

10 tips FOR A HOT APPELLATE WRIT:

When (and When Not) to Seek Emergency Appellate Relief

By Herb Fox

A SUCCESSFUL APPELLATE writ petition can be a genuine game changer. By preventing a prejudicial, adverse interlocutory order from taking effect, a well-crafted writ can reshape the trajectory of a case from quashing a summons and disqualifying a judge to protecting an evidentiary privilege and guaranteeing the right to a jury trial.

At the same time, it is extraordinarily difficult to shake loose a writ from an appellate court. Indeed, the California Constitution labels writ relief as “extraordinary,” and Ninth Circuit case law follows suit.¹ In addition, whether to consider the merits of the petition is discretionary, and appellate courts rarely exercise that discretion.²

Appellate courts frequently view a writ petition as an attempt to cut in line ahead of litigants awaiting adjudication of their appeals, with about 94 percent of all civil writ petitions in the California Courts of Appeal summarily denied.³ Making matters worse, the terminology, procedures, and standards for obtaining a writ are frustratingly arcane and byzantine.

There are many different types of writs strewn throughout California and

federal civil, criminal, and administrative law, of which appellate writs are but one category.

In that one category, there have been five California Supreme Court opinions since 1984 that explain what an appellate court can and cannot do in response to a writ petition.⁴ As one appellate court put it, those who have tried to extract a coherent set of rules on writs “have found it easier to comprehend a ‘washing bill in Babylonian cuneiform.’”⁵

Far be it, then, for this article to fully meet that challenge; however, there are some basic concepts and standards that all civil trial lawyers ought to know.

Here are ten quick tips to help determine whether, when, and how to pursue a “hot writ.”⁶

1 What, Exactly, Is a Writ?

A writ is simply a court order commanding the addressee to do or refrain from doing a specified act.⁷ There are dozens of different kinds of writs.⁸

Among the more common writs in modern legal practice are writs of administrative mandamus that seek judicial review of administrative

proceedings;⁹ writs of execution and possession that enforce a judgment;¹⁰ and writs of habeas corpus which challenge unlawful detention.

But there is a more narrow set of writs, called “prerogative” or extraordinary writs, which seek an order from a higher court to enjoin or restrain the order of a lower tribunal. Those include writs of mandate, prohibition, and certiorari (also called “review”).¹¹ Of these, there are two kinds in the state court—common law writs and statutory writs.

2 Know Your Statutory Writs

As a general rule, most interlocutory orders are preserved for review upon an appeal from the final judgment, and the failure to seek immediate review by way of a writ petition is not a waiver of the right to that appellate review.¹²⁻¹³

However, there are specific state court civil proceedings where the exclusive appellate recourse is an immediate writ petition, and there is no right to appellate review after judgement.¹⁴ Failure to pursue such a statutory writ petition is a waiver of a client’s right to later challenge the order on appeal.¹⁵



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Thus, if one is on the losing end of such an order, it is imperative to weigh the merits of a petition and make a reasoned calculation whether to pursue a writ. Such statutory writs include orders such as contempt;¹⁶ the disqualification of a judge;¹⁷ the expungement of a *lis pendens*;¹⁸ granting a change of venue;¹⁹ denying a motion to quash service of summons;²⁰ a good faith settlement;²¹ the granting or denial of a motion for reclassification A;²² and the granting of a motion to coordinate cases.²³

3 Know Your Deadlines

In addition to knowing whether writ review is the sole appellate remedy, trial lawyers must be aware of the mandated deadlines. Statutory writs are governed by notoriously strict and fleeting filing deadlines, sometimes as short as ten days. (Refer to the chart on statutory writ deadlines on page 35.)

For non-statutory writ petitions, the general rule is that the petition should be filed within 60 days of the ruling.²⁴ But be wary as appellate courts expect extraordinary effort from parties who are asking for extraordinary relief. The sooner the petition is filed, the more convincing will be the argument that the situation is a legitimate emergency.

Dispatch is especially important if there is a need to stay an imminent deadline such as responses to discovery or a trial date. The writ petition itself does not stay the trial court proceedings, and there will be no stay unless the appellate court orders one. If obtaining the stay is critical, the petition should be filed early enough to give the Court of Appeal a reasonable amount of time to assess the situation and avoid a possible laches problem.

4 What Is a Writ-Worthy Petition?

Because there is no “right” to appellate court review by way of a writ petition, it is useful to understand the criteria employed by the appellate courts in deciding whether to entertain a petition on its merits.

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The worthiness of a writ petition boils down to whether the petitioner would suffer substantial prejudice—such as the loss of a significant right or privilege—that cannot be corrected later in an appeal from a final judgment, and/or whether the case presents a burning question of law that cries out for immediate resolution. The leading opinion on writ-worthiness sets forth the following criteria:

- Is the issue of widespread interest or does it presents a significant and novel constitutional issue?
- Does the trial court’s order deprive a client of an opportunity to present a substantial portion of his or her cause of action?
- Does the issue invoke conflicting trial court interpretations of law that requires resolution?
- Is the order clearly erroneous as a matter of law and does it substantially prejudice a client’s case?
- Does the client lack the adequate means, such as a direct appeal, to attain relief?
- Will the client suffer harm or prejudice in a manner that cannot be corrected in an appeal from a final judgment?²⁵

Writ relief is described as a “drastic and extraordinary remedy reserved for really extraordinary causes,” and “only exceptional circumstances amounting to a judicial usurpation of power, or a clear abuse of discretion, will justify the invocation of this extraordinary remedy.”²⁶

The factors applied by the Ninth Circuit in assessing whether to consider the writ petition on its merits are quite similar to those applied in the state court.²⁷

5 Choose Your Writ Petitions with Care

Choosing your battles carefully is good



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policy when applied to writ petitions. A losing petition is a waste of time and money, while a frivolous writ petition can result in sanctions.²⁸

Sometimes writ petitions are filed in order to show-up judges who are hostile or careless in their rulings. But that strategy can easily backfire, given the low probability of success. A thin-skinned trial judge may take offense at such an effort and be emboldened by the implicit blessing of the appellate court, thus making matters worse in the courtroom.

All of these factors should be taken into account before deciding to pull the trigger on a writ petition. Some of the more common flash-points that lead to writ petitions are also the least likely to succeed. For example:

- Discovery orders are rarely successful candidates for writ petitions unless the issue involves a Constitutional right,²⁹ privilege issues,³⁰ or interpretation of statutes or judicial council forms.³¹
- The denial of a request for trial continuance is in the discretion of the trial court and usually withstands writ review except in extreme cases, such as where a continuance was denied even though plaintiff's counsel died prior to trial.³²
- Rulings on motions *in limine* or the admissibility of expert opinion are usually best reserved for appeal after the rendering of a judgment, except, for example, where the issue is one of first impression and prejudice is apparent.³³

On the other hand, egregiously erroneous rulings that interfere or ignore a client's rights and privileges, especially those based on Constitutional guarantees, are more likely to receive careful consideration by the appellate courts.

Examples include the denial of the right to a jury trial;³⁴ the granting

or denial of a motion to disqualify counsel;³⁵ and the right to privacy.³⁶

6 Get the Trial Court on Your Side

One obscure way to get traction on a writ petition is to persuade the trial court to urge immediate appellate review, as allowed by Civ. Pro. §166.1.

This section entitles the trial court to state in its order that there is a "controlling question of law as to which there are substantial grounds for a difference of opinion" and that interlocutory appellate review "may materially advance the conclusion of the litigation."³⁷

However, while this little-used statute does not guarantee that the appellate court will take up the writ petition, applying it could help meet the burden of establishing writ worthiness.³⁸

7 Don't Forget to Ask for a Stay of Proceedings

Unlike the filing of a Notice of Appeal,³⁹ the filing of a writ petition does not deprive the trial court of jurisdiction over the case or the issues being challenged. Thus, if a deadline is approaching—such as the date to respond to discovery or the commencement of trial—it is imperative to first request that the trial court issue a stay pending the determination of the writ petition. If that fails, ask the appellate court to issue a stay until it has either denied the petition or reached a decision on its merits.

That request for a stay—and an explanation for the urgency—must be set forth in the petition itself. The cover of the petition must prominently include the words "STAY REQUESTED" and identify the nature and date of the proceeding or act in question.⁴⁰

8 Know the Rules for Writs

Appellate writ petitions in state court are governed by their own Rules of Court, specifying the contents and the format of the petition.⁴¹ The more common errors that are made when filing a writ petition in state court include:

- Failure to file a verified petition that sets forth the procedural facts
- Failure to state on the cover of the petition that a stay of trial court proceedings is being requested and the date by which that stay should be ordered
- Failure to include a reporter's transcript of the proceedings from which from which relief is being sought
- Failure to include declaration explaining why a transcript is not available and summarizing the proceedings
- Failure to include a transcript or a declaration can alone be grounds to deny the petition⁴²

Be advised that writs submitted to the Ninth Circuit are also governed by their own set of rules.⁴³

9 Draft a Crisp, Compelling Introduction

In drafting the petition, remember that establishing trial court error is only one piece of the equation. It is equally important to justify your plea to step ahead of the many other parties awaiting an adjudication of their appeals. It's imperative to demonstrate the critical and extraordinary nature of the client's situation.⁴⁴ If the petition doesn't grab the Court of Appeal's attention by the second page, a summary denial is more than likely.

10 Specify the Relief Sought

In order to maximize the value of the petition, be as specific as possible about the relief that the client needs, and if possible offer the appellate court a choice of various outcomes if a full reversal of the challenged order is unpalatable. The appellate court can issue a writ that reverses or modifies the challenged order, or remands the cause to the trial court for further proceedings.⁴⁵

Each of these possible outcomes will have different consequences to the client and to the case, not the least of which is whether a decision on the merits will result in the right to a peremptory disqualification of the trial judge.⁴⁶

Don't Be Proud: Ask for Help

Above all, remember to ask for help if you need it. If one thing is clear, obtaining extraordinary relief by way of a writ petition is a difficult task that requires careful assessment, time, and attention, as well as a thorough understanding of the rules and standards by which such petitions are considered by the appellate court.

Seeking knowledgeable assistance in putting an effective writ petition together can save all concerned a great amount of time, as well as the cost of seeking otherwise unobtainable relief. 

(1993); *Lewis v. Superior Court*, 19 Cal. 4th 1232; and *Brown, Winfield & Canzoneri, Inc. v. Superior Court* (supra) 47 Cal. 4th 1233.

⁵ *Omaha Indemnity Co. v. Superior Court*, 209 Cal. App. 3d 1266, 1272 (1989).

⁶ Writ petitions with merit are sometimes called "hot writs" by the Court of Appeal's research staff or clerks. ⁷ Black's Law Dictionary (Garner, 10th Ed., 2014).

⁸ The Tenth Edition of Black's Law Dictionary lists 118 different kinds of writs.

⁹ Civ. Pro. §1094.5.

¹⁰ Civ. Pro. §712.010 et seq.; §699.510 et seq.

¹¹ 8 Witkin, Cal. Proc. 5th Writs §1 (2008); Civ. Pro. §1067 et seq.; 1084 et seq., and 1102 et seq.

¹² See, e.g., Code of Civil Procedure §904.1(a)(1):

An appeal may be taken from a judgment "except an interlocutory judgment..."

¹³ This general rule does not apply in proceedings governed by the Probate Code, where there are dozens of interim orders that must be immediately appealed or the right to appeal is waived. See Probate Code §§1300 et seq.; *Estate of Gilkison* (1998) 65 Cal. App. 4th 1443, 1450 at fn. 5: orders made appealable by the Probate Code must be appealed timely or they become final and cannot be attacked in an appeal from the final order of distribution.

¹⁴ There is no analogous set of "statutory writs" in the Federal courts.

¹⁵ See, e.g., *PBA, LLC v. KPOD, Ltd.* (2003) 112 Cal. App. 4th 965, 971.

¹⁶ Civ. Pro. §5904.1(a)(1)(B), 1222.

¹⁷ Civ. Pro. §170.3(d); see *Brown v. America Bicycle Group LLC*, 224 Cal.App. 4th 665 (2014).

¹⁸ Civ. Pro. §405.39.

¹⁹ Civ. Pro. §400.

²⁰ Civ. Pro. §418.10(c).

²¹ Civ. Pro. §877.6(e).

²² Civ. Pro. §403.080.

²³ Civ. Pro. §404.6.

²⁴ *Cal West Nurseries v. Superior Court*, 129 Cal.App. 4th 1170, 1174 (2005).

²⁵ *Omaha Indemnity Co. v. Superior Court* 209 Cal.App. 3d 1266, 1273 (1989).

²⁶ *Hernandez v. Tanninen*, 604 F.3d 1095, 1099 (9th Cir. 2010).

²⁷ *Bauman v. United States Dist. Court*, (supra) 557 F.2d at 654 – 655.

²⁸ Rule of Court 8.492; *Mooney v. Superior Court* (2016) 245 Cal.App. 4th 523, 537.

²⁹ See, e.g., *Raef v. Superior Court*, 240 Cal.App. 4th 1112 (2016), First Amendment issue.

³⁰ See, e.g., *Titmas v. Superior Court*, 87 Cal.App. 4th 738 (2001), attorney-client privilege.

³¹ See, e.g., *Mitchell v. Superior Court*, 243 Cal.App. 4th 269 (2015), construing Form Interrogatory 12.1.

³² *Hernandez v. Superior Court*, 115 Cal.App. 4th 1242 (2004).

³³ See, e.g., *Apple v. Superior Court*, 19 Cal.App. 5th 1101 (2018), where the issue was the applicability of standards governing the admissibility of expert opinion evidence to a class certification motion.

³⁴ See, e.g., *Owens-Illinois, Inc. v. U.S. District Court for Western District of Washington, at Tacoma*, 698 F.2d 967, 969 (9th Cir. 1983): Where the constitutional right to a jury trial is in question, mandamus is an appropriate remedy.

³⁵ See, e.g., *Castaneda v. Superior Court*, 237 Cal.App. 4th 1434 (2015).

³⁶ See, e.g., *Rancho Publications v. Superior Court*, 68 Cal.App.4th 1538 (1999).

³⁷ Civ. Pro. §166.1.

³⁸ *Bank of America v. Superior Court*, 198 Cal.App. 4th 862 (2011).

³⁹ Civ. Pro. §916.

⁴⁰ Cal. Rules of Court 8.487(a)(7)).

⁴¹ Rules of Court 8.485 – 8.493.

⁴² Rule of Court 8.487.

⁴³ Federal Rule of Appellate Procedure 21.

⁴⁴ *Four Point Entertainment, Inc. v. New World Entertainment, Ltd.* 60 Cal.App.4th 79, (1997).

⁴⁵ See Civ. Pro. §43.

⁴⁶ Civ. Pro. §170.6; *Overton v. Superior Court*, 22 Cal. App. 4th 112 (1994).

Deadlines for Statutory Writs

Order/Judgment	Statute	Deadline to File	Possible extension
Denying motion to disqualify a judge	Civ. Pro. §170.3(d)	10 days	None
Granting or denying motion to expunge lis pendens	Civ. Pro. §405.39	20 days	10 days
Denying motion for summary judgment	Civ. Pro. §437c(m)(1)	20 days	10 days
Granting change of venue	Civ. Pro. §400	20 days	10 days
Denying motion to quash service of summons	Civ. Pro. §418.10(c)	10 days	20 days
Determination of good faith settlement	Civ. Pro. §877.6(e)	20 days	20 days
Granting or denying motion to reclassify case from limited to unlimited or vice versa	Civ. Pro. §403.080	20 days	10 days
Granting motion to coordinate cases	Civ. Pro. §404.6	20 days	10 days