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Extraordinary clients deserve extraordinary writs

From kings to courts: Petitioning the appellate court for extraordinary writ relief — A look at history and practice

Although most trial court rulings are appealable in the sense that they will eventually be subject to appellate review, irreparable harm may ensue if your client is left waiting in line for two years for an appeal to process. In other situations, an appeal can't provide an adequate remedy. But filing an appeal has never been the only option for challenging a trial court's decision. This article details another option: petitioning the appellate court for extraordinary writ relief.

What is a writ?

In the Middle Ages, kings issued writs to command an individual to perform a specific action. By the 1300's, writs had literally taken on hundreds of forms. This flourishing writ practice unintentionally created a structural framework that gave birth to English common law. And at the core of this medieval writ practice existed a set of *prerogative* writs including *certiorari, habeas corpus*, *mandamus*, and *prohibition*.

Most Americans – and hopefully most attorneys – would probably agree they have heard of the United States Supreme Court granting "cert." in highly publicized cases. Writs of certiorari existed under ancient Roman Law. The term itself is derived from *certiorari*, a Latin word meaning "we wish to be informed."

Early English common law provided that writs of certiorari would lie if equal justice could not be provided in a base court. (1 Rastell, Les Termes de la Ley (1636) p. 51.) If granted, the base court was required to remove its record into the Chancery. (*Ibid.*) But perhaps more important to today's civil trial attorneys are writs of mandate and prohibition.

Writs of mandate

In English common law, writs of *mandamus* were granted to prevent failures of justice and to execute the common law, a statute, or the king's charter. In modern practice, a writ of mandate may be issued by an appellate court to a trial court, to compel the performance of an act which the law specially enjoins. (Code Civ. Proc., § 1085.) A writ of mandate may be either peremptory or alternative. (*Ibid.*) A peremptory writ commands the trial court to perform a specified action. (*Ibid.*) An alternative writ of mandate commands the same but provides the trial court with the alternative option of showing cause why it has not performed the mandate. (*Id.* at § 1087.)

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Writs of prohibition

A writ of prohibition may be issued by any court to arrest the proceedings of an inferior tribunal. (*Id.* at § 1102.) Writs of prohibition come in two varieties: alternative or peremptory. An alternative writ of prohibition directs the trial court to desist or refrain from further proceedings until further ordered or show cause why it should not be restrained from proceeding. (*Id.* at § 1104.) The peremptory writ of prohibition is similar but doesn't afford the trial court an opportunity to show cause. (*Ibid.*)

History of civil writ practice in California

In 1849, the original California Constitution vested its newly established Supreme Court with authority to issue writs of *habeas corpus* at the instance of any person held in actual custody and authority to issue all other writs and process necessary to the exercise of their appellate jurisdiction. (Cal. Const. of 1849, art. VI, § 4.)

In 1850, California's Supreme Court was presented with the question whether it had authority to issue a writ of *mandamus* to a lower court. (*In People ex rel. Mulford v. Turner* (1850) 1 Cal. 143.) "First, as to the power. The seventh section of the Act organizing this Court, declares that 'the Court, and each of the Justices thereof, shall have power to issue writs of habeas corpus, of mandamus, of injunction, certiorari, supersedes, and such other writs and process known to the law, as may be necessary in the exercise of their jurisdiction.' This section containing an express delegation of power to issue the writ of mandamus, there can be no question that, so far as statutory authority is concerned, the power resides in the Court, to issue such writs in all cases in which they may appear to form the appropriate remedy. The only doubt which can be entertained upon the subject, arises under the Constitution which creates the Court, and from which all its powers must be derived." (*Id.* at pp. 144-45.)

By 1879, when California's current constitution was ratified, it unequivocally vested the Supreme Court with "power to issue writs of mandamus, certiorari, prohibition, and habeas corpus, and all other writs necessary or proper to the complete exercise of its appellate jurisdiction." (Cal. Const. of 1879, art. VI, § 4.)

At the same time, England understood *writ* to mean the "king's precept, in writing under seal issuing out of some court to the sheriff, or other person, and commanding something to be done[.]" (Tomlin, The Law-Dictionary (1811) p. 458.) But in true American fashion, an edited version – that would trouble any king – found its way into California's newly enacted Code of Civil Procedure, which to date provides: "Writ" means an order or precept in writing, *issued in the name of the people*, or of a court or judicial officer. (*Id.* at § 17, subd. (b)(14), emphasis added.)

Not only was the king lost in translation, but so too were certain Latin terms. In 1872, the Legislature had intended to simplify law by eradicating Latin from our vocab. Thus writ of certiorari was denominated writ of *review*. Writ of mandamus became writ of mandate. The historical scraps of this abandoned effort can still be observed under Code of Civil Procedure sections 1067 and 1084 respectively.

Writ relief is still available in modern practice

An appeal may be taken from most civil trial court judgments, final orders, or certain non-final rulings. (*Id.* at § 904.) But in *extraordinary* situations, the appellate court may grant writ relief. (*Noe v. Superior Court* (2015) 237 Cal.App.4th 316, 323.) Writs of mandate and writs of prohibition are issued in cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law. (Code of Civ. Proc., §§ 1086, 1103(a).) Failure to exhaust all *available* remedies at the trial court level creates a good reason for an overloaded appellate court to summarily deny your petition for writ relief.

Extraordinary situations warrant writ relief

Appellate courts may grant extraordinary writ relief following a civil trial court's adjudication of a:

- Motion to disqualify a judge;
- Motion to disqualify opposing counsel;
- Motion to change venue;
- Motion to expunge lis pendens;
- Motion to quash service of process;
- Motion for summary adjudication;
- Motion for summary judgment;
- Motion for determination of good faith settlement;
- Demurrer sustained without leave to amend certain causes of action;
- Newly enacted statute;
- Significant issue of first impression;
- Issue that unnecessarily causes duplicative expenditures;
- Second trial on the same issues;
- Issue concerning legislative acts (e.g. the Public Records Act, California's Environmental Quality Act, etc.);
- Issue concerning widespread interest;
- Issue where trial courts are conflicted;
- Domestic violence restraining order.

This is not an exhaustive list of situations giving rise to the issuance of an extraordinary writ. Don't discount common law if you cannot find a statutory basis for your petition.

Drafting a petition for writ relief

When you read an exemplar petition for the first time, notice the formatting looks like an unusual cross between a civil complaint and an appellate brief. Petitions do not retain the same case caption from superior court. Think of the petition as a separate lawsuit brought by the party who was wronged by the superior court. After all, you're asking the appellate court to exercise its original jurisdiction.

The party who was allegedly wronged by the superior court's decision will become the petitioner. The respondent is the superior court. Any other parties named in the superior court case should be identified as real parties in interest. Since the respondent in a petition for writ review is the superior court, it makes life easier when you are searching for appellate decisions regarding writ relief. Just do a party name search on Westlaw or Lexis for "Superior Court."

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The cover page of a petition for writ review should display the type of writ relief requested, the decision appealed from, the superior court case number, the superior court judge's name, and whether a related appeal is pending. If you are requesting a temporary stay, notice must be included on the cover page.

The second page should be a certificate of interested persons. (Cal. Rules of Court, rule 8.488.) This helps the appellate court rule out any potential for conflicts of interest. Next there should be a table of contents and authorities followed by a brief introduction and statement why extraordinary writ relief should issue.

Following these sections is the actual petition. Each paragraph contained in the petition should be consecutively numbered. It should contain the procedural history, relevant facts, and a prayer for relief, followed by the petitioner's verification. Think of the petition as the counterpart to a complaint in the trial court. But bear in mind that your goal is to convince the appellate court to exercise its discretion to consider the petition. So do your best to tell the story in a compelling way.

After the petition, which must be verified, the next subsection is the memorandum of points and authorities. You shouldn't consecutively number the paragraphs in your points and authorities. The last page should be a certification of word count in compliance with California Rules of Court, rule 8.204(c)(1), which states a brief produced on a computer must not exceed 14,000 words, including footnotes.

Extraordinarily short time limitations

Drafting a petition for writ relief is undeniably a time-consuming task that must be completed within 60 days or less. According to the Fourth Appellate District, "There is no set time limit for filing a petition for a common law writ. Instead, general principles of laches apply, and 60 days is the rule of thumb." (Court of Appeal Handout on Writs (2015) pp. 2-3 <http://www.courts.ca.gov/documents/writs_handout.pdf>.) However, the time limitation for filing a statutory writ can be as little as 10 days! Make sure to determine the correct deadline before proceeding.

And consider whether the appellate court may infer your client is not in any dire situation based on the fact you waited until the very last moment to file the petition.

Why does your client get a fast-pass?

Remember, you're not just asking for an appeal or expedited review, you're running to the appellate court, raising a red flag over your head, shouting for relief, and praying the justices don't look the other way. You need to grab the court's attention with a well-crafted and easy-to-read argument that presents facts backed by accurate citations.

An appellate court may issue a writ of mandate directing a trial court to dispose of its decision granting summary adjudication. However, appealing from a judgment after trial ordinarily provides an adequate remedy at law for a party aggrieved by an order granting summary adjudication. (*Rehmani v. Superior Court* (2012) 204 Cal.App.4th 945, 949.) If you are seeking extraordinary writ relief, your petition should provide specific facts supporting your argument why other remedies are inadequate. You should also demonstrate why absent extraordinary relief, irreparable harm, or other injuries will result.

Support your allegations of irreparable harm with facts

In *Phelan v. Superior Court* (1950) 35 Cal.2d 363, 370, the petitioner alleged he had no other plain, speedy, or adequate remedy unless a writ of mandate was issued. He further alleged he would suffer great and irreparable harm and injuries. The Supreme Court of California disagreed, in bank, "such general allegations, without reference to any facts are not sufficient to sustain [petitioner's] burden of showing that the remedy of appeal would be inadequate." (*Ibid.*)

Include supporting documents

By the time you begin preparing the petition, the superior court clerk's transcript won't be available. This does not mean you get to file a petition without supporting evidence. Unless exigent circumstances exist, the petition must be accompanied by an adequate record, including copies of the ruling from which you are seeking relief from, documents and exhibits submitted to the trial court supporting and opposing the petitioner's petition, any other documents necessary for a complete understanding of the case and the ruling under review, and a reporter's transcript of the oral proceedings that resulted in the ruling under review. Make all of these documents exhibits and bind them together into one index tabbed document, with a table of contents. Review California's Rules of Court, rule 8.486, for detailed requirements.

If the petition fails to include the required record or explanations or does not present facts sufficient to excuse the failure to submit them, the court may summarily deny a stay request, the petition, or both. (*Ibid.*)

Caution: don't forget to timely file notice of an appeal!

Appellate courts have discretion to determine whether writ review is warranted based on the circumstances of the case. (*Fisherman's Wharf Bay Cruise Corp. v. Superior Court* (2003) 114 Cal.App.4th 309, 319.) But "writ review is deemed extraordinary and appellate courts normally are reluctant to grant it[.]" (*United Health Care Centers of San Joaquin Valley, Inc. v. Superior Court* (2014) 229 Cal.App.4th 63, 74.) For this reason, you should never forgo the opportunity to take a related appeal, unless you have a specific reason not to. And remember, petitioning for writ relief does not toll the time limitation for filing a notice of appeal.

The petitioner in *Phelan*, failed to timely file an appeal and then applied for a writ. The court found that the

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petitioner's failure to exhaust his remedies by timely filing an appeal did not justify his subsequent application for a writ of mandate. (*Phelan v. Superior Court*, *supra*, 35 Cal.2d at p. 370.) Don't let your client be that petitioner!

What to expect once you file a petition for writ relief

"When a petition is filed seeking a writ commanding the respondent superior court to act in a certain manner, such as by vacating or revising an interim order, an appellate court may (1) summarily deny the petition, (2) issue an alternative writ or an order to show cause pursuant to section 1087, or (3) issue a peremptory writ in the first instance, pursuant to section 1088[.]" (*Brown, Winfield & Canzoneri, Inc. v. Superior Court* (2010) 47 Cal.4th 1233, 1241.)

Recently determined writ opinions

In *Safeway Inc. v. Superior Court* (June 19, 2014, A141505) [nonpub. opn.], the petitioners brought motions for summary judgment claiming the plaintiff's medical malpractice complaint was untimely. The First Appellate District directed the superior court to vacate its orders denying summary judgment and to issue new orders granting summary judgment in favor of the defendants.

In *Judicial Council of California v. Superior Court* (2014) 229 Cal.App.4th 1083, a plaintiff was severely injured while riding an elevator in the Clara Shortridge Foltz Criminal Justice Center in Los Angeles. She filed suit against defendants Judicial Council of California and the Administrative Office of the Courts. The defendants' motion for summary judgment was denied. Defendants petitioned for a writ of mandate arguing the plaintiff failed to present a government claim to the Secretariat of the Judicial Council. The Second Appellate District issued a writ of mandate instructing the trial court to grant the defendant's motion for summary judgment.

In *Local TV, LLC, v. Superior Court* (2016) 3 Cal.App.5th 1, the owners of KTLA petitioned for writ of mandate following a denial of their motion for summary judgment. The Second Appellate District concluded the trial court's ruling denying summary judgment was in error and granted the petition. (*Ibid.*)

In *Greenberg v. Superior Court* (June 18, 2015, B262432) [nonpub. opn.], the trial court granted summary judgment in favor of the defendant, concluding it was not liable for the plaintiff's injuries caused by asbestos dust from brake linings. Petitioners sought a writ directing the trial court to vacate its summary judgment and enter a new order denying motion for summary judgment. The Second Appellate District granted the petition for writ of mandate. (*Ibid.*)

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