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Litigation Practice Tip - January 2024

Convincing a Court to Hear Your Case When it Doesn't Have to.

Part I: Appellate Writs.

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While motions and appeals are often difficult to win, at least you are usually entitled to your proverbial "day in court": a decision on the merits. But what happens when review is discretionary? How do you convince a court to hear your case or, conversely, not to hear your opponent's case? **This Tip and its sequel next month will answer those questions for two of the most frequently used applications for discretionary review: appellate writs in the Court of Appeal,[1] and petitions for review in the California Supreme Court.**

An appellate writ petition**[2]** seeks to overturn a trial court order issued before the final judgment. While appellate courts are required to hear appeals, they have discretion whether or not to decide writ petitions on their merits. Appellate writs are potentially available to challenge virtually any interlocutory trial court order, from discovery orders to denials of continuances.

But potentially available is not the same as likely winnable. For reasons of equity and judicial economy, there is a built-in bias against appellate writs. A writ petitioner is essentially asking to cut in line in front of litigants who have appealed a final judgment, which usually takes at least a year from start to finish. And appellate justices, who must hear and decide even the least meritorious appeal, are reluctant to add writ matters to their caseload when they don't have to.

Even so, writ petitions are an established and sometimes successful part of appellate practice. Indeed, most Court of Appeal divisions hold weekly conferences to consider those petitions and employ research attorneys whose sole job is to evaluate writ petitions for the justices. To convince those justices, a petitioner needs to show not only a strong case on the merits, but also that "there is no plain, speedy, and adequate alternative remedy." *Payne v. Superior Court*, 17 Cal. 3d 908, 925 (1976).

If the challenged trial court order is appealable, the petitioner needs to demonstrate why an appeal is inadequate and why an appellate writ is necessary. For example, an order denying a preliminary injunction is appealable. Code Civ. Proc. § 904.1(a)(6). But if the order would result in the imminent dispossession of your client, an appeal would not be a speedy or adequate alternative remedy and an appellate writ would be appropriate.

If the challenged order is not appealable, the alternative remedy is to wait until final judgment and then appeal. To help decide whether that remedy would be considered adequate, a good opinion to read is *Omaha Indemnity Co. v. Superior Ct.*, 209 Cal. App. 3d 1266, 1273 (1989). In that case, the Court of Appeal explained in depth why writs are hard

to secure. One of those reasons is that petitioners "seeking extraordinary writs do not always consider that a purported error of a trial judge may (1) be cured prior to trial, (2) have little or no effect upon the outcome of trial, or (3) be properly considered on appeal." *Id.* at 1273. For instance, an order denying a motion to compel compliance with a discovery request is unlikely to become subject to writ review because of the possibility that the information sought could be obtained elsewhere; doubt that the information will make or break the case; and the fear that becoming the final arbiter of discovery disputes would bring the Court of Appeal to a grinding halt.

On the other hand, if the order requires your client to hand over legally confidential information, such as information protected by the constitutional right to privacy, an appellate court is far more likely to issue a writ. The harm of compelled disclosure would be immediate and could not be cured by a later successful appeal.

Another factor to emphasize in a writ petition is the importance of the legal issue presented. *See, e.g.*, *Cianci v. Superior Court*, 40 Cal.3d 903, 908 (1985) (despite "traditional reluctance" to review rulings on pleadings through the writ procedure, Court intervened "because of the significant legal importance and the timeliness of the issues presented."). As a Court of Appeal justice once said at a conference when asked about framing writ petitions, "attorneys should realize that we (justices) are nerds. We really like deciding interesting legal issues."

Some timing considerations

Keep in mind timing considerations. If there is a genuine emergency, you need to ask for a temporary stay. Common sense and Rule 8.486(a)(7)(B) dictate that the "cover of the petition must prominently display the notice 'STAY REQUESTED' and identify the nature and date of the proceeding or act sought to be stayed." (For example, "STAY REQUESTED (TRIAL SET FOR (imminently upcoming date)"). Otherwise, the writ petition may end up at the figurative bottom of the pile of petitions that might or might not get discussed at the next weekly conference.

For non-emergency situations, no statute or rule sets a deadline for filing the petition. Case law generally requires that "a writ petition should be filed within the 60-day period that applies to appeals." *Lab. & Workforce Dev. Agency v. Superior Ct.*, 19 Cal. App. 5th 12, 24 (2018). But as a practical matter, writ petitions should be filed as soon as possible. You don't want a justice thinking, "if this issue is so important and petitioners' counsel want us to drop everything else we are doing and intervene, why did they wait 60 days to ask us?"

What happens after a writ petition is filed and when does it happen?

There is no reliable answer to the latter question. No deadlines govern when a Court of Appeal needs to respond to a writ petition. Responses can be as quick as a day or two (at least for summary denials of writ petitions) or can take many months.

In a typical writ petition, the party challenging the trial court order is the petitioner; the Superior Court is the respondent; and the opposing party in the litigation is real party in interest.**[3]** The Court of Appeal may not issue a writ without providing the real party in interest an opportunity to file opposition.

The court has numerous other options for its initial response. Ranging from worst to best case scenario for writ petitioners, they are:

- Summary denial of the writ petition.
- Request for the real party in interest to file a preliminary opposition. While this is an encouraging signal for petitioners, counsel should hold off on popping champagne corks. Sometimes after receiving preliminary opposition, the Court of Appeal will summarily deny the petition.
- An order to show cause why the writ should not be issued. This guarantees the opportunity for full briefing and oral argument.
- An "alternative writ" that takes the form of an order to the trial court to change its decision or explain its refusal to do so (a task usually undertaken by the real party in interest). This is stronger than an order to show cause because the trial court might

accept the offer and change its order even if that is not what the Court of Appeal intends. *See Solorzano v. Superior Court*, 10 Cal. App. 4th 1135, 1138, n.1 (1992) ("Contrary to popular belief, we sometimes issue . . . alternative writs . . . not because we have made up our minds that the petition ought to be granted but because we perceive a genuine dispute and want to hear the other side of the story.").

- A "*Palma* notice," named after *Palma v. U.S. Industrial Fasteners, Inc.*, 36 Cal. 3d 171 (1984). The notice warns the real party in interest that the Court of Appeal is contemplating granting the requested writ without oral argument and provides an opportunity to file an opposition.
- A "suggestive *Palma* notice" that, in addition to the usual *Palma* warning, discusses the probable merit of the writ petition and suggests that the trial court might want to change its order. The trial court may then do so after giving the real party in interest an opportunity to oppose the requested relief. *Brown, Winfield & Canzoneri, Inc. v. Superior Ct.*, 47 Cal. 4th 1233, 1239 (2010).

Strategy considerations for opposing a writ petition.

If you are in the more enviable position of having prevailed in the trial court and your opponent has filed a writ petition, Rule 8.487(a)(1) authorizes the filing of a preliminary opposition. Experienced appellate attorneys have not achieved consensus on whether filing a preliminary opposition is a good idea. Some argue that doing so may be counter-productive by drawing unwanted attention to the petition. The opposing view—which I agree with— is that preliminary oppositions can be useful in balancing the court's first impression, providing ammunition to justices for a summary denial.

All agree that a preliminary opposition should lead with any argument you might have that the factors described in *Omaha Indemnity* and like cases show that it is unnecessary for the Court of Appeal to reach the merits of the writ petition. Beyond that, how deeply to explore the merits is a judgement call, depending in large part on how superficially appealing the writ petition is.

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[1] This Tip will not expressly cover writs taken from superior courts of limited jurisdiction to the appellate divisions of those courts. Though the applicable court rules differ, many of the strategy considerations are identical.
[2] I like to use the terms "appellate writs" and "trial court writs" because of how easy it is to confuse the two. Both are often based on the same statute—Code of Civil Procedure § 1085—and use some of the same terminology, but they are very different creatures. *See* October 2023 Tip: Section 1094.5 and 1085 Writs: Bringing Individual and Systemic Challenges Together.
[3] The mechanics of filing a writ petition, governed by California Rule of Court 8.486 and some local rules for each appellate district, are beyond the scope of this Tip. Chapter 15 of The Rutter Group's *Civil Appeals and Writs* is a good source.

Stay tuned for next month's tip on petitions for review to the California Supreme Court. As always if you have any questions about this Tip or other litigation topics, please reach out.