

Court of Appeal

FOURTH APPELLATE DISTRICT

Division One

750 B Street, Suite 300

San Diego, CA 92101

HANDOUT ON WRITS

Preliminary Note

This handout is intended to demystify the process for the practitioner and layperson who may be contemplating filing a petition for writ of mandate, writ of prohibition or writ of supersedeas. It does not address petitions for writ of review, petitions for writ of habeas corpus or other specialized petitions.

The court recognizes that writ petitions are frequently prepared in a hurry, are often filed by counsel or parties with limited experience in the world of writs and may be the only avenue of relief. As such, the court takes a relatively informal approach to writ procedure. The court will treat your petition as having the proper label -- deem it a petition for writ of mandate, for example, although you improperly prayed for writ of prohibition. The court may likewise call the parties if, for example, an exhibit is missing.

There are, however, certain requirements that are crucial to writ success. This handout focuses on those requirements.

General Considerations

The trial court has just made an adverse ruling that you believe is critical to your case. What can you do? You may want to consider filing a petition for a writ.

When you file a petition for a writ in an appellate court, you are asking that court to order an inferior tribunal, usually the superior court, to do something or refrain from doing something. You are saying the trial court made a mistake and you cannot wait for an appeal.

The first thing to think about in considering whether to file a petition for a writ is whether there is an adequate remedy at law (i.e., is the order appealable or is the issue one usually handled on appeal?). Check Code of Civil Procedure section 904.1 for a list of appealable orders. Look at the cases dealing with the issue in question to see if they are appellate opinions or writ opinions.

If the order is not appealable, the next item to consider is whether irreparable injury will result absent immediate relief. Generally, money damages are not considered to be irreparable injury and the total of who owes what to whom can be figured out at the end of the case. The threatened loss of petitioner's home may be irreparable injury, although the threatened foreclosure of unimproved commercial property may not be. Release of privileged information, disclosure of work product and invasion of privacy interests ordinarily qualify as irreparable injury. You need to judge the circumstances and how severe the consequences will be without writ relief.

Preparing a Petition

Because a writ petition can be denied merely because it is incomplete, it is very important that you file a complete petition. The petition has three parts: 1) the petition itself; 2) the points and authorities; and 3) the exhibits.

The petition itself is the only new material that needs to be prepared. The petition should be verified by counsel as to the facts within his or her knowledge and by the petitioner as to the facts within petitioner's knowledge. You should include within the petition the name and status of each party, the background and procedural history of the questioned order, the action of the lower tribunal and an explanation of how the tribunal erred, why appeal is inadequate and how the harm is irreparable.

The parties in a writ proceeding differ from those in the underlying case. The party filing the petition is the "petitioner", the tribunal making the contested order is the "respondent", and the party who prevailed below is the "real party in interest".

The heart of your petition should focus on the inadequacy of appeal and irreparable nature of the injury. The handling of writs is within the discretion of the court. The appellate court does not have to grant writ relief just because the lower court erred. Therefore, you must convince the court why it should entertain the issue by writ instead of a regular appeal where the court decides the matter with a full record and less time pressure.

If time is extremely short, you can prepare the points and authorities by photocopying the points and authorities used in the lower court or by incorporating your points and authorities by reference to an exhibit. However, the better practice is to redraft the points and authorities to respond to the reasons given by the lower court in its ruling.

You should attach as exhibits all papers presented to the lower court for consideration in making its ruling. This includes copies of the moving papers, the opposition, the reply, relevant pleadings, a transcript of the hearing and a copy of the challenged order.

If a transcript is not available, include a statement explaining why the transcript is unavailable and fairly summarizing the proceeding; or else a statement that the transcript has been ordered and the date it will be available. Additional factual material may be presented to the appellate court by declaration supported with appropriate documents and an explanation why the material was not presented to the lower court.

The color for the cover of the writ petition, exhibits and the answer is red.

Stays

There are two situations in which the Court of Appeal may, if requested, grant a stay. First, the court may stay enforcement of the challenged order or proceedings in the trial court while it is reviewing the writ petition. Second, the court may stay a judgment during the period of appeal.

A. Stay of trial court proceedings

If petitioner seeks a stay of the contested order or the trial proceedings in general, he or she should first ask the trial court (or agency below) for a stay. Petitioner should advise the Court of Appeal whether he or she requested a stay from the lower tribunal (and, if not, why not) and include any relevant orders granting or denying the request. Petitioner must specify exactly what needs to be stayed, when the stay goes into effect and whether the stay will prejudice any of the parties.

The Court of Appeal may issue a stay without first soliciting or receiving a response. (Ct. App., Fourth Dist., Local Rules, rule 1, Requests for An Immediate Stay or Other Immediate Relief in Writ Proceedings.) Therefore, if you wish to oppose a request for stay, call the Clerk's Office immediately and let the court know that you will be filing opposition.

A petitioner who requests a stay, immediate relief or a writ of supersedeas must place "STAY REQUESTED", "IMMEDIATE RELIEF REQUESTED" or words of similar effect prominently on the cover of the petition and identify the nature and date of the proceeding or act to be stayed. (Cal. Rules of Court¹, rules 8.116(a)(1) & (2), 8.490(b)(7); Ct. App., Fourth Dist., Local Rules, rule 1.) A petitioner who requests a stay or a writ of supersedeas must also state on the cover of the petition (1) the trial court and department involved and (2) the name and telephone number of the trial judge whose order the request seeks to stay. (Rules 8.116(b), 8.490(b)(7).)

¹ Unless otherwise specified, all rule references are to the California Rules of Court.

B. Stay of judgment pending appeal (writ of supersedeas)

The writ of supersedeas is in essence a stay or injunction issued by the appellate court to maintain the status quo pending an appeal. (See generally rule 8.112.) To obtain a writ of supersedeas, petitioner should first show that he or she has tried unsuccessfully to get a stay from the trial court under a statutory provision or through exercise of the court's discretionary powers. (See, e.g., Code Civ. Proc., § 917.4 (sale of real property), Code Civ. Proc., § 917.7 (child custody), etc.) Petitioner must also show the appeal is meritorious on its face and irreparable injury will occur such that the appellant will be more harmed without the stay than respondent will be with the stay.

The notice of appeal must be filed and appropriate filing fees paid before the appellant may file a petition for writ of supersedeas. There is no additional fee for filing the petition.

Certificate of Interested Entities or Persons

In petitions for writ of mandate, certiorari, or prohibition in civil matters (other than family, juvenile, guardianship and conservatorship cases), each party must comply with the requirements of rule 8.208 (governing civil appeals) concerning serving and filing a Certificate of Interested Entities or Persons. (Rule 8.490(i)(1,2).) The purpose of the certificate "is to provide justices of the Court of Appeal with additional information to help them determine whether to disqualify themselves from a proceeding." (Rule 8.208(a).) It is signed by appellate counsel or an unrepresented party. "Entity" is defined as "a corporation, a partnership, a firm, or any other association, but does not include a governmental entity or its agencies or a natural person." (Rule 8.208(c)(2).)

The petitioner's certificate must be included in the petition. Those of the respondent and real party in interest must be included in their preliminary opposition, or, if no opposition is filed, in their return, if any. The certificate must appear after the cover and before the tables. If the identity of any party has not been publicly disclosed in the proceedings, the party may apply for permission to file its certificate under seal separately from the petition, preliminary opposition, or return. (Rule 8.490(i)(3).) If a party fails to file the certificate, the clerk will notify the party by mail that the party must file the certificate within 10 days after the clerk's notice is mailed and that failure to comply may result in the striking of the petition if the party is the petitioner, or the document if the party is the respondent or the real party in interest. (Rule 8.490(i)(4).)

If an entity is a party, that party's certificate must list any other entity or person that the party knows has an ownership interest of 10 percent or more in the party. (Rule

8.208(e)(1).) If a party knows of any other person or entity that has a financial or other interest in the outcome of the proceeding that the party reasonably believes the justices should consider in determining whether to disqualify themselves, the party's certificate must list that entity or person and identify the nature of the interest of the person or entity. (Rule 8.208(e)(2).) A party must promptly serve and file a supplemental certificate in the reviewing court upon learning of changed or additional information that must be disclosed under rule 8.208(e). (Rule 8.208(f).)

Time Limits

The legislature has enacted statutes which specify that certain rulings may be reviewed by writ -- hence the term "statutory writ". In these cases, it is not necessary to explain why an appeal is inadequate or why irreparable injury will occur because the legislature has, in effect, already made the determinations by providing for writ review.

Writs other than those prescribed by statute are called "common law writs".

A. Statutory Writs

Statutory writs must be filed within the time frame prescribed by the Legislature. If the petition is not filed within the specified period, the Court of Appeal generally has no power to act and the petition must be denied. Deadlines for some statutory writs are listed below.

Civil Cases

Motion to disqualify a judge (Code Civ. Proc., § 170.3, subd. (d))	10 days after notice to the parties of the decision
Denial of a motion to quash service of process (Code Civ. Proc., § 418.10, subd. (c))	10 days after service of written notice of entry of the order
Summary adjudication of issues or denial of summary judgment (Code Civ. Proc., § 437c, subd. (m)(1))	20 days after service of written notice of entry of the order
Coordination motion (Code Civ. Proc., § 404.6)	20 days after service of written notice of entry of the order
Motion to expunge lis pendens (Code Civ. Proc., § 405.39)	20 days after service of written notice of the order
Good faith settlement determination (Code Civ. Proc., § 877.6, subd. (e))	20 days after service of written notice of determination
Motion for change of venue (Code Civ. Proc., § 400)	20 days after service of written notice of the order

Criminal Cases

Order denying motion to dismiss (Pen. Code, §§ 995, 999a)	15 days after denial of the motion (also comply with Pen. Code, § 1510)
Order denying motion to suppress (Pen. Code, § 1538.5, subd. (i))	30 days after denial of motion (also comply with Pen. Code, § 1510)

In the case of statutory writs without a specific time limit as, for example, a petition challenging an order awarding sanctions of \$5,000 or less (Code Civ. Proc., § 904.1, subd. (b)), or an order on a minor's emancipation (Fam. Code, § 7123)), the filing period is subject to general principles of laches described in "Common Law Writs" (Section B below).

B. Common Law Writs

There is no set time limit for filing a non-statutory common law writ. However, general principles of laches apply and 60 days is the rule of thumb. If your petition is filed more than 60 days after entry of the order, you should explain the reason for the delay and demonstrate the absence of prejudice to the real party. A petition may also be denied as untimely even when it is filed within the 60-day period if, for example, the petition was not filed until the eve of trial and the challenged order was made some time before the trial date.

Requirement of Personal Service

A petitioner who requests an immediate stay or other immediate relief must serve the petition by personal delivery or by an expeditious method consented to in advance by the party served. If the respondent or any real party in interest is not so served, absent a showing of good cause, the court will not act on the request for five days, except to deny it summarily. The document cover must state conspicuously "STAY REQUESTED" or "IMMEDIATE RELIEF REQUESTED" or words of similar effect. (Ct. App., Fourth Dist., Local Rules, rule 1.)

Response to the Petition

The real party does not have to do anything when served with a writ petition. The Court of Appeal will not issue an order to show cause or peremptory writ in the first instance without affording real party an opportunity to oppose the petition. (Ct. App., Fourth Dist., Div. One, Internal Operating Practices & Proc., V, Original Proceedings; see rule 8.490(g) & (h).)

If the court requests a response from real party, it will notify petitioner. If needed, real party may usually obtain a short extension of time on the response by calling the court. Requests for extensions in excess of one week should be made in writing.

Disposition of the Writ Petition

The Court of Appeal may issue an order summarily denying your petition with or without obtaining a response. (Rule 8.490(g)(4).)

The appellate court may grant relief by issuing what is called a peremptory writ in the first instance if it affords real party an opportunity to respond. The court will not issue a peremptory writ in the first instance unless entitlement to relief is clear -- i.e., entitlement is conceded, there has been clear error under well-settled principles of law and undisputed facts -- or there is an unusual urgency requiring acceleration.

Normally, however, when the court is considering granting writ relief, it will issue an order to show cause or alternative writ. As mentioned above, this court will not issue the order to show cause (or alternative writ) without first providing real party an opportunity to oppose the petition. Issuance of the order to show cause or alternative writ converts the matter into a "cause" and requires the court to hear argument (if requested) and prepare an opinion.

Review of Writ Decisions

The Court of Appeal immediately loses jurisdiction when it issues an order summarily denying a writ petition and, therefore, has no power to entertain a petition for rehearing or reconsideration. A petitioner who wishes to challenge a summary denial must file a petition for review in the Supreme Court within 10 days of the date the appellate court denied the petition. (Rules 8.264(b)(2)(A), 8.500(e)(1).)

If, on the other hand, the Court of Appeal issues an order to show cause, an alternative writ or a peremptory writ in the first instance, the court prepares an opinion. In such cases, unless the court provides for early finality under rule 8.264(b)(3), the time limits and procedures for review are the same as those governing regular appeals.

Summary

1. The court cannot properly review an incomplete petition. Be sure to include a copy of the signed order -- or a minute order -- for it is the order that gives the court jurisdiction. An unsigned order or oral ruling is insufficient.

2. Generally, the court looks for a reporter's transcript of the hearing under review. If you do not have a transcript, include a declaration explaining why the transcript is unavailable and fairly summarizing what transpired at the hearing; or a declaration stating the transcript has been ordered and when it will be available.
3. When you are served with a writ petition, you do not have to do anything. The court will not grant writ relief or issue an order to show cause without first affording real party an opportunity to respond. The court will contact real party if it requests a response and notify petitioner of the request.
4. Extensions of time are not automatically granted. If you need a short extension to respond to a writ petition, call the Writ Department judicial assistant. File a written request for an extension of more than a week.
5. A petition for an extraordinary writ with a request for an immediate stay or other immediate relief must be served by personal delivery or by an expeditious method consented to in advance by the party served. If the respondent or any real party in interest is not so served, absent a showing of good cause, the court will not act on the request for five days, except to deny it summarily.
6. You must indicate any request for stay on the cover of your writ petition. The stay may be for the period the court is considering the petition or longer depending on the circumstances. Be specific about the need for -- and timing of -- your stay request.
7. The court requires an original plus 4 copies of the writ petition and exhibits bound in the same volume as the petition. If your exhibits are bound separately from your petition, you need to file only one set of exhibits with the court. (Rules 8.44(b)(3), 8.44(b)(5), 8.490(d)(3).)
8. The California Rules of Court govern the tabbing and pagination of writ exhibits. Rule 8.490(d)(1) requires that the exhibits be index-tabbed by number or letter with consecutive pagination throughout. The court will file a non-conforming petition but may strike or deny the petition absent compliance within five days. (Rule 8.490(d)(2).) You may supply the court with a corrected version that has been properly tabbed and paginated. In the alternative, you may come to the Clerk's Office to add tabs and paginate the exhibits as needed.
9. The court appreciates your letting it know in advance when you expect to file a petition that requires action that same day or the following day. In those instances, the court will make its best efforts to notify the trial court and the parties of its decision by

telephone. (See rule 8.490(k)(2).) The court also appreciates your letting it know if you have changed your mind after you have alerted the court that you are filing a petition that needs immediate action.

RULE 8.490. PETITIONS FOR WRIT OF MANDATE, CERTIORARI, OR PROHIBITION

(a) Application

- (1) Except as provided in (2), this rule governs petitions to the reviewing court for writs of mandate, certiorari, or prohibition, or other writs within its original jurisdiction. In all respects not provided for in this rule, rule 8.204 applies.

- (2) This rule does not apply to petitions for writs of supersedeas under rule 8.116, to petitions for writs of habeas corpus, except as provided in rule 8.384, or to petitions for writs of review under rules 8.494-8.498.

(b) Petition

- (1) If the petition could have been filed first in a lower court, it must explain why the reviewing court should issue the writ as an original matter.

- (2) If the petition names as respondent a judge, court, board, or other officer acting in a public capacity, it must disclose the name of any real party in interest.

- (3) If the petition seeks review of trial court proceedings that are also the subject of a pending appeal, the notice "Related Appeal Pending" must appear on the cover of the petition and the first paragraph of the petition must state:
 - (A) The appeal's title, trial court docket number, and any reviewing court docket number; and

 - (B) If the petition is filed under Penal Code section 1238.5, the date the notice of appeal was filed.

- (4) The petition must be verified.

- (5) The petition must be accompanied by a memorandum, which need not repeat facts alleged in the petition.

(6) Rule 8.204(c) governs the length of the petition and memorandum, but the tables, the certificate, the verification, and any supporting documents are excluded from the limits stated in rule 8.204(c)(1) and (2).

(7) If the petition requests a temporary stay, it must comply with rule 8.116 and explain the urgency.

(c) Contents of supporting documents

(1) A petition that seeks review of a trial court ruling must be accompanied by an adequate record, including copies of:

(A) The ruling from which the petition seeks relief;

(B) All documents and exhibits submitted to the trial court supporting and opposing the petitioner's position;

(C) 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; and

(D) A reporter's transcript of the oral proceedings that resulted in the ruling under review.

(2) If a transcript under (1)(D) is unavailable, the record must include a declaration by counsel:

(A) Explaining why the transcript is unavailable and fairly summarizing the proceedings, including counsel's arguments and any statement by the court supporting its ruling; or

(B) Stating that the transcript has been ordered, the date it was ordered, and the date it is expected to be filed, which must be a date before any action requested of the reviewing court other than issuance of a temporary stay supported by other parts of the record.

(3) A declaration under (2) may omit a full summary of the proceedings if part of the relief sought is an order to prepare a transcript for use by an indigent criminal defendant in support of the petition and if the declaration demonstrates the petitioner's need for and entitlement to the transcript.

(4) In exigent circumstances, the petition may be filed without the documents required by (1)(A)–(C) if counsel files a declaration that explains the urgency and

the circumstances making the documents unavailable and fairly summarizes their substance.

(5) If the petitioner does not submit the required record or explanations or does not present facts sufficient to excuse the failure to submit them, the court may summarily deny a stay request, the petition, or both.

(d) Form of supporting documents

(1) Documents submitted under (c) must comply with the following requirements:

(A) They must be bound together at the end of the petition or in separate volumes not exceeding 300 pages each. The pages must be consecutively numbered.

(B) They must be index-tabbed by number or letter.

(C) They must begin with a table of contents listing each document by its title and its index-tab number or letter. If a document has attachments, the table of contents must give the title of each attachment and a brief description of its contents.

(2) The clerk must file any supporting documents not complying with (1), but the court may notify the petitioner that it may strike or summarily deny the petition if the documents are not brought into compliance within a stated reasonable time of not less than 5 days.

(3) Rule 8.44(a) governs the number of copies of supporting documents to be filed in the Supreme Court; rule 8.44(b) governs the number of copies of supporting documents to be filed in the Court of Appeal.

(e) Sealed records

Rule 8.160 applies if a party seeks to lodge or file a sealed record or to unseal a record.

(f) Service

(1) If the respondent is the superior court or a judge of that court, the petition and one set of supporting documents must be served on any named real party in interest but only the petition must be served on the respondent.

(2) If the respondent is not the superior court or a judge of that court, both the petition and one set of supporting documents must be served on the respondent and on any named real party in interest.

(3) In addition to complying with the requirements of rule 8.25, the proof of service must give the telephone number of each attorney served.

(4) The petition must be served on a public officer or agency when required by statute or rule 8.29.

(5) The clerk must file the petition even if its proof of service is defective, but if the petitioner fails to file a corrected proof of service within 5 days after the clerk gives notice of the defect the court may strike the petition or impose a lesser sanction.

(6) The court may allow the petition to be filed without proof of service.

(g) Preliminary opposition

(1) Within 10 days after the petition is filed, the respondent or any real party in interest, separately or jointly, may serve and file a preliminary opposition.

(2) An opposition must contain a memorandum and a statement of any material fact not included in the petition.

(3) Within 10 days after an opposition is filed, the petitioner may serve and file a reply.

(4) Without requesting opposition or waiting for a reply, the court may grant or deny a request for temporary stay, deny the petition, issue an alternative writ or order to show cause, or notify the parties that it is considering issuing a peremptory writ in the first instance.

(h) Return or opposition; reply

(1) If the court issues an alternative writ or order to show cause, the respondent or any real party in interest, separately or jointly, may serve and file a return by demurrer, verified answer, or both. If the court notifies the parties that it is considering issuing a peremptory writ in the first instance, the respondent or any real party in interest may serve and file an opposition.

(2) Unless the court orders otherwise, the return or opposition must be served and filed within 30 days after the court issues the alternative writ or order to show

cause or notifies the parties that it is considering issuing a peremptory writ in the first instance.

(3) Unless the court orders otherwise, the petitioner may serve and file a reply within 15 days after the return or opposition is filed.

(4) If the return is by demurrer alone and the demurrer is not sustained, the court may issue the peremptory writ without granting leave to answer.

(i) Certificate of Interested Entities or Persons

(1) This subdivision applies in writ proceedings in civil cases other than family, juvenile, guardianship, and conservatorship cases.

(2) Each party must comply with the requirements of rule 8.208 concerning serving and filing a Certificate of Interested Entities or Persons.

(3) The petitioner's certificate must be included in the petition. The certificates of the respondent and real party in interest must be included in their preliminary opposition or, if no such opposition is filed, in their return, if any. The certificate must appear after the cover and before the tables. If the identity of any party has not been publicly disclosed in the proceedings, the party may file an application for permission to file its certificate under seal separately from the petition, preliminary opposition, or return.

(4) If a party fails to file a certificate as required under (2) and (3), the clerk must notify the party by mail that the party must file the certificate within 10 days after the clerk's notice is mailed and that if the party fails to comply, the court may impose one of the following sanctions:

(A) If the party is the petitioner, the court may strike the petition; or

(B) If the party is the respondent or the real party in interest, the court may strike the document.

(5) If the party fails to file the certificate as specified in the notice under (4), the court may impose the sanctions specified in the notice.

(j) Attorney General's amicus curiae brief

(1) If the court issues an alternative writ or order to show cause, the Attorney General may file an amicus curiae brief without the permission of the Chief

Justice or presiding justice, unless the brief is submitted on behalf of another state officer or agency.

(2) The Attorney General must serve and file the brief within 14 days after the return is filed or, if no return is filed, within 14 days after the date it was due.

(3) The brief must provide the information required by rule 8.200(c)(2) and comply with rule 8.200(c)(4).

(4) Any party may serve and file an answer within 14 days after the brief is filed.

(k) Notice to trial court

(1) If a writ or order issues directed to any judge, court, board, or other officer, the reviewing court clerk must promptly send a certified copy of the writ or order to the person or entity to whom it is addressed.

(2) If the writ or order stays or prohibits proceedings set to occur within 7 days or requires action within 7 days--or in any other urgent situation--the reviewing court clerk must make a reasonable effort to notify the clerk of the respondent court by telephone. The clerk of the respondent court must then notify the judge or officer most directly concerned.

(3) The clerk need not give telephonic notice of the summary denial of a writ, whether or not a stay previously issued.

(l) Responsive pleading under Code of Civil Procedure section 418.10

If the Court of Appeal denies a petition for writ of mandate brought under Code of Civil Procedure section 418.10(c) and the Supreme Court denies review of the Court of Appeal's decision, the time to file a responsive pleading in the trial court is extended until 10 days after the Supreme Court files its order denying review.

(m) Costs

(1) Except in a criminal or juvenile proceeding or other proceeding in which a party is entitled to court-appointed counsel:

(A) Unless otherwise ordered by the court under (B), the prevailing party in an original proceeding is entitled to costs if the court resolves the proceeding by written opinion after issuing an alternative writ, an order to show cause, or a peremptory writ in the first instance.

(B) In the interests of justice, the court may also award or deny costs as it deems proper in the proceedings listed in (A) and in other circumstances.

(2) The opinion or order resolving the proceeding must specify the award or denial of costs.

(3) Rule 8.278(b)-(d) governs the procedure for recovering costs under this rule.

(n) Sanctions

(1) On motion of a party or its own motion, a Court of Appeal may impose sanctions, including the award or denial of costs under (m), on a party or an attorney for:

(A) Filing a frivolous petition or filing a petition solely to cause delay; or

(B) Committing any other unreasonable violation of these rules.

(2) The court must give notice in writing if it is considering imposing sanctions.

(3) Within 10 days after the court sends such notice, a party or attorney may serve and file an opposition, but failure to do so will not be deemed consent. An opposition may not be filed unless the court sends such notice.

(4) Unless otherwise ordered, oral argument on the issue of sanctions must be combined with any oral argument on the merits of the petition.

(As amended, eff. January 1, 2008.)

Writ Handout
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