

## Puttin' On The Writs: 10 Tips For Petitioning For Calif. Appeal

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Problem: You want to challenge a California superior court ruling, but you have no right to an appeal. Your alternative is to seek a writ. But writ review is usually discretionary. So, job No. 1 in seeking a writ is convincing the court of appeal there's a really good reason to hear your case — now. Here are a few things to keep in mind:

### **1. Know the odds.**

Put simply, your odds of having a common law writ petition granted are usually dismal. Unlike appeals that are heard as a matter of right, appellate review of writ petitions is usually discretionary. As the California Court of Appeal website acknowledges, more than 90 percent of writ petitions are summarily denied. Why? As one court of appeal noted, "Writ relief, if it were granted at the drop of a hat, would interfere with an orderly administration of justice at the trial and appellate levels." (*Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1272.) Even if the trial court's ruling was dead wrong, the court of appeal will usually grant a writ petition only in the most exigent circumstances, e.g., a child being removed illegally from the United States or an unwarranted and ongoing violation of your constitutional rights. In sum, writ petitions are not meant to correct trial court errors that can be rectified on appeal and do not cause exorbitant harm in the interim.

### **2. Make sure you know the deadline to file.**

Time limits for filing writ petitions depend on whether the writ you are seeking is a statutory or a common law writ. Statutory writs are usually subject to short filing deadlines, which are generally held to be jurisdictional. Examples: orders denying summary judgment or overruling a motion to dismiss for lack of personal jurisdiction. Check the statute right away. The failure to file your writ petition on time may not only cause the court to deny your petition outright, you may even waive your right to obtain review of the issue by a subsequent writ or appeal. Where a statute contains no filing deadline, equitable considerations apply, just as in the case of common law writs.

Common law writs may be barred by laches if the court finds there has been unreasonable delay to the prejudice of the opposing party. Although there is no absolute deadline for filing a common law writ, the general rule of thumb is to file no later than 60 days after notice of entry of the challenged order. That



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said, your petition should really be filed at the earliest possible time to show the court why the writ relief is warranted. If more than 60 days have passed, explain the delay and demonstrate why it has not prejudiced the opposing party.

### ***3. Don't forget to verify the petition.***

You must verify all facts included in your writ petition based on personal knowledge, not on information and belief. So, either your client or you (and typically counsel) will need to sign a verification (or both of you if your personal knowledge of facts is split) and include it with your petition. If your petition fails to include a verification, the court of appeal likely will summarily deny it without permitting you to remedy the defect. Public entities are exempt from the verification requirement.

### ***4. Make sure to provide a sufficient record.***

Even if your issue otherwise merits review, your petition will likely be denied if you don't provide the court of appeal with an adequate record. Usually included in a separately bound "exhibits in support of petition," the record ordinarily must include four things: the ruling from which the petition seeks relief, all documents and exhibits the parties submitted to the trial court regarding the ruling, a reporter's transcript of the oral proceedings that resulted in the ruling, and "any other documents or portions of documents submitted to the trial court that are necessary for a complete understanding of the case and the ruling under review." (Cal. Rule of Ct. 8.486(b).)

In "exigent circumstances," you can file your petition without these documents but must include a declaration that "explains the urgency and the circumstances making the documents unavailable and fairly summarizes their substance." (Id.) The exhibits must be consecutively numbered, bound in volumes of not more than 300 pages, and include table of contents that lists each document by its title and its index-tab number or letter (Cal. R. of Ct. 8.486(c)(1)(A)-(C).) Good news: You only have to provide the court of appeal with one set of exhibits.

### ***5. Consider seeking a peremptory writ in the first instance.***

A peremptory writ in the first instance is an order from the court of appeal that issues without an alternative writ and without full briefing and argument. Such relief is rare and reserved for circumstances of "unusual urgency" or where the relief the petitioner is seeking is "so obvious that no purpose could reasonably be served by plenary consideration of the issue." (Alexander v. Superior Court (1993) 5 Cal.4th 1218, 1223.) If you realistically believe your issue qualifies, specifically asking for this relief can help grab the court's attention and make your case stand out. In other words, in the right case seeking a peremptory writ can at least increase your chances of persuading the court to issue an alternative writ. To grant a peremptory writ in the first instance, the court of appeal must give your opponent fair notice that it is considering such relief and allow a response on the merits. (Palma v. U.S. Industrial Fasteners Inc. (1984) 36 Cal.3d 171, 180.)

### ***6. Consider enlisting your opponent to support your petition.***

Sometimes, both sides in a lawsuit agree that having the court of appeal decide an issue on writ review is best for everyone and cooperate in urging the court of appeal to grant review. That happened in ICF Kaiser Engineers Inc. v. Superior Court (1999) 75 Cal.App.4th 226. There, the trial court vacated an arbitration award in favor of a general contractor on grounds it had not substantially complied with the contractor licensing requirements. Because the other party's cross-complaint remained pending, the

court's ruling on the licensing issue was not an appealable order. This key issue was so crucial that neither party wanted to spend money litigating other issues before it was decided, and both sides asked the court of appeal to grant writ review. It worked. According to the court, the "parties' lawyers then decided to take a rational approach to the overriding issue, with [the other party] ultimately agreeing that it would support Kaiser if Kaiser filed a petition for writ of mandate in which it asked us to finally resolve the licensing issue in an expeditious manner." (Id. at p. 232.) This approach won't work every time, of course. But keep it in mind.

#### ***7. Also consider seeking a stay.***

Unlike an appeal, where the trial court loses jurisdiction and matters typically are stayed automatically or by posting a bond, filing a writ petition does not stop the case from continuing in the trial court. Because writ petitions address interlocutory matters, without a stay the issue raised often could be moot by the time the court of appeal decides it. If this is your situation, the solution is to include a stay request as part of the writ petition. (See Cal. R. of Ct. 8.486(a)(7).) Your petition must explain the urgency. Also, the cover of your petition must include the notation "stay requested" and indicate the nature and date of the proceeding or act that you want stayed. The cover also must show the trial court, department, and name and telephone number for the trial judge whose order you are seeking to stay. (Id.)

#### ***8. Alert the court staff your petition is on the way.***

Especially if seeking a stay, call the court clerk to let the court know to expect your petition. That way, the court can give your petition the immediate attention it requires. If the deadline is imminent, you should also provide the court as much lead time as possible to make a decision.

#### ***9. Consider going outside the record to explain why immediate review is so important.***

Unlike an appeal, a writ petition can sometimes contain information and documents that are not "in the record" in the proceedings that gave rise to the order you are challenging. Because a writ petition is an "original proceeding" where equitable principles apply, the court of appeal has discretion to consider evidence outside the record. (Bruce v. Gregory (1967) 65 Cal.2d 666, 671-672.) In addition, the court may consider facts or documents demonstrating the need for immediate review. For example, that the tomatoes are rotting in the field. Or that the ruling will effectively put a party out of business. Or any other key fact that, while not relevant to the legal issue in question, might help convince the court to hear your issue now. All such statements must comply with the ordinary rules of evidence.

#### ***10. Consider seeking a "grant and transfer" order.***

Sometimes the court of appeal will summarily deny review of an issue that is of great importance and cannot wait until the end of the case for review. There is one more option. You can seek a "grant and transfer" order from the California Supreme Court. (See Cal. R. of Ct. 8.500(b)(4).) The procedure is the same as with any other petition for review, except the remedy you seek is for the Supreme Court to grant review and transfer the matter back to the court of appeal to decide the question by issuing an order to show cause or alternative writ. Review by this method is rare. On the other hand, because the Supreme Court does not itself have to decide the question, there are times when it will effectively "do justice" by requiring the court of appeal to decide a dispositive issue in the first instance. (See, for example, Sartor v. Superior Court (1982) 136 Cal.App.3d 322.)

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