or show the appellate court why the trial court should not be ordered to do so. In reality, it's the real party in interest, not the respondent court, who must show cause why the requested relief should not be granted.

When the appeals court issues an alternative writ, it leaves open its option to change its mind. In issuing that alternative writ, the Court of Appeal has not ordered the lower court to do anything. Nor has it obligated itself to hold a hearing or issue an opinion. If the lower court changes its ruling, and it almost always does, there will be no hearing set.

Peremptory writ in the first instance – Palma notice: Pursuant to *Palma v. United States Industrial Fasteners, Inc*. (1984) 36 Cal.3d 171, if the reviewing court is considering granting a peremptory writ in the first instance, it must first notify the parties that it is considering doing so. When you see the words "in the first instance," they mean without a hearing. In this situation, the Court of Appeal has committed itself to issuing a writ, but it will do so without a hearing.

The *Palma* notice is for circumstances that are obvious the appeals court needs to act. For example, in *Scott S. v. Superior Court* (2012) 204 Cal.App.4th 326, the public guardian applied for an order authorizing her to consent to the amputation of a conservatee's toe without a finding there was a medical necessity to do so. The lower court ordered the amputation based on a declaration without any testimony or opportunity to cross-examine. A *Palma* notice was given, and the petition was granted.

A *suggestive Palma* notice is directed to the court. It tells the trial court why the appellate court thinks there was error. The Court of Appeal, figuratively speaking, taps the trial court on the shoulder and suggests that it change its ruling. This procedure is described and authorized by the California Supreme Court in *Brown, Winfield & Canzoneri v. Superior Court* (2010) 47 Cal.4th 1233. Note, the appellate court has *not* told the trial judge to change the order. It merely suggested the change. If the superior court changes its order, and it almost always does, the appellate court will dismiss the petition. If the superior court does not change its order, the appellate court will issue a peremptory opinion in the first instance.

Order to show cause: Once the appellate court issues an order to show cause, the matter becomes a cause. The court will provide an opportunity for a hearing and issue an opinion.

A tough decision

Counsel has a tough decision to make with regard to spending time and money on a writ petition upon realizing a client has been done wrong. Should one salvage what is possible and just wait for an appeal later? If the issue involves a privilege or some novel constitutional issue, a writ might be the best course. If irreparable harm might result, it may be the only course to take. And if petitioning for a writ is the single means to seek review, "it's petition for a writ or forever hold your peace."

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