



## Demystifying California civil writs

WRIT RELIEF IS EXTRAORDINARY AND COMPLETELY DISCRETIONARY; MOST PETITIONS ARE DENIED. HERE ARE THE BASICS FOR TRIAL LAWYERS

If writs confuse you, you are in good company. This article reviews basics: What exactly *is* a writ; how do you prepare a writ petition; when does the Court of Appeal generally issue writ relief; what are the different kinds of relief the Court can issue, and how can you increase your odds of success?

### What is a writ?

A “writ” is an order issued by the reviewing court directing the lower court to do something or prohibiting it from doing something. Writs permit the appellate court to review nonappealable judgments and orders. Writ relief is extraordinary and completely discretionary, so 90-95% of them are denied, usually without explanation.

The Court of Appeal has “original” jurisdiction over a writ petition. (Cal. Const. Art. VI, § 10.) There are two categories of writs: common law and statutory. The most frequent common law writs include writs of mandate (Code Civ. Proc., § 1086 [to correct abuse of discretion

or enforce a nondiscretionary duty]), writs of prohibition (Code Civ. Proc., § 1103 [to prevent an act exceeding the court’s jurisdiction]), writs of certiorari (Code Civ. Proc., § 1068 [seeking review of act that exceeded the court’s jurisdiction]), and writs of supersedeas (Code Civ. Proc., § 923 [empowering court to keep the status quo through stay or other orders unrelated to merits of the action]).

Statutory writs differ from common law writs primarily concerning the deadlines in which to file the writ petition. Petitions for common law writs do not have a specific deadline, though such petitions are typically filed within sixty days. Beyond that window, it becomes increasingly difficult to show a likelihood of imminent and irreparable harm. In contrast, some statutes provide for specific deadlines (usually significantly shorter than the 60-day period) to challenge a ruling by writ petition. Many courts treat statutory writ deadlines as jurisdictional, failing to consider the petition after the deadline has passed.

Statutory writs include (but are not limited to) the following:

- Grant or denial of motion to disqualify judge (Code Civ. Proc., § 170.3, subd. (d).)
- Grant or denial of motion to change venue (Code Civ. Proc., § 400.)
- Grant or denial of motion to expunge lis pendens (Code Civ. Proc., § 405.39.)
- Denial of motion to quash service of process (Code Civ. Proc., § 418.10, subd. (c).)
- Grant or denial of motion for summary adjudication or denial of motion for summary judgment (Code Civ. Proc., § 437c, subd. (m)(1).)
- Grant or denial of motion for good faith settlement determination (Code Civ. Proc., § 877.6, subd. (e).)

Despite the statutory deadlines for bringing writs, not all rulings that *can* be challenged by writ *must* be challenged by writ. For most rulings, counsel has an option to bring a writ or to see how the case proceeds and, if necessary, challenge

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the adverse ruling on appeal from the final judgment.

Beware: There are some rulings for which statutory writs provide the *exclusive remedy for review*, including but not limited to:

- Denial of motion to quash service of summons for lack of personal jurisdiction (Code Civ. Proc., 418.10, subd. (c).)
- A ruling on the disqualification of a judge (Code Civ. Proc., § 170.3, subd. (d).)
- A ruling on the expungement of a notice of lis pendens (Code Civ. Proc., § 405.39.)
- A ruling in a Public Records Act case (Gov. Code, § 6259, subd. (c).)
- A ruling regarding revocation, suspension or restriction of a medical license (Bus. & Prof. Code, § 2337.)

### What is included in the writ petition?

The writ petition requires inclusion of several items: the petition itself, verification, memorandum of points and authorities, exhibits, certificate of interested parties, a certificate of word count, and any applicable filing fee. Make sure any protected information is redacted or, if necessary, filed under seal.

The accompanying exhibits must include either a reporter's transcript of the hearing that led to the challenged ruling, or, if the transcript is unavailable, a declaration from counsel that fairly summarizes what happened at the hearing *or* that states the transcript has been ordered and when it will be available.

As of March 2020, the California Supreme Court implemented mandatory electronic filing (for all but a narrow category of pro per individuals and those who have been excused from the requirements under local rules) through its platform TrueFiling.com. Because of this, it is important to familiarize yourself with the Court Rules governing electronic formatting, including bookmarking, using searchable-text, consecutive page numbering, electronic signatures, and more. (See Cal. Rules of Court, rules 8.70 et seq.).

The Court of Appeal's website is a helpful, free resource containing samples, templates, rules, instructions, etc.

### Does the writ petition stay the underlying proceeding?

The writ petition does *not* automatically stay the proceedings in the trial court or stay enforcement of a judgment or order. A stay request to the Court of Appeal requires indicating whether or not a stay was first requested in the lower court, and if not, why. It further requires attaching the order granting or denying the request. Therefore, it is best to *first request the stay in the trial court*.

In addition to including information concerning the results of the stay request in the lower court, the stay request accompanying the writ petition must explicitly address *why* a stay is necessary, *what* should be stayed, *when* the stay should go into effect, and *whether* the stay will cause prejudice to either party.

Additionally, the cover of the accompanying petition should include the words "STAY REQUESTED" *prominently* placed. Additionally, the cover should contain the following information: the nature of the ruling, proceeding, or act to be stayed and the date by which the stay is requested. (Cal. Rules of Court, rules 8.116(a), 8.486(a)(7)(B).) If the request seeks a stay of further proceedings in or of a trial court order, the petition's cover must *also* include the trial judge's name, department, and telephone number. Failure to include this information may be fatal to the stay request. (Cal. Rules of Court, rule 8.116(c).)

Pay attention to local rules governing service of the stay request on the real party in interest (typically opposing counsel). For instance, the Fourth Appellate District requires the stay request to be served by personal delivery or an "expeditious method" agreed to in advance by the real party in interest. (Ct. App., Fourth Dist., Local Rule 1(a).) The Second Appellate District requires similar notice for writs from juvenile dependency proceedings. (Ct. App., Second Dist., Local Rule 6.)

### Distinguishing writs of supersedeas

If an appeal is pending and a stay is necessary to preserve the status quo, counsel may file a writ of supersedeas in the Court of Appeal. The petition for writ of supersedeas is similar to the petition for writ of mandate/prohibition, but it requires an appeal to already be pending, and the party seeking the writ must show it will raise a substantial issue on appeal, including a fair summary of the material facts and the issues that are likely to be raised on appeal. (Cal. Rules of Court, rule 8.112.) The petitioner must also show it will suffer irreparable harm without a stay, and that the injury suffered will be greater than the injury to the opposing party if the stay issues. (Cal. Rules of Court, rule 8.112.)

The petitioner must file the following documents with the petition: (1) The judgment or order, showing its date of entry; (2) The notice of appeal, showing its date of filing; (3) A reporter's transcript of any oral statement by the court supporting its rulings related to the issues that are likely to be raised on appeal, or, if a transcript is unavailable, a declaration fairly summarizing any such statements; (4) Any application for a stay filed in the trial court, any opposition to that application, and a reporter's transcript of the oral proceedings concerning the stay or, if a transcript is unavailable, a declaration fairly summarizing the proceedings, including the parties' arguments and any statement by the court supporting its ruling; and (5) Any other document from the trial court proceeding that is necessary for proper consideration of the petition. As with the petition for writ of mandate, the petition for supersedeas must be verified.

Like other writ petitions, a petition for writ of supersedeas may include a request for a temporary stay under rule 8.116, pending the ruling on the petition. A separately filed request for a temporary stay must also be served on the respondent. (Cal. Rules of Court, rule 8.112(c).)

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### Opposing writ petitions

Typically, writ petitions are summarily resolved, absolving the real party in interest from any need to respond. California Rules of Court, rule 8.487(a)(4) authorizes the Court to grant or deny a request for temporary stay, deny the petition, issue an alternative writ or order to show cause, or notify the parties that it is considering issuing a peremptory writ in the first instance – all *without* requesting preliminary opposition or waiting for a reply. Therefore, it is a good practice to call the clerk's office to notify the clerk if you plan to oppose a stay request, because the Court of Appeal may issue a stay without waiting for a response.

In any event, within 10 days after the petition for writ of mandate/prohibition/certiorari is filed, the respondent or any real party in interest may (separately or jointly) file and serve a preliminary opposition. The preliminary opposition must include a memorandum and statement of any material fact that was omitted from the petition. (Cal. Rules of Court, rule 8.487(a).) Within 10 days thereafter, the petitioner may file and serve a reply.

If the court issues an alternative writ or order to show cause (see next section), the respondent or other real party in interest (separately or jointly) may serve and file a return by demurrer, verified answer, or both. If the court notifies the party 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, due within 30 days (unless the court orders otherwise). (Cal. Rules of Court, rule 8.487(b).) Unless the court orders otherwise, the petitioner may serve and file a reply within 15 days after the return or opposition is filed. If the return is by demurrer alone and the demurrer is not sustained, the court may issue the peremptory writ without granting leave to answer.

### Differentiating amongst the common types of relief

In broad strokes, the Court of Appeal may summarily deny the writ petition, may issue an alternative writ, may issue a “suggestive” *Palma* notice, or may grant the petition.

Often, the court will summarily deny the writ petition. (Cal. Rules of Court, rule 8.487(a)(4).) In such a case, the petitioner is not offered an opportunity for oral argument. (*Lewis v. Sup.Ct. (Green)* (1999) 19 Cal.4th 1232, 1260, fn. 18.)

The court may issue an alternative writ, an order to show cause or a peremptory writ. Its issue does not indicate that the court agrees with the merits; rather, merely that extraordinary relief is the only adequate avenue for review. (*Bridgestone/Firestone, Inc. v. Superior Court* (1992) 7 Cal.App.4th 1384, 1389, fn. 4.) The alternative writ triggers further briefing (a return and reply) as well as an oral hearing. It is in the nature of an order to show cause, but it provides that the trial court must either change its ruling by the specified date or show cause why it has not. If the Court of Appeal does not wish to allow the trial court to change its ruling before the appellate court can consider the issue, it can issue an order to show cause. This is functionally the same as the alternative writ, except that it does not give the trial court the chance to moot the proceeding by changing its ruling.

Following the briefing and argument, the court issues a written opinion. If the Court of Appeal grants the petition, the alternative writ or order to show cause will be discharged and a peremptory writ issued.

For petitions for writs of *mandate*, an alternative writ must command the party to whom it is directed immediately after the receipt of the writ, or at some other specified time, to do the act required to be performed, or to show cause before the court at a time and place then or thereafter specified by court order why he has not done so. (Code Civ. Proc., § 1087.) For petitions for writs of *prohibition*, the alternative writ must command the party to whom it is directed to desist

or refrain from further proceedings in the action or matter specified therein, until the further order of the court from which it is issued, and to show cause before such court at a time and place then or thereafter specified by court order why such party should not be absolutely restrained from any further proceedings in such action or matter. (Code Civ. Proc., § 1104.)

A *peremptory writ* is essentially the grant of the writ petition and orders the respondent to grant the relief requested. A court seldom issues a peremptory writ in the first instance without proceeding first with an alternative writ and additional briefing. Petitioners must show “unusual urgency” or “obvious” entitlement to relief. (*Alexander v. Sup.Ct. (Saheb)* (1993) 5 Cal.4th 1218, 1223 (disapproved on other grounds in *Hassan v. Mercury American River Hosp.* (2003) 31 Cal.4th 709, 724, fn. 4.) That being said, a court will not issue a peremptory writ without first issuing an alternative writ unless the adverse party is given due notice that such relief is being sought or considered by the court (so-called “*Palma* notice”). (Code Civ. Proc., §§ 1088, 1105.)

Courts also issue “suggestive” *Palma* notices. Such notices alert the parties that the appellate court is strongly considering issuing a peremptory writ granting the requested relief, provides a brief legal discussion indicating the trial court erred, and, further indicates that if the trial court reverses its order, the writ petition would be summarily denied as moot. Courts may properly issue such “suggestive” *Palma* notices without first having received or requested opposition, but if the trial court decides to take the “suggestion,” it must first provide the parties with notice and an opportunity to be heard. (*Brown, Winfield & Canzoneri, Inc. v. Sup. Ct. (Great American Ins. Co.)* (2010) 47 Cal.4th 1233, 1238.)

If the Court of Appeal denies the writ petition, counsel may seek relief in the California Supreme Court. However, following a summary denial of the writ petition in the Court of Appeal, the

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petitioner has only ten (10) days in which to seek such relief. (Cal. Rules of Court, rules 8.490(b)(1)(A), 8.500(e)(1).) For review of written opinions, unless the appellate court specifies otherwise, the normal time limits for petitions for review apply. (Cal. Rules of Court, rule 8.490(b)(2)(A).)

### Tips for optimizing the odds of success

The rates for successfully obtaining writ relief are abysmal. (see e.g., Eisenberg, Horvitz & Wiener, Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2019) ¶ 15:1.3; see also 2020 California Court Statistics Report [<https://www.courts.ca.gov/documents/2020-Court-Statistics-Report.pdf>, pages 38, 41].)

Despite fighting an uphill battle, there are considerations for giving your client the best possible chance of writ relief. For instance, the petitioner must successfully demonstrate to the Court of Appeal that he/she/it satisfies the following requirements: 1. The petitioner must not have any other “adequate

remedy” at law; 2. The petitioner will suffer “irreparable harm” absent writ relief; and 3. The petitioner has a “beneficial interest” in the lawsuit (however, for writs of mandate the petitioner must have standing). One common mistake is burying this showing in the substance of their legal arguments. The court will not be interested in the merits of your legal argument *unless* these three requirements have been met.

Additional circumstances that may increase the likelihood of writ relief include opportunities for the appellate court to: resolve conflicts amongst trial courts in the application of a law; correct a ruling or order that is both clearly erroneous and causes petitioner substantial prejudice; to correct a ruling or order that substantially deprives a party of its opportunity to plead or present a substantial portion of the claim; to protect a potential violation of privilege; to address newly enacted legislation; or to address a matter of widespread interest.

Two final quick tips: (A) Prior to bringing a writ petition, first seek relief in the lower court. Otherwise, it can be

difficult to show the petitioner had no other adequate remedy at law. (B) Immediately request a transcript of the relevant proceedings, which is usually a required part of the record. (Cal. Rules of Court, rule 8.486.)

### Conclusion

Despite the statistical deterrent for writ success, under appropriate circumstances, writ relief may be the *only* way to prevent your client from suffering a *significant* miscarriage of justice. And, should you find yourself responding to a writ petition, remember to keep calm and carry on.

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