Six Tips for Effective Writ Practice

by Jeffrey Isaac Ehrlich

A. Four Tips for the Petitioner

A "writ" is an order issued by the reviewing court to an inferior tribunal, typically the superior court, directing it to do something (mandate) or forbidding it from doing something (prohibition). Article 6, section 10 of the California Constitution defines the relief available by writs as "extraordinary." Likewise, the cases refer to these writs as "extraordinary writs" and note that, ". . . writ relief is deemed 'extraordinary.'" *Science Applications International Corp. v. Superior Court*, 39 Cal.App.4th 1095, 1100, 46 Cal.Rptr.2d 332, 334 (1995).

The United States Supreme Court has said, "The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations . . . . only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy." *Kerr v. U. S. Dist. Court for Northern Dist. of California*, 426 U.S. 394, 402, 96 S.Ct. 2119 (1976) (citations omitted).

The view is the same in the California courts. The California Court of Appeal has explained:

> We deny the vast majority of petitions we see and we rarely explain why. In reality, perhaps the most fundamental reason for denying writ relief is the case is still with the trial court and there is a good likelihood purported error will be either mooted or cured by the time of judgment. As one court has summarized it: "[I]f it were granted at the drop of a hat, [writ review] would interfere with an orderly administration of justice at the trial and appellate levels. . . . [¶] 'If the rule were otherwise, in every ordinary action a defendant whenever he chose could halt the proceeding in the trial court by applying for a writ . . . to stop the ordinary progress of that action toward a judgment until a reviewing tribunal passed upon an intermediate question that had arisen. If such were the rule, reviewing courts would in innumerable cases be converted from appellate courts to nisi prius tribunals[ ]' . . . [and] [¶] would be trapped in an appellate gridlock. . . ."

Science Applications International Corp. v. Superior Court, 39 Cal.App.4th 1095, 1100, 46 Cal.Rptr.2d 332, 334 (1995), citing, *Omaha Indemnity Co. v. Superior Court*, 209 Cal.App.3d 1266, 1272-1273, 258 Cal.Rptr. 66 (1989).

Treatises on appellate practice warn that 90 percent of writ petitions are summarily denied. *See e.g.*, Eisenberg, Horvitz & Weiner, *California Practice Guide — Civil Appeals and Writs* (Rutter Group 2000 rev.) (*"Civil Appeals and Writs"*) ¶ 15.3.1, p. 15-1. The strict standards for granting review, and the daunting denial rate, might discourage most prudent lawyers from taking the trouble to draft and file a petition for an extraordinary writ.

With the odds against them, why do lawyers still file petitions for writs? Because despite the statistics, and the strict standards for relief, sometimes the Courts of Appeal grant them. There are currently between 5,000 and 7,800 published California decisions arising out of writ proceedings. (Typically, in a writ proceeding, the Superior Court is named as the responding party. A Westlaw search finds 7,843 published decisions in California that include "the Superior Court" in the title; 6,594 that include the term "real party in interest;" and 5,049 that include both phrases.) What follows are four tips for the petitioner who wants to buck the odds.

1. Make Sure It's a Big Deal

What constitutes the "extraordinary" circumstances that will justify writ relief? The Court of Appeal's decision in *Omaha Indemnity Co. v. Superior Court,* 209 Cal.App.3d at 1273-1274, 258 Cal.Rptr. 66 (1989), provides a useful list:

- The issue presented in the petition should be of widespread interest, or present a significant and novel constitutional issue;
- The trial court's order has deprived the petitioner from presenting a substantial portion of the case;
- There are conflicting trial court interpretations of the law that require resolution; or
- The trial court's order is clearly erroneous as a matter of law and substantially prejudices the petitioner's case.

In addition to satisfying one or more of these criteria, the petitioner must overcome a further hurdle — that the typical remedy for error committed by the trial court, an appeal, would not provide an adequate remedy. *Omaha Indemnity v. Superior Court*, 209 Cal.App.3rd at 1274, 258 Cal.Rptr. at 70.

Appellate courts are inclined to grant writs to prevent an irreparable injury, but they are unlikely to

be moved by an "irreparable inconvenience." *Ordway v. Superior Court*, 198 Cal.App.3rd 98, 101 n. 1, 243 Cal.Rptr. 536 (1988). The lawyer who petitions for a writ must therefore be able to show the Court that the issue presented is (a) interesting, and (b) important. In other words, that it is a big deal.

2. Make It Clear to the Court Why It's a Big Deal

Every writ petition should start with an introduction that explains to the court why the petition involves something that is a "big deal" and deserves the court's attention. Common sense would dictate that a writ petition would explain in the clearest possible terms what is at stake, and make the point clear immediately.

Unfortunately, many lawyers seem constitutionally incapable of coming to the point quickly; they file documents filled with needless "throat clearing." Don't let the first sentence in your writ petition be, "Petitioner John Jones (hereinafter "Jones" or "Petitioner") hereby moves for a writ of mandate and/or prohibition seeking review of the order of January 10, 2000, by the Honorable Arthur Smith, Judge of the Superior Court, respondent, granting the petition to compel arbitration brought by real party in interest CIGNA Corp." The court already knows much of this information just by reading the caption of the petition.

Better to start right into the argument, e.g., "The trial court granted CIGNA's petition to compel arbitration even though its arbitration clause lacked the disclosures mandated by Insurance Code section 12123.19, and was therefore invalid. This case presents a novel issue of statewide importance: whether section 12123.19 is preempted by the Federal Arbitration Act, or is saved from preemption by the McCarran Ferguson Act."

One of the country's leading teachers of legal writing, Bryan Garner, suggests that all briefs (and this would include a writ petition) should begin with a short factual statement of the issue, which ends with a question that suggests its own answer. The issue should raise the ultimate issue in the case and the suggested answer should necessitate a favorable outcome for the petitioner. Garner insists that the entire statement be no more than 75 words, regardless of the complexity of the case.

This is a tall order, and many lawyers would resist. But Garner insists that, "About 98% of the time, if you can't phrase your issue in 75 words, you probably don't know what the issue is, it's that simple." B. Garner, *The Winning Brief* (Oxford Univ. Press 1999), p. 71. Garner provides the following "uncommonly good" example of the technique:

> Under Wyoming law, administrative agencies have only those powers provided by statute. No statute gives the Wyoming Natural Resources Commission the authority to impose any sanctions for discovery abuse. May the Commission dismiss a permit application if it finds that the applicant has failed to respond to discovery requests?

Id. at 71.

Working to frame the issue in the way Garner suggests is both time consuming and valuable. It can take hours, or sometimes days, to find the most succinct way to frame the issue persuasively. But during the course of struggling with the best way to frame the issue you may decide that the key issue is not the first one that came to mind. And, a well-framed issue can grab the court's attention and let it know right away that it is dealing with one of the "extraordinary" cases that might warrant writ relief.

3. Be Aware of Deadlines

Unlike the strict deadlines for filing a notice of appeal, in most cases there is no court rule or statute prescribing the deadline for filing a writ. Since writs are deemed equitable in nature, relief may be barred by laches if the petitioner has unreasonably delayed filing the petition, and the delay is prejudicial to the real party in interest. *Sentry Ins. Co. v. Superior Court*, 207 Cal.App.3rd 526, 529-530, 255 Cal.Rprt.13, 15 (1989). Courts generally expect that a writ will be filed within 60 days of the entry of the order being challenged, but have discretion to hear a writ beyond this 60-day period. "*Civil Appeals and Writs*", *supra*, ¶ 15.146, p.15-67.

Likewise, in some cases laches could bar relief where the writ was filed within 60 days, if the circumstances warranted a speedier petition. For example, if the petitioner files a writ on the day before trial, challenging a ruling made 60 days earlier, the petition is unlikely to receive a warm reception. The

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Jeffrey Isaac Ehrlich is a certified appellate specialist and heads the appellate practice group of Shernoff, Bidart & Darras in Claremont, California. He is an Associate Editor of the Advocate.

rule is this: when seeking a writ, file it as the earliest opportunity. If there has been any appreciable delay, explain why.

There is a important exception to the general "60-day" rule for filing writs. In some cases, a statute will prescribe the period in which a writ must be filed if a party seeks review of a ruling made under the statute. These are known as "statutory writs." Typically, the deadline prescribed in the statute is shorter than 60 days.

For example, Code of Civil Procedure section 437c(*l*) requires that a writ seeking review of an order denying a motion for summary judgment or summary adjudication must be filed within 20 days after service of the written notice of entry of the order denying the motion. (This period can be extended by the trial court for ten additional days upon a showing of good cause, but is not automatically extended by the filing of a motion for reconsideration.)

Generally, a failure to meet the deadline for filing a statutory writ will preclude later review of the issue by a common law writ, and in some cases, where the statute makes writ review the exclusive remedy, will preclude later appellate review of the ruling. For example, a statutory writ is the exclusive method to obtain review of an order denying a motion to quash for lack of personal jurisdiction, or challenging the denial of a motion to disqualify a judge. *McCorkle v. City of Los Angeles*, 70 Cal.2d 252, 257, 74 Cal.Rptr. 389, 393 (1969) (motion to quash); *People v. Hull* , 1 Cal.4th 266, 275, 2 Cal.Rtpr.2d 526, 532 (1991) (motion to disqualify judge).

4. Give the Court a Proper Record

A writ petition must be supported by a record that is adequate to permit the court of appeal to review the challenged ruling. This is both a matter of common sense, and court rule — Rule 56(c) of the California Rules of Court. Failure to supply an adequate record is grounds for the summary denial of the petition. Rule 56(c)(4).

Rule 56(c) prescribes the contents of a record that must be filed in support of a writ petition. These include:

- A copy of the order from which relief is sought;
- Copies of all documents and exhibits submitted to the trial court supporting and opposing the petitioner's position;
- Copies of any other documents submitted to the trial court that are necessary for a complete understanding of the case and the ruling;
- The transcript of the proceedings in the trial court.

If the transcript is not available when the petition is filed, Rule 56(c) allows the petitioner to file a statement that fairly summarizes the proceedings and explaining why the transcript is not available. Rule 56(c) also allows counsel to file a declaration stating when the transcript was ordered and when it will be expected. Since a transcript is a required component of the record, if the trial court makes a ruling that will be the basis of a writ petition, the best course is to order the transcript from the

court reporter on the way out of the courtroom after the hearing.

The exhibits to a petition should be assembled in chronological order, paginated, and bound either at the end of petition or in a separate volume, which must not exceed 300 pages. Rule 56(d). The exhibits must begin with a table of contents. *Ibid.*

B. Two Tips for the Respondent

1. Any Preliminary Opposition Must Be Filed Fast

Unless the reviewing court requests it, neither the respondent court nor the real party in interest is required to file an opposition to a writ petition. Cal. Rules of Court, Rule 56(b). Rule 56(b) allows either the respondent or the real party in interest to file "points and authorities in opposition and a statement of any fact considered material not included in the petition." This document is often referred to as a "preliminary opposition" to the petition.

Appellate practitioners and justices offer differing opinions on whether to file a preliminary opposition. Some believe it "dignifies" or calls undue attention to a petition that might otherwise be routinely dismissed. Others find it useful to explain their client's position and to assure the court that the petition overstates the issue. Some follow a middle ground, generally not filing a preliminary opposition unless there is something misleading in the petition. The deadline for filing a preliminary opposition is quite short — five days after service. *Ibid.* Courts often process writ petitions quickly. It is therefore advisable to file a preliminary opposition as quickly as possible, and not on the last day. It is not unheard of for an attorney who has filed a preliminary opposition on the fifth day to receive a phone call from the clerk of the court declining to file the document because the court denied the petition the day before.

2. If the Court Issues the Alternative Writ, File a Proper Return

The court will not grant a writ on the merits without an opposition. In most cases, if the court finds that the petition raises issues that might warrant relief, it

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will issue an alternative writ — essentially an order to show cause to the trial court to change its order or show cause why not. Upon issuance of the alternative writ, the real party and the respondent can file a "return" to the petition. C.R.C. 56(f). A return can be in the form of a demurrer to the petition, or a verified answer, or both. C.C.P. § 1089; C.R.C. 56(f). The verified answer allows the responding party to controvert the factual contentions in the petition, and it is therefore a good idea to file one. A return by demurrer alone does not controvert the petition's factual allegations, and the court may overrule the demurrer and issue the relief sought in the petition without giving leave to file an answer. Rule 56(f).

Likewise, filing an unverified "opposition" or "response" to the petition also fails to controvert the factual allegations in the petition. *County of San Bernardino v. Superior Court*, 30 Cal.App.4th 378, 382 n. 6, 35 Cal.Rptr.2d 760, 761 (1994) (responsive brief that does not respond to formal allegations in the petition is not a return). A return should mirror a petition, containing an introduction and summary of the argument, the "return" itself in the form of a verified answer or demurrer, or both, and a supporting memorandum of points and authorities.

One further note: Under the rules, the responding parties have the right to file a return if the court issues an alternative writ. Sometimes, however, the petition will seek issuance of the peremptory writ in the first instance, or the court will give notice that it intends to proceed on that basis. In that event, any preliminary opposition that is filed should essentially constitute a return, because it may be the only opposition filed before the court rules. ■