

## **To Writ or Not to Writ? A Basic Primer on California Writ and Appeal Procedures**

As lawyers we are paid to anticipate critical issues that may affect the outcome for our clients and develop plans or a course of action for addressing those issues. One issue that should always be in the mind of the litigator well before a verdict is issued is appellate review. Some interlocutory matters must by definition be addressed before the end of a trial otherwise the right to appellate review on the issue is lost. A motion for disqualification of a judge is one such matter. Unless writ review is sought within ten days of a denial of a motion for judicial disqualification, appellate review is forever lost.

There are other issues, however, where there is a choice between seeking review before the end of the trial by writ or waiting to bring an appeal after a final judgment has been entered. Sometimes, the choice is not critical. Other times, it is because filing a writ petition immediately rather than waiting to file an appeal can make a difference where the mere passage of the time may prevent reversal of a trial court's ruling. The primary objective of the article is to alert practitioners to the type of circumstances in which a writ may provide the better course of action for protecting and preserving the rights of clients. In particular, in those cases where the risk of harm is substantial and irreparable, a writ petition may increase a practitioner's chances of successfully overturning a lower court's ruling.

### **Appeals Process and Writ Procedures Generally**

At this point, some general information regarding writ and appellate procedures may be useful. As noted previously, there are two possible methods by which appellate

courts can review lower court judgments and orders: by direct appeal or on a petition for an extraordinary writ of mandamus,<sup>1</sup> prohibition,<sup>2</sup> or certiorari or review.<sup>3</sup>

As an initial matter, trial counsel should always bear in mind that direct appeals take time, lots and lots of time. Generally a party may only file an appeal once there has been a final judgment in a case.<sup>4</sup> So if there is an issue such as an improper evidentiary ruling, the losing party can raise the issue on appeal after conclusion of the entire matter, after the court has entered a final judgment.

After the notice of appeal has been timely filed, the appellant must then designate the record and request the clerk's transcript.<sup>5</sup> Generally, it takes a few months for both to be prepared.<sup>6</sup> Once they are prepared, the appellant has thirty days to file the opening brief.<sup>7</sup> The respondent has thirty days to file its response. And the appellant then has twenty days to file its reply brief. After all the briefing is done, it still could take months

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<sup>1</sup> A writ of mandate issues to correct an abuse of discretion or to compel the performance of a ministerial duty. (Cal. Code Civ. Proc. §1085.)

<sup>2</sup> A writ of prohibition issues to prevent a threatened judicial act in excess of jurisdiction. (Cal. Code Civ. Proc. §1102.)

<sup>3</sup> A writ of certiorari issues to correct a completed judicial act in excess of jurisdiction. (Cal. Code Civ. Proc. §1068.)

<sup>4</sup> California Code of Civil Procedure section 904.1, the Family Code and the Probate Code do allow some matters, like "death knell orders" an example of which is an order denying certification of a class for a class action lawsuit, to be brought up on interlocutory appeals even if there is no final judgment, (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4<sup>th</sup> 429, 435.) The general rule is, however, that there must be a final judgment before an appellate court will consider an appeal.

<sup>5</sup> See California Rules of Court Rules 2-4.

<sup>6</sup> There are some ways of expediting the record process. For example, the parties may elect to proceed by joint appendix rather than by clerk's transcript. See California Rules of Court Rule 5.1. Or they may proceed without a reporter's transcript pursuant to California Rules of Court Rule 4 subdivision (a) subsection (3).

<sup>7</sup> This time can be extended by an agreement between the parties or by a request for extension. California Rules of Court Rule 17 (a) provides an additional fifteen days without request. If a party does not file their brief within thirty days the clerk mails out a notice for the party to file its brief fifteen days after the date the notice is mailed. This is referred to as "Rule 17" time.

before the appeals court schedules oral argument.<sup>8</sup> Following oral argument there may be a wait of up to ninety days before the court issues its decision. All in all, it could take up to one year or more before there is a ruling on the appeal.

The writ petition, while not encouraged as a substitute for an appeal, is one means by which appellate courts can expeditiously exercise their reviewing power.<sup>9</sup> By its very nature, a petition for writ of mandate, prohibition, or other appropriate relief is a request for emergency or extraordinary relief. In filing a writ petition, the party is essentially saying to the court that the lower court's ruling or other matter requires the appeals court's immediate intervention without which the petitioner would suffer irreparable injury. Therefore, it should take precedence over the appeals already sitting in a justice's chambers.

Procedurally, the process is triggered when the petitioner files a writ petition asking the court of appeals to issue an order commanding the lower tribunal to take certain action or not take certain action. As a general rule, a writ petition should be filed as soon as possible following written notice of the ruling or order the petitioner wishes to challenge. For common law writs there is not hard and fast rule on time, however. Ordinarily, filing within sixty days after notice of the court's ruling may be considered timely or reasonable. (Eisenberg, Horvitz & Weiner, Cal. Practice Guide: Civil Appeals & Writs (The Rutter Group, 2003) ¶15:146 [citing *Volkswagen of America Inc. v.*

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<sup>8</sup> Of course the parties can request expedited proceedings and request calendar preference.

<sup>9</sup> In fact, filing a writ petition does not affect a party's ability to bring an appeal of an appealable order unless there has been a disposition on the merits or unless writ review is the sole appellate remedy. (*Leone v. Medical Board* (2000) 22 Cal.4<sup>th</sup> 660, 669). Generally, a summary denial of a writ petition is not decision on the merits and does not preclude a party from raising the issue in a timely appeal. (*Kowis v. Howard* (1992) 3 Cal. 4<sup>th</sup> 888, 889).

*Superior Court (Adams)* (2001) 95 Cal. App. 4<sup>th</sup> 695, 701]). Yet in some circumstances sixty days may be seen as dilatory especially given that in filing the petition the petitioner is claiming that the lower court's ruling requires the appellate court's immediate attention. (Eisenberg, Horvitz & Weiner, Cal. Practice Guide: Civil Appeals & Writs, *supra*, at ¶15:146.1). If the complaint is that the threat of harm is great then an unreasonable delay in filing the petition will undercut a party's claim to such extraordinary relief.

Statutory writs have jurisdictional deadlines. They must be filed within the stated time period or writ review is lost. In some cases, such as with a ruling on a motion to disqualify a judge, writ review is the only review available. Therefore, a party must file its petition within ten days of receiving notice of the decision.<sup>10</sup> For writ petitions seeking review of a grant or denial of a motion for summary judgment, the statutory deadline is twenty days. (Cal. Code Civ. Proc. §437c (m)(1)).

Once a writ petition has been filed, the opposing party may file a response if the court requests it. If the court is considering issuing a peremptory writ in the first instance without first issuing an alternative writ however, it must give a *Palma*<sup>11</sup> notice notifying the responding party that a peremptory writ is being sought and that the court is considering issuing it. (Cal. Code Civ. Proc. §1088.) It is at this point that the

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<sup>10</sup> The ten day period is triggered from the moment the parties have notice such as when the court announces its decision in open court in presence of counsel. Written notice is not required to trigger the start of the ten-day time period. (*Guedalia v. Superior Court (Lomac)* (1989) 211 Cal.App.3d 1156, 1163-1165).

<sup>11</sup> “[A]n appellate court, absent exceptional circumstances, should not issue a peremptory writ in the first instance without having received, or solicited, opposition from the party or parties adversely affected.” (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal. 3d 171, 180)

responding party has the right to file a response or opposition to the writ. The court may limit the time for a response to a period of several days. Once the response has been filed, the court rules on the petition very quickly, much more quickly than the ninety days it has to rule on an appeal. Such a condensed period between filing and review of the petition makes it an attractive alternative to the long appeals process.

Given the swiftness of review and that writ relief is designed to provide extraordinary relief, under extraordinary circumstances, the requirements for obtaining writ review are stringent. Those threshold requirements are: 1) an abuse of discretion or erroneous ruling; 2) threat of irreparable or substantial injury absent the writ; and 3) lack of an adequate legal remedy.<sup>12</sup>

The initial requirement is that there must be an abuse of discretion or other legal error by the lower court.<sup>13</sup> The trial court must have done something it should not have or refuse to do something it was *clearly* required to do. The irreparable harm element requires a showing that the harm to the petitioner is harm that cannot be undone if the lower court's ruling is allowed to stand. And finally, it must also be shown that there is no adequate legal remedy during the normal course of the litigation proceedings to redress the harm to the petitioner. If the matter may be cured in the subsequent course of the litigation or on appeal, then writ review will generally not be granted.

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<sup>12</sup> The petitioner must also establish that he or she has a beneficial interest in the lawsuit, meaning that the petitioner has some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large. (*Carsten v. Psychology Examining Committee of Board of Med. Quality Assur.* (1980) 27 Cal.3d 793, 796). Unlike with a direct appeal, the petitioner need not be the aggrieved party.

<sup>13</sup> Appellate courts may depart from this requirement where the writ petition raises important constitutional issues or petitioner had no opportunity to present the issue.

Considering these requirements it is no surprise that the chances for securing writ review are very small. It is after all extraordinary relief. And because the risk of success is so small and the writ process relatively expensive some practitioners do not consider filing a writ as a feasible alternative. Nevertheless, in cases where delay can forever alter the posture of the case or the issues involved, writ review may be worth pursuing.

### **Specific Cases Where Writ May Be Worth Pursuing**

What are some of those situations where it may be worth the cost to file a writ petition? For one, cases involving disclosure of private or otherwise privileged information provide some of the best opportunities for writ relief. This is because once privileged information has been disclosed, it is impossible to un-ring the bell.

Say for example, one party is ordered by the court to turn over a computer hard-drive containing private or privileged information.<sup>14</sup> Waiting to file an appeal after a final judgment has been entered could not undo the harm from disclosure. Writ relief would provide immediate review of and possible relief from the order. Specifically, an immediate challenge by writ may prevent disclosure in the first instance. Therefore, when it is necessary to protect a substantial right, such as a privilege or constitutional right, writ review may be the more appropriate choice. (*Schmier v. Supreme Court of Calif.* (2000) 78 Cal.App.4<sup>th</sup> 703, 707-708; *see also Raytheon Co. v. Superior Court (Renault & Handley Employees Inv. Co.)* (1989) 208 Cal.Ap.3d 683, 686 [issuing writ where discovery order compelled disclosure of documents protected by attorney-client privilege]; *Planned Parenthood Golden Gate v. Superior Court (Foti)* (2000) 83

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<sup>14</sup> With regard to orders requiring one party to turn over documents, an appeal does not automatically stay the court's order. (Cal. Code Civ. Proc. §917.2.) Of course the party may request a stay while an appeal is pending.

Cal.App.4<sup>th</sup> 347, 355 [issuing writ where discovery order compelled disclosure of names, addresses, and phone numbers of Planned Parenthood volunteers and nonparty staff, infringing on constitutional right to privacy]).

Another situation in which writ relief may be a more effective alternative to filing an appeal is where the court has granted or denied a motion for disqualification of counsel. Disqualification is a prophylactic device used to prevent an attorney's conflict or unethical behavior from contaminating the entire litigation process. "Ultimately, disqualification motions involve a conflict between the clients' right to counsel of their choice and the need to maintain ethical standards of professional responsibility." (*Neal v. Health Net, Inc.*, (2002) 100 Cal. App. 4<sup>th</sup> 831, 840 [internal citations omitted]).

In those situations where there is a conflict of interest or where there is intimidation or the threat of violence from one counsel to another, a writ petition would allow immediate review of the trial court's denial of the motion well before a final judgment is entered. Conversely, where the trial court has granted a disqualification motion, writ review prevents the deprivation of a party's right to have counsel of his or her choice. (*Reed v. Superior Court* (2001) 92 Cal. App. 4<sup>th</sup> 448, 455 [approving use of writ petition to challenge disqualification orders because the "specter of disqualification of counsel should not be allowed to hover over the proceedings for an extended period of time for an appeal."]).

Waiting until a final judgment has been entered to challenge the disqualification ruling would do little to redress the harm of not having the attorney of one's choice throughout the proceedings or being involved with trial counsel who has gained an unfair

advantage either through a prior representation or through physical intimidation. Writ review would offer the quickest opportunity to challenge the court's ruling.

Finally, writ review may be the better alternative for challenging a child custody order. Given what is at stake, the threshold requirements for writ review are easily met, particularly, the risk of irreparable harm that cannot be remedied during the normal course of litigation proceedings.

Recently, I observed first-hand where the failure to file a writ petition may have sealed the outcome of a custody case. The case involved an appeal by the prospective adoptive parents of a custody order granting custody to the birth parent. I was hired to draft the brief for the birth parent, the Respondent in the case.

The prospective adoptive parents chose not to file a writ petition to challenge the family court's order immediately after it was issued. Instead they waited to file an appeal. About one year later the court of appeals issued a decision affirming the family court's custody order.<sup>15</sup>

Looking through the clerk's transcript my first thought was, "why didn't they file a writ?" I considered my client's position to be one supported by the law, and knew that ultimately the lower court's decision would be affirmed. Nonetheless, the strength of our position was bolstered by the length of time that had already passed and the length of time it would take for the court to issue its decision. This optimism was not without support.

In *Guardianship of Zachary H.* (1999) 73 Cal.App.4<sup>th</sup> 61, the court refused to order a change in custody because of the amount of time that had passed. Removing the

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<sup>15</sup> The court did not base its opinion affirming the family court's decision on the length of time the child had been in the birth parent's custody.

child from the adoptive parents after years of appeals, the court concluded, would have caused “life-long permanent damage.” (*Id.* at p. 59).

In line with this reasoning, the court in *Lester v. Lennane* (2000) 84 Cal.App.4<sup>th</sup> 536 observed that the non-custodial parent should have brought a writ petition to challenge the temporary custody order granting custody to the child’s mother. The court specifically observed:

A noncustodial parent who seeks to obtain custody will often be at a disadvantage by the time of trial if the child has bonded with the custodial parent. The noncustodial parent’s only effective recourse is to obtain immediate review of any objectionable temporary custody order. This can be done by filing a petition for writ....

(*Id.* at 565.) From the analysis in both *Zachary H.* and *Lester*, the importance of seeking immediate writ review of custody orders is quite evident.

In sum, it is crucial that immediately upon receiving an unfavorable order or verdict lawyers give thought to whether their clients’ interests will be better served if they sought a writ challenging the order instead of or in addition to filing an appeal. Given the condensed time period for writ review, it should be apparent that in cases where harm will result from a delay in review, that filing a writ petition would be the wiser alternative.