Contents

Volume 1

Preface
Foreword
Acknowledgments
About the Consulting Editor
About the Authors
About the Judicial Consultants
About the Consultants
Contributors to Prior Editions
Selected Developments
Cutoff Dates and CEB Citation

Part I: Superior Court Writ Practice

1 Overview of Superior Court Writ Practice
The Hon. Kathleen M. Banke

2 Traditional Mandate
The Hon. Kathleen M. Banke

3 Administrative Mandamus
Mitchell E. Abbott
Ginetta L. Giovinco

4 Other Superior Court Writs
Mark Fogelman

5 Initiating a Superior Court Writ Proceeding
Mitchell E. Abbott
T. Peter Pierce
Brian D. Mabee

6 Requesting a Stay in a Superior Court Writ Proceeding
Jeffrey Chine
Jennifer La Fond Chavez

7 The Record in Superior Court Writ Proceedings
David de Jesus

8 Responsive Pleadings and Petitioner's Reply
Kelly J. Savage

9 Action by Superior Court

The Hon. Kathleen M. Banke
Maureen M. Home

10 Enforcing Writs Issued by Superior Court
Judy L. McKelvey

11 Challenging the Superior Court's Decision
The Hon. Margaret M. Grignon (Ret.)
Judith E. Posner

12 Writ Petitions in Limited Civil and Small Claims Cases
Efrat M. Cogan

13 Superior Court Forms

Part II: Appellate and Supreme Court Writ Practice

14 Overview of Appellate Court Writ Practice
The Hon. Kathleen M. Banke

15 Common Writs and Basic Requirements
Grace K. Won
David K. Ismay

16 Availability of Writ Relief
Paul D. Fogel

Volume 2

Part II: Appellate and Supreme Court Writ Practice (continued)

17 Determining Whether to File an Appellate Court Writ Petition
Robert H. Wright

18 Initiating a Writ Proceeding in the Court of Appeal
Terry P. Anastassiou
Susan H. Handelman

19 Requesting a Stay in an Appellate Court Writ Proceeding
Christina J. Imre
Douglas J. Collodel

20 The Record in Appellate Court Writ Proceedings
David de Jesus

21 Preliminary Opposition Authorized by Rules of Court
M.C. Sungaila

22 Initial Action by Court of Appeal
Mitchell E. Abbott

James C. Nielsen

23 Opposition and Reply
M.C. Sungaila

24 Action by Court of Appeal After Issuance of *Palma* Notice, Alternative Writ, or Order to Show Cause
Mitchell E. Abbott
James C. Nielsen

25 Review of Court of Appeal's Action on Writ Petition
H. Thomas Watson

26 Petition for Writ of Supersedeas
Jeremy B. Rosen

27 Petitions in the California Supreme Court
Robert M. Dato

28 Court of Appeal and Supreme Court Forms

Appendix A: Chart: Review Method for Superior Court Orders
Appendix B: Sacramento Superior Court Guide to the Procedures for Prosecuting Petitions for Prerogative Writs
Table of Statutes, Regulations, and Rules
Table of Cases
Table of References
Table of Forms
Index

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Preface

CEB published its one-volume first edition of California Civil Writ Practice in 1970 as one of the only books on writ practice in California. In the intervening years, the frequency with which judicial and nonjudicial decisions have been subject to writ review has increased dramatically. This two-volume, fourth edition of California Civil Writ Practice reflects the expansion of writ practice in California and provides a practical, nuts-and-bolts guide for attorneys handling writ proceedings in the trial courts, the courts of appeal, and the California Supreme Court. Parts I and II, on superior court and appellate court writ practice, respectively, each begin with a chapter that discusses the general nature of writ practice, quickly enabling counsel to understand and to conceptualize writ issues specific to those courts. Subsequent chapters address all facets of writ practice and are organized to track the manner in which a civil writ proceeding generally unfolds in either a superior or an appellate court. For more details, see the Foreword.

The format of the book provides ready access to practical information. Comprehensive chapter outlines and a thorough index help practitioners find topics quickly. Practice Tips, Notes, Cautions, and Judicial Perspectives call attention to significant points in civil writ practice.

A companion CD includes forms from the final chapters of Part I (superior court exemplars) and Part II (appellate and supreme court exemplars), which are derived from actual writ documents drafted by the authors and other practicing attorneys.

This publication is also available on OnLAW, CEB's web-based practice library, allowing practitioners to conduct word searches and to view the exact language of citations through online links.

CEB gratefully acknowledges the Honorable Kathleen M. Banke, currently an Associate Justice of the California Court of Appeal, First District, for working with CEB attorneys to develop the concept of the new edition and each of its chapter outlines, for writing several chapters, for reviewing the manuscript for the entire book, and for assisting with the editing of every chapter. Bringing to this project the perspective of both a jurist and an experienced appellate practitioner who has handled writs in the superior and appellate courts, Justice Banke contributed generously to the creation of a new edition that fully reflects current civil writ practice in California. See About the Consulting Editor.

The authors who wrote chapters for this book are all experienced jurists, or trial court or appellate court practitioners, who have regularly handled sophisticated writ proceedings. Without exception, CEB admires both their depth of knowledge and their extraordinary generosity in sharing that knowledge in the pages of this new text. Their names appear on the contents page and, with biographical information, in the About the Authors section.

CEB Attorney Editors Karen Frasier-Kolligs (Managing Editor), Norma Piatt, and Francesca Bannerman, and Legal Editors Julie Brook, Matthew Mandelbaum, Enrique De Anda, Andrew Rosner, and Carolyn Valley contributed to this title. Roberta Klein, Nancy Lawlor, and Claire Morel-Setoux provided additional legal editing support. Administrative support was provided by Cynthia Kimberlin, Debby Harrison, and Nila Kanzaria. The book was designed by Grier Thornburg. Dorie Riepe and Joseph Curran were responsible for copy editing and production. Robert Burke wrote the index. Composition was performed by CEB's Electronic Publishing staff.

April 2010 Update

CEB wishes to thank the Honorable Kathleen M. Banke, Associate Justice of the Court of Appeal, First District, for her contributions as the author of this 2010 update.

CEB Attorney Editor Jon Heywood and Legal Editors Julie Hammel Brook, Enrique De Anda, Karen Nutter, and Dorothy M. Robins contributed to this update. Administrative support was provided by Kenya Denman and Nila Kanzaria. Laura Linden handled copyediting and production. Kathryn Te Selle updated the index. Composition was performed by CEB's Electronic Publishing staff.

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Foreword

Scarcely another area of civil practice contains more arcane terminology than civil writ practice, *e.g.,* "mandamus," "prohibition," "corum vobis," "corum nobis," "alternative writ," "peremptory writ," "return," "replication," "*Palma* notice," "postcard denial." And what exactly is it that one is supposed to do after determining that one needs to file a writ petition to challenge a nonjudicial action in the superior court or a judicial action in the court of appeal, or after one has been served with a writ petition in either venue? Relatively few procedural rules exist, and local rules and practice still play a particularly important role in how the superior courts manage writ proceedings. This two-part text demystifies writ practice and serves as a practical nuts-and-bolts guide to handling writ proceedings in the trial and appellate courts, including the California Supreme Court.

Trial and appellate courts are empowered to issue the same panoply of civil writs, *e.g.,* mandate, prohibition, habeas corpus. But the nature of writ proceedings and the way in which they unfold in these courts differ significantly. Accordingly, Part I covers writ practice in the superior courts. Part II focuses on writ practice in the courts of appeal and the supreme court.

The chapters in each part track the usual progression of a writ proceeding. Thus, the initial chapters in Part I discuss when a party should file a writ petition in the superior court rather than, or in conjunction with, a civil complaint. See chaps 2-4. Later chapters discuss drafting a superior court writ petition and the supporting memorandum (see chap 5), seeking a stay of the challenged action (see chap 6), compiling and lodging the record or filing supporting documentation (see chap 7), opposing a writ petition (see chap 8), filing a reply (see chap 8), the scope and nature of superior court hearings on writ petitions (see chap 9), the ruling options available to the court (see chap 9), enforcing a writ (see chap 10), and challenging a superior court's judgment in a writ proceeding (see chap 11). The final substantive chapter in Part I covers writ petitions filed in the appellate division of the superior court, a discrete and relatively rare procedure. See chap 12. The concluding chapter of Part I contains exemplar pleadings and documents commonly filed in superior court writ proceedings. See chap 13.

The initial chapters in Part II discuss when a party should consider filing, or in some cases must file, a writ petition in the court of appeal to obtain immediate appellate review of an interlocutory ruling by a trial court in an ongoing civil lawsuit and, in rare cases, review of nonjudicial action. See chaps 15-17. Subsequent chapters discuss drafting an appellate court writ petition and supporting memorandum (see chap 18), seeking a stay of the challenged action (see chap 19), compiling and filing the record (see chap 20), filing opposition (including preliminary opposition permitted by the Rules of Court, opposition after the court of appeal issues a "*Palma*" notice, and formal opposition after the appellate court issues an alternative writ or order to show cause) (see chaps 21, 23), filing a replication or reply (see chap 23), the various procedural options available to the court of appeal (ranging from summary denial before any opposition is filed, to deciding the writ petition on the merits after full briefing and oral argument) (see chaps 22, 24), and challenging the court of appeal's decision (see chap 25). Part II also includes chapters on petitions for writs of supersedeas (which seek a stay of a superior court judgment on appeal) (see chap 26) and petitions for review by the California Supreme Court. See chap 27. The final chapter of Part II includes exemplar pleadings and documents commonly filed in appellate court writ proceedings. See chap 28.

Although writ lexicon retains some of the archaic terminology and conventions of tradition-bound English common law practice, modern trial and appellate court writ proceedings follow a logical progression. This comprehensive practice guide will help practitioners and courts alike to more quickly and successfully navigate this specialized, but increasingly common, area of civil practice.

Kathleen M. Banke
Associate Justice,
California Court of
Appeal, First District

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Acknowledgments

CEB wishes to acknowledge the generosity of the members of the California appellate and superior court bench who reviewed and commented on one or more chapters and added their perspectives to this book: Justice Arthur Gilbert, Justice James R. Lambden, Justice Ronald B. Robie, Justice Miriam A. Vogel, Judge Steven A. Brick, Judge Dzintra Janavs (Ret.), Judge Richard A. Kramer, and Judge Socrates Peter Manoukian. For biographical notes about these jurists, see About the Judicial Consultants.

Many practicing attorneys and court attorneys reviewed and commented on one or more chapters of the book. Their contributions have made the book more reflective of current civil writ practice in California. See About the Consultants.

CEB would particularly like to thank Nancy Fleischer, an attorney at the Sacramento Superior Court, who reviewed several chapters on superior court writ practice and who assisted CEB with its request for permission to reprint the Sacramento Superior Court Guide to the Procedures for Prosecuting Petitions for Prerogative Writs (see App B).

The following judges and attorneys helped develop the outline for the new fourth edition, ensuring that it covers all important aspects of both superior court and appellate court writ practice: Justice Arthur Gilbert, Second District Court of Appeal; Justice Miriam A. Vogel, Second District Court of Appeal; Judge Dzintra Janavs (Ret.), Los Angeles County Superior Court; Judge Socrates Peter Manoukian, Santa Clara County Superior Court; Mitchell E. Abbott, Richards, Watson & Gershon; Elliot Bien, Bien & Summers, LLP; Robert M. Dato, Buchalter Nemer; Paul D. Fogel, Reed Smith LLP; Christina J. Imre, Sedgwick, Detert, Moran & Arnold; James C. Martin, Reed Smith LLP; Gregory Orland, Office of the City Attorney of Los Angeles; T. Peter Pierce, Richards, Watson & Gershon; Susan M. Popik, Chapman, Popik & White, LLP; Michael S. Sorgen, San Francisco; and the law firm of Horvitz & Levy, Encino (coordinated by Julie Woods).

The fourth edition includes many new exemplar forms for both superior court and appellate court writ practice. The following attorneys provided the forms on which CEB based the exemplars provided in chapters 13 and 28: Mitchell E. Abbott and T. Peter Pierce, Richards, Watson & Gershon; Jennifer La Fond Chavez and Jeffrey Chine, Luce, Forward, Hamilton & Scripps LLP, San Diego; Vince Chhabria, Office of the City Attorney of San Francisco; Paul D. Fogel and David de Jesus, Reed Smith LLP; and the law firm of Horvitz & Levy, Encino (coordinated by Julie Woods).

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The following individuals, who served as consultants for this book, are practicing lawyers or court attorneys in California. Many of the consultants reviewed and commented on one or more chapter manuscripts. Without exception they provided astute and thoughtful advice, generously supporting the efforts of the CEB attorneys who edited each chapter. Their suggestions have made the book more reflective of current California civil writ practice.

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Selected Developments

April 2010 Update

Summarized below are some of the more important developments since the 2009 update of this publication:

For cases on abuse of discretion in granting a writ petition, see *Golden Drugs Co. v Maxwell-Jolly* (2009) 179 CA4th 1455, 102 CR3d 446 (Department of Health Care Services did not abuse its discretion in terminating pharmacy's Medi-Cal provider status for violation of regulations in way that threatens public welfare), and *Munroe v Los Angeles County Civil Serv. Comm'n* (2009) 173 CA4th 1295, 1300, 93 CR3d 716 (superior court erred in granting writ petition because Commission did not abuse discretion in not extending time to request appeal hearing), in §2.9.

On the use of mandate to compel performance of a ministerial duty, as opposed to a discretionary act, the court in *Daily Journal Corp. v County of Los Angeles* (2009) 172 CA4th 1550, 1558, 92 CR3d 219 found that the governmental entity's decision not to pursue a legal claim involves discretion that cannot be enjoined by mandate. See §2.20.

For recent cases in which mandate issued to invalidate legislative acts in excess of a governing body's authority, see *Citizens for Planning Responsibly v County of San Luis Obispo* (2009) 176 CA4th 357, 364, 97 CR3d 636 (writ issued invalidating initiative measure amending county's general plan and zoning regulations; reversed on appeal); *California Sch. Bds. Ass'n v State of California* (2009) 171 CA4th 1183, 1193, 90 CR3d 501 (writ issued directing Commission to set aside and reconsider certain decisions); *Rental Hous. Ass'n v City of Oakland* (2009) 171 CA4th 741, 90 CR3d 181 (writ issued to invalidate certain provisions of initiative measure that placed limits and requirements on evictions), in §2.24.

In *Y.K.A. Indus., Inc. v Redevelopment Agency* (2009) 174 CA4th 339, 94 CR3d 424, the court of appeal held that, because there is no evidence of administrative proceedings that possessed judicial character and yielded a result that could have been subject of review in mandate, a trial court erred in concluding that plaintiff had failed to exhaust mandatory judicial remedies—in the form of petition for writ of mandate—before filing a legal action. See §2.31.

On the necessity of exhausting administrative remedies, see *Thomas v Shewry* (2009) 170 CA4th 1480, 1480, 89 CR3d 105, in which a traditional mandamus action was barred because petitioner failed to exhaust administrative remedies. See §2.34.

On the due process requirement that an administrative hearing be "fair," the supreme court in *Morongo Band of Mission Indians v State Water Resources Control Bd.* (2009) 45 C4th 731, 737, 88 CR3d 610 found no violation of a licensee's due process rights for the attorney prosecuting its license revocation matter before a board to be simultaneously serving as an advisor to the board on an unrelated matter. See §3.11.

In *The Termo Co. v Luther* (2008) 169 CA4th 394, 399, 86 CR3d 687, the court held that an administrative order directing the plugging and abandonment of oil wells that were in operation or in idle status for many years implicates a fundamental, vested right and is thus reviewed under the independent judgment standard. See §3.17.

On laches as a defense to a writ petition, see *Schellinger Bros. v City of Sebastopol* (2009) 179 CA4th 1245, 102 CR3d 394 (court found "abundant support" for determination that petitioner acted with unreasonable delay and acquiesced in City taking more than 1 year to certify environmental impact report), in §§3.19, 5.74.

For a case denying admission of extra-record evidence in a traditional mandamus action challenging adjudicatory decisions, see *Golden Drugs Co. v Maxwell-Jolly* (2009) 179 CA4th 1455, 102 CR3d 446, in §7.12.

In an application of the rule that a superior court's order on a writ petition must be *final* to be appealable, the court in *Canandaigua Wine Co. v County of Madera* (2009) 177 CA4th 298, 302, 99 CR3d 264 held that, because only one out of three causes of action in a writ petition was disposed of, the writ order granting partial summary adjudication was not appealable. See §11.9.

In *Silverbrand v County of Los Angeles* (2009) 46 C4th 106, 92 CR3d 595, the California Supreme Court reiterated that timely filing a notice of appeal is mandatory and jurisdictional, and held that the "prison-delivery rule," governing filing of notice of appeal by self-represented prisoners, applies to civil cases. See §§11.22-11.23.

For recent cases in which the California Supreme Court has granted petitions for review and exercised its discretionary review authority, see *Ste. Marie v Riverside County Reg'l Park & Open-Space Dist.* (2009) 46 C4th 282,

93 CR3d 369 and *Spielbauer v County of Santa Clara* (2009) 45 C4th 704, 88 CR3d 590, in §11.35.

The availability of habeas corpus relief to challenge aspects of constructive restraint was reiterated in *People v Villa* (2009) 45 C4th 1063, 1069, 90 CR3d 344. See §15.39.

In *County of Sonoma v Superior Court* (2009) 173 CA4th 322, 336 n6, 93 CR3d 39, the court found writ review appropriate because the case involved a novel and significant constitutional question that had generated conflicting trial court decisions, and the petitioner lacked an adequate remedy at law and would suffer irreparable harm absent writ review. See §§15.56, 15.61, 15.70.

The California Supreme Court has noted that irreparable injury, necessitating writ review, is often found in discovery cases when a trial court's order granting discovery allegedly violates a privilege of the party against whom discovery is granted. See *Costco Wholesale Corp. v Superior Court* (2009) 47 C4th 725, 101 CR3d 758, in §15.62.

For another case illustrating the availability of mandate to review judicial challenge orders, see *Swift v Superior Court* (2009) 172 CA4th 878, 91 CR3d 504 (involving writ of mandate compelling trial court to vacate order striking CCP §170.6 peremptory challenge), in §16.5.

For another case in which a litigant sought a writ of mandate to overturn an order denying a motion to quash, see *Ameriloan v Superior Court* (2008) 169 CA4th 81, 88, 86 CR3d 572, in §16.54.

In *Burlage v Superior Court* (2009) 178 CA4th 524, 100 CR3d 531, the court of appeal denied a writ petition and upheld a trial court's order vacating an arbitrator's award based on the arbitrator's wrongful refusal to consider material evidence. See §16.99.

In *Cable Connection, Inc. v DIRECTV, Inc.* (2008) 44 C4th 1334, 1340, 82 CR3d 229, the supreme court held that the general rule of limited review of private arbitration awards (*Moncharsh v Heily & Blase* (1992) 3 C4th 1, 12, 10 CR2d 183) may be displaced by the parties' agreement. See §16.99.

Another court has issued a writ to overturn an order concerning attorney disqualification. See *Baker Manock & Jensen v Superior Court* (2009) 175 CA4th 1414, 96 CR3d 785 (writ of mandate issued directing trial court to vacate order disqualifying law firm; trial court erred in finding that circumstances of case constituted conflict of interest), in §16.102.

The court in *Crab Addison, Inc. v Superior Court* (2008) 169 CA4th 958, 965, 87 CR3d 400 reiterated that interlocutory review of discovery orders by writ of mandate is the only adequate remedy when a court orders production of documents that may be subject to a privilege. See §16.120.

The California Supreme Court, in a case that was not final as this update went to press, has upheld the use of "suggestive *Palma* notices" in *Brown, Winfield & Canzoneri, Inc. v Superior Court* (Feb. 1, 2010, S156598), 2010 Cal Lexis 588, discussed in §22.22.

For an example of the use of a writ of supersedeas seeking to reduce the amount of the appeal bond under CCP §917.1, see *Leung v Verdugo Hills Hosp.* (2008) 168 CA4th 205, 212, 85 CR3d 203, cited in §§26.3, 26.12.

In *Hollywood Park Land Co. v Golden State Transp. Fin. Corp.* (2009) 178 CA4th 924, 928, 100 CR3d 752, the court held unconstitutional a statute dictating that an original writ in the supreme court is the exclusive means for direct review of a reverse validation action concerning contracts and bonds authorized by amended Indian gaming compacts because it abridges the jurisdiction of appellate courts. See §27.3.

The California Supreme Court exercised its original writ jurisdiction in *Strauss v Horton* (2009) 46 C4th 364, 398, 93 CR3d 591, regarding an initiative to add a new section to the California Constitution providing: "Only marriage between a man and a woman is valid or recognized in California." See §27.8.

On the method of review for Government Claims Act claims, see *Sparks v Kern County Bd. of Supervisors* (2009) 173 CA4th 794, 798, 93 CR3d 173 (public employee seeking reimbursement for defense costs must satisfy claims statutes before filing petition for writ of mandate), in App A.

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1

Overview of Superior Court Writ Practice

The Hon. Kathleen M. Banke

I. INTRODUCTION §1.1

II. TYPES OF WRITS AVAILABLE §1.2

III. RULES AND PROCEDURES §1.3

IV. COVERAGE OF SUPERIOR COURT WRIT PRACTICE AND PROCEDURE §1.4

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§1.1 I. INTRODUCTION

Nearly all writ petitions filed in the superior courts challenge an action or decision by a *nonjudicial* body, such as a governing board or a private body, an administrative agency, or a public official.

It is helpful to think of a writ petition as analogous to a civil complaint; it is the operative pleading in a writ action. Thus, a petition must set forth all the allegations necessary to support the relief sought. The allegations must identify the parties, spell out how and why the challenged action or decision is wrong or an abuse of discretion, state why the petitioner is entitled to writ relief, and specify the relief sought.

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§1.2 II. TYPES OF WRITS AVAILABLE

Most writ petitions filed in the superior courts seek a writ of mandate under CCP §1085 (traditional or ordinary mandate) (see chap 2) or CCP §1094.5 (administrative mandamus) (see chap 3). The requirements for these types of mandate differ, as do some of the court procedures. However, the fundamental character of mandate, whether traditional or administrative, is the same—the writ compels the respondent to take a specified action.

The superior courts also have jurisdiction over other kinds of writ proceedings, including habeas corpus, prohibition, and review (certiorari) (see chap 4). Civil habeas corpus proceedings usually arise in the context of civil commitment proceedings. Prohibition is similar to mandate, except the writ prohibits rather than compels action by the respondent. However, prohibition as well as review apply only to judicial action, which is exercised by only a couple of constitutionally created state agencies. Thus, prohibition and review are rarely sought in the superior courts.

Occasionally there may be a question about which writ applies in a given situation or whether a writ alone will provide complete relief. For example, it may be unclear whether the petitioner should pursue traditional or administrative mandamus, or should seek declaratory relief as well as writ relief. Thus, it is not unusual to seek alternative forms of writ relief or to file a combined writ petition and complaint. Even when a petitioner prays for the "wrong" writ, many superior courts will not consider this fatal and will issue the appropriate writ if the petitioner otherwise demonstrates entitlement to relief. Similarly, many superior courts will grant leave to amend to add causes of action for declaratory relief or damages if necessary to provide complete relief.

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§1.3 III. RULES AND PROCEDURES

There are very few statutes and rules of court that spell out the procedures for writ proceedings in the superior courts, so a number of courts have filled the gap with local rules or published guidelines. In some courts, local writ practice may be dictated by historical convention, by the presiding judge, or by a dedicated writ department. Thus, more so than in other contexts, litigants in superior court writ proceedings must check local rules and often must consult with the court clerk regarding basic writ procedure.

Over the years, two basic procedures have developed for prosecuting superior court writ actions: the noticed motion procedure and the alternative writ procedure (see chap 5). Some superior courts have a clear preference, usually for the noticed motion procedure. In these courts, the petitioner commences the writ proceeding by filing and serving only the writ petition (see chap 5). The respondent and any real party in interest file a responsive pleading (usually a demurrer or an answer) (see chap 8). After the pleadings are settled, the petitioner files a notice of motion for issuance of a peremptory writ and supporting documentation, which usually consists of an administrative record or other evidentiary showing by way of declarations and exhibits and a memorandum of points and authorities (see chaps 5, 7). The respondent files an opposing memorandum and in some cases opposing evidence (see chap 8). The nature of the hearing on the motion depends on the type of writ that is sought and the character of the challenged action or decision. Usually, the hearing is akin to a law-and-motion hearing (see chap 9). After the hearing, the superior court issues a ruling granting or denying the motion and subsequently enters judgment; and, if applicable, it issues a writ. Even under the noticed motion procedure, specific writ procedures vary from county to county, so it is important to check local rules and also to check with the court clerk.

The alternative writ procedure is somewhat more cumbersome and generally involves more paperwork, which is why some courts prefer the noticed motion procedure. Under the alternative writ procedure, the petitioner not only files and serves the writ petition at the outset of the writ proceeding, but also files an application for issuance of an alternative writ and some supporting documentation (usually heard through ex parte procedures). Thus, the petitioner must show and the court must determine at the outset of the proceeding that the writ petition has some colorable merit. However, a number of courts treat alternative writ applications as little more than requests for hearing dates (see chap 5). These courts routinely grant such applications and specify when the respondent and any real party in interest must file a "return" (which may be by demurrer or answer or both) and when the writ petition will be heard on the merits (see chap 8). The parties subsequently brief the matter and either provide the complete administrative record or make a full evidentiary showing, and the superior court rules de novo on the merits of the writ petition (see chap 9). The nature of the hearing on the petition and the superior court's possible actions are the same as in the noticed motion procedure described above.

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§1.4 IV. COVERAGE OF SUPERIOR COURT WRIT PRACTICE AND PROCEDURE

Part I of this book focuses on writ practice in the superior court and provides a pragmatic, nuts-and-bolts discussion of all facets of superior court writ proceedings, *i.e.*:

- The basic requirements for writ relief (see chaps 2-4);
- The kinds of writs superior courts are empowered to issue (see chaps 2-4);
- How to prepare a writ petition (see chap 5);
- The two basic approaches to prosecuting a superior court writ proceeding (the noticed motion and alternative writ approaches) (see chap 5);
- Requesting a stay in a superior court writ proceeding (see chap 6);
- Preparing the documentation supporting a writ petition (see chaps 5, 7);
- Preparing the documentation in opposition to a writ petition (see chap 8); and
- The scope and nature of superior court writ hearings (see chap 9).

The final chapters of Part I discuss how to enforce a writ issued by a superior court (see chap 10), appellate review of a superior court's judgment in a writ action (see chap 11), and the relatively rare circumstance of writ review by a superior court appellate division of judicial action in a limited jurisdiction civil matter (see chap 12). Part I concludes with a collection of exemplar superior court writ forms (see chap 13). The Sacramento Superior Court Guide to the Procedures for Prosecuting Petitions for Prerogative Writs is reprinted in App B.

Part II of this book focuses on writ proceedings in the courts of appeal and the California Supreme Court (see chaps 14-28).

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2

Traditional Mandate

The Hon. Kathleen M. Banke

I. NATURE OF TRADITIONAL MANDATE PROCEEDINGS IN THE SUPERIOR COURTS
- A. Overview §2.1
- B. Scope of Chapter §2.2

II. REQUIREMENTS FOR ISSUANCE OF TRADITIONAL MANDATE §2.3
- A. Statutorily Available Relief §2.4
  - 1. Clear and Present Ministerial Duty §2.5
    - a. Ministerial Duty Defined §2.6
    - b. Ministerial Duty Distinguished From Discretionary Action §2.7
  - 2. Duty to Exercise Discretion §2.8
  - 3. Abuse of Discretion §2.9
  - 4. Entitlement to Office §2.10
- B. Prerequisites for Mandate Relief §2.11
  - 1. Substantial Beneficial Interest §2.12
    - a. Beneficial Interest Requirement Relaxed When Public Right Is at Stake §2.13
    - b. Loss of Beneficial Interest While Proceeding Is Pending §2.14
  - 2. No Plain, Speedy, or Adequate Remedy at Law
    - a. Action at Law Available §2.15
    - b. Other Administrative Remedies Available §2.16

III. ACTS AND DECISIONS SUBJECT TO CHALLENGE THROUGH TRADITIONAL MANDATE PROCEEDINGS IN THE SUPERIOR COURTS
- A. Acts and Decisions of Governmental Bodies and Public Officials and Employees §2.17
  - 1. To Compel Performance of Ministerial Duty §2.18
    - a. Governmental Body or Public Official or Employee Required to Act §2.19
    - b. No Judgment or Discretion Exercised §2.20
    - c. Statutory Act Believed to Be Unconstitutional §2.21
  - 2. To Compel Exercise of Discretion, But Not Manner in Which Discretion Is Exercised §2.22
  - 3. Legislative Actions Generally Not Subject to Mandate §2.23
    - a. Exception: Legislative and Quasi-Legislative Action in Excess of Authority §2.24
    - b. Exception: Implementation of Legislation §2.25
    - c. Exception: Legislative Action Depriving Agency of Funds to Perform Mandatory Duty §2.26
- B. Actions and Decisions of Administrative Agencies §2.27
  - 1. To Compel Agency, Official, or Employee to Perform Mandatory Duty
    - a. Legally Required Ministerial Duties §2.28
    - b. Statutory Duty to Issue Regulations §2.29
    - c. Duty to Exercise Discretion §2.30
    - d. Duty to Hold Administrative Hearing or Otherwise Comply With Administrative Review Requirements §2.31
  - 2. To Review Quasi-Judicial Agency Decisions §2.32
    - a. Traditional Mandate Applies When Statutory Requirements of CCP §1094.5 Not Met §2.33
    - b. Exhaustion of Administrative Remedies §2.34
    - c. Other Statutory Forms of Writ Review of Agency Decisions §2.35
  - 3. To Compel Agency to Comply With Administrative Decision §2.36
  - 4. To Review Quasi-Legislative Acts §2.37
- C. Decisions of Nongovernmental Corporations, Associations, and Officers §2.38

IV. EXAMPLES OF SPECIFIC CONTEXTS IN WHICH NONJUDICIAL ACTIONS REVIEWED BY TRADITIONAL MANDATE
- A. Issuance of Professional Licenses and Certificates §2.39
- B. DMV Suspension or Revocation §2.40
- C. Land Use Decisions and Issuance of Permits or Variances §2.41
- D. Assignment, Classification, and Discipline of Teachers and Students

1. Teachers §2.42
2. Students §2.43
E. Election Issues
1. Reapportionment and Redistricting Issues §2.44
2. Election Processes §2.45
3. Certification of Initiative or Referendum Petition
a. Challenging Placement on Ballot §2.46
b. Compelling Processing of Initiative Petition §2.47
c. Pre- or Post-Election Review of Initiative §2.48
F. Admission or Restoration of Right to Office §2.49
G. Unions and Employee Organizations
1. Compelling Negotiation §2.50
2. Compelling Arbitration §2.51
3. Holding Hearings §2.52
4. Inspecting Records §2.53
H. Corporations and Corporate Officers §2.54
I. Private Organizations and Associations §2.55
J. Enforcement of Civil Rights §2.56
K. Taxes §2.57
1. Compelling Taxation or Assessment §2.58
2. Compelling Record-Keeping and Handling Duties §2.59
3. Compelling Tax Authority to Review Claim or Hear Appeal §2.60
4. Reviewing Assessment Practices §2.61
5. Exception: Mandate Will Not Lie to Challenge Assessment §2.62
6. Exception: Mandate Will Not Lie to Prevent Collection of Property Taxes §2.63
L. Statutory Payment Obligations §2.64
M. Issuance of Subpoenas §2.65
N. Consideration of Claim §2.66
O. Publication of Notice §2.67
P. Public Records Act
1. Mandate for Denial of Disclosure §2.68
2. No Requirement of Inadequate Remedy at Law §2.69

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I. NATURE OF TRADITIONAL MANDATE PROCEEDINGS IN THE SUPERIOR COURTS

§2.1 A. Overview

Mandate is "the principal extraordinary writ surviving under California law." *City of King City v Community Bank* (2005) 131 CA4th 913, 925, 32 CR3d 384. The writ statutes provide for two types of mandate: traditional (CCP §1085, also called ordinary) and administrative (CCP §1094.5). *Bunnett v Regents of Univ. of Cal.* (1995) 35 CA4th 843, 848, 41 CR2d 567. The terms "mandate" and "mandamus" are used interchangeably in practice and are synonymous. CCP §1084. This text uses the terminology "traditional mandamus," "traditional mandate," and "mandate" to refer to writ proceedings under CCP §1085 and "administrative mandamus" to refer to writ proceedings under CCP §1094.5.

Determining which writ to seek in a superior court writ action depends on the nature of the challenged action or decision: traditional mandate generally applies to ministerial and quasi-legislative acts (see §§2.17-2.26), and administrative mandamus generally applies to quasi-judicial (or adjudicatory) acts (see §§2.27-2.36). *Katosh v Sonoma County Employees' Retirement Ass'n* (2008) 163 CA4th 56, 62 n4, 77 CR3d 324; *California Water Impact Network v Newhall County Water Dist.* (2008) 161 CA4th 1464, 1482, 75 CR3d 393; *Ohton v Board of Trustees of Cal. State Univ.* (2007) 148 CA4th 749, 766, 56 CR3d 111; *McGill v Regents of the Univ. of Cal.* (1996) 44 CA4th 1776, 1785, 52 CR2d 466. On administrative mandamus, see chap 3.

NOTE: A party may be entitled to both types of mandate. See, *e.g.*, *Mileikowsky v Tenet Healthsystem* (2005) 128 CA4th 531, 554, 27 CR3d 171 (traditional mandate to review whether hearing officer had authority to terminate peer review hearing, and administrative mandamus to review whether hearing officer's sanction for doctor's misconduct during hearing was abuse of discretion), disapproved in part on other grounds in *Mileikowsky v West Hills Hosp. & Med. Ctr.* (2009) 45 C4th 1259, 1273, 91 CR3d 516; *Conlan v Bonta* (2002) 102 CA4th 745, 751, 125 CR2d 788 (traditional mandate to compel DHS to reimburse Medi-Cal recipients as required by law, and administrative mandamus to challenge decision denying reimbursement to petitioner).

In nearly all instances, a writ of mandate issued by a superior court compels action by a *nonjudicial* body, *i.e.,* a governmental body, administrative agency, private corporation, or association, or by an official or employee of a governmental body or private entity. See, *e.g.*, *Santa Clara County Counsel Attorneys Ass'n v Woodside* (1994) 7 C4th 525, 541, 28 CR2d 617 (writ issued to compel public employer to meet and confer with county counsel attorneys as required by statute); *Mission Hosp. Reg'l Med. Ctr. v Shewry* (2008) 168 CA4th 460, 469, 85 CR3d 639 (court of appeal directed trial court to issue writ compelling Department of Health Care Services to comply with federal law); *SN Sands Corp. v City & County of San Francisco* (2008) 167 CA4th 185, 190, 83 CR3d 885 (writ issued to compel city's public utilities commission to execute contract); *Adair v Stockton Unified Sch. Dist.* (2008) 162 CA4th 1436, 77 CR3d 62 (writ issued to invalidate school district's salary schedule); *Fiscal v City & County of San Francisco* (2008) 158 CA4th 895, 902, 70 CR3d 324 (writ issued to invalidate local proposition); *Corrales v Bradstreet* (2007) 153 CA4th 33, 47, 62 CR3d 440 (writ issued to compel Labor Commissioner to process wage and hour claims in timely manner as specified by statute); *Morris v Harper* (2001) 94 CA4th 52, 58, 114 CR2d 62 (writ issued to compel acting director of California Youth Authority to obtain licensing for its correctional treatment centers). See also §§2.39-2.69.

The superior court appellate division may issue a writ of mandate to a superior court acting in a limited jurisdiction civil or small claims case. See chap 12.

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§2.2 B. Scope of Chapter

This chapter discusses traditional mandate proceedings under CCP §§1085-1094 to challenge actions and decisions of nonjudicial public and private entities, and of public and private officials and employees. It first discusses the basic requirements for mandate (see §§2.3-2.16), including the threshold requirements that a petitioner must meet to seek writ relief. See §2.3. The chapter concludes with two case overview sections: The first includes case exemplars of mandate actions against (a) governmental bodies, officials, and employees; (b) administrative agencies, officials, and employees; and (c) private bodies, officers, and employees. See §§2.17-2.38. The second includes case exemplars of traditional mandate actions in a variety of substantive contexts. See §§2.39-2.69.

Chapter 3 provides an overview of administrative mandamus. For a full discussion of this topic, see California Administrative Mandamus (3d ed Cal CEB 2003). Chapter 12 discusses the instances in which a superior court, generally the court's appellate panel, may issue a writ of mandate to compel judicial action in a limited jurisdiction civil case.

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§2.3 II. REQUIREMENTS FOR ISSUANCE OF TRADITIONAL MANDATE

The basic requirements for traditional mandate are threefold:

- Traditional mandate will issue to compel only certain kinds of action. Thus, a petitioner must ensure that he or she is seeking statutorily available relief. CCP §1085(a); see §§2.4-2.10.
- To seek relief, a petitioner must have a beneficial interest in the outcome of the proceedings. CCP §1086; see §2.11.
- To obtain writ relief, a petitioner must not have any other plain, speedy, or adequate remedy at law. CCP §1086; see §§2.15-2.16.

NOTE: Although these requirements must all be met, appellate court opinions in writ cases originating in the trial courts seldom discuss them at length unless the issue on appeal involves the petitioner's beneficial interest or inadequacy of other relief. See *Mission Hosp. Reg'l Med. Ctr. v Shewry* (2008) 168 CA4th 460, 478, 85 CR3d 639 (respondent argued petitioners lacked "standing" to seek writ relief). Usually, appellate opinions address the substantive merits of the trial court's judgment in a writ proceeding. Nevertheless, some of the more recent appellate decisions have discussed them. See, *e.g.*, *Munroe v Los Angeles County Civil Serv. Comm'n* (2009) 173 CA4th 1295, 1300, 93 CR3d 716 (reciting basic requirements); *Mednik v State Dep't of Health Care Servs.* (2009) 175 CA4th 631, 639, 96 CR3d 112 (same); *V.S. v Allenby* (2008) 169 CA4th 665, 670, 87 CR3d 143 (same); *County of San Diego v State* (2008) 164 CA4th 580, 593, 79 CR3d 489 (same). On appellate review see §§11.7-11.36.

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Source: Civil Litigation/California Civil Writ Practice/2 Traditional Mandate/§2.4 A. Statutorily Available Relief

§2.4 A. Statutorily Available Relief

A writ of mandate will issue "to any inferior tribunal, corporation, board, or person" to compel (CCP §1085(a)):

- "[T]he performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station" (see §§2.5-2.9); or
- "[T]he admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by such inferior tribunal, corporation, board, or person" (see §2.10).

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§2.5 1. Clear and Present Ministerial Duty

A writ of traditional mandate is most often sought to compel a clear, present and usually ministerial duty on the part of the respondent. *Munroe v Los Angeles County Civil Serv. Comm'n* (2009) 173 CA4th 1295, 1300, 93 CR3d 716 quoting *American Fed'n of State, County & Mun. Employees v Metropolitan Water Dist.* (2005) 126 CA4th 247, 261, 24 CR3d 285 (traditional writ of mandate under CCP §1085 is "'a method for compelling a public entity to perform a legal and usually ministerial duty'"); *V.S. v Allenby* (2008) 169 CA4th 665, 670, 87 CR3d 143 (mandate to compel director of Department of Social Services to direct DSS's agents to take action within specified time so federal foster case funding would not be lost). See, *e.g., City of Dinuba v County of Tulare* (2007) 41 C4th 859, 868, 62 CR3d 614 (mandate to compel duty to correctly calculate and distribute tax revenue); *Kavanaugh v West Sonoma County Union High Sch. Dist.* (2003) 29 C4th 911, 916, 129 CR2d 811 (mandate to compel school district to notify teacher of job classification in timely manner); *Mission Hosp. Reg'l Med. Ctr. v Shewry* (2008) 168 CA4th 460, 469, 85 CR3d 639 (mandate to compel Department of Health Care Services to comply with federal law); *Sustainability of Parks, Recycling & Wildlife Legal Defense Fund v County of Solano Dep't of Resource Mgmt.* (2008) 167 CA4th 1350, 84 CR3d 889 (mandate to compel county department to hold hearing); *SN Sands Corp. v City & County of San Francisco* (2008) 167 CA4th 185, 190, 83 CR3d 885 (mandate to compel ministerial duty to award contract); *California Ass'n for Health Servs. at Home v State Dep't of Health Servs.* (2007) 148 CA4th 696, 704, 56 CR3d 102 (mandate to compel DHS to conduct annual rate reviews as required by statute); *Corrales v Bradstreet* (2007) 153 CA4th 33, 47, 62 CR3d 440 (mandate to compel Labor Commissioner to process wage and hour claims in timely manner); *American Fed'n of State, County & Mun. Employees v Metropolitan Water Dist.* (2005) 126 CA4th 247, 260, 24 CR3d 285 (mandate to compel water district to select hearing officer and conduct hearing on grievance); *Morris v Harper* (2001) 94 CA4th 52, 58, 114 CR2d 62 (mandate to compel acting director of California Youth Authority to obtain licensing for correctional treatment centers).

For examples of cases in which traditional mandate has been sought, see §§2.39-2.69.

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§2.6 a. Ministerial Duty Defined

A ministerial duty is imposed on a person in public office who, by virtue of that position, is obligated to perform in a legally prescribed manner when a given state of facts exists. *City of King City v Community Bank* (2005) 131 CA4th 913, 926, 32 CR3d 384. It is a duty that a governmental or private body, by or through a public or private board, agency, official, or employee, is required to perform without the exercise of independent judgment or opinion. *County of San Diego v State* (2008) 164 CA4th 580, 593, 79 CR3d 489. Compare *Kavanaugh v West Sonoma County Union High Sch. Dist.* (2003) 29 C4th 911, 916, 129 CR2d 811 (school district had duty to notify teacher of her job classification in timely manner, enforceable by mandate), with *US Ecology, Inc. v State* (2001) 92 CA4th 113, 137, 111 CR2d 689 (whether to designate site as low-level radioactive waste disposal site was discretionary decision, not reviewable by mandate). Ministerial actions "'are essentially automatic based on whether certain fixed standards and objective measurements have been met.'" *Sustainability of Parks, Recycling & Wildlife Legal Defense Fund v County of Solano Dep't of Resource Mgmt.* (2008) 167 CA4th 1350, 84 CR3d 889 quoting *Calvert v County of Yuba* (2006) 145 CA4th 613, 623, 51 CR3d 797.

When "a statute requires an officer to do a prescribed act upon a prescribed contingency, his functions are ministerial, and upon the happening of the contingency the writ may be issued." *Drummey v State Bd. of Funeral Dirs. & Embalmers* (1939) 13 C2d 75, 83, 87 P2d 848. In general, a ministerial act does not entail the exercise of judgment or discretion. See, *e.g., Jenkins v Knight* (1956) 46 C2d 220, 223, 293 P2d 6 (governor's constitutional duty to call special election to fill legislative vacancies was ministerial and subject to mandate). A ministerial act is one "that a public officer is required to perform in a prescribed manner in obedience to the mandate of a legal authority" and without regard to his or her own judgment or opinion as to the act's propriety or impropriety. *Ridgecrest Charter Sch. v Sierra Sands Unified Sch. Dist.* (2005) 130 CA4th 986, 1002, 30 CR3d 648, quoting *Morris v Harper* (2001) 94 CA4th 52, 62, 114 CR2d 62.

For examples of cases in which traditional mandate has been sought, see §§2.39-2.69.

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§2.7 b. Ministerial Duty Distinguished From Discretionary Action

Unlike a ministerial duty, which is an act that the law compels under a given set of facts, an exercise of discretion involves the use of judgment in deciding what action to take. See, *e.g., Ridgecrest Charter Sch. v Sierra Sands Unified Sch. Dist.* (2005) 130 CA4th 986, 1003, 30 CR3d 648, quoting *Morris v Harper* (2001) 94 CA4th 52, 62, 114 CR2d 62 ("discretion is the power conferred on public functionaries to act officially according to the dictates of their own judgment"); *Carrancho v California Air Resources Bd.* (2003) 111 CA4th 1255, 1266, 4 CR3d 536 (agency action in preparing diversion plan and progress report involved exercise of discretion in quasi-legislative capacity). The exercise of discretion in reaching a decision is not susceptible to mandate except for a refusal to exercise it or an abuse of discretion. See §§2.8-2.9.

EXAMPLE: A county ordinance requires the county to negotiate in good faith with an employee union. The county must thus meet and confer. The county's performance of its meet and confer obligation can be compelled by mandate. However, mandate will not lie to compel the county to agree to specific terms, because that is matter as to which the county exercises discretion. See, *e.g.*, *Los Angeles County Employees Ass'n, Local 660 v County of Los Angeles* (1973) 33 CA3d 1, 8, 108 CR 625.

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§2.8 2. Duty to Exercise Discretion

If a nonjudicial body or entity, or an official or employee, has a clear duty to exercise discretion but refuses to do so, mandate will lie to compel the exercise of that discretion. However, the court will not "'compel the exercise of that discretion in a particular manner or to reach a particular result.'" *Daily Journal Corp. v County of Los Angeles* (2009) 172 CA4th 1550, 1555, 92 CR3d 219, quoting *Building Indus. Ass'n v Marin Mun. Water Dist.* (1991) 235 CA3d 1641, 1646, 1 CR2d 625. See, *e.g., California Ass'n for Health Servs. at Home v State Dep't of Health Servs.* (2007) 148 CA4th 696, 708, 56 CR3d 102 (mandate issued to compel DHS to conduct annual rate reviews but not to compel DHS to set specific rates in absence of rate review); *Shamsian v Department of Conserv.* (2006) 136 CA4th 621, 639, 39 CR3d 62 (mandate would not issue to control department's discretion in establishing recycling centers); *Los Angeles County Employees Ass'n, Local 660 v County of Los Angeles* (1973) 33 CA3d 1, 8, 108 CR 625 (mandate issued to compel county to negotiate in good faith but not to agree to specific terms).

For examples of cases in which traditional mandate has been sought, see §§2.39-2.69.

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§2.9 3. Abuse of Discretion

Although mandate will not lie to control the exercise of discretion in a particular way, it will issue to correct an abuse of discretion. *Saleeby v State Bar* (1985) 39 C3d 547, 562, 216 CR 367 ("mandamus will lie to correct an *abuse* of discretion or the actions of an administrative agency which exceed the agency's legal powers") (emphasis in original); *Neighbors in Support of Appropriate Land Use v County of Tuolumne* (2007) 157 CA4th 997, 1004, 68 CR3d 882 ("trial court may not substitute its judgment for that of a public agency or force the agency to exercise its discretion in a particular manner, but may correct abuses of discretion"). See *e.g., Munroe v Los Angeles County Civil Serv. Comm'n* (2009) 173 CA4th 1295, 1300, 93 CR3d 716 (superior court erred in granting writ petition because commission did not abuse discretion in not extending time to request appeal hearing); *Ridgecrest Charter Sch. v Sierra Sands Unified Sch. Dist.* (2005) 130 CA4th 986, 1006, 30 CR3d 648 (superior court found that school district abused its discretion by failing to show that it could not accommodate charter school at single school site).

The superior court's inquiry regarding abuse of discretion in a traditional mandate proceeding is limited to whether the agency's action was "arbitrary, capricious or entirely without evidentiary support," and whether it conformed to legally required procedures. *Neighbors in Support of Appropriate Land Use v County of Tuolumne, supra*. See, *e.g., SN Sands Corp. v City & County of San Francisco* (2008) 167 CA4th 185, 192, 83 CR3d 885 (writ sought on ground that board abused its discretion by interfering with award of contract); *State Bldg. & Constr. Trades Council v Duncan* (2008) 162 CA4th 289, 300, 76 CR3d 507 (writ sought on grounds director had abused his discretion by misinterpreting and misapplying law).

The appropriate degree of judicial scrutiny in any particular case lies along a continuum with nonreviewability at one end and independent judgment at the other; because "the ultimate question is whether the agency has abused its discretion, the answer is one of degree." *Shapell Indus., Inc. v Governing Bd.* (1991) 1 CA4th 218, 233, 1 CR2d 818. See *Golden Drugs Co. v Maxwell-Jolly* (2009) 179 CA4th 1455, 102 CR3d 446 (applying *Shapell* and holding that Department of Health Care Services did not abuse discretion in terminating pharmacy's Medi-Cal provider status for violation of regulations in way that threatens public welfare).

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§2.10 4. Entitlement to Office

Mandate will lie to compel a governmental or private entity to admit an individual to an office or position to which the individual is legally entitled. See, *e.g., Woodmansee v Lowery* (1959) 167 CA2d 645, 648, 334 P2d 991 (petitions for mandate for payment of salary filed by two parties, each of whom claimed to hold same municipal court judgeship; court determined which party was de facto officeholder by examining, but not deciding, legal title to office). This is essentially another instance in which an entity can be compelled by mandate to comply with a clear legal duty.

An action to test title or right to office, formerly known as quo warranto, is governed by CCP §§803-811; mandate cannot be used to decide title to an office. On quo warranto, see §4.27. See, *e.g.*, *Hallinan v Mellon* (1963) 218 CA2d 342, 347, 32 CR 446 (taxpayer suit to compel repayment of salary by officeholder who was allegedly appointed illegally; writ denied because remedy to try title to office is quo warranto action). Although mandate cannot be used to decide title to an office, it can be used to determine which party has the best claim to legal title and, thus, is the de facto officer. See *Woodmansee v Lowery, supra*; *Klose v Superior Court* (1950) 96 CA2d 913, 920, 217 P2d 97 (prohibition action filed by officeholder to restrain mandate action filed by taxpayer to compel city council to fill officeholder's seat because of alleged vacancy).

For examples of cases in which traditional mandate has been sought, see §§2.39-2.69.

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Source: Civil Litigation/California Civil Writ Practice/2 Traditional Mandate/§2.11 B. Prerequisites for Mandate Relief

§2.11 B. Prerequisites for Mandate Relief

In addition to ensuring that the challenged action or decision is the kind reviewable by traditional mandate (see §§2.3-2.10), a petitioner also must satisfy two threshold requirements for writ relief (see CCP §1086):

- A beneficial interest in the outcome of the proceeding, concomitant to the duty to be performed (see §2.12); and
- No plain, speedy, or adequate legal remedy. See §§2.15-2.16.

NOTE: Although these two requirements must be specifically alleged in a petition seeking writ relief (on contents of petition, see §§5.38-5.62), court of appeal opinions in writ cases originating in the trial courts seldom discuss them in detail unless the issue on appeal involves the petitioner's beneficial interest or inadequacy of other relief. See *Mission Hosp. Reg'l Med. Ctr. v Shewry* (2008) 168 CA4th 460, 480, 85 CR3d 639 (ruling that petitioners had beneficial interest and could seek writ relief). Appellate opinions more often address the substantive merits of a trial court's judgment in a writ proceeding. Some courts, however, have addressed requirements in more detail, as discussed in §2.3. See also §§11.7-11.36 on appellate review of a trial court judgment.

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§2.12 1. Substantial Beneficial Interest

The petitioner must have "a clear, present and beneficial right" to the performance of the duty allegedly owed by the respondent. *Mission Hosp. Reg'l Med. Ctr. v Shewry* (2008) 168 CA4th 460, 478, 85 CR3d 639; *County of San Diego v State* (2008) 164 CA4th 580, 593, 79 CR3d 489; *California Ass'n for Health Servs. at Home v State Dep't of Health Servs.* (2007) 148 CA4th 696, 704, 56 CR3d 102. See CCP §1086 (writ "must be issued upon the verified petition of the party beneficially interested"). This is in the nature of a "standing" requirement, ensuring that the party seeking relief has a direct interest in the outcome of the writ proceeding. See *Syngenta Crop Protection, Inc. v Helliker* (2006) 138 CA4th 1135, 1181, 42 CR3d 191 (pesticide manufacturers had standing to seek writ challenging agency's nonpermissive use of their data to evaluate registrations of other companies); *City of Gilroy v State Bd. of Equalization* (1989) 212 CA3d 589, 604, 260 CR 723 (city had standing to collaterally challenge tax board's refund decision that precipitated board's demand that city return tax revenues).

"A beneficial interest means the petitioner has a special interest over and above the interest of the public at large." *People ex rel. Dept. of Conserv. v El Dorado County* (2005) 36 C4th 971, 986, 32 CR3d 109 (director of department had beneficial interest in seeing that the Surface Mining and Reclamation Act was adequately enforced). See, *e.g., Mission Hosp. Reg'l Med. Ctr. v Shewry* (2008) 168 CA4th 460, 469, 85 CR3d 639 (hospitals had beneficial interest in Department of Health Services' compliance with federal law); *Associated Builders & Contractors, Inc. v San Francisco Airports Comm'n* (1999) 21 C4th 352, 362, 87 CR2d 654 (association members had beneficial interest in validity of project stabilization agreement); *California Ass'n for Health Servs. at Home v State Dep't of Health Servs.,* 148 CA4th at 706 (association members had beneficial interest in forcing DHS to carry out ministerial duty to conduct annual rate reviews); *Savient Pharms., Inc. v Department of Health Servs.* (2007) 146 CA4th 1457, 1468, 53 CR3d 689 (drug company lacked standing to attack contract).

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§2.13 a. Beneficial Interest Requirement Relaxed When Public Right Is at Stake

The beneficial interest requirement is relaxed somewhat when a public right is at stake. See, *e.g., Green v Obledo* (1981) 29 C3d 126, 144, 172 CR 206 (mandate to challenge AFDC travel reimbursement regulation that allegedly violated federal law). In *Green*, the supreme court held that a citizen's interest in having laws executed and public duties enforced was sufficient to meet the beneficial interest requirement. This exception to the general rule that a petitioner must have more than a general interest in the outcome (see §2.12) promotes the public policy of citizens ensuring that a governmental entity does not impair or defeat a legislatively created public right. See *Hogar Dulce Hogar v Community Dev. Comm'n* (2003) 110 CA4th 1288, 1294, 2 CR3d 497 (nonprofit agency created after governmental agency began disregarding law had sufficient interest to enforce statutory obligations); *Timmons v McMahon* (1991) 235 CA3d 512, 518, 286 CR 620 (sufficient interest to compel county to properly determine eligibility requirements for AFDC-FC benefits).

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§2.14 b. Loss of Beneficial Interest While Proceeding Is Pending

If circumstances change during the pendency of a mandate proceeding such that the petitioner no longer has a beneficial interest in the outcome, the superior court will deny writ relief. See, *e.g.*, *County of San Luis Obispo v Superior Court* (2001) 90 CA4th 288, 292, 108 CR2d 753 (petitioner suffered foreclosure before court ruled on challenge to adverse administrative decision and consequently lost "standing" to obtain writ and declaratory relief).

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2. No Plain, Speedy, or Adequate Remedy at Law

§2.15 a. Action at Law Available

Mandate will issue only when the petitioner has no plain, speedy, or adequate remedy at law. CCP §1086. See, *e.g., Barratt Am., Inc. v City of Rancho Cucamonga* (2005) 37 C4th 685, 704, 37 C3d 149 (validation action was adequate remedy to challenge city's failure to conduct fee review and set future fee rates to avoid excessive surplus); *Little v Los Angeles County Assessment Appeals Bds.* (2007) 155 CA4th 915, 922, 66 CR3d 401 (tax refund action was adequate remedy); *Canova v Trustees of Imperial Irrig. Dist. Employee Pension Plan* (2007) 150 CA4th 1487, 1494, 59 CR3d 587 (claim for breach of contract was adequate remedy).

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§2.16 b. Other Administrative Remedies Available

It is not only a legal action in court that will provide an adequate remedy foreclosing writ relief. Other administrative remedies may foreclose writ relief. See, *e.g.*, *American Employers Group, Inc. v Employment Dev. Dep't* (2007) 154 CA4th 836, 843, 65 CR3d 233 (petition for tax reassessment by California Unemployment Insurance Appeals Board provided adequate remedy); *Imagistics Int'l, Inc. v Department of Gen. Servs.* (2007) 150 CA4th 581, 590, 59 CR3d 18 (bid protest procedures provided adequate remedy). When the petitioner is pursuing traditional mandate, "the exhaustion requirement speaks to whether there exists an adequate legal remedy. If an administrative remedy is available and has not yet been exhausted, an adequate remedy exists and the petitioner is not entitled to extraordinary relief." *Eight Unnamed Physicians v Medical Exec. Comm. of the Med. Staff of Washington Township Hosp.* (2007) 150 CA4th 503, 510, 59 CR3d 100, quoting *Unnamed Physician v Board of Trustees of St. Agnes Med. Ctr.* (2001) 93 CA4th 607, 620, 113 CR2d 309. See *California Water Impact Network v Newhall County Water Dist.* (2008) 161 CA4th 1464, 1484, 75 CR3d 393 (regardless of whether writ petition was for administrative or traditional mandamus review, it failed because petitioner did not exhaust administrative remedies). But see *O.W.L. Found. v City of Rohnert Park* (2008) 168 CA4th 568, 583, 86 CR3d 1 (explaining that exhaustion requirement does not implicate subject matter jurisdiction; under unique circumstances of case, failure to exhaust administrative remedies did not preclude review).

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III. ACTS AND DECISIONS SUBJECT TO CHALLENGE THROUGH TRADITIONAL MANDATE PROCEEDINGS IN THE SUPERIOR COURTS

§2.17 A. Acts and Decisions of Governmental Bodies and Public Officials and Employees

Traditional mandate will issue to compel action by a governmental body or public official or employee when:

- The action is a ministerial duty (see §§2.18-2.21);
- The governmental body or public official or employee is required to exercise discretion but has refused to do so (see §2.22); or
- A legislative or quasi-legislative act is unlawful or an abuse of discretion (see §§2.23-2.26).

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§2.18 1. To Compel Performance of Ministerial Duty

Mandate will issue to compel a governmental body or public official or employee to perform a ministerial duty. See §§2.19-2.21.

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§2.19 a. Governmental Body or Public Official or Employee Required to Act

A ministerial duty is one that a public agency, board, official, or employee is *required* to perform. See, *e.g., City of Dinuba v County of Tulare* (2007) 41 C4th 859, 868, 62 CR3d 614 (county may be compelled to correctly allocate and distribute tax revenues); *Santa Clara County Counsel Attorneys Ass'n v Woodside* (1994) 7 C4th 525, 541, 28 CR2d 617 (public employer compelled to comply with statutory obligation to meet and confer with county counsel attorneys); *Mission Hosp. Reg'l Med. Ctr. v Shewry* (2008) 168 CA4th 460, 469, 85 CR3d 639 (mandate to compel Department of Health Care Services to comply with federal law); *SN Sands Corp. v City & County of San Francisco* (2008) 167 CA4th 185, 190, 83 CR3d 885 (city had no authority to reject contract and public utilities commission had ministerial duty, and could be compelled, to approve contract); *Norton v San Bernardino City Unified Sch. Dist.* (2008) 158 CA4th 749, 756, 69 CR3d 917 (school district compelled to comply with administrative decision to reinstate employee); *Alliance for a Better Downtown Millbrae v Wade* (2003) 108 CA4th 123, 128, 133 CR2d 249 (city clerk compelled to certify initiative petition based on compliance with submission requirements, and without regard to extrinsic evidence); *Stationary Eng'rs Local 39 v County of Sacramento* (1997) 59 CA4th 1177, 69 CR2d 598 (county compelled to comply with civil service employment rules); *Terminal Plaza Corp. v City & County of San Francisco* (1986) 186 CA3d 814, 836, 230 CR 875 (zoning administrator compelled to enforce planning commission resolution requiring developer to build pedestrian way as condition of development permit). See also *Defend Bayview Hunters Point Comm. v City & County of San Francisco* (2008) 167 CA4th 846, 858, 84 CR3d 486 (writ denied because clerk had ministerial duty to reject petition to force referendum); *Vasquez v Happy Valley Union Sch. Dist.* (2008) 159 CA4th 969, 981, 72 CR3d 15 (writ denied because district complied with statutory classification requirements; affirmed on other grounds); *Capo for Better Representation v Kelley* (2008) 158 CA4th 1455, 1462, 71 CR3d 354 (writ denied because registrar met statutory duty); *Friends of Bay Meadows v City of San Mateo* (2007) 157 CA4th 1175, 1192, 68 CR3d 916 (writ denied because registrar met statutory duty in invalidating signatures); *Women Organized for Employment v Stein* (1980) 114 CA3d 133, 139, 170 CR 176 (writ denied when no statute required officials to collect data petitioners sought). See also §§2.5-2.7.

For additional examples of cases in which traditional mandate has been sought, see §§2.39-2.69.

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§2.20 b. No Judgment or Discretion Exercised

A ministerial duty does not require the exercise of judgment and discretion. Rather, it is an act that must be performed under a certain set of circumstances and in a specific manner. Compare *South Dakota v Brown* (1978) 20 C3d 765, 779, 144 CR 758 (writ denied because governor's refusal to extradite was discretionary), with *California Correctional Peace Officers Ass'n v State Personnel Bd.* (1995) 10 C4th 1133, 1148, 43 CR2d 693 (State Personnel Board had ministerial duty to hear and decide case by date certain). See also, *e.g., Kavanaugh v West Sonoma County Union High Sch. Dist.* (2003) 29 C4th 911, 916, 129 CR2d 811 (school district had duty to notify teacher of job classification in timely manner); *Daily Journal Corp. v County of Los Angeles* (2009) 172 CA4th 1550, 1558, 92 CR3d 219 (governmental entity's decision not to pursue legal claim involves discretion that cannot be enjoined by mandate); *Alliance for a Better Downtown Millbrae v Wade* (2003) 108 CA4th 123, 128, 133 CR2d 249 (city election official had duty to certify initiative petition based on its compliance with submission requirements, and without regard to extrinsic evidence). See also §§2.5-2.7.

For additional examples of cases in which traditional mandate has been sought, see §§2.19, 2.39-2.69.

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§2.21 c. Statutory Act Believed to Be Unconstitutional

Even if a governmental body or public official believes that a statutorily required duty is unconstitutional, mandate will lie to compel performance of that duty if no court has declared the statute unconstitutional. See, *e.g.*, *Lockyer v City & County of San Francisco* (2004) 33 C4th 1055, 1068, 17 CR3d 225 (mayor's belief that state constitution prohibited discrimination against gay men and lesbians with respect to marriage did not allow county clerk to disregard statutory marriage licensing requirements; writ issued compelling city officials to cease issuing marriage licenses to same-sex couples).

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§2.22 2. To Compel Exercise of Discretion, But Not Manner in Which Discretion Is Exercised

If a governmental body or public official or employee has a duty to exercise discretion but refuses to do so, mandate will issue to compel the exercise of that discretion. See, *e.g., California Water Impact Network v Newhall County Water Dist.* (2008) 161 CA4th 1464, 1483, 75 CR3d 393 (mandate will lie to require exercise of discretion but not particular manner in which discretion is exercised); *Sego v Santa Monica Rent Control Bd.* (1997) 57 CA4th 250, 255, 67 CR2d 68 (mandate to compel rent control board to issue certificates of rent levels). See also §2.8.

Mandate will not lie, however, to compel a governmental body or public official to exercise discretion in a particular way. See, *e.g., People v Karriker* (2007) 149 CA4th 763, 774, 57 CR3d 412 (mandate to compel public conservator to investigate defendant for possible conservatorship, but not to select particular conservatorship); *Ridgecrest Charter Sch. v Sierra Sands Unified Sch. Dist.* (2005) 130 CA4th 986, 1002, 30 CR3d 648 (mandate to compel school district to provide reasonably equivalent and contiguous facilities to charter school, but district had discretion to decide how to comply with that duty); *Los Angeles County Employees Ass'n, Local 660 v County of Los Angeles* (1973) 33 CA3d 1, 8, 108 CR 625 (mandate to compel county to negotiate in good faith, but not to agree to specific terms). See also §2.8.

When discretion is exercised in the context of making a quasi-adjudicatory decision (usually made by an agency), courts sometimes characterize the standard of judicial review as "abuse of discretion." *O.W.L. Found. v City of Rohnert Park* (2008) 168 CA4th 568, 585, 86 CR3d 1 (comparing and contrasting standard of review in traditional and administrative mandamus cases). Generally, this means judicial review is limited to determining whether the decision was "arbitrary, capricious, or entirely lacking in evidentiary support." *American Bd. of Cosmetic Surgery v Medical Bd.* (2008) 162 CA4th 534, 547, 75 CR3d 574. As to legal issues, however, the courts apply de novo review. See §2.19.

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§2.23 3. Legislative Actions Generally Not Subject to Mandate

Legislative action is the formulation of a rule to be applied in future cases. *McGill v Regents of the Univ. of Cal.* (1996) 44 CA4th 1776, 1785, 52 CR2d 466, citing *Strumsky v San Diego County Employees Retirement Ass'n* (1974) 11 C3d 28, 35 n2, 112 CR 805. Such action is usually not subject to control by mandate. The courts will not interfere with legislative (or budgeting) processes unless the action exceeds the scope of the governmental body's authority or is so unreasonable as to be an abuse of discretion as a matter of law. See, *e.g., Carmel Valley Fire Protection Dist. v State* (2001) 25 C4th 287, 300, 105 CR2d 636 (denying writ to compel Commission on State Mandates to grant fire district's claim for reimbursement; legislature statutorily empowered to suspend operation of statutes and executive orders that mandate local programs and to withdraw funding); *Carrancho v California Air Resources Bd.* (2003) 111 CA4th 1255, 1266, 4 CR3d 536 (denying writ to compel agency's preparation of diversion plan and progress report; acts involved exercise of discretion in quasi-legislative capacity); *Sklar v Franchise Tax Bd.* (1986) 185 CA3d 616, 622, 230 CR 42 (denying writ to compel legislative action by Franchise Tax Board); *Gilliland v County of Los Angeles* (1981) 126 CA3d 610, 614, 179 CR 73 (denying writ to compel zoning change because zoning is legislative act).

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§2.24 a. Exception: Legislative and Quasi-Legislative Action in Excess of Authority

Mandate will issue to invalidate legislative acts in excess of a governing body's authority. This is a significant use of traditional mandamus. See, *e.g.*, *Tobe v City of Santa Ana* (1995) 9 C4th 1069, 1084, 40 CR2d 402 (challenge to constitutionality of city ordinance); *Saleeby v State Bar* (1985) 39 C3d 547, 562, 216 CR 367 (challenge to "quasi-legislative" action of adopting rules; writ issued compelling State Bar to reformulate rules); *Walker v County of Los Angeles* (1961) 55 C2d 626, 639, 12 CR 671 (writ issued compelling board to fix workers' wages on basis of those prevailing); *American Distilling Co. v City Council* (1950) 34 C2d 660, 667, 213 P2d 704 (writ issued ordering city to terminate proceedings to annex contiguous territory); *Citizens for Planning Responsibly v County of San Luis Obispo* (2009) 176 CA4th 357, 364, 97 CR3d 636 (writ issued invalidating initiative measure amending county's general plan and zoning regulations; reversed on appeal); *California Sch. Bds. Ass'n v State* (2009) 171 CA4th 1183, 1193, 90 CR3d 501 (writ issued directing commission to set aside and reconsider certain decisions); *Rental Hous. Ass'n v City of Oakland* (2009) 171 CA4th 741, 90 CR3d 181 (writ issued to invalidate certain provisions of initiative measure that placed limits and requirements on evictions); *Mission Hosp. Reg'l Med. Ctr. v Shewry* (2008) 168 CA4th 460, 469, 85 CR3d 639 (writ will issue to require Legislature to comply with laws); *SN Sands Corp. v City & County of San Francisco* (2008) 167 CA4th 185, 191, 83 CR3d 885 (challenge to city's refusal to award contract; acts leading up to award and award of contract are legislative in character); *Hernandez v County of Los Angeles* (2008) 167 CA4th 12, 84 CR3d 10 (post-election challenge to local ballot measure); *County of San Diego v State* (2008) 164 CA4th 580, 593, 79 CR3d 489 (writ issued invalidating Secretary of State's rules not adopted in accordance with APA); *Adair v Stockton Unified Sch. Dist.* (2008) 162 CA4th 1436, 77 CR3d 62 (writ issued to invalidate school district's salary schedule); *San Joaquin County Local Agency Formation Comm'n v Superior Court* (2008) 162 CA4th 159, 166, 76 CR3d 93 (writ issued preventing depositions of commissioners; commission's actions are quasi-legislative in nature and reviewed by ordinary mandamus, rather than administrative mandamus); *California Water Impact Network v Newhall County Water Dist.* (2008) 161 CA4th 1464, 1483, 75 CR3d 393 (quasi-legislative actions must be challenged by traditional mandate); *Fiscal v City & County of San Francisco* (2008) 158 CA4th 895, 902, 70 CR3d 324 (writ declaring local ordinance invalid).

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§2.25 b. Exception: Implementation of Legislation

Implementation of legislation, once passed, is a ministerial duty that can be compelled by mandate. See, *e.g., Woodland Hills Residents Ass'n, Inc. v City Council* (1980) 26 C3d 938, 944, 164 CR 255 (writ compelling city to hold public discussions and follow proper procedures required by California Environmental Quality Act); *Stationary Eng'rs Local 39 v County of Sacramento* (1997) 59 CA4th 1177, 69 CR2d 598 (writ compelling civil service commission to grant exam preference points in accordance with civil service rules); *Glendale City Employees Ass'n v City of Glendale* (1975) 15 C3d 328, 343, 124 CR 513 (writ compelling city to increase employee pay); *Environmental Council v Board of Supervisors* (1982) 135 CA3d 428, 440, 185 CR 363 (writ compelling supervisors to make statutorily required findings on mitigation factors); *Rivera v Division of Indus. Welfare* (1968) 265 CA2d 576, 605, 71 CR 739 (writ compelling enforcement of wage, hour, and working condition regulations). But see *Mendoza v State* (2007) 149 CA4th 1034, 1049, 57 CR3d 505 (writ prohibiting implementation or enforcement of statute deemed unconstitutional).

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§2.26 c. Exception: Legislative Action Depriving Agency of Funds to Perform Mandatory Duty

If local legislative action deprives a local agency of the resources it needs to carry out its functions, mandate may lie. In *Scott v Common Council* (1996) 44 CA4th 684, 689, 52 CR2d 161, a writ issued compelling the city council to reinstate and fund two investigator positions, the functions of which were mandated by the city charter. *Scott* held that judicial intervention in the budgeting process is appropriate when the superior court makes the factual finding that budget cuts prevented an official from carrying out mandated duties.

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Source: Civil Litigation/California Civil Writ Practice/2 Traditional Mandate/§2.27 B. Actions and Decisions of Administrative Agencies

§2.27 B. Actions and Decisions of Administrative Agencies

Traditional mandate will issue in connection with administrative actions to:

- Compel an administrative agency, official, or employee to perform a mandatory duty (see §§2.28-2.30);
- Compel an administrative agency to hold a required administrative hearing (see §2.31);
- Review an adjudicatory decision when CCP §1094.5 requirements are not met (§§2.32-2.33);
- Compel an administrative agency to comply with a final administrative decision (see §2.36); and
- Compel an administrative agency to take required quasi-legislative action or to review such action for abuse of discretion (see §2.37).

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1. To Compel Agency, Official, or Employee to Perform Mandatory Duty

§2.28 a. Legally Required Ministerial Duties

Traditional mandate will issue to compel administrative agencies and their officials and employees to perform legally required ministerial duties. On ministerial duties, see §§2.5-2.7, 2.18-2.21. See, *e.g.*, *Mission Hosp. Reg'l Med. Ctr. v Shewry* (2008) 168 CA4th 460, 469, 85 CR3d 639 (mandate compelling Department of Health Care Services to comply with federal law); *Sustainability of Parks, Recycling & Wildlife Legal Defense Fund v County of Solano Dep't of Resource Mgmt.* (2008) 167 CA4th 1350, 84 CR3d 889 (mandate compelling county department to hold hearing); *Fonseca v Fong* (2008) 167 CA4th 922, 84 CR3d 567 (petition to compel police department to comply with state law); *California Ass'n for Health Servs. at Home v State Dep't of Health Servs.* (2007) 148 CA4th 696, 704, 56 CR3d 102 (mandate compelling DHS to comply with federal Medicaid and state Medi-Cal laws); *Benjamin G. v California Special Educ. Hearing Office* (2005) 131 CA4th 875, 883, 32 CR3d 366 (mandate compelling agency to allow parents' expert to observe district's proposed placement of child before placement hearing); *Jackson v Gourley* (2003) 105 CA4th 966, 970, 130 CR2d 72 (mandate compelling DMV to accept certificates of completion from students who took private school driver education correspondence course); *Lomeli v Department of Corrections* (2003) 108 CA4th 788, 797, 134 CR2d 179 (mandate compelling agency to provide reinstatement and payment of back pay and benefits); *Conlan v Bonta* (2002) 102 CA4th 745, 751, 125 CR2d 788 (mandate compelling DHS to establish and implement reasonable procedures as required by law for Medi-Cal beneficiaries to obtain reimbursement for covered services incurred during retroactivity period).

For examples of cases in which traditional mandate has been sought, see §§2.39-2.69.

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§2.29 b. Statutory Duty to Issue Regulations

Traditional mandate will issue to compel administrative agencies to adopt statutorily required regulations. See, *e.g., Newland v Kizer* (1989) 209 CA3d 647, 652, 257 CR 450 (mandate compelling DHS to adopt regulations). However, mandate will not issue to dictate the specific content of regulations or to otherwise compel a governmental agency to exercise its administrative discretion in a particular manner. See, *e.g.*, *Sklar v Franchise Tax Bd.* (1986) 185 CA3d 616, 622, 230 CR 42 (denying writ to compel Franchise Tax Board to adopt specific procedures to control use of alcohol entertainment expense as business deduction).

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§2.30 c. Duty to Exercise Discretion

Traditional mandate will lie to compel administrative agencies or their officials or employees to exercise discretion when they are required, but have refused, to do so. See, *e.g.*, *Belridge Farms v ALRB* (1978) 21 C3d 551, 559, 147 CR 165 (mandate can compel official to exercise discretion when refusal to do so is based on erroneous view of powers vested in official). See also §§2.8, 2.19-2.20.

However, mandate will not issue to compel the exercise of discretion in a particular way or to reach a particular result. *Daily Journal Corp. v County of Los Angeles* (2009) 172 CA4th 1550, 1555, 92 CR3d 219. See, *e.g.*, *California Water Impact Network v Newhall County Water Dist.* (2008) 161 CA4th 1464, 1483, 75 CR3d 393 (mandate lies to require exercise of discretion but not manner in which discretion exercised); *Shamsian v Department of Conserv*. (2006) 136 CA4th 621, 39 CR3d 62 (mandate denied when department's decision to establish recycling centers within certain areas was discretionary); *Sklar v Franchise Tax Bd.* (1986) 185 CA3d 616, 230 CR 42 (mandate denied to compel Franchise Tax Board to adopt specific procedures to control use of alcohol entertainment expense as business deduction). See also §§2.8, 2.22.

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§2.31 d. Duty to Hold Administrative Hearing or Otherwise Comply With Administrative Review Requirements

Traditional mandate will issue to compel administrative agencies to hold legally required hearings or otherwise to comply with required administrative procedures (even if the agency's final decision is reviewable by way of administrative, rather than traditional, mandamus). See, *e.g.*, *Sustainability of Parks, Recycling & Wildlife Legal Defense Fund v County of Solano Dep't of Resource Mgmt.* (2008) 167 CA4th 1350, 84 CR3d 889 (county department compelled to hold hearing); *State Personnel Bd. v Department of Personnel Admin.* (2005) 37 C4th 512, 523, 36 CR3d 142 (mandate compelling compliance with existing disciplinary provisions); *California Correctional Peace Officers Ass'n v State Personnel Bd.* (1995) 10 C4th 1133, 1148, 43 CR2d 693 (mandate compelling State Personnel Board to hold hearing or render decision by date certain); *Forrest v Trustees of Cal. State Univ. & Colleges* (1984) 160 CA3d 357, 360, 206 CR 595 (mandate compelling hearing on grievance). See also *Saleeby v State Bar* (1985) 39 C3d 547, 561, 216 CR 367 (mandate compelling State Bar to provide hearings in which findings would be sufficient to allow judicial review); *Y.K.A. Indus., Inc. v Redevelopment Agency* (2009) 174 CA4th 339, 94 CR3d 424 (lacking evidence there were administrative proceedings of judicial character, with outcome subject to review in mandate, court erred in finding that plaintiff failed to exhaust mandatory judicial remedies—in form of petition for writ of mandate—before filing legal action).

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§2.32 2. To Review Quasi-Judicial Agency Decisions

Adjudicatory administrative decisions (*i.e.*, quasi-judicial decisions) are usually reviewed by way of administrative mandamus under CCP §1094.5. *Western States Petroleum Ass'n v Superior Court* (1995) 9 C4th 559, 566, 38 CR2d 139; *Katosh v Sonoma County Employees' Retirement Ass'n* (2008) 163 CA4th 56, 62 n4, 77 CR3d 324; *California Water Impact Network v Newhall County Water Dist.* (2008) 161 CA4th 1464, 1482, 75 CR3d 393. Administrative mandamus requires that the challenged decision result from a proceeding in which (1) a hearing is required to be held; (2) evidence is required to be taken; and (3) discretion in the determination of the facts is vested in the agency. CCP §1094.5(a). See §§3.3-3.6. See *McGill v Regents of the Univ. of Cal.* (1996) 44 CA4th 1776, 1785, 52 CR2d 466 (appeal of writ directing university to set aside decision denying tenure; court found no legal requirement that tenure decision result from evidentiary hearing, thus, traditional mandate applied). See also *Ohton v Board of Trustees of Cal. State Univ.* (2007) 148 CA4th 749, 766, 56 CR3d 111 (discussing administrative mandamus requirements in reversing summary judgment in civil action with directions to (1) permit motion for leave to amend complaint to add claim for writ of mandate, and (2) decide issues arising from that motion). Courts characterize the standard of review of quasi-adjudicatory decisions (usually made by agencies) as "abuse of discretion." *O.W.L. Found. v City of Rohnert Park* (2008) 168 CA4th 568, 585, 86 CR3d 1 (comparing and contrasting standard of review in traditional and administrative mandamus cases). Generally, this means review is limited to determining whether the decision was "arbitrary, capricious, or entirely lacking in evidentiary support." *American Bd. of Cosmetic Surgery v Medical Bd.* (2008) 162 CA4th 534, 547, 75 CR3d 574. As to legal issues, however, the courts apply de novo review. See §2.19.

For examples of cases in which traditional mandate has been sought, see §§2.39-2.69.

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§2.33 a. Traditional Mandate Applies When Statutory Requirements of CCP §1094.5 Not Met

If any of the three statutory criteria of CCP §1094.5 are not met (see §2.32), administrative adjudicatory decisions are reviewed by way of traditional mandate under CCP §1085. See, *e.g.*, *O.W.L. Found. v City of Rohnert Park* (2008) 168 CA4th 568, 585, 86 CR3d 1; *McGill v Regents of the Univ. of Cal.* (1996) 44 CA4th 1776, 1785, 52 CR2d 466.

The requirement that is most often not met is a "legally required" hearing. See *Keeler v Superior Court* (1956) 46 C2d 596, 600, 297 P2d 967 (hearing only as "deemed necessary"; thus review by traditional mandate); *Blue Cross v Department of Health Care Servs.* (2007) 153 CA4th 322, 329, 62 CR3d 772 (although informal oral presentation allowed, review procedures did not require hearing; thus review by traditional mandate); *Excelsior College v Board of Registered Nursing* (2006) 136 CA4th 1218, 1236, 39 CR3d 618 (no right to evidentiary hearing and thus no right to administrative mandamus; board's action was discretionary and not an abuse of discretion; thus no right to traditional mandate); *McGill v Regents of the Univ. of Cal.* (1996) 44 CA4th 1776, 1785, 52 CR2d 466 (hearing not required in connection with decision denying tenure; thus review by traditional mandate); *Bunnett v Regents of Univ. of Cal.* (1995) 35 CA4th 843, 848, 41 CR2d 567 (no provision in pension plan for evidentiary hearing if application for benefits was denied; thus review by traditional mandate); *Motors Ins. Corp. v Division of Fair Employment Practices* (1981) 118 CA3d 209, 215, 173 CR 332 (no provision for hearing or taking of evidence in connection with issuance of accusation by California Division of Fair Employment Practices; thus review by traditional mandate).

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§2.34 b. Exhaustion of Administrative Remedies

To obtain writ relief, a petitioner must have no other plain, speedy, or adequate remedy. See §§2.15-2.16. Thus, generally, administrative remedies must be exhausted before an administrative decision can be challenged through a mandate proceeding. See, *e.g.*, *Thomas v Shewry* (2009) 170 CA4th 1480, 1480, 89 CR3d 105 (traditional mandamus action barred because petitioner failed to exhaust administrative remedies); *California Water Impact Network v Newhall County Water Dist.* (2008) 161 CA4th 1464, 1484, 75 CR3d 393 (court did not need to decide whether traditional or administrative mandate applied because petitioner failed to exhaust administrative remedies); *Eight Unnamed Physicians v Medical Exec. Comm. of the Med. Staff of Washington Township Hosp.* (2007) 150 CA4th 503, 510, 59 CR3d 100 (petitioners should have appealed to board from decision denying request to consolidate disciplinary hearings); *Imagistics Int'l, Inc. v Department of Gen. Servs.* (2007) 150 CA4th 581, 590, 59 CR3d 18 (petitioner failed to exhaust administrative bid protest remedy). But see *O.W.L. Found. v City of Rohnert Park* (2008) 168 CA4th 568, 583, 86 CR3d 1 (explaining that exhaustion requirement does not implicate subject matter jurisdiction; under unique circumstances of case, failure to exhaust administrative remedies did not preclude review).

NOTE: In the class action context, a court may deem exhaustion of remedies by some of the putative class members as sufficient to satisfy the exhaustion requirement. *Tarkington v California Unemployment Ins. Appeals Bd.* (2009) 172 CA4th 1494, 92 CR3d 131, quoting *Friends of Mammoth v Board of Supervisors* (1972) 8 C3d 247, 268, 104 CR 761 ("requiring all putative class members [in administrative mandamus proceeding] to exhaust their remedies 'would serve no additional useful purpose'"). Although *Tarkington* arose in the administrative mandamus context it also would apply in the traditional mandamus context.

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§2.35 c. Other Statutory Forms of Writ Review of Agency Decisions

Special writ proceedings (*e.g.,* through a "writ of review") apply to some administrative agencies, such as the Public Utilities Commission, the Alcoholic Beverage Control Appeals Board, and the Workers' Compensation Appeals Board. On these proceedings and the agencies to which they apply, see §§4.28, 16.18-16.48.

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§2.36 3. To Compel Agency to Comply With Administrative Decision

Traditional mandate will issue to compel an agency to comply with a final administrative decision. See, *e.g.*, *Lomeli v Department of Corrections* (2003) 108 CA4th 788, 794, 134 CR2d 179 (mandate issued to compel agency to abide by State Personnel Board decision to reinstate employee with back pay).

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§2.37 4. To Review Quasi-Legislative Acts

Mandate generally will not lie to control legislative action unless such action is invalid (*i.e.,* exceeds the scope of the agency's authority) or is an abuse of discretion as a matter of law. See, *e.g.*, *Saleeby v State Bar* (1985) 39 C3d 547, 561, 216 CR 367 (challenge to reimbursement decision from State Bar's client security fund reviewed under traditional mandate because (1) no requirement that hearing be held or record made and (2) claim was fundamentally challenge to bar's promulgation of rules, which was quasi-legislative act); *Pacific Legal Found. v California Coastal Comm'n* (1982) 33 C3d 158, 168, 188 CR 104 (challenge to quasi-legislative act of adopting guidelines interpreting Coastal Act's access provisions); *Woods v Superior Court* (1981) 28 C3d 668, 678, 170 CR 484 (challenge to regulation's validity in adjudicatory hearing on relocation benefits); *Mission Hosp. Reg'l Med. Ctr. v Shewry* (2008) 168 CA4th 460, 85 CR3d 639, (writ issued invalidating rate freeze on health care reimbursements); *County of San Diego v Bowen* (2008) 166 CA4th 501, 82 CR3d 818 (writ issued invalidating Secretary of State's rules not adopted in accordance with Administrative Procedure Act); *State Bldg. & Constr. Trades Council v Duncan* (2008) 162 CA4th 289, 300, 76 CR3d 507 (writ sought on grounds director had misinterpreted and misapplied law); *California Water Impact Network v Newhall County Water Dist.* (2008) 161 CA4th 1464, 1483, 75 CR3d 393 (quasi-legislative actions must be challenged by traditional mandate); *County Sanitation Dist. No. 2 v County of Kern* (2005) 127 CA4th 1544, 1578, 27 CR3d 28 (CEQA petition challenging agency action that is legislative or quasi-legislative reviewed by traditional mandate); *Wilson v Hidden Valley Mun. Water Dist.* (1967) 256 CA2d 271, 276, 63 CR 889 (challenge to board's quasi-legislative decision to deny petitions to exclude land from water district). See also *20th Century Ins. Co. v Garamendi* (1994) 8 C4th 216, 275, 32 CR2d 807 (discussing what makes administrative action quasi-legislative as opposed to quasi-judicial in context of challenges to insurance regulations promulgated for implementation of Proposition 103).

For examples of cases in which traditional mandate has been sought, see §§2.39-2.69.

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§2.38 C. Decisions of Nongovernmental Corporations, Associations, and Officers

Traditional mandate lies to compel a nongovernmental entity ("corporation, board, or person") to perform a legal duty or to admit or reinstate a party to a right or office. CCP §1085. See, *e.g., Lee v Blue Shield* (2007) 154 CA4th 1369, 1378, 65 CR3d 612 (declaratory relief complaint should have been treated as mandate petition, and mandate issued compelling health care insurer to reinstate provider contract and conduct peer review hearing before terminating provider's contract); *Mileikowsky v Tenet Healthsystem* (2005) 128 CA4th 531, 554, 27 CR3d 171, disapproved in part on other grounds in *Mileikowsky v West Hills Hosp. & Med. Ctr.* (2009) 45 C4th 1259, 1273, 91 CR3d 516 (mandate sought to review conduct of hospital disciplinary hearing); *Unnamed Physician v Board of Trustees of St. Agnes Med. Ctr.* (2001) 93 CA4th 607, 619, 113 CR2d 309 (mandate sought to review hearing officer's prehearing rulings).

For examples of cases in which traditional mandate has been sought, see §§2.39-2.69.

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IV. EXAMPLES OF SPECIFIC CONTEXTS IN WHICH NONJUDICIAL ACTIONS REVIEWED BY TRADITIONAL MANDATE

§2.39 A. Issuance of Professional Licenses and Certificates

Traditional mandate will lie to challenge licensing and certificating decisions when the statutory requirements for administrative mandamus are not met. For example:

- California licensing board stopped evaluating out-of-state programs prospectively. See *Excelsior College v Board of Registered Nursing* (2006) 136 CA4th 1218, 1236, 39 CR3d 618 (no hearing required).
- Agency required to issue permit to operate hospital pharmacy. See *Warrack Med. Ctr. Hosp. v California State Bd. of Pharmacy* (1967) 249 CA2d 118, 122, 57 CR 85 (individual licensees barred from operating pharmacy, but no prohibition against corporate applicants comprised of licensees).
- Agency compelled to issue branch office licenses to optometrists. See *Rich v State Bd. of Optometry* (1965) 235 CA2d 591, 604, 45 CR 512 (no hearing required).

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§2.40 B. DMV Suspension or Revocation

Ordinarily, Department of Motor Vehicles (DMV) decisions to suspend or revoke a driver's license are reviewed under CCP §1094.5. See, *e.g.*, *Coombs v Pierce* (1991) 1 CA4th 568, 574, 2 CR2d 249 (driving under influence (DUI) suspension or revocation order reviewed under CCP §1094.5 unless Veh C §13559 specifies otherwise).

The DMV has a mandatory duty to impose suspensions or revocations in some DUI cases. It has no authority to review the underlying conviction precipitating the suspension or revocation. Accordingly, administrative mandamus will not lie to challenge the DMV's reliance on an underlying criminal conviction, including out-of-state convictions. If a driver wants to challenge the validity of that underlying conviction, the driver must do so: (1) in the court in which that decision was rendered; (2) in a mandate proceeding directed to the court that rendered that decision; or (3) in a criminal proceeding in which that conviction is used as a prior offense. *Thomas v DMV* (1970) 3 C3d 335, 337, 90 CR 586. See *Larsen v DMV* (1995) 12 C4th 278, 285, 48 CR2d 151 (same rule applies if conviction obtained in another state).

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Source: Civil Litigation/California Civil Writ Practice/2 Traditional Mandate/§2.41 C. Land Use Decisions and Issuance of Permits or Variances

§2.41 C. Land Use Decisions and Issuance of Permits or Variances

Traditional mandate is frequently used to challenge various land use decisions, including issuance or denial of permits or variances. For example:

- Regional park's acquisition of land did not constitute "dedication" of land for park or open space triggering statutory restrictions on disposition. *Ste. Marie v Riverside County Reg'l Park & Open-Space Dist.* (2009) 46 C4th 282, 93 CR3d 369.
- City prepared sufficient new water supply assessment during environmental review process. *O.W.L. Found. v City of Rohnert Park* (2008) 168 CA4th 568, 586, 86 CR3d 1.
- Coastal Commission properly denied development permit. *Charles A. Pratt Constr. Co. v California Coastal Comm'n* (2008) 162 CA4th 1068, 1072, 76 CR3d 466.
- City lacked authority to issue use exemption contrary to zoning. *Neighbors in Support of Appropriate Land Use v County of Tuolumne* (2007) 157 CA4th 997, 1004, 68 CR3d 882.
- Caltrans lacked authority to require compliance with local zoning ordinance as requirement for issuing state billboard permit. *Traverso v Department of Transp.* (1996) 46 CA4th 1197, 1204, 54 CR2d 434.
- City had ministerial duty to issue building permit in the absence of any discretionary provision in ordinance or law. *Prentiss v City of S. Pasadena* (1993) 15 CA4th 85, 89, 18 CR2d 641.
- City required to withhold building permits until it fixed amount of and imposed fees on developers. *Fontana Unified Sch. Dist. v City of Rialto* (1985) 173 CA3d 725, 734, 219 CR 254.

NOTE: Mandate cannot compel a zoning change, because zoning is a legislative act. *Gilliland v County of Los Angeles* (1981) 126 CA3d 610, 614, 179 CR 73.

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D. Assignment, Classification, and Discipline of Teachers and Students

§2.42 1. Teachers

Traditional mandate will lie to review decisions and actions concerning teachers when the statutory requirements of administrative mandamus are not met. For example:

- Professor's demotion was improper because collective bargaining agreement did not authorize dean to require a tenured professor to engage in any activity; agreement authorized dean only to make suggestions for improvement. *Moosa v State Personnel Bd.* (2002) 102 CA4th 1379, 1384, 126 CR2d 321.
- "Compressed" salary schedule violated state statute. *Adair v Stockton Unified Sch. Dist.* (2008) 162 CA4th 1436, 77 CR3d 62.
- Teacher entitled to be reclassified as regular employee. *Stryker v Antelope Valley Community College Dist*. (2002) 100 CA4th 324, 329, 122 CR2d 489.
- Transfer of teacher cannot violate teacher's constitutional rights. *Finot v Pasadena City Bd. of Educ.* (1967) 250 CA2d 189, 202, 58 CR 520.

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Source: Civil Litigation/California Civil Writ Practice/2 Traditional Mandate/§2.43 2. Students

§2.43 2. Students

Traditional mandate may also be appropriate to challenge decisions involving students. For example:

- Challenge to high school's refusal to allow student to play sports. *Zuehlsdorf v Simi Valley Unified Sch. Dist.* (2007) 148 CA4th 249, 251, 55 CR3d 467.
- Challenge to school district's policy of assigning late-enrolling students to alternative schools until space became available at student's school of residence. *Helena F. v West Contra Costa Unified Sch. Dist.* (1996) 49 CA4th 1793, 1796, 57 CR2d 605.
- Challenge to school board's student grooming requirements. *Akin v Board of Educ. of Riverside Unified Sch. Dist.* (1968) 262 CA2d 161, 163, 68 CR 557.

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E. Election Issues

§2.44 1. Reapportionment and Redistricting Issues

Traditional mandate can be appropriate to challenge a reapportionment plan. For example:

- Alternative writ of mandate issued and appointment of special masters to hear evidence at public hearings on proposed reapportionment plans and draft recommendations. Court retained jurisdiction and invited an application to dismiss if the reapportionment plans were enacted. Court subsequently accepted plans prepared by special masters, discharged the alternative writ of mandate, and denied the writ petition on ground there was no reason to believe parties would not accept the court's holding. *Wilson v Eu* (1991) 54 C3d 471, 286 CR 280.
- Mandate sought to resolve impasse created by legislature's failure to pass legislative and congressional reapportionment bills acceptable to governor in time for 1972 election; court retained jurisdiction to draft plans for 1974 and 1980 elections if legislature failed to act by end of 1972 legislative session. *Legislature v Reinecke* (1972) 6 C3d 595, 603, 99 CR 481; see also *Silver v Brown* (1965) 63 C2d 270, 282, 46 CR 308 (writ petition denied without prejudice to seek similar relief if legislature did not enact new congressional districting measure by close of regular 1967 session).
- Mandate sought to compel redistricting of supervisor districts. Writ denied but jurisdiction retained for further hearing and to enter further orders as necessary if board failed to act within 90 days. *Wiltsie v Board of Supervisors* (1966) 65 C2d 314, 317, 54 CR 320.

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§2.45 2. Election Processes

Traditional mandate can be appropriate to challenge election processes. For example:

- To compel an officer to conduct an election. *Hoffman v State Bar* (2003) 113 CA4th 630, 634, 6 CR3d 592.
- To compel the county registrar to accept a municipal judge candidate's designation of her occupation on the ballot as an administrative law judge. *Andrews v Valdez* (1995) 40 CA4th 492, 493, 46 CR2d 744.
- To compel the registrar of voters to accept a ballot argument and include it in voter information pamphlets. *Barnes v Wong* (1995) 33 CA4th 390, 394, 39 CR2d 417 (mandate denied because ballot argument was submitted after filing deadline).
- To prevent an election limited to members of a proposed district. *Fullerton Joint Union High Sch. Dist. v State Bd. of Educ.* (1982) 32 C3d 779, 787, 187 CR 398.
- To compel the governor to call a special election. *Jenkins v Knight* (1956) 46 C2d 220, 224, 293 P2d 6 (duty to call special election ministerial; mandate denied on facts).

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3. Certification of Initiative or Referendum Petition

§2.46 a. Challenging Placement on Ballot

Traditional mandate will lie to challenge the placement of initiatives or referendums on the ballot. For example:

- To compel the county clerk to certify that a referendum has the requisite number of signatures. *Wheelwright v County of Marin* (1970) 2 C3d 448, 451, 85 CR 809 (mandate denied); *Friends of Bay Meadows v City of San Mateo* (2007) 157 CA4th 1175, 1181, 68 CR3d 916 (mandate denied).
- To compel the city council to submit an initiative ordinance on firefighter's compensation to voters. *Kugler v Yocum* (1968) 69 C2d 371, 373, 71 CR 687.
- To compel the registrar of voters and county clerk to determine the sufficiency of a petition's signatures and, if sufficient, to place the initiative on the local ballot. *Farley v Healey* (1967) 67 C2d 325, 326, 62 CR 26; *Friends of Bay Meadows v City of San Mateo* (2007) 157 CA4th 1175, 1186, 68 CR3d 916.
- To direct the Secretary of State to refrain from verifying signatures gathered on an initiative petition, and from certifying and placing the initiative on the ballot, because the initiative violated the single-subject requirement. *California Trial Lawyers Ass'n, Inc. v Eu* (1988) 200 CA3d 351, 357 n2, 245 CR 916.
- To direct city clerk to refrain from certifying referendum petition based on failure to comply with statutory "text" requirement. *Lin v City of Pleasanton* (2009) 176 CA4th 408, 96 CR3d 730.

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§2.47 b. Compelling Processing of Initiative Petition

Traditional mandate can be used to compel election officials to process initiative and referendum petitions. For example:

- To direct city elections official to certify an initiative for the ballot unless the initiative's noncompliance with election requirements is manifest on the face of the petition. *Alliance for a Better Downtown Millbrae v Wade* (2003) 108 CA4th 123, 129, 133 CR2d 249 (mandate issued; election official exceeded scope of ministerial duties by using evidence extrinsic to initiative petition to justify refusal to certify initiative).
- To compel the city clerk to accept and process an initiative petition. *Friends of Bay Meadows v City of San Mateo* (2007) 157 CA4th 1175, 1186, 68 CR3d 916 (mandate denied because initiative petition did not contain enough valid signatures); *Duran v Cassidy* (1972) 28 CA3d 574, 579, 104 CR 793 (mandate issued compelling city clerk to accept and process initiative petition).
- To compel the acceptance of a referendum petition. *Defend Bayview Hunters Point Comm. v City & County of San Francisco* (2008) 167 CA4th 846, 858, 84 CR3d 486 (mandate denied; clerk had ministerial duty to reject petition to force referendum that failed to include copy of redevelopment plan); *Billig v Voges* (1990) 223 CA3d 962, 963, 273 CR 91 (mandate denied; referendum petition rejected for failure to comply with election statute that required text of ordinance to be printed in referendum petition).

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§2.48 c. Pre- or Post-Election Review of Initiative

Traditional mandate generally will not lie to challenge the legality of an initiative measure before an election unless the measure clearly is invalid on its face. *Brosnahan v Eu* (1982) 31 C3d 1, 4, 181 CR 100 (petitions for writ of mandate and prohibition to prevent Secretary of State from certifying initiative and taking other steps to submit initiative denied). In *Independent Energy Producers Ass'n v McPherson* (2006) 38 C4th 1020, 1024, 44 CR3d 644, the court held that the *Brosnahan* presumption against pre-election review did not apply when the challenge to a measure was based on the grounds that the conferral of additional regulatory authority could not be enacted by initiative. The supreme court noted that this type of challenge is one that can be raised post election—when there is more time for briefing and deliberation—and that deferring a challenge often will be the wiser course.

Pre-election review is warranted for challenges based on the failure to comply with essential procedural requirements necessary to qualify an initiative for the ballot. See, *e.g., Costa v Superior Court* (2006) 37 C4th 986, 1005, 39 CR3d 470 (challenge to petition circulation process). A challenge to an initiative based on a violation of the single-subject rule may be heard before the election because of the constitutional prohibition against submitting an initiative that addresses more than one subject to the electorate. *Senate v Jones* (1999) 21 C4th 1142, 1154, 90 CR2d 810 (mandate issued restraining Secretary of State and county registrars from placing initiative on ballot because it violated single-subject rule contained in Cal Const art II, §8(d)). Compare *Hernandez v County of Los Angeles* (2008) 167 CA4th 12, 84 CR3d 10 (appellate court refused pre-election challenge to local ballot measure and considered merits on appeal from denial of writ petition). For examples of writ actions challenging validity of legislative actions, see §2.24.

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§2.49 F. Admission or Restoration of Right to Office

Traditional mandate may be appropriate to determine who holds a particular office. See, *e.g., Woodmansee v Lowery* (1959) 167 CA2d 645, 648, 334 P2d 991 (mandate proper to determine which claimant to judgeship was de facto officer; legal title was not adjudicated, but court examined question of legal title). However, mandate is not ordinarily the proper remedy to determine title to public office. See §2.10.

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G. Unions and Employee Organizations

§2.50 1. Compelling Negotiation

Other than some statutory exceptions (see, *e.g.*, Govt C §3542 (writ review allowed only under specified circumstances) and Cal Rules of Ct 8.495-8.498), traditional mandate may lie to compel governmental entities to negotiate with unions and other employee organizations. See, *e.g.*, *Santa Clara County Counsel Attorneys Ass'n v Woodside* (1994) 7 C4th 525, 541, 28 CR2d 617 (mandate issued compelling county to meet and confer with county counsel's union); *Huntington Beach Police Officers Ass'n v City of Huntington Beach* (1976) 58 CA3d 492, 495, 129 CR 893 (mandate issued directing city to reinstate 4-day workweek); *Los Angeles County Employees Ass'n, Local 660 v County of Los Angeles* (1973) 33 CA3d 1, 8, 108 CR 625 (mandate issued compelling county to negotiate with unions as to size of worker caseloads).

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§2.51 2. Compelling Arbitration

Arbitration can be compelled by petition. See, *e.g., Butchers' Union Local 229 v Cudahy Packing Co.* (1967) 66 C2d 925, 927, 59 CR 713 (compelling arbitration of grievance under terms of collective bargaining agreement); *American Fed'n of State, County & Mun. Employees, Local 1902, AFL-CIO v Metropolitan Water Dist.* (2005) 126 CA4th 247, 261, 24 CR3d 285 (mandate denied because grievance was untimely and memorandum of understanding did not contain agreement to arbitrate).

NOTE: As the current update to this publication was going to press, the California Supreme Court accepted review of *United Teachers Los Angeles v Los Angeles Unified Sch. Dist.* (review granted Dec. 23, 2009, S177403; superseded opinion at 177 CA4th 863, 99 CR3d 524). In a now-superseded opinion, the court of appeal reversed an order denying a petition to compel arbitration. On review, the supreme court will consider the following issue: Can a school district be required to arbitrate disputes over the granting of a charter school petition under the terms of a collective bargaining agreement, or does Ed C §47611.5(e) preclude referring such a dispute to arbitration? The outcome of this case will be included in a future update.

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§2.52 3. Holding Hearings

In certain circumstances, an expelled union member may use mandate to obtain a fair hearing on the charges against him or her. See, *e.g., Cason v Glass Bottle Blowers Ass'n* (1951) 37 C2d 134, 140, 231 P2d 6 (mandate issued ordering labor union to afford member full and fair hearing or to reinstate member in union).

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§2.53 4. Inspecting Records

Mandate may lie to compel a labor union to permit a member to inspect certain union financial records when the member has a substantial private interest to protect. *Deacon v International Union of Operating Eng'rs, Local No. 12* (1965) 236 CA2d 302, 46 CR 11.

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§2.54 H. Corporations and Corporate Officers

Traditional mandate may lie to:

- Compel a corporation to call an annual shareholders' meeting to elect a board of directors. *Dedrick v California Whaling Co.* (1936) 16 CA2d 284, 288, 60 P2d 551.
- Compel a corporation to file amended articles of incorporation. *Pratt-Low Preserving Co. v Jordan* (1933) 217 C 292, 295, 18 P2d 676.
- Compel a former officer to return corporate records (*Potomac Oil Co. v Dye* (1909) 10 CA 534, 537, 102 P 677) and other personal property (*Liberal Catholic Church v Rogers* (1944) 65 CA2d 196, 198, 150 P2d 486) to the corporation.
- Compel the examination of corporate property. *Hobbs v Tom Reed Gold Mining Co.* (1913) 164 C 497, 502, 129 P 781.
- Compel the inspection of corporate books. *Johnson v Langdon* (1902) 135 C 624, 625, 67 P 1050; *Most v First Nat'l Bank* (1966) 246 CA2d 425, 426, 54 CR 669. See *Hartman v Hollingsworth* (1967) 255 CA2d 579, 582, 63 CR 563 (reversing issuance of writ ordering inspection of dissolved corporation's books and records because petitioner had no statutory right to inspect books and records).

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§2.55 I. Private Organizations and Associations

Traditional mandate will lie to:

- Challenge hearing procedures and dismissal from medical staff. *Mileikowsky v Tenet Healthsystem* (2005) 128 CA4th 531, 554, 27 CR3d 171, disapproved in part on other grounds in *Mileikowsky v West Hills Hosp. & Med. Ctr.* (2009) 45 C4th 1259, 1273, 91 CR3d 516 (traditional mandate to review whether hearing officer has authority to terminate peer review hearing).
- Compel a health care insurer to reinstate a provider contract and hold peer review hearing process before terminating provider's contract. *Lee v Blue Shield* (2007) 154 CA4th 1369, 1378, 65 CR3d 612.
- Challenge prehearing rulings by hearing officer. *Unnamed Physician v Board of Trustees of St. Agnes Med. Ctr.* (2001) 93 CA4th 607, 619, 113 CR2d 309.
- Challenge more lenient member discipline imposed by parent organization, which reversed state organization's expulsion. *California Dental Ass'n v American Dental Ass'n* (1979) 23 C3d 346, 350, 152 CR 546 (mandate issued to vacate discipline decision imposed by parent organization and to rehear matter in light of ethical rules of state organization).
- Challenge a hospital's refusal to consolidate disciplinary hearings for individual doctors who, as a group, decided to move their practice from one hospital to another. *Eight Unnamed Physicians v Medical Exec. Comm. of the Med. Staff of Washington Township Hosp.* (2007) 150 CA4th 503, 510, 59 CR3d 100.

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§2.56 J. Enforcement of Civil Rights

A claim involving federal constitutional rights may be joined with a mandate action. *Lockyer v County of Santa Cruz* (2006) 416 F Supp 2d 797, 799 (mandate sought to compel county to comply with accessibility requirements for individuals with physical disabilities and injunction sought for compliance with Americans with Disabilities Act). Traditional mandate may lie to enforce a civil right. See, *e.g.*, *City & County of San Francisco v State* (2008) 43 C4th 757, 857, 76 CR3d 683 (mandate issued to compel state officials to ensure that local officials perform their duty to enforce marriage statutes without making distinction between opposite-sex and same-sex couples); *League of Women Voters v McPherson* (2006) 145 CA4th 1469, 1473, 52 CR3d 585 (mandate issued to compel Secretary of State to issue memorandum to county clerks and election officials informing them that only persons convicted of felony and on parole after felony conviction, but not persons on felony probation, were disenfranchised by Cal Const art II, §4); *Stone v Board of Dirs.* (1941) 47 CA2d 749, 754, 118 P2d 866 (mandate issued to compel board and city officials to admit black petitioners to privileges and facilities of municipal bath houses and swimming pool).

Mandate also may be appropriate to challenge governmental practices that are discriminatory or prior restraints on the exercise of First Amendment rights, including restraints on political activities of students, teachers, and other public employees. See, *e.g.*, *Adcock v Board of Educ.* (1973) 10 C3d 60, 65, 109 CR 676 (mandate used to invalidate teacher's transfer to different school, based on teacher's exercise of free speech); *Los Angeles Teachers Union, Local 1021 v Los Angeles City Bd. of Educ.* (1969) 71 C2d 551, 553, 78 CR 723 (mandate used to restrain board and other school administrators from interfering with teachers' right to circulate petition during non-work time); *Hegwer v Board of Civil Serv. Comm'rs* (1992) 5 CA4th 1011, 1015, 7 CR2d 389 (mandate used to challenge weight requirements for paramedics as sex discrimination; denied); *Hardy v Stumpf* (1974) 37 CA3d 958, 960, 112 CR 739 (mandate used to challenge height and weight requirements for police officers as impermissible sex discrimination; granted).

PRACTICE TIP: In most civil rights cases and many cases involving constitutional rights, the court will deny writ review because there is likely an adequate legal remedy by way of a complaint for damages or injunctive relief. See §2.15.

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§2.57 K. Taxes

Mandate can be used by one governmental entity to compel another entity or its taxing officials to perform duties required by tax laws, *e.g.*, to release funds for use as required by statute. See, *e.g.*, *City of Dinuba v County of Tulare* (2007) 41 C4th 859, 868, 62 CR3d 614 (redevelopment agency sought mandate to compel county to pay retroactively taxes due to agency after audit corrected tax rate codes assigned to parcels within redevelopment project); *Redevelopment Agency of the City of San Bernardino v County of San Bernardino* (1978) 21 C3d 255, 262, 145 CR 886 (redevelopment agency sought mandate to compel county to reassess taxes on property acquired by city and to reallocate tax revenues based on reassessment).

Mandate is not available when a tax refund action can test the legality of an action. See, *e.g.*, *Malibu W. Swimming Club v Flournoy* (1976) 60 CA3d 161, 164, 131 CR 279 (review of additional tax rate hike could be had by paying extra tax, then filing tax refund suit).

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§2.58 1. Compelling Taxation or Assessment

Traditional mandate will lie to compel taxing authorities to comply with tax laws, including levying taxes and making assessments as required by law. See, *e.g.*, *Huntington Park Redev. Agency v Martin* (1985) 38 C3d 100, 103, 211 CR 133 (mandate issued compelling redevelopment agency administrator to publish sales and use tax ordinance adopted by agency); *City & County of San Francisco v Farrell* (1982) 32 C3d 47, 51, 184 CR 713 (city sought writ compelling controller to certify availability of funds generated from proceeds of tax increase); *County of Sacramento v Hickman* (1967) 66 C2d 841, 845, 59 CR 609 (mandate issued compelling county assessor to comply with statute requiring assessment of all taxable property at announced fraction of its full cash value); *May v Board of Dirs. of El Camino Irrigation Dist.* (1949) 34 C2d 125, 130, 208 P2d 661 (mandate issued compelling directors of irrigation district to levy assessments to pay bonds and interest). See also *City of Dinuba v County of Tulare* (2007) 41 C4th 859, 868, 62 CR3d 614 (city and redevelopment agency could seek writ of mandate to compel county to comply with statutory duty to calculate and distribute tax revenue correctly, and to recover tax revenue mistakenly distributed to wrong agencies); *Santa Clara County Local Transp. Auth. v Guardino* (1995) 11 C4th 220, 228, 45 CR2d 207 (original writ proceeding initiated in appellate court by local transportation agency to validate sales tax that passed with less than 60-percent vote; writ denied because tax was invalid).

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§2.59 2. Compelling Record-Keeping and Handling Duties

Traditional mandate will lie to compel compliance with statutory duties in connection with documents and records. See, *e.g.*, *State Bd. of Equalization v Watson* (1968) 68 C2d 307, 312, 66 CR 377 (mandate issued compelling assessor to comply with statutory duty to make available to board records pertaining to assessing commercial airlines). When tax is duly and fully paid, mandate will lie to compel collector to issue official receipt. See, *e.g., Consolidated Title Sec. Co. v Hopkins* (1934) 1 C2d 414, 416, 35 P2d 320 (writ denied because amount tendered was insufficient).

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§2.60 3. Compelling Tax Authority to Review Claim or Hear Appeal

Traditional mandate will lie to compel a board of equalization that has unlawfully refused to hear an appeal challenging an assessment to hear the merits of the appeal. See, *e.g., Sunset Retirement Villa v Dear* (1997) 58 CA4th 948, 955, 68 CR2d 416 (mandate issued compelling local tax assessment board to hear taxpayer's appeal on merits). See also *Little v Los Angeles County Assessment Appeals Bds.* (2007) 155 CA4th 915, 922, 66 CR3d 401 (discussing *Sunset*'s limited application; suit for refund of taxes adequate remedy, thus no need for writ of mandate).

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§2.61 4. Reviewing Assessment Practices

Some county assessment practices can be challenged through traditional mandate. See, *e.g.*, *Smith v Anderson* (1967) 67 C2d 635, 637, 63 CR 391 (reversing dismissal of writ proceeding to compel county tax collector to request separate valuations from county assessor for undivided interests in property owned by state as payment for delinquent taxes); *County of Sacramento v Hickman* (1967) 66 C2d 841, 845, 59 CR 609 (mandate issued compelling county assessor to comply with statute requiring assessment of all taxable property at announced fraction of its full cash value); *Board of Educ. v Watson* (1966) 63 C2d 829, 831, 48 CR 481 (writ proceeding to compel county assessor to supply school boards within county with written estimated total assessed valuation of taxable property in their districts; writ denied, but assessor directed to supply such information on future requests).

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§2.62 5. Exception: Mandate Will Not Lie to Challenge Assessment

Mandate will not lie to challenge an assessment. A taxpayer must avail itself of the equalization appeals process, and if that process is unsuccessful, pay the tax owed and file a refund action. See, *e.g.*, *PG&E v State Bd. of Equalization* (1980) 27 C3d 277, 281, 165 CR 122 (writ denied because adequate remedy for error in assessment process existed at law); *Little v Los Angeles County Assessment Appeals Bds.* (2007) 155 CA4th 915, 922, 66 CR3d 401 (suit for refund of taxes adequate remedy, thus no need for writ of mandate). The assessment decision is an exercise of the taxing agency's discretion, and the agency cannot be compelled to exercise its discretion in a particular way. See, *e.g.*, *Stevens v Fox Realty Corp.* (1972) 23 CA3d 199, 206, 100 CR 63 (mandate will not lie to compel different result after lawful exercise of discretion in setting assessment amount).

If, however, a statute provides for a method of property assessment in the event a taxing agency fails to assess property as required, then mandate may lie to compel the assessor to accept an assessment using that method. See, *e.g.*, *Bunker v County of Orange* (2002) 103 CA4th 542, 550, 126 CR2d 825 (mandate available to force county to accept taxpayer's assessment of property value if (as per statute) county failed to respond to request for reassessment for 2 years).

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§2.63 6. Exception: Mandate Will Not Lie to Prevent Collection of Property Taxes

Mandate will not lie to prevent the collection of property taxes. Rev & T C §4807. See, *e.g.*, *Connolly v County of Orange* (1992) 1 C4th 1105, 1113, 4 CR2d 857 (mandate did not lie, for additional reasons that no timely claim was filed and neither county nor assessor had duty to grant claimed property tax exemption); *Community Facilities Dist. v Harvill* (1999) 74 CA4th 876, 882, 88 CR2d 405 (policy underlying statute prohibiting prepayment use of mandate is to permit revenue collection during pendency of litigation). A tax refund action is an adequate remedy at law to challenge an overpayment, thus mandate is not available. See §2.15. See also *Merced County Taxpayers Ass'n v Cardella* (1990) 218 CA3d 396, 400, 267 CR 62 (mandate denied because taxpayers sought assessment adjustment to avoid payment of future taxes; taxpayers' disclaimer of refund for past taxes did not change nature of claim).

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§2.64 L. Statutory Payment Obligations

Traditional mandate will lie to enforce a statutory payment obligation, if the law fixes the amount of the obligation and if payment involves the performance of a ministerial duty. See 8 Witkin, California Procedure, *Extraordinary Writs* §§90-91 (5th ed 2008). For example, mandate is proper to compel:

- Retroactive payment of taxes due to an agency after an audit corrected the tax rate codes assigned to parcels within a redevelopment project. *City of Dinuba v County of Tulare* (2007) 41 C4th 859, 867, 62 CR3d 614.
- Payment of a salary when a dispute concerns the construction of legislation giving rise to the duty to pay it. *Coan v California* (1974) 11 C3d 286, 291, 113 CR 187; *Veguez v Governing Bd. of Long Beach Unified Sch. Dist.* (2005) 127 CA4th 406, 413, 25 CR3d 526 (mandate challenging school district's denial of differential-pay sick leave).
- A controller and other officials to certify the availability of funds for payment on a public improvements contract as set forth in the city charter. *Flora Crane Serv., Inc. v Ross* (1964) 61 C2d 199, 201, 37 CR 425.
- City officials to certify and approve payrolls showing that petitioners were entitled to vacation pay for services provided before discharge. *Tevis v City & County of San Francisco* (1954) 43 C2d 190, 200, 272 P2d 757.

Mandate generally will not lie, however, to enforce a contractual obligation against, or to compel payment of money by, a public entity. In such situations, an action at law for damages is usually adequate and thus mandate is unavailable. See, *e.g., Wenzler v Municipal Court* (1965) 235 CA2d 128, 132, 45 CR 54.

PRACTICE TIP: Although a mandate action against a public entity may result in the entity's payment or release of money, the action is not one for money and the judgment is not "damages" as contemplated by the Government Claims Act. Understanding the nature of the requested action that may result in the payment of money by the public agency will eliminate any misconceptions as to the judgment. See *City of Dinuba v County of Tulare* (2007) 41 C4th 859, 867, 62 CR3d 614 (city redevelopment agency sought mandate to compel county to pay retroactively taxes due to agency after audit corrected tax rate codes assigned to parcels within redevelopment project).

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Source: Civil Litigation/California Civil Writ Practice/2 Traditional Mandate/§2.65 M. Issuance of Subpoenas

§2.65 M. Issuance of Subpoenas

Traditional mandate will lie to challenge the issuance of or failure to issue subpoenas:

- In administrative proceedings. *Mosk v Superior Court* (1979) 25 C3d 474, 479, 159 CR 494 (mandate issued to order superior court to quash subpoena issued to associate supreme court justice by Commission on Judicial Performance to compel testimony at public hearing); *Shively v Stewart* (1966) 65 C2d 475, 481, 55 CR 217 (mandate issued to enforce prehearing discovery rights in administrative proceedings before State Board of Medical Examiners; traditional mandate proper because subpoena issuance is mandatory before, though not during, hearing under Administrative Procedure Act). See California Administrative Mandamus §5.28 (3d ed Cal CEB 2003).
- By county clerk. *Patterson v Sharp* (1967) 253 CA2d 838, 61 CR 517 (mandate issued compelling clerk to issue subpoenas to city police officers without payment of witness fees; officers were participants in (*i.e.*, defendants) and eyewitnesses to accident that formed basis of underlying action).

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§2.66 N. Consideration of Claim

Traditional mandate will issue to compel consideration of a claim. See, *e.g., Hobbs v Northeast Sacramento County Sanitation Dist.* (1966) 240 CA2d 552, 49 CR 606 (mandate issued to compel agency to consider petitioner's wrongful death claim).

Mandate will not lie to enforce a claim or judgment against the state, state officers, or state employees, by attachment, garnishment, execution, or mandate to reach state funds or property. Govt C §§965.5-965.6.

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§2.67 O. Publication of Notice

Traditional mandate will lie to compel publication of required public notices. See, *e.g.*, *City of Santa Clara v Von Raesfeld* (1970) 3 C3d 239, 243, 90 CR 8 (mandate issued compelling city manager to mail notice of sale of bonds under city resolution); *City of Santa Monica v Grubb* (1966) 245 CA2d 718, 720, 54 CR 210 (mandate issued compelling city clerk to publish notice inviting sealed bids for purchase of water revenue bonds).

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P. Public Records Act

§2.68 1. Mandate for Denial of Disclosure

If a public entity denies a request for disclosure of public records under the California Public Records Act (PRA) (Govt C §§6250-6276.48), the requesting party can seek review of that action by filing an action for injunctive or declaratory relief, or by way of mandate. Govt C §6258. See, *e.g.*, *BRV, Inc. v Superior Court* (2006) 143 CA4th 742, 758, 49 CR3d 519 (mandate issued compelling disclosure of private investigator's report on school superintendent's alleged misconduct and school board's alleged "sweetheart deal" with superintendent to keep report confidential); *Bakersfield City Sch. Dist. v Superior Court* (2004) 118 CA4th 1041, 1046, 13 CR3d 517 (mandate issued compelling disclosure of disciplinary records of school district employee when complaints against employee were "of a substantial nature" and reasonable cause existed to believe complaints were well founded).

The superior court's order in such an action is reviewable solely by writ of mandate. Govt C §6259.

A public entity is not entitled to initiate proceedings under the PRA to determine its disclosure obligations. See, *e.g. Filarsky v Superior Court* (2002) 28 C4th 419, 434, 121 CR2d 844.

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§2.69 2. No Requirement of Inadequate Remedy at Law

In *Wilder v Superior Court* (1998) 66 CA4th 77, 77 CR2d 629, the court of appeal held that a petitioner does not need to establish lack of an adequate remedy at law to obtain public documents under Govt C §6258. The court noted that the legislature had expressly made legal proceedings and mandate available to review a denial of a disclosure request, holding that the statutory enforcement provision is not the equivalent of ordinary mandate. The court of appeal issued a writ compelling the superior court to set aside its dismissal order and reconsider the merits of the writ petition. 66 CA4th at 82.

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3

Administrative Mandamus

Mitchell E. Abbott
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I. SCOPE OF CHAPTER §3.1

II. NATURE OF ADMINISTRATIVE MANDAMUS §3.2
- A. Requirements for Administrative Mandamus §3.3
  - 1. Hearing Required by Law §3.4
  - 2. Evidence Required to Be Taken §3.5
  - 3. Discretion Vested in Hearing Officer or Decision-Maker §3.6
- B. Review Generally Limited to Administrative Record §3.7
- C. Scope of Judicial Review in Administrative Mandamus Proceedings §3.8
  - 1. Did the Administrative Body Proceed Without or in Excess of Jurisdiction?
    - a. Jurisdiction Limited by Statute or Constitution §3.9
    - b. Administrative Reconsideration or Modification of Decision §3.10
  - 2. Was the Petitioner Provided a Fair Hearing? §3.11
  - 3. Did the Administrative Body Prejudicially Abuse Its Discretion? §3.12
    - a. Administrative Body Did Not Proceed as Required by Law §3.13
    - b. Agency's Decision Not Supported by the Findings §3.14
    - c. Agency's Findings Not Supported by Evidence §3.15
      - (1) Substantial Evidence Standard §3.16
      - (2) Independent Judgment Standard §3.17

III. DIFFERENCES BETWEEN TRADITIONAL AND ADMINISTRATIVE MANDAMUS PROCEEDINGS
- A. Nature and Fundamental Requisites of the Writs §3.18
- B. Filing Deadlines §3.19

IV. CHOOSING BETWEEN WRIT OF TRADITIONAL AND ADMINISTRATIVE MANDAMUS
- A. Checklist: Determining Appropriate Writ §3.20
- B. Pleading in the Alternative §3.21

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§3.1 I. SCOPE OF CHAPTER

This chapter compares traditional and administrative mandamus and provides analytical tools for determining which writ a petitioner should seek in a particular case. In doing so, the chapter provides only a summary overview of administrative mandamus, describing the requirements for and limitations of its use. A detailed discussion of administrative mandamus appears in California Administrative Mandamus (3d ed Cal CEB 2003). On traditional mandamus (mandate), see chap 2 of this book.

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§3.2 II. NATURE OF ADMINISTRATIVE MANDAMUS

Administrative mandamus is a statutorily created species of mandamus used to review certain administrative decisions. Administrative mandamus is authorized and governed by CCP §1094.5, not the traditional mandamus statute, CCP §1085. However, many of the procedural rules applicable to traditional mandamus also apply to administrative mandamus. On traditional mandamus, see chap 2.

NOTE: The terms "mandamus" and "mandate" are used interchangeably in practice and are synonymous. CCP §1084. This text uses the terminology "administrative mandamus" to refer to writ proceedings under CCP §1094.5, and "traditional mandamus," "traditional mandate," or "mandate" to refer to writ proceedings under CCP §1085.

Administrative mandamus is akin to an appeal in a civil case. In seeking writ review under §1094.5, a petitioner is essentially "appealing" from an administrative adjudicatory decision to the superior court. There are three requirements, set out in §1094.5, that must be met for writ review to be proper by way of administrative mandamus, rather than traditional mandamus. See §3.3.

On the nature of administrative mandamus proceedings, see California Administrative Mandamus, chap 1 (3d ed Cal CEB 2003).

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§3.3 A. Requirements for Administrative Mandamus

An administrative decision is reviewable by way of administrative mandamus under CCP §1094.5, rather than traditional mandamus under CCP §1085, when:

- A hearing in the underlying administrative proceeding is required by law (see §3.4);
- Evidence is required to be taken at the hearing (see §3.5); and
- Discretion in the determination of contested factual issues is vested in the administrative decision-maker. See §3.6.

Broadly speaking, the type of administrative decision reviewable by administrative mandamus is called an adjudicatory or quasi-judicial decision. Other types of actions and decisions by governmental and private bodies, such as quasi-legislative actions and ministerial actions, are reviewed by way of traditional mandamus under CCP §1085. See *Katosh v Sonoma County Employees' Retirement Ass'n* (2008) 163 CA4th 56, 62 n4, 77 CR3d 324. Traditional mandamus also applies to administrative adjudicatory decisions when §1094.5's three statutory requirements for administrative mandamus are not met, *e.g.*, when a hearing is not required by law. See §3.18. On traditional mandamus, see chap 2.

PRACTICE TIP: Some statutory schemes specifically require review of administrative decisions under CCP §1094.5. See, *e.g.*, Welf & I C §14171(j) (review of director's decision on social service benefits audit); *Phelps v State Water Resources Control Bd.* (2007) 157 CA4th 89, 98, 68 CR3d 350 (under Water C §1126, orders of SWRCB are reviewed via CCP §1094.5); *County of Sonoma v Commission on State Mandates* (2000) 84 CA4th 1264, 1278, 101 CR2d 784 (under Govt C §17559, decisions of Commission on State Mandates reviewed via CCP §1094.5). When seeking writ review of an administrative decision, check applicable statutes, operating procedures, and organizational documents to determine whether they specify a particular method of judicial review. See §3.20 and chaps 2, 4.

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§3.4 1. Hearing Required by Law

The first requirement for writ review under CCP §1094.5 is that a hearing in the underlying administrative proceeding is required by law. See CCP §1094.5(a). If a hearing is not legally required, review by administrative mandamus is unavailable. See, *e.g., Keeler v Superior Court* (1956) 46 C2d 596, 599, 297 P2d 967 (CCP §1094.5 inapplicable because hearing not required by statute or agency's own rules); *O.W.L. Found. v City of Rohnert Park* (2008) 168 CA4th 568, 585, 86 CR3d 1 (although city chose to hold public hearing, no hearing was required to be held as matter of law; thus, case was properly pursued as traditional mandamus action); *Blue Cross v State Dep't of Health Servs.* (2007) 153 CA4th 322, 329, 62 CR3d 772 (traditional mandamus applied to hearing officer's decision because hearing was not required); *Bunnett v Regents of Univ. of Cal.* (1995) 35 CA4th 843, 848, 41 CR2d 567 (when hearing is not required, administrative adjudicatory decision is reviewed by way of traditional mandamus, not administrative mandamus).

The "required" administrative hearing need not be a formal, trial-type proceeding, but may be comparatively casual, sometimes conducted in the hearing officer's office or a conference room. See, *e.g., Topanga Ass'n for a Scenic Community v City & County of Los Angeles* (1974) 11 C3d 506, 518, 113 CR 836 (noting that land-use decisions often arise out of quasi-judicial proceedings that may be characterized as "casual"). In fact, a required hearing can be on documents only. *Friends of the Old Trees v Department of Forestry & Fire Protection* (1997) 52 CA4th 1383, 1391, 61 CR2d 297 (hearing requirement satisfied by purely documentary proceedings). But see *State Bd. of Chiropractic Exam'rs v Superior Court* (2009) 45 C4th 963, 978 n3, 89 CR3d 576 (noting court of appeal relied on *Friends of Trees* and one earlier case to conclude that CCP §1094.5 applied and expressing "no view as to the validity of these decisions").

A hearing is required if mandated by statute or administrative regulations and procedures. Compare, *e.g., Pomona College v Superior Court* (1996) 45 CA4th 1716, 1729, 53 CR2d 662 (hearing requirement in faculty handbook for review of tenure decisions sufficient for §1094.5), with *Bunnett v Regents of Univ. of Cal.* (1995) 35 CA4th 843, 848, 41 CR2d 567 (optional hearing not sufficient for §1094.5).

The hearing need not have taken place for §1094.5 to apply, as long as it was legally required. See, *e.g., Helene Curtis, Inc. v Los Angeles County Assessment Appeals Bds.* (2004) 121 CA4th 29, 37, 16 CR3d 658 (CCP §1094.5 applicable even if hearing not held).

On the legally required hearing requirement, see §2.33; California Administrative Mandamus §§5.8-5.9 (3d ed Cal CEB 2003).

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§3.5 2. Evidence Required to Be Taken

The second requirement for writ review under CCP §1094.5 is that it is legally required that evidence be taken at the administrative hearing. See CCP §1094.5(a). If the presentation of evidence is not legally required, review must be by traditional mandamus rather than administrative mandamus. See, *e.g., Burt v County of Orange* (2004) 120 CA4th 273, 282, 15 CR3d 373 (CCP §1094.5 review not applicable when there was no clear requirement that evidence be taken); *Taylor v State Personnel Bd.* (1980) 101 CA3d 498, 502, 161 CR 677 (CCP §1094.5 not applicable when disciplinary procedures did not require that evidence be taken).

JUDICIAL PERSPECTIVE: In "real life" this issue rarely arises because most administrative schemes provide for the taking of evidence, both oral and documentary.

On the presentation of evidence requirement, see California Administrative Mandamus §§1.14, 5.8 (3d ed Cal CEB 2003).

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§3.6 3. Discretion Vested in Hearing Officer or Decision-Maker

The third requirement for writ review under CCP §1094.5 is that discretion in the determination of contested factual issues is vested in the administrative decision-maker. See CCP §1094.5(a). Indeed, the essence of administrative mandamus is judicial review of a discretionary, adjudicatory *decision* by an administrative decision-maker. See, *e.g., Ocean Park Assoc. v Santa Monica Rent Control Bd.* (2004) 114 CA4th 1050, 1061, 8 CR3d 421. If the administrative decision-maker has no discretion in the determination of the facts, *i.e.*, if the decision-maker's action is ministerial, writ review must be by way of traditional mandamus under CCP §1085 rather than by way of administrative mandamus under §1094.5. On ministerial decisions and traditional mandate, see §§2.5-2.7. On ministerial decisions requiring no exercise of discretion, see California Administrative Mandamus §§5.23-5.24 (3d ed Cal CEB 2003).

There are many types of adjudicatory decisions in which discretion in the determination of contested factual issues is vested in the administrative decision-maker. Examples can include: whether a professional's license should be revoked, whether a public employee or school teacher should be disciplined or terminated, and whether a local governing body should approve or deny a conditional use permit. On the types of adjudicatory decisions subject to review by administrative mandamus, see California Administrative Mandamus §§5.2-5.18 (administrative mandamus), 5.19-5.29 (traditional mandamus) (3d ed Cal CEB 2003).

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§3.7 B. Review Generally Limited to Administrative Record

The hearing on a superior court writ petition is often called a "trial." However, in an administrative mandamus proceeding, there are no live witnesses or proffered exhibits. Instead, there is an administrative record, consisting of the documentary and testimonial evidence presented during the administrative proceedings, which is lodged in the superior court and provides the evidentiary universe considered by the court. Thus, like an appeal, in which the appellate court's review is limited to the record on appeal, a superior court's review of an administrative adjudicatory decision under CCP §1094.5 usually is confined to the record in the administrative proceedings. CCP §1094.5(a). See *Moore v City of Los Angeles* (2007) 156 CA4th 373, 382, 67 CR3d 218 (trial court properly ruled that statute of limitations defense was forfeited by failure to raise it before Board because review of administrative proceedings under §1094.5 is confined to issues appearing in record of that body). On the record in administrative mandamus proceedings, see California Administrative Mandamus, chap 4 (3d ed Cal CEB 2003). On the record in traditional mandamus proceedings, see chap 7 of this book.

In exceptional circumstances, evidence outside the administrative record may be introduced in an administrative mandamus proceeding. See CCP §1094.5(e) (evidence must be relevant and "in the exercise of reasonable diligence, could not have been produced or… was improperly excluded at the hearing"). This is an exceedingly narrow exception, and courts usually deny requests to submit evidence outside the administrative record. See, *e.g., Eureka Citizens for Responsible Gov't v City of Eureka* (2007) 147 CA4th 357, 367, 54 CR3d 485 (extra-record evidence allowed only if unavailable at trial or improperly excluded). See also *Voices of Wetlands v California State Water Resources Control Bd.* (review granted Mar. 19, 2008 superseded opinion at 157 CA4th 1268, 69 CR3d 487) (court may not consider extra-record evidence not presented to agency, but court has authority to remand decision to administrative agency to obtain additional evidence)). As a practical matter, if something does not appear in the administrative record, it does not exist for purposes of administrative mandamus. On using extra-record evidence in administrative mandamus proceedings, see California Administrative Mandamus §4.2 (3d ed Cal CEB 2003). On using extra-record evidence in traditional mandamus proceedings, see §§7.9-7.12.

PRACTICE TIP: Because parties may not retain counsel in connection with administrative proceedings, the administrative record may not be fully developed, which limits issues the superior court can consider on writ review. Counsel retained after an initial administrative hearing but before a final decision should check agency rules and procedures for ways to augment the record before the decision becomes final (*e.g.,* some agencies permit additional evidence in connection with a request for reconsideration or during an appeal at the agency level). On augmenting the administrative record, see California Administrative Mandamus §14.18 (3d ed Cal CEB 2003).

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§3.8 C. Scope of Judicial Review in Administrative Mandamus Proceedings

The scope of judicial review in an administrative mandamus proceeding is delineated by statute. CCP §1094.5(b). A superior court can determine only whether the administrative body has done one of the following:

- Proceeded without or in excess of its jurisdiction (see §§3.9-3.10);
- Afforded the petitioner a fair hearing (see §3.11); or
- Prejudicially abused its discretion (see §3.12).

On the superior court's scope of judicial review under CCP §1094.5, see California Administrative Mandamus, chap 6 (3d ed Cal CEB 2003). See also *Manufactured Home Communities, Inc. v County of San Luis Obispo* (2008) 167 CA4th 705, 84 CR3d 367 (proceeding violated standards of due process because administrative agency's findings rested on testimony of individuals who were not subject to cross-examination); *Antelope Valley Press v Poizner* (2008) 162 CA4th 839, 849, 75 CR3d 887 (discussing scope of review under §1094.5).

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1. Did the Administrative Body Proceed Without or in Excess of Jurisdiction?

§3.9 a. Jurisdiction Limited by Statute or Constitution

Administrative bodies can exercise adjudicatory authority only to the extent they are authorized to do so. See, *e.g., Brooks v State Personnel Bd.* (1990) 222 CA3d 1068, 1075, 272 CR 292 (university not authorized to amend notice of dismissal). Thus, jurisdictional issues arise when an administrative body acts outside the scope of its constitutional, statutory, or regulatory authority. See, *e.g., California Correctional Peace Officers Ass'n v State Personnel Bd.* (1995) 10 C4th 1133, 1151, 43 CR2d 693 (when constitutional due process or statute requires hearing, agency's action without hearing may be in excess of its jurisdiction); *Horner v Board of Trustees* (1964) 61 C2d 79, 86, 37 CR 185 (failure to hold required hearing within reasonable period of time may deprive agency of jurisdiction to act); *Zuniga v Los Angeles County Civil Serv. Comm'n* (2006) 137 CA4th 1255, 1259, 40 CR3d 863 (commission had no jurisdiction to adjudicate claims of former employee). An agency can also act in excess of its jurisdiction by failing to follow procedural rules and regulations it has established. See, *e.g., Langan v City of El Monte* (2000) 79 CA4th 608, 617, 94 CR2d 254.

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§3.10 b. Administrative Reconsideration or Modification of Decision

Absent express authorization, an administrative body cannot reconsider or modify a decision that has become final under applicable procedural rules. See, *e.g., Hollywood Circle, Inc. v Department of Alcoholic Beverage Control* (1961) 55 C2d 728, 732, 13 CR 104. This restriction on further administrative action is intended to protect a party's rights to a decision based solely on the evidence and to prevent a redetermination of its rights or privileges without due process. Further administrative action that consists merely of reducing or mitigating the punishment imposed is permissible, because it does not implicate due process rights. See, *e.g., Guilbert v Regents of Univ. of Cal.* (1979) 93 CA3d 233, 243, 155 CR 583.

NOTE: Most agencies operating under the Administrative Procedure Act (Govt C §§11340-11529) are expressly permitted to reconsider a decision or to grant a rehearing. Govt C §11521(a).

On administrative jurisdictional issues challenged in administrative mandamus proceedings, see California Administrative Mandamus §§6.16-6.35 (3d ed Cal CEB 2003).

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Source: Civil Litigation/California Civil Writ Practice/3 Administrative Mandamus/§3.11 2. Was the Petitioner Provided a Fair Hearing?

§3.11 2. Was the Petitioner Provided a Fair Hearing?

Due process principles determine whether an administrative hearing was "fair." *Morongo Band of Mission Indians v State Water Resources Control Bd.* (2009) 45 C4th 731, 737, 88 CR3d 610. State statutes may impose additional procedural protections, but they cannot constrict or limit constitutionally mandated due process protections. See *Cleveland Bd. of Educ. v Loudermill* (1985) 470 US 532, 541, 84 L Ed 2d 494, 105 S Ct 1487 (constitutional guarantee of due process operates independently of state statutes granting substantive rights).

What constitutes a fair hearing under due process varies with the factual circumstances. See *Gilbert v Homar* (1997) 520 US 924, 930, 138 L Ed 2d 120, 117 S Ct 1807 ("due process is flexible and calls for such procedural protections as the particular situation demands").

NOTE: Whether an administrative complainant has received a fair hearing is generally a legal issue for the superior court to decide. See *Manufactured Home Communities, Inc. v County of San Luis Obispo* (2008) 167 CA4th 705, 84 CR3d 367 (court found that party was denied fair hearing). The question of whether there was a fair hearing may include issues related to prehearing and posthearing proceedings, as well as issues arising during the administrative hearing itself.

A fair hearing was *not* held when:

- The accusation in a license revocation hearing did not give fair notice of the charges. *Smith v California State Bd. of Pharmacy* (1995) 37 CA4th 229, 241, 43 CR2d 532 (agency counsel switched theory during hearing from personal wrongful conduct to negligence for conduct of others).
- The hearing officer refused to grant a short continuance despite good cause. *Wood v City Civil Serv. Comm'n* (1975) 45 CA3d 105, 110, 119 CR 175 (complainant's attorney was engaged in criminal trial; denial of short continuance deprived claimant of fair hearing).
- Party to administrative proceeding was not allowed to cross-examine witnesses. *Manufactured Home Communities, Inc. v County of San Luis Obispo* (2008) 167 CA4th 705, 84 CR3d 367.
- The hearing officer had a financial interest in the outcome or other bias for or against one of the parties. *Haas v County of San Bernardino* (2002) 27 C4th 1017, 1024, 119 CR2d 341 (temporary hearing officer whose selection for future work depended entirely on goodwill of county had pecuniary interest that required disqualification); *Nasha, LLC v City of Los Angeles* (2004) 125 CA4th 470, 483, 22 CR3d 772 (complainant's authorship of article opposing project by member of hearing panel established unacceptable probability of bias).
- Persons involved in the investigation or prosecution of the administrative proceeding also were involved in the adjudicatory process. *Department of Alcoholic Beverage Control v Alcoholic Beverage Control Appeals Bd.* (2006) 40 C4th 1, 9, 50 CR3d 585 (ex parte contacts between agency's prosecutor and ultimate decision-maker before decision was rendered created bias problem); *Quintero v City of Santa Ana* (2003) 114 CA4th 810, 812, 7 CR3d 896 (city failed to show that attorney who acted as advisor to board in past and who was acting as prosecutor in instant administrative proceeding was not biased); *Nightlife Partners, Ltd. v City of Beverly Hills* (2003) 108 CA4th 81, 87, 133 CR2d 234 (hearing officer's announcement that city's attorney would be advising him was sufficient to show bias); *Department of Alcoholic Beverage Control v Alcoholic Beverage Control Appeals Bd.* (2002) 99 CA4th 880, 885, 121 CR2d 729 (administrative law judge's employment by agency, alone, was insufficient to establish actual bias). Compare *Morongo Band of Mission Indians v State Water Resources Control Bd.* (2009) 45 C4th 731, 737, 88 CR3d 610 (no violation of licensee's due process rights when attorney prosecuting its license revocation matter before board simultaneously served as advisor to board on unrelated matter); *Witt Home Ranch, Inc. v County of Sonoma* (2008) 165 CA4th 543, 568, 81 CR3d 123 (no evidence that deputy county counsel acted as advocate in connection with plaintiff's proceedings; fact that she reached conclusions and provided advice to board before hearing did not convert her from adviser to advocate, and did not demonstrate bias).

On the fair hearing requirement, see California Administrative Mandamus §§6.36-6.54 (3d ed Cal CEB 2003).

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Source: Civil Litigation/California Civil Writ Practice/3 Administrative Mandamus/§3.12 3. Did the Administrative Body Prejudicially Abuse Its Discretion?

§3.12 3. Did the Administrative Body Prejudicially Abuse Its Discretion?

The most frequent challenge to an administrative adjudicatory decision is that the administrative body prejudicially "abused its discretion." An abuse of discretion is established if (CCP §1094.5(b)):

- The agency did not proceed as required by law (see §3.13);
- The administrative decision is not supported by the findings (see §3.14); or
- The findings are not supported by the evidence (§§3.15-3.17).

Establishing an abuse of discretion, alone, is not enough. A petitioner also must demonstrate that the abuse of discretion was prejudicial, *i.e.,* that it resulted in a miscarriage of justice. See, *e.g., Leal v Gourley* (2002) 100 CA4th 963, 968, 123 CR2d 220 (court found no evidence of prejudice stemming from Department of Motor Vehicles' violation of rule requiring that it give notification of right to have translator at hearings).

On the abuse of discretion standard, see California Administrative Mandamus §§6.55-6.175 (3d ed Cal CEB 2003).

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§3.13 a. Administrative Body Did Not Proceed as Required by Law

Under this prong of the statutory abuse of discretion standard, a petitioner can challenge the legality of the adjudicatory decision (*i.e.,* Did the tribunal follow the applicable law?) or attack the validity of the administrative body's procedural rules and regulations applicable to that decision. See, *e.g., Young v Gannon* (2002) 97 CA4th 209, 221, 118 CR2d 187 (petitioner unsuccessfully argued WCAB abused its discretion by failing to proceed in manner required by law); *Usher v County of Monterey* (1998) 65 CA4th 210, 220, 76 CR2d 274 (agency did not proceed in manner required by law when it delegated its decision-making authority to hearing officer).

Determining whether an administrative body failed to proceed in the manner required by law requires identification of the procedural and substantive law governing the administrative body's action. The location of such law depends on the context and circumstances. Constitutional or statutory provisions, case law, or regulatory provisions may apply. On some of the laws and regulations applicable to administrative agency practice, see California Administrative Hearing Practice §§1.18-1.34 (2d ed Cal CEB 1997).

NOTE: Regardless of the "abuse of discretion" nomenclature, whether an administrative body failed to act as required by law is a legal issue for the superior court to decide. See *Katosh v Sonoma County Employees' Retirement Ass'n* (2008) 163 CA4th 56, 62 n4, 77 CR3d 324 (interpretation and application of statute to undisputed facts presented legal question); *Moss v County of Humboldt* (2008) 162 CA4th 1041, 1053, 76 CR3d 428 (when issue in California Environmental Quality Act case is one of law, de novo standard applies).

On the failed-to-act-in-accordance-with-law prong of the statutory abuse of discretion standard, see California Administrative Mandamus §§6.55-6.105 (3d ed Cal CEB 2003).

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§3.14 b. Agency's Decision Not Supported by the Findings

Under this prong of the statutory abuse of discretion standard, a petitioner can challenge an adjudicatory decision as not supported by the administrative fact-finder's findings. A petitioner's ability to make such a challenge depends on the particular issue in the administrative proceeding, the evidence presented, and the administrative decision-maker's findings.

The Administrative Procedure Act (APA) traditionally has required that the finder of fact make written findings. See Govt C §11425.50. Whether written findings were also required in non-APA cases was unclear until the supreme court's landmark decision in *Topanga Ass'n for a Scenic Community v City & County of Los Angeles* (1974) 11 C3d 506, 515, 113 CR 836. In *Topanga*, the court held that CCP §1094.5 implicitly requires an agency rendering a decision to "set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order." See, *e.g., Saad v City of Berkeley* (1994) 24 CA4th 1206, 1212, 30 CR2d 95 (agency findings sufficient under *Topanga*). The written findings need not be extensive or detailed. *Environmental Protection & Info. Ctr. v California Dep't of Forestry & Fire Protection* (2008) 44 C4th 459, 515, 80 CR3d 28, citing *Topanga, supra* (although agency's findings should have referred more specifically to those portions of report that support its conclusion, there was no trouble discerning "the analytic route [it] traveled from evidence to action").

Findings that fail to bridge the analytic gap between the evidence and the final decision are insufficient. See, *e.g.*, *Glendale Mem. Hosp. & Health Ctr. v State Dep't of Mental Health* (2001) 91 CA4th 129, 110 CR2d 101 (findings that were terse boilerplate statements did not provide sufficient detail to bridge analytic gap between evidence presented and agency's ultimate decision).

NOTE: Regardless of the "abuse of discretion" nomenclature, whether the findings are adequate to support the administrative decision is a legal issue for the superior court to decide.

On the decision-not-supported-by-the-findings prong of the statutory abuse of discretion standard, see California Administrative Hearing Practice §§8.52-8.67 (2d ed Cal CEB 1997).

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§3.15 c. Agency's Findings Not Supported by Evidence

Under this prong of the statutory abuse of discretion standard, a petitioner can challenge the administrative fact-finder's findings as not being supported by the evidence.

Depending on the circumstances, the courts use one of two standards to determine whether administrative findings are supported by the evidence in the administrative record:

- The substantial evidence standard (see §3.16); or
- The independent judgment standard (see §3.17).

On determining whether a superior court applies the substantial evidence or independent judgment standard, see California Administrative Mandamus §§6.129-6.155 (3d ed Cal CEB 2003).

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§3.16 (1) Substantial Evidence Standard

The court applies the substantial evidence standard in all cases in which the law does not require use of the independent judgment standard. See *Strumsky v San Diego County Employees Retirement Ass'n* (1974) 11 C3d 28, 32, 112 CR 805 (court's inquiry is limited to determination of whether findings are supported by substantial evidence unless agency's order or decision substantially affects fundamental vested right, in which case court uses independent judgment standard); *Auerbach v Los Angeles County Assessment Appeals Bd. No. 2* (2008) 167 CA4th 1415, 1420, 85 CR3d 118 (same); *Antelope Valley Press v Poizner* (2008) 162 CA4th 839, 850, 75 CR3d 887 (same). On the independent judgment standard, see §3.17.

In assessing whether substantial evidence supports administrative findings, the court accords significant deference to the administrative fact-finder. See, *e.g., Committee to Save the Hollywoodland Specific Plan v City of Los Angeles* (2008) 161 CA4th 1168, 1182, 74 CR3d 665 (court gives deference to administrative findings and will uphold decision supported by substantial evidence); *Patterson Flying Serv. v Department of Pesticide Regulation* (2008) 161 CA4th 411, 419, 74 CR3d 290 (under deferential substantial evidence standard, court must presume correctness of administrative ruling); *Young v Gannon* (2002) 97 CA4th 209, 221, 225, 118 CR2d 187 (court views evidence in light most favorable to administrative findings). The court neither reassesses the credibility of witnesses and other evidence nor weighs the supporting and contrary evidence. The testimony of even a single witness believed by the fact-finder can be sufficient to support a finding. See, *e.g., Duncan v Department of Personnel Admin.* (2000) 77 CA4th 1166, 1174 n6, 92 CR2d 257.

Substantial evidence is not synonymous with *any* evidence; rather it is defined as evidence of "ponderable legal significance… reasonable in nature, credible, and of solid value [, and] relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Young v Gannon, supra*.

Administrative decisions reviewed under the substantial evidence standard can include: establishment of employment practices and procedures, including for employee discipline (see, *e.g., County of Los Angeles v Civil Serv. Comm'n* (1995) 39 CA4th 620, 633, 46 CR2d 256), the denial of a variance or use permit (see, *e.g., BreakZone Billiards v City of Torrance* (2000) 81 CA4th 1205, 1244, 97 CR2d 467), compliance with the California Environmental Quality Act (CEQA) (see, *e.g., San Franciscans Upholding the Downtown Plan v City & County of San Francisco* (2002) 102 CA4th 656, 673, 125 CR2d 745). But see *Moss v County of Humboldt* (2008) 162 CA4th 1041, 1053, 76 CR3d 428 (when issue in CEQA case is one of law, de novo standard applies).

On the substantial evidence standard, see California Administrative Mandamus §6.141 (3d ed Cal CEB 2003).

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§3.17 (2) Independent Judgment Standard

In some contexts, the court must employ the independent judgment standard and reweigh the evidence, affording no deference to the factual assessments of the administrative fact-finder. *Auerbach v Los Angeles County Assessment Appeals Bd. No. 2* (2008) 167 CA4th 1415, 1420, 85 CR3d 118; *Antelope Valley Press v Poizner* (2008) 162 CA4th 839, 850, 75 CR3d 887. In *Strumsky v San Diego County Employees Retirement Ass'n* (1974) 11 C3d 28, 34, 112 CR 805, quoting *Bixby v Pierno* (1971) 4 C3d 130, 144, 93 CR 234, the supreme court held that

> [w]hen an administrative decision affects a right which has been legitimately acquired or is otherwise "vested," and when that right is of a fundamental nature from the standpoint of its economic aspect or its "effect… in human terms and the importance… to the individual in the life situation," then a full and independent judicial review of that decision is indicated because "[the] abrogation of the right is too important to the individual to relegate it to exclusive administrative extinction."

Administrative decisions reviewed under the independent judgment standard can include:

- The revocation or suspension of a professional license (see, *e.g., Griffiths v Superior Court* (2002) 96 CA4th 757, 767, 117 CR2d 445);
- The suspension or revocation of a driver's license (see, *e.g., Elizabeth D. v Zolin* (1993) 21 CA4th 347, 353, 25 CR2d 852); and
- Discipline or termination of a public employee for failing to comply with employment rules or conditions (see, *e.g., Barber v Long Beach Civil Serv. Comm'n* (1996) 45 CA4th 652, 658, 53 CR2d 4; see also *The Termo Co. v Luther* (2008) 169 CA4th 394, 399, 86 CR3d 687 (administrative order directing plugging and abandonment of oil wells that were in operational or idle status for many years implicates fundamental, vested right and is reviewed under "independent judgment" standard)).

On the independent judgment standard, see California Administrative Mandamus §6.134 (3d ed Cal CEB 2003).

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III. DIFFERENCES BETWEEN TRADITIONAL AND ADMINISTRATIVE MANDAMUS PROCEEDINGS

§3.18 A. Nature and Fundamental Requisites of the Writs

Traditional mandamus under CCP §1085 is available when:

- The respondent has a clear, present, and usually ministerial duty to perform; and
- The petitioner has a clear, present, and beneficial right to performance.

See, *e.g., Conlan v Bonta* (2002) 102 CA4th 745, 752, 125 CR2d 788. On traditional mandamus and case examples, see §§2.3-2.16, 2.39-2.69. Thus, traditional mandamus may be used to challenge an administrative body's failure to perform an act required by law (*Conlan v Bonta, supra*) as well as to review an adjudicatory decision when the administrative body is not legally required to hold an evidentiary hearing. See, *e.g., O.W.L. Found. v City of Rohnert Park* (2008) 168 CA4th 568, 586, 86 CR3d 1; *DeCuir v County of Los Angeles* (1998) 64 CA4th 75, 81, 75 CR2d 102; *Bunnett v Regents of Univ. of Cal.* (1995) 35 CA4th 843, 848, 41 CR2d 567. On requirements for and uses of traditional mandamus, see §§2.3-2.38.

In contrast, administrative mandamus under CCP §1094.5 is available only to challenge a final adjudicatory decision resulting from an administrative proceeding in which by law:

- A hearing is required to be given;
- Evidence is required to be taken; and
- Discretion in the determination of facts is vested in the inferior tribunal.

Conlan, 102 CA4th at 752. See §§3.3-3.6.

PRACTICE TIP: If an administrative agency's action could potentially be challenged by traditional mandate or administrative mandate, or if it is unclear which writ is applicable, a petitioner should request both writs as alternative remedies in the same petition. See §3.21.

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§3.19 B. Filing Deadlines

There are few specific statutory deadlines for traditional mandamus proceedings. On traditional mandamus, see chaps 2 and 5. In contrast, there are numerous statutory deadlines for filing administrative mandamus proceedings, depending on the type of administrative decision involved. All the deadlines tend to be relatively short. See CCP §1094.6. See also, *e.g., FEHC v Superior Court (Las Brisas Apartment, Ltd.)* (2004) 115 CA4th 629, 9 CR3d 409 (30-day statute of limitations under Govt C §11523 to challenge Fair Employment and Housing Commission decisions); Govt C §65009(c)(1) (challenge to land-use decisions generally must be filed within 90 days of notice of decision). On the sometimes complex limitation periods applicable to administrative mandamus proceedings, see California Administrative Mandamus, chap 9 (3d ed Cal CEB 2003).

There is some uncertainty as to whether the statutory periods within which mandamus proceedings must be brought are jurisdictional in nature or are statutes of limitations that can be waived. Compare *Ginns v Savage* (1964) 61 C2d 520, 524, 39 CR 377 (holding statutory periods not jurisdictional and waived if not raised as affirmative defense), with *Donnellan v City of Novato* (2001) 86 CA4th 1097, 1103, 103 CR2d 882 (CCP §1094.6 is procedural limitations period and consequently jurisdictional). Thus, it is important to know the applicable deadline and comply with it to avoid any risk that a writ petition is jurisdictionally defective.

PRACTICE TIP: Because laches or unreasonable delay can be a defense to a writ petition, even if filed within the statutory period, a petitioner should seek writ relief without undue delay. See, *e.g., Schellinger Bros. v City of Sebastopol* (2009) 179 CA4th 1245, 102 CR3d 394 (court found "abundant support" for determination that petitioner acted with unreasonable delay and acquiesced in city taking over 1 year to certify environmental impact report); *Vernon Fire Fighters Ass'n v City of Vernon* (1986) 178 CA3d 710, 727, 223 CR 871 (delay of over 5 years between petitioner's discharge from employment and writ proceeding was unreasonable and trial court was justified in finding prejudice had resulted to public employer and laches barred action).

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IV. CHOOSING BETWEEN WRIT OF TRADITIONAL AND ADMINISTRATIVE MANDAMUS

§3.20 A. Checklist: Determining Appropriate Writ

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The following checklist may be used to analyze the facts and procedural context of a case to determine whether traditional or administrative mandamus is the appropriate remedy.

- Is there statutory or regulatory law that governs the substantive area?
- Review governing law for provisions that specify what procedure should be used to obtain judicial review.
- Research cases decided under the governing statutes or regulations to determine which method of writ review is appropriate.
- When preparing a challenge to a decision of an agency or organization:
- Review relevant procedures and policy statements for information about challenging decision.
- Contact agency counsel, decision-making body, or other agency contact to find out how decisions are reviewed, but verify information received to avoid possibility of accidental misinformation.

PRACTICE TIP: Counsel must be careful not to engage in improper ex parte communications concerning the specifics of the case.

- Research case law for precedent on method of review.
- Analyze the administrative decision to determine if it is:
- *Legislative* in nature (*e.g.*, a formulation of a rule to be applied in future cases). If the decision is a legislative action, then it is reviewed by traditional mandate. See *Strumsky v San Diego County Employees Retirement Ass'n* (1974) 11 C3d 28, 35 n2, 112 CR 805; *Mike Moore's 24-Hour Towing v City of San Diego* (1996) 45 CA4th 1294, 1303, 53 CR2d 355; §§2.17-2.38.
- A *policy* decision (*e.g.*, one that affects all similarly situated persons). Decisions about statements of policy or procedures that affect all similarly situated persons are usually reviewed by traditional mandate. See §2.13.
- *Ministerial* in nature (*e.g.*, is the decision limited to the agency's application of its rules or regulations to the petitioner?). If so, then traditional mandate probably applies. See §2.5.
- *Adjudicatory* in nature (*e.g.*, does the decision purport to evaluate or adjudicate the complaint or claim of just the petitioner?). Decisions that evaluate and adjudicate an individual's situation are usually reviewed by administrative mandate if the requirements of CCP §1094.5 have been met. See item 4, below.
- If the decision is *adjudicatory* in nature, then ascertain whether (CCP §1094.5(a)):
- A hearing was required by law.
- If a hearing is not required by law, even if one was held, the decision must be reviewed by traditional mandate. See, *e.g., Coelho v State Personnel Bd.* (1989) 209 CA3d 968, 257 CR 557 (traditional mandate must be used if agency not required by law to hold hearing). See §3.4. On traditional mandate, see chap 2.
- If a hearing was required but no hearing was held, then administrative mandate applies. See, *e.g., Helene Curtis, Inc. v Los Angeles County Assessment Appeals Bds.* (2004) 121 CA4th 29, 37, 16 CR3d 658. See §3.4.
- The taking of evidence was required by law. If there is no requirement that evidence be taken, then the decision must be reviewed by traditional mandate. See, *e.g., DeCuir v County of Los Angeles* (1998) 64 CA4th 75, 81, 75 CR2d 102 (traditional mandate appropriate when agency not required to hold evidentiary

hearing). See §3.5.

- The administrative agency or decision-maker has discretion in determination of contested factual issues. If the decision-maker, whether the agency board itself or a hearing officer designated to hear the matter on behalf of the agency or organization, does not have discretion to make determinations of contested factual issues, then the decision must be reviewed by traditional mandate. See §3.6.

- If administrative mandamus is not available (see item 4 above), have the requirements of traditional mandate been met? including (CCP §1085-1086; §§2.3-2.16):

- The respondent must be an inferior tribunal, corporation, board, or person.
- The respondent must have failed to perform a clear, present duty, having had the legal authority and ability to do so.
- The duty involved must entail ministerial action, the assumption of, or refusal to assume, jurisdiction, or the refusal to exercise, or the abuse of, discretion.
- The petitioner must have a clear, present right to, and a beneficial interest in, the performance of the real party in interest's or the respondent's duty.
- Either the petitioner must have no other remedy at law or the other remedy must be inadequate.

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Source: Civil Litigation/California Civil Writ Practice/3 Administrative Mandamus/§3.21 B. Pleading in the Alternative

§3.21 B. Pleading in the Alternative

When in doubt about whether traditional mandamus (CCP §1085) or administrative mandamus (CCP §1094.5) is the proper remedy, a petitioner should request both. Pleading for relief in the alternative ensures that the court has jurisdiction over the controversy and can issue the appropriate form of relief. Thus, when in doubt, a petitioner should:

- Title the pleading to alert the court and opposing counsel that relief is being sought under either statute, *e.g.*:

Petition for Writ of Mandate (CCP §1085 or CCP §1094.5);

- Include essential allegations for *each* form of relief requested; and
- Meet the earliest filing deadline if different ones are proscribed under CCP §§1085 and 1094.5.

If a petition seeks an inapplicable form of mandate without pleading in the alternative, the petition may be denied (see, *e.g.*, *Tielsch v City of Anaheim* (1984) 160 CA3d 570, 574, 206 CR 738 (grounds for denying relief included that petitioner requested CCP §1085 relief when he should have proceeded under §1094.5)) or the court may decide the case using incorrect standards (see, *e.g.*, *Eureka Teachers Ass'n v Board of Educ. of the Eureka City Schs.* (1988) 199 CA3d 353, 361, 244 CR 240 (trial court applied wrong standard of review (under CCP §1085) and did not consider appropriate evidence (under CCP §1094.5)).

JUDICIAL PERSPECTIVE: In many cases, courts will overlook a request for the "wrong" writ and issue the appropriate writ if the record supports relief, but it is not worth the risk of being wrong: If there is any doubt as to the appropriate writ, the better practice is to ask for traditional and administrative mandamus in the alternative.

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4

Other Superior Court Writs

Mark Fogelman

I. SCOPE OF CHAPTER §4.1

II. WRIT OF PROHIBITION
- A. Description and Purpose §4.2
- B. Limited Scope of Review §4.3
- C. How Prohibition Differs From Other Primary Common Law Writs §4.4
- D. Applicability of Prohibition
  - 1. Most Administrative Bodies Not Subject to Prohibition §4.5
  - 2. Prohibition Available to Review Adjudicatory Decisions of Constitutional Statewide Agencies §4.6
  - 3. Applicability of Prohibition to Corporations §4.7
  - 4. Applicability of Prohibition to Persons §4.8
- E. Specific Requirements for Prohibition §4.9

III. WRIT OF REVIEW (CERTIORARI)
- A. Description and Purpose §4.10
- B. Scope of Review §4.11
- C. Hearing Required §4.12
- D. Applicability of Writ of Review (Certiorari)
  - 1. Most Administrative Bodies Not Subject to Review (Certiorari) §4.13
  - 2. Most Local Agencies Not Subject to Review (Certiorari) §4.14
  - 3. Writ of Review (Certiorari) Available to Review Adjudicatory Decisions of Constitutional Statewide Agencies §4.15
- E. Specific Requirements for Writ of Review (Certiorari) §4.16

IV. WRIT OF HABEAS CORPUS
- A. Description and Purpose §4.17
- B. Habeas Corpus in Civil Cases
  - 1. Habeas Corpus in Proceedings Involving Children
    - a. Habeas Corpus in Child Custody Context §4.18
    - b. Habeas Corpus in Juvenile Dependency Proceedings §4.19
    - c. Habeas Corpus for Ineffective Assistance of Counsel in Proceedings Involving Children §4.20
  - 2. Civil Commitment Proceedings §4.21
    - a. Commitment Under Lanterman-Petris-Short Act §4.22
    - b. Parental Commitment of Minor to State Hospital §4.23
    - c. Commitment to State Hospital for Mentally Disordered §4.24
    - d. Commitment to State Hospital for Developmentally Disabled §4.25
- C. Specific Requirements for Habeas Corpus §4.26

V. QUO WARRANTO PROCEEDINGS §4.27

VI. ENFORCEMENT OF ORDERS IN AGRICULTURAL LABOR RELATIONS BOARD PROCEEDINGS §4.28

VII. OTHER SUPERIOR COURT WRITS
- A. Attachment §4.29
- B. Execution, Possession, and Sale
  - 1. Writ of Execution §4.30
  - 2. Writ of Possession §4.31
  - 3. Writ of Sale §4.32
- C. Injunction §4.33

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§4.1 I. SCOPE OF CHAPTER

This chapter provides an overview of writs other than mandamus that may be sought in the superior court, specifically:

- Prohibition. See §§4.2-4.9.
- Review (certiorari). See §§4.10-4.16.
- Habeas Corpus. See §§4.17-4.26.
- Quo Warranto. See §4.27.
- Enforcement of Orders in Agricultural Labor Relations Board Proceedings. See §4.28.
- Attachment. See §4.29.
- Execution, Possession, and Sale. See §§4.30-4.32.
- Injunction. See §4.33.

On traditional mandamus, see chap 2. On administrative mandamus, see chap 3. On writs in limited jurisdiction civil cases, see chap 12.

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II. WRIT OF PROHIBITION

§4.2 A. Description and Purpose

A writ of prohibition issues to an inferior tribunal, body, or person (*i.e.,* a governmental or private body or official) that exercises quasi-judicial functions (see Cal Const art VI, §11). The primary purpose of prohibition is to prevent or restrain the inferior tribunal, body, or person from erroneously assuming jurisdiction or acting in excess of its jurisdiction. See CCP §1102 (writ of prohibition "arrests the proceedings of any tribunal, corporation, board, or person exercising judicial functions, when such proceedings are without or in excess of [its] jurisdiction"). A writ of prohibition generally preserves the status quo because it addresses jurisdictional error that is threatened but not completed. See *Union Pac. R.R. v State Bd. of Equalization* (1989) 49 C3d 138, 158, 260 CR 565.

The appellate division of the superior court may issue a writ of prohibition directed to the superior court in a limited jurisdiction civil case, a misdemeanor case, or an infraction case. In such cases, the superior court is deemed an inferior tribunal to the superior court appellate division. CCP §1103(b). On writ petitions in limited jurisdiction civil cases, see chap 12.

On writs of prohibition issued by the appellate courts, see §§15.14-15.26.

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§4.3 B. Limited Scope of Review

The writ of prohibition addresses only "jurisdictional error," *i.e.,* threatened actions that are without or in excess of jurisdiction. The concept of jurisdictional error is quite broad in this context and allows a court to prevent or restrain the exercise of unauthorized power even when an inferior tribunal, body, or person has jurisdiction over the subject matter and the parties. Any act exceeding the defined power of the inferior tribunal, body, or person—whether defined by a constitutional provision, statute, rule, or by the courts and followed under the doctrine of stare decisis—is in excess of jurisdiction for purposes of a writ of prohibition. See *Abelleira v District Court of Appeal* (1941) 17 C2d 280, 291, 109 P2d 942.

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§4.4 C. How Prohibition Differs From Other Primary Common Law Writs

A writ of prohibition differs from a writ of review (certiorari) in that prohibition lies to restrain or prevent a threatened judicial act without or in excess of jurisdiction, while review lies to correct a completed judicial act without or in excess of jurisdiction. Compare CCP §1068 with CCP §1102. See §4.3. A writ of mandate, in contrast, compels the performance of a ministerial duty or corrects an abuse of discretion. CCP §1085. On traditional mandamus, see chap 2. On administrative mandamus, see chap 3.

PRACTICE TIP: Although the distinctions between the common law writs have been codified and a petitioner should seek the writ that applies to the particular circumstances, many courts will grant writ relief if it is warranted even if the petitioner has sought the "wrong" writ. See, *e.g.*, *Babb v Superior Court* (1971) 3 C3d 841, 850, 92 CR 179 (although petition sought writ of prohibition, court decided mandate was more appropriate remedy and treated petition as one for mandate). However, a petitioner should not rely on such indulgent treatment from the court. When in doubt as to the appropriate writ, it is better practice to seek alternative forms of writ relief and "all other appropriate relief." On seeking alternative relief, see §§5.36-5.37.

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D. Applicability of Prohibition

§4.5 1. Most Administrative Bodies Not Subject to Prohibition

A tribunal, body, or person is subject to prohibition only if exercising a judicial function. CCP §1102; see §§15.15-15.17. The legislature is powerless, however, to grant judicial power to state agencies. Thus, prohibition does not lie to restrain state agencies of legislative origin. See, *e.g., Whitten v California State Bd. of Optometry* (1937) 8 C2d 444, 445, 65 P2d 1296. The legislature likewise lacks power to invest local agencies with judicial functions. Thus, prohibition also does not lie to restrain the actions of local agencies. See, *e.g., Strumsky v San Diego County Employees Retirement Ass'n* (1974) 11 C3d 28, 42, 112 CR 805. See also California Administrative Mandamus §1.17 (3d ed Cal CEB 2003).

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§4.6 2. Prohibition Available to Review Adjudicatory Decisions of Constitutional Statewide Agencies

Certain statewide *constitutional* agencies are subject to prohibition if they have constitutionally invested adjudicatory power. See *O'Brien v Olson* (1941) 42 CA2d 449, 109 P2d 8 (writ of prohibition used to restrain governor from investigating charges or removing state prison board directors from office). On this same point developed in the context of writs of review (certiorari), see §4.15. Even as to those few state agencies subject to prohibition, petitioners generally seek review of their decisions by way of administrative mandamus, if it is available, because the scope of judicial review is broader. On the scope of judicial review in administrative mandamus, see §§3.8-3.17.

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§4.7 3. Applicability of Prohibition to Corporations

Although CCP §§1102-1103 indicate prohibition is applicable to "corporations," the writ is used rarely, if ever, in this context. This is probably because corporations do not engage in judicial acts, and a person dissatisfied with corporate action normally has an adequate legal remedy, *e.g.*, action for injunctive relief, action on contract, or the various statutory remedies available to stockholders.

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§4.8 4. Applicability of Prohibition to Persons

The reference in CCP §§1102-1103 to "persons" is likely a reference to public officials or individual members of inferior tribunals or boards imbued with adjudicatory power and threatening to act without or in excess of jurisdiction.

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§4.9 E. Specific Requirements for Prohibition

In addition to meeting the basic requirements for extraordinary relief, *e.g.*, a beneficially interested petitioner and the absence of a plain, speedy, and adequate remedy (see §§2.2-2.16), the petitioner seeking a writ of prohibition must show that (CCP §§1102-1103):

- The act at issue is judicial in nature;
- The act is actually threatened but not completed;
- The adjudicatory tribunal lacked or acted in excess of its jurisdiction.

The requirements for prohibition are the same in superior court as in the court of appeal. On writs of prohibition in the court of appeal, see §§15.14-15.26.

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III. WRIT OF REVIEW (CERTIORARI)

§4.10 A. Description and Purpose

A writ of review is also called a writ of certiorari. CCP §1067. As originally enacted, §1067 mandated use of the term writ of review. Thus, many statutes continue to refer to the writ of certiorari as the writ of review. However, Cal Const art VI, §10 uses the terminology writ of certiorari.

The purpose of the writ of review is to review completed adjudicatory action taken without or in excess of jurisdiction when there is no appeal and no other adequate remedy. CCP §§1068(a), 1074. Thus, a writ of review, like prohibition (and unlike mandate), is a jurisdictional writ. A writ of review sought from the superior court issues to a tribunal of inferior jurisdiction or to a nonjudicial body or officer that exercises judicial functions. CCP §1068(a). The writ orders the party to whom the writ is directed to certify or return to the court a record of the underlying proceedings and to desist from further proceedings pending judicial review. CCP §§1070-1071.

The appellate division of the superior court may grant a writ of review directed to the superior court in a limited jurisdiction civil matter, a misdemeanor case, or an infraction case. In such cases, the superior court is an inferior tribunal to the superior court appellate division for purposes of the writ of review. CCP §1068(b). On writ petitions in limited civil cases, see chap 12.

On writs of review issued by the appellate courts, see §§15.27-15.38.

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§4.11 B. Scope of Review

The superior court's scope of review of the inferior tribunal's action is limited to whether the tribunal, board, or officer "regularly pursued" its authority. CCP §1074. This entails determining whether the tribunal, board, or officer exceeded its jurisdiction. See CCP §1068 (authorizing writ when tribunal, board, or officer "has exceeded the jurisdiction of such tribunal, board or officer").

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§4.12 C. Hearing Required

After the superior court issues a writ of review (certiorari), the court holds a hearing and enters judgment affirming, annulling, or modifying the challenged action. CCP §1075. The judgment, rather than the writ, is the ultimate relief sought. On the superior court's action on a petition for writ of review, see §§9.49-9.52

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D. Applicability of Writ of Review (Certiorari)

§4.13 1. Most Administrative Bodies Not Subject to Review (Certiorari)

Although the writ of review (certiorari) historically was used to review adjudicatory actions of legislatively created statewide administrative agencies (see *State Bd. of Chiropractic Exam'rs v Superior Court* (1927) 201 C 108, 255 P 749), the California Supreme Court held in 1936 that the legislature cannot confer judicial power on a state agency. *Standard Oil Co. v State Bd. of Equalization* (1936) 6 C2d 557, 559, 59 P2d 119. Because a writ of review lies only as to judicial actions, the writ is not available to review adjudicatory decisions of statutorily created state agencies.

PRACTICE TIP: In practice, administrative adjudicatory decisions are generally reviewed by way of administrative mandamus under CCP §1094.5. On administrative mandamus, see chap 3; California Administrative Mandamus §1.7 (3d ed Cal CEB 2003).

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§4.14 2. Most Local Agencies Not Subject to Review (Certiorari)

Even after *Standard Oil Co. v State Bd. of Equalization* (1936) 6 C2d 557, 559, 59 P2d 119, courts assumed local agencies could exercise judicial functions (see *Irvine v Citrus Pest Dist. No. 2* (1944) 62 CA2d 378, 385, 144 P2d 857) and their adjudicatory determinations could thus be reviewed either on writ of review (certiorari) or by way of administrative mandamus. See, *e.g., La Prade v Department of Water & Power* (1945) 27 C2d 47, 53, 162 P2d 13; *DeLucia v County of Merced* (1968) 257 CA2d 620, 622, 65 CR 177.

In *Strumsky v San Diego County Employees Retirement Ass'n* (1974) 11 C3d 28, 44, 112 CR 805, however, the California Supreme Court held local agencies cannot exercise judicial power. *Strumsky* concerned the scope of review of adjudicatory determinations of local agencies under CCP §1094.5. See also *McHugh v Santa Monica Rent Control Bd.* (1989) 49 C3d 348, 372, 261 CR 318 (rent control board lacked judicial authority to impose punitive damages). The supreme court in *Strumsky* did not specifically address whether a writ of review will lie against a local agency. However, it necessarily follows that if local agencies cannot exercise judicial functions, their adjudicatory determinations are no more reviewable by a writ of review than those legislatively created state agencies.

PRACTICE TIP: In practice, local agency adjudicatory decisions generally are reviewed by way of administrative mandamus under §1094.5. On administrative mandamus, see chap 3.

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§4.15 3. Writ of Review (Certiorari) Available to Review Adjudicatory Decisions of Constitutional Statewide Agencies

A writ of review (certiorari) is available to review adjudicatory actions of statewide agencies of constitutional origin. *Boren v State Personnel Bd.* (1951) 37 C2d 634, 637, 234 P2d 981. Constitutional agencies derive their adjudicatory power directly from the California Constitution, and thus are not subject to the rule of *Standard Oil Co. v State Bd. of Equalization* (1936) 6 C2d 557, 559, 59 P2d 119. See, *e.g., Strumsky v San Diego County Employees Retirement Ass'n* (1974) 11 C3d 28, 35, 112 CR 805; *Koehn v State Bd. of Equalization* (1958) 166 CA2d 109, 117, 333 P2d 125; §4.13. Examples of constitutional statewide agencies include the Public Utilities Commission, the Workers' Compensation Appeals Board, the Agricultural Labor Relations Board, the Public Employment Relations Board, and the State Water Resources Control Board.

In practice, however, adjudicatory decisions of constitutional statewide agencies are usually reviewed by way of administrative mandamus because the scope of review is broader. On the scope of judicial review on a writ of review, see §4.11; on the scope of judicial review under administrative mandamus, see §3.8.

PRACTICE TIP: Specific statutory provisions establish exclusive procedures for review of the orders and decisions of certain statewide constitutional agencies. For example, California Public Utilities Commission (PUC) orders and decisions are reviewable only by the court of appeal and supreme court under the procedures established by the Public Utilities Code. See Pub Util C §§1756-1768. On statutes authorizing writ review of the decisions of particular administrative agencies, see §§16.18-16.48.

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§4.16 E. Specific Requirements for Writ of Review (Certiorari)

Besides meeting the basic requirements for extraordinary relief, *i.e.,* a beneficially interested petitioner and the absence of a plain, speedy, and adequate remedy (see §§2.3-2.16), the petitioner seeking a writ of review (certiorari) must demonstrate that:

- The act at issue is judicial in nature;
- The act has been completed;
- The lower tribunal lacked or acted in excess of its jurisdiction; and
- There is no right to appeal.

The requirements for writs of review are the same in superior court as in the court of appeal. On writs of review in the court of appeal, see §§15.27-15.38.

PRACTICE TIP: If the challenged act is incomplete, *e.g.,* if the inferior tribunal has reached a decision but has not yet acted on it, prohibition may be available to restrain the threatened act. On writs of prohibition, see §§4.2-4.9.

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IV. WRIT OF HABEAS CORPUS

§4.17 A. Description and Purpose

The writ of habeas corpus permits a person who is unlawfully imprisoned or restrained to challenge the lawfulness of the confinement or restraint. Pen C §1473(a). All California courts have original jurisdiction in habeas corpus proceedings. Cal Const art VI, §10.

The writ of habeas corpus originally was used to secure the petitioner's release from actual imprisonment or other illegal confinement. In modern practice, the petitioner need not be physically confined; a petitioner released on bail or on his or her own recognizance may seek habeas corpus relief because such restraints are sufficient to constitute constructive custody. See, *e.g., In re Catalano* (1981) 29 C3d 1, 9, 171 CR 667 (defendants were under sufficient restraint to permit habeas corpus when judgment required them to pay fine or face incarceration); *In re Smiley* (1967) 66 C2d 606, 612, 58 CR 579 (habeas corpus was available to defendant released on his own recognizance). See also *Gray v Superior Court* (2005) 125 CA4th 629, 636 n3, 23 CR3d 50 (court of appeal chose to treat petition challenging bail condition as one for writ of mandate instead of writ of habeas corpus because trial court allegedly exceeded its jurisdiction, issue was purely legal, and there was no need for evidentiary hearing); Appeals and Writs in Criminal Cases §§9.3-9.6 (3d ed Cal CEB 2007).

Although habeas corpus is not itself a criminal proceeding (Part 2, Title 12 of the Penal Code classifies habeas corpus as a "special proceeding of a criminal nature"), it is most commonly used by those charged with, or convicted of, criminal offenses. The following sections summarize use of the writ in civil proceedings only. On habeas corpus in criminal proceedings, see Appeals & Writs, chap 9.

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B. Habeas Corpus in Civil Cases

1. Habeas Corpus in Proceedings Involving Children

§4.18 a. Habeas Corpus in Child Custody Context

Habeas corpus may be used when a person entitled to custody of a minor child is denied possession. See, *e.g., In re Barr* (1952) 39 C2d 25, 27, 243 P2d 787; *In re Paul W.* (2007) 151 CA4th 37, 53, 60 CR3d 329. In child custody and adoption-related matters, however, just as in all other matters, "habeas corpus cannot serve as a substitute for an appeal, and, in the absence of special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment." *Adoption of Alexander S.* (1988) 44 C3d 857, 865, 245 CR 1, quoting *In re Dixon* (1953) 41 C2d 756, 759, 264 P2d 513.

PRACTICE TIP: Under Welf & I C §366.26, an order permanently terminating parental rights is conclusive and once final the court cannot modify it. Some authorities hold this means the order cannot be modified even on habeas corpus (see, *e.g., In re Meranda P.* (1997) 56 CA4th 1143, 1161, 65 CR2d 913), but other decisions have held that it is a restriction only on the ordering court and not on the habeas power of appellate courts. See, *e.g., In re Darlice C.* (2003) 105 CA4th 459, 464, 129 CR2d 472.

In *Adoption of Alexander S.* (1988) 44 C3d 857, 866, 245 CR 1, the California Supreme Court listed six grounds for using habeas corpus in child custody matters. These include: (1) enforcement of an existing right to physical custody established by prior order, (2) determination of physical custody when no previous custody order has issued, (3) modification of a modifiable order, (4) protecting a child from imminent danger, (5) allowing a natural parent lacking physical custody to bring an original action in habeas corpus when his or her consent to an adoption was required but not obtained, and (6) a collateral attack on a prior order issued by a court without jurisdiction. See also *In re Meranda P.* (1997) 56 CA4th 1143, 1164 n15, 65 CR2d 913.

PRACTICE TIP: Family law courts rarely hear habeas corpus proceedings. Before initiating a habeas proceeding, a complainant should consider more common remedies, such as an order modifying custody or an order for return of the child.

On challenging child custody rulings, see California Child Custody Litigation and Practice, chap 19 (Cal CEB 2006).

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§4.19 b. Habeas Corpus in Juvenile Dependency Proceedings

Habeas corpus is the proper vehicle for challenging a dependency order. See, *e.g., In re Paul W.* (2007) 151 CA4th 37, 53, 60 CR3d 329. See also *In re Emilye A.* (1992) 9 CA4th 1695, 1707 n9, 12 CR2d 294 ("reversal of an order in a dependency proceeding does not necessarily mean that the status quo is reinstated and that the child can no longer be protected").

On habeas corpus in juvenile dependency proceedings, see California Juvenile Dependency Practice §§10.109-10.117 (Cal CEB 2002).

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§4.20 c. Habeas Corpus for Ineffective Assistance of Counsel in Proceedings Involving Children

Often in habeas cases focusing on jurisdiction over children, the challenged custody order or order terminating parental rights is final, and the habeas petition is based on a claim of ineffective assistance of counsel. See, *e.g., In re O. S.* (2002) 102 CA4th 1402, 1409, 126 CR2d 571; *In re Carrie M.* (2001) 90 CA4th 530, 533, 108 CR2d 856. This is an appropriate use of habeas corpus because the issues in an ineffective assistance claim go beyond the trial record. See, *e.g., In re Emilye A.* (1992) 9 CA4th 1695, 1707 n9, 12 CR2d 294 (reversal because ineffective assistance of counsel does not preclude further dependency proceedings in juvenile court; it simply requires that proceedings be reconducted because parents were not properly represented).

An indigent parent has a liberty interest in the care, custody, and management of his or her child. Thus, in some parental right termination cases, the parent may have a due process right to appointment of competent counsel. See, *e.g., In re Kristin H*. (1996) 46 CA4th 1635, 1642, 54 CR2d 722. See also *In re Darlice C.* (2003) 105 CA4th 459, 462, 129 CR2d 472; Welf & I C §§317, 317.5. The parent may, by inaction, waive the rights to appointed counsel and to contest a determination for ineffective assistance of counsel. See, *e.g., In re Meranda P.* (1997) 56 CA4th 1143, 1157, 65 CR2d 913. The right to counsel, cognizable on habeas corpus, may also implicate other due process rights, such as the right to notice. See, *e.g., In re O. S.* (2002) 102 CA4th 1402, 1407, 126 CR2d 571.

On habeas relief based on ineffective assistance of counsel, see California Juvenile Dependency Practice §10.111 (Cal CEB 2002).

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§4.21 2. Civil Commitment Proceedings

Habeas corpus is available in a variety of proceedings involving the commitment of mentally disordered or other developmentally disabled persons.

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§4.22 a. Commitment Under Lanterman-Petris-Short Act

The Lanterman-Petris-Short Act (Welf & I C §§5000-5550) establishes procedures for the involuntary commitment of persons who, as the result of mental disorders, are dangerous to themselves or others, or who are gravely disabled. Any person certified for an additional 14 days of intensive treatment beyond the initial 72-hour treatment and evaluation period of Welf & I C §5150 automatically receives a certification review proceeding (Welf & I C §§5254, 5256-5256.8) unless the person elects to seek judicial review by a writ of habeas corpus. Welf & I C §§5254.1, 5275-5277.

The detained person, or anyone acting on his or her behalf, obtains habeas review by requesting release from the person delivering the copy of the notice of certification or from any other member of the facility's treatment staff. Welf & I C §5275.

Judicial review takes place in the superior court in the county in which the detaining facility is located. Welf & I C §5276. The detained person is entitled to counsel (appointed, if necessary) to prepare the petition and provide representation at the hearing. Welf & I C §5276. The court must release the detained person or order that an evidentiary hearing be held within 2 court days after the petition is filed. Welf & I C §5276.

On civil commitment proceedings under the Lanterman-Petris-Short Act, see California Conservatorship Practice, chap 23 (Cal CEB 2005) and California Guardianship Practice §11.20 (Cal CEB Annual).

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§4.23 b. Parental Commitment of Minor to State Hospital

A minor committed to a state hospital by a parent can challenge his or her commitment by a writ of habeas corpus. See, *e.g., In re Roger S.* (1977) 19 C3d 921, 937, 141 CR 298 (holding 14-year-old could challenge commitment to state mental hospital by parents under Welf & I C §6000(b) through writ of habeas corpus in superior court).

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§4.24 c. Commitment to State Hospital for Mentally Disordered

Anyone committed to a state hospital for the mentally disordered may apply for a writ of habeas corpus to the superior court in the county in which the hospital is located. Welf & I C §7250. The patient, anyone acting on his or her behalf, the State Department of Mental Health, or the State Department of Developmental Services may apply for the writ. The court inquires into and determines "the truth of the allegations under which he or she was committed." Welf & I C §7250.

On judicial review of commitment to a state hospital, see California Conservatorship Practice §23.97 (Cal CEB 2005).

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§4.25 d. Commitment to State Hospital for Developmentally Disabled

A developmentally disabled adult committed to a state hospital may apply for a writ of habeas corpus to the superior court to challenge the lawfulness of the commitment. Welf & I C §4800(a). See, *e.g., In re Hop* (1981) 29 C3d 82, 94, 171 CR 721 (holding that adult could challenge commitment to state hospital by filing habeas corpus petition in superior court of county in which she was confined); *In re Violet C.* (1989) 213 CA3d 86, 261 CR 470. In addition, a petition for habeas corpus, filed in the superior court of the county of confinement, is "an appropriate vehicle to inquire into the conditions of an institution which would endanger the health and safety of a conservatee… or which deprive a conservatee of fundamental rights." *In re Gandolfo* (1984) 36 C3d 889, 898 n7, 206 CR 149.

On judicial review of commitment to a state hospital, see California Conservatorship Practice §23.97 (Cal CEB 2005).

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§4.26 C. Specific Requirements for Habeas Corpus

The procedures in habeas corpus proceedings in superior court generally are governed by Pen C §§1473-1508 and Cal Rules of Ct 4.550-4.552. There are also special procedures concerning civil commitment established by Welf & I C §5276, discussed in §4.22. On procedures for obtaining a writ of habeas corpus, see Appeals and Writs in Criminal Cases, chap 10 (3d ed Cal CEB 2007).

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§4.27 V. QUO WARRANTO PROCEEDINGS

At common law, the writ of quo warranto issued to bring a defendant before the court to show by what authority he or she claimed an office, franchise, or liberty of the Crown. See, *e.g., People v Dashaway Ass'n* (1890) 84 C 114, 118, 24 P 277; *International Ass'n of Fire Fighters v City of Oakland* (1985) 174 CA3d 687, 695, 220 CR 256.

In California, the writ of quo warranto no longer exists. See 8 Witkin, California Procedure, *Extraordinary Writs* §27 (5th ed 2008). A statutory action, identical in purpose and effect to quo warranto, was established in 1872. CCP §§803-811. Under CCP §803, the statutory action may be brought against "any person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise, or against any corporation, either de jure or de facto, which usurps, intrudes into, or unlawfully holds or exercises any franchise, within this state."

PRACTICE TIP: Courts continue to refer to the remedy provided by the statutory action as "quo warranto." (The official chapter title of the statute is "Actions for Usurpation of an Office or a Franchise," which, as B. E. Witkin points out, is rather unwieldy. See 8 Witkin, California Procedure, *Extraordinary Writs* §7).

For examples of recent uses of proceedings in the nature of quo warranto, see:

- Quo warranto proceeding proper method to challenge consolidation of county's correctional and peace officers. *People ex rel Deputy Sheriffs' Ass'n v County of Santa Clara* (1996) 49 CA4th 1471, 1476, 57 CR2d 322.
- Quo warranto proceeding proper method to challenge validity of a judicial assignment. *People v Kwolek* (1995) 40 CA4th 1521, 1531, 48 CR2d 325.
- Quo warranto the exclusive remedy to challenge a city charter amendment that unilaterally altered wages and working conditions in violation of the Meyers-Milias-Brown Act (Govt C §§3500-3508.5). *International Ass'n of Fire Fighters v City of Oakland* (1985) 174 CA3d 687, 698, 220 CR 256.

On the overlap between quo warranto and mandate proceedings, see 8 Witkin, California Procedure, *Extraordinary Writs* §27.

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§4.28 VI. ENFORCEMENT OF ORDERS IN AGRICULTURAL LABOR RELATIONS BOARD PROCEEDINGS

If no timely petition for review of an Agricultural Labor Relations Board (ALRB) order is filed in the court of appeal, or if review is denied, the ALRB may petition the superior court for enforcement of its order. Lab C §1160.8. On writ review of ALRB interim and final orders in the court of appeal, see §§16.18-16.21.

In an enforcement proceeding, the superior court may not review the merits of the administrative decision. The court must enforce the decision by writ of injunction or other process if, after the hearing, the court determines that (1) the order was issued under procedures established by the ALRB and (2) the person to whom the order is directed refuses to comply. *ALRB v Tex-Cal Land Mgmt., Inc.* (1987) 43 C3d 696, 701, 238 CR 780.

A superior court judgment enforcing a final ALRB order is appealable. 43 C3d at 705. The points that can be raised on appeal are limited to procedural irregularity and refusal to comply with the order. 43 C3d at 706.

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VII. OTHER SUPERIOR COURT WRITS

§4.29 A. Attachment

A writ of attachment permits a plaintiff in a civil action to have a defendant's property levied as security for the satisfaction of any judgment the plaintiff may recover, unless the defendant gives other security to cover the judgment. See CCP §§481.010-492.090.

Under CCP §483.010(a), attachment is available only if all of the following exist:

- There is an action on a claim or claims for money;
- That action is based on an express or implied contract; and
- The total amount of the claim(s) is a fixed or readily ascertainable amount of at least $500, exclusive of costs, interest, and attorney fees.

PRACTICE TIP: A party must strictly follow the statutory provisions on attachment.

On attachment, including forms, see Debt Collection Practice in California, chap 6 (2d ed Cal CEB 1999).

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B. Execution, Possession, and Sale

§4.30 1. Writ of Execution

A writ of execution authorizes seizure and appropriation of a defendant's property to satisfy an existing money judgment against the defendant. See generally the Enforcement of Judgments Act (CCP §§680.010-724.260). On property subject to execution, see CCP §§695.010-695.070. Procedures for obtaining a writ of execution and levying on property subject to execution are set out in CCP §§699.010-701.830.

On writs of execution, including forms, see Debt Collection Practice in California §§9.2-9.36 (2d ed Cal CEB 1999).

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§4.31 2. Writ of Possession

A writ of possession is used to enforce a judgment for possession of real or personal property. CCP §§712.010-712.070, 714.010-714.030, 715.010-715.050.

On writs of possession, including forms, see Debt Collection Practice in California §§6.111-6.166 (2d ed Cal CEB 1999).

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§4.32 3. Writ of Sale

A writ of sale is used to enforce a judgment for sale of real or personal property. CCP §§712.010-712.070, 716.010-716.030.

On writs of sale, including forms, see Debt Collection Practice in California §§9.37-9.49G (2d ed Cal CEB 1999).

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§4.33 C. Injunction

An injunction is a "writ or order requiring a person to refrain from a particular act." CCP §525. Injunctive relief, which may be temporary or permanent, is governed by CCP §§525-534. Normally, a party must seek injunctive relief in the superior court. CCP §86(a)(8).

There are three forms of injunctive relief (see CCP §§526-527):

- A temporary restraining order, which may be issued ex parte for a limited time, usually pending the court's ruling on the complainant's application for a preliminary injunction;
- A preliminary injunction, which binds a party during the pendency of an action; and
- A permanent injunction, which issues on final judgment.

A stay is a form of injunctive relief. On stays, see chap 6.

On injunctions, see California Civil Procedure Before Trial, chap 32 (4th ed Cal CEB 2004). See also 5 Witkin, California Procedure, *Pleading* §§822-832 (5th ed 2008); 6 Witkin, Procedure, *Provisional Remedies* §§363-418.

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5

Initiating a Superior Court Writ Proceeding

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I. SCOPE OF CHAPTER §5.1

II. OVERVIEW OF SUPERIOR COURT WRIT PROCEDURES §5.2
- A. Applicable Statutory Authorities
  - 1. Statutes Pertaining Specifically to Writs §5.3
  - 2. Other Statutes Made Applicable to Writ Proceedings §5.4
  - 3. Rules of Court §5.5
- B. Local Rules and Procedures §5.6
  - 1. Local Rules §5.7
  - 2. Unwritten Procedures §5.8
- C. Procedural Options: Noticed Motion or Alternative Writ §5.9
  - 1. Noticed Motion Procedure
    - a. Chronology of Noticed Motion Procedure §5.10
    - b. Advantages and Disadvantages of Noticed Motion Procedure
      - (1) No Need for Ex Parte Appearance §5.11
      - (2) Time Savings for Court §5.12
      - (3) Hearing on Merits Likely §5.13
      - (4) Control Over Timing of Hearing on Merits §5.14
  - 2. Alternative Writ Procedure
    - a. Chronology of Alternative Writ Procedure §5.15
    - b. Advantages and Disadvantages of Alternative Writ Procedure
      - (1) Immediate Relief Possible §5.16
      - (2) Early Hearing §5.17
      - (3) Court Can Deny Alternative Writ and Dismiss Petition §5.18
  - 3. Issuance of Peremptory Writ in First Instance Unusual §5.19

III. DRAFTING THE WRIT PETITION §5.20
- A. Format Requirements §5.21
  - 1. In General
    - a. Typewritten or Printed §5.22
    - b. Type and Size of Paper §5.23
    - c. Margins §5.24
    - d. Line Numbers §5.25
    - e. Page Numbers §5.26
    - f. Binding §5.27
    - g. Hole Punching §5.28
    - h. Exhibits §5.29
    - i. Footer §5.30
  - 2. First (Caption) Page §5.31
- B. Designation of Parties
  - 1. Petitioner §5.32
  - 2. Respondent §5.33
  - 3. Real Party in Interest
    - a. Determining Existence §5.34
    - b. Right to Notice and Hearing §5.35
- C. Requesting Alternative Forms of Writ Relief
  - 1. Selecting Wrong Writ Usually Not Fatal §5.36
  - 2. Pleading and Praying for Different Forms of Writ Relief §5.37
- D. Contents of Petition
  - 1. Opening Paragraph §5.38
  - 2. Request for Stay §5.39

3. Enumerated Allegations §5.40
a. Identity of Parties
(1) Form: Petitioner §5.41
(2) Form: Respondent §5.42
(3) Form: Real Party in Interest §5.43
(4) Particular Contexts
(a) Form: When Petition Challenges Nonjudicial Action §5.44
(b) Form: When Petitioner Is Party to Ongoing Administrative Proceeding §5.45
b. Describing Challenged Action and Factual Background
(1) Style for Statement of Facts §5.46
(2) Using Supporting Citations §5.47
(3) Relating to Legal Basis for Relief §5.48
c. Describing Basis for Challenging Action §5.49
(1) Specific Allegations Required for Mandate §5.50
(2) Specific Allegations Required for Prohibition §5.51
(3) Specific Allegations Required for Review (Certiorari) §5.52
d. Absence of Adequate Legal Remedy
(1) Requirement for Mandate and Prohibition §5.53
(2) Form: Absence or Inadequacy of Other Remedies §5.54
e. Exhaustion of Administrative Remedies
(1) Aspect of No-Adequate-Legal-Remedy Requirement §5.55
(2) Form: Exhaustion of Administrative Remedies §5.56
f. Alleging Damages if Appropriate §5.57
g. Alleging Basis for Stay if Requested §5.58
h. Prayer for Relief §5.59
(1) Form: Types of Relief §5.60
(2) Form: Costs and Attorney Fees §5.61
(3) Form: Other Appropriate Relief §5.62
4. Form: Signature Block §5.63
5. Verification Required §5.64
a. Public Entities Exempt §5.65
b. Verification Must Be Based on Personal Knowledge §5.66
c. Petitioner Must Verify Petition §5.67
d. Defects in Verification May Be Challenged §5.68
e. Form: Verification §5.69
6. Exhibits §5.70

IV. FILING AND SERVING THE PETITION §5.71
A. Time for Filing
1. When Special Statutory Deadline §5.72
2. When No Special Statutory Deadline §5.73
3. Laches §5.74
B. Venue §5.75
C. When Using Noticed Motion Procedure
1. Filing and Serving Writ Petition Only at Outset of Proceeding §5.76
a. Filing Procedures
(1) Place of Filing §5.77
(2) Civil Case Cover Sheet §5.78
(3) Filing Fee §5.79
(4) Copies §5.80
b. Serving Procedures
(1) When to Serve §5.81
(2) Whom to Serve §5.82
(3) Manner of Service §5.83
(4) Proof of Service
(a) Time of Filing §5.84
(b) Format §5.85
2. Bringing Petition on for Hearing
a. Preparing Motion for Issuance of Requested Writ §5.86
b. Format of Motion §5.87
c. Required Papers §5.88
(1) Notice of Motion §5.89
(2) Motion §5.90
(3) Combining Notice of Motion and Motion §5.91
(4) Supporting Memorandum

(a) Purpose of Supporting Memorandum §5.92
(b) Required Contents of Supporting Memorandum §5.93
(c) Format of Supporting Memorandum §5.94
(d) Page Limits §5.95
(e) Style of Supporting Memorandum §5.96
(i) Supporting Memorandum Should Be Persuasive §5.97
(ii) Supporting Memorandum Should Clearly State Basis for Issuance of Writ §5.98
(iii) Citations to Evidence §5.99
(iv) Use of Quotations §5.100
d. Additional Papers
(1) Declarations §5.101
(2) Administrative Record §5.102
(3) Proposed Order/Judgment §5.103
e. Service and Filing of Motion and Supporting Documents §5.104
(1) Whom to Serve §5.105
(2) When to Serve §5.106
(3) Where and When to File Papers §5.107
D. When Using Alternative Writ Procedure §5.108
1. Preparing the Papers
a. Writ Petition §5.109
b. Supporting Memorandum §5.110
c. Exhibits/Declarations §5.111
d. Proposed Alternative Writ §5.112
2. Filing and Service Procedures
a. Use of Ex Parte Application §5.113
(1) Contents of Ex Parte Application §5.114
(2) Service of Ex Parte Application §5.115
(3) Personal Appearance §5.116
(4) Following Local Procedures §5.117
b. Court Action on Ex Parte Application §5.118

V. COMBINING WRIT PETITION AND COMPLAINT §5.119

VI. CONSIDERING RESTRICTIONS OF TRIAL COURT DELAY REDUCTION ACT §5.120

VII. COSTS AND ATTORNEY FEES
A. Recovery of Costs
1. By Prevailing Party §5.121
2. Costs Allowed §5.122
3. Procedure for Claiming Costs §5.123
B. Award of Attorney Fees
1. When Fees Are Recoverable §5.124
2. Procedure for Recovering Attorney Fees
a. When to File §5.125
b. What to File §5.126
C. Interplay Between Motion for Fees and Costs Bill §5.127

VIII. CHECKLIST: PITFALLS TO AVOID §5.128

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§5.1 I. SCOPE OF CHAPTER

This chapter discusses how to initiate a writ proceeding in the superior court. It begins with an overview of superior court writ procedures, including discussions of the statutes and court rules governing writ proceedings (see §§5.2-5.5), the significance of local rules and unwritten procedures (see §§5.6-5.8), and the procedural options available to the petitioner in initiating a writ proceeding (see §§5.9-5.19). The chapter next discusses the particulars of drafting a writ petition (see §§5.20-5.70), including filing and serving procedures (see §§5.71-5.118) and when a writ petition should be combined with a complaint (see §5.119). The chapter discusses the impact of the Trial Court Delay Reduction Act on writ proceedings. See §5.120. It also discusses the recovery of costs and attorney fees. See §§5.121-5.127. The chapter concludes with a checklist of pitfalls that the petitioner should avoid. See §5.128.

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§5.2 II. OVERVIEW OF SUPERIOR COURT WRIT PROCEDURES

Handling a writ proceeding in the superior court can be bewildering. The applicable statutes are not models of clarity, and they include anachronistic terms such as "alternative writ" and "return." Some rules of court apply but do not provide much illumination as to the manner in which writ proceedings unfold. To fill the void and provide better direction, a number of superior courts have adopted local rules providing specific procedures for writ proceedings. A petitioner should always check for these rules before going forward.

Unlike ordinary civil actions, writ proceedings often do not involve discovery. Usually, extensive memoranda are filed in advance of the "trial," which in most cases is more akin to a law and motion hearing. The judge reviews the memoranda and any permissible documentary evidence, hears argument at a hearing that may last as little as 30 minutes, and then enters a judgment granting or denying the writ petition.

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A. Applicable Statutory Authorities

§5.3 1. Statutes Pertaining Specifically to Writs

Only a few statutes deal specifically with writ proceedings:

- Traditional mandate is addressed by CCP §§1084-1097 (except for CCP §1094.5, which deals with administrative mandamus, a statutorily created species of mandamus used to review most administrative adjudicatory decisions. For discussion of administrative mandamus, see chap 3 and California Administrative Mandamus (3d ed Cal CEB 2003)).
- Prohibition is addressed by CCP §§1102-1105.
- Review (certiorari) is addressed by CCP §§1067-1077.
- Preliminary provisions appear in CCP §§1063-1064.
- General rules pertaining to mandate, prohibition, and review appear in CCP §§1107-1110b.

NOTE: Writs of prohibition and review challenge judicial action, which generally only courts can take. Thus, these writs are rarely sought in the superior court. On the use of prohibition and review in superior court proceedings, see §§4.5-4.8 (prohibition), 4.13-4.15 (review).

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§5.4 2. Other Statutes Made Applicable to Writ Proceedings

Code of Civil Procedure §1109 makes the provisions of part two of the Code of Civil Procedure applicable to mandate, prohibition, and review (certiorari) proceedings. Accordingly, the code sections governing pleading and practice in ordinary civil cases (see CCP §§307-1062.20) apply to mandate, prohibition, and review proceedings except as otherwise provided in CCP §§1067-1110b. For example, although CCP §412.20 allows a defendant 30 days to file a responsive pleading in an ordinary civil case, CCP §1089.5 provides specific time periods for filing a responsive pleading in a mandate proceeding when no alternative writ has issued. See also CCP §§23, 363 (construing "action" as used in Title 2 of Code of Civil Procedure as including special proceedings of civil nature (*e.g.,* writ proceedings)).

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§5.5 3. Rules of Court

Some California Rules of Court apply to writ proceedings:

- Rule 2.2 provides that the trial court rules (Cal Rules of Ct 2.1-2.1100) "apply to all cases in the superior courts unless otherwise specified by a rule or statute."
- Rules 3.1100 and 3.1103(a)(2) expressly make the general law and motion rules (Cal Rules of Ct 3.1100-3.1370) applicable to superior court writ proceedings.

See also Cal Rules of Ct 1.6 (defining "action" to include "special proceedings" (*e.g.,* writ proceedings); and defining "civil case" to mean any case prosecuted "for the declaration, enforcement, or protection of a right or the redress or prevention of a wrong" and including "all cases except criminal cases and petitions for habeas corpus").

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§5.6 B. Local Rules and Procedures

Given the relatively few statutes and rules of court that specifically address writ proceedings, and the resulting lack of clear procedural directions, a number of superior courts have adopted local rules governing writ proceedings. Even when a superior court has not adopted local rules, there may be local practices that the court expects parties to follow. Thus, before initiating a writ proceeding, a petitioner must check for applicable local rules and contact the court clerk to determine whether the court has specific or preferred procedural practices for writ proceedings.

PRACTICE TIP: When contacting a court clerk, parties must remember that clerks cannot provide substantive legal advice.

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§5.7 1. Local Rules

Some superior courts have adopted local court rules or published guidelines for writ proceedings. See Amador Ct R 11.18 (noticed motion procedure should be used for bringing petition on for hearing "whenever possible"); Contra Costa Ct R 7(G)(1)(a) (specifying procedure for setting hearing on petition for writ of mandate); Imperial Ct R 3.4.0(a) (noticed motion procedure should be used "whenever possible"); Los Angeles Ct R 9.5(d)(1) (noticed motion procedure preferred); Sacramento County Superior Court Guide to the Procedures for Prosecuting Petitions for Prerogative Writs, p. 7 (same) (see copy in App B); San Diego Ct R 2.4.8(A) (same); San Francisco Ct R 8.1(A)(3)(a) (writs heard in civil law and motion department).

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§5.8 2. Unwritten Procedures

Even when a court has not adopted local rules or published guidelines on writ proceedings, it still may have established or preferred practices. For example, in some counties, the presiding judge determines the procedures applicable to writ proceedings. In other counties, designated writ departments may have their own unwritten procedural conventions. As a result, these unwritten procedures may change as judges rotate in and out of assignments. In still other counties, unwritten procedures may have remained constant for a number of years. Thus, if there are no published local rules or guidelines, parties to a writ proceeding should contact the court clerk (or research attorney, if appropriate) to determine whether the court has preferred procedures for handling writ petitions. Court clerks and research attorneys, however, can provide information only as to general court procedures; they cannot provide any substantive legal advice.

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§5.9 C. Procedural Options: Noticed Motion or Alternative Writ

Over the years, two procedural options have become the standard methods for prosecuting writ proceedings in the superior courts: (1) the noticed motion procedure and (2) the alternative writ procedure (order to show cause procedure in the context of writs of review (certiorari)). A writ petition will make its way through the court in a slightly different way depending on which procedure is used, and each procedure has its particular advantages and disadvantages. But ultimately, these procedures are simply two different routes to the same goal—obtaining a hearing on the merits of the writ petition.

Some superior courts have an expressed preference as to which procedure should be used. See Amador Ct R 11.18 (noticed motion procedure should be used "whenever possible"); Imperial Ct R 3.4.0(a) (same); Los Angeles Ct R 9.5(d)(1) (same); Sacramento County Superior Court Guide to the Procedures for Prosecuting Petitions for Prerogative Writs, p. 7 (same) (see copy in App B); San Diego Ct R 2.4.8(A) (same). Local rules also may set out a wholly unique procedure for handling writ petitions. See Contra Costa Ct R 7(G)(1)(a) (in mandate proceedings, petitioner appears ex parte to schedule status conference at which hearing date and briefing schedule will be set). If there are no local rules, the court may have unwritten practices as to how it handles writ proceedings.

PRACTICE TIP: The noticed motion procedure is the more common method used to prosecute superior court writ petitions, particularly in larger jurisdictions, although there may be times when the alternative writ procedure is preferable. See §§5.16-5.18.

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1. Noticed Motion Procedure

§5.10 a. Chronology of Noticed Motion Procedure

If the petitioner uses the noticed motion procedure:

- The petitioner files the writ petition and obtains a summons. The petition is the operative pleading that initiates the proceeding, just as a complaint initiates a civil action. See §§5.20-5.70.
- The petitioner serves the petition and summons but does not make any application for or serve any motion seeking issuance of a peremptory writ at that time. See §§5.76-5.85.
- If necessary to prevent irreparable injury pending disposition of the petition, the petitioner may seek a stay. See chap 6.
- The respondent or real party in interest files a responsive pleading or motion, *e.g.,* a demurrer or answer. See §§8.6-8.15.
- If permissible in the particular writ proceeding, the parties may conduct discovery, or, if the writ proceeding is based on an administrative record and the record has not already been requested or prepared and lodged with the court, the parties will request or prepare the record. See chap 7.
- When ready to proceed with the hearing on the merits of the petition, the petitioner files and serves a motion for issuance of the requested writ. See §§5.86-5.107.
- The respondent or real party in interest files opposition to the motion. See §§8.16-8.20.
- The petitioner may, and should, file a reply. See §§8.62-8.63.
- The court holds a hearing on the motion and either grants or denies the writ petition. See §§9.25-9.48.

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b. Advantages and Disadvantages of Noticed Motion Procedure

§5.11 (1) No Need for Ex Parte Appearance

At the time the writ petition is filed, a petitioner does not need to appear ex parte to obtain issuance of an alternative writ or file any other documentation in support of the petition (*e.g.,* supporting memorandum, declarations).

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§5.12 (2) Time Savings for Court

The use of the noticed motion procedure means that the superior court usually spends no time on the writ proceeding until shortly before the noticed hearing on the merits. In courts with a high number of writ proceedings or a dedicated writ department, not having to review and act on alternative writ applications can add up to a significant savings of time and judicial resources.

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§5.13 (3) Hearing on Merits Likely

The court can deny an application for an alternative writ and dismiss the writ petition. See §§9.17-9.19. If the petitioner uses the noticed motion procedure, however, the first time the court considers the matter is usually at the hearing on the merits of the petition, unless the respondent or real party in interest files a demurrer or other motion aimed at dismissing the petition. See §§8.40-8.44, 8.50-8.56. The noticed motion procedure often ensures a hearing on the merits. See §§5.86-5.107.

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§5.14 (4) Control Over Timing of Hearing on Merits

The noticed motion procedure allows the petitioner to control the timing of the hearing on the merits, which may be important if the writ proceeding is complex or involves a large record, or if counsel for the petitioner has special time constraints. The petitioner wants to ensure ample time to brief the merits of the petition.

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2. Alternative Writ Procedure

§5.15 a. Chronology of Alternative Writ Procedure

If the petitioner uses the alternative writ procedure:

- The petitioner prepares the writ petition, an application for an alternative writ, a supporting memorandum, and any supporting declarations and exhibits, and submits these to the court on an ex parte basis. See §§5.108-5.118. On the notice and service required for an ex parte hearing on an application for an alternative writ, see §5.115.
- The respondent or real party in interest may, but is not required to, oppose an ex parte application for an alternative writ. Many superior courts view alternative writs simply as a means of giving notice of the date of the hearing on the merits of the writ petition and therefore routinely issue them, absent some glaring deficiency in the petition. Even so, the respondent or real party in interest still may want to appear at the ex parte hearing to weigh in on the return date, briefing schedule, and hearing date. See §§8.21-8.31.
- If the court issues the alternative writ, the writ will set forth the date for the return (*i.e.,* the date by which the respondent or real party in interest must file a responsive pleading) and also a date for the hearing on the merits of the writ petition, which may be (but usually is not) the same as the return date. See §§9.6-9.10.
- If the court denies the application for an alternative writ, the court might also dismiss the petition if it is procedurally defective or meritless on its face. See §§9.17-9.19. If the court merely denies the application for an alternative writ but leaves the writ petition pending (an unlikely, but possible scenario), the petitioner can proceed by way of the noticed motion procedure to obtain a hearing on the merits. See §9.19.
- After the court issues an alternative writ and if it is permissible in the particular writ proceeding, the parties may conduct discovery, or, if the writ proceeding is based on an administrative record and the record has not already been requested or prepared and lodged with the court, the parties request or prepare the record. See chap 7.
- The respondent and any real party in interest may (and should) file a return supported by a memorandum opposing issuance of a writ. See §§8.35-8.38.
- The petitioner may (and should) file a reply. See §§8.57-8.63.
- The court holds a hearing and either grants or denies the writ petition. See §§9.25-9.48.

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b. Advantages and Disadvantages of Alternative Writ Procedure

§5.16 (1) Immediate Relief Possible

If the court issues an alternative writ, the respondent may comply (*e.g.,* by setting aside its decision or changing its action) rather than show cause why it should not be compelled to do so, thus sparing the petitioner further time and expense in proceeding with challenging the decision or action. (If the respondent does comply with the alternative writ, the petitioner should notify the court immediately.) On compliance, see §§10.3-10.10.

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§5.17 (2) Early Hearing

If the court issues an alternative writ, the writ will set dates for the return and the hearing on the merits of the writ petition, which may be sooner than if the noticed motion procedure were used. For example, an alternative writ might impose a shorter deadline for filing a responsive pleading than the 30 days that the respondent or real party in interest would otherwise have if the noticed motion procedure were used. Compare CCP §1089 (responsive pleading when alternative writ issued) and §1089.5 (responsive pleading when no alternative writ sought). On responsive pleadings, see §§8.35-8.56. Similarly, an alternative writ might set a tight briefing schedule and a hearing date soon after the date for the return. Although a compressed timetable will not be feasible or appropriate in many cases, shorter time periods might be appropriate if there is a small record and the petition raises a straightforward legal question.

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§5.18 (3) Court Can Deny Alternative Writ and Dismiss Petition

Unlike the noticed motion procedure, in which the petitioner largely controls the timing of the hearing on the merits, there is a risk that the court might deny the application for an alternative writ and dismiss the writ petition (*e.g.,* if the court determines that the petition is procedurally defective or meritless on its face). See §§9.17-9.19.

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§5.19 3. Issuance of Peremptory Writ in First Instance Unusual

The writ statutes permit a superior court to grant a peremptory writ in the first instance if the petitioner gives 10 days' notice of the application for a writ. See CCP §1088. However, this is not a procedure commonly used in the superior courts, no doubt because it does not provide a reasonable time for the respondent or real party in interest to respond or for busy courts to review the merits of the petition. If immediate action is required, the courts prefer to consider a stay request. See chap 6. On the issuance of a preemptory writ in the first instance in appellate court writ proceedings, see §§22.18-22.22.

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§5.20 III. DRAFTING THE WRIT PETITION

Regardless of whether the petitioner proceeds by way of the noticed motion procedure (see §§5.10-5.14) or the alternative writ procedure (see §§5.15-5.18), the initiating document is the writ petition.

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§5.21 A. Format Requirements

All papers filed in a superior court writ proceeding must comply with the rules of court generally governing the format of papers presented for filing (see Cal Rules of Ct 2.100-2.119) as well as the rules specifically governing the format of motion papers (see Cal Rules of Ct 3.1110-3.1370).

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1. In General

§5.22 a. Typewritten or Printed

Papers must be typewritten, printed, or prepared by a photocopying process that produces clear and permanent copies equally as legible as printing in type not smaller than 12 points. Cal Rules of Ct 2.104. The type face must be the equivalent of Courier, Times New Roman, or Arial, and the print color must be blue-black or black. Cal Rules of Ct 2.105-2.106. Lines must be 1½-spaced or double-spaced, on consecutively numbered lines. Cal Rules of Ct 2.108(1). The paper should be printed on one side only. Cal Rules of Ct 2.102.

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Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/§5.23 b. Type and Size of Paper

§5.23 b. Type and Size of Paper

The paper must be (Cal Rules of Ct 2.103):

- White or unbleached;
- Opaque;
- Unglazed;
- Of standard quality not less than 20-pound weight; and
- 8½ by 11 inches.

In addition, the paper used in all original papers filed with the court and in all copies, documents, and exhibits, whether filed or served on other parties, must be recycled. Cal Rules of Ct 2.101(a).

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§5.24 c. Margins

The left margin must be at least 1 inch wide and the right margin at least ½ inch wide. Cal Rules of Ct 2.107.

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§5.25 d. Line Numbers

Lines on each page must be consecutively numbered starting with the number 1, placed at the left margin, and separated from the text by a vertical column of space at least one-fifth (1/5) inch wide or a single or double vertical line. Each line number must be aligned with a line of type, or the line numbers must be evenly spaced vertically on the page. There must be at least three line numbers for every vertical inch on the page. Cal Rules of Ct 2.108(4).

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§5.26 e. Page Numbers

Unless a rule provides otherwise for a particular type of document, each page must be numbered consecutively at the bottom. Cal Rules of Ct 2.109, 3.1110(c).

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§5.27 f. Binding

The pages must be firmly bound together at the top and consist entirely of original pages without riders. Cal Rules of Ct 2.113, 3.1110(e). If the circumstances warrant it, the petition can be bound with a supporting memorandum and paginated consecutively. Cal Rules of Ct 3.1112(c).

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§5.28 g. Hole Punching

Each paper presented for filing must be prepunched with two holes centered 2½ inches apart and ⅝ inches from the top of the paper. Cal Rules of Ct 2.115.

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§5.29 h. Exhibits

Exhibits may be fastened to 8½ by 11-inch pages, but must be as legible and permanent as typewritten material. Cal Rules of Ct 2.114. In addition, each exhibit must be separated by a hard 8½ by 11-inch sheet with hard paper or plastic tabs extending below the bottom of the page, bearing the exhibit designation. There must be an exhibit index. Pages from a single deposition and associated exhibits must be designated as a single exhibit. Exhibits written in a foreign language must be accompanied by an English translation certified under oath by a qualified interpreter. Cal Rules of Ct 3.1110(f)-(g). On exhibits generally, see chap 7.

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§5.30 i. Footer

All papers filed with the court must have a footer in the bottom margin of each page that contains the title of the document or some clear, concise abbreviation of the title. The footer must be in at least 10-point type. This requirement does not apply to exhibits (Cal Rules of Ct 2.110) or to an administrative record lodged with the court (see §7.21).

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§5.31 2. First (Caption) Page

The first page of a writ petition filed in the superior court (sometimes called the caption page) must set forth (CCP §422.30; Cal Rules of Ct 2.111):

- The name, State Bar membership number, address, telephone number, fax number, and e-mail address (if available) of the attorney or unrepresented party who is filing the petition.
- The title of the court and county in which the action is brought, and a space for the number of the case, which will be stamped by the clerk when the petition is filed.
- The title of the case, which should include the names of all the parties, including every real party in interest. See CCP §422.40. Omitting a necessary party could render a writ ineffective by failing to bring that party before the court.
- The title of the document, indicating the nature of the proceeding (*e.g.*, "PETITION FOR WRIT OF MANDATE (CCP §1085)"). The given title is not determinative of the nature of the proceeding and does not limit the relief that can be granted; the petition's allegations control. *Jaffe v Carroll* (1973) 35 CA3d 53, 57, 110 CR 435; *Coffelt v Coffelt* (1964) 229 CA2d 659, 665, 40 CR 513. See *Lee v Blue Shield* (2007) 154 CA4th 1369, 1378, 65 CR3d 612 (court should have treated complaint for declaratory relief as petition for writ of mandate).
- In a limited jurisdiction civil case, the phrase "Limited Civil Case." On writ petitions in limited jurisdiction civil cases, see chap 12.

For a sample caption page, see form in §13.1.

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B. Designation of Parties

§5.32 1. Petitioner

The party instituting a civil writ proceeding typically is called the petitioner. The writ statutes allow use of the terms "plaintiff" and "defendant." CCP §1063. However, that terminology is not commonly used in writ proceedings.

PRACTICE TIP: Occasionally, a clerk's office will improperly refuse to file documents that use a nonstandard term for the parties. The safer approach, therefore, is to use the more common terms "petitioner," "respondent," and "real party in interest."

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§5.33 2. Respondent

The entity (*e.g.,* a governmental body or agency, or private corporation or association), official, or employee whose action or decision is being challenged in the writ proceeding is the respondent. See *Sustainability of Parks, Recycling & Wildlife Legal Defense Fund v County of Solano Dep't of Resource Mgmt.* (2008) 167 CA4th 1350, 1358, 84 CR3d 889 (holding landfill operator was not "indispensable party" to writ proceeding because petition sought to enforce ministerial duty of county department).

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3. Real Party in Interest

§5.34 a. Determining Existence

A real party in interest is any entity or person whose interest will be directly affected by the outcome of the writ proceeding. See *Tracy Press, Inc. v Superior Court* (2008) 164 CA4th 1290, 1297-1302, 80 CR3d 464 (writ petition filed in superior court properly named real party in interest, but writ petition filed in court of appeal did not and therefore was dismissed). Usually the real party in interest has been a participant in the underlying proceedings giving rise to the writ proceeding. *Sonoma County Nuclear Free Zone '86 v Superior Court* (1987) 189 CA3d 167, 173, 234 CR 357. In cases challenging or reviewing the actions of the state, a county, city, agency, board, school district, corporation, or charitable organization, or of an official of any of these entities, there often is no real party in interest. This is often the case in superior court writ proceedings. The petitioner and respondent (*e.g.*, a local school district) are the only parties. See *Vasquez v Happy Valley Union Sch. Dist.* (2008) 159 CA4th 969, 978, 72 CR3d 15 (only parties were petitioner (terminated teacher) and respondent (school district)); *Building Material & Constr. Teamsters Union, Local 216 v Farrell* (1986) 41 C3d 651, 656, 224 CR 688 (only parties were petitioner (union) and respondent (city agency)).

However, this is not always the case. See *California Correctional Peace Officers Ass'n v State Personnel Bd.* (1995) 10 C4th 1133, 1140, 43 CR2d 693 (parties were petitioner (union), respondents (State Personnel Board), and real parties in interest (Department of Corrections and Department of Youth Authority)); *Imagistics Int'l, Inc. v Department of Gen. Servs.* (2007) 150 CA4th 581, 585, 59 CR3d 18 (parties were petitioner (Imagistics International), respondent (Department of General Services), and real party in interest (Sharp Electronics)); *Savient Pharms., Inc. v Department of Health Servs.* (2007) 146 CA4th 1457, 1461, 53 CR3d 689 (parties were petitioner (Savient Pharmaceuticals), respondent (Department of Health Services), and real party in interest (Ramsell Corporation)). See also *Fonseca v Fong* (2008) 167 CA4th 922, 927 n6, 84 CR3d 567 (sheriff, not police department, administered jail; real party in interest problem "solved" by assuming sheriff had "self interest" in complying with court's ruling).

PRACTICE TIP: In determining whether a real party in interest exists, it may be helpful to consider the concept of indispensable parties in ordinary civil actions. A person is an indispensable party if the party's absence will prevent the court from granting a complete determination of the matter, or will seriously prejudice any party before the court, or if a judgment rendered will inequitably affect or jeopardize the party's interest. See CCP §389; *Hebbard v Colgrove* (1972) 28 CA3d 1017, 1026, 105 CR 172. See also California Civil Procedure Before Trial §§14.8-14.12 (4th ed Cal CEB 2004).

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§5.35 b. Right to Notice and Hearing

Any real party in interest *must* be named in the petition, is entitled to notice, and has a right to be heard. CCP §389; *Sonoma County Nuclear Free Zone '86 v Superior Court* (1987) 189 CA3d 167, 173, 234 CR 357; 8 Witkin, California Procedure, *Extraordinary Writs* §§166-168 (5th ed 2008). This requirement flows from due process principles and the fact that issuance of a peremptory writ will overturn a decision favoring the real party in interest, thus directly affecting a party who would presumably want the action or decision upheld.

PRACTICE TIP: The petitioner must make every effort to identify and name all real parties in interest. Failure to do so may result in delay or dismissal of the petition. See *Tracy Press, Inc. v Superior Court* (2008) 164 CA4th 1290, 1297-1302, 80 CR3d 464 (writ petition filed in superior court properly named real party in interest, but writ petition filed in court of appeal did not and therefore was dismissed); *Inland Counties Reg'l Ctr. v Office of Admin. Hearings* (1987) 193 CA3d 700, 704, 238 CR 422 (affirming trial court's order setting aside judgment granting writ of mandate because petition failed to name minor as real party in interest).

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C. Requesting Alternative Forms of Writ Relief

§5.36 1. Selecting Wrong Writ Usually Not Fatal

Most courts will not refuse relief just because the petitioner has asked for the wrong type of writ as long as the petition adequately alleges, and the petitioner proves, entitlement to writ relief. See *Coelho v State Personnel Bd.* (1989) 209 CA3d 968, 971, 257 CR 557 (petitioner incorrectly requested administrative mandamus but alleged an abuse of discretion; court should have considered petition as one for traditional mandate); *Eureka Teachers Ass'n v Board of Educ. of the Eureka City Schs.* (1988) 199 CA3d 353, 366, 244 CR 240 (when parties seek wrong writ, superior court must review petition under standard of review of proper writ). See also *Lee v Blue Shield* (2007) 154 CA4th 1369, 1378, 65 CR3d 612 (court should have treated complaint for declaratory relief as petition for writ of mandate); Chernoff & Watson, *Writ Lore*, 56 Cal SBJ 12 (1981).

PRACTICE TIP: Although courts may not deny relief because the petitioner asks for the wrong writ, a sloppy and inartful pleading does not make a favorable first impression, particularly if review is sought under a statute specifying a particular writ. For examples of writs authorized by statute, see chaps 2-4; §§16.2-16.85.

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§5.37 2. Pleading and Praying for Different Forms of Writ Relief

The requirements for various writs are not jurisdictional straitjackets limiting the petitioner's choice of relief, and it may be unclear in some cases which writ is appropriate. Thus, it is not uncommon to seek alternative forms of relief —*e.g.*, a peremptory writ of mandate under CCP §1085 or §1094.5, or a peremptory writ of mandate or prohibition. See *Eder v California Dep't of Fish & Game* (2009) 170 CA4th 216, 87 CR3d 788 (seeking relief under §1085 and §1094.5); *Young v Gannon* (2002) 97 CA4th 209, 219, 118 CR2d 187 (same). See also *Neighbors in Support of Appropriate Land Use v County of Tuolumne* (2007) 157 CA4th 997, 1004, 68 CR3d 882 (considering issue under both §1085 and §1094.5, with same result). The petition can be entitled as follows: "PETITION FOR WRIT OF MANDATE (CCP §1085) OR ADMINISTRATIVE MANDAMUS (CCP §1094.5)." Another option would be: "PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER EXTRAORDINARY RELIEF."

JUDICIAL PERSPECTIVE: If there is a wrong to be corrected, many judges will fashion an appropriate remedy despite a writ petition that asks for the incorrect type of relief.

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D. Contents of Petition

§5.38 1. Opening Paragraph

The opening paragraph of the petition should succinctly state the type of writ being sought and why writ relief is proper (*e.g.,* no other adequate legal remedy) and necessary (*e.g.,* the respondent has failed to perform an act required by law).

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§5.39 2. Request for Stay

Any stay request should be noted in the opening paragraph, *e.g.,* "In addition to a writ of mandate, the petitioner also seeks issuance of an immediate stay." In addition, the facts supporting a stay must be alleged in the subsequent enumerated paragraphs of the petition, and the prayer for relief should include a request for a stay. The request should also appear on the caption page of the petition.

PRACTICE TIP: A petitioner should not rely on a stay request in the petition to bring the request to the attention of the court. Rather, the petitioner should prepare a separate stay application or seek preliminary injunctive relief. On requesting a stay or preliminary injunctive relief, see chap 6.

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§5.40 3. Enumerated Allegations

The heart of the petition consists of a series of enumerated factual allegations that tell the court all the information it needs to make a decision in the case, *e.g.*, who the parties are, the factual background and procedural history, the challenged action or decision, and the basis for challenging it.

PRACTICE TIP: The allegations in the following section are only examples. Their language and the order in which they appear should not be slavishly followed. The allegations must be case specific. On the proper style for the statement of facts, see §5.46.

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a. Identity of Parties

§5.41 (1) Form: Petitioner

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5.41-1 Allegation concerning petitioner

[1.] Petitioner(s) _ _[*specify name(s)*]_ _ _ _[*is/are*]_ _ **now and at all times mentioned in this petition** _ _[*explain role and beneficial interest of petitioner(s) in the proceeding, e.g., individual who was denied building permit, agency entitled to retroactive payment of taxes*]_ _**.**

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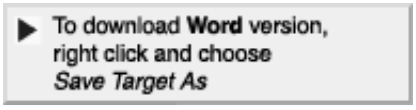
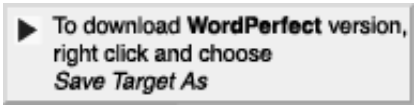
Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/§5.42 (2) Form: Respondent

§5.42 (2) Form: Respondent





5.42-1 Allegation concerning respondent

[2.] Respondent(s) _ _[*specify name(s)*]_ _ _ _[*is/are*]_ _ **now and at all times mentioned in this petition** _ _[*has/have*]_ _ **been** _ _[*a/an/the*]_ _ _ _[*designate type of inferior tribunal or officer, e.g., board, agency, or commissioner*]_ _**, responsible for administering the** _ _[*statute/ordinance/regulation*]_ _ **and** _ _[*obligated to perform the ministerial duty of* _ _[*specify duty*]_ _*/exercising adjudicatory functions in connection with* _ _[*specify proceeding*]_ _]_ _**.**

5.42-2 Optional addition to 5.42-1: Individual respondent

[3.] Respondent _ _[*name of public official or other individual respondent*]_ _ **is now, and at all times mentioned in this petition has been,** _ _[*a/an*]_ _ _ _[*specify position, e.g., Director of the Department of General Services*]_ _**, and in that capacity at all times relevant to these proceedings has** _ _[*failed to perform the ministerial duty of*_ _[*specify duty and manner in which respondent has failed to perform*]_ _*/abused* _ _[*his/her*]_ _*discretion by* _ _[*specify manner in which respondent has abused discretion*]_ _*/exercised powers in excess of* _ _[*his/her*]_ _*jurisdiction in that*_ _[*specify in what manner respondent has acted in excess of jurisdiction*]_ _]**.**

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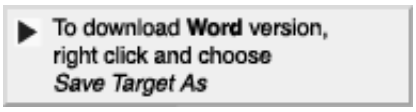
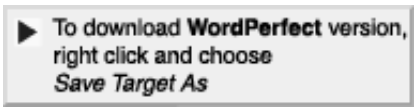
Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/§5.43 (3) Form: Real Party in Interest

§5.43 (3) Form: Real Party in Interest





5.43-1 Allegation concerning real party in interest

[3.] Real Party(ies) in Interest _ _[*specify name(s)*]_ _ _ _[*is/are*]_ _ **now and at all times mentioned in this petition** _ _[*specify role in the proceeding*]_ _**.**

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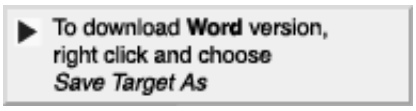
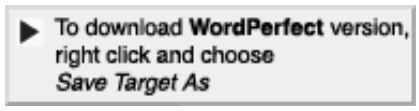
(4) Particular Contexts

§5.44 (a) Form: When Petition Challenges Nonjudicial Action





5.44-1 Allegations when nonjudicial action involved

[*Example 1: Petitioner seeks to compel action by California State Labor Commissioner*]

[1.] Petitioner(s), _ _[*name(s)*]_ _, _ _[*is/are*]_ _ _ _[*give status, e.g., an employee who seeks unpaid wages in three consolidated claims filed with the Labor Commissioner, entitled Able, Baker, and Cooper v William P. Bennett and Alicia Lopez, dba The Open Door, No. 12-12345 (1, 2, 3)*]_ _**.**

[2.] Respondent(s), _ _[*name(s)*]_ _,_ _[*specify connection to matter, e.g., is charged by California State Labor Code §98 with investigating employee complaints and with adjudicating them according to Labor Code guidelines*]_ _**.**

[3.] Real _ _[*party/parties*]_ _ **in Interest** _ _[*is/are*]_ _ _ _[*name(s)*]_ _**.** _ _[*Specify interest in the outcome, e.g.: The order sought by this petition directly affects real parties because they would be obliged to pay all unpaid wages that the California State Labor Commissioner found owing to petitioner employees*.]_ _

[*Example 2: Petitioner seeks to compel county controller to issue retirement check*]

[1.] Petitioner(s) _ _[*is/are*]_ _ **former employee(s) of the County of** _ __ __ _**, having been employed by the County from** _ _[*date*]_ _**, to** _ _[*date*]_ _**, and having retired from such service on** _ _[*date*]_ _**.**

[2.] Respondent(s), _ _[*name(s)*]_ _**,** _ _[*specify connection to matter*]_ _**.**

[*Example 3: Petitioner seeks to compel registrar of voters to delete from ballot the name of an ineligible incumbent, and to add that of petitioner-candidate*]

[1.] Petitioner is, and at all times mentioned in this petition was, a citizen and taxpayer and the candidate receiving the _ _[*e.g., second highest number of votes in the primary election held November 7, 2007, for the office of Judge of the Superior Court for the County of Buena Vista*]_ _**.**

[2.] Respondent(s), _ _[*name(s)*]_ _**,** _ _[*specify connection to matter*]_ _**.**

[*Example 4: Petitioner seeks to compel action by a corporation or association, e.g., when director or stockholder seeks inspection of corporate records*]

[1.] Petitioner(s) _ _[*is/are*]_ _**, and at all times mentioned in this petition** _ _[*was/were*]_ _**,** _ _[*director(s)/stockholder(s) and owner(s) of* _ _[*number*]_ _ *shares of the capital stock*]_ _ **of XYZ Company, Inc., a corporation organized and existing under the laws of**

[*Option 1: Domestic corporation*]

the State of California.

[*Option 2: Foreign corporation*]

the State of _ _[*name*]_ _ **and authorized to do business in California.**

[*Continue*]

[2.] Respondent(s), _ _[*name(s)*]_ _, _ _[*specify connection to matter*]_ _.

Comment: These are examples of challenges to nonadjudicatory action.

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Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/§5.45 (b) Form: When Petitioner Is Party to Ongoing Administrative Proceeding

§5.45 (b) Form: When Petitioner Is Party to Ongoing Administrative Proceeding

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5.45-1 Allegation when petitioner is party to ongoing administrative proceeding

[1.] Petitioner(s), _ _[*name(s)*]_ _**,** _ _[*is/are*]_ _ _ _[*one of*]_ _ **the** _ _[*plaintiff(s)/defendant(s)*]_ _ **in a proceeding** _ _[*now pending/ commenced*]_ _ **in** _ _[*name of, e.g., administrative agency's forum*]_ _**, entitled** _ _[*title of action*]_ _**, No.** _ _**. The** _ _[*plaintiff(s)/defendant(s)*]_ _ **in that proceeding** _ _[*is/are*]_ _ **named in this petition as real** _ _[*party/parties*]_ _ **in interest.**

Comment: This allegation covers the situation in which the petitioner is a party to an ongoing proceeding and wishes to challenge an action that has occurred in that proceeding. The use of this type of allegation in a superior court writ proceeding is rare, however, because the petitioner is usually challenging the *final* decision or action of a governmental or private entity. The petitioner may want to add a more specific allegation concerning the agency, *e.g.,* when a challenge to the hearing officer is involved.

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b. Describing Challenged Action and Factual Background

§5.46 (1) Style for Statement of Facts

The factual story should be told simply and directly, in whatever sequence provides the maximum force and continuity. The petitioner should avoid excessive formalism and try to be clear and straightforward. The factual allegations in the petition should be made in the ultimate-fact style characteristic of a complaint. For an example, see form in §13.1.

JUDICIAL PERSPECTIVE: Unless there is good reason not to, it usually is best to tell the court the factual story in chronological order. The petitioner should keep in mind that the judge will not be familiar with the case. If the factual allegations are lengthy, they can be separated into different sections under descriptive headings.

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§5.47 (2) Using Supporting Citations

If the writ proceeding arises from a proceeding that generated a record and that record will be part of the evidentiary basis for the writ proceeding, all factual allegations should cite to the record (if already prepared). Alternatively, if declarations or affidavits have been prepared and will be submitted to the court when the writ petition is filed, the factual allegations should refer to those documents. If the noticed motion procedure is used, supporting declarations and exhibits may be filed later in support of the motion for issuance of a peremptory writ. On the noticed motion procedure, see §§5.10-5.14, 5.76-5.107. On citing to the record, see §7.23.

PRACTICE TIP: It is important for the petitioner to be candid with the court in the factual recitation. Failure to tell the whole story, or to tell it fairly, can be extremely prejudicial to the petitioner's case both because the judge may form a negative opinion of the petitioner's case and because of the risk of creating an unclean hands defense.

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§5.48 (3) Relating to Legal Basis for Relief

The factual allegations must set forth all facts necessary to support the ground urged for issuance of the writ, *e.g.,* acting contrary to the law or an abuse of discretion. On the legal bases for writ relief, see chaps 2-4.

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Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/§5.49 c. Describing Basis for Challenging Action

§5.49 c. Describing Basis for Challenging Action

The allegations identifying the basis for relief are the crux of the writ petition. These allegations cannot be reduced to a formula; rather, they depend on the facts of the particular case. If the allegations in the petition flow chronologically, as recommended (see Judicial Perspective in §5.46), the allegations setting forth the basis for relief will follow the factual and procedural recitation. For an example, see form in §13.1.

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§5.50 (1) Specific Allegations Required for Mandate

To obtain a writ of mandate, the petition must allege, in addition to or in conjunction with the allegations discussed above, the following:

- The petitioner's beneficial interest in the outcome of the proceedings.
- The petitioner's clear, present, and legal right to the respondent's performance.
- The respondent's present legal duty and present ability to perform.
- The respondent's failure and refusal to perform, or the respondent's abuse of discretion.
- The lack of any plain, speedy, and adequate legal remedy.

On mandate generally, see chap 2.

PRACTICE TIP: An alternative writ of mandate, in and of itself, does not stay the challenged action or decision. To obtain temporary relief, the writ petition can include a request for and allegations supporting a stay. See §§5.39, 5.58. On stays in the superior court, see chap 6.

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§5.51 (2) Specific Allegations Required for Prohibition

To obtain prohibitory relief restraining a quasi-judicial tribunal or officer from acting without or in excess of jurisdiction (rarely applicable in superior court writ proceedings), the petition must allege, in addition to or in conjunction with the allegations discussed above, the following:

- Pendency of the action or proceeding over which the respondent exercises or is threatening to exercise judicial functions.
- The respondent's exercise of judicial functions.
- The respondent's intent, unless prohibited, to act or to continue to act without or in excess of jurisdiction (*e.g.*, to proceed to hear and determine the action or proceeding or to make or render a certain invalid order, judgment, or decision).
- The lack of any plain, speedy, and adequate legal remedy.

On prohibition generally, see §§4.2-4.9.

PRACTICE TIP: Although an alternative writ of prohibition in theory effects a stay by its own terms (see CCP §1104), to ensure immediate temporary relief, the writ petition can include a request for and allegations supporting a stay. See §§5.39, 5.58. On stays in the superior court, see chap 6.

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§5.52 (3) Specific Allegations Required for Review (Certiorari)

To obtain a writ of review (certiorari) of completed quasi-judicial action (rarely applicable in superior court writ proceedings), the petition must allege, in addition to or in conjunction with the allegations discussed above, the following:

- The respondent's exercise of judicial functions.
- A description of the completed judicial act sought to be reviewed for excess of jurisdiction.
- The reason or reasons for the invalidity of the respondent's action.
- The lack of a right of appeal, and the lack of any plain, speedy, and adequate legal remedy.

On writs of review generally, see §§4.10-4.16.

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d. Absence of Adequate Legal Remedy

§5.53 (1) Requirement for Mandate and Prohibition

Mandate and prohibition will issue only when the petitioner has no plain, speedy, and adequate remedy at law. CCP §§1086, 1103(a). For discussion, see §§2.15-2.16, 4.9.

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§5.54 (2) Form: Absence or Inadequacy of Other Remedies

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5.54-1 Allegation concerning absence or inadequacy of other remedies

[11.] Petitioner(s) _ _[*has/have*]_ _ **no plain, speedy, or adequate remedy** _ _[*at law*]_ _ **to challenge respondent's(s')** _ _[*order/judgment/decision of* _ _[*date*]_ _]_ _ **(Exhibit** _ _**) other than the relief sought in this petition.** _ _[*Detail factual basis supporting why petitioner(s) has/have no plain, speedy, and adequate remedy and what specific harm will result if writ relief is denied*.]_ _

Comment: This allegation is usually one of the last allegations in the petition and is numbered sequentially. Petitioners must be specific in explaining why there is no adequate remedy at law and what specific harm will result if writ relief is denied. *Phelan v Superior Court* (1950) 35 C2d 363, 370, 217 P2d 951. In a writ of review (certiorari) proceeding, the petitioner must allege not only the absence or inadequacy of other remedies but also that there is no right of appeal. CCP §1068(a). For discussion, see §4.16.

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e. Exhaustion of Administrative Remedies

§5.55 (1) Aspect of No-Adequate-Legal-Remedy Requirement

An aspect of the requirement that the petitioner have no adequate legal remedy is that the petitioner must exhaust all available administrative remedies before an administrative decision can be challenged through a writ proceeding. For further discussion, see §2.34.

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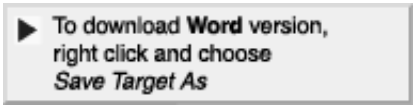
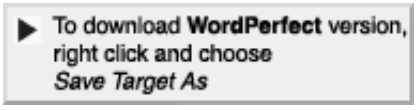
Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/§5.56 (2) Form: Exhaustion of Administrative Remedies

§5.56 (2) Form: Exhaustion of Administrative Remedies





5.56-1 Alternative: Allegation concerning exhaustion of all available remedies (administrative or other nonjudicial remedies)

[10.] Petitioner(s) _ _[*has/have*]_ _ **exhausted all available** _ _[*administrative*]_ _ **remedies required to be pursued by** _ _[*him/her/it/them*]_ _**,** _ _[*as set forth in Paragraph* _ _ *above/as follows:*]_ _ _ _[*Specify*]_ _**.**

5.56-2 Alternative: Allegation concerning failure to exhaust remedies (administrative or other nonjudicial remedies)

[10.] Petitioner(s) _ _[*has/have*]_ _ **not exhausted all available** _ _[*administrative*]_ _ _ _[*remedy/remedies*]_ _ **provided by** _ _[*e.g., statute/bylaws/contract*]_ _ **because** _ _[*e.g., the remedy is inadequate/to do so would cause irreparable injury*]_ _ **in that** _ _[*state in sufficient detail why available remedies have not been exhausted*]_ _**.**

Comment: When using this allegation, the petitioner should state clearly and concisely the steps taken, if any, otherwise required by law, administrative regulations, organizational rules, or contract provisions, and the specific reasons why any additional steps were not taken.

5.56-3 Alternative: Allegation concerning futility of exhausting administrative or other nonjudicial remedies

[10.] Petitioner(s) _ _[*has/have*]_ _ **not exhausted all available** _ _[*administrative*]_ _ _ _[*remedy/remedies*]_ _ **provided by** _ _[*e.g., statute/bylaws/contract*]_ _ **because it would be futile to do so in that** _ _[*state in sufficient detail why it would be futile to exhaust administrative remedies*]**.**

Comment: Futility is a narrow exception and will not suffice unless the petitioner "can positively state that [the respondent] has declared what its ruling will be in a particular case." *Sea & Sage Audubon Soc'y v Planning Comm'n* (1983) 34 C3d 412, 418, 194 CR 357. For further discussion of the futility exception, see California Administrative Mandamus §3.43 (3d ed Cal CEB 2003).

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§5.57 f. Alleging Damages if Appropriate

In mandate and prohibition proceedings, the petitioner can recover damages resulting from the challenged action or decision. CCP §1095. Damages may be enforced in the manner provided for money judgments generally. CCP §1095. In cases in which the respondent is an officer or employee of a public entity, any damages are recoverable against the entity, not the official or employee, provided the court finds that the official or employee appeared and defended in good faith. CCP §1095.

PRACTICE TIP: Claim filing requirements and various governmental immunities may affect the petitioner's ability to recover damages against a public entity. See California Government Tort Liability Practice, chaps 5, 10 (4th ed Cal CEB 1999).

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§5.58 g. Alleging Basis for Stay if Requested

If a stay is requested by application or request for temporary restraining order, the allegations must detail the facts and circumstances establishing that a stay is appropriate. On requesting a stay, see chap 6. If the stay would cause some apparent harm to the respondent or real party in interest, the petitioner may offer, if possible, to alleviate or diminish the harm in some way or provide clear evidence that the relative harm to the petitioner if the court denies the stay is greater.

PRACTICE TIP: A petitioner who intends to seek a stay of the challenged action or decision should do so at the earliest opportunity. Delay undercuts any alleged need for a stay and may result in the court denying a stay request.

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§5.59 h. Prayer for Relief

The prayer for relief follows the allegations and precedes the verification. The prayer should specify all types of relief sought by the petitioner, including any damages. When a stay is requested (see chap 6), it should be mentioned first. In addition, many courts will accept a request for both an alternative writ followed by issuance of a peremptory writ and a request for peremptory writ issued pursuant to noticed motion.

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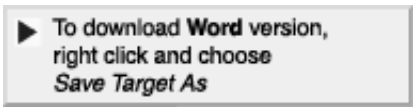
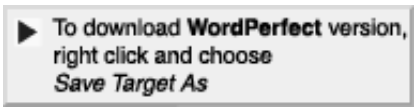
Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/§5.60 (1) Form: Types of Relief

§5.60 (1) Form: Types of Relief





5.60-1 Opening language of prayer

WHEREFORE, petitioner respectfully prays that:

5.60-2 Optional: Stay

[1.] This Court immediately stay _ _[*specify what is to be stayed and, if administrative action is involved, give case number*]_ _**.**

5.60-3 Alternative: Petitioner seeks alternative writ of mandate

[2.] An alternative writ of mandate issue under seal of this Court commanding _ _[*respondent(s)/real* _ _[*party/parties*]_ _ *in interest*]_ _ _ _[*specify names of those to whom order is directed*]_ _ **to** _ _[*set out acts or duties required to be performed*]_ _**, or to show cause before this Court, at a time and place then or thereafter specified by Court order, why** _ _[*it/they*]_ _ _ _[*has/have*]_ _ **not done so and why a peremptory writ should not issue.**

[3.] On the return of the alternative writ and hearing on the order to show cause, a peremptory writ of mandate issue under seal of this Court compelling respondent(s) to _ _[*set out acts or duties to be performed*]_ _**.**

5.60-4 Alternative: Petitioner seeks alternative writ of prohibition

[2.] An alternative writ of prohibition issue under seal of this Court commanding _ _[*respondent(s)/real* _ _[*party/parties*]_ _ *in interest*]_ _ _ _[*specify names of those to whom order is directed*]_ _ **to desist and refrain from taking any further action or proceedings** _ _[*including, e.g., trial/continuance/enforcement of earlier proceedings*]_ _ **in the above described** _ _[*action/matter*]_ _ **until further order of this Court, and directing and requiring respondent(s)** _ _[*and real* _ _[*party/parties*]_ _ *in interest*]_ _ **to show cause before this Court, at a time and place then or thereafter specified by Court order, why it should not be absolutely and forever restrained from any further proceedings in the** _ _[*action/matter*]_ _**; or to show cause before this Court, at a time and place then or thereafter specified by Court order, why** _ _[*it/they*]_ _ _ _[*has/have*]_ _ **not done so and why a peremptory writ should not issue.**

[3.] On the return of the alternative writ and hearing on the order to show cause, a peremptory writ of prohibition issue under seal of this Court restraining respondent(s) absolutely and forever from taking any further proceedings in this _ _[*action/matter*]_ _**.**

5.60-5 Alternative: Petitioner seeks peremptory writ after briefing and a hearing

[2.] A peremptory writ of _ _[*prohibition/mandate*]_ _ **issue under seal of this Court commanding** _ _[*respondent(s)/real* _ _[*party/parties*]_ _ *in interest*]_ _ _ _[*specify names of those to whom order is directed*]_ _ _ _[*to desist and refrain from taking any further action or proceedings* _ _[*including, e.g., trial/continuance/enforcement of earlier proceedings*]_ _ **to** _ _[*set out acts or duties required to be performed*]_ _]_ _**.**

5.60-6 Alternative: Petitioner seeks writ of review (certiorari)

[2.] A writ of review (certiorari) issue under seal of this Court commanding respondent _ _[*state name of court or agency*]_ _ **to certify to this Court, at a time and place specified by Court order, a transcript of the record and proceedings of the above described** _ _[*action/cause/matter/hearing*]_ _**.**

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§5.61 (2) Form: Costs and Attorney Fees

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5.61-1 Request costs and attorney fees (when appropriate)

[4.] This Court award petitioner(s) the costs of this action.

[5.] This Court award petitioner(s) reasonable attorney fees under _ _[*cite applicable authority*]**_ _.**

Comment: On the recovery of costs and attorney fees, see §§5.121-5.127.

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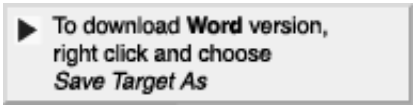
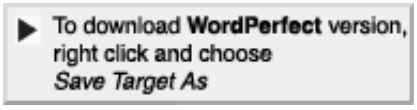
§5.62 (3) Form: Other Appropriate Relief





5.62-1 Request other appropriate relief

[6.] This Court grant such other relief as may be just and proper.

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§5.63 4. Form: Signature Block

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5.63-1 Signature block

Date: _ _ _ _ _ _

Respectfully submitted,
__[*Signature of attorney(s)*]__
_ _[*Typed name(s)*]_ _
Attorney(s) for Petitioner(s)

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§5.64 5. Verification Required

A petition for extraordinary relief must be verified (CCP §§1069, 1086, 1103(a)) in the same manner in which an ordinary civil complaint is verified (CCP §§446, 1109). Either a declaration under penalty of perjury or an affidavit may be used. CCP §§2009, 2015.5. Courts will decline to consider a petition on the merits for lack of, or for an inadequate, verification. See *Krueger v Superior Court* (1979) 89 CA3d 934, 939, 152 CR 870 (appellate court writ petition fatally defective because verification was dated December 3, but body of petition was dated December 22). For a form of verification, see §5.69.

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§5.65 a. Public Entities Exempt

In general, when the petitioner is a governmental body or public officer acting in his or her official capacity, the petition need not be verified. CCP §446(a); see, *e.g.*, *Fremont Union High Sch. Dist. v Santa Clara County Bd. of Educ.* (1991) 235 CA3d 1182, 1188, 286 CR 915 (petitioner school district exempt from verification requirement); *Murrieta Valley Unified Sch. Dist. v County of Riverside* (1991) 228 CA3d 1212, 1223, 279 CR 421 (same); *Elliott v Contractors' State License Bd.* (1990) 224 CA3d 1048, 1054, 274 CR 286 (answer of Contractors' State License Board exempt from verification requirement). But see *People v Superior Court (Alvarado)* (1989) 207 CA3d 464, 469, 255 CR 46 (People's petition must be verified when used as evidence of facts); *Municipal Court v Superior Court* (1988) 199 CA3d 19, 25 n1, 244 CR 591 (writ provisions requiring verification of petitions prevail over §446). The better practice is for the governmental body or official to verify the petition because it is often used as evidence of the facts alleged.

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§5.66 b. Verification Must Be Based on Personal Knowledge

To the extent the petition alleges facts that are intended to be relied on as evidence, the verification must be based on personal knowledge, not information and belief. *Star Motor Imports, Inc. v Superior Court* (1979) 88 CA3d 201, 204, 151 CR 721. When there are no disputed facts, the petition may be based on information and belief. *League of Women Voters v Eu* (1992) 7 CA4th 649, 9 CR2d 416. See also *Soltani-Rastegar v Superior Court* (1989) 208 CA3d 424, 428, 256 CR 255.

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§5.67 c. Petitioner Must Verify Petition

The petitioner must verify the writ petition. CCP §§1069, 1086, 1103(a). Under CCP §446, only in extenuating circumstances may a pleading be verified by the attorney rather than the party litigant. *Perlman v Municipal Court* (1979) 99 CA3d 568, 573, 160 CR 567 (verification by attorney merely for sake of convenience invalid). Extenuating circumstances might include the party's absence from the county in which the attorney's office is located, the party litigant's inability to verify, or the existence of facts that are within the exclusive knowledge of the attorney (*e.g.,* proceedings that occurred in court). See *Suzanne J. v Superior Court* (1996) 46 CA4th 785, 788, 54 CR2d 25 (court dismissed petition in dependency proceeding because mother's attorney had verified petition without explaining why mother had failed to do so or to execute declaration indicating her consent to attorney's doing so).

PRACTICE TIP: Every effort should be made to have the petitioner verify the petition. An attorney who verifies the petition must be careful not to verify facts that constitute a waiver of the attorney-client privilege, thus subjecting the attorney to deposition inquiries concerning the factual basis for the verification. See *Alpha Beta Co. v Superior Court* (1984) 157 CA3d 818, 825, 203 CR 752.

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§5.68 d. Defects in Verification May Be Challenged

The respondent or real party in interest must be sure to challenge improper verification or lack of verification because these errors are not jurisdictional and even minor defects may be sufficient to defeat a petition. If the respondent fails to object to the absence of verification, he or she waives the defect, and the court may allow the verification to be added by amendment even though the limitation period has expired since the date the petition was filed. See *Ware v Stafford* (1962) 206 CA2d 232, 237, 24 CR 153.

For further discussion of verifications, see §§18.42-18.48.

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§5.69 e. Form: Verification

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5.69-1 Alternative: Affidavit with notary acknowledgment

State of _ _ _ _ _ _, County of _ _ _ _ _ _:

I, the undersigned, being sworn, say:

I am _ _[_ _[*one of***]_ _*/the attorney(s) for*]_ _ the petitioner(s) in this action. _ _[***All facts alleged in the above document are true of my own personal knowledge/I have read the above Petition for Writ of _ _[***Mandate/Prohibition/Review (Certiorari)***]_ _ and know its contents. All facts alleged in the petition are true of my own personal knowledge***.]_ _**

I declare under penalty of perjury that the foregoing is true and correct and that this affidavit was executed on _ _[*date***]_ _, at _ _[***city***]_ _, California.**

__[*Signature of petitioner/petitioner's attorney*]__
_ _[*Typed name*]_ _
_ _[*Petitioner/Attorney for petitioner*]_ _

State of California

County of _ _[*name of county***]_ _**

On _ _[*date***]_ _, before me, _ _[***name and title of notary***]_ _, personally appeared _ _[***name of affiant***]_ _, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) _ _[***is/are***]_ _ subscribed to the within instrument and acknowledged to me that _ _[***he/she/they***]_ _ executed the same in _ _[***his/her/their***]_ _ authorized capacity(ies), and that by _ _[***his/her/their***]_ _ signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.**

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____ (Seal)

5.69-2 Alternative: Declaration

I, the undersigned, declare:

I am _ _[_ _[*one of***]_ _*/the attorney(s) for*]_ _ the petitioner(s) in this action. _ _[***All facts alleged in the above document are true of my own personal knowledge/I have read the above Petition for Writ of _ _[***Mandate/Prohibition/Review (Certiorari)***]_ _ and know its contents. All facts alleged in the petition are true of my own personal knowledge***.]_ _**

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on _ _[*date***]_ _, at _ _[***city***]_ _, California.**

__[*Signature of petitioner/petitioner's attorney*]__
_ _[*Typed name*]_ _
_ _[*Petitioner/Petitioner's attorney*]_ _

Comment: The verification can be in the form of an affidavit or a declaration under penalty of perjury. CCP §2015.5. Verifications signed outside California must add the language "under the laws of the State of California" but need not recite the place of verification. CCP §2015.5.

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§5.70 6. Exhibits

If the record supporting the writ petition is only a few pages in length, it may be attached to the writ petition as an exhibit. In most cases, however, an administrative record (if there is one) will be lodged separately, as will any supporting declarations and exhibits. On the record in a superior court writ proceeding, see §§7.24-7.25.

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§5.71 IV. FILING AND SERVING THE PETITION

Some of the procedures for filing and serving a writ petition differ depending on whether the petitioner prosecutes the writ petition using the noticed motion procedure or the alternative writ procedure. For a description and comparison of these two procedures, see §§5.9-5.19. The procedures for filing and serving the petition when using the noticed motion procedure are discussed in §§5.76-5.85. The procedures for filing and serving when using the alternative writ procedure are discussed in §§5.108-5.118.

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A. Time for Filing

§5.72 1. When Special Statutory Deadline

A writ petition must be filed before any statutory deadline applicable to the specific context. For example:

- A proceeding challenging the adoption and application of an ordinance that restricts property development would be governed by the 90-day limitation periods of either Govt C §66499.37 (applied challenges) or Govt C §65009(c) (facial challenges).
- A mandate petition brought under the California Environmental Quality Act (CEQA) (Pub Res C §§21000-21177) must be brought within the time periods set forth in Pub Res C §21167.

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§5.73 2. When No Special Statutory Deadline

In the absence of a special statutory deadline (see §5.72), the statute of limitations applicable to the right or obligation sought to be enforced fixes the outside time limit for filing a writ petition. CCP §1109. For example, CCP §338(a), the 3-year statute of limitations, applies to enforce a statutory liability, and CCP §337(1), the 4-year statute of limitations, applies to enforce rights under a written contract or other instrument. See *Peralta Fed'n of Teachers v Peralta Community College Dist.* (1979) 24 C3d 369, 386, 155 CR 679 (3-year statute of limitations of CCP §338 applied to mandate proceeding in which teachers sought proper classification and salary); 8 Witkin, California Procedure, *Extraordinary Writs* §179 (5th ed 2008).

PRACTICE TIP: In appellate court writ proceedings, the courts of appeal have adopted the view that writ petitions should be filed within the 60-day time period applicable to filing a notice of appeal. See *Cal W. Nurseries, Inc. v Superior Court* (2005) 129 CA4th 1170, 1173, 29 CR3d 170. This view is grounded in the fact that appellate court writ petitions usually seek immediate interlocutory appellate review of a trial court ruling in an ongoing proceeding. See §§18.66-18.68. By contrast, many superior court writ proceedings are not in the nature of an appeal (*e.g.,* a challenge to the validity of a statute or regulation, or an action to compel the adoption or implementation of regulations or the performance of a ministerial duty). Thus, while it is good practice to file a superior court writ proceeding within 60 days of the challenged action or decision, this is by no means a jurisdictional deadline.

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§5.74 3. Laches

Because writ proceedings are equitable in nature, the doctrine of laches may be invoked against a dilatory petitioner. *El Dorado Palm Springs, Ltd. v Rent Review Comm'n* (1991) 230 CA3d 335, 346, 281 CR 327 ("mandamus is a type of action in which equitable principles, such as the doctrine of laches, apply"). See, *e.g., Schellinger Bros. v City of Sebastopol* (2009) 179 CA4th 1245, 102 CR3d 394 (finding "abundant support" for determination that petitioner unreasonably delayed and acquiesced in city taking over 1 year to certify environmental impact report).

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§5.75 B. Venue

The rules governing ordinary civil actions govern the selection of the proper venue in writ proceedings. See CCP §1109; *Harris v Alcoholic Beverage Control Appeals Bd.* (1961) 197 CA2d 759, 761, 18 CR 151. For example, in actions against a public officer or board, CCP §393(b) has been held to apply, *i.e.,* the petition must be filed in the county in which the cause arose. *Sutter Union High Sch. Dist. v Superior Court* (1983) 140 CA3d 795, 798, 190 CR 182.

See also California Administrative Mandamus §10.20 (3d ed Cal CEB 2003), which discusses venue in both traditional mandate and administrative mandamus. On venue generally, see California Civil Procedure Before Trial, chap 8 (4th ed Cal CEB 2004); 3 Witkin, California Procedure, *Actions* §§779-958 (5th ed 2008).

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C. When Using Noticed Motion Procedure

§5.76 1. Filing and Serving Writ Petition Only at Outset of Proceeding

When the petitioner prosecutes a writ proceeding using the noticed motion procedure, the case proceeds in much the same way as a regular civil action. Accordingly, no additional action need be taken at the outset other than filing and serving the writ petition. See §5.10 for a chronology.

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a. Filing Procedures

§5.77 (1) Place of Filing

Because practice varies from county to county, counsel must check local court rules or with the clerk's office to find out where to file the petition. Some courts consider writ petitions to be specialized proceedings and require that they be filed and heard in a specific department or branch of the court.

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§5.78 (2) Civil Case Cover Sheet

California Rule of Court 3.220 requires that the first paper filed in an "action or proceeding" be accompanied by a case cover sheet. See CCP §363 (construing "action" to include special proceedings of civil nature (*e.g.,* writ proceedings)); Cal Rules of Ct 1.6 (defining "action" to include "special proceedings"). The Judicial Council has mandated the use of Civil Case Cover Sheet (Form CM-010). Cal Rules of Ct 3.220(b).

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§5.79 (3) Filing Fee

The filing fee for a writ petition is the same as for any other civil action (*i.e.*, $355). Govt C §70611 (filing fee for first paper in civil action or proceeding in superior court).

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§5.80 (4) Copies

Usually only the original writ petition and any attachments must be filed. However, counsel should check local rules to see whether the court requires additional copies. Counsel should prepare and have file-stamped sufficient copies for his or her own records.

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b. Serving Procedures

§5.81 (1) When to Serve

When no alternative writ is sought (*i.e.*, the noticed motion procedure is used), the petition can be served on the respondent and real party in interest either before or after the petition is filed, although the court cannot issue a peremptory writ until it is served. CCP §§1088, 1088.5, 1105, 1107.

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§5.82 (2) Whom to Serve

Each respondent and real party in interest named in the petition must be served with a copy of the petition and all accompanying documents. CCP §§1088, 1088.5, 1105, 1107. When the respondent or real party in interest is a board or a commission, service is made on the presiding officer, the secretary, or a majority of the members of the board or commission. CCP §1107. See also Los Angeles Ct R 9.5(c).

For a detailed discussion of service, see California Civil Procedure Before Trial, chaps 17-18 (4th ed Cal CEB 2004).

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Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/§5.83 (3) Manner of Service

§5.83 (3) Manner of Service

The writ statutes are somewhat ambiguous on the issue of the manner of service of the petition. See CCP §1107. However, because the petition is the initiating pleading, due process demands that it be served in the same manner as a regular civil summons and complaint. See CCP §§413.10-417.40.

For further discussion of service of summons, see California Civil Procedure Before Trial §§17.14-17.46 (4th ed Cal CEB 2004).

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(4) Proof of Service

§5.84 (a) Time of Filing

When a writ of mandate is sought under CCP §1088.5 (*i.e.*, no alternative writ is requested and the noticed motion procedure is used), the petition need not be accompanied by a proof of service at the time of filing, although one must be filed before any court hearing or action on the petition. CCP §§1088.5, 1107.

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§5.85 (b) Format

Proof of service should be made on a Judicial Council form whenever possible. CCP §417.10(f). It should include all of the information required by CCP §417.10(a). See the sample proof of service forms in California Civil Litigation Forms Manual §9.2 (Cal CEB 1980) and in California Civil Procedure Before Trial §§18.21-18.23 (4th ed Cal CEB 2004).

PRACTICE TIP: Although adverse parties may be referred to and served as defendants (see CCP §1063), this is not done in practice and it is preferable to designate the parties being served as respondents or real parties in interest.

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Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/ 2. Bringing Petition on for Hearing/§5.86 a. Preparing Motion for Issuance of Requested Writ

2. Bringing Petition on for Hearing

§5.86 a. Preparing Motion for Issuance of Requested Writ

After the petitioner has filed and served the writ petition and when ready to proceed on the merits, the petitioner must file and serve a notice of motion and motion for issuance of the requested writ.

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§5.87 b. Format of Motion

A motion for issuance of a writ must comply with the general rules of court governing the format of papers presented for filing (see Cal Rules of Ct 2.100-2.119) as well as with the civil law and motion rules (see Cal Rules of Ct 3.1110-3.1370). Cal Rules of Ct 2.2, 2.100, 3.1100, 3.1103(a)(2). On the general rules governing the format of papers presented for filing, see §5.21. In addition to the specific formatting requirements described below for the moving papers, the first page of each document must specify the following information immediately below the case number (Cal Rules of Ct 3.1110(b)):

- The date, time, and location of the scheduled hearing, and the judge, if ascertainable;
- The date of filing of the writ proceeding; and
- The nature of any attached paper other than an exhibit (*e.g.,* a declaration).

PRACTICE TIP: Rather than file several separate documents, many petitioners file the petition and any accompanying declarations and documents bound together, unless doing so would make the filing too unwieldy to be presented as a single filing.

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Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/§5.88 c. Required Papers

§5.88 c. Required Papers

A motion for issuance of a writ must be supported by at least the following documents (Cal Rules of Ct 3.1112(a)):

- A notice of hearing on the motion;
- The motion; and
- A supporting memorandum.

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§5.89 (1) Notice of Motion

The notice of motion is a very short formal statement that identifies the time, date, and place of the hearing, the nature of the order being sought, the grounds for the motion, and the documents and other items that support the motion. See Cal Rules of Ct 3.1110(a). See also the standard notice of motion form in California Civil Procedure Before Trial §12.140 (4th ed Cal CEB 2004).

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§5.90 (2) Motion

The motion must identify the party making the motion, name the parties to whom it is addressed, briefly state the basis for the motion and the relief sought, and if a pleading is being challenged, identify the portion being challenged. Cal Rules of Ct 3.1112(d).

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§5.91 (3) Combining Notice of Motion and Motion

Under Cal Rules of Ct 3.1112, a "motion" that is largely duplicative of the notice of motion must be filed in addition to the notice of motion, even though CCP §1005.5 provides that a motion is deemed made on serving and filing of the notice of motion. Accordingly, the usual practice is to combine the notice of motion and the motion into a single document entitled "Notice of Motion and Motion."

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(4) Supporting Memorandum

§5.92 (a) Purpose of Supporting Memorandum

The supporting memorandum is of critical importance. It identifies and focuses the legal issues presented, makes the petitioner's case for relief, and anticipates and rebuts arguments or defenses likely to be raised by the respondent or real party in interest. Thus, the memorandum must be as complete and persuasive as possible. On the similar memorandum supporting writ petitions filed in the appellate courts, see §§18.49-18.56.

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Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/§5.93 (b) Required Contents of Supporting Memorandum

§5.93 (b) Required Contents of Supporting Memorandum

A memorandum must contain (Cal Rules of Ct 3.1113):

- A statement of facts supported by references to the supporting evidence, *e.g.,* verified allegations of the petition or other evidentiary documents, such as exhibits attached to the petition, declarations and their attachments, or an administrative record.
- A concise statement of the standard of review to be applied by the superior court, supported by statutory or case authority or both.
- Arguments supporting issuance of a writ, referencing the pertinent facts and supported by statutory or case authority.
- A table of contents and table of authorities if the memorandum is longer than ten pages, and an opening summary of argument if it is longer than 15 pages.
- Copies of any non-California authority tabbed in accordance with Cal Rules of Ct 3.1110(f). Alternatively, a separate compendium of non-California authorities, tabbed as required by the rules, can be submitted as part of the moving papers.

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§5.94 (c) Format of Supporting Memorandum

It is good practice to use the basic structure of a memorandum filed in an appellate writ proceeding, *i.e.,* separate sections for the introduction, facts and procedural history, argument, and conclusion. In the argument section, each point should be made separately under an appropriate heading, which should be a concise description of the point being made. See Cal Rules of Ct 8.204(a)(1)(B) (appellate rules on headings). If absolutely necessary, a point heading may be as long as three to four lines. It should be a specific application of a rule of law to the facts of the case and not a bare legal conclusion or statement of an abstract principle.

The caption page of the memorandum should not be numbered, but the pages of the tables must be numbered consecutively, using lowercase Roman numerals starting on the first page of the tables. The pages of the text must be numbered consecutively using Arabic numerals starting on the first page of the text. Cal Rules of Ct 3.1113(h).

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§5.95 (d) Page Limits

A supporting memorandum may not exceed 15 pages, excluding exhibits, declarations, attachments, the tables of contents and authorities (if required), and the proof of service. Cal Rules of Ct 3.1113(d). A party may apply to the court for permission to file a longer memorandum. See Cal Rules of Ct 3.1113(e).

PRACTICE TIP: Counsel should not expect courts to be very generous in granting such requests, although a stipulation signed by all parties may be helpful in securing permission for additional pages.

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Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/§5.96 (e) Style of Supporting Memorandum

§5.96 (e) Style of Supporting Memorandum

Some attorneys rely primarily on the petition to convey the facts and persuade the court; others feel that the judge may go directly to the supporting memorandum. Although the facts in the petition should be alleged in the ultimate-fact style characteristic of a complaint, they should be restated in the memorandum in a more persuasive manner, with citation to the operative allegations in the writ petition or to other supporting evidence (*e.g.,* the administrative record or declarations and attached exhibits).

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§5.97 (i) Supporting Memorandum Should Be Persuasive

The point of the supporting memorandum is to persuade the court to issue a writ. Often, the most persuasive elements are the factual story and the reasons why writ relief is proper. A formalistic approach can be a handicap in telling the story. One effective approach is a simple narrative style, in which the facts are told in chronological order. Other approaches include trying to capture the reader's attention by using a dramatic arrangement of the facts or organizing the facts around one or two major points of argument, if that is interesting and does not confuse the reader.

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Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/§5.98 (ii) Supporting Memorandum Should Clearly State Basis for Issuance of Writ

§5.98 (ii) Supporting Memorandum Should Clearly State Basis for Issuance of Writ

Merely stating the alleged basis for a writ with citations to legal authorities is meaningless. In the memorandum, the petitioner must explain why the applicable law applies to the facts at hand and requires relief.

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§5.99 (iii) Citations to Evidence

All factual assertions in the memorandum should be supported by a citation to evidence, such as the verified writ petition (*e.g.,* Pet. p. 10, ¶20), an administrative record (*e.g.,* Rec. at 5), hearing transcript (*e.g.,* 9-1-07 Hrg. Tr. at 5:3-10), or a supporting declaration (*e.g.,* Smith Decl., p. 7, ¶5; Smith Decl., Exh. A at 5). If support exists in multiple places in the record, then citations should be made to all pieces of supporting evidence.

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Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/§5.100 (iv) Use of Quotations

§5.100 (iv) Use of Quotations

Quotations can be appropriate on crucial points and, if carefully used, may be preferable to summarization. Lengthy quotations should be avoided, however, and quoted material must be supported by a specific citation to the source document and any supporting evidence.

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d. Additional Papers

§5.101 (1) Declarations

Depending on the nature of the writ proceeding, the petitioner may submit evidence in support of the petition by way of declaration and exhibits. Any such declaration must be based on personal knowledge and meet other evidentiary rules. See *Star Motor Imports, Inc. v Superior Court* (1979) 88 CA3d 201, 204, 151 CR 721 (declaration made on information and belief is hearsay and does not establish evidentiary facts in petition). Exhibits should be authenticated.

On preparing the record in a superior court writ proceeding, see chap 7.

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§5.102 (2) Administrative Record

Many writ cases arise from proceedings that generate a record. The record may consist entirely of documents, or it also may include a transcript of an administrative hearing. See §§7.6-7.13. If there is such a record, it almost always must be lodged with the superior court before the hearing on the merits. See §7.25.

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Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/§5.103 (3) Proposed Order/Judgment

§5.103 (3) Proposed Order/Judgment

Court rules require the moving party to submit a proposed order and judgment. Cal Rules of Ct 3.1113(m).

PRACTICE TIP: The proposed order and judgment can aid the judge by showing exactly what the court is being asked to order and by requiring only a signature, without the need for further drafting time or delay. The judge also can sign the proposed order and judgment with confidence that adversaries served in advance had the chance to raise any arguments about form and content. The petitioner must make certain that there is no substantive variance between the relief requested in the petition and that in the proposed order and judgment. Preparing a proposed order and judgment at the outset also is useful for counsel as a means of focusing the motion papers on precisely what is being requested.

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Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/§5.104 e. Service and Filing of Motion and Supporting Documents

§5.104 e. Service and Filing of Motion and Supporting Documents

Because the writ petition has already been filed and served, and the respondent and any real party in interest have already appeared, the notice of motion and other moving papers are served and filed according to CCP §§1003-1020.

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Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/§5.105 (1) Whom to Serve

§5.105 (1) Whom to Serve

All parties to the action must be served with a copy of the moving papers. See CCP §§1010-1020.

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§5.106 (2) When to Serve

The petitioner must give at least 16 court days' notice of the motion for issuance of a writ, plus additional time if the notice is mailed, unless the time has been shortened for good cause by the court. CCP §1005(b). See California Civil Procedure Before Trial §12.65 (4th ed Cal CEB 2004) for the procedures for applying for an order shortening time. The parties may want, however, to agree on a briefing schedule that allows more time than otherwise is provided by the rules of court. This is frequently the case in writ proceedings of any complexity or in those involving a significant evidentiary showing or a sizeable record. The court likely will approve a stipulated briefing schedule, particularly if it allows ample time for the court to prepare for the hearing after the reply memorandum is filed.

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§5.107 (3) Where and When to File Papers

The originals of the motion papers, with appropriate proofs of service, are filed either in the court clerk's office (see Cal Rules of Ct 3.1302(a)) or in a particular department specified by the court's local rules. Counsel also should submit copies for file endorsement to ensure that the petitioner has an accurate record of the document filing dates.

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§5.108 D. When Using Alternative Writ Procedure

When the petitioner prosecutes a writ proceeding using the alternative writ procedure, the petitioner must, at the outset of the proceeding, file not only the writ petition but several other documents as well. For a chronology of a writ proceeding using the alternative writ procedure, see §5.15.

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1. Preparing the Papers

§5.109 a. Writ Petition

As with the noticed motion procedure (see §5.76), the writ proceeding begins with the filing of the writ petition. On drafting the writ petition, see §§5.20-5.70. When the alternative writ procedure is used, the petition must include allegations supporting and requesting issuance of an alternative writ.

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§5.110 b. Supporting Memorandum

In addition to filing the writ petition, a petitioner using the alternative writ procedure also should file a memorandum in support of the petition and application for an alternative writ. No statute or rule expressly requires a supporting memorandum. This is conventional practice, however, and it is expected by the courts, for good reason:

- In substance, the petition is a complaint and does not contain legal arguments and authorities. It therefore is important to include a supporting memorandum setting forth the legal arguments and authorities that support the requested writ relief.
- Frequently, the memorandum submitted in conjunction with the writ petition (when the petitioner uses the alternative writ procedure) is considered the opening brief on the merits of the petition. If, as is likely, the court issues an alternative writ and sets a hearing date, the court also may set a briefing schedule, with the respondent and any real party in interest filing both a return and an opposing memorandum and the petitioner closing with a reply memorandum. See §§9.6-9.10.
- Although there is no specific statutory requirement that the petition be accompanied by a supporting memorandum, there is a specific rule that a notice of motion *must* be accompanied by a memorandum. See Cal Rules of Ct 3.1113(a). Because petitions for writs are covered by the law and motion superior court rules (see Cal Rules of Ct 3.1103(a)(2)), the court will expect a supporting memorandum.
- A writ petition filed in the court of appeal or supreme court must be accompanied by a supporting memorandum (see Cal Rules of Ct 8.486(a)(5)), so by analogy a writ petition in superior court should be supported by a memorandum.
- Local rules may require a supporting memorandum.

For an example of a memorandum in support of an application for an alternative writ, see form in §13.3.

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§5.111 c. Exhibits/Declarations

Exhibits may be attached to the writ petition. However, in most cases, any supporting evidentiary material (*e.g.,* an administrative record or supporting declarations and exhibits) should be filed separately. See §§5.101-5.102.

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Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/§5.112 d. Proposed Alternative Writ

§5.112 d. Proposed Alternative Writ

The petitioner also should submit a proposed alternative writ compelling the respondent to do the act required to be performed (mandate) or ordering the respondent to desist or refrain from performing a specified act (prohibition) immediately or by a specified date, or to appear before the court on a specified date to show cause why the respondent should not be so ordered. CCP §§1087, 1104.

JUDICIAL PERSPECTIVE: Sometimes lawyers submit proposed alternative writs with the writ petition; other times they submit an order to show cause. The mandate and prohibition statutes specifically provide only for issuance of an alternative writ, although they do include order-to-show-cause language. Most judges will sign either one. If the respondent's or real party in interest's counsel is concerned that the petitioner will use an order to show cause to suggest to third persons or to the public that the court has made a preliminary determination against his or her client, counsel should consider asking the court to modify the language or to use an alternative writ.

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2. Filing and Service Procedures

§5.113 a. Use of Ex Parte Application

In nearly all instances in which the alternative writ procedure is used, the petitioner begins the writ proceeding by filing an ex parte application for issuance of an alternative writ. See CCP §1088 (application for writ may be made without notice, but in such case court can issue only alternative writ). In fact, many courts mandate compliance with ex parte procedures (see Cal Rules of Ct 3.1200-3.1207) before issuing an alternative writ. See, *e.g.*, Los Angeles Ct R 9.5(e)(2). On ex parte applications generally, see California Civil Procedure Before Trial, chap 13 (4th ed Cal CEB 2004).

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§5.114 (1) Contents of Ex Parte Application

An ex parte application for issuance of an alternative writ must (Cal Rules of Ct 3.1200-3.1207):

- Notify all parties of the application at least by 10 a.m. on the court day before the appearance, absent exceptional circumstances (Cal Rules of Ct 3.1203(a));
- Be in writing and include (Cal Rules of Ct 3.1201):
- The case caption;
- The relief requested;
- A declaration in support of the application making an affirmative factual showing by competent testimony based on personal knowledge of irreparable harm, immediate danger, or any other statutory basis for granting relief ex parte (see Cal Rules of Ct 3.1202(c));
- A declaration based on personal knowledge as to the giving of notice (see Cal Rules of Ct 3.1204);
- A supporting memorandum; and
- A proposed order;
- State (Cal Rules of Ct 3.1202):
- The name, address, and telephone number of each party or the party's attorney; and
- Whether a previous application has been made of the same character or for the same relief, and the court's disposition of that previous application.

PRACTICE TIP: The petitioner should check local rules to see whether the court has more specific requirements for ex parte applications.

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§5.115 (2) Service of Ex Parte Application

The petitioner must serve the ex parte application and any other papers (*e.g.*, the petition, the supporting memorandum, or the proposed alternative writ) on all opposing parties at the first reasonable opportunity, *i.e.,* before the hearing begins. Cal Rules of Ct 3.1206; see also CCP §1107. Absent exceptional circumstances, the hearing will not be held unless such service has been made. Cal Rules of Ct 3.1206. Check local rules to see whether the court has more specific notification and service requirements for ex parte applications.

NOTE: Because Cal Rules of Ct 3.1206 requires that, in most cases, the petitioner give reasonable notice, each county may impose its own definition of "reasonable." For example, in Los Angeles County, the petitioner must serve the application at least 5 days before the ex parte hearing, unless good cause is shown. Los Angeles Ct R 9.5(e)(1).

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Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/§5.116 (3) Personal Appearance

§5.116 (3) Personal Appearance

The petitioner, or counsel for the petitioner, must appear at the ex parte hearing except in the case of (Cal Rules of Ct 3.1207):

- Applications to file memorandum in excess of the page limit;
- Applications for extensions of time to serve pleadings;
- Setting hearing dates on alternative writs and orders to show cause; or
- Stipulations by the parties or other court orders.

The respondent and any real party in interest may want to appear, if only to urge the court to establish reasonable dates for the return, briefing schedule, and hearing on the merits of the petition.

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§5.117 (4) Following Local Procedures

Check local rules and policies concerning ex parte procedures, as they vary in each county. For example, a county might allow counsel to file the ex parte application with the clerk and then present it to the presiding judge in chambers with the proposed alternative writ. If the alternative writ issues, the petitioner serves a copy of the writ, along with the petition and any other supporting documents, on the respondent and any real party in interest. In some cases, the respondent and any real party in interest may appear at the ex parte hearing. They may oppose issuance of the alternative writ, or more likely, may urge the court to establish reasonable dates for the return and hearing on the merits as well as a briefing schedule.

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§5.118 b. Court Action on Ex Parte Application

When presented with an ex parte application for issuance of an alternative writ, the court has several options. It can:

- Issue the alternative writ;
- Deny the application; or
- Deny the application and also dismiss the petition, with or without leave to amend.

On the respondent's and any real party in interest's responsive pleadings and papers, see §§8.21-8.38. On the petitioner's reply papers, see §§8.57-8.63. On the hearing and the court's action on the merits of a petition, see §§9.21-9.48.

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§5.119 V. COMBINING WRIT PETITION AND COMPLAINT

In some situations, a writ may not provide full and complete relief. In such case, the petitioner can file a combined initial pleading—a petition *and* a complaint for damages, declaratory relief, or injunctive relief, as may be appropriate. See *Morehart v County of Santa Barbara* (1994) 7 C4th 725, 735, 29 CR2d 804; *California Sch. Bds. Ass'n v State* (2009) 171 CA4th 1183, 90 CR3d 501 (combined complaint for declaratory relief and writ petition); *County of San Diego v State* (2008) 164 CA4th 580, 79 CR3d 489 (same). The combined pleading can be entitled, *e.g.,* "PETITION FOR WRIT OF MANDATE (CCP §1085) AND COMPLAINT FOR DAMAGES." On declaratory and injunctive relief, see California Civil Procedure Before Trial, chaps 32 (injunctions), 35 (declaratory relief) (4th ed Cal CEB 2004).

PRACTICE TIP: Combining a writ petition with a complaint may have the effect of prolonging the proceedings, *e.g.,* because of additional discovery prompted by the claims in the complaint or because those claims take longer to resolve by summary judgment or trial.

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§5.120 VI. CONSIDERING RESTRICTIONS OF TRIAL COURT DELAY REDUCTION ACT

The Trial Court Delay Reduction Act (Govt C §§68600-68620) applies to all actions and proceedings in the superior courts filed on and after July 1, 1992, except for juvenile, probate, and domestic relations cases. Govt C §68605.5. The Judicial Council has established standards for timely disposition to reduce delay in the superior courts (Govt C §68603), and these standards generally require a case to be resolved within 1 year (see Cal Rules of Ct 3.710-3.715). As a practical matter, these provisions have few consequences for writ proceedings because writ petitions often seek immediate or expedited relief, and it would be an extremely rare case in which the merits of a petition were not considered within 1 year. In addition, some provisions appear to conflict with the writ statutes. Compare Govt C §68616(b) (delay reduction rules may not shorten 30-day time period in which to file responsive pleading) with CCP §1089 (court sets date for return to alternative writ of mandate). The more specific writ statutes should govern writ proceedings, particularly because the flexibility given the courts by these statutes reflects the often urgent nature of writ proceedings.

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VII. COSTS AND ATTORNEY FEES

A. Recovery of Costs

§5.121 1. By Prevailing Party

As in other civil actions, the prevailing party in a superior court writ proceeding is entitled to allowable costs. See CCP §§1095, 1105, 1109 (making CCP §§1032, 1033, and 1033.5 applicable to writ proceedings). See also Cal Rules of Ct 8.493 (prevailing party in appellate court writ proceeding may be awarded costs); *Vasquez v Happy Valley Union Sch. Dist.* (2008) 159 CA4th 969, 987, 72 CR3d 15 (awarding costs to prevailing respondent in petitioner's appeal from denial of writ petition); *Little v Los Angeles County Assessment Appeals Bds.* (2007) 155 CA4th 915, 928, 66 CR3d 401 (same).

On the prevailing party concept, see California Attorney Fee Awards, chap 2 (2d ed Cal CEB 1994). On the prevailing party's entitlement to costs, see California Trial Practice: Civil Procedure During Trial §§27.8-27.18 (3d ed Cal CEB 1995).

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§5.122 2. Costs Allowed

The items of recoverable costs are specified in CCP §1033.5. The most common costs in a writ proceeding are filing fees and fees paid to have documents served. Other allowable costs include copying costs, those incurred during the trial, *e.g.,* jury fees and expenses (if a jury is used), and witness fees (if any are called).

On allowable cost items, see California Trial Practice: Civil Procedure During Trial §§27.67-27.81 (3d ed Cal CEB 1995).

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§5.123 3. Procedure for Claiming Costs

A prevailing party who claims costs must serve and file a verified memorandum of costs within (Cal Rules of Ct 3.1700(a)(1)):

- 15 days after the date of mailing notice of entry of judgment or dismissal by the clerk under CCP §664.5;
- 15 days after the date of serving the written notice of entry of judgment or dismissal; or
- 180 days after entry of judgment, whichever occurs first.

If the cost memorandum is served by mail, the time period for the losing party to seek to strike or tax costs is extended as provided in CCP §1013 (5 calendar days if mailed to and from California, 10 calendar days if mailed to or from outside California, and 20 calendar days if mailed to or from outside United States).

NOTE: The time for filing a cost memorandum may be extended by the parties' agreement, which must be in writing, specify the extended date for service, and be filed with the clerk. In the absence of an agreement, the court may extend the time for serving the cost memorandum for no more than 30 days. Cal Rules of Ct 3.1700(b)(3).

If cost items are expressly authorized by CCP §1033.5 and appear proper on their face, a verified memorandum of costs is prima facie evidence that they were necessarily incurred. *Nelson v Anderson* (1999) 72 CA4th 111, 131, 84 CR2d 753.

For a sample memorandum of costs, see California Trial Practice: Civil Procedure During Trial §27.129 (3d ed Cal CEB 1995).

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B. Award of Attorney Fees

§5.124 1. When Fees Are Recoverable

Attorney fees may be recoverable in a writ proceeding under a statute or contractual attorney fees provision. See *Mejia v City of Los Angeles* (2007) 156 CA4th 151, 157, 67 CR3d 228 (fees awarded to successful petitioner under CEQA statutes); *Zuehlsdorf v Simi Valley Unified Sch. Dist.* (2007) 148 CA4th 249, 255, 55 CR3d 467 (fees awarded under Govt C §800 (authorizing fees for successful challenge to decision by administrative agency if agency acted in arbitrary and capricious manner)).

For further discussion of recoverable attorney fees, see California Trial Practice: Civil Procedure During Trial §§27.96-27.102 (3d ed Cal CEB 1995). On fees recoverable under the private attorney general statute, see California Attorney Fee Awards, chap 4 (2d ed Cal CEB 1994). On attorney fee awards based on contract, see Attorney Fee Awards, chap 6. On attorney fees awarded for administrative proceedings, see Attorney Fee Awards, chap 10.

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2. Procedure for Recovering Attorney Fees

§5.125 a. When to File

A notice of motion to claim attorney fees for services up to and including the rendition of judgment in the superior court must be served and filed within the time for filing a notice of appeal under Cal Rules of Ct 8.104 and 8.108. Cal Rules of Ct 3.1702(b)(1). The parties may extend the time for filing the motion by stipulation or by the court on good cause. Cal Rules of Ct 3.1702(b)(2), (d).

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§5.126 b. What to File

Motions for attorney fees follow the same procedure as other motions. See Cal Rules of Ct 3.1100-3.1370. The prevailing party generally files and serves the fee motion, and the opponent files and serves opposition, with an opportunity for the moving party to file and serve a reply. See Cal Rules of Ct 3.1300(a).

The fee motion should include:

- A notice of motion, including the date, time, place of motion, summary of the grounds for entitlement to fees, and the documents on which the claim is based (see California Attorney Fee Awards, Appendix C (2d ed Cal CEB 1994) for sample form);
- A supporting memorandum discussing the background of the litigation, the grounds for entitlement, and the justification for the amount requested (see Attorney Fee Awards, App D for sample form);
- Declarations from attorneys claiming the fees, including, if appropriate, declarations from other attorneys or experts supporting the fee application (see Attorney Fee Awards, App E for sample form);
- A declaration explaining why the fees claimed are reasonable (see Attorney Fee Awards, App F for sample form); and
- A proposed order awarding reasonable attorney fees, including specific findings on the fee calculation (see Attorney Fee Awards, App I for sample form).

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§5.127 C. Interplay Between Motion for Fees and Costs Bill

When attorney fees are awardable, the party normally will want to claim both attorney fees under the applicable statute, contract, or equitable doctrine, and statutory costs under CCP §1033.5. The prevailing party must file separate documents: (1) a memorandum of costs to claim recoverable costs (see §5.123) and (2) a motion to recover attorney fees (see §§5.125-5.126). The prevailing party must pay attention to the timing and requirements for each type of filing.

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§5.128 VIII. CHECKLIST: PITFALLS TO AVOID

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The petitioner should make sure to:

- Determine whether there is a statutory deadline for filing a petition. See §§5.71-5.74.
- Determine whether there is a real party in interest that must be named and served. See §§5.34-5.35.
- Determine whether there are local rules or unwritten practices governing writ proceedings. See §§5.6-5.8.
- Allege all the essential facts in the petition, including the petitioner's beneficial interest in the proceedings. See §§5.40-5.58.
- Allege why writ relief should be granted, *i.e.,* the legal ground on which writ relief is sought and can be granted. See §§5.49-5.52.
- Identify why there is no other adequate legal remedy. See §§5.53-5.54.
- Include a clear and complete prayer for relief. See §§5.59-5.62.
- Properly verify the writ petition. See §§5.64-5.69.
- Request preparation of an administrative record if the writ petition arises from a proceeding that generated a record. Failure to request the administrative record can be fatal to a petitioner's case. Even a delayed request for preparation of the record may have consequences because in some writ proceedings the respondent is not required to file an answer until 30 days after the record is prepared and served. See CCP §1089.5. On record preparation, see chap 7.
- Prepare an adequate supporting memorandum. See §§5.92-5.100.
- Properly cite to the verified writ petition, administrative record, or other documentary evidence in the supporting memorandum. When confronted with inadequate citations, the court probably will not sift through the evidentiary materials to determine whether support exists for the position asserted. See §5.99.
- Seek a stay if one is necessary. See chap 6.
- Factually justify a stay request. See §5.58; chap 6.

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6

Requesting a Stay in a Superior Court Writ Proceeding

Jeffrey Chine
Jennifer La Fond Chavez

I. SCOPE OF CHAPTER §6.1

II. GENERAL CONSIDERATIONS
- A. Two Methods for Staying Challenged Action or Decision §6.2
- B. Determining When Stay or Injunction Is Necessary or Appropriate §6.3
  - 1. Type of Writ Relief Sought May Be Determinative of Need for Stay §6.4
  - 2. Court Makes Preliminary Decision on Merits of Petition §6.5
- C. Factors to Consider When Deciding Between Stay or Preliminary Injunction §6.6

III. STAY APPLICATION
- A. Applying for Stay
  - 1. Application Can Be Part of Writ Petition or Separate Document §6.7
  - 2. Length of Stay §6.8
  - 3. Preparation of Documents
    - a. When Stay Application Is Part of Writ Petition §6.9
    - b. When Stay Application Is Separate Document §6.10
      - (1) Application §6.11
      - (2) Supporting Memorandum
        - (a) Contents §6.12
        - (b) Standard of Review §6.13
      - (3) Record §6.14
      - (4) Supporting Declarations §6.15
      - (5) Proposed Order §6.16
  - 4. Filing Documents §6.17
- B. Opposing Stay Application
  - 1. Entering Stipulation if No Opposition §6.18
  - 2. Filing Written Opposition if Time Permits §6.19
  - 3. Requesting Undertaking
    - a. Court Has Discretion to Require Undertaking §6.20
    - b. Court Has Discretion to Set Amount of Undertaking §6.21
- C. Superior Court Action on Stay Application
  - 1. Stay Hearing
    - a. Noticed Motion Procedure §6.22
    - b. Ex Parte Procedure §6.23
  - 2. Grant or Denial of Stay Request
    - a. Decision Is Within Court's Discretion §6.24
    - b. When Stay Application Is Granted §6.25
    - c. When Stay Application Is Denied §6.26
- D. Appellate Relief §6.27
- E. Modifying or Dissolving a Stay §6.28

IV. TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION
- A. Seeking Stay Through Preliminary Injunctive Relief §6.29
- B. Required Showing §6.30
- C. Temporary Restraining Order
  - 1. Description and Purpose §6.31
  - 2. Motion Papers Must Include Copy of Verified Writ Petition §6.32
  - 3. Court Has Discretion to Require Bond or Undertaking §6.33
  - 4. If Temporary Restraining Order Application Is Denied §6.34
  - 5. If Temporary Restraining Order Application Is Granted §6.35
- D. Motion for Preliminary Injunction

1. Criteria for Issuance §6.36
2. Undertaking (Bond) Requirement
    a. When Required §6.37
    b. Amount of Undertaking (Bond) §6.38

V. CHECKLIST: OBTAINING STAY ORDER §6.39

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Source: Civil Litigation/California Civil Writ Practice/6 Requesting a Stay in a Superior Court Writ Proceeding/§6.1 I. SCOPE OF CHAPTER

§6.1 I. SCOPE OF CHAPTER

This chapter discusses staying a challenged action or decision while a writ petition is pending in the superior court.

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II. GENERAL CONSIDERATIONS

§6.2 A. Two Methods for Staying Challenged Action or Decision

Neither the writ statutes nor the rules of court address the procedures for staying a challenged action or decision during the pendency of a superior court writ proceeding. As a result, and like other areas of superior court writ practice, the courts vary in how they handle stay requests. There are generally two accepted ways to seek a stay, by:

- Filing an application for a stay (see §§6.7-6.17); or
- Seeking a temporary restraining order or preliminary injunction (see §§6.29-6.38).

NOTE: This chapter does not address stays in administrative mandamus proceedings under CCP §1094.5(g)-(h). On staying an administrative adjudicatory decision, see California Administrative Mandamus §§11.3-11.27 (3d ed Cal CEB 2003). On administrative mandamus, see chap 3.

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Source: Civil Litigation/California Civil Writ Practice/6 Requesting a Stay in a Superior Court Writ Proceeding/§6.3 B. Determining When Stay or Injunction Is Necessary or Appropriate

§6.3 B. Determining When Stay or Injunction Is Necessary or Appropriate

A petitioner should seek a stay (by application or injunctive procedures) whenever the petitioner's interests are likely to be adversely and irreparably affected before the superior court can act on the writ petition.

PRACTICE TIP: A petitioner may avoid having to seek a stay from the superior court by first discussing the issue with the respondent and/or real party in interest. The respondent or real party may voluntarily agree to refrain from acting or enforcing a decision before the superior court rules on the writ petition, particularly if the petitioner agrees to bring the writ petition on for hearing within a relatively short time period.

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§6.4 1. Type of Writ Relief Sought May Be Determinative of Need for Stay

The need for a stay will be determined in part by the type of writ sought:

- **Alternative writ of mandate.** An alternative writ of mandate by its nature does not act as a stay. Accordingly, a petitioner will need a stay to halt the challenged action or decision. CCP §§1085, 1087. On alternative writs, see §§5.15-5.18.
- **Alternative writ of prohibition.** An alternative writ of prohibition, in contrast, does act as a stay. CCP §1104; see §4.2. In rare cases, however, a petitioner may need to seek a stay to clarify the action the respondent or real party in interest must stop.
- **Peremptory writ.** When a petitioner seeks only a peremptory writ (which is usually done through the noticed motion procedure; see §5.19), the petitioner may need a stay until the court acts on the merits of the writ petition.
- **Writ of review (certiorari).** A writ of review (certiorari) ordinarily provides for a stay (CCP §1071), although the court has discretion to omit it (CCP §1072).

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§6.5 2. Court Makes Preliminary Decision on Merits of Petition

When a superior court considers a stay request, it makes a preliminary, albeit nonbinding, decision on the merits of the writ petition. Thus, before seeking a stay (by way of application or injunctive procedures), a petitioner must consider the likelihood of success and make certain the moving papers are well prepared and amply supported. The court's first take on the case will be based on these papers and that impression could affect the court's later view of the case when it rules on the merits of the writ petition.

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§6.6 C. Factors to Consider When Deciding Between Stay or Preliminary Injunction

The principal factor in deciding whether to seek a stay by way of application or injunctive procedures is the particular preference of the superior court. Compare, *e.g.*, Sacramento County Superior Court Guide to the Procedures for Prosecuting Petitions for Prerogative Writs, p. 5 (instructing petitioners to follow temporary restraining order (TRO)/preliminary injunction procedures when seeking stay in traditional mandate proceedings) (see copy in App B) and Los Angeles Superior Court Local Rules 9.5(d) (indicating "stay or other temporary order" in writ proceedings may be obtained by ex parte procedures). If the superior court in which the petition will be filed does not have any published rules or guidelines on seeking stays in writ proceedings, the petitioner should check with the court clerk to determine whether the court has a procedural preference or there is a conventional practice.

If there is no required or standard practice for seeking a stay in a writ proceeding, the urgency of the situation may weigh in favor of using injunctive procedures (TRO followed by preliminary injunction). However, if the superior court will entertain a stay application on its ex parte calendar, there is no difference in the utility of application or injunctive procedures.

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III. STAY APPLICATION

A. Applying for Stay

§6.7 1. Application Can Be Part of Writ Petition or Separate Document

In some courts, a petitioner can seek a stay of the challenged action or decision by way of application. A stay application can be made in the writ petition itself or separately. The petitioner should check local rules and with the court clerk to determine if the court has a preference. However, in the absence of either a separate stay application or an application for an alternative writ bringing the petition to the attention of the court, the courts will simply file the writ petition.

PRACTICE TIP: A separate stay application is also helpful to the court because it focuses specifically and succinctly on why a stay is appropriate and necessary in the particular case.

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§6.8 2. Length of Stay

The courts generally dislike granting extended stays, especially if there is a risk of harm to the respondent or real party in interest. Thus, when seeking a stay, the petitioner should also urge the court to set a briefing schedule and hearing date on the petition that is reasonable under the circumstances, taking into consideration the size of the record, the date it will be prepared, and the amount of time the parties will need to review it, and then prepare the briefing in support of and in opposition to the petition. In addition, once a stay is in place, the court may be reluctant to grant a continuance of the hearing date, particularly if the respondent or real party in interest objects.

PRACTICE TIP: Depending on the circumstances, the petitioner may be able to negotiate terms for a stay that protect the petitioner while permitting certain activities to occur in the intervening period before a decision on the writ. The respondent or real party in interest may stipulate to a stay in exchange for specific protections or accommodations from the petitioner.

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3. Preparation of Documents

§6.9 a. When Stay Application Is Part of Writ Petition

When a stay is requested in the petition, the petition should:

- So state on the caption page (*e.g.*, "Petition for Writ of Mandate and Application for Stay");
- Contain all the necessary factual allegations for a stay in the body of the petition (*i.e.*, allege why a stay is necessary and appropriate); and
- Include a stay request in the prayer for relief.

Simply including the stay request in the writ petition, however, will not bring it before the court unless the petitioner is making the request in conjunction with an application for issuance of an alternative writ. See §§5.15-5.18. The petitioner should file a supporting memorandum and any necessary declarations supporting a stay as part of the application for an alternative writ. See §§6.12, 6.15. The petitioner should also lodge two orders, one pertaining to the request for an alternative writ and the other pertaining to the request for a stay, because:

- The court may grant the alternative writ but deny the request for a stay; and
- Speed is of the essence in ruling on a stay application, and the court may grant the stay immediately but wait for preliminary opposition before deciding whether to issue an alternative writ (although in most cases an alternative writ is sought ex parte). On opposition to application for issuance of alternative writ, see §§8.21-8.31.

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§6.10 b. When Stay Application Is Separate Document

A stay application filed as a separate document is in essence a motion. See Cal Rules of Ct 3.1103(a)(1) (motion includes "application before trial for an order"). Thus, the California Rules of Court relating to law and motion proceedings (Cal Rules of Ct 3.1100-3.1370) apply to stay applications. Because stay requests are generally time sensitive, they are usually heard on the court's ex parte calendar. See §6.23. A petitioner that cannot establish the grounds necessary to justify an ex parte stay order may seek a stay as a regularly noticed motion. However, it is likely that if the petitioner cannot demonstrate the urgency necessary to place the matter on the court's ex parte calendar, the petitioner will be unable to make the showing necessary to support a stay.

PRACTICE TIP: A petitioner should file a stay request promptly because the passage of time weakens the argument that harm will result without a stay.

On applying for an order ex parte, see California Civil Procedure Before Trial, chap 13 (4th ed Cal CEB 2004).

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§6.11 (1) Application

The stay application should be entitled "Request [or Application] for Stay of [*e.g.*, Name of Respondent]'s Decision." The application is similar to a notice of motion and motion: It identifies the parties and the nature, extent, and duration of the relief requested; sets out the reasons for the stay; and concludes with a prayer asking for the stay.

If the petitioner requests the stay ex parte, then "Ex Parte" should appear in the title, and the application must explain the urgency for the stay. California Rules of Court 3.1200-3.1207 detail the documents and information that must be included in an ex parte application (*e.g.*, a declaration describing the notice given to the other party or the reason for the lack of notice). In most cases, the petitioner should seek an ex parte order shortening time to hear the stay request.

PRACTICE TIP: Before filing an ex parte stay application, counsel should be sure to check the court's local rules for any additional requirements.

On applying for an order ex parte, see California Civil Procedure Before Trial, chap 13 (4th ed Cal CEB 2004).

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(2) Supporting Memorandum

§6.12 (a) Contents

The memorandum supporting a stay application must establish the necessity for the stay. It should include discussion of the facts, the action or decision being challenged, why that action or decision is invalid or an abuse of discretion, and most importantly, why a stay should issue. See Cal Rules of Ct 3.1113 (requirements for memorandum). The memorandum should refer to specific portions of the record, if available.

On the preparation of a memorandum generally, see California Civil Procedure Before Trial §§12.30-12.42 (4th ed Cal CEB 2004).

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§6.13 (b) Standard of Review

The only specific criteria governing stays in writ proceedings are set out in CCP §1094.5(g)-(h), governing stays in administrative mandamus proceedings. Compare CCP §1072 (specifying stay is included in writ of review unless court in its sound discretion orders otherwise). See also CCP §1072 (if appeal is taken from judgment granting writ relief, superior court may order that judgment is not stayed on showing that petitioner will suffer irreparable injury in business or reputation if execution is stayed).

Some adjudicatory administrative decisions are reviewed by way of traditional mandamus under CCP §1085, rather than administrative mandamus under CCP §1094.5, *e.g.,* when a hearing is not "required by law" (even if a hearing was held). See §2.33. In such cases, there is a good argument that the superior courts should be guided by the stay criteria in CCP §1094.5(g)-(h), because that criteria was specifically designed to address adjudicatory, administrative decisions and the policy reasons underlying those criteria apply whether the adjudicatory administrative decision is challenged in a §1085 or §1094.5 writ proceeding.

In other contexts, the superior courts will, as a practical matter, apply the weighing approach employed in deciding whether to issue a temporary restraining order and preliminary injunction. Thus, the court will weigh the extent to which there has been a colorable showing on the merits of the petition and the claimed injury if a stay does not issue. See §6.30.

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§6.14 (3) Record

The verified allegations in the writ petition will be essential to apprising the superior court of the operative facts. In addition, the petitioner should submit critical portions of the record, such as the challenged decision, any findings, key portions of hearing transcripts, and any other significant documents as attachments to counsel's declaration. (If the writ proceeding is based on an administrative record, the record often will not yet be prepared when the writ petition is filed and a stay is sought).

PRACTICE TIP: The petitioner should keep in mind that the objective is to make at least a colorable showing that the writ petition has merit.

On preparing the record, see §§7.5-7.17.

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Source: Civil Litigation/California Civil Writ Practice/6 Requesting a Stay in a Superior Court Writ Proceeding/§6.15 (4) Supporting Declarations

§6.15 (4) Supporting Declarations

Because the superior court will weigh the likelihood and extent of harm in deciding whether to grant a stay request, the petitioner (or other appropriate individual) must submit a declaration explaining the necessity for a stay pending the court's decision on the merits of the writ petition. The declaration should be based on personal knowledge (as opposed to information and belief) and should include:

- Specific facts describing the situation and the need to maintain the status quo;
- The reason a stay is required to maintain that status quo; and
- The harm the petitioner will suffer if the court denies the stay request.

If the petitioner can offer any accommodations to minimize harm from the stay on the respondent or real party in interest, the declaration should include an explanation of these points as well.

PRACTICE TIP: If the application requests the stay ex parte, the declaration should show that the petitioner gave proper notice of an ex parte hearing as required by Cal Rules of Ct 3.1204(b).

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§6.16 (5) Proposed Order

The petitioner should submit a proposed order granting the stay request and staying the challenged decision or action either for a specific time or until the court disposes of the writ petition on the merits. It should describe the evidence considered by the court, the basis for issuance of the stay, the specific actions being stayed, who is subject to the stay, and its duration.

PRACTICE TIP: Some courts prefer that orders be prepared without the party's name in the upper left-hand corner. The petitioner should check with the clerk to determine the court's preference.

On preparing a proposed order, see California Civil Procedure Before Trial §12.107 (4th ed Cal CEB 2004).

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§6.17 4. Filing Documents

In most counties, the petitioner files the writ petition and stay application in the clerk's office and then takes them to the assigned department for a ruling on the stay application by the judge. In other counties, the petition is filed in the clerk's office, but ex parte papers (such as an ex parte application for a stay) are filed directly in the assigned department. Some counties require ex parte applications to be scheduled with the clerk (see San Francisco Ct R 9.0(B) (ex parte hearing must be scheduled with clerk at least 24 hours before proposed hearing date)) while others require ex parte applications to be submitted to the clerk before the hearing. Counsel should consult any applicable local rules and, if there are none, call the court clerk.

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B. Opposing Stay Application

§6.18 1. Entering Stipulation if No Opposition

In some cases, the respondent or real party in interest may not oppose a stay, particularly if the petitioner agrees to prosecute the writ petition expeditiously. In such cases, the parties can enter into a written stipulation, eliminating the need to seek a stay from the court. Such a stipulation should usually be filed with the court and transformed into an order of the court by including "IT IS SO ORDERED" at the end, with date and signature lines for the judge. Enforcement of the stipulated order is easier and quicker than enforcement of a simple stipulation, as the latter may be enforceable only in a separate action for breach of contract.

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§6.19 2. Filing Written Opposition if Time Permits

If the respondent or real party in interest opposes a stay of the challenged action or decision, the respondent or real party in interest should file written opposition, if time permits, and appear at the hearing on the stay request. The hearing on the stay request may take place in conjunction with an application for issuance of an alternative writ.

If the writ petition is plainly frivolous or suffers from an obvious procedural defect, the opposition should point that out to the court. Otherwise, the opposition should focus on why there is no compelling reason for a stay, *e.g.*, the petitioner will not suffer any irreparable harm in the absence of a stay.

PRACTICE TIP: Opposition to a stay request is not the vehicle for making a full-blown attack on the merits of the writ petition, although respondent or real party in interest should say enough about the merits to let the court know that there will be serious opposition to the petition.

The opposition should include a supporting memorandum, competent declarations establishing the prejudice that the respondent or real party in interest will suffer if the court grants a stay, and, if the record has not been prepared, copies of any relevant documents that the petitioner failed to include in the application.

On opposing motions, see California Civil Procedure Before Trial §§12.78-12.94 (motions in general), 32.57-32.58, 32.66-32.74 (requests for temporary restraining order or preliminary injunction) (4th ed Cal CEB 2004).

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3. Requesting Undertaking

§6.20 a. Court Has Discretion to Require Undertaking

In addition to opposing a stay request (see §6.19), a respondent or real party in interest can and typically should ask the superior court to require an undertaking if the stay is granted. The request should be accompanied by competent evidence of the degree of potential harm the stay may cause.

There is no statutory requirement for an undertaking (also called a bond; see CCP §995.210) as a condition for issuance of a stay, but the court may in its discretion apply the statutory provisions concerning bonds (CCP §§995.010-996.560) to writ proceedings. See CCP §1109 (applying Part 2 of Code of Civil Procedure (CCP §§307-1062.20) to writ proceedings).

NOTE: Specified public agencies and officers are exempt from any undertaking requirement. See CCP §995.220.

On the requirements for undertakings, see California Civil Appellate Practice §§6.21-6.62 (3d ed Cal CEB 1996).

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§6.21 b. Court Has Discretion to Set Amount of Undertaking

The court has discretion to set the amount of any undertaking, but the amount should be sufficient to protect the respondent or real party in interest from the economic consequences of a stay if the court upholds the challenged decision. For example, the court may stay a city's decision to approve a development project on the condition the petitioner post an undertaking sufficient to cover the costs of lost contracts, land carry, and any other costs caused by the stay in development activities. If the court ultimately upholds the decision, this undertaking is available to compensate the respondent or real party in interest for the costs incurred because of the stay.

PRACTICE TIP: When economically appropriate, a party opposing a stay application should ask that any stay be conditioned on the petitioner's posting an undertaking. Petitioner should support the request with a competent declaration specifying the likely costs of staying the decision. The anticipated costs should include attorney fees.

If the potential harm of the stay is great and the bond is commensurately high, the petitioner may be unable to post the bond. This reality should motivate the opponent to make a complete showing in support of a bond. The possibility that recovery may be limited to the amount of the bond, even if actual damages from the stay are higher, is another reason to seek to obtain as high a bond as possible.

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C. Superior Court Action on Stay Application

1. Stay Hearing

§6.22 a. Noticed Motion Procedure

Because stay requests are generally time sensitive, they do not usually proceed via the regular noticed motion procedure. See Cal Rules of Ct 3.1100-3.1370. However, if the noticed motion procedure is used, the parties must submit their moving, opposition, and reply papers in advance of the hearing, which will be held in open court, with an opportunity for oral argument and a court reporter present to transcribe the hearing.

On noticed motion hearing procedures, see California Civil Procedure Before Trial, chap 12 (4th ed Cal CEB 2004).

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§6.23 b. Ex Parte Procedure

Stay applications usually proceed via the court's ex parte procedures, either as a stand-alone application or in conjunction with an application for issuance of an alternative writ. See §5.39.

PRACTICE TIP: Courts set ex parte hours at different times and days, so counsel should check the local rules and with the court clerk. See, *e.g.*, Los Angeles Ct R 9.9(a) (8:30 a.m., Monday through Friday); San Francisco Ct R 9.0(A) (11 a.m., Monday through Friday). To appear telephonically, counsel must either place the phrase "Telephone Appearance" below the title of the moving or opposing papers or notify the court and all other parties of counsel's intent to appear telephonically at least 3 court days before the hearing. Cal Rules of Ct 3.670(g)(1). Note that local rules may require that counsel use a particular vendor for telephone appearances. Cal Rules of Ct 3.670(*l*). In addition, the vendor may require a minimum amount of notice to set up the conference call.

Superior courts differ in how they handle ex parte applications. Some judges consider and rule on ex parte applications in chambers without counsel present, in which case the clerk will advise the parties of the court's decision. Some judges hear argument from the parties and rule on the application in chambers. Still others review the ex parte papers in chambers and then hold a hearing in open court with or without a court reporter present. Counsel should consult any applicable local rules and, if there are none, call the court clerk to determine the court's practice.

PRACTICE TIP: If a party wants a record of the stay proceeding, counsel should notify the court clerk before the hearing to make certain that a court reporter is available. See, *e.g.*, San Luis Obispo Ct R 7.17(b) (party should request court reporter no earlier than 48 hours and no later than 24 hours before hearing; court reporting fees to be paid before hearing as well). If the court's practice is to rule in chambers, counsel can request that a court reporter be present or that the ruling be given from the bench so there is at least a record of the court's action. Counsel should think carefully before making this request because it is highly unusual for appellate courts to reverse a superior court's decision on a stay request. See §6.27.

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2. Grant or Denial of Stay Request

§6.24 a. Decision Is Within Court's Discretion

The grant or denial of a stay application is within the sound discretion of the court. See *Medical Bd. v Superior Court* (1991) 227 CA3d 1458, 1462, 278 CR 247; *Venice Canals Resident Home Owners Ass'n v Superior Court* (1977) 72 CA3d 675, 679, 140 CR 361; *Ciro's of San Francisco, Inc. v State Bd. of Equalization* (1956) 143 CA2d 99, 299 P2d 985. The court will weigh the extent to which there has been a colorable showing on the merits of the petition and the claimed injury if a stay does not issue. See §6.13.

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§6.25 b. When Stay Application Is Granted

When the court grants a stay application, the petitioner should personally serve the stay order on the respondent and any real party in interest. Some administrative agencies authorize their counsel to accept service on their behalf. In such case, the petitioner can serve the order on counsel at the proceeding. This is also true if the court issues the stay with an alternative writ. In conjunction with granting the stay application, some courts will also set a briefing schedule and a hearing date on the return to the writ (if an alternative writ is issued) or on the merits of the writ petition (if the petitioner intends to proceed by noticed motion for issuance of a peremptory writ).

On issuance of an alternative writ, see §§5.15-5.18. On use of the noticed motion procedure for issuance of a peremptory writ, see §§5.10-5.14.

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§6.26 c. When Stay Application Is Denied

When the court denies a stay application, the court will issue a minute order or ask the respondent to prepare an order. At the end of the stay hearing, many courts will set a briefing schedule and a hearing date on the merits of the writ petition. Sometimes the court will request that the parties confer and submit a stipulated briefing schedule. On issuance of an alternative writ setting return and hearing dates, see §5.15. On use of the noticed motion procedure for issuance of a peremptory writ, see §5.19.

PRACTICE TIP: The denial of a stay request is not a ruling on the merits of the writ petition, and the petitioner may still ultimately prevail.

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§6.27 D. Appellate Relief

The grant or denial of a stay is not an appealable order. CCP §904.1. Rather, appellate relief must be sought by filing a petition for a writ of mandate under CCP §1085 in the court of appeal. However, because the discretion accorded a superior court in granting or denying a stay application is very broad (see §6.24), a reviewing court only very rarely will overrule the lower court's ruling. *Medical Bd. v Superior Court* (1991) 227 CA3d 1458, 1462, 278 CR 247; *Board of Med. Quality Assur. v Superior Court* (1980) 114 CA3d 272, 275, 170 CR 468.

On filing a writ petition in the court of appeal, see chap 18.

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§6.28 E. Modifying or Dissolving a Stay

When a court has granted a stay, it may dissolve or modify the stay at any time on the motion of the respondent or real party in interest, or on its own motion. *Ciro's of San Francisco, Inc. v State Bd. of Equalization* (1956) 143 CA2d 99, 299 P2d 985; *Morton v Superior Court* (1953) 119 CA2d 665, 260 P2d 215. Possible grounds include the petitioner's failure to diligently prosecute the petition.

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IV. TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

§6.29 A. Seeking Stay Through Preliminary Injunctive Relief

Local rules may require or suggest that a petitioner seek a stay through injunctive procedures, *i.e.*, a temporary restraining order (TRO) and preliminary injunction, rather than through an application for a stay. See, *e.g.*, Sacramento County Superior Court Guide to the Procedures for Prosecuting Petitions for Prerogative Writs, p. 5 (instructing petitioners to follow TRO/preliminary injunction procedures when seeking stay in traditional mandate proceeding) (see copy in App B).

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§6.30 B. Required Showing

The superior court must balance two factors when considering a request for preliminary injunctive relief (either in the form of a temporary restraining order or a preliminary injunction): (1) the likelihood that the plaintiff will prevail on the petition; and (2) the interim harm that the petitioner will face if injunctive relief is denied as compared to the harm that the respondent or real party in interest will face if it is granted. *IT Corp. v County of Imperial* (1983) 35 C3d 63, 69, 196 CR 715. The court uses a sliding scale, so the greater the petitioner's showing on one factor, the less need be shown on the other. *Butt v State* (1992) 4 C4th 668, 678, 15 CR2d 480. Regardless of the balance of harm, however, there always must be some possibility that the petitioner will prevail on the petition to justify preliminary injunctive relief. *Butt v State, supra*.

On equitable considerations and injunctive relief, see California Civil Procedure Before Trial §§32.29-32.35 (4th ed Cal CEB 2004).

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C. Temporary Restraining Order

§6.31 1. Description and Purpose

A temporary restraining order (TRO) is an interim order issued to preserve the status quo pending a hearing on a motion for a preliminary injunction. See CCP §527. A TRO is technically not an injunction, although it has the same force and effect, because it may issue ex parte (see CCP §527(c)-(d)) without requiring a bond or undertaking (except in an action for a claim and delivery of personal property; see CCP §515.010(a)). Generally, a TRO:

- Expires automatically at the end of 15 days or, if good cause is shown, 22 days after its issuance (see CCP §527(d)(1));
- Terminates if the court denies a motion for a preliminary injunction (*International Union of Operating Eng'rs v Superior Court* (1989) 207 CA3d 340, 355, 254 CR 782); or
- Is superseded by issuance of a preliminary injunction (*International Union of Operating Eng'rs v Superior Court, supra*; *Houser v Superior Court* (1932) 121 CA 31, 33, 8 P2d 483).

Whether an order is a TRO or a preliminary injunction is determined by its effect, not its title. *Yellen v Fidelity & Cas. Co.* (1931) 115 CA 434, 436, 1 P2d 1019. If the order states that it is effective "until further order of the court" or "until final judgment on the merits," it is a preliminary injunction and a bond is required regardless of what the order is called. *San Diego Water Co. v Pacific Coast S.S. Co.* (1894) 101 C 216, 218, 35 P 651; *McManus v KPAL Broad. Corp.* (1960) 182 CA2d 558, 562, 6 CR 441.

On the procedures for moving for a temporary restraining order, see California Civil Procedure Before Trial §§32.36-32.59 (4th ed Cal CEB 2004).

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§6.32 2. Motion Papers Must Include Copy of Verified Writ Petition

The judge who will hear the application for a temporary restraining order (TRO) must have a copy of the verified writ petition. If the petitioner files the petition on the same day as the TRO application, he or she must file the petition first, and then present the judge with a file-stamped copy. If the petitioner seeks the TRO in an existing case, the applicant must request that the court make its file available to the judge. See Cal Rules of Ct 3.1150(b).

On the documents that must accompany a motion for a temporary restraining order, see California Civil Procedure Before Trial §§32.37-32.46 (4th ed Cal CEB 2004).

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§6.33 3. Court Has Discretion to Require Bond or Undertaking

Whether to require a bond or undertaking when issuing a temporary restraining order (TRO) is discretionary with the court. *Biasca v Superior Court* (1924) 194 C 366, 367, 228 P 861; *Allen v Pitchess* (1973) 36 CA3d 321, 329, 111 CR 658. If the court orders a bond or undertaking, the TRO does not become effective until the bond or undertaking is given. *Heyman & Co. v Landers* (1859) 12 C 107; *Armstrong v Superior Court* (1916) 173 C 341, 343, 159 P 1176.

NOTE: Courts often do not require a bond or undertaking in connection with the issuance of a TRO, because of its relatively short duration. If a judge orders a bond or undertaking, the judge will look to the amount of damages that may result from issuance of the TRO to determine the amount of the bond or undertaking.

On the bond or undertaking, see California Civil Procedure Before Trial §32.56 (4th ed Cal CEB 2004).

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§6.34 4. If Temporary Restraining Order Application Is Denied

If the court denies the application for a temporary restraining order (TRO), the moving party may still schedule a hearing for a preliminary injunction. In addition, even if it denies the TRO application, the court still may issue an order to show cause why a preliminary injunction should not issue, returnable within 15 days, or 22 days if there is good cause, of the date of the order.

On moving for a preliminary injunction, see §§6.36-6.38.

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§6.35 5. If Temporary Restraining Order Application Is Granted

If the court grants an application for a temporary restraining order (TRO), it must set the hearing on the preliminary injunction within 15 days, or 22 days if there is good cause, of the issuance of the TRO. CCP §527(d)(1). Additionally, within the earlier of 5 days after the court issues the TRO or 2 days before the date of the preliminary injunction hearing, the applicant must serve the opposing party with: a copy of the petition, if it has not previously done so; the order to show cause stating the date, time, and place of the hearing; and all supporting papers. CCP §527(d)(2). If the applicant does not serve these materials in a timely manner, the court must dissolve the TRO. CCP §527(d)(3).

On moving for a preliminary injunction, see §§6.36-6.38.

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D. Motion for Preliminary Injunction

§6.36 1. Criteria for Issuance

A petitioner seeking a preliminary injunction must establish that (1) the petitioner has a reasonable likelihood of success on the merits of the underlying controversy, and (2) the petitioner will suffer harm without preliminary injunctive relief as compared to the harm that the respondent or real party in interest will face if relief is granted. *Cohen v Board of Supervisors* (1985) 40 C3d 277, 286, 219 CR 467; *IT Corp. v County of Imperial* (1983) 35 C3d 63, 69, 196 CR 715. The greater the chance of petitioner's success on the merits, the less severe the harm must be for the injunction to issue, particularly when the requested injunction maintains the status quo. *Butt v State* (1992) 4 C4th 668, 678, 15 CR2d 480; *King v Meese* (1987) 43 C3d 1217, 1228, 240 CR 829. When a governmental agency is the respondent, the petitioner must make a "significant" showing of irreparable harm because "[t]here is a general rule against enjoining public officers or agencies from performing their duties." *Tahoe Keys Prop. Owners' Ass'n v State Water Resources Control Bd.* (1994) 23 CA4th 1459, 1471, 28 CR2d 734.

PRACTICE TIP: The petitioner can use the declarations and supporting memorandum prepared for a temporary restraining order (TRO) application in support of the preliminary injunction, as appropriate. The petitioner should consider, however, supplemental declarations addressing newly discovered facts and background information unavailable at the TRO hearing. A petitioner who wishes to file such supplemental declarations should request permission to do so at the TRO hearing so that the court can set the briefing schedule and hearing date accordingly.

On procedures for obtaining a preliminary injunction, see California Civil Procedure Before Trial §§32.19-32.35, 32.60-32.91 (4th ed Cal CEB 2004).

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2. Undertaking (Bond) Requirement

§6.37 a. When Required

If the court decides that a preliminary injunction should issue, it must require the moving party to file a written undertaking (or bond) to ensure that the applicant will pay any damages that the wrongfully enjoined party sustains because of the injunction, unless excused by CCP §529(b). CCP §529(a). Under certain circumstances, the court may exercise discretion whether it will require an undertaking, *e.g.*, when the moving party is indigent (CCP §995.240), in domestic violence cases (CCP §529(b)(2)), or when the moving party is a public entity or officer described in CCP §995.220 (CCP §529(b)(3)).

On undertaking requirements, see California Civil Procedure Before Trial §§32.92-32.94 (4th ed Cal CEB 2004).

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§6.38 b. Amount of Undertaking (Bond)

The undertaking (or bond) must be sufficient to secure any costs and damages that the respondent or real party in interest may incur as a result of the preliminary injunction if that injunction is later found to have been wrongfully imposed. CCP §529(a). The court may require that the undertaking cover the enjoined party's attorney fees. *Satinover v Dean* (1988) 202 CA3d 1298, 1300, 249 CR 277.

On amount of undertaking, see California Civil Procedure Before Trial §32.96 (4th ed Cal CEB 2004).

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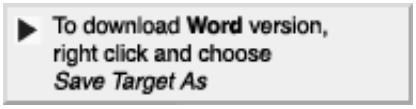
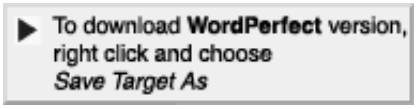
Source: Civil Litigation/California Civil Writ Practice/6 Requesting a Stay in a Superior Court Writ Proceeding/§6.39 V. CHECKLIST: OBTAINING STAY ORDER

§6.39 V. CHECKLIST: OBTAINING STAY ORDER





The following are tasks the petitioner should perform when seeking a stay of the challenged action or decision pending writ review in the superior court:

- Request preparation of the record; obtain estimated date of delivery. It might be necessary to seek a stay before the record can be compiled. If so, counsel should be sure to lodge copies of relevant documents with the stay application or motion for a temporary restraining order (TRO). See §6.14.
- Decide whether to prosecute writ proceeding by noticed motion procedure or alternative writ procedure (see §5.9); check local rules or call the court clerk to determine the court's preference.
- Decide whether to seek a stay by application (see §§6.7-6.17), or preliminary injunction procedures (see §§6.31-6.33 (TRO), §§6.36-6.38 (preliminary injunction)), by first checking local rules or guidelines, calling court clerk to determine any procedural preference or local practice, and then considering timing and other factors.
- Prepare application or request for TRO or preliminary injunction, supporting brief, necessary declarations, and proposed order.
- Check with court regarding filing practices and notice requirements.
- Give notice as required; prepare declaration of notice.
- Prepare copies of writ petition and, if filed separately, stay application; file original and required number of copies with court.
- If disqualification of the judge is desired, consider filing a CCP §170.6 challenge. See California Trial Practice: Civil Procedure During Trial §§6.26-6.78 (3d ed Cal CEB 1995).
- Be prepared to post bond or undertaking if required as a condition of stay or injunction.
- If court grants a stay, TRO, or preliminary injunction, serve order.

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7

The Record in Superior Court Writ Proceedings

David de Jesus

I. SCOPE OF CHAPTER §7.1

II. PURPOSE OF THE RECORD §7.2
- A. Necessity of Sufficient Record §7.3
- B. Statutory Guidance Limited §7.4

III. PREPARING THE RECORD FOR A SUPERIOR COURT WRIT PROCEEDING
- A. Who Prepares the Record §7.5
- B. What Record Includes
  - 1. Record Depends on Type of Petition and Nature of Underlying Proceeding §7.6
  - 2. Include All Relevant Evidence Presented During the Underlying Proceeding §7.7
  - 3. Include Opposing Party's Evidence Presented During Underlying Proceeding §7.8
  - 4. Evidence Not Presented During Underlying Proceeding (Extra-Record Evidence) §7.9
    - a. If Challenging Ministerial or Informal Actions §7.10
    - b. If Challenging Quasi-Legislative Actions §7.11
    - c. If Challenging Adjudicatory Decisions §7.12
  - 5. Record in Pre-Merits Hearings §7.13
- C. Obtaining Record From Decision-Making Body in Underlying Proceeding §7.14
  - 1. When to Request Underlying Record §7.15
  - 2. How to Request Underlying Record §7.16
  - 3. Paying for Preparation of Underlying Record §7.17

IV. FORMAT OF THE RECORD PRESENTED TO THE SUPERIOR COURT
- A. Administrative Record" Versus Documentation Submitted by Way of Exhibits §7.18
  - 1. Appending Supporting Documentation to Petition §7.19
  - 2. Separate Supporting Documentation §7.20
- B. Indexing, Pagination, and Order of Supporting Documentation §7.21
- C. Visual Quality of Documents §7.22
- D. Citation to the Record §7.23

V. SERVING AND LODGING/FILING THE RECORD DOCUMENTATION
- A. Serving the Record §7.24
- B. Lodging/Filing the Record §7.25

VI. PROTECTING CONFIDENTIAL DOCUMENTS §7.26
- A. Criteria for Sealing Documents §7.27
- B. Procedure for Sealing Documents §7.28
  - 1. Moving for Sealing Order §7.29
  - 2. Lodging Document (Record) With Court §7.30
    - a. Conditionally Sealing Document (Record) §7.31
    - b. Court's Handling of Conditionally Sealed Document (Record) §7.32
- C. Inserting Slip Pages for Sealed Documents §7.33

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§7.1 I. SCOPE OF CHAPTER

This chapter discusses the documentation submitted in support of a writ petition filed in the superior court (other than a petition for a writ of administrative mandamus under CCP §1094.5). The chapter begins with a discussion of the purpose of the supporting documentation, which can be in the form of:

- A true administrative record generated during an administrative adjudicatory proceeding;
- A record generated during underlying governmental or private proceedings that is both extensive and akin to (and often called) an administrative record; or
- Declarations and exhibits submitted in support of the petition.

Collectively and generally, this documentation is referred to in this chapter as the "record." See §§7.2-7.3.

The chapter next discusses how to compile the record (see §§7.5-7.17) and general formatting. See §§7.18-7.23. The chapter then discusses serving and lodging an administrative record, and serving and filing supporting declarations and exhibits. See §§7.24-7.25. The chapter concludes with a discussion of how to protect confidential documents by sealing portions of the record. See §§7.26-7.33.

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§7.2 II. PURPOSE OF THE RECORD

Many superior court writ actions arise from proceedings before a governmental or private body, in which the participants presented documents and/or testimony to the decision-maker. All administrative mandamus actions under CCP §1094.5 arise from such proceedings, as do many traditional mandamus actions under CCP §1085. See §§7.9-7.12. In such actions, the record generated during the underlying proceedings often provides the factual universe that the superior court considers in deciding the merits of the writ petition. Even when there is no underlying record, a petitioner usually must support a writ petition with sworn declarations setting out relevant facts and/or authenticating relevant exhibits. In any event, the petitioner has the burden of submitting all the information necessary for the superior court to decide the issues presented by the writ petition.

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§7.3 A. Necessity of Sufficient Record

The lack of an adequate record (*i.e.*, the documentation necessary for the superior court to fully consider the issues presented) is grounds to deny a writ petition. See *Darley v Ward* (1980) 28 C3d 257, 260, 168 CR 481 (superior court denied writ petition on ground petitioner failed to carry burden to provide adequate record; supreme court reversed, holding that superior court should have granted continuance to allow petitioner to obtain written transcription of hearing); *Pomona Valley Hosp. Med. Ctr. v Superior Court* (1997) 55 CA4th 93, 108 n8, 63 CR2d 743 (noting that superior court in administrative mandamus proceeding did not err in refusing to allow petitioner to file "statement of facts" and selective portions of record as substitute for complete administrative record). See also *Sherwood v Superior Court* (1979) 24 C3d 183, 186, 154 CR 917 (in appellate court writ proceeding, absence of transcripts of grand jury proceeding and trial court hearing rendered record insufficient and petition was denied); *Tyler v Superior Court* (1980) 102 CA3d 82, 86, 162 CR 82 (in appellate court writ proceeding, failure to include transcript of superior court hearing and superior court's order denying pretrial motion rendered record insufficient and petition was denied).

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§7.4 B. Statutory Guidance Limited

The writ statutes make limited reference to the record and primarily in the context of administrative adjudicatory decisions challenged under CCP §1094.5. See CCP §§1089.5 (timing of answer affected if administrative record has been requested and filed), 1094.5(a) (all or part of administrative record may be filed with petition, opposing memorandum, or otherwise as ordered by court), 1094.6(c) (respondent must prepare complete record when requested by petitioner), 1094.8(d)(1) (in First Amendment permit or entitlement decisions, record to be prepared within 5 court days of petitioner's request). However, a record can be generated in many kinds of governmental and private proceedings, and thus may be a necessary component of other kinds of writ proceedings as well. See §§7.2, 7.9, 7.11-7.12. Absent an underlying record, a petitioner will often need to support a petition for a writ of traditional mandate or other writ with declarations and/or exhibits. See §7.18.

The rules of court, in turn, expressly address the lodging of an administrative record in an administrative mandamus proceeding under CCP §1094.5. Cal Rules of Ct 3.1140. They also expressly address the preparation and filing of declarations and exhibits in the superior court (see Cal Rules of Ct 3.1110(c)-(g), 3.1113(k) (made applicable to writ proceedings by Cal Rules of Ct 3.1103(a)(2)) and the record in an appellate court writ proceeding (see Cal Rules of Ct 8.486(b)-(c); chap 20).

Thus, as with other aspects of superior court writ practice, the statutes and rules do not fully address the handling of records in traditional mandate and other kinds of writ actions. For example, there may be an extensive underlying record in a traditional mandate case that the parties will call and treat as an "administrative" record, but is not specifically covered by any statute or rule of court. The courts generally have no objection to the parties treating such an underlying record as an administrative record and lodging it with the court. See §7.18.

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III. PREPARING THE RECORD FOR A SUPERIOR COURT WRIT PROCEEDING

§7.5 A. Who Prepares the Record

It is the petitioner's responsibility to provide the superior court with the documentation necessary for the court to decide the issues presented by the writ petition. See §7.3. In some cases, the petitioner can fulfill its responsibility by giving notice to the entity whose action or decision is being challenged to prepare the record of the underlying proceedings. See Govt C §11523 (specifying that agency shall prepare record of adjudicatory proceedings).

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B. What Record Includes

§7.6 1. Record Depends on Type of Petition and Nature of Underlying Proceeding

The documentation submitted in support of a superior court writ petition depends on:

- The type of writ sought;
- The nature of the challenged action or decision;
- The character of the underlying proceeding; and
- The issues raised in the writ petition.

For example, if the statutory requirements for administrative mandamus (CCP §1094.5) are not all met, a petitioner may challenge an administrative adjudicatory decision by way of traditional mandamus (CCP §1085). See §§2.3-2.6, 3.3-3.6. In such a case, there will be a full administrative record. Similarly, the petitioner may challenge a land use decision reviewable under CCP §1085 in which a substantial record was generated during the underlying proceedings. See, *e.g., Bright Dev. v City of Tracy* (1993) 20 CA4th 783, 790, 24 CR2d 618.

On the other hand, a petitioner may challenge the validity of local legislative action by way of traditional mandate, in which case there will be a smaller record, which might include some history of the local enactment (*e.g.,* reports, analyses, testimony). In addition, the petitioner might rely on supporting declarations, or even a set of stipulated facts. See, *e.g., Friends of Bay Meadows v City of San Mateo* (2007) 157 CA4th 1175, 1181, 68 CR3d 916.

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§7.7 2. Include All Relevant Evidence Presented During the Underlying Proceeding

At a minimum, the documentation submitted to the superior court should include all documents and testimony presented to the decision-maker or decision-making body that are relevant to the petitioner's challenge to the underlying action or decision. The extent of this documentation will vary depending on the nature of the underlying proceedings and the issues presented in the writ petition. See §7.6. For example, an administrative hearing with multiple witnesses and numerous documents might generate a large record, but a license or permit denial might generate a relatively small one. In any case, the touchstone is relevance: The petitioner must ensure that the superior court has all documentation and testimony (if any) relevant to assessing the merits of the challenged action or decision. If the underlying proceeding did not involve documents (*e.g.,* if a party asked a governmental entity to perform a ministerial duty and no hearing was held), the supporting documentation will be in the form of declarations from individuals with personal knowledge of the underlying proceeding.

PRACTICE TIP: Statutes pertaining to administrative mandamus provide some guidance on the types of items that may be important to submit in a traditional mandamus action. See, *e.g.,* CCP §1094.6(c) (describing contents of record in administrative mandamus proceedings involving local agencies other than school districts); Govt C §11523 (describing contents of record in cases to be decided under administrative adjudication provisions of Administrative Procedure Act). On administrative mandamus, see chap 3. See also Cal Rules of Ct 8.486(b) (governing record in appellate court writ proceedings); §20.6.

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§7.8 3. Include Opposing Party's Evidence Presented During Underlying Proceeding

The record presented to the superior court must be complete, which means that the petitioner must include all relevant documents and testimony presented in the underlying proceedings by the respondent or any real party in interest as well by the petitioner. See, *e.g.,* CCP §1094.6(c) (in administrative mandamus proceedings, record includes "all pleadings" as well as all admitted exhibits and rejected exhibits in possession of local agency or its commission, board, officer, or agent); Govt C §11523 (in proceedings under Administrative Procedure Act, record includes "the pleadings" and "the exhibits admitted or rejected"). See also Cal Rules of Ct 8.486(b)(1)(B), (D) (in appellate court writ proceedings, record must include all documents submitted to trial court supporting and opposing challenged ruling and any other documents submitted to trial court necessary for complete understanding of case).

PRACTICE TIP: This does not mean that every document and all testimony presented (if any) during the underlying proceeding must be submitted to the superior court. Some of it may be irrelevant to the issues raised in the writ petition, and the court should not be burdened with such extraneous material. See CCP §1094.5(a) (in administrative mandamus proceeding, petitioner may submit all or part of administrative record).

A complete record is not simply a matter of the petitioner carrying its burden of proof (see §7.3), but also a matter of fundamental candor with the superior court. A petitioner will suffer a serious blow to credibility if the court discovers that the proffered "record" of the challenged action or decision is one-sided. Moreover, a party that prevails in the superior court based on an incomplete record (*i.e.*, one that does not support relief) risks later reversal on appeal.

PRACTICE TIP: "Unclean hands" can be interposed as a defense to a writ petition, and actions constituting unclean hands can occur before or during a superior court writ proceeding, including in connection with preparing a record. See generally *Allen v Los Angeles County Dist. Council of Carpenters* (1959) 51 C2d 805, 812, 337 P2d 457 (trial court did not abuse its discretion in denying writ of mandate given petitioner's unclean hands). On the unclean hands defense, see 5 Witkin, California Procedure, *Pleading* §1126 (5th ed 2008).

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§7.9 4. Evidence Not Presented During Underlying Proceeding (Extra-Record Evidence)

Extra-record evidence is evidence that was not presented during the underlying governmental or private proceedings. This evidence can include matters that are judicially noticeable, although judicial notice is most frequently requested in support of a legal argument (*e.g.*, the legislative history of a statute for a statutory construction argument), rather than to establish the operative facts. See, *e.g.*, *Preserve Shorecliff Homeowners v City of San Clemente* (2008) 158 CA4th 1427, 1444 n14, 71 CR3d 332 (judicial notice of legislative history); *Fiscal v City & County of San Francisco* (2008) 158 CA4th 895, 913, 70 CR3d 324 (same). See also *Tuolumne County Citizens for Responsible Growth, Inc. v City of Sonora* (2007) 155 CA4th 1214, 1220, 66 CR3d 645 (judicial notice of numerous items in CEQA writ proceeding).

PRACTICE TIP: If judicial notice is permissible, a petitioner must proceed in accordance with Cal Rules of Ct 3.1113(*l*) (made applicable to writ proceedings by Cal Rules of Ct 3.1103(a)(2)). On judicial notice requests in appellate court writ proceedings, see §§20.17-20.22.

The propriety of submitting extra-record evidence to the superior court in traditional mandamus proceedings under CCP §1085 depends on the type of action or decision being challenged. See §§7.10-7.11. See also *SN Sands Corp. v City & County of San Francisco* (2008) 167 CA4th 185, 195 n5, 83 CR3d 885. In contrast, in administrative mandamus proceedings under CCP §1094.5, the court can consider extra-record evidence only if (CCP §1094.5(e)):

- In the exercise of reasonable diligence the parties could not have produced it during the underlying proceedings; or
- The evidence was improperly excluded during the administrative proceedings.

This standard is also likely to be applied in a traditional mandate action challenging an administrative adjudicatory decision (*e.g.,* where the statutory requirements of CCP §1094.5 are not all met (see §§2.3-2.6, 3.3-3.6). See §7.12. On extra-record evidence in an administrative mandamus proceeding, see §3.7.

PRACTICE TIP: Under extremely limited circumstances, discovery is permissible in mandamus proceedings. In such circumstances, the superior court may necessarily be considering extra-record evidence. Any such review, however, still must be limited to relevant evidence. On discovery in superior court writ proceedings, see §§5.10, 5.16.

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§7.10 a. If Challenging Ministerial or Informal Actions

Extra-record evidence may be appropriate in traditional mandamus actions challenging or seeking to compel ministerial actions, particularly if the facts are in dispute. See *Western States Petroleum Ass'n v Superior Court* (1995) 9 C4th 559, 575, 38 CR2d 139 (extra-record evidence "is usually necessary only when the courts are asked to review ministerial or informal administrative actions, because there is often little or no record in such cases"). See also *SN Sands Corp. v City & County of San Francisco* (2008) 167 CA4th 185, 195 n5, 83 CR3d 885 (discussing *Western States*). See also CCP §1090 (allowing court to permit jury trial of disputed essential facts). For example, the petitioner may need to seek judicial notice of relevant rules, regulations, policies, charter provisions, ordinances, or other procedures with which the respondent allegedly is required to comply. See §7.9.

In addition, the petitioner will need to present to the superior court through exhibits—either attached to the petition or to an authenticating declaration—whatever documentation may have been generated in connection with the performance of or refusal to perform the action at issue. Although this is usually referred to as "extra-record" evidence, it is actually the documentary record, albeit minimal, of the underlying action or decision. See §7.18-7.20.

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§7.11 b. If Challenging Quasi-Legislative Actions

Extra-record evidence is generally not admissible in traditional mandamus proceedings challenging quasi-legislative actions if the issues presented are legal ones. See *Western States Petroleum Ass'n v Superior Court* (1995) 9 C4th 559, 575, 38 CR2d 139 (administrative record developed during quasi-legislative process is usually adequate for courts to review decision without recourse to extra-record evidence); *SN Sands Corp. v City & County of San Francisco* (2008) 167 CA4th 185, 195 n5, 83 CR3d 885 (extra-record declarations disregarded); *San Joaquin County Local Agency Formation Comm'n v Superior Court* (2008) 162 CA4th 159, 163, 76 CR3d 93 (trial court erred in ordering depositions of commissioners to learn what extra-record information they had when making decision on agency formation application because such extra-record evidence is inadmissible); *Shapell Indus., Inc. v Governing Bd.* (1991) 1 CA4th 218, 233, 1 CR2d 818 (court is not required to consider new evidence in mandamus proceeding presenting only legal question of whether agency acting in its quasi-legislative capacity has exceeded its authority). Limiting review to the administrative record is generally appropriate because of the limited scope of review applicable to quasi-legislative actions. *San Joaquin County Local Agency Formation Comm'n,* 162 CA4th at 167.

NOTE: There may be exceptional circumstances warranting consideration of extra-record evidence, such as issues concerning standing or capacity to sue, affirmative defenses, accuracy of the administrative record, procedural unfairness, or agency misconduct. *Western States Petroleum Ass'n v Superior Court* (1995) 9 C4th 559, 575 n5, 38 CR2d 139; *San Joaquin County Local Agency Formation Comm'n,* 162 CA4th at 167. However, extra-record evidence "can never be admitted merely to contradict the evidence the administrative agency relied on in making a quasi-legislative decision or to raise a question regarding the wisdom of that decision." *San Joaquin County Local Agency Formation Comm'n,* 162 CA4th at 169, quoting *Western States Petroleum Ass'n*, 9 C4th at 579.

When there are disputes as to essential facts, however, the superior courts may entertain extra-record evidence. See CCP §1090 (allowing court to permit jury trial of disputed essential facts); *Dare v Board of Med. Exam'rs* (1943) 21 C2d 790, 797, 136 P2d 304 (if there are disputed issues of fact, "any competent evidence may be introduced and received and the ordinary procedural rules apply"); *Shapell Indus., Inc. v Governing Bd., supra* (court may consider new evidence in mandamus proceeding in which factual questions are raised); *Bright Dev. v City of Tracy* (1993) 20 CA4th 783, 795, 24 CR2d 618 (in traditional mandamus proceeding, parties may present evidence outside administrative record).

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§7.12 c. If Challenging Adjudicatory Decisions

Extra-record evidence is generally not admissible in traditional mandamus actions challenging adjudicatory decisions. See *Bunnett v Regents of Univ. of Cal.* (1995) 35 CA4th 843, 853, 41 CR2d 567 (superior court cannot "accept evidence in addition to the administrative record in a mandate proceeding concerning an adjudicatory decision"), citing *Fascination, Inc. v Hoover* (1952) 39 C2d 260, 264, 246 P2d 656 (in mandamus proceeding challenging adjudicatory decision, trial court is limited to examination of matters that lower tribunal considered). See also *Golden Drugs Co. v Maxwell-Jolly* (2009) 179 CA4th 1455, 102 CR3d 446 (Department of Health Care Services reached adjudicatory decision that depended on particular facts of case, and petitioner failed to show why it should have been allowed to add extra-record evidence in trial court).

NOTE: Most administrative adjudicatory decisions are reviewed by way of administrative mandamus under CCP §1094.5, but if any of the three statutory requirements for administrative mandamus is not met (see §§3.3-3.7), an administrative adjudicatory decision is reviewed by way of traditional mandamus under CCP §1085. On traditional mandamus, see chap 2.

Extra-record evidence may be permissible, however, if the issue is whether the petitioner received a "fair" administrative hearing. See *Nasha v City of Los Angeles* (2004) 125 CA4th 470, 485, 22 CR3d 772 (in administrative mandamus proceeding, extra-record evidence permissible if petitioner claims that he or she was denied due process or fair hearing).

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§7.13 5. Record in Pre-Merits Hearings

There may be proceedings in a writ action before the superior court hears the petition on the merits (*e.g.*, on an application for alternative writ or application for stay or temporary restraining order). A party seeking preliminary relief must provide the court with sufficient information to decide the preliminary matter, generally by way of declaration and attached and authenticated exhibits.

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§7.14 C. Obtaining Record From Decision-Making Body in Underlying Proceeding

Because proceedings before a governmental or private body are often less formal than court proceedings, a petitioner may not have ready access to a copy of the full record generated during the underlying proceeding. The statutes may entitle the petitioner to request the record, in writing, from the lower agency or tribunal. See *e.g.,* Pub Res C §21167.6(a). This is most likely to be the case in connection with an administrative adjudicatory proceeding subject to review by way of administrative mandamus under CCP §1094.5.

If the decision-making body is not under any obligation to prepare a record of the underlying proceedings, the petitioner will need to assemble all relevant documents and hearing transcripts (if any).

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§7.15 1. When to Request Underlying Record

If applicable, a petitioner should promptly request the governmental or private body to prepare the record of the underlying proceedings.

PRACTICE TIP: A petitioner should not rely on a request for preparation of a record to stay the deadline for filing a writ petition. The best practice is to timely file the writ petition and include in the verified allegations when the record was requested, what was requested, and any known information as to when the record will be prepared.

The administrative mandamus statute requires a local agency to prepare a record within 190 days of the petitioner's request. CCP §1094.6(c). But see CCP §1094.8(d)(1) (administrative agency has only 5 court days to prepare record in cases involving denial, revocation, or suspension of permit for constitutionally protected expressive conduct). There is no similar deadline in the traditional mandamus statutes. A petitioner preparing a record in a traditional mandamus case is strongly recommended to comply with the administrative mandamus deadlines, particularly if it is unclear whether the traditional mandate or administrative mandate statutes apply. Indeed, the record preparation request is often made before the petitioner even files the petition and thus there will have not yet been a specific designation of the writ action as one for traditional or administrative mandamus, or both. On traditional mandamus, see chap 2. On administrative mandamus, see chap 3.

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§7.16 2. How to Request Underlying Record

There is no prescribed written form for requesting preparation of a record generated in an underlying governmental or private proceeding. Thus, a petitioner should inquire whether the body or agency has any special requirements for the written request. A letter is usually sufficient if it states the necessary information. If a state agency is the respondent, the petitioner should mail the request to the agency. See Govt C §11523 (specifying that agency shall prepare record). The request should identify (by number and title, if available) the following:

- The proceeding at issue;
- The parties to the proceeding and the parties to the pending or anticipated writ proceeding; and
- All desired items, including exhibits.

When requesting preparation of a record, the petitioner also should request a cost estimate for preparation. Once the estimated costs are ascertained, a check in that amount should be sent immediately, so as not to delay preparation of the record. Another option is to provide a "not to exceed" check when a rough estimate is available. The petitioner should not delay requesting the record while waiting for a cost estimate, however. On paying for the preparation of the record, see §7.17.

PRACTICE TIP: Although not required, petitioner should mail a courtesy copy of a request for a record to counsel for each party to the underlying proceeding and to the pending writ proceeding (if known). Petitioner may invite counsel for the other parties to supplement the request with additional material. This practice helps ensure that the record will be complete, thus avoiding delays in prosecuting the writ petition. It also encourages the parties to act with civility and professionalism.

On requesting the record in an administrative adjudicatory proceeding, see California Administrative Mandamus §§10.8-10.10 (3d ed Cal CEB 2003).

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§7.17 3. Paying for Preparation of Underlying Record

The governmental or private body preparing a record generally may recover its initial costs of doing so from the petitioner. See CCP §1094.5(a); Govt C §11523. A petitioner proceeding in forma pauperis, however, is not required to pay for the agency's record preparation costs. CCP §1094.5(a).

The prevailing party in a writ proceeding is entitled to recover costs for record preparation, compilation, and certification. See CCP §§1033.5, 1094.5(a); Govt C §11523. Accordingly, a petitioner that ultimately prevails in a writ proceeding may recover the costs it paid for record preparation.

On the cost of an administrative record, see California Administrative Mandamus §§10.14-10.16 (3d ed Cal CEB 2003).

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IV. FORMAT OF THE RECORD PRESENTED TO THE SUPERIOR COURT

§7.18 A. "Administrative Record" Versus Documentation Submitted by Way of Exhibits

Administrative record. In cases in which the petitioner requests that a governmental or private body prepare an underlying record (either a true administrative record generated during an administrative adjudicatory proceeding or an extensive record developed during other governmental or private proceedings), the governmental or private body will likely deliver the record to the petitioner as a bound document in one or more volumes. The petitioner need not reformat or recompile the record, but must ensure that it is timely lodged with the superior court. See Cal Rules of Ct 3.1140 (requiring administrative record in administrative mandamus action be lodged with court at least 5 days before hearing on writ petition); §7.25. As a result, the superior courts receive records of underlying proceedings in a variety of formats, *e.g.*, in three-ring binders, in vela-bound volumes, in tape-bound volumes, in boxes, and even in rubber-banded batches (not recommended).

Similarly, if the petitioner compiles the administrative record, it may be assembled in volumes, with an index and pages consecutively numbered.

PRACTICE TIP: The petitioner should check local rules or with the court clerk to determine whether the superior court has a specific preference on how to assemble the record in a writ proceeding.

Record in form of declarations and exhibits. In many traditional mandamus cases under CCP §1085, and in other types of writ cases, the record presented to the superior court is not the equivalent of an "administrative record," and instead will be in the form of declarations with attached and authenticated exhibits. See §§7.2, 7.6-7.7, 7.10, 7.19-7.20. The rules specify the format for exhibits. See Cal Rules of Ct 3.1110(c)-(g), 3.1113(j) (made applicable to writ proceedings by Cal Rules of Ct 3.1103(a)(2)).

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§7.19 1. Appending Supporting Documentation to Petition

If the supporting documentation consists of only a few pages (*i.e.,* it is not an administrative record or treated as such (see §7.18)), it can be attached as one or more exhibits to the writ petition with an index preceding the exhibits. See Cal Rules of Ct 3.1110(e)-(f), 3.1113(j) (made applicable to writ proceedings by Cal Rules of Ct 3.1103(a)(2)). See also Cal Rules of Ct 8.486(c)(1)(A) (specifying form of supporting documents for appellate court writ petitions). Exhibits can be authenticated by way of either a verified allegation in the petition or an authenticating declaration.

PRACTICE TIP: It is hard to quantify what constitutes a "few" pages. If the writ petition seems at all unwieldy, it is best to file supporting declarations and exhibits separately. See §7.20.

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§7.20 2. Separate Supporting Documentation

If the supporting documentation consists of more than a few pages, petitioner should submit it separately by attachment to sworn and authenticating declarations, or as an appendix of exhibits in support of the petition (the exhibits may be authenticated by verified allegation in the writ petition or an accompanying sworn declaration). See Cal Rules of Ct 3.1110(e)-(f), 3.1113(j) (made applicable to writ proceedings by Cal Rules of Ct 3.1103(a)(2)).

Any compendium of supporting exhibits exceeding 300 pages in length should be separated into volumes of no more than 300 pages each (with the caption page title noting, *e.g.,* Volume 1 of 3). For ease of reference, counsel should attach a complete index to the beginning of each volume. See Cal Rules of Ct 3.1110(f) (made applicable to writ proceedings by Cal Rules of Ct 3.1103(a)(2)). If the supporting documentation is of this length, however, it is likely to be the administrative record or its equivalent and, if so, the petitioner should treat it accordingly. See §7.18.

PRACTICE TIP: If a record or supporting exhibits include multiple copies of a document or if an irrelevant document is an exhibit to an otherwise relevant document, the petitioner can substitute a single page in place of the duplicate or irrelevant document that identifies the document and explains its omission or where its duplicate is located. The courts will appreciate efforts to minimize the size of a record or documentation submitted in support of a writ petition.

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§7.21 B. Indexing, Pagination, and Order of Supporting Documentation

Regardless of whether supporting documentation is appended to the writ petition (see §7.19) or submitted separately in the form of declarations and exhibits (see §7.20), it must conform with the following format requirements:

- **Index tab the documents.** Each exhibit must be separated by a hard 8½ × 11-inch sheet with tabs extending below the bottom of the page, bearing the exhibit designation. Counsel must designate pages from a single deposition and associated exhibits as a single exhibit. Cal Rules of Ct 3.1110(f) (made applicable to writ proceedings by Cal Rules of Ct 3.1103(a)(2)).

PRACTICE TIP: This requirement can lead to an unwieldy and confusing compendium if the exhibits themselves contain separately tabbed items, creating multiple layers of identification. One solution is to follow appellate court practice and, in a compendium of exhibits, in addition to the required tabs, use consecutive pagination for all exhibit pages. See Cal Rules of Ct 8.486(c)(1)(A); *Great Oaks Water Co. v Santa Clara Valley Water Dist.* (2009) 170 CA4th 956, 965 n7, 88 CR3d 506 (court complained that record was tabbed, but not consecutively or consistently numbered, and explained that "[e]ach page of the administrative record should be numbered so that reference can easily be made to specific pages within a specific document"). This allows for much more succinct citation to the record in the briefing (*e.g.,* "Vol. 1 of Exhs., Exh. 25 at 157") and helps the court turn quickly to referenced record material. See Cal Rules of Ct 3.1113(k) (made applicable to writ proceedings by Cal Rules of Ct 3.1103(a)(2)). On citation to the record, see §7.23.

- **Provide an index**. Counsel must provide an index to the exhibits. Cal Rules of Ct 3.1110(f) (made applicable to writ proceedings by Cal Rules of Ct 3.1103(a)(2)).

Additionally, counsel should:

- **Chronologically order the documents.** Place supporting documents in chronological order by date, with the earliest filed document appearing first.
- **Check local rules.** Check the court's local rules for any additional requirements.

PRACTICE TIP: The goal in preparing the supporting documentation is to provide the superior court with a user-friendly, easily understood, and manageable compendium that lends itself to a straightforward citation format in the writ petition and in the supporting and opposing memoranda.

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§7.22 C. Visual Quality of Documents

All copies of supporting documents should be readable and unmarked. If a copy of a document contains handwritten notations that counsel cannot "white out" to produce a clean copy, the petitioner should obtain a clean copy from the respondent or real party in interest. If available duplicating equipment will not produce a high-quality copy, counsel should use a professional copy service.

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§7.23 D. Citation to the Record

Citations should be short and easily understood. Citation to a record lodged with the court (see §7.18) can be very concise, *e.g*., "Rec. at 25," "Vol. 1 of Rec. at 5," "Rec., Vol. 1 at 5." Citation to declarations and exhibits should also be concise, *e.g.*, "Smith Dec., Exh. A at 5" or "Exhs., Exh. A at 5." See Cal Rules of Ct 3.1113(k) (made applicable to writ proceedings by Cal Rules of Ct 3.1103(a)(2)). See also Cal Rules of Ct 8.486(c).

Counsel should avoid cumbersome citations that recite the title of the document; not only are they difficult to decipher, they also add unnecessary length to documents and create problems with page limits.

PRACTICE TIP: To ensure that the court understands the citation format, the petitioner should drop a footnote immediately after the first record citation explaining the format, *e.g.,* "'Exh. 5' refers to page 5 of exhibit A attached to this writ petition" or "'Exh. 5' refers to page 5 of the compendium of exhibits submitted in conjunction with this petition" or "'Exh. 5' refers to page 5 of the record that will be lodged with the court within the time period provided by [*cite statute or rule*]."

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V. SERVING AND LODGING/FILING THE RECORD DOCUMENTATION

§7.24 A. Serving the Record

If a record of the underlying proceedings is prepared by a governmental or private body (see §7.18), the petitioner should serve a copy of the record shortly after receiving it, or at least when filing a notice of motion and motion for issuance of a writ. Similarly, if the petitioner prepares the administrative (or equivalent) record (see §7.18), it should be served when it is compiled, or at least when filing a notice of motion and motion for issuance of a writ.

PRACTICE TIP: Promptly serving a copy of the record allows the opposing party to work with the record in its final format, and ensures that record citations by all of the parties will follow a consistent format.

If the writ petition is supported by declarations and exhibits (see §§7.18-7.21), the time for service depends on whether the petitioner chooses to proceed by way of the noticed motion or alternative writ procedure, and also depends on any procedures specified by local rule of court. On noticed motion procedures, see §§5.76-5.107; on alternative writ procedure, see §§5.108-5.118.

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§7.25 B. Lodging/Filing the Record

Lodging an "administrative record." If a record of the underlying proceedings is prepared by a governmental or private body (see §7.18), or if the petitioner assembles such a record, the record should be lodged with the superior court at least 5 days before the hearing. See Cal Rules of Ct 3.1140.

PRACTICE TIP: Although Rule 3.1140 expressly applies to administrative mandamus proceedings, given its purpose and intent, it should also guide lodging of a record in a traditional mandamus proceeding.

If a writ action is an administrative mandamus action under CCP §1094.5, or a combined action under both CCP §1094.5 and §1085, there will be no uncertainty as to the procedures for assembling and lodging a record generated during the underlying proceedings. An administrative record must be "lodged" with the court, not filed. Cal Rules of Ct 3.1140. After the administrative mandamus action is over (*i.e.*, after the time to appeal has expired or, if there is an appeal, after the remittitur issues), the "lodged" record will probably be returned to the petitioner, thereby freeing up valuable shelf space at the court.

If the writ proceeding is solely one for traditional mandamus under CCP §1085, the court or its clerk may be uncertain about how to handle a proffered record of underlying governmental or private proceedings, because the rules only refer to a "record" in a traditional mandamus action. See §7.4. The cases make clear, however, that a record of underlying governmental or private proceedings (equivalent to an "administrative record" in an administrative adjudicatory proceeding) may exist in traditional mandamus actions. See §§7.11-7.12. Thus, if the clerk refuses such a proffered record, the petitioner may need to submit an application to the court (preferably accompanied by a stipulation signed by all parties) explaining that there is a record of the underlying proceedings, describing the record in some detail (*i.e.*, showing that it is the equivalent of an "administrative record"), and asking to lodge the record under Cal Rules of Ct 3.1140. The court should be receptive to lodging such a record because that allows the court to return the record to the petitioner (and thus recover shelf space) at the end of the writ action.

PRACTICE TIP: Counsel should view the 5-day deadline for lodging a record under Cal Rules of Ct 3.1140 as the statutory minimum. In practice, the court may require that petitioner prepare and lodge a record long before that time. For instance, in a large case, the court will normally set a briefing schedule and a date for lodging the record. Likewise, in cases in which the petitioner uses the noticed motion procedure, it is good practice to lodge a record in conjunction with the notice of motion and motion for issuance of the writ and serve it on the respondent and any real party in interest. In any event, a petitioner should check with the trial court for its preference, as practice varies widely.

Filing supporting declarations and exhibits. Documentation in support of a writ petition submitted by way of declarations and exhibits, as is often the case in traditional mandamus proceedings (see §§7.18-7.21), will be filed with the court (not lodged). The timing of this filing depends on whether the petitioner proceeds by way of the noticed motion or alternative writ procedure. On noticed motion procedures, see §§5.76-5.107; on alternative writ procedure, see §§5.108-5.118. As with other aspects of superior court writ practice, the petitioner should check local rules to determine whether the court has any special filing requirements. Because these documents are filed with the superior court and become part of the court's public record, they are not returned to the petitioner after the writ action is over.

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§7.26 VI. PROTECTING CONFIDENTIAL DOCUMENTS

Unless confidentiality of records is required by law, court records are presumed to be open to the public. Cal Rules of Ct 2.550(c). Thus, if a party to a writ proceeding believes that documents in the record submitted in a writ action (either as part of a formal record lodged with the court or as an exhibit filed in the court) should not be made public, that party must move for an order from the superior court sealing those documents or portions of them. Cal Rules of Ct 2.550-2.551. On moving to seal record, see §7.29.

On sealing documents generally, see California Civil Procedure Before Trial §§12.122-12.139 (4th ed Cal CEB 2004); Judge Kleinberg, *To Seal or Not to Seal: Protecting Confidential Records Under the Rules of Court*, 29 CEB Civ Litigation Rep 131 (Aug. 2007).

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§7.27 A. Criteria for Sealing Documents

To seal documents, the court must expressly find that (Cal Rules of Ct 2.550(d)):

- There is an overriding interest that overcomes the public's right to access the documents;
- The overriding interest supports sealing the record;
- A substantial probability exists that *not* sealing the record will prejudice the overriding interest;
- The proposed sealing is narrowly tailored; and
- No less restrictive means are available to achieve the overriding interest.

The parties cannot stipulate to sealing a document. The court must conduct an independent review and make the required findings to place a document under seal.

PRACTICE TIP: Although the parties cannot stipulate to filing a document under seal, a motion to file under seal has a better chance of success if it is unopposed or brought as a joint motion. Thus, counsel for a party seeking to seal a document should try to reach agreement with opposing counsel about the scope of the sealing order and stipulate when possible, particularly on documents or information that are indisputably confidential or private, such as Social Security numbers.

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Source: Civil Litigation/California Civil Writ Practice/7 The Record in Superior Court Writ Proceedings/§7.28 B. Procedure for Sealing Documents

§7.28 B. Procedure for Sealing Documents

When a party seeks to have a document or a portion of a document sealed, it must simultaneously:

- Move for an order sealing document(s) (called a "record" in the rules pertaining to sealing) (see §7.29); and
- Lodge the document(s) with the court under temporary seal (see §7.30).

On the procedures for sealing documents, see California Civil Procedure Before Trial §§12.126-12.133 (4th ed Cal CEB 2004).

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§7.29 1. Moving for Sealing Order

A party requesting that the court file documents (called "records" in the rules pertaining to sealing) under seal must file a motion or an application for an order sealing the record. The moving party must accompany this motion or application with a supporting memorandum and a declaration with facts sufficient to justify the sealing. Cal Rules of Ct 2.551(b)(1).

JUDICIAL PERSPECTIVE: The motion should state facts supporting each of the criteria for sealing documents. It is not sufficient to merely recite the criteria. On criteria for sealing documents, see §7.27.

The moving party must serve the motion or application to seal on all parties that have appeared in the case. Cal Rules of Ct 2.551(b)(2).

If necessary to prevent disclosure, any motion or application, opposition, and supporting documents "must be filed in a public redacted version and lodged in a complete version conditionally under seal." Cal Rules of Ct 2.551(b)(5).

PRACTICE TIP: Counsel should limit a motion to seal only to those documents, or portions of documents, that can legally be filed under seal. If a document contains confidential and non-confidential information, counsel should ask only that the confidential information be filed under seal. The rest of the document can remain in the public file in redacted form.

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§7.30 2. Lodging Document (Record) With Court

The party requesting that a document or portions of a document (called a "record" in the rules pertaining to sealing) be filed under seal must lodge those documents with the court under Cal Rules of Ct 2.551(d) when the motion or application is made, unless good cause exists for not lodging it or the document was previously lodged under Cal Rules of Ct 2.551(b)(3)(A)(i). Pending the determination of the motion or application, the court holds the lodged document or portions of the document conditionally under seal. Cal Rules of Ct 2.551(b)(4).

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§7.31 a. Conditionally Sealing Document (Record)

When counsel requests an order that a document or portions of a document (called a "record" in the rules pertaining to sealing) be filed under seal, counsel must lodge the record with the court in a sealed envelope or other appropriate container, labeled "CONDITIONALLY UNDER SEAL." Cal Rules of Ct 2.551(d)(1)-(2). Counsel must affix to the envelope or container a cover sheet that (Cal Rules of Ct 2.551(d)(3)(A)-(B)):

- Contains all the information required on a caption page under Cal Rules of Ct 2.111; and
- States that the enclosed record is subject to a motion or an application to file the record under seal.

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§7.32 b. Court's Handling of Conditionally Sealed Document (Record)

When the clerk receives a document (called a "record" in the rules pertaining to sealing) lodged under Cal Rules of Ct 2.551(d), it endorses the affixed cover sheet with the date of receipt and retains, but does not file, the document unless the court orders it filed. Cal Rules of Ct 2.551(d)(4).

PRACTICE TIP: Some superior courts scan filed documents into a publicly available database. If the proper procedures are followed, conditionally sealed documents will not be scanned; however, mistakes can and do occur. Accordingly, after lodging the confidential documents with the court, counsel should check the court's website to make certain those documents have not been scanned. If there is a mistake, counsel should apply ex parte as quickly as possible to remedy the situation.

If the documents placed under seal are voluminous and within a public agency's custody, the superior court may order the sealed records to remain with the agency "in a secure fashion" rather than with the clerk. Cal Rules of Ct 2.551(g).

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§7.33 C. Inserting Slip Pages for Sealed Documents

If the superior court orders sealed some documents in a record to be lodged with the court (see §7.18), those documents are before the court by virtue of the sealing order and do not need to be resubmitted to the court when the complete record is lodged. The petitioner should include slip pages in the record where the sealed documents otherwise would appear, stating that the document was filed under seal and providing the date of the sealing order. The same procedure can be used if sealed documents are part of exhibits submitted in support of a writ petition. See §§7.18-7.21.

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8

Responsive Pleadings and Petitioner's Reply

Kelly J. Savage

I. INTRODUCTION
- A. Scope of Chapter §8.1
- B. Terminology §8.2

II. PROCEDURAL ASPECTS OF RESPONDING TO A WRIT PETITION
- A. Response Controlled by Manner in Which Petitioner Chooses to Proceed §8.3
- B. When Petitioner Seeks Stay of Challenged Action or Decision §8.4
- C. Consider Joint Response §8.5
- D. When Petitioner Uses Noticed Motion Procedure
  - 1. File Responsive Pleading or Motion §8.6
    - a. Time to File §8.7
      - (1) When Record Has Been Filed or Is Unnecessary §8.8
      - (2) When Record Has Been Requested But Not Filed §8.9
      - (3) Time May Be Extended by Stipulation or Application §8.10
    - b. Filing, Fee, and Service
      - (1) File in Same Court as Petition §8.11
      - (2) Fee §8.12
      - (3) Serve All Parties §8.13
      - (4) How to Serve §8.14
    - c. Consequences of Not Filing Responsive Pleading §8.15
  - 2. File Opposition to Motion for Issuance of Writ §8.16
    - a. Time to File §8.17
    - b. Contents of Opposition Memorandum §8.18
    - c. Format of Opposition §8.19
    - d. Evidence in Opposition §8.20
- E. Alternative Writ Procedure
  - 1. Opposition to Application for Issuance of Alternative Writ
    - a. Optional if Petitioner Seeks Ex Parte Issuance of Alternative Writ §8.21
    - b. Strongly Recommended if Petitioner Gives 10 Days' Notice of Application for "a" Writ or for "Peremptory" Writ §8.22
    - c. Time to File §8.23
      - (1) When Alternative Writ Is Sought Ex Parte §8.24
      - (2) When Petitioner Has Given 10 Days' Notice of Application for "a" Writ or for "Peremptory" Writ §8.25
    - d. Content of Opposition
      - (1) When Alternative Writ Is Sought Ex Parte §8.26
      - (2) When Petitioner Has Given 10 Days' Notice of Application for "a" Writ or for "Peremptory" Writ §8.27
    - e. Filing, Fee, and Service
      - (1) Opposition Filed in Same Court as Petition §8.28
      - (2) Fee §8.29
      - (3) Serve All Parties §8.30
      - (4) How to Serve §8.31
  - 2. If Superior Court Issues Alternative Writ
    - a. Effect of Alternative Writ §8.32
      - (1) If Respondent Chooses to Comply §8.33
      - (2) If Respondent Chooses Not to Comply §8.34
    - b. Return After Issuance of Alternative Writ
      - (1) File Responsive Pleading or Motion §8.35
      - (2) Time to File §8.36
      - (3) Consequences of Filing Defective Return or No Return §8.37
      - (4) Memorandum Addressing Merits of Writ Petition §8.38
  - 3. "*Palma"* Notices Not Used in Superior Court Writ Proceedings §8.39

III. TYPES OF RESPONSIVE PLEADINGS AND MOTIONS
- A. Demurrer
  - 1. Tests Sufficiency of Petition §8.40
  - 2. Basis for Demurrer §8.41
  - 3. General Guidelines for Demurrers
    - a. If Demurrer Sustained §8.42
    - b. If Demurrer Overruled §8.43
  - 4. Answer in Conjunction With Demurrer §8.44
- B. Answer
  - 1. Function of Answer §8.45
  - 2. Content of Answer §8.46
    - a. Allegations Deemed Admitted if Not Denied §8.47
    - b. Affirmative Defenses Must Be Raised in Answer §8.48
  - 3. Verification Required §8.49
- C. Responsive Motions §8.50
  - 1. Motion to Dismiss §8.51
  - 2. Motion to Quash §8.52
  - 3. Motion for Judgment on the Pleadings §8.53
  - 4. Motion for Summary Judgment §8.54
  - 5. Other Miscellaneous Motions §8.55
  - 6. File Answer in Conjunction With Motion §8.56

IV. PETITIONER'S REPLY
- A. Replication (Reply) §8.57
  - 1. Deadline for Filing Replication (Reply) §8.58
  - 2. Contents of Replication (Reply) §8.59
  - 3. Advance Notice Required if Replication (Reply) Made by Evidence Presented at Hearing §8.60
  - 4. Filing and Service §8.61
- B. Petitioner's Reply Memorandum
  - 1. When Noticed Motion Procedure Is Used §8.62
  - 2. When Alternative Writ Procedure Is Used §8.63

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I. INTRODUCTION

§8.1 A. Scope of Chapter

This chapter discusses the ways in which the respondent or real party in interest may respond to a writ petition. It also discusses the petitioner's options in reply.

- The first part of the chapter summarizes the procedural differences in responding to a writ petition, depending on whether the petitioner proceeds by way of (a) noticed motion to bring the writ petition on for a hearing on the merits (see §§8.6-8.20), or (b) alternative writ (see §§8.21-8.38). This discussion includes responding to a stay application or request for preliminary injunctive relief. See §8.4.
- The second part of the chapter discusses the different kinds of responsive pleadings and motions a respondent or real party in interest can file, *e.g.,* a demurrer, answer, or motion to strike. See §§8.40-8.56.
- The third part of the chapter discusses the petitioner's reply to the respondent's or real party in interest's responsive pleadings. See §§8.57-8.63.

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§8.2 B. Terminology

In superior court writ practice, there are various terms of art used by statutes, rules, courts, and counsel. The following terms refer to the kinds of documents that may be filed in a superior court writ proceeding:

"Opposition to application for alternative writ": An optional, but strongly recommended, preliminary memorandum that can be filed, if time permits, in opposition to an application for an alternative writ. See §§8.21-8.31.

"Return": This term has multiple meanings. Most commonly, it refers to the class of documents the respondent or real party in interest may file in response to an alternative writ (if the alternative writ procedure is used to prosecute the writ petition). A return can be an answer, a demurrer, or both, or a responsive motion (*e.g.,* motion to strike). See §8.35. This term also refers to the respondent's report back to the court, after the court has issued a peremptory writ, regarding whether the respondent has complied with the writ. This return is required only if the court issuing the writ orders it. See §§10.3-10.10.

"Answer": A verified response to a writ petition containing paragraph-by-paragraph admissions and denials of the facts alleged in the petition as well as affirmative defenses. See §§8.45-8.49. The time for filing an answer depends on whether the petitioner proceeds by way of the noticed motion procedure or by way of an alternative writ. See §§5.10-5.18.

"Opposition memorandum": A memorandum filed by the respondent or real party in interest presenting legal arguments in opposition to the writ petition. See §§8.16-8.20 (if noticed motion procedure used), §8.38 (if alternative writ procedure used).

"Replication": A pleading filed by the petitioner in response to new affirmative allegations in the respondent's or real party in interest's answer. It is also called a "reply" (and sometimes a "traverse"). See §§8.57-8.61.

"Reply memorandum": A memorandum filed by the petitioner presenting legal arguments in reply to the arguments made in the respondent's or real party in interest's opposition memorandum. See §§8.62-8.63.

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II. PROCEDURAL ASPECTS OF RESPONDING TO A WRIT PETITION

§8.3 A. Response Controlled by Manner in Which Petitioner Chooses to Proceed

The manner in which the respondent or real party in interest responds to a writ petition largely depends on how the petitioner chooses to bring the petition on for a hearing on the merits. The petitioner may do so either (1) by noticed motion for issuance of the requested writ (see §§5.10-5.14) or (2) by seeking an alternative writ (see §§5.15-5.18).

The possible responses when the petitioner uses the noticed motion procedure are discussed below in §8.6. The possible responses when the petitioner seeks an alternative writ are discussed below in §§8.21-8.22.

PRACTICE TIP: There are few statutes and rules of court governing superior court writ practice. See §§5.2-5.8. Some superior courts have adopted local rules specifying required or preferred procedures. See, *e.g.,* Amador Ct R 11.18; Calaveras Ct R 1.4; Imperial Ct R 3.4.0; Los Angeles Ct R 9.5; San Diego Ct R 2.4.8; Sacramento County Superior Court Guide to the Procedures for Prosecuting Petitions for Prerogative Writs, p. 7 (copy located in App B). In other superior courts, writ procedures are a matter of historical practice in that particular court. Accordingly, it is important for the respondent and any real party in interest to check local rules and consult with the court clerk for procedures that may affect the nature and timing of any response to a writ petition.

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§8.4 B. When Petitioner Seeks Stay of Challenged Action or Decision

In conjunction with filing the writ petition, the petitioner can seek a stay of the challenged action or decision by filing a stay application seeking preliminary injunctive relief (*i.e.,* a temporary restraining order, preliminary injunction, or both). See §6.2. A respondent or real party in interest who opposes issuance of a stay must do so by promptly filing written opposition (if sufficient notice has been given) and appearing at the hearing on the stay request. On receiving notice of an ex parte application for issuance of an immediate stay or temporary restraining order (or for an order shortening time to hear such a request), counsel for the respondent or real party in interest should let the court know whether the application will be opposed and, if so, whether and when written opposition will be filed.

PRACTICE TIP: Because superior court writ procedures vary from one county to the next, the parties must check local rules or call the court clerk to determine how and when to file opposition to a stay request.

For further discussion of opposing a stay request, see §§6.18-6.21.

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§8.5 C. Consider Joint Response

If a writ proceeding is brought against both a respondent and a real party in interest, and their interests in defending the challenged action or decision are the same, they should consider responding jointly when appropriate, *e.g.,* filing a joint memorandum in opposition to a motion for issuance of a writ.

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D. When Petitioner Uses Noticed Motion Procedure

§8.6 1. File Responsive Pleading or Motion

When the petitioner uses the noticed motion procedure, typically only the writ petition is filed and served at the outset of the writ proceedings. See §§5.76-5.85. In response, the respondent or real party in interest files a responsive pleading or motion, *e.g.,* a demurrer, answer, or motion to strike. CCP §§1089.5, 1109. Demurrers and answers are by far the most common responses to a writ petition. If a demurrer or motion to strike is filed, the respondent or real party must comply with the rules of court and any local rules in bringing the demurrer or motion on for hearing.

PRACTICE TIP: The petitioner may notice a hearing on a motion for issuance of the requested writ concurrently with filing the writ petition. In that situation, even though the respondent or real party in interest will file memorandum opposing the motion for issuance of a writ, filing an answer or demurrer is still essential. Without a responsive *pleading* on file, *e.g.,* an answer or demurrer, the court likely will deem all factual allegations in the petition admitted. See CCP §§1088, 1094. If it will avoid unnecessary duplication, it may be appropriate to file one memorandum, in opposition to the motion for issuance of a writ and in support of the demurrer. However, counsel should check with the court or apply for permission to file a combined memorandum to avoid any risk that the motion for issuance of a writ is deemed unopposed or the responsive demurrer or motion is deemed unsupported.

On demurrers, see §§8.40-8.44. On answers, see §§8.45-8.49. On other responsive motions, see §§8.50-8.56.

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§8.7 a. Time to File

The time in which the respondent or real party in interest must file a responsive pleading or motion depends on whether an administrative record is necessary and, if so, whether it has been requested and filed. CCP §1089.5. On the record, see chap 7.

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§8.8 (1) When Record Has Been Filed or Is Unnecessary

If the administrative record has been filed with the writ petition, or if no record of the underlying proceeding is required, the responsive pleading or motion must be filed 30 days after service of the writ petition. CCP §1089.5.

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§8.9 (2) When Record Has Been Requested But Not Filed

If the petitioner has requested preparation of a record under Govt Code §11523 or some other statute, and the record has not been filed with the writ petition, the respondent or real party in interest need not respond until 30 days after receipt of a copy of the record. CCP §1089.5.

PRACTICE TIP: In this situation, it is good practice to confirm with the petitioner in writing the timing of the responsive pleading. In addition, the respondent or real party in interest should calendar reminders to check periodically on the status of the record preparation in case it takes an extended period of time.

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§8.10 (3) Time May Be Extended by Stipulation or Application

As in other civil actions, the time to file a responsive pleading can be extended by stipulation of the parties (see Cal Rules of Ct 3.110(d) (parties may stipulate to one 15-day extension (made applicable to writ proceedings by Cal Rules of Ct 3.10; rules apply to all civil cases in the superior courts unless otherwise provided); Govt C §68616(b) (under Trial Court Delay Reduction Act, parties may stipulate to one 15-day extension) or by application to the court.

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b. Filing, Fee, and Service

§8.11 (1) File in Same Court as Petition

The responsive pleading or motion is filed in the same court as the writ petition. The respondent and any real party in interest should check the court's local rules for specific filing requirements (*e.g.,* number of copies).

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§8.12 (2) Fee

When filing a responsive pleading or motion, the respondent or real party in interest must pay the normal first appearance fee of $355. Govt C §70612(a).

PRACTICE TIP: There may be surcharges in Riverside, San Bernardino, and San Francisco Counties. Govt C §70603(a)(3)-(5). Accordingly, parties involved in writ proceedings in those counties should check the court's local rules before filing a responsive pleading or motion.

If the court has designated an action as complex, an additional complex case fee will be added. See Govt C §70616(b).

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§8.13 (3) Serve All Parties

The respondent or real party in interest must serve a copy of the responsive pleading or motion on the petitioner and any other parties named in the petition. CCP §465 (made applicable to writ proceedings by CCP §1109).

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§8.14 (4) How to Serve

The method of service is governed by CCP §§1010-1020. CCP §§1107, 1109. For further discussion of service, see California Civil Procedure Before Trial, chap 18 (4th ed Cal CEB 2004).

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§8.15 c. Consequences of Not Filing Responsive Pleading

The superior court cannot grant a peremptory writ by default. CCP §§1088, 1094, 1105. Thus, even if the respondent or real party in interest fails to file a responsive pleading, the court must still decide whether writ relief is permissible and warranted. However, if no responsive pleading is filed, the factual allegations in the writ petition likely will be deemed uncontroverted. See *Titmas v Superior Court* (2001) 87 CA4th 738, 741, 104 CR2d 803 (real parties in interest failed to file return in appellate court writ proceeding, so facts alleged in petition accepted as true); *Shaffer v Superior Court* (1995) 33 CA4th 993, 996 n2, 39 CR2d 506 (same).

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§8.16 2. File Opposition to Motion for Issuance of Writ

When the petitioner brings the writ petition on for a hearing on the merits by filing a noticed motion for issuance of the requested peremptory writ, the respondent or real party in interest must file a memorandum in opposition to the motion. On the contents of an opposition memorandum, see §§8.18-8.20.

On bringing a writ petition on for a hearing on the merits, see §§5.86-5.107.

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§8.17 a. Time to File

Unless the parties agree to (and the court permits) a different briefing schedule, opposition papers must be filed at least 9 court days before the time set for hearing the motion. CCP §1005(b) (made applicable to writ proceedings by CCP §1109).

PRACTICE TIP: In writ proceedings in which there is any kind of lengthy or complicated record (either an administrative record or extensive exhibits), the standard law and motion deadlines might not afford the parties enough time to prepare adequate briefing (*i.e.,* opposition by the respondent or real party in interest, and reply by the petitioner). If possible, the parties should stipulate to a reasonable briefing schedule and hearing date and submit the stipulation to the court for approval. The court will probably approve such a stipulation, particularly if the schedule allows the court adequate time to review the matter after the last brief is filed. Once the court has approved the stipulation, however, it may be reluctant to grant additional time. Thus, in agreeing to a briefing schedule, counsel should take into account all foreseeable time contingencies.

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§8.18 b. Contents of Opposition Memorandum

The memorandum in opposition to a motion for issuance of a peremptory writ should fully address the merits of the writ petition and should contain the following (Cal Rules of Ct 3.1113(b) (made applicable to writ proceedings by Cal Rules of Ct 3.1103(a)(2))):

- A short introduction summarizing the nature of the writ proceeding and why writ relief is not warranted;
- A concise statement of the facts (important to balance the petitioner's factual statement or to tell the other side of the story) supported by references to the administrative record (if there is one) or to other evidence (*e.g.,* declarations and exhibits; see §8.20);
- A concise statement of the standard of review to be applied by the superior court, supported by relevant case authorities if the respondent or real party in interest disputes the standard stated by the petitioner or the petitioner has failed to set forth the applicable standard (see §§5.92-5.100);
- Arguments responding to those made by the petitioner, supported by relevant legal citations and references to the administrative record or other evidence before the court;
- Arguments in support of affirmative defenses not previously raised by demurrer; and
- A succinct conclusion.

PRACTICE TIP: Copies of any non-California authorities must be submitted in the format prescribed by the rules of court. See Cal Rules of Ct 3.1110(f), 3.1113(i) (made applicable to writ proceedings by Cal Rules of Ct 3.1103(a)(2)). In addition, if there are citations to regulations or other authorities that might not be readily accessible, copies of these should be provided as well.

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§8.19 c. Format of Opposition

The rules of court govern the format of all writ papers filed in the superior courts. Cal Rules of Ct 2.2, 3.1100, 3.1103(a)(2) (made applicable to writ proceedings by Cal Rules of Ct 3.1103(a)(2)). This includes rules concerning typeface, spacing, pagination, and binding. See Cal Rules of Ct 2.100-2.119. For example:

- **Maximum page length.** The opposition may not exceed 15 pages, excluding exhibits, declarations, attachments, the tables of contents and authorities, and the proof of service. Cal Rules of Ct 3.1113(d). A party may apply for permission to file a longer memorandum. Cal Rules of Ct 3.1113(e).

PRACTICE TIP: The page limits set by the rules of court may not be sufficient in complex writ proceedings. Thus, in addition to stipulating to a briefing schedule (see §8.17), counsel should also agree to reasonable page limitations, bearing in mind that the superior courts do not look kindly on long memoranda. Although the court may allow additional pages, it may allow fewer pages than counsel request. Alternatively, because the page limits do not apply to the answer, the respondent or real party in interest can elect to include a full factual recitation in the answer by allegation and a shorter statement of facts in the opposition memorandum.

- **Requirements based on page length.** An opposition memorandum exceeding 10 pages must include a table of contents, a table of authorities, and an opening summary of argument. Cal Rules of Ct 3.1113(f).
- **Binding, page numbering, and hole punching.** The pages must be bound together at the top and numbered consecutively at the bottom. Each page must be prepunched with two holes centered 2½ inches apart and ⅝ inch from the top of the paper. Cal Rules of Ct 2.113, 2.115, 3.1110(c).
- **Local rules and practice.** Although the rules of court are meant to preempt local rules on the form and format of papers filed in the superior courts (Cal Rules of Ct 2.100(a)), counsel should check local rules for any special requirements for pleadings and papers in writ proceedings.

For a complete list of format requirements, see §§5.21-5.31.

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§8.20 d. Evidence in Opposition

The evidence considered depends on the nature of the writ proceeding. Sometimes, the evidence is contained in a formal administrative record, requested by the petitioner and prepared by the administrative agency whose action or decision is at issue. The administrative record will be lodged with the superior court and served on all parties before the hearing on the motion for issuance of a writ. See §7.18. In such cases, the opposition memorandum should include clear and concise citations to that record to support all factual assertions (*e.g.,* "Rec. 100" or "App. 100"). When the record permits, counsel should provide the line numbers or identify the relevant paragraph. On citing to the record, see §7.23.

In other contexts, the evidence will be presented through declarations and exhibits, just as it would in a regular civil case. See §7.2. (In very rare instances, oral testimony may be presented at the hearing with leave of court under Cal Rules of Ct 3.1306. See §9.30.) The rules of evidence apply, so only relevant and properly authenticated evidence can be introduced. When relevant to a particular point, clear and concise reference to the evidence should be made in the opposing memorandum (*e.g.,* Baker Decl. at 5, ¶3; App. Exh. 5 at 13).

NOTE: Evidence may also be presented in the form of exhibits to a verified answer. See §§8.45-8.46.

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E. Alternative Writ Procedure

1. Opposition to Application for Issuance of Alternative Writ

§8.21 a. Optional if Petitioner Seeks Ex Parte Issuance of Alternative Writ

A petitioner who uses the alternative writ procedure files a writ petition and also seeks, at the outset of the proceedings, issuance of an alternative writ. CCP §§1087-1088. See §5.15. This is usually done through ex parte procedures or on shortened time. See §§5.15-5.18, 9.2-9.20. In contrast to appellate court writ procedures (see Cal Rules of Ct 8.487(a)(1)), there is no rule expressly allowing the respondent or real party in interest to file a preliminary opposition to an application for an alternative writ in superior court writ proceedings. Nevertheless, if time permits, a respondent or real party in interest can file a written opposition and appear at the hearing to oppose the issuance of an alternative writ. On preliminary oppositions in appellate court writ proceedings, see chap 21.

PRACTICE TIP: Many superior courts will readily issue an alternative writ, viewing the application simply as a notification device for the hearing on the merits of the return or writ petition. See §§5.15, 9.5. These courts hardly expect opposition on the merits, unless the respondent or real party in interest can point out a patent defect in the petition or establish that it is frivolous. Thus, a respondent or real party in interest may choose not to spend the time and effort opposing the issuance of an alternative writ, but nonetheless appear at the ex parte hearing to obtain a briefing schedule and hearing date that allows sufficient time to respond to the petition on the merits.

As long as the petitioner gives less than 10 days' notice (which will always be the case when the ex parte procedure is used), the court is limited to issuing an alternative writ and cannot issue a peremptory writ in the first instance. CCP §1088.

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§8.22 b. Strongly Recommended if Petitioner Gives 10 Days' Notice of Application for "a" Writ or for "Peremptory" Writ

If, instead of using ex parte procedures, a petitioner gives at least 10 days' notice of an application for issuance of "a" writ (meaning an application not limited to issuance of an alternative writ, but embracing a request for issuance of a peremptory writ) or a peremptory writ, the respondent or real party in interest must take action. If such notice is given, statutes allow issuance of a peremptory writ in the first instance. CCP §1088. See *Palma v U.S. Indus. Fasteners, Inc.* (1984) 36 C3d 171, 178, 203 CR 626 (court's authority to issue peremptory writ in first instance is limited to cases in which opposing party has received "due notice" at least 10 days beforehand).

However, case law makes it clear that a peremptory writ can be issued in the first instance (*i.e.,* in the absence of issuance of an alternative writ) only in the following limited circumstances:

- The court has received or solicited opposition from the parties adversely affected;
- The petition and opposition adequately address the issues raised by the petition;
- No factual dispute exists; and
- Additional briefing following the issuance of an alternative writ is unnecessary to the disposition of the petition.

Lewis v Superior Court (1999) 19 C4th 1232, 1240, 82 CR2d 85; *Palma,* 36 C3d at 178. The accelerated *Palma* procedure is reserved for "extremely narrow circumstances," primarily those cases in which a "compelling temporal urgency requires an immediate decision." *Lewis*, 19 C4th at 1261, citing *Ng v Superior Court* (1992) 4 C4th 29, 35, 13 CR2d 856. Thus, even an application for a peremptory writ on at least 10 days' notice rarely meets the requirements for issuance of the writ in the first instance.

PRACTICE TIP: As a practical matter, the expedited "*Palma*" notice procedure is rarely, if ever, used in superior court writ practice. Rather, it has become established superior court writ practice that petitioners either seek an alternative writ ex parte (see §§5.108-5.118) or use the noticed motion procedure (see §§5.76-5.107). The truncated "*Palma"* notice procedure under CCP §1088 is, instead, a feature of appellate court writ practice. See §§22.18-22.22.

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§8.23 c. Time to File

The time for filing opposition is driven by the manner in which the petitioner chooses to proceed.

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§8.24 (1) When Alternative Writ Is Sought Ex Parte

If the petitioner seeks an alternative writ ex parte or on shortened time, the respondent or real party in interest will have very little time to prepare and file an opposition memorandum. If time permits, counsel should prepare a short opposition identifying any glaring procedural or substantive defects in the petition. Counsel also should notify the court clerk that written opposition will be filed. If there is not enough time to prepare written opposition, the respondent or real party in interest should appear at the hearing to oppose the issuance of the alternative writ. Again, counsel should notify the clerk of any planned appearance at the hearing to oppose issuance of an alternative writ.

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§8.25 (2) When Petitioner Has Given 10 Days' Notice of Application for "a" Writ or for "Peremptory" Writ

If the petitioner has given at least 10 days' notice of an application for issuance of "a" writ (meaning an application not limited to issuance of an alternative writ, but embracing a request for issuance of a peremptory writ) or a peremptory writ, opposition must be filed within 5 days "after service and filing" of the application for issuance of the writ. CCP §§1088, 1107. If the respondent or real party in interest does not have sufficient time to prepare opposition, it should either work with the petitioner to reschedule the hearing date and establish a briefing schedule, or apply to the court for an extension of time and a new hearing date. If the time sought is reasonable under the circumstances, and the petitioner will not be prejudiced, the court in all likelihood will grant the continuance. Application for a writ on 10-days notice is rarely, if ever, made in a superior court writ proceeding. See §8.22.

PRACTICE TIP: A respondent or real party in interest that needs additional time but faces a credible showing of prejudice by the petitioner should propose options minimizing or avoiding the claimed prejudice, *e.g.,* agreeing to postpone a planned action. This will decrease the likelihood of strong opposition by the petitioner and increase the chances that the court will grant the extension.

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d. Content of Opposition

§8.26 (1) When Alternative Writ Is Sought Ex Parte

Because many superior courts typically view a request for issuance of an alternative writ simply as a request for a hearing date on the merits of the return or petition, they do not invest significant time on the merits of the writ petition in deciding whether to issue an alternative writ. In such cases, therefore, any written opposition should be succinct and focus on any readily apparent procedural problems or substantive deficiencies in the petition. In addition, the opposition should note the limited purpose of an alternative writ and remind the court that full briefing on the merits will follow.

PRACTICE TIP: If there is an easily explained and compelling reason why the writ petition lacks merit, previewing that point in the opposition to the application for issuance of an alternative writ might convince the court to deny the writ petition outright. See *Patterson v Board of Supervisors* (1947) 79 CA2d 670, 675, 180 P2d 945 (superior court not required to issue alternative writ before denying writ petition when record substantiated board's decision).

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§8.27 (2) When Petitioner Has Given 10 Days' Notice of Application for "a" Writ or for "Peremptory" Writ

When the petitioner has given at least 10 days' notice of an application for issuance of a writ (meaning an application not limited to issuance of an alternative writ, but embracing a request for issuance of a peremptory writ) or for a peremptory writ, the respondent or real party in interest must take into account that the court, by statute, can issue a peremptory writ in the first instance. CCP §1088. There are, however, significant limitations on the court's ability to do so. See §8.22. Further, this truncated procedure is rarely, if ever, used in superior court writ proceedings. See §8.22. If a respondent or real party receives such notice, written opposition should (a) urge the court to deny the writ petition outright—*i.e.,* attack the merits of the petition as best as can be done within the short period of time available—and (b) alternatively urge the court to issue only an alternative writ and establish a reasonable briefing schedule and set a hearing date on the merits of the petition.

NOTE: The statutory 10-day notice provision in CCP §1088 (*e.g.*, "*Palma*" notice (*Palma v U.S. Indus. Fasteners, Inc.* (1984) 36 C3d 171, 178, 203 CR 626)) is rarely, if ever, used in superior court writ practice. See §8.22.

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e. Filing, Fee, and Service

§8.28 (1) Opposition Filed in Same Court as Petition

Opposition to issuance of an alternative writ is filed in the same court as the writ petition. The respondent and any real party in interest should check local rules for specific filing requirements (*e.g.,* number of copies).

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§8.29 (2) Fee

The respondent or real party in interest must pay the normal first appearance fee of $355. Govt C §70612(a).

PRACTICE TIP: There may be surcharges in Riverside, San Bernardino, and San Francisco Counties. Govt C §70603(a)(3)-(5). Accordingly, parties involved in writ proceedings in those counties should check the court's local rules before filing an opposition.

If the court has designated an action as complex, an additional complex case fee will be added. See Govt C §70616(b).

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§8.30 (3) Serve All Parties

The respondent or real party in interest must serve a copy of any written opposition on the petitioner and on any other parties named in the petition. CCP §465 (made applicable to writ proceedings by CCP §1109).

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§8.31 (4) How to Serve

The method of service is governed by CCP §§1010-1020. CCP §§1107, 1109. See California Civil Procedure Before Trial, chaps 17-18 (4th ed Cal CEB 2004).

JUDICIAL PERSPECTIVE: Given the short timeframes involved, personal service is preferred. It not only reflects positively on the respondent or real party in interest, but also avoids the court's having to possibly continue the hearing if the petitioner argues that it has not had adequate time to consider the opposition.

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2. If Superior Court Issues Alternative Writ

§8.32 a. Effect of Alternative Writ

An alternative writ commands the respondent either to perform or cease to perform an act (as sought in the writ petition's prayer for relief) or to show cause why it should not be compelled to do so. CCP §§1087 (traditional mandate), 1104 (prohibition).

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§8.33 (1) If Respondent Chooses to Comply

If the respondent chooses to comply with the alternative writ, the court will dismiss the petition as moot after the respondent shows proof of compliance to the court. *Bruce v Gregory* (1967) 65 C2d 666, 671, 56 CR 265.

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§8.34 (2) If Respondent Chooses Not to Comply

If the respondent chooses not to comply with the alternative writ, the respondent or real party in interest must show cause why a peremptory writ should not issue by making a "return" to the alternative writ, which consists of filing a responsive pleading or motion (*e.g.,* a demurrer, answer, or motion to strike). CCP §§1089, 1105. If a demurrer or motion to strike is filed, the respondent or real party must comply with the rules of court and any local rules in bringing the demurrer or motion on for hearing.

On specific responsive pleadings and motions, see §§8.40-8.56.

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b. Return After Issuance of Alternative Writ

§8.35 (1) File Responsive Pleading or Motion

A respondent or real party in interest "makes a return" to an alternative writ by filing a responsive pleading or motion (*e.g.,* a demurrer, answer, or motion to strike). CCP §§1089, 1105. If a demurrer or motion to strike is filed, the respondent or real party must comply with the rules of court and any local rules in bringing the demurrer or motion on for hearing.

NOTE: This is the same responsive pleading or motion the respondent or real party in interest would initially file if the petitioner used the noticed motion procedure. See §8.6.

On demurrers, see §§8.40-8.44. On answers, see §§8.45-8.49. On other responsive motions, see §§8.50-8.56.

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§8.36 (2) Time to File

The responsive pleading or motion must be filed on the "date for return of the alternative writ" (CCP §§1089, 1105), which is set forth in the alternative writ. If the respondent or real party in interest needs additional time, counsel should first try to obtain a stipulation with opposing counsel, which likely will be approved by the court if the extension is for a reasonable period of time. If opposing counsel will not stipulate, the respondent or real party in interest should apply for an extension from the court. If good cause is shown, and the petitioner will not be prejudiced, the court will likely grant the extension.

PRACTICE TIP: The respondent or real party will often want to attend the ex parte hearing on the application for issuance of an alternative writ if for no other reason than to weigh in on both the date the return is due and the date for the hearing on the return or writ petition. The objective is to ensure that the respondent or real party in interest has enough time to prepare an adequate responsive pleading as well as enough time to prepare a thorough and persuasive memorandum in opposition to the petition. The petitioner, in turn, wants to have a reasonable period of time to prepare and file a reply. Thus, if the respondent or real party in interest proposes a reasonable return, briefing, and hearing schedule, the court likely will include those dates in the alternative writ.

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§8.37 (3) Consequences of Filing Defective Return or No Return

The superior court cannot grant a peremptory writ by default. CCP §§1088, 1094, 1105. Thus, a defective return or no return at all does not guarantee that the petitioner will succeed. Nonetheless, if no return is filed, the factual allegations in the writ petition will be deemed uncontroverted, greatly enhancing the chances that the petitioner will prevail if the dispute turns on those factual issues. See *Titmas v Superior Court* (2001) 87 CA4th 738, 741, 104 CR2d 803 (respondent failed to file return in appellate court writ proceeding, so facts alleged in petition accepted as true); *Shaffer v Superior Court* (1995) 33 CA4th 993, 996 n2, 39 CR2d 506 (same).

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§8.38 (4) Memorandum Addressing Merits of Writ Petition

Just as the application for an alternative writ is accompanied by a supporting memorandum (see §5.110), a return also should include a memorandum in opposition to the petition. No statute or rule expressly requires an opposing memorandum. However, the formal return (*i.e.,* the demurrer or answer) is simply a pleading. The legal arguments in support of that pleading and in opposition to the writ petition must be presented to the court in a memorandum.

When this memorandum should be filed often is fixed by stipulation, by the order issuing the alternative writ, or in the alternative writ itself. The respondent or real party in interest should check local rules and, if there are none, call the court clerk. Absent any other provision for filing a memorandum in support of the return and in opposition to the issuance of a writ, it should be filed at the same time the return is made, *i.e.,* when the responsive pleading is filed.

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§8.39 3. "*Palma*" Notices Not Used in Superior Court Writ Proceedings

The *Palma* notice procedure, as employed by the courts of appeal, is not a feature of superior court writ practice. See §§8.22, 8.25, 8.27. Under *Palma v U.S. Indus. Fasteners, Inc.* (1984) 36 C3d 171, 180, 203 CR 626, the courts of appeal sometimes issue a notice shortly after a writ petition is filed advising the parties that the court may issue a peremptory writ in the first instance (*i.e.,* without issuing an alternative writ, awaiting a formal return, holding oral argument, or preparing an opinion) and inviting opposition to be filed within a specified time, usually 20 days. Indeed, this procedure makes no sense in superior court writ proceedings given the routine practice of hearing applications for alternative writs on the ex parte calendar, as well as superior courts' common view that an alternative writ is basically notification of the hearing on the merits of the return or writ petition. On the use of *Palma* notices in appellate court writ proceedings, see §§22.18-22.22.

CAUTION: It is conceivable that a petitioner could give 10 days' notice of an application for issuance of a writ (*i.e.*, an application not limited to issuance of an alternative writ) for issuance of a peremptory writ. In such case, the respondent and real party in interest should be vigilant about appearing and opposing the application. See §8.22. However, the 10-day notice procedure (*e.g.*, "*Palma*" notice) is rarely, if ever, used in superior court writ practice. Rather, the established procedures are the alternative writ and noticed motion procedures. See §§5.108-5.118 (alternative writ procedure), 5.76-5.107 (noticed motion procedure).

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III. TYPES OF RESPONSIVE PLEADINGS AND MOTIONS

A. Demurrer

§8.40 1. Tests Sufficiency of Petition

A demurrer tests the legal sufficiency of a writ petition. See, *e.g., Sustainability of Parks, Recycling & Wildlife Legal Defense Fund v County of Solano Dep't of Resource Mgmt.* (2008) 167 CA4th 1350, 1356, 84 CR3d 889 (in light of amendments, trial court overruled demurrer); *Fonseca v Fong* (2008) 167 CA4th 922, 926, 84 CR3d 567 (trial court agreed with respondents that statute was per se preempted and sustained demurrer without leave to amend). *Larson v City of Redondo Beach* (1972) 27 CA3d 332, 337, 103 CR 592. See generally CCP §§430.10-430.80 (governing demurrers) (made applicable to writ practice by CCP §1109, making rules of practice governing civil actions applicable to writ proceedings). See also Cal Rules of Ct 3.1103(a)(2) (making law and motion rules applicable to writ proceedings).

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§8.41 2. Basis for Demurrer

A demurrer can raise any legal defect apparent on the face of the petition. This could include the lack of any beneficial interest, the existence of an adequate remedy at law, or the failure to state a claim for relief. See, *e.g.*, *Fonseca v Fong* (2008) 167 CA4th 922, 926, 84 CR3d 567 (demurrer to writ petition on preemption grounds should have been overruled); *Larson v City of Redondo Beach* (1972) 27 CA3d 332, 337, 103 CR 592 (demurrer sustained; city officials not legally required to administer boat slip rental rates because city's duties were discretionary, not mandatory). Additional grounds include untimeliness, the failure to exhaust available administrative remedies, mootness, unclean hands, a missing or defective verification, and improper venue.

For an example of a demurrer, see forms in §§13.10-13.11. See also discussion of demurrers and example in California Civil Procedure Before Trial, chap 23 (4th ed Cal CEB 2004).

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3. General Guidelines for Demurrers

§8.42 a. If Demurrer Sustained

If the superior court sustains the demurrer without leave to amend, the court will enter an order of dismissal, which, when filed, constitutes a judgment of dismissal. CCP §§581(f)(1), 581d, 1109. If the court sustains the demurrer with leave to amend, the petitioner may file an amended petition to rectify the pleading problems. Unless the court orders otherwise, the petitioner has 10 days to file an amended petition. Cal Rules of Ct 3.1320(g).

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§8.43 b. If Demurrer Overruled

If the court overrules the demurrer, and the respondent or real party in interest did not also file an answer, the court "may allow an answer to be filed within such time as it may designate." CCP §1089, see also CCP §§1069.1, 1105. Unless the court orders otherwise, the respondent or real party in interest has 10 days to file an answer. Cal Rules of Ct 3.1320(g) (made applicable to writ proceedings by Cal Rules of Ct 3.10 (rules apply to all civil cases in the superior courts unless otherwise provided)).

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§8.44 4. Answer in Conjunction With Demurrer

Case law indicates that a court has discretion under CCP §1089 to deny a respondent and/or real party leave to file an answer to a writ petition after overruling a demurrer. See *Florence W. Med. Clinic v Bontá* (2000) 77 CA4th 493, 505, 91 CR2d 609, citing *Ryne v Municipal Court* (1980) 113 CA3d 807, 819, 170 CR 312. However, a court's exercise of this discretion under §1089, like any exercise of discretion by a court, must be reasonable rather than arbitrary and can be challenged in an appropriate case as an abuse of discretion. See *Harris v Alcoholic Beverage Control Appeals Bd.* (1965) 62 C2d 589, 594, 43 CR 633, citing *Bailey v Taaffe* (1866) 29 C 422, 424. For example, were a court to deny leave to file an answer and to grant a peremptory writ when overruling a demurrer that addressed issues other than those necessary to the court's determination of the merits of the writ petition (such as the statute of limitations and exhaustion of administrative remedies), the denial of leave to file an answer would arguably constitute an abuse of discretion. The denial of leave to file an answer in those circumstances would effectively place the respondent and/or real party in default, require the court to decide the merits and rule on the petition under CCP §§1088 ("writ cannot be granted by default") and 1094 ("If no return be made, the case may be heard on the papers of the applicant"), and deprive the respondent and/or real party of a full and fair opportunity to defend themselves on the merits. *Florence W. Med. Clinic, supra*. But see Cal Rules of Ct 8.933(b)(4) (in limited civil cases, if return is by demurrer alone and court overrules demurrer, court may issue peremptory writ without granting respondent or real party in interest leave to answer).

Filing an answer in conjunction with a demurrer avoids any risk that the court might overrule the demurrer but deny leave to file an answer. See CCP §1089, see also CCP §§1069.1, 1105. It also avoids any argument by the petitioner that the failure to file an answer amounts to a waiver of the respondent's or real party in interest's right to do so following the court's overruling of a demurrer. It is far and away the best practice to file an answer in conjunction with any demurrer.

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B. Answer

§8.45 1. Function of Answer

An answer responds to the allegations of the writ petition, alleges any additional relevant facts, attaches and authenticates additional exhibits, and asserts any available affirmative defenses. See CCP §§431.10-431.30 (made applicable to writ practice by CCP §1109), 1069.1, 1089, 1089.5, 1105.

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§8.46 2. Content of Answer

The answer may consist of admissions, denials, and affirmative defenses. CCP §431.30 (made applicable to writ proceedings by CCP §1109). Counsel must also allege any relevant facts not contained in the petition supporting the answer. See, *e.g.*, *Coy v Superior Court* (1962) 58 C2d 210, 221, 23 CR 393 (answer in appellate court writ proceeding failed to include any supporting facts; peremptory writ issued). Additional documents may be attached as exhibits and authenticated in the answer.

The answer may raise issues of fact and law, both in its denial of the petition's facts and legal conclusions and in its affirmative defenses. See, *e.g.*, *McMahan's of Santa Monica v City of Santa Monica* (1983) 146 CA3d 683, 689, 194 CR 582 (issue of law: city's statutory immunity); *Lowell v Mother's Cake & Cookie Co.* (1978) 79 CA3d 13, 19, 144 CR 664 (issue of fact: justification).

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§8.47 a. Allegations Deemed Admitted if Not Denied

The respondent or real party in interest must deny all allegations that it disputes; otherwise, the allegations are deemed admitted. See, *e.g., Dulaney v Municipal Court* (1974) 11 C3d 77, 81 n3, 112 CR 777 (allegations not expressly denied in answer to writ petition were deemed admitted); *Baumgardner v City of Hawthorne* (1951) 104 CA2d 512, 517, 231 P2d 864 (same).

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§8.48 b. Affirmative Defenses Must Be Raised in Answer

The respondent or real party in interest must raise all affirmative defenses (*e.g.,* lack of capacity to sue, failure to exhaust administrative remedies, and laches) in the answer. CCP §430.80 (made applicable to writ proceedings by CCP §1109). See, *e.g., Parker v Bowron* (1953) 40 C2d 344, 349, 254 P2d 6 (in response to writ to raise workers' wages, city's answer alleged city wages on par with private wages, and existing ordinance for increased wage); See *Resource Defense Fund v County of Santa Cruz* (1982) 133 CA3d 800, 804, 184 CR 371 (answer to petition raised affirmative defenses of mootness, laches, and statute of limitations). Defenses not asserted are deemed waived, except lack of subject matter jurisdiction and the failure to state facts sufficient to constitute a cause of action. See CCP §430.80(a) (made applicable to writ proceedings by CCP §1109).

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§8.49 3. Verification Required

An answer to a writ petition must be verified. CCP §1089; see also CCP §446(a) (made applicable to writ proceedings by CCP §1109). To the extent the answer alleges facts to be relied on as evidence, the verification must be based on personal knowledge, not information and belief. See *Star Motor Imports, Inc. v Superior Court* (1979) 88 CA3d 201, 204, 151 CR 721 (verification of writ petition "on information and belief" ineffective; petition dismissed).

NOTE: Certain public entities and officials acting in their public capacities are exempt from the verification requirement. See CCP §446(a); *Crowl v Commission on Prof. Competence of the Governing Bd. of the San Juan Unified Sch. Dist.* (1990) 225 CA3d 334, 342, 275 CR 86 (school district); *Elliott v Contractors' State License Bd.* (1990) 224 CA3d 1048, 1054, 274 CR 286 (Contractors' State License Board). But see *People v Superior Court (Alvarado)* (1989) 207 CA3d 464, 255 CR 46 (division of authority in criminal cases regarding verification requirement for public entities and officials).

On verifications, see §§5.64-5.69; California Civil Procedure Before Trial §§25.9, 25.15-25.21 (4th ed Cal CEB 2004).

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§8.50 C. Responsive Motions

Although answers and demurrers are by far the most common responses to a writ petition filed in superior court (and the only ones expressly authorized by the writ statutes), courts have recognized the propriety of other motions to test the sufficiency of a writ petition. These motions are noticed in the same manner as are motions in a regular civil case, unless otherwise directed by the court. See generally CCP §§1003-1020; Cal Rules of Ct 3.1100-3.1370. Counsel should also check the court's local rules or call the clerk for specific procedures on filing a motion in a writ proceeding. For a full discussion of noticed motions, see California Civil Procedure Before Trial, chap 12 (4th ed Cal CEB 2004).

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§8.51 1. Motion to Dismiss

A respondent or real party in interest may file a motion to dismiss the petition. See, *e.g.*, *Swars v Council of the City of Vallejo* (1944) 64 CA2d 858, 861, 149 P2d 397 (noting that sufficiency of petition for writ of review should be raised by demurrer or motion to dismiss). It can be used, for example, to dismiss an inappropriate party or to dismiss the petition for failure to join an indispensable party or based on forum non conveniens. As a matter of current practice, however, motions to "dismiss" are directed at lack of prosecution—failure to serve summons within 3 years (mandatory dismissal under CCP §§583.210-583.250), failure to bring to trial within 5 years (mandatory dismissal under CCP §§583.310-583.360), or delay in prosecution (discretionary dismissal under CCP §§583.410-583.430). These dismissal motions are applicable to prerogative writs in the superior court through CCP §1109.

On motions to dismiss, see California Civil Procedure Before Trial, chap 39 (4th ed Cal CEB 2004).

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§8.52 2. Motion to Quash

A respondent or real party in interest may file a motion to quash service of the petition to challenge the court's jurisdiction over any of the parties or actions challenged. See, *e.g.*, *Hammond Lumber Co. v Board of Supervisors* (1948) 85 CA2d 568, 570, 193 P2d 503 (demurrer and motion to quash petition for writ of review (certiorari) sustained because act of school district was not judicial in character). On motions to quash, see California Civil Procedure Before Trial, chap 19 (4th ed Cal CEB 2004).

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§8.53 3. Motion for Judgment on the Pleadings

A motion for judgment on the pleadings is the equivalent of a demurrer, but can be made after an answer has been filed and the matter is at issue. CCP §438. A petitioner could make this motion instead of a demurrer to the answer. A respondent or real party in interest might make this motion after the petitioner has filed a replication (reply) to the answer. See *California Water Impact Network v Newhall County Water Dist.* (2008) 161 CA4th 1464, 1491, 75 CR3d 393 (trial court properly granted respondent's motion for judgment on pleadings). On filing a replication, see §§8.57-8.61. On the various technical requirements for and restrictions on making a motion for judgment on the pleadings, see California Civil Procedure Before Trial, chap 27 (4th ed Cal CEB 2004).

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§8.54 4. Motion for Summary Judgment

A motion for summary judgment is rarely appropriate in a writ proceeding. If the noticed motion procedure is used, the parties have a full opportunity to address all issues pertinent to the merits of the petition. If the alternative writ procedure is used, the merits hearing following issuance of an alternative writ is much the same. Nevertheless, the statutes do not preclude a summary judgment motion. See, *e.g.*, *Stanton v Dumke* (1966) 64 C2d 199, 207, 49 CR 380 (demurrer sustained and summary judgment granted; grievance moot). A summary judgment motion might be appropriate, for example, if based on a dispositive affirmative defense peripheral to the substantive merits of the petition when the material facts of the defense do not appear on the face of the petition, are not judicially noticeable, and thus could not be raised by demurrer.

PRACTICE TIP: In writ proceedings, the usefulness of a motion for summary judgment or adjudication to economically dispose of an unmeritorious case or claim is slight. See CCP §437c(a) (notice of motion for summary judgment must be served at least 75 days before hearing). The parties should consider whether a hearing on the merits of the writ petition will achieve the same purpose as a motion for summary judgment or adjudication, but at less cost. See Guide to the Procedures for Prosecuting Petitions for Prerogative Writs, Sacramento Superior Court, p. 6 (see App B).

For discussion of summary judgment motions, see California Civil Procedure Before Trial, chap 36 (4th ed Cal CEB 2004).

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§8.55 5. Other Miscellaneous Motions

Other pretrial matters applicable to civil proceedings, including discovery motions, motions for a change of venue, and motions to strike, also may be (but rarely are) brought in writ proceedings. CCP §1109; see also Guide to the Procedures for Prosecuting Petitions for Prerogative Writs, Sacramento Superior Court, p. 6 (see App B).

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§8.56 6. File Answer in Conjunction With Motion

As with a demurrer (see §8.44), it is prudent to file an answer in conjunction with the filing of a responsive motion. Although it is unlikely that the court, following disposition of a responsive motion, would deny leave to answer and proceed to decide the merits of the petition based solely on the allegations therein, filing an answer in conjunction with a responsive motion eliminates any such risk. See CCP §418.10(e)(1) (filing answer in conjunction with motion to quash does not constitute general appearance until order denying motion is entered). On answers, see §§8.45-8.49.

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IV. PETITIONER'S REPLY

§8.57 A. Replication (Reply)

If the answer to a writ petition alleges affirmative matters, the petitioner *must* deny or rebut them, as appropriate, or they will be deemed admitted. This is usually done by:

- A replication (also called a reply) to the answer; or
- Proof presented by the petitioner at the time of the trial. See CCP §1091 (petitioner is not "precluded by the return from any valid objection to its sufficiency, and may countervail it by proof either in direct denial or by way of avoidance"); see also CCP §1105.

Factual allegations in the answer that are not rebutted by a replication (reply) or proof at trial are taken as true. See, *e.g.*, *Elliott v Contractors' State License Bd.* (1990) 224 CA3d 1048, 1054, 274 CR 286.

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§8.58 1. Deadline for Filing Replication (Reply)

The writ statutes do not specify when a replication (reply) to an answer should be filed. However, because CCP §1109 makes Part 2 of the Code of Civil Procedure (CCP §§307-1062.20) applicable to writ proceedings, the deadlines to respond to an answer should apply. See CCP §§430.40(b) (10 days to demur to answer to complaint), 435(b)(1) (motion to strike answer must be filed within time to respond to a pleading). In any event, the replication should be filed as soon as possible and far enough in advance of the hearing to allow the court adequate time to review it.

PRACTICE TIP: When the petitioner uses the alternative writ procedure, the respondent or real party in interest has until the return date to file a responsive pleading, and the hearing on the petition also may be scheduled for that day. In such cases, the petitioner has no time to file a replication and thus may want to seek a continuance of the hearing date. Alternatively, the petitioner must make sure to challenge the responsive pleading at the hearing. CCP §1091. On continuance motions and forms, see California Civil Procedure Before Trial §§12.66-12.68, 12.146, 12.151 (4th ed Cal CEB 2004).

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§8.59 2. Contents of Replication (Reply)

The replication (reply) should contain admissions and denials in a pleading format similar to the answer. CCP §1091. See, *e.g.*, *English v City of Long Beach* (1952) 114 CA2d 311, 314, 250 P2d 298 (petitioner filed "what is denominated a traverse" to respondent's answer with detailed factual denials and allegations; entitled to court's consideration "with like effect as if originally set forth in her petition"). If the answer raises an affirmative defense (*e.g.,* the petition is barred by a statute of limitations), the replication may allege facts showing that the defense is inapplicable (*e.g.,* the respondent or real party in interest is estopped from asserting the defense).

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§8.60 3. Advance Notice Required if Replication (Reply) Made by Evidence Presented at Hearing

If the petitioner intends to contradict or challenge allegations in the answer by presenting oral testimony at the hearing, court rules require an advance request to the court and notice to opposing parties. Cal Rules of Ct 3.1306(b) (made applicable to writ proceedings by Cal Rules of Ct 3.1103(a)(2)). The notice should describe the nature of the evidence and the time that is likely to be required for its presentation.

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§8.61 4. Filing and Service

The petitioner must file the replication (reply) with the court and serve it on the respondent and any real party in interest or their attorneys. The method of service is governed by CCP §§1010-1020. CCP §§465, 1109. See California Civil Procedure Before Trial, chaps 17-18 (4th ed Cal CEB 2004).

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B. Petitioner's Reply Memorandum

§8.62 1. When Noticed Motion Procedure Is Used

Under standard motion practice, the petitioner is entitled to file a reply memorandum and additional evidence in rebuttal (if permissible and relevant) to any opposition filed by the respondent or real party in interest. CCP §§1005(b), 1109.

PRACTICE TIP: Although a reply memorandum is optional under the law and motion rules, the petitioner should always file one, because it is his or her last chance to communicate with the court on paper before the hearing and may be what tips the balance for a favorable tentative ruling.

Unless the parties have agreed on and the court has approved a specific briefing schedule, the petitioner's reply memorandum must be filed 5 court days before the scheduled hearing date. CCP §§1005(b), 1109.

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§8.63 2. When Alternative Writ Procedure Is Used

When the petitioner uses the alternative writ procedure, the respondent or real party in interest almost always will want to obtain a briefing schedule and hearing date that allows adequate time for briefing. Such a briefing schedule should specify when the petitioner's reply brief is due.

Otherwise, when seeking an alternative writ, the petitioner should ask for a hearing date on the merits sufficiently after the return date to ensure that there is adequate time to file a reply.

PRACTICE TIP: Although a reply memorandum is considered an optional pleading, a petitioner should always file one, because it is the petitioner's last chance to communicate with the court on paper before the hearing and may tip the balance for a favorable tentative ruling.

Unless the parties have agreed on and the court has approved a specific briefing schedule, the petitioner's reply memorandum should be filed in accordance with the standard law and motion rules, *i.e.,* 5 court days before the scheduled hearing date. CCP §1005(b).

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9

Action by Superior Court

The Hon. Kathleen M. Banke
Maureen M. Home

I. SCOPE OF CHAPTER §9.1

II. ACTION ON APPLICATION FOR ALTERNATIVE WRIT OF MANDATE OR PROHIBITION §9.2
- A. Court Usually Hears Application Ex Parte §9.3
- B. Hearing on Application §9.4
- C. Alternative Writ Usually Issues §9.5
- D. Effect of Issuance of Alternative Writ §9.6
- E. Content of Alternative Writ
  - 1. Writ of Mandate §9.7
  - 2. Writ of Prohibition §9.8
  - 3. Dates for Return and Hearings
    - a. Date for Return to Writ Petition §9.9
    - b. Date for Hearing Merits of Return and Petition §9.10
- F. Service of Alternative Writ
  - 1. By Petitioner §9.11
  - 2. What to Serve
    - a. Petition and Alternative Writ §9.12
    - b. Order Directing Issuance of Alternative Writ §9.13
    - c. Stay Order §9.14
  - 3. Whom to Serve §9.15
  - 4. When to Serve §9.16
- G. Denial of Alternative Writ and Petition if Facially Defective or Patently Meritless §9.17
  - 1. Leave to Amend §9.18
  - 2. Proceed by Way of Noticed Motion §9.19
- H. Peremptory Writ of Mandate or Prohibition May Issue in Limited Circumstances §9.20

III. ACTION ON MERITS OF PETITION FOR WRIT OF MANDATE OR PROHIBITION
- A. Hearing Date
  - 1. When Noticed Motion Procedure Is Used §9.21
    - a. Standard Law and Motion Rules Apply §9.22
    - b. If Petitioner Gives 10 Days' Notice §9.23
  - 2. When Alternative Writ Procedure Is Used §9.24
- B. Nature of Hearing
  - 1. If No Return Filed §9.25
  - 2. If Return Raises Only Questions of Law §9.26
  - 3. If Return Raises Factual Dispute
    - a. Petitioner Has Burden to Establish Disputed Facts §9.27
    - b. Parties Entitled to Present Evidence §9.28
      - (1) Evidence Presented by Declaration or Judicial Notice §9.29
      - (2) Oral Testimony §9.30
      - (3) Jury Trial Discretionary §9.31
- C. Rulings and Judgments
  - 1. Tentative Ruling Before Hearing §9.32
  - 2. Ruling at Conclusion of Hearing or After Submission §9.33
  - 3. Statement of Decision
    - a. Considerations in Requesting Statement of Decision §9.34
    - b. When to Request Statement of Decision §9.35
    - c. Content of Statement of Decision §9.36
  - 4. When Petitioner Prevails
    - a. Petitioner Prepares Judgment §9.37
      - (1) Purpose of Judgment §9.38
      - (2) Content of Judgment §9.39

(3) Conformed Copies for Parties §9.40
b. Petitioner Prepares Peremptory Writ
(1) Proposed Peremptory Writ §9.41
(2) Respondent's Return Date §9.42
(3) When to Prepare Writ §9.43
(4) Content of Writ §9.44
(5) Service of Writ §9.45
(6) Laying Foundation for Future Sanctions §9.46
5. When Respondent Prevails
a. Respondent Prepares Judgment Denying Issuance of Writ §9.47
b. Content of Judgment §9.48

IV. ACTION ON PETITION FOR WRIT OF REVIEW (CERTIORARI)
A. Issuance of Order to Show Cause §9.49
B. Issuance of Writ of Review (Certiorari) §9.50
C. Hearing and Decision on Merits §9.51
D. Ruling and Judgment §9.52

V. RULING ON MISCELLANEOUS MOTIONS §9.53

VI. RES JUDICATA EFFECT OF SUPERIOR COURT JUDGMENT
A. Final Judgment in Writ Proceeding Has Preclusive Effect §9.54
B. Denial of Alternative Writ Has No Preclusive Effect §9.55

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§9.1 I. SCOPE OF CHAPTER

This chapter discusses the actions that a superior court can take in a proceeding for a writ of mandate, prohibition, or review (certiorari). For a general discussion of the uses of these writs, see chaps 2, 4. This chapter discusses:

- Actions the superior court may take when the petitioner applies for an alternative writ of mandate or prohibition. See §§9.2-9.20. On the procedures for seeking an alternative writ, see §§5.108-5.118.
- Actions the superior court may take in considering and deciding the merits of a petition for a writ of mandate or prohibition. See §§9.21-9.31.
- Procedures following a ruling on the merits, *e.g.,* who needs to prepare the judgment and, if applicable, the peremptory writ. See §§9.32-9.48.
- Actions the superior court may take on a petition for a writ of review (certiorari). See §§9.49-9.52.
- Various motions the superior court may have to hear and determine before hearing the merits of the writ petition (*e.g.,* demurrer, motion for a change of venue). See §9.53.
- Res judicata effect of judgments in superior court writ proceedings. See §§9.54-9.55.

This chapter does *not* address actions the superior court can take on a petition for a writ of administrative mandamus under CCP §1094.5. For discussion of superior court actions in administrative mandamus proceedings, see California Administrative Mandamus, chaps 11, 14 (3d ed Cal CEB 2003). On the differences between traditional and administrative mandamus, including how to decide when to seek which writ, see §§3.18-3.21.

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§9.2 II. ACTION ON APPLICATION FOR ALTERNATIVE WRIT OF MANDATE OR PROHIBITION

A petitioner may initiate an action for a writ of mandate or prohibition by filing a writ petition and an application for issuance of an alternative writ. CCP §§1087-1088 (alternative writ of mandate), 1104 (alternative writ of prohibition). On the procedures for seeking an alternative writ of mandate or prohibition, see §§5.108-5.118.

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§9.3 A. Court Usually Hears Application Ex Parte

In most cases, a petitioner seeks an alternative writ ex parte. Although the writ statutes permit a court to issue an alternative writ of mandate or prohibition ex parte (*i.e.,* without notice or service of the petition; see CCP §§1088, 1105, 1107), the rules of court (and many local rules) require an ex parte applicant to provide at least some minimal notice to opposing parties of an ex parte appearance. See Cal Rules of Ct 3.1203(a) (absent exceptional circumstances, party seeking ex parte order must notify opposing parties no later than 10:00 a.m. one court day before appearance); Los Angeles Ct R 9.5(e)(1) (petitioner must serve application for alternative writ at least 5 days before ex parte hearing).

On the procedures for seeking an alternative writ, see §§5.108-5.118.

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Source: Civil Litigation/California Civil Writ Practice/9 Action by Superior Court/§9.4 B. Hearing on Application

§9.4 B. Hearing on Application

When a petitioner seeks an alternative writ ex parte, local rules and practice will govern the extent to which there is any hearing or argument by counsel. Often, the judge hearing the ex parte application will decide the matter in chambers based on the verified petition, the application for an alternative writ, and any opposition filed by the respondent or real party in interest. See CCP §166(a)(1) (superior court judge may grant ex parte application for alternative writ in chambers).

PRACTICE TIP: Because the superior court's decision on an ex parte application is often made solely on the papers filed, the form and quality of those papers is of the utmost importance. Even when the judge decides the application in chambers, counsel may get an opportunity to present argument to the judge's research attorney.

On rare occasions, the judge may hold a formal hearing (*i.e.,* both sides appear and present argument) before ruling on the application for an alternative writ of mandate or prohibition. See, *e.g.*, *Patterson v Board of Supervisors* (1947) 79 CA2d 670, 672, 180 P2d 945.

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§9.5 C. Alternative Writ Usually Issues

Many superior courts view an ex parte application for an alternative writ of mandate or prohibition as little more than a request for dates for (1) the return to the alternative writ; (2) a hearing on the return (if the respondent or real party in interest files a demurrer or other responsive motion); and (3) a hearing on the merits of the writ petition. See CCP §§1089 (mandate), 1105 (prohibition). On the return, see §§8.35-8.38. In such courts, absent a glaring deficiency in the writ petition (see §§9.17-9.19), the ex parte application is granted and the alternative writ issued.

JUDICIAL PERSPECTIVE: In some cases, the court will deny the application for an alternative writ and instead set a briefing schedule and hearing date on the merits of the petition.

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§9.6 D. Effect of Issuance of Alternative Writ

Once an alternative writ is issued, the superior court must hear the merits of the return, *i.e.,* rule on any demurrer or other responsive motion (*e.g.,* motion to strike) filed by the respondent or real party in interest. See CCP §§1090, 1105 (return may be by demurrer, answer, or both). See also §§8.40-8.44, 8.50-8.56. If the petition withstands a demurrer or other motion, then the respondent or real party in interest files an answer (or will already have filed an answer) (see §§8.45-8.49), and the court will hear the petition on the merits, including ruling on any affirmative defenses. See CCP §§1090 (discretionary jury trial of disputed facts), 1094 (court hears petition if return raises only questions of law or puts in issue only immaterial facts not affecting substantial rights of the parties), 1105 (mandate procedures also applicable to prohibition). See §§9.25-9.31.

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E. Content of Alternative Writ

§9.7 1. Writ of Mandate

If the superior court issues an alternative writ of mandate, it will "command" the respondent or real party in interest immediately or at some other specified time "to do the act required to be performed, or to show cause before the court at a time then or thereafter specified by court order why he has not done so." CCP §1087. For an example of an alternative writ of mandate, see form in §13.6.

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§9.8 2. Writ of Prohibition

If the superior court issues an alternative writ of prohibition, it will "command the party to whom it is directed to desist or refrain from further proceedings" until further order of the court and "to show cause before the court at a time and place then or thereafter specified by court order why such party should not be absolutely restrained from any further proceedings." CCP §1104.

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Source: Civil Litigation/California Civil Writ Practice/9 Action by Superior Court/ 3. Dates for Return and Hearings/§9.9 a. Date for Return to Writ Petition

3. Dates for Return and Hearings

§9.9 a. Date for Return to Writ Petition

The alternative writ will specify a date by which the respondent or real party in interest must make a return, *i.e.,* file a demurrer, verified answer, or other responsive motion. CCP §§1089, 1105. On preparing and filing a return, see §§8.35-8.56.

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§9.10 b. Date for Hearing Merits of Return and Petition

The alternative writ may specify either the return date or a later date as the date for the hearing on the merits of the return (when the respondent or real party in interest has filed a demurrer or other responsive motion). This date may also be the date for hearing the merits of the writ petition. See Los Angeles Ct R 9.5(e) ("Issuance of the alternative writ places the matter on the Court's calendar for hearing"); Sacramento County Superior Court Guide to the Procedures for Prosecuting Petitions for Prerogative Writs, p. 8 ("alternative writ is an order to show cause that calendars a writ petition for a hearing on the merits") (see App B).

Often the hearing date on the merits of the petition is later than the date for the return so the court has an opportunity to review the return and the petitioner has an opportunity to file a replication (reply). The court may also continue the hearing if, for example, the return raises a triable issue of fact and the court decides to exercise its discretion and hold a jury trial.

On replications (replies), see §§8.57-8.61. On jury trials, see §9.31.

PRACTICE TIP: To ensure adequate time for the petitioner to file a replication (reply) and for the court to adequately review the return and any replication, the parties should agree, whenever possible, on a briefing schedule and hearing date and ask the court to specify these dates in the alternative writ.

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F. Service of Alternative Writ

§9.11 1. By Petitioner

The petitioner is responsible for serving an alternative writ. An alternative writ must be served in the same manner as a summons in an ordinary civil action (see CCP §§417.10-417.40) unless waived by the respondent or otherwise ordered by the court. CCP §§1096 (mandate), 1105 (prohibition).

PRACTICE TIP: It is critical to ensure that the alternative writ is served properly. Improper service may mean the respondent is not required to comply with the writ or appear in court to justify noncompliance.

Any opposing party who is not served cannot be bound, because the court acquires jurisdiction over a party only when he or she is properly served or has made a general appearance. CCP §410.50(a).

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2. What to Serve

§9.12 a. Petition and Alternative Writ

Code of Civil Procedure §1088 requires that a copy of the petition be served with the alternative writ. If the respondent and any real party in interest were served with a copy of the petition in conjunction with the ex parte application for issuance of an alternative writ, it may not be necessary to serve them with another copy of the petition—but only if the respondent and real party in interest agree and confirm in writing that the petitioner need not serve them with a second copy of the petition.

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§9.13 b. Order Directing Issuance of Alternative Writ

The order directing the clerk to issue the alternative writ need not be served except when the order and alternative writ are a single document. The court can direct that any separate order be served. Moreover, it is always better practice to serve opposing parties with copies of any order made by the court.

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Source: Civil Litigation/California Civil Writ Practice/9 Action by Superior Court/§9.14 c. Stay Order

§9.14 c. Stay Order

If the superior court also issues a stay order, which is tantamount to a preliminary injunction, the stay order must be served in conjunction with the alternative writ. To ensure the ability to enforce compliance, the stay order should be personally served by a registered process server.

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§9.15 3. Whom to Serve

Service must be made on each respondent and real party in interest. Code of Civil Procedure §1096 states explicitly that service of the alternative writ on a board or a body may be made by serving a majority of its members, "whether at the time of the service the board or body was in session or not." Legal counsel for a particular respondent agency or officer is not generally the statutorily authorized person on whom service may be made. See CCP §§416.10-416.80. When time is of the essence, the petitioner might be able to effect service expeditiously by requesting the respondent agency to authorize its legal counsel to accept service, although it is doubtful an agency facing litigation would do so. See CCP §416.90.

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§9.16 4. When to Serve

The court may direct a minimum time within which the alternative writ must be served. If not, service must be made within a reasonable time before the return date. At a minimum, reasonable time is at least 10 calendar days before the return date (see CCP §1088), and it may well be longer depending on the nature and complexity of the case. The petitioner must bear in mind that an unclean hands objection might lie if it appears that the petitioner is trying to prevent the respondent and any real party in interest from having sufficient time to respond.

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§9.17 G. Denial of Alternative Writ and Petition if Facially Defective or Patently Meritless

Although many superior courts will routinely grant an application for an alternative writ (see §9.5), a petitioner is not entitled to its issuance. If the writ petition is procedurally defective or patently meritless, the court may deny the application and dismiss the petition. See, *e.g.*, *Dare v Board of Med. Exam'rs* (1943) 21 C2d 790, 797, 136 P2d 304 (courts may deny application for alternative writ "out of hand" when petition fails to allege prima facie case); *Kingston v Department of Motor Vehicles* (1969) 271 CA2d 549, 552, 76 CR 614 (courts may deny application for alternative writ when "it appears from the face of the petition that a peremptory writ will not be issued").

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§9.18 1. Leave to Amend

If it appears that the defects in the petition could be cured through amendment, the court may grant the petitioner leave to amend. CCP §472a(c) (made applicable to writ proceedings by CCP §1109). Unless otherwise ordered, the petitioner has 10 days to file and serve an amended petition. Cal Rules of Ct 3.1100, 3.1103(a)(2), 3.1320(g). If the petitioner fails to amend the petition, the matter ends with the denial of the application for an alternative writ and, if the court also orders it, dismissal of the petition.

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§9.19 2. Proceed by Way of Noticed Motion

If the superior court denies an application for an alternative writ and does not also dismiss the petition, the petitioner may file a noticed motion seeking issuance of a peremptory writ. See §§5.86-5.107. Whether it is worth the time to do so depends on the court's reason for denying the application for an alternative writ. If the court concluded that the petitioner's showing was insufficient to issue even an alternative writ, it is difficult to imagine that the court would conclude that the petition is meritorious and issue a peremptory writ. However, if the court denied the application on a nonsubstantive ground (*e.g.,* defective notice), proceeding by way of a noticed motion may be justified.

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Source: Civil Litigation/California Civil Writ Practice/9 Action by Superior Court/§9.20 H. Peremptory Writ of Mandate or Prohibition May Issue in Limited Circumstances

§9.20 H. Peremptory Writ of Mandate or Prohibition May Issue in Limited Circumstances

If the petitioner gives the respondent and real party in interest at least 10 days' notice of the application for issuance of "a writ" (meaning the request is not limited to an alternative writ), the superior court is empowered to issue a peremptory writ in the first instance. CCP §§1088, 1105. However, case law makes it clear that a peremptory writ can be issued in the first instance (*i.e.,* in the absence of issuance of an alternative writ) only in the following limited circumstances:

- The court has received or solicited opposition from the parties adversely affected;
- The petition and opposition adequately address the issues raised by the petition;
- No factual dispute exists; and
- Additional briefing following the issuance of an alternative writ is unnecessary to the disposition of the petition.

Lewis v Superior Court (1999) 19 C4th 1232, 1240, 82 CR2d 85; *Palma,* 36 C3d at 178. The accelerated *Palma* procedure is reserved for "extremely narrow circumstances," primarily those cases in which a "compelling temporal urgency requires an immediate decision." *Lewis*, 19 C4th at 1261, citing *Ng v Superior Court* (1992) 4 C4th 29, 35, 13 CR2d 856. Thus, even an application for a peremptory writ on at least 10 days' notice rarely meets the requirements for issuance of the writ in the first instance. See §8.22. Moreover, this procedure is virtually never followed in the superior courts (except, *e.g.,* in the unusual circumstance in which the respondent or real party in interest agrees to issuance of the peremptory writ). Petitioners either seek ex parte issuance of an alternative writ or proceed by way of noticed motion for issuance of a peremptory writ. See §§5.76-5.118.

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III. ACTION ON MERITS OF PETITION FOR WRIT OF MANDATE OR PROHIBITION

A. Hearing Date

§9.21 1. When Noticed Motion Procedure Is Used

When the petitioner proceeds by way of noticed motion (*i.e.,* moves for issuance of a peremptory writ of mandate or prohibition after the respondent or real party in interest has filed an answer; see §§5.86-5.107), the hearing date is set either (a) in the same manner as with other motions (see, *e.g.,* Los Angeles Ct R 9.5(d)(1) (hearing on petition "may be set by noticed motion in the manner generally governing motions")) or (b) according to local rules specifically governing writ proceedings (see, *e.g.,* Sacramento Ct R 2.01(E) (referring parties to court's guide for prosecuting writ petitions)).

PRACTICE TIP: The superior court's local rules may not only provide guidance on how to notice a hearing on a writ petition, but also indicate whether the court actually prefers the noticed motion procedure rather than the alternative writ procedure. See, *e.g.*, Los Angeles Ct R 9.5(d)(1) (motion procedure preferred); San Diego Ct R 2.4.8(A) (motion procedure should be used whenever possible).

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§9.22 a. Standard Law and Motion Rules Apply

When the noticed motion procedure is used, the standard law and motion rules apply (see Cal Rules of Ct 3.1100-3.1370), unless a writ statute or local rules specify a different procedure. CCP §1109; Cal Rules of Ct 3.1100, 3.1103(a)(2). See §9.21.

For a general discussion of motion and hearing procedures, see California Civil Procedure Before Trial, chap 12 (4th ed Cal CEB 2004).

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§9.23 b. If Petitioner Gives 10 Days' Notice

The writ statutes require a minimum of 10 days' notice before the superior court can issue a peremptory writ in the first instance. CCP §§1088, 1105. In such cases, the respondent or real party in interest may file a memorandum in opposition within 5 days of service of the application. CCP §1107. However, this procedure is rarely, if ever, used in superior court writ proceedings. See §8.22. The superior courts use either the standard noticed motion or alternative writ procedures, or a variation thereof set forth in the court's local rules. See §§5.9-5.19.

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§9.24 2. When Alternative Writ Procedure Is Used

If the superior court issues an alternative writ of mandate or prohibition, the alternative writ will set dates for hearings both on the merits of the return (if the return is by way of demurrer or other responsive motion) and on the writ petition (after the respondent or real party in interest has filed an answer). CCP §§1089-1090, 1094, 1105. See §§9.9-9.10.

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B. Nature of Hearing

§9.25 1. If No Return Filed

If the respondent or real party in interest does not file a responsive pleading (*i.e.*, does not file a return), the superior court assumes the truth of the petitioner's factual allegations. See, *e.g.*, *Block v Superior Court* (1998) 62 CA4th 363, 368 n2, 72 CR2d 610. Although the court cannot issue a writ by default (CCP §§1088, 1105), it can hear and decide the matter solely on the basis of the petitioner's papers. CCP §§1094, 1105; see, *e.g.*, *Rodriguez v Municipal Court* (1972) 25 CA3d 521, 526, 102 CR 45 (CCP §1088 requires court to hold hearing on remaining questions of law even though respondent failed to answer petition and factual allegations are deemed true); *Weisman v Board of Bldg. & Safety Comm'rs* (1927) 85 CA 493, 494, 259 P 768 (writ was not granted by default when superior court reviewed petition and heard and considered evidence).

JUDICIAL PERSPECTIVE: Even if the writ petition is unopposed and the factual allegations are deemed true, the court is always under an obligation to determine whether the petitioner is legally entitled to writ relief.

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§9.26 2. If Return Raises Only Questions of Law

If the return (*e.g.*, the answer) raises only questions of law, or puts in issue only immaterial factual allegations not affecting the substantial rights of the parties, the court must hold a hearing. CCP §§1094, 1105; see, *e.g.*, *California Standardbred Sires Stakes Comm., Inc. v California Horse Racing Bd.* (1991) 231 CA3d 751, 762, 282 CR 656; *English v City of Long Beach* (1952) 114 CA2d 311, 316, 250 P2d 298.

JUDICIAL PERSPECTIVE: Although the court determines whether the return raises only questions of law or puts in issue only immaterial allegations not affecting the substantial rights of the parties, the respondent or real party in interest should weigh in not only on that issue but also on whether writ relief legally can and should be granted.

Similarly, if a writ petition is based solely on an administrative record, the merits are heard by the court. CCP §1094.

PRACTICE TIP: Whether extra-record evidence is admissible depends on the nature of the challenged action or decision, and the nature of the writ sought. See §§7.9-7.12.

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3. If Return Raises Factual Dispute

§9.27 a. Petitioner Has Burden to Establish Disputed Facts

The petitioner has the burden of establishing those facts alleged in the petition that the respondent does not admit. See, *e.g.*, *California Standardbred Sires Stakes Comm., Inc. v California Horse Racing Bd.* (1991) 231 CA3d 751, 762, 282 CR 656.

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§9.28 b. Parties Entitled to Present Evidence

When the return raises a factual dispute essential to the determination of the petition and affecting the substantial rights of the parties, the superior court must hold a factual hearing at which the parties are entitled to present evidence on the merits of the petition. CCP §§1090-1091, 1105; see, *e.g.*, *Dare v Board of Med. Exam'rs* (1943) 21 C2d 790, 797, 136 P2d 304 (if there are disputed issues of fact, "any competent evidence may be introduced and received and the ordinary procedural rules apply"); *Bright Dev. v City of Tracy* (1993) 20 CA4th 783, 795, 24 CR2d 618 (in traditional mandamus proceeding, parties may present evidence outside administrative record); *English v City of Long Beach* (1952) 114 CA2d 311, 316, 250 P2d 298 ("[T]he pleadings having tendered a factual issue…, [petitioner] was entitled as of right to a trial thereon"). However, the type of writ sought, the nature of the challenged action or decision, and the issues raised most likely will limit the kind of evidence that may be presented to the trial court. See §§7.7-7.12.

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§9.29 (1) Evidence Presented by Declaration or Judicial Notice

Unless the superior court orders otherwise for good cause shown, the evidence presented at the hearing on a writ petition must be by declaration or judicial notice. See Cal Rules of Ct 3.1103(a)(2), 3.1306(a); *American Fed'n of State, County & Mun. Employees v Metropolitan Water Dist.* (2005) 126 CA4th 247, 263, 24 CR3d 285 (in writ of mandate hearing, trial court has broad discretion to decide case on basis of declarations and other documents rather than live, oral testimony).

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§9.30 (2) Oral Testimony

To present oral testimony, a party must seek permission from the court and comply with Cal Rules of Ct 3.1306(b). See also Los Angeles Ct R 9.5(g) ("evidence is presented by way of declarations, deposition testimony, etc., and not by oral testimony unless the court, in its discretion, permits it"); Sacramento County Superior Court Guide to the Procedures for Prosecuting Petitions for Prerogative Writs, p. 10 (directing parties who wish to present oral testimony to follow procedures in Cal Rules of Ct 3.1306) (copy located in App B). Counsel should also check the court's local rules for any additional procedures.

JUDICIAL PERSPECTIVE: The burden of justifying oral testimony at the hearing on the merits of a writ petition is a heavy one (*e.g.,* when there is extremely lengthy or technical testimony, a claim of bias by a decisionmaker, or the credibility of a party is in issue).

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§9.31 (3) Jury Trial Discretionary

The superior court may exercise its discretion and order factual disputes tried before a jury, postponing argument on the merits of the writ petition until after the trial and the verdict has been certified to the court. CCP §§1090, 1105; see, *e.g.*, *English v City of Long Beach* (1952) 114 CA2d 311, 316, 250 P2d 298. The court may also direct the jury to assess damages if it finds for the petitioner. CCP §1090.

JUDICIAL PERSPECTIVE: As a practical matter, juries are seldom used in writ proceedings because factual disputes are usually limited and most courts prefer to decide them without the aid of a jury. In addition, when the writ petition is combined with a complaint for damages, the court will try the writ petition first.

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C. Rulings and Judgments

§9.32 1. Tentative Ruling Before Hearing

Many superior courts (or certain departments within a particular superior court) offer a tentative ruling procedure that allows the court, before the hearing, to inform the parties of a tentative decision based on its review of the submitted papers. Cal Rules of Ct 3.1308 (made applicable to writ proceedings by Cal Rules of Ct 3.1103(a)(2)).

PRACTICE TIP: Counsel should be sure to check the court's local rules to determine not only whether the court has a tentative ruling procedure, but also the procedures by which counsel must contest the ruling (*e.g.*, through the court's website or by leaving a voicemail message with the department in which the hearing will take place after notice to all parties). Cal Rules of Ct 3.1308(c).

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Source: Civil Litigation/California Civil Writ Practice/9 Action by Superior Court/§9.33 2. Ruling at Conclusion of Hearing or After Submission

§9.33 2. Ruling at Conclusion of Hearing or After Submission

The court may announce its decision on the writ petition in open court at the end of the hearing, sometimes simply by adopting its previously announced tentative ruling as the statement of decision. However, in many cases, especially ones involving complicated factual or legal issues, the court will take the case under submission and notify the parties later of its decision. Cal Rules of Ct 3.1109 (made applicable to writ proceedings by Cal Rules of Ct 3.1103(a)(2)).

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3. Statement of Decision

§9.34 a. Considerations in Requesting Statement of Decision

If there are material factual disputes that the superior court must decide, counsel can request that the court prepare a statement of decision explaining the factual and legal bases for the court's decision on each material issue. CCP §632; Cal Rules of Ct 3.1590. A statement of decision provides a clear record of the court's findings and rulings if there is an appeal. In addition, a statement of decision occasionally reveals that the court has misunderstood a party's contentions or facts in the record, potentially justifying a motion for reconsideration. However, many writ petitions present only legal issues, in which case the parties are not entitled to a statement of decision. Nevertheless, some courts, if asked, will prepare a statement of decision that sets forth its analysis of the legal issues.

PRACTICE TIP: If no party requests a statement of decision, the court may issue a simple order stating that the petition is either granted or denied, without elaborating on the reasons. Accordingly, counsel should always request a statement of decision if there is any chance of appeal.

JUDICIAL PERSPECTIVE: Even if no party requests a statement of decision, many courts will nevertheless issue an order explaining the rationale for the decision.

For a general discussion of statements of decision, see California Trial Practice: Civil Procedure During Trial §§24.34-24.50 (3d ed Cal CEB 1995).

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§9.35 b. When to Request Statement of Decision

If the hearing will last less than 1 day, or less than 8 hours over more than 1 day, a request for a statement of decision must be made before the matter is submitted for decision. Otherwise, a request can be made within 10 days after the court announces its tentative decision. A request must specify the controverted issues counsel wishes the court to address in the statement. After a request is made, any party may make proposals concerning the statement's content. CCP §632.

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§9.36 c. Content of Statement of Decision

The statement of decision should discuss the contentions of the parties and the factual findings and legal conclusions needed to support the judgment. The procedures for preparing a proposed statement of decision and for making objections to one are set forth in Cal Rules of Ct 3.1590. On statements of decision, see California Trial Practice: Civil Procedure During Trial §§24.34-24.50 (3d ed Cal CEB 1995).

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4. When Petitioner Prevails

§9.37 a. Petitioner Prepares Judgment

When the superior court grants a writ petition, it will usually direct the petitioner to prepare the judgment, submit a proposed statement of decision (if the case involved disputed factual issues and a statement was timely requested under CCP §632 and Cal Rules of Ct 3.1590), and prepare the proposed peremptory writ of mandate or prohibition. See Cal Rules of Ct 3.1312.

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§9.38 (1) Purpose of Judgment

The principal function of the judgment in a mandate or prohibition proceeding is to order issuance of the peremptory writ. CCP §§1095 (mandate), 1104 (prohibition). The judgment will also address damages (if requested), interest (if any), costs, and attorney fees (if applicable).

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§9.39 (2) Content of Judgment

In mandate and prohibition, the judgment serves as the superior court's confirmation that the petition has been granted and as a directive to the court clerk to issue the writ, *e.g.,* "Let a peremptory writ of mandate issue, commanding…." The judgment should also contain reference to any award of costs and, when applicable, attorney fees.

JUDICIAL PERSPECTIVE: The petitioner should leave blank spaces for insertion of the amounts of any costs and attorney fees, because these will be determined in postjudgment proceedings. See §§5.121-5.127; California Trial Practice: Civil Procedure During Trial, chaps 26-27 (3d ed Cal CEB 1995).

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Source: Civil Litigation/California Civil Writ Practice/9 Action by Superior Court/§9.40 (3) Conformed Copies for Parties

§9.40 (3) Conformed Copies for Parties

To facilitate giving notice of entry of the judgment, counsel should submit to the superior court clerk an original and one copy for each party of the judgment so the clerk may send conformed copies. In some counties, the petitioner submits the judgment to the superior court clerk rather than to the clerk of the department that made the decision. Counsel should contact the court clerk for local practice.

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b. Petitioner Prepares Peremptory Writ

§9.41 (1) Proposed Peremptory Writ

When the petitioner prevails in a mandate or prohibition proceeding, the superior court will order the issuance of the peremptory writ. The petitioner must then prepare and submit a proposed peremptory writ (and a $25 fee; see Govt C §70626(a)(1)) and see that it is approved, issued, and served. The petitioner may, but is not required to, submit a proposed peremptory writ when filing the petition. This gives notice of the precise relief being sought. The writ is issued by the clerk, not the judge, and thus should be prepared for the clerk's signature. For an example of a peremptory writ, see form in §28.15.

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§9.42 (2) Respondent's Return Date

If requested in the petition and ordered by the superior court, the petitioner must include a return date in the peremptory writ. This is a different kind of "return" than that made after issuance of an alternative writ. See §9.6. In this context, the return date is the deadline for the respondent to report to the court that it has complied with the writ (or what it has done to comply). On respondent's compliance, see §§10.3-10.10.

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Source: Civil Litigation/California Civil Writ Practice/9 Action by Superior Court/§9.43 (3) When to Prepare Writ

§9.43 (3) When to Prepare Writ

The petitioner should submit a proposed peremptory writ concurrently with the proposed judgment and proposed statement of decision (if applicable).

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Source: Civil Litigation/California Civil Writ Practice/9 Action by Superior Court/§9.44 (4) Content of Writ

§9.44 (4) Content of Writ

In all cases, the peremptory writ must track the judgment granting the writ. It also must follow substantially the language set out in the appropriate code section. See CCP §§1087 (mandate), 1104 (prohibition). The peremptory writ is similar in form to the alternative writ except that the words requiring the party to show cause are omitted and a return date need not be included unless the judgment provided for one. For an example of a peremptory writ, see form in §28.15.

JUDICIAL PERSPECTIVE: The petitioner should pay careful attention to the wording of the writ, making sure that it is precise, easy to understand, and contains no extraneous matters.

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§9.45 (5) Service of Writ

A peremptory writ must be served in the same manner as the summons in an ordinary civil action unless the court expressly orders some other method of service. CCP §§1096, 1105.

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§9.46 (6) Laying Foundation for Future Sanctions

To lay the foundation to enforce the peremptory writ, the petitioner should effect personal service on the respondent and any real party in interest, and file the required proof of service with the court. CCP §§1097, 1105. On enforcing the writ, see §§10.11-10.19.

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Source: Civil Litigation/California Civil Writ Practice/9 Action by Superior Court/ 5. When Respondent Prevails/§9.47 a. Respondent Prepares Judgment Denying Issuance of Writ

5. When Respondent Prevails

§9.47 a. Respondent Prepares Judgment Denying Issuance of Writ

If the superior court rules against the petitioner, the court usually will direct the respondent (or real party in interest, if appropriate) to prepare and submit a proposed judgment and, if applicable, a proposed statement of decision. See Cal Rules of Ct 3.1312. On statements of decision, see §§9.34-9.36.

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§9.48 b. Content of Judgment

When the superior court rules in favor of the respondent, the judgment should not only state that the petition is denied, but also order any alternative writ discharged and, if a stay is in force, that the stay is dissolved. The judgment should also dispose of the matter of costs. CCP §1095. In mandate and prohibition, the judgment should state: "The petition for a peremptory writ is denied and the alternative writ is discharged."

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IV. ACTION ON PETITION FOR WRIT OF REVIEW (CERTIORARI)

§9.49 A. Issuance of Order to Show Cause

A petitioner may initiate a proceeding for a writ of review (certiorari) by filing a writ petition. The superior court may require that notice of this filing be given to the adverse party, or it may issue an order to show cause (OSC) why the writ should not be allowed. CCP §1069. If the petitioner seeks an OSC ex parte, the rules of court and any local ex parte rules will apply. See §9.3. The OSC will set out the date for the return by demurrer or answer (CCP §1069.1) and for hearing on the return and request for issuance of a writ. Theoretically, the petitioner could use the noticed motion procedure to obtain a writ of review, rather than obtaining an OSC. However, given the nature of the writ (*i.e.*, it simply commands the clerk of a lower tribunal to transmit the record of the lower proceedings to the superior court), the OSC procedure can be more efficient and result in a writ ordering transmission of the record to the court for review more speedily.

On the uses and requirements for a writ of review, see §§4.10-4.16, 15.27-15.38.

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Source: Civil Litigation/California Civil Writ Practice/9 Action by Superior Court/§9.50 B. Issuance of Writ of Review (Certiorari)

§9.50 B. Issuance of Writ of Review (Certiorari)

After the respondent and any real party files a return by way of demurrer or answer (CCP §1069.1), the superior court decides whether to issue a writ of review (certiorari). If the court refuses to issue a writ, that is the end of the action.

If the superior court orders issuance of a writ of review, the writ orders the party to whom it is directed to certify or return to the superior court the record of the judicial proceedings below and to desist from further proceedings in the matter under review. CCP §1071. The writ specifies the date for this return (different from the return specified in CCP §1069.1) and also usually provides the date for the hearing on the merits of the petition. CCP §1071; see also CCP §1074.

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§9.51 C. Hearing and Decision on Merits

After the respondent files the return to the writ of review (certiorari)—*i.e.,* after the respondent certifies the record below to the court issuing the writ—the superior court hears the case on the merits and issues a decision and judgment either affirming, annulling, or modifying the proceedings below. CCP §§1074-1075. If the return is defective (*e.g.,* improper service or incomplete record), the court may order that a further return be made. CCP §1075.

The superior court's review is based on the record of the proceedings below transmitted by the clerk of the lower tribunal (*e.g.,* any pleadings, transcripts of hearings, and briefs and evidence submitted by the parties). CCP §1074. Thus, the hearing in the superior court is usually confined to oral argument by counsel concerning the legal and factual issues raised by that record. The court's review cannot extend further than to determine whether the inferior tribunal, board, or officer has regularly pursued the authority of such tribunal, board, or officer, *i.e.,* acted beyond or in excess of its jurisdiction. CCP §1074. For discussion of the uses and requirements for a writ of review, see §§4.10-4.16.

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§9.52 D. Ruling and Judgment

In a writ of review (certiorari) proceeding, a prevailing petitioner only needs to prepare a proposed judgment and a proposed statement of decision (if the court decided material factual issues and a statement was timely requested). See CCP §1076.

If the petitioner prevails, the court either annuls or modifies the proceedings below and disposes of the writ, *e.g.,* "The order is annulled and the writ discharged." CCP §1075. If costs and attorney fees are awarded, the judgment should contain that information as well. If the respondent prevails, the judgment affirms the challenged proceeding, and because the writ of review has already issued, the judgment disposes of the writ, *e.g.,* "The order is affirmed and the writ discharged." CCP §1075.

A copy of the judgment signed by the clerk must be transmitted to the inferior tribunal, board, or officer having custody of the record or proceeding certified up. CCP §1076.

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Source: Civil Litigation/California Civil Writ Practice/9 Action by Superior Court/§9.53 V. RULING ON MISCELLANEOUS MOTIONS

§9.53 V. RULING ON MISCELLANEOUS MOTIONS

Because the ordinary rules of civil practice apply to writ proceedings (see CCP §1109), the superior court has authority to hear and decide the following motions:

- Motion to dismiss (see §8.51);
- Motion to quash (see §8.52);
- Motion for judgment on the pleadings (see §8.53);
- Motion for summary judgment (see §8.54);
- Motion for change of venue (see §8.55);
- Motion to strike (see §8.55); and
- Discovery motions (see §8.55).

These motions should be raised, briefed, and decided as any other motion in a civil action. For discussion of motions in civil actions, see California Civil Procedure Before Trial, chap 12 (4th ed Cal CEB 2004).

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VI. RES JUDICATA EFFECT OF SUPERIOR COURT JUDGMENT

§9.54 A. Final Judgment in Writ Proceeding Has Preclusive Effect

The superior court's judgment granting or denying issuance of a peremptory writ of mandate or prohibition has preclusive effect because it is a final determination of the rights of the litigants and therefore constitutes a final judgment within the meaning of CCP §1064. See, *e.g.*, *Overstreet v County of Butte* (1962) 57 C2d 504, 506, 20 CR 631; *Hollywood Circle, Inc. v Department of Alcoholic Beverage Control* (1961) 55 C2d 728, 733, 13 CR 104.

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§9.55 B. Denial of Alternative Writ Has No Preclusive Effect

Because an alternative writ may be denied for reasons that do not go to the ultimate merits of the petition (*e.g.,* a procedural defect in the petition), a denial of an application for an alternative writ generally has no preclusive effect in future proceedings. See *Kowis v Howard* (1992) 3 C4th 888, 893, 12 CR2d 728; *Palma v U.S. Indus. Fasteners, Inc.* (1984) 36 C3d 171, 182, 203 CR 626; *Bigbee v Pacific Tel. & Tel. Co.* (1983) 34 C3d 49, 57 n11, 192 CR 857.

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10

Enforcing Writs Issued by Superior Court

Judy L. McKelvey

I. SCOPE OF CHAPTER §10.1

II. OBLIGATION TO COMPLY WITH PEREMPTORY WRIT OF MANDATE OR PROHIBITION §10.2

III. PEREMPTORY WRIT COMPLIANCE
- A. Respondent or Real Party in Interest May File Return Regarding Compliance §10.3
  - 1. Contents of Return §10.4
    - a. Writ Satisfied in Full §10.5
    - b. Writ Satisfied in Part §10.6
    - c. Writ Not Satisfied §10.7
  - 2. Acceptable Reasons for Noncompliance With Writ §10.8
  - 3. Financial Burden Not Acceptable Reason for Noncompliance With Writ §10.9
- B. Challenging Return §10.10

IV. PEREMPTORY WRIT ENFORCEMENT
- A. Court Retains Jurisdiction to Enforce Writ §10.11
- B. Writ Must Be Personally Served §10.12
- C. Enforcement Methods
  - 1. Motion to Enforce Compliance §10.13
  - 2. Order to Show Cause re Contempt §10.14
  - 3. New or Supplemental Writ Petition §10.15
- D. Penalties for Noncompliance §10.16
  - 1. Enforcement Order §10.17
  - 2. Fine §10.18
  - 3. Imprisonment §10.19

V. ENFORCING WRITS OF REVIEW (CERTIORARI)
- A. Remedies for Failure to Comply With Writ of Review (Certiorari) §10.20
- B. New Writ Petition Necessary to Enforce Judgment in Writ of Review (Certiorari) Proceeding §10.21

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§10.1 I. SCOPE OF CHAPTER

This chapter discusses enforcing writs of mandate or prohibition, including:

- The obligation to comply with a writ of mandate or prohibition (see §10.2);
- The contents of a "return" showing the superior court the respondent or real party in interest has complied with the writ (see §§10.3-10.9);
- Challenging the return (see §10.10); and
- Enforcing the writ (see §§10.11-10.19).

This chapter also discusses enforcing writs of review (certiorari) (see §§10.20-10.21).

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§10.2 II. OBLIGATION TO COMPLY WITH PEREMPTORY WRIT OF MANDATE OR PROHIBITION

Once a final judgment has been entered and a peremptory writ of mandate or prohibition issued, the respondent (or real party in interest, depending on the terms of the peremptory writ) is legally obliged to comply with the writ. See CCP §1097.

NOTE: An appeal from the final judgment may affect the legal obligation to comply with a peremptory writ. On appeal staying compliance with a writ, see §10.8. On appellate review of a superior court's judgment in a writ action, see chap 11.

In addition to entering final judgment and issuing a writ, the superior court may order the respondent or real party in interest to file a "return," advising the court of all actions taken in response to the writ. CCP §1108. On filing a return, see §§10.3-10.9.

If the respondent or real party does not comply with the peremptory writ, the court may take enforcement action. On court enforcement, see §§10.11-10.15. The court may also order penalties for noncompliance with the writ. On penalties for noncompliance, see §§10.16-10.19.

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III. PEREMPTORY WRIT COMPLIANCE

§10.3 A. Respondent or Real Party in Interest May File Return Regarding Compliance

A superior court issuing a peremptory writ of mandate or prohibition may order the respondent or real party in interest to file a "return" within a specified period of time after entry of final judgment or issuance of the writ. By its return, the respondent or real party in interest advises the court of all actions it has taken in response to the peremptory writ. CCP §1108. On contents of return, see §10.4.

NOTE: The "return" filed after issuance of a peremptory writ is not the same as the "return" filed by a respondent and any real party after issuance of an alternative writ or order to show cause. The latter is a responsive pleading challenging the merits of the petition, *e.g.,* an answer, demurrer, or both. CCP §§1089, 1105. See §§8.35-8.38.

Filing a return after entry of final judgment is not mandatory unless the court issuing the peremptory writ specifically requires it. CCP §1108.

PRACTICE TIP: Even if the court does not expressly require a return, a respondent or real party in interest may want to file one. If a respondent or real party in interest has complied with all terms of the writ, filing a return will alert the court to the actions taken and may head off an enforcement action by the petitioner. If there are any unsatisfied terms of the writ, however, filing a return may alert an inattentive petitioner to grounds for an enforcement action.

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§10.4 1. Contents of Return

It is recommended practice that the return advise the court whether the respondent or real party in interest has satisfied the writ either in full or in part, or has not satisfied the writ.

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Source: Civil Litigation/California Civil Writ Practice/10 Enforcing Writs Issued by Superior Court/§10.5 a. Writ Satisfied in Full

§10.5 a. Writ Satisfied in Full

If the respondent or real party in interest has fully complied with the terms of the writ, the return should:

- State that the writ has been satisfied in full compliance with the final judgment and writ; and
- Set out the actions taken in compliance with the writ.

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§10.6 b. Writ Satisfied in Part

If the respondent or real party in interest has only partially complied with the writ, the return should:

- State that the writ has been partially satisfied;
- Set out the actions taken in compliance with the writ; and
- State why the filing party has been unable to satisfy fully the terms of the writ.

On acceptable reasons for noncompliance with a writ, see §10.8.

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§10.7 c. Writ Not Satisfied

If the respondent or real party in interest has not complied with the writ, the return should state the reasons why the writ has not been satisfied. On acceptable and unacceptable reasons for noncompliance, see §§10.8-10.9.

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§10.8 2. Acceptable Reasons for Noncompliance With Writ

An appeal may be an acceptable reason for not complying with a writ. If the writ requires affirmative conduct on the part of the respondent, as writs of mandate typically do, an appeal automatically stays the judgment and thus the operative force of the writ. See CCP §1110b. On appeal staying writ of mandate, see §11.24. However, the superior court may, on a showing by the petitioner that it will suffer irreparable damage in its business or profession, order that appeal does not stay the judgment and writ. CCP §1110b. An appeal does not automatically stay the judgment and operative effect of a writ of prohibition. On appeal not staying writ of prohibition, see §11.25.

Other acceptable reasons for not complying with a writ include:

- Change in the law rendering the writ moot;
- Object of writ has been lost, damaged, or destroyed;
- Death of the respondent or real party in interest;
- Action by another court with an inconsistent order; or
- Impossible, incomprehensible, or ambiguous writ.

The respondent or real party in interest may simply need more time to comply with a writ. In such instances, a return showing due diligence and good cause will probably stave off enforcement proceedings.

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§10.9 3. Financial Burden Not Acceptable Reason for Noncompliance With Writ

A respondent or real party in interest may not refuse to comply with a peremptory writ simply because compliance will impose a substantial financial burden. Although a showing of fiscal impossibility or practical difficulty in a particular case has sometimes been held to excuse nonperformance of an official duty (see, *e.g., Sutro Heights Land Co. v Merced Irrigation Dist.* (1931) 211 C 670, 704, 296 P 1088 (court found respondent discharged duty to extent that could be reasonably required with available money)), there is no generally applicable excuse from performance of a mandatory official duty due to fiscal difficulty. See *King v Martin* (1971) 21 CA3d 791, 796, 98 CR 711 (*Sutro Heights* does not establish generally applicable excuse for financial burden). See also *King v Woods* (1983) 144 CA3d 571, 579, 192 CR 724 (court recognized enormity of task required by writ, but did not find it to be impossible).

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§10.10 B. Challenging Return

If the petitioner believes the respondent's or real party in interest's return to the peremptory writ is invalid because of (a) failure to comply with some or all terms of the writ or (b) inaccurately reporting the basis for noncompliance, the petitioner can challenge the return by filing:

- An enforcement motion requesting a finding that the respondent has not in fact complied with the writ. See §10.13. See, *e.g.*, *City of Carmel-By-The-Sea v Board of Supervisors* (1982) 137 CA3d 964, 970, 187 CR 379 (petitioner successfully moved for order finding respondent had not complied with writ);
- A motion for and order to show cause re contempt (see §10.14); or
- A supplemental writ petition under the original action's case number or a new writ petition (see §10.15).

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IV. PEREMPTORY WRIT ENFORCEMENT

§10.11 A. Court Retains Jurisdiction to Enforce Writ

The court issuing a peremptory writ of mandate or prohibition retains complete jurisdiction and may take all steps necessary to enforce the writ until it is completely satisfied. CCP §§1097, 1105; *California Labor Fed'n AFL-CIO v Occupational Safety & Health Standards Bd.* (1992) 5 CA4th 985, 989 n1, 7 CR2d 399. Accordingly, if the respondent or real party in interest fails to comply with the peremptory writ, the issuing court may enforce it and impose penalties as appropriate. On compliance with writ, see §§10.3-10.9.

NOTE: All orders issued by the court to enforce compliance with the writ must be consistent with the terms of the original judgment. See, *e.g.*, *Carroll v Civil Serv. Comm'n* (1970) 11 CA3d 727, 734, 90 CR 128 (first order must be obeyed and second order must be reversed, because second order went far beyond first order and constituted major modification of that order).

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§10.12 B. Writ Must Be Personally Served

The court can enforce a peremptory writ of mandate or prohibition only if the petitioner has filed proof of personal service of the writ on the respondent or real party in interest. CCP §1096 (unless court orders otherwise, petitioner must serve peremptory writ in same manner as summons in civil action). See also CCP §§1097, 1105. On service requirements, see §§5.81-5.85.

PRACTICE TIP: The petitioner should effect personal service of the peremptory writ and file a proof of service with the issuing court as soon as possible. The service and filing will facilitate petitioner's efforts to enforce the writ if the respondent or real party in interest fails to comply with the terms and requirements set out in the peremptory writ. See CCP §§1097, 1105.

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C. Enforcement Methods

§10.13 1. Motion to Enforce Compliance

If the respondent or real party in interest fails to comply with the terms of the peremptory writ, the petitioner should file a motion for an order compelling compliance with the writ. CCP §§1097, 1105. Petitioner must support the motion with evidence (through declarations, affidavits, and documents, as appropriate) showing that:

- The petitioner personally served the responding party with the writ (see §10.12);
- The petitioner filed a proof of service; and
- The responding party failed to comply with all or part of the peremptory writ.

The court should grant the motion if it appears that the responding party has, without good cause, refused or neglected to comply with the writ. CCP §§1097, 1105.

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§10.14 2. Order to Show Cause re Contempt

Courts may treat a motion to compel enforcement brought under CCP §1097 as being "in the nature of sanctions for contempt." *Carroll v Civil Serv. Comm'n* (1970) 11 CA3d 727, 733, 90 CR 128. Thus, a respondent's or real party in interest's noncompliance with a peremptory writ can be brought before the court by means of a sworn declaration and an order to show cause re contempt. The petitioner may include an affidavit regarding the facts constituting the failure to comply with the writ (the "contempt"). CCP §1211(a). On contempt procedures, see California Trial Objections, chap 57 (Cal CEB Annual); California Trial Practice: Civil Procedure During Trial §§16.99-16.129 (3d ed Cal CEB 1995); California Criminal Law Procedure and Practice, chap 58 (Cal CEB Annual).

The court may elect to treat a contempt motion as a supplemental writ proceeding to issue a writ of enforcement. See, *e.g.*, *Professional Eng'rs in Cal. Gov't v State Personnel Bd.* (1980) 114 CA3d 101, 109, 170 CR 547 (superior court's characterization of action as "supplemental writ" indicated it was continuing to exercise its jurisdiction in attempting to enforce original writ). On supplemental writ petitions, see §10.15.

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§10.15 3. New or Supplemental Writ Petition

A petitioner may request enforcement of a peremptory writ by filing either a supplemental writ petition under the same case number as the original petition for peremptory writ, or by filing an entirely new writ petition under a new case number. *City of Carmel-By-The-Sea v Board of Supervisors* (1982) 137 CA3d 964, 971, 187 CR 379 (indicating that when return states that court's mandate has been carried out, petitioner may challenge validity of that claim by new petition or by supplemental petition). See also *Bakkebo v Municipal Court* (1981) 124 CA3d 229, 234, 177 CR 239 (when respondent court refused to comply with decision of appellate department, writ was proper remedy).

On contents and format of writ petition, see §§5.20-5.70.

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Source: Civil Litigation/California Civil Writ Practice/10 Enforcing Writs Issued by Superior Court/§10.16 D. Penalties for Noncompliance

§10.16 D. Penalties for Noncompliance

The superior court may order the following penalties for noncompliance with a peremptory writ (CCP §1097):

- Enforcement;
- A fine not exceeding $1000, if the court finds no good cause for the failure to comply; or
- Imprisonment, if the court finds persistent refusal to comply with the writ.

The court's determination of which of the three available penalties is appropriate depends on the severity of the circumstances. *King v Woods* (1983) 144 CA3d 571, 578, 192 CR 724.

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§10.17 1. Enforcement Order

The superior court may issue whatever orders are necessary and proper to enforce a writ of mandate or prohibition. CCP §§1097, 1105. The court's power to order compliance with a writ is inherent and the court may use it when there is any inadequacy in compliance; there is no requirement of a showing of willfulness or persistent refusal. *King v Woods* (1983) 144 CA3d 571, 578, 192 CR 724. To justify the issuance of an enforcement order, the petitioner need only show that it personally served the responding party or real party in interest and that party has not adequately complied with the peremptory writ. CCP §§1097, 1105.

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§10.18 2. Fine

The court may impose a fine of up to $1000 for noncompliance with a peremptory writ if (*King v Woods* (1983) 144 CA3d 571, 578, 192 CR 724):

- The party was personally served with the writ;
- The party refused or neglected to obey the writ; and
- The party's refusal or neglect was without just excuse.

On just excuses for a party's refusal or neglect to comply with a peremptory writ, see §10.8.

The court may impose a fine after finding that the respondent refused or neglected to obey the writ. CCP §§1097, 1105. The court need not find that the respondent deliberately intended to refuse to comply with the writ. 144 CA3d at 579 (fine valid given respondent's refusal or neglect to comply with writ).

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§10.19 3. Imprisonment

The court may order the respondent or real party in interest imprisoned for failure to comply with a peremptory writ if (*King v Woods* (1983) 144 CA3d 571, 578, 192 CR 724):

- The party was personally served with the writ;
- The party refused or neglected to obey the writ;
- The party's refusal or neglect was without just excuse; and
- The party's refusal to comply is persistent.

For the court to order imprisonment, it must find more than mere indifference. The court must find intentional refusal to obey the writ. 114 CA3d at 579. When appropriate, the court can order a willfully disobedient respondent jailed until the writ is fully satisfied. CCP §§1097, 1105.

JUDICIAL PERSPECTIVE: In practice, courts are (and should be) reluctant to order imprisonment. It is harsh and dangerous. Instead, courts try to fashion other ways of enforcing the writ. See §§10.17-10.18.

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V. ENFORCING WRITS OF REVIEW (CERTIORARI)

§10.20 A. Remedies for Failure to Comply With Writ of Review (Certiorari)

In contrast to the statutes applicable to mandamus and prohibition (CCP §§1097, 1105), the statutes dealing specifically with writs of review (certiorari) (CCP §§1067-1077) provide no express remedy or penalty for a respondent's failure to comply with the writ (which directs the clerk of the lower tribunal to certify the record of the proceedings therein to the court issuing the writ). On nature of writs of review, see §§4.10-4.16. On initiating a writ of review proceeding, see chap 5.

A court issuing a writ of review, however, has inherent power to enforce its orders through sanctions proceedings or the contempt process. On contempt procedures, see California Trial Objections, chap 57 (Cal CEB Annual); California Trial Practice: Civil Procedure During Trial §§16.99-16.129 (3d ed Cal CEB 1995); California Criminal Law Procedure and Practice, chap 58 (Cal CEB Annual).

If a return is made to a writ of review (certiorari) but it is defective, the superior court can order that a further return be made. CCP §§1076.

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§10.21 B. New Writ Petition Necessary to Enforce Judgment in Writ of Review (Certiorari) Proceeding

A petitioner seeking enforcement of the judgment on the merits entered after issuance of writ of review (certiorari) and the return thereto (see §§10.3-10.7) must file a new writ action, either for a peremptory writ of mandate or prohibition. On filing a writ petition, see §§5.71-5.75.

To compel a lower tribunal to comply with a reviewing court's judgment, the petitioner should file a petition for a writ of mandate. To prevent the tribunal from acting in excess of its authority, it is recommended practice that the petitioner file a petition for a writ of prohibition. Given the technicalities of these writs, the best practice may be to seek alternative relief. On initiating a writ proceeding, see chap 5. On seeking alternative writ relief, see §§5.36-5.37.

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11

Challenging the Superior Court's Decision

The Hon. Margaret M. Grignon (Ret.)
Judith E. Posner

I. SCOPE OF CHAPTER §11.1

II. SEEKING RELIEF IN SUPERIOR COURT §11.2
- A. Motion for New Trial §11.3
- B. Motion to Vacate §11.4
- C. Motion for Reconsideration
  - 1. Probably Not Permissible if Ruling on Petition Disposes of All Issues §11.5
  - 2. When Order Does Not Finally Determine All Issues §11.6

III. SEEKING RELIEF IN COURT OF APPEAL
- A. Filing Appeal Is Usual Remedy §11.7
  - 1. No Formal Judgment Necessary §11.8
  - 2. Decision Must Finally Determine Parties' Rights §11.9
    - a. Denial Without Prejudice §11.10
    - b. Multi-Party Cases §11.11
  - 3. Decision Final Despite Noncompliance With Writ §11.12
  - 4. Postjudgment Orders Appealable §11.13
  - 5. Interlocutory Rulings Not Appealable §11.14
- B. Deciding Whether to Appeal
  - 1. Factors to Consider §11.15
    - a. Standard of Review on Appeal §11.16
    - b. Time and Financial Costs §11.17
    - c. Gravity of Adverse Consequences of Judgment §11.18
  - 2. Prospect of Settlement on Appeal §11.19
- C. Summary Overview of Appellate Process
  - 1. Rules Applicable in Writ Proceedings §11.20
  - 2. Notice of Appeal §11.21
    - a. Time to File §11.22
    - b. Timely Filing Is Jurisdictional §11.23
  - 3. Stay on Appeal
    - a. Appeal Automatically Stays Execution of Writ of Mandate, But Not of Writ of Prohibition §11.24
    - b. Exceptions to Automatic-Stay Rule §11.25
  - 4. Record on Appeal §11.26
  - 5. Briefing on Appeal §11.27
    - a. Appellant's Opening Brief §11.28
    - b. Respondent's Brief §11.29
    - c. Appellant's Reply Brief §11.30
  - 6. Oral Argument §11.31
  - 7. Opinion of Court of Appeal §11.32
  - 8. Costs on Appeal §11.33
- D. Challenging Court of Appeal's Decision
  - 1. Rehearing in Court of Appeal §11.34
  - 2. Review by Supreme Court §11.35
- E. Requesting Depublication of Published Court of Appeal Opinion §11.36

IV. SEEKING WRIT RELIEF IN APPELLATE COURTS
- A. Petition Filed in Court of Appeal §11.37
- B. Petition Filed in Supreme Court §11.38

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§11.1 I. SCOPE OF CHAPTER

A party aggrieved by a superior court's final decision on a writ petition can challenge that decision by:

- Moving for relief in the superior court;
- Appealing to the court of appeal; or
- In very rare situations, filing a writ petition in the court of appeal instead of, or in addition to, an appeal.

This chapter first discusses the possibility of seeking relief in the superior court by way of a motion for a new trial, a motion to vacate, or a motion for reconsideration. See §§11.2-11.6. The chapter next discusses appealing from an adverse decision and provides a summary description of the appellate process. See §§11.7-11.36. The chapter concludes with a discussion of the rare circumstances in which an aggrieved party should consider filing a writ petition in the court of appeal instead of, or in conjunction with, an appeal. See §§11.37-11.38.

For a general discussion of appeals from superior court judgments, including from superior court writ proceedings, see California Civil Appellate Practice (3d ed Cal CEB 1996).

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§11.2 II. SEEKING RELIEF IN SUPERIOR COURT

The superior courts have only limited authority to revisit decisions in writ proceedings, as discussed below. On postjudgment motions in civil cases, see California Civil Appellate Practice, chap 2 (3d ed Cal CEB 1996).

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§11.3 A. Motion for New Trial

Any aggrieved party in a writ proceeding may file a motion for a new trial under CCP §§656-662.5. CCP §§1092, 1105, 1109-1110 (making post-trial statutes applicable to writ proceedings). See *Lippman v City of Los Angeles* (1991) 234 CA3d 1630, 1633, 286 CR 406 (new trial denied in mandate proceeding seeking to compel city to consult with citizens' committee in implementing redevelopment project); *City of Poway v City of San Diego* (1991) 229 CA3d 847, 855, 280 CR 368 (new trial denied in mandate proceeding challenging city's decision on roadway closure).

PRACTICE TIP: An aggrieved party must challenge the superior court's factual findings by filing a motion for a new trial, not a new or supplemental writ petition. *Pollak v State Personnel Bd.* (2001) 88 CA4th 1394, 1405, 107 CR2d 39 (petitioner improperly used supplemental petition to seek readjudication of factual issues instead of seeking new trial).

On the grounds and procedures for motions for a new trial, see California Civil Appellate Practice §§2.3-2.38 (3d ed Cal CEB 1996); California Trial Practice: Civil Procedure During Trial §§25.22-25.71 (3d ed Cal CEB 1995).

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§11.4 B. Motion to Vacate

An aggrieved party in a writ proceeding may move to vacate the judgment under CCP §663 when (1) there is an incorrect or erroneous legal basis for the decision or (2) the decision is not consistent with or not supported by the facts. CCP §§1109-1110 (making post-trial statutes applicable to writ proceedings). See *Hernandez v County of Los Angeles* (2008) 167 CA4th 12, 18, 84 CR3d 10 (petitioners moved to vacate judgment denying writ petition and then appealed from judgment and order denying motion to vacate); *Lippman v City of Los Angeles* (1991) 234 CA3d 1630, 1633, 286 CR 406 (parties seeking to intervene in mandate proceeding filed notice of intent to move for new trial and to vacate judgment); *Simac Design, Inc. v Alciati* (1979) 92 CA3d 146, 152, 154 CR 676 (motion to vacate properly made in mandate proceeding in which superior court rendered erroneous judgment based on uncontroverted findings of fact).

On the procedures for motions to vacate, see California Civil Appellate Practice §§2.52-2.60 (3d ed Cal CEB 1996); California Trial Practice: Civil Procedure During Trial §§25.72-25.77 (3d ed Cal CEB 1995).

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C. Motion for Reconsideration

§11.5 1. Probably Not Permissible if Ruling on Petition Disposes of All Issues

A party may move for reconsideration of an appealable *order* under CCP §1008, but not of a final *judgment*. See *Ramon v Aerospace Corp.* (1996) 50 CA4th 1233, 1237, 58 CR2d 217.

Code of Civil Procedure §1064 defines "judgment" for purposes of writ proceedings as the "final determination of the rights of the parties." CCP §1064. Section 1064 also states the definitions of a "motion" and an "order" in a civil action are applicable to "similar acts in a special proceeding." CCP §1064. Nevertheless, the courts have repeatedly held that an order granting or denying a writ petition that finally determines the rights of the parties is deemed a final judgment from which an appeal can be taken. See, *e.g.*, *Steen v Board of Civil Serv. Comm'rs* (1945) 26 C2d 716, 727, 160 P2d 816 (minute order denying petition for writ of mandate appealable when no further ruling contemplated); *Public Defenders' Org. v County of Riverside* (2003) 106 CA4th 1403, 1409, 132 CR2d 81 (order granting or denying writ petition constitutes final judgment for purposes of appeal); *Townsel v San Diego Metro. Transit Dev. Bd.* (1998) 65 CA4th 940, 944 n1, 77 CR2d 231 (order denying petition for writ of mandate treated as appealable judgment); *Manhattan Sepulveda, Ltd. v City of Manhattan Beach* (1994) 22 CA4th 865, 869 n6, 27 CR2d 565 (party properly appealed from minute order denying writ petition). See also §§11.8-11.9. Thus, these cases treating an order disposing of all issues in a writ proceeding as an appealable final judgment appear to foreclose a motion for reconsideration.

NOTE: In *Arnold v California Exposition & State Fair* (2004) 125 CA4th 498, 502 n1, 22 CR3d 790, the court of appeal noted that the petitioner had moved for reconsideration of the denial of his petition for a writ of mandate. The court simply observed that an order denying a motion for reconsideration is not appealable and did not discuss whether a motion for reconsideration may properly be made following the denial or grant of a writ petition. A case is not authority for a proposition it does not specifically address. *Zurich Am. Ins. Co. v Superior Court* (2007) 155 CA4th 1485, 1503, 66 CR3d 833.

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§11.6 2. When Order Does Not Finally Determine All Issues

An order that does not finally determine all of the issues between the parties is not a final judgment. Thus, if the petitioner has filed a combined writ petition and complaint (see §5.119), and the superior court has ruled only on the writ petition, the court's order does not dispose of all issues between the parties and is not a final judgment for purposes of appeal. *Griset v Fair Political Practices Comm'n* (2001) 25 C4th 688, 697, 107 CR2d 149 (order denying petition for writ of administrative mandamus not appealable because it did not resolve remaining three causes of action); *Nerhan v Stinson Beach County Water Dist.* (1994) 27 CA4th 536, 540, 33 CR2d 10 (denial of writ petition to compel action on variance not appealable because complaint for damages remained pending). In such cases, a motion for reconsideration under CCP §1008 may be appropriate.

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III. SEEKING RELIEF IN COURT OF APPEAL

§11.7 A. Filing Appeal Is Usual Remedy

Because a superior court's final decision on a writ petition disposing of all the issues between the parties is deemed a final judgment (see CCP §1064), an aggrieved party must seek review of the decision in the court of appeal by filing an appeal, *not* by filing a writ proceeding. CCP §904.1(a)(1) (appeal may be taken from "judgment"). See, *e.g.*, *Palos Verdes Faculty Ass'n v Palos Verdes Peninsula Unified Sch. Dist.* (1978) 21 C3d 650, 655, 147 CR 359 (appeal from ruling granting writ of mandate); *Mission Hosp. Reg'l Med. Ctr. v Shewry* (2008) 168 CA4th 460, 469, 85 CR3d 639 (both petitioners and respondent appealed from adverse portions of trial court's judgment in mandamus action); *Sustainability of Parks, Recycling & Wildlife Legal Defense Fund v County of Solano Dep't of Resource Mgmt.* (2008) 167 CA4th 1350, 84 CR3d 889 (appeal from order denying writ of mandate); *SN Sands Corp. v City & County of San Francisco* (2008) 167 CA4th 185, 191, 83 CR3d 885 (respondent appealed from grant of writ of mandate); *Vasquez v Happy Valley Union Sch. Dist.* (2008) 159 CA4th 969, 980, 72 CR3d 15 (appeal from ruling denying writ of mandate); *Capo for Better Representation v Kelley* (2008) 158 CA4th 1455, 1459, 71 CR3d 354 (appeal from ruling denying writ of mandate); *Little v Los Angeles County Assessment Appeals Bds.* (2007) 155 CA4th 915, 917, 66 CR3d 401 (appeal from ruling denying writ of mandate); *Sacramento County Alliance of Law Enforcement v County of Sacramento* (2007) 151 CA4th 1012, 1021, 60 CR3d 202 (appeal from ruling denying writ of mandate).

PRACTICE TIP: In exceedingly rare circumstances, an aggrieved party may want to seek appellate review by filing a writ petition, either alone or in addition to an appeal. See §§11.37-11.38.

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§11.8 1. No Formal Judgment Necessary

An order granting or denying a petition for a writ of mandate, prohibition, or review (certiorari) that finally determines the rights of the parties is a judgment under the writ statutes and thus reviewable on appeal even if it is in the form of a minute order instead of a formal judgment. CCP §1064; see, *e.g.*, *Steen v Board of Civil Serv. Comm'rs* (1945) 26 C2d 716, 727, 160 P2d 816 (minute order denying petition for writ of mandate appealable when no further order contemplated); *State Bldg. & Constr. Trades Council v Duncan* (2008) 162 CA4th 289, 301 n6, 76 CR3d 507 (appeals from order granting writ petition were proper, appeals from actual issuance of writ were not); *JKH Enters., Inc. v Department of Indus. Relations* (2006) 142 CA4th 1046, 1056, 48 CR3d 563 (order denying writ petition appealable despite lack of formal judgment because order appeared to have terminated case in superior court); *Public Defenders' Org. v County of Riverside* (2003) 106 CA4th 1403, 1409, 132 CR2d 81 (order granting or denying writ petition is final judgment for purposes of appeal even if there is no separate formal judgment); *Townsel v San Diego Metro. Transit Dev. Bd.* (1998) 65 CA4th 940, 944 n1, 77 CR2d 231 (order denying petition for writ of mandate treated as appealable judgment); *Manhattan Sepulveda, Ltd. v City of Manhattan Beach* (1994) 22 CA4th 865, 869 n6, 27 CR2d 565 (appeal from court's minute order denying writ petition proper despite court's failure to enter formal judgment). However, in *Hadley v Superior Court* (1972) 29 CA3d 389, 394, 105 CR 500, the court held that a minute order, entered after an alternative writ issued and an evidentiary hearing was held, was *not* appealable because entry of judgment was contemplated. This case has not been followed and seems to be an anomaly based on the court of appeal's determination that formal entry of judgment was contemplated.

CAUTION: Because no formal judgment is necessary to make an order granting or denying a writ petition appealable, an aggrieved party should appeal from both the order and any subsequent judgment to ensure that, if the order is appealable, he or she has timely appealed. See *MCM Constr. Inc. v City & County of San Francisco* (1998) 66 CA4th 359, 367 n3, 78 CR2d 44 (two appeals were filed "in an abundance of caution"—one from order denying petition for writ of mandate and one from subsequent judgment). On time to file appeal, see §11.22.

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§11.9 2. Decision Must Finally Determine Parties' Rights

To be appealable, a superior court's order on a writ petition must be final—*i.e.,* the order must completely dispose of all issues and causes of action between the parties. See, *e.g.*, *Griset v Fair Political Practices Comm'n* (2001) 25 C4th 688, 697, 107 CR2d 149 (order denying petition for writ of administrative mandamus not appealable because it did not resolve remaining three causes of action); *Morehart v County of Santa Barbara* (1994) 7 C4th 725, 743, 29 CR2d 804 (no appeal permitted from judgment that does not dispose of all causes of action even when causes of action disposed of are tried separately or can be characterized as "separate and independent" from those remaining); *Canandaigua Wine Co. v County of Madera* (2009) 177 CA4th 298, 302, 99 CR3d 264 (when only one of three causes of action in writ petition was disposed of, leaving two others pending, order granting summary adjudication was not appealable); *Haight v City of San Diego* (1991) 228 CA3d 413, 416, 278 CR 334 (petitioner able to appeal order denying petition for writ of mandate because he dismissed other claims).

NOTE: In *Griset*, the supreme court explicitly disapproved earlier cases holding that a superior court's decision on a writ petition was appealable even if other issues remained pending. 25 C4th at 698.

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§11.10 a. Denial Without Prejudice

An order denying a writ petition without prejudice (*i.e.,* the petitioner could initiate a new proceeding) is appealable unless the superior court's order states that the petition is not dismissed, thus neither terminating the proceeding nor finally determining the parties' rights. Compare *Unified Teachers—Los Angeles v Los Angeles Unified Sch. Dist.* (1994) 24 CA4th 1510, 1514 n3, 29 CR2d 897 (order denying writ petition without prejudice appealable because no further action or order on petition was necessary) with *Gibson v Savings & Loan Comm'r* (1970) 6 CA3d 269, 272, 85 CR 799 (order denying writ not appealable because superior court made it "quite clear" that it was not dismissing petition).

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§11.11 b. Multi-Party Cases

In multi-party cases, an order resolving all issues as to one party is final and appealable as to that party, and that "party need not wait [to appeal] until final judgment has been entered against the other parties." *Consumers Union, Inc. v California Milk Producers Advisory Bd.* (1978) 82 CA3d 433, 436, 147 CR 265. Indeed, that party cannot wait to appeal, because the time periods to file a notice of appeal begin when the order is entered and served on that party. Cal Rules of Ct 8.104.

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§11.12 3. Decision Final Despite Noncompliance With Writ

Whether there has been compliance with a writ issued by the superior court is irrelevant to whether the court's decision on the petition is appealable as a final judgment. *Public Defenders' Org. v County of Riverside* (2003) 106 CA4th 1403, 1410, 132 CR2d 81 (county's alleged failure to comply with writ irrelevant to appealability of court's decision). However, if subsequent events render the dispute moot, the court of appeal generally will not consider the matter. See generally *MHC Operating Ltd. Partnership v City of San Jose* (2003) 106 CA4th 204, 215, 130 CR2d 564.

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§11.13 4. Postjudgment Orders Appealable

An order made after a final decision granting or denying a writ petition is appealable. CCP §904.1(a)(2). See, *e.g.*, *Arnold v California Exposition & State Fair* (2004) 125 CA4th 498, 509, 22 CR3d 790 (appeal from order denying motion for attorney fees under CCP §1021.5 made after decision denying petition for writ of mandate).

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§11.14 5. Interlocutory Rulings Not Appealable

An interlocutory ruling in a superior court writ action, by definition, is not a final decision resolving all issues and claims between the parties. Accordingly, such rulings are not generally appealable. See, *e.g.*, *Sunseri v Board of Med. Exam'rs* (1964) 224 CA2d 309, 319, 36 CR 553 (order denying motion to amend writ petition not appealable and purported appeal dismissed); *McPheeters v Board of Med. Exam'rs* (1946) 74 CA2d 46, 47, 168 P2d 65 (order denying a motion to strike petition for writ of mandate not appealable).

PRACTICE TIP: By statute, a limited number of interlocutory rulings are appealable, *e.g.*, an order on a motion to disqualify opposing counsel. In fact, if a party fails to exercise a statutory right of appeal, he or she forfeits appellate review. See California Civil Appellate Practice §§3.25-3.47 (3d ed Cal CEB 1996).

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B. Deciding Whether to Appeal

§11.15 1. Factors to Consider

Deciding whether to appeal a superior court's decision in a writ proceeding is often difficult. The decision to appeal should be made only after a thorough evaluation of the record, the potential issues for appeal, the standard of review for each of those issues, whether any superior court error was prejudicial, and the overall equities of the case. Counsel should keep in mind that most appeals are not successful. See Cal Const art VI, §13 (reversal of superior court judgment permissible only if appellate court finds miscarriage of justice); CCP §475 (reversal permissible only if error was prejudicial); *Mathew Zaheri Corp. v New Motor Vehicle Bd.* (1997) 55 CA4th 1305, 1313, 64 CR2d 705 (all intendments are construed in favor of judgment, which is presumed correct). On these and other factors to consider in deciding whether to appeal, see California Civil Appellate Practice §§1.49-1.61 (3d ed Cal CEB 1996).

PRACTICE TIP: Because it may be difficult for the client and trial counsel to make a dispassionate assessment of the merits of an appeal, it may be helpful to hire or consult with an appellate lawyer, who will be thoroughly conversant with the standards of review and other issues bearing on the outcome of an appeal.

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§11.16 a. Standard of Review on Appeal

The standard of review on appeal—*i.e.,* how the court of appeal will review the action taken by the superior court—is one of the most important indicators of the chances of success on appeal. In a traditional mandate proceeding under CCP §1085, the appellate standard of review will vary depending on the nature of the writ proceeding and the issues presented on appeal. See, *e.g.*, *Mednik v State Dep't. of Health Care Servs.* (2009) 175 CA4th 631, 639, 96 CR3d 112 (substantial evidence review of foundational factual findings, but legal questions, including ultimate determination of whether administrative proceedings were fundamentally fair, reviewed de novo); *Munroe v Los Angeles County Civil Serv. Comm'n* (2009) 173 CA4th 1295, 1301, 93 CR3d 716 (in ordinary mandamus proceeding, appellate court applies substantial evidence test to review trial court's factual findings, but applies de novo standard to questions of law); *Sustainability of Parks, Recycling & Wildlife Legal Defense Fund v County of Solano Dep't of Resource Mgmt.* (2008) 167 CA4th 1350, 1357, 84 CR3d 889 (de novo review of purely legal question); *Fonseca v Fong* (2008) 167 CA4th 922, 929, 84 CR3d 567 (de novo review of dismissal following order sustaining demurrer); *Hernandez v County of Los Angeles* (2008) 167 CA4th 12, 18, 84 CR3d 10 (legal issues reviewed de novo); *SN Sands Corp. v City & County of San Francisco* (2008) 167 CA4th 185, 191, 83 CR3d 885 (appellate court applied same standard as trial court in reviewing agency's decision). See also *Committee for Responsible Sch. Expansion v Hermosa Beach City Sch. Dist.* (2006) 142 CA4th 1178, 1184, 48 CR3d 705 (de novo review of interpretation of California Constitution); *Branciforte Heights, LLC v City of Santa Cruz* (2006) 138 CA4th 914, 933, 42 CR3d 96 (de novo review of applicable statute). An appellant's chances of success are enhanced when the standard of review is de novo and no deference is given to the superior court. On these standards of review, see California Civil Appellate Practice §§1.50, 1.53 (3d ed Cal CEB 1996).

In a prohibition action under CCP §1102, the standard of review will generally be de novo since the writ is "jurisdictional," that is, it examines whether the respondent is engaged in judicial action without or in excess of its jurisdiction—generally questions of law. See, *e.g.*, *Jensen v Superior Court* (2008) 160 CA4th 266, 271, 72 CR3d 594 (legal analysis of whether trial court could proceed); *Good v Superior Court* (2008) 158 CA4th 1494, 1505, 71 CR3d 125 (same).

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§11.17 b. Time and Financial Costs

The appellate process is time-consuming and expensive, and these factors must be carefully weighed in light of the (usually small) chances of success on appeal. An appeal can be less stressful for clients than the superior court proceedings because the appellate process, until oral argument, takes place on a paper record. However, the appellate process is lengthy, and the ongoing uncertainty about the matter can be stressful.

PRACTICE TIP: In addition to the financial costs of the appellate process, an aggrieved party, and particularly public entity clients, should consider any long-term costs resulting from a published, adverse decision.

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§11.18 c. Gravity of Adverse Consequences of Judgment

In some cases, the consequences of an adverse judgment may be so great that filing an appeal is warranted regardless of limited chances of success. For example, if a professional license is involved, an adverse judgment may mean the irreversible loss of a professional career. In such cases, the time and costs associated with an appeal become reasonable, even if the chances of success are relatively low. The same could be true in a case involving the destruction of the environment or a law that impacts many people. Additionally, in cases in which the issues of law and equity are close, counsel may obtain a stay of the challenged action while the appeal is pending. This in itself may benefit the client, even if the appeal is not successful in the long run. On obtaining a stay in the court of appeal, see chap 19.

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§11.19 2. Prospect of Settlement on Appeal

Some courts of appeal have formal settlement and mediation programs, many of which have been remarkably successful. See, *e.g.,* 1st App Dist Local R 2(d) (requiring parties to submit Case Screening Form to mediation program administrator); 4th App Dist (Div 2) Local R 4 (parties must submit Settlement Conference Information Form after filing notice of appeal). A writ proceeding, like any civil proceeding, may be amenable to settlement on appeal.

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C. Summary Overview of Appellate Process

§11.20 1. Rules Applicable in Writ Proceedings

The rules governing appeals from ordinary civil judgments apply to writ proceedings unless inconsistent with the provisions specifically governing writs. CCP §1110.

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§11.21 2. Notice of Appeal

Filing a notice of appeal initiates the appellate process. The appellant must do all of the following:

- File with the clerk of the superior court that rendered the judgment the original, signed notice of appeal and the required filing fee. Cal Rules of Ct 8.100(a)(1), (b)(1).
- Identify in the notice of appeal the particular judgment or order being appealed. Cal Rules of Ct 8.100(a)(2).
- Serve and file the notice of appeal on all parties and file proof of service with the clerk of the superior court. Cal Rules of Ct 8.25(a), 8.100(a)(1).

On the requirements for filing of a notice of appeal, including a form Notice of Appeal, see California Civil Appellate Practice §§7.8-7.24 (3d ed Cal CEB 1996).

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§11.22 a. Time to File

The basic time for filing a notice of appeal from an appealable order or judgment is the earliest of the following (Cal Rules of Ct 8.104(a)):

- 60 days after the clerk serves the party filing the notice of appeal with a document entitled "Notice of Entry" of judgment or a file-stamped copy of the judgment (NOTE: The 60-day period is not extended under CCP §1013(a) when service is by mail);
- 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled "Notice of Entry" of judgment or a file-stamped copy of the judgment, accompanied by proof of service (NOTE: The 60-day period is not extended under CCP §1013(a) when service is by mail); or
- 180 days after entry of judgment.

CAUTION: The deadlines to file a notice of appeal are jurisdictional and cannot be extended by the court. See §11.23. However, timely filed postjudgment motions may extend the time to appeal as specified in Cal Rules of Ct 8.108.

NOTE: The "prison-delivery rule," which provides that a self-represented inmate's notice of appeal in a criminal case is deemed timely filed if, within the relevant time period, the notice is delivered to prison authorities, applies to civil cases. *Silverbrand v County of Los Angeles* (2009) 46 C4th 106, 92 CR3d 595.

On the time for filing a notice of appeal generally, see California Civil Appellate Practice §§7.25-7.43 (3d ed Cal CEB 1996). On extensions of the time for filing a notice of appeal, see Civ App Prac §§7.44-7.77.

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§11.23 b. Timely Filing Is Jurisdictional

Filing a timely notice of appeal is critical. If the notice is not timely filed with the superior court, the appellate court lacks jurisdiction and the appeal must be dismissed. *Silverbrand v County of Los Angeles* (2009) 46 C4th 106, 92 CR3d 595 (filing of timely notice of appeal is jurisdictional prerequisite); *Hollister Convalescent Hosp., Inc. v Rico* (1975) 15 C3d 660, 668, 125 CR 757 (untimely appeal dismissed because time to file is "mandatory and jurisdictional"). Courts may not extend the time to file a notice of appeal, except as provided in Cal Rules of Ct 8.104(b) (for public emergency).

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3. Stay on Appeal

§11.24 a. Appeal Automatically Stays Execution of Writ of Mandate, But Not of Writ of Prohibition

An order or judgment granting a writ of mandate is stayed on appeal unless the superior court or the court of appeal orders otherwise. CCP §1110b; see also CCP §916(a). This is consistent with the general rule that a mandatory injunction (*i.e.,* one that changes the status quo) is automatically stayed on appeal, but a prohibitory injunction is not. See, *e.g.*, *Union Pac. R.R. v State Bd. of Equalization* (1989) 49 C3d 138, 158, 260 CR 565 (party required to comply with writ of prohibition during appeal). Thus, a writ of mandate is automatically stayed on appeal, but a writ of prohibition is not. On writs of prohibition, see §§15.14-15.26.

PRACTICE TIP: If the superior court refuses to recognize or enforce a stay arising by virtue of the filing of an appeal, the appellant can seek a writ of supersedeas from the court of appeal directing the issuance of a stay. CCP §923. On petitions for writs of supersedeas, see chap 26; California Civil Appellate Practice §§6.68-6.85 (3d ed Cal CEB 1996).

In contrast, an order or judgment granting a writ of prohibition or review (certiorari) is not stayed by the filing of a notice of appeal. See, *e.g., Union Pac. R.R. Co. v State Bd. of Equalization* (1989) 49 C3d 138, 158, 260 CR 565 (party required to comply with writ of prohibition during appeal). This is consistent with the general rule that an appeal does not stay a prohibitory injunction. If the circumstances are unusual and a stay is warranted, the respondent or real party in interest should first seek a stay in the superior court and, if not successful, petition the court of appeal for a writ of supersedeas.

On stays on appeal, see chap 19; Civ App Prac, chap 6. On petition for writ of supersedeas, see chap 26.

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§11.25 b. Exceptions to Automatic-Stay Rule

If the petitioner shows that a stay of a writ of mandate will result in irreparable damage to his or her business or profession, the superior court or court of appeal can order that the filing of an appeal does not stay execution of a writ of mandate. CCP §1110b. There also is no stay on appeal from an order or judgment directing issuance of a writ of mandate involving delivery of water for irrigation. CCP §1110a.

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§11.26 4. Record on Appeal

In addition to filing a timely notice of appeal, an appellant must timely file a designation of the record on appeal. Cal Rules of Ct 8.121(a). Although the time to file a record designation is not jurisdictional, the failure to timely procure the record may, and likely will, result in dismissal of the appeal.

The record on appeal generally consists of:

- The reporter's transcript of the superior court proceedings (Cal Rules of Ct 8.120(b), 8.130); and
- The superior court pleadings in the form of (Cal Rules of Ct 8.120(a)):
- A clerk's transcript (Cal Rules of Ct 8.122);
- An appendix prepared by a party on appeal (Cal Rules of Ct 8.124);
- The original superior court file (Cal Rules of Ct 8.128);
- An agreed statement (Cal Rules of Ct 8.134(a)(2)); or
- A settled statement (Cal Rules of Ct 8.137).

On designating the record on appeal, see chap 20; California Civil Appellate Practice, chap 9 (3d ed Cal CEB 1996).

In a writ proceeding in which there is an administrative record, that record also is part of the record on appeal. See *Crawford v City of Los Angeles* (2009) 175 CA4th 249, 254, 95 CR3d 550 (discussing administrative record on appeal and importance of adequate record, but noting that failure to properly designate administrative record as part of appellate record—"a technical defalcation" in this case—is not "the equivalent of failing to provide [the] court with a complete record"). On the administrative record, see §§7.14-7.18; California Administrative Mandamus, chap 4 (3d ed Cal CEB 2003).

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Source: Civil Litigation/California Civil Writ Practice/11 Challenging the Superior Court's Decision/§11.27 5. Briefing on Appeal

§11.27 5. Briefing on Appeal

The most important part of an appeal is the briefing. Before oral argument, the courts of appeal fully work up a case along with a draft opinion.

JUDICIAL PERSPECTIVE: Courts rarely change a draft opinion as a result of oral argument. Accordingly, the parties must make every effort to win on the briefing.

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§11.28 a. Appellant's Opening Brief

The opening brief is generally the appellate court's first view of the case and thus should clearly, concisely, and persuasively present the appellant's case. An opening brief should include (Cal Rules of Ct 8.204):

- An introduction summarizing the case and identifying the issues on appeal;
- A statement of the facts and procedural background;
- An argument section broken down into subsections addressing the relevant legal issues and including a statement of the standard of review applicable to each issue; and
- A conclusion.

Briefing should be scrupulously faithful to the record. All factual statements should be supported by a citation to the record. Overstating or misstating the facts will hurt the party's credibility. Similarly, briefing should fairly and accurately cite legal authorities. Misciting cases or other legal authority also will seriously damage the party's credibility.

PRACTICE TIP: Although a brief can be as long as 14,000 words (Cal Rules of Ct 8.204(c)(1)), shorter, well-edited briefs often are much more effective.

On the format and content of opening briefs, see California Civil Appellate Practice §§12.1-12.52 (3d ed Cal CEB 1996). On the time for filing and the consequences of the failure to file, see Cal Rules of Ct 8.212, 8.220; Civ App Prac §§12.59-12.66.

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§11.29 b. Respondent's Brief

The respondent's brief should be complete and self-contained, enabling the court of appeal to fully understand the respondent's position without referring to the appellant's opening brief. The basic components of the respondent's brief are the same as those of an appellant's opening brief, *i.e.,* an introduction, a statement of the facts and procedural history, an argument section, and a conclusion. Cal Rules of Ct 8.204. See §11.28.

PRACTICE TIP: The legal discussion should not only refute the issues raised by the appellant, but should also affirmatively demonstrate the merits of the respondent's case and the correctness of the superior court's decision.

On the format and content of respondent's briefs, see California Civil Appellate Practice §§13.1-13.26 (3d ed Cal CEB 1996). On the time for filing, see Civ App Prac §13.27.

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§11.30 c. Appellant's Reply Brief

Unlike an opening brief, a reply brief is optional. Cal Rules of Ct 8.200(a)(3). Nevertheless, an appellant should file a reply brief, because it allows the appellant to:

- Refocus the court on the legal and factual issues supporting reversal of the superior court's decision; and
- Directly respond to the respondent's legal arguments.

CAUTION: Do not raise new issues for the first time in the reply brief. The courts of appeal almost always deem belatedly raised issues forfeited, absent compelling justification for not raising the issue in the opening brief. See *Save the Sunset Strip Coalition v City of W. Hollywood* (2001) 87 CA4th 1172, 1181 n3, 105 CR2d 172 (refusing to consider issue raised for first time in reply brief).

On the format and content of reply briefs, see California Civil Appellate Practice §§12.67-12.77 (3d ed Cal CEB 1996). On the time for filing, see Civ App Prac §12.78.

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§11.31 6. Oral Argument

Parties have a right to oral argument on appeal and to the presence at oral argument of each justice who will participate in deciding the appeal. *Moles v Regents of Univ. of Cal.* (1982) 32 C3d 867, 871, 187 CR 557. See also Cal Rules of Ct 8.256 (notice and conduct of oral argument). Although parties may waive oral argument, it is the one opportunity for counsel to determine whether the court understands the party's arguments as presented in the brief(s), and it is the only opportunity that a client has to observe the court that will be deciding his or her case.

The following are some practical tips for counsel in making their oral argument:

- **Make oral argument short, concise, and to the point.** The main purpose of oral argument is to answer questions posed by the court, and counsel should be prepared to take questions and answer them directly. Sometimes, however, the panel is silent, in which case counsel should also have prepared remarks.
- **Prepare for oral argument knowing that the justices have reviewed a draft opinion.** The justice assigned to author the opinion in the case circulates a draft opinion to the other two justices on the panel before oral argument. In many courts, the justices also conference before oral argument to discuss their tentative views on the case. Thus, simply repeating the arguments made in the briefs often is not helpful to the court. Instead, counsel should focus on one or two major points or recap the party's position in a different light.
- **Do not focus on any one justice.** The court notifies the parties as to which justices will hear the case shortly before or at oral argument. The court, however, does not identify which justice has been assigned to write the opinion. It might become clear at oral argument based on the questions asked which justice "has the case." But the writing assignment could change, and the justice who is most active at argument may be in the minority trying to persuade the panel majority to change their view. Therefore, counsel should pay attention to each justice on the panel.

The appellate court submits the case for decision when a waiver of oral argument has been noted on the record, at the conclusion of oral argument, or upon submission of any supplemental briefing requested by the court. Cal Rules of Ct 8.256(d)(1).

On oral argument, see California Civil Appellate Practice, chap 16 (3d ed Cal CEB 1996).

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§11.32 7. Opinion of Court of Appeal

The court of appeal generally issues its opinion within 90 calendar days of the submission date. Although not formally prescribed by statute, court of appeal justices respect the 90-day deadline because receipt of their salaries is contingent on having no cause undetermined for 90 days after submission. Cal Const art VI, §19; Govt C §68210 (to receive salary, justice must file affidavit stating that no cause remains undetermined for 90 days after submission for decision). On determining submission date, see §24.16.

NOTE: As a practical matter, because the justices file the affidavits only once a month, the court often has slightly more than 90 days (to the end of the month in which the 90th day falls) to issue an opinion.

Appellate courts publish their opinions only if a majority of the court certifies the opinion for publication before the decision is final. Cal Rules of Ct 8.1105(b). An opinion may be published if it (Cal Rules of Ct 8.1105(c)):

- Establishes a new rule of law;
- Applies an existing rule of law to a set of facts significantly different from those stated in published opinions;
- Modifies, explains, or criticizes with reasons given, an existing rule of law;
- Advances a new interpretation, clarification, criticism, or construction of a provision of a constitution, statute, ordinance, or court rule;
- Addresses or creates an apparent conflict in the law;
- Involves a legal issue of continuing public interest;
- Makes a significant contribution to the legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law;
- Invokes a previously overlooked rule of law or reaffirms a legal principle not applied in a recently reported decision; or
- Is accompanied by a separate concurring or dissenting opinion, and publication of the majority and separate opinions would significantly contribute to the development of the law.

On requesting depublication of a published court of appeal opinion, see §11.36. On publication of opinions, see California Civil Appellate Practice §§21.5-21.18 (3d ed Cal CEB 1996).

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§11.33 8. Costs on Appeal

The party prevailing in the court of appeal in a civil case is generally entitled to costs on appeal. See, *e.g., Vasquez v Happy Valley Union Sch. Dist.* (2008) 159 CA4th 969, 987, 72 CR3d 15 (costs awarded to respondent prevailing in petitioner's appeal from writ judgment); *Fiscal v City & County of San Francisco* (2008) 158 CA4th 895, 920, 70 CR3d 324 (costs awarded to petitioner prevailing in respondents' appeal from writ judgment). If the court of appeal affirms the superior court's decision, the respondent is the prevailing party; if the court reverses the superior court's decision in its entirety, the appellant is the prevailing party. Cal Rules of Ct 8.278(a)(1)-(2). If the court reverses the superior court's decision in part or modifies it, or if there is more than one notice of appeal, the opinion must specify the award or denial of costs. Cal Rules of Ct 8.278(a)(3). In the interests of justice, the court may award or deny costs as it deems proper. Cal Rules of Ct 8.278(a)(5). See, *e.g., Capo for Better Representation v Kelley* (2008) 158 CA4th 1455, 1466, 71 CR3d 354 (in "interest of justice" each side to bear costs on appeal from writ judgment).

The clerk of the court will indicate in the remittitur whether costs are awarded. Cal Rules of Ct 8.278(b)(1).

NOTE: The remittitur is a document issued by the clerk of the court of appeal to the superior court, notifying the superior court that the judgment of the appellate court is final and that the superior court has regained jurisdiction over the matter. See Cal Rules of Ct 8.272; *Schwartz v Schwartz* (1969) 268 CA2d 685, 690, 74 CR 192.

A party awarded costs must file a memorandum of costs in the superior court within 40 days after the appellate court clerk mails notice of the issuance of remittitur. Cal Rules of Ct 8.278(c)(1). Costs on appeal are usually relatively small. See Cal Rules of Ct 8.278(d)(1) (listing recoverable costs).

Unless the court of appeal orders otherwise, its award of costs neither includes attorney fees on appeal nor precludes a party from seeking them. Cal Rules of Ct 8.278(d)(2).

On costs on appeal, see California Civil Appellate Practice §§20.1-20.12 (3d ed Cal CEB 1996).

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D. Challenging Court of Appeal's Decision

§11.34 1. Rehearing in Court of Appeal

On petition of a party, or on its own motion, the court of appeal may order rehearing of any decision that is "not final in that court on filing." Cal Rules of Ct 8.268(a)(1). See also Cal Rules of Ct 8.264(b) (on finality of decision).

Petitions for rehearing are rarely granted. The vast majority of appeals are correctly decided, and, even when reasonable minds may differ on the correct outcome, it is difficult to persuade the court that its opinion is incorrect and should be revisited. Nevertheless, a petition for rehearing may be appropriate, and indeed necessary, in the following instances:

- If the court of appeal decided the case on an issue neither party raised or had opportunity to brief. Govt C §68081. See *People v Alice* (2007) 41 C4th 668, 674, 61 CR3d 648 (providing guidance on use of petition for rehearing based on new issue under §68081).
- If the aggrieved party intends to seek review by the California Supreme Court and believes that the court of appeal's opinion omits or misstates facts. Cal Rules of Ct 8.500(c)(2) (supreme court normally accepts court of appeal opinion's statement of issues and facts unless party has raised any alleged omission or misstatement of issue or fact in petition for rehearing).
- If the case is one of the exceedingly rare instances in which the appellate court determines that it wrongly decided the case. See, *e.g., Kaplan v Coldwell Banker Residential Affiliates, Inc.* (1997) 59 CA4th 741, 69 CR2d 640 (decision on rehearing reversing summary judgment vacates previously published opinion affirming summary judgment).
- If a party believes that the court of appeal needs to limit, modify, or clarify its decision to enable the superior court or parties to comply with it in the case at hand or in future cases.

On the filing deadline for petitions for rehearing and the timing for the court of appeal to act on the petition, see Cal Rules of Ct 8.264, 8.268. For further discussion of petitions for rehearing in the court of appeal, see §§25.16-25.25; California Civil Appellate Practice, chap 19 (3d ed Cal CEB 1996).

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§11.35 2. Review by Supreme Court

In almost all cases, an aggrieved party's last resort is to seek review by the California Supreme Court. Cal Rules of Ct 8.500(a)(1). A party does not appeal from an adverse decision by a court of appeal, but rather files a petition for review asking the supreme court to exercise its discretionary review authority. Cal Const art VI, §12(b). See, *e.g.*, *Ste. Marie v Riverside County Reg'l Park & Open-Space Dist.* (2009) 46 C4th 282, 93 CR3d 369 (granting review and reversing court of appeal's judgment, which had affirmed trial court judgment issuing writ to prevent sale of park district property); *Spielbauer v County of Santa Clara* (2009) 45 C4th 704, 88 CR3d 590 (granting review and reversing court of appeal's judgment, which had reversed trial court's judgment in mandate action challenging dismissal from public employment).

The California Supreme Court is not a court of error. Rather, its mission is to establish and clarify the law of the state. The supreme court grants review only in limited circumstances (*e.g.,* to decide important public issues or to resolve conflicts among the courts of appeal), and thus only a small fraction of petitions for review are granted.

On the grounds and procedures for petitioning for review and what occurs once review has been granted, see §§27.12-27.33; California Civil Appellate Practice, chap 22 (3d ed Cal CEB 1996).

PRACTICE TIP: A petition for review challenging a court of appeal's opinion is entirely different from a petition invoking the supreme court's original jurisdiction and seeking issuance of a prerogative writ of mandate, prohibition, or review (certiorari). Although the supreme court is empowered to issue prerogative writs, original proceedings in the high court are extremely rare. See §§27.2-27.11.

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§11.36 E. Requesting Depublication of Published Court of Appeal Opinion

In addition to, or in lieu of, a petition for review, a party or other interested person may request the supreme court to order that an opinion certified for publication not be published. This request cannot be part of a petition for review; rather, it must be made by a separate letter to the supreme court. See Cal Rules of Ct 8.1125(a) (rules on content and service of request). An order by the supreme court depublishing a court of appeal's opinion is not a statement as to the correctness of the decision or any of its legal analysis. Cal Rules of Ct 8.1125(d).

On requesting depublication, including practical considerations and procedure, see California Civil Appellate Practice §§21.15-21.18 (3d ed Cal CEB 1996).

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IV. SEEKING WRIT RELIEF IN APPELLATE COURTS

§11.37 A. Petition Filed in Court of Appeal

In exceedingly rare cases, a party aggrieved by a superior court's decision in a writ proceeding may file a writ petition in the court of appeal instead of, or in addition to, an appeal. Writ review is appropriate when an appeal does not provide an adequate remedy, *i.e.,* when time is of the essence. For example:

- When the superior court issued a writ of mandate invalidating the certification of a referendum petition and striking the referendum from the ballot, the court of appeal allowed the writ petition on the ground that an appeal was an inadequate remedy because it could not be heard before the election occurred. *Hayward Area Planning Ass'n v Superior Court* (1990) 218 CA3d 53, 55, 266 CR 745.
- The court of appeal acted on a petition for a writ of mandate filed as an original proceeding, instead of an appeal, because of the need for a speedy resolution of issues that were in the public interest. *San Gabriel Tribune v Superior Court* (1983) 143 CA3d 762, 770, 192 CR 415.

CAUTION: The filing of a writ petition in the court of appeal does not toll or extend the time to file a notice of appeal. If the court of appeal concludes that an appeal is an adequate remedy but the time to appeal has lapsed while the writ petition was pending, the party will have forfeited the right to appeal. Thus, it is always advisable to file both a notice of appeal *and* a writ petition to ensure that the right to appeal is not lost in the event the appellate court denies the writ petition.

On choosing between a direct appeal and an extraordinary writ, see California Civil Appellate Practice, chap 3A (3d ed Cal CEB 1996).

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§11.38 B. Petition Filed in Supreme Court

On even rarer occasions, a petitioner may file a writ petition in the California Supreme Court, skipping the court of appeal altogether. See *Brown v Superior Court* (1971) 5 C3d 509, 514, 96 CR 584 (original mandate proceeding filed in supreme court because public interest in constitutionality of finance disclosure laws required more rapid determination of issue than was possible in course of normal appeal); *Farley v Healey* (1967) 67 C2d 325, 326, 62 CR 26 (original mandate proceeding filed in supreme court because timing of issue made appeal from superior court order inadequate remedy). This procedure is strongly disfavored unless the petitioner feels that time constraints and the overriding public importance compel attention by the supreme court. On original writ petitions in the supreme court, see §§27.2-27.11.

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12

Writ Petitions in Limited Civil and Small Claims Cases

Efrat M. Cogan

I. SCOPE OF CHAPTER §12.1

II. LIMITED JURISDICTION CIVIL CASES
- A. Definition of Limited Jurisdiction Civil Case §12.2
- B. Writ Review of Superior Court's Interlocutory Action in Limited Jurisdiction Civil Case §12.3
- C. Initiating Writ Proceeding in Appellate Division
  - 1. Format and Contents of Petition §12.4
  - 2. Supporting Memorandum §12.5
  - 3. Supporting Record
    - a. Contents of Record §12.6
    - b. Format of Record §12.7
    - c. Inadequate or Nonconforming Record §12.8
  - 4. Requesting a Stay §12.9
  - 5. Filing and Service §12.10
- D. Initial Action by Appellate Division §12.11
- E. Opposition to Writ Petition
  - 1. Preliminary Opposition
    - a. Format and Contents of Preliminary Opposition §12.12
    - b. Time for Filing Preliminary Opposition §12.13
  - 2. Opposition When Appellate Division Considers Issuing Peremptory Writ in First Instance §12.14
  - 3. Opposition and Return When Appellate Division Issues Alternative Writ §12.15
- F. Petitioner's Reply
  - 1. Reply to Preliminary Opposition §12.16
  - 2. Reply to Opposition and Return §12.17
- G. Review of Appellate Division's Decision on Writ Petition
  - 1. Mandate and Prohibition
    - a. Filing New Petition in Court of Appeal §12.18
    - b. Court of Appeal May Treat Erroneous Appeal as Writ Petition §12.19
  - 2. Filing Appeal in Writ of Review (Certiorari) Cases §12.20
  - 3. Writ Petition to California Supreme Court May Be Appropriate in Rare Cases §12.21
- H. Review of Appellate Division's Judgment on Appeal
  - 1. By Writ Petition to Court of Appeal §12.22
  - 2. By Certification or Transfer to Court of Appeal
    - a. Certification to Court of Appeal §12.23
    - b. Transfer to Court of Appeal §12.24
- I. Costs §12.25

III. SMALL CLAIMS COURT CASES
- A. Writ Review Unavailable to Challenge Small Claims Court Judgment §12.26
- B. Writ Review May Be Available to Challenge Superior Court Judgment After Appeal §12.27

IV. WRITS OF SUPERSEDEAS §12.28

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§12.1 I. SCOPE OF CHAPTER

This chapter discusses writ proceedings in limited jurisdiction civil and small claims court cases.

- **Limited jurisdiction civil cases.** In a limited jurisdiction civil case, a party aggrieved by an interlocutory order or ruling can seek immediate appellate review by filing a writ petition in the appellate division of the superior court. See §12.3. This is analogous to a party in a general civil action seeking immediate appellate review of an interlocutory order or ruling by filing a writ petition in the court of appeal. The procedures for prosecuting writs in limited jurisdiction civil cases are discussed in §§12.4-12.17. A party aggrieved by the appellate division's decision on a petition for a writ of mandate or prohibition can seek further appellate review by filing a new writ petition in the court of appeal (which likely will be denied). See §§12.18-12.19. A party aggrieved by the appellate division's decision granting or denying a petition for a writ of review (also called a writ of certiorari) can seek review by way of appeal to the court of appeal. See §12.20. A party aggrieved by the judgment in a limited civil case must appeal to the appellate division. A party aggrieved by the appellate division's decision on appeal can seek writ review by the court of appeal or, more commonly, seek certification and transfer to the court of appeal. See §12.22-12.24.
- **Small claims court cases.** Writ review is generally unavailable to challenge a small claims court judgment. See §12.26. However, the superior court's appellate division may review a judgment rendered by the superior court in a small claims court appeal if there is a need to settle a significant issue of small claims law or procedure. See §§12.27-12.28.

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II. LIMITED JURISDICTION CIVIL CASES

§12.2 A. Definition of Limited Jurisdiction Civil Case

Limited jurisdiction civil cases consist of those actions or special proceedings in which (1) the amount in controversy, exclusive of attorney fees, interest, and costs, does not exceed $25,000, and (2) the relief sought is solely of the type that can be granted in limited civil cases. CCP §85. In addition, some proceedings have been designated by statute as limited civil cases. See CCP §86. For further discussion, see California Civil Procedure Before Trial §§6.15-6.17 (4th ed Cal CEB 2004).

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§12.3 B. Writ Review of Superior Court's Interlocutory Action in Limited Jurisdiction Civil Case

The superior court's appellate division has jurisdiction to grant writs of mandate, prohibition, or review (certiorari) directed to the superior court in limited jurisdiction civil cases. CCP §§1068(b), 1085(b), 1103(b); see *General Elec. Capital Auto Fin. Servs. v Appellate Div.* (2001) 88 CA4th 136, 144, 105 CR2d 552. Accordingly, a party aggrieved by an interlocutory order or ruling in a limited civil case can seek immediate appellate review by filing a writ petition in the appellate division of the superior court.

NOTE: For the purposes of CCP §§1068, 1085, and 1103, when the superior court acts in its limited jurisdiction capacity, it is an "inferior tribunal" to the superior court's appellate division. CCP §§1068(b), 1085(b), 1103(b).

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C. Initiating Writ Proceeding in Appellate Division

§12.4 1. Format and Contents of Petition

The superior court appellate division is the appellate tribunal for limited jurisdiction matters and therefore entertains, hears, and decides matters as an appellate body. See §12.2. A writ petition filed in the appellate division of the superior court should be prepared in accordance with the rules set out in Cal Rules of Ct 8.931, 8.932. See Cal Rules of Ct 8.930. Rule 8.931 governs petitions filed by parties unrepresented by counsel. Writ petitions filed by attorneys must follow Rule 8.931 unless otherwise required by Rule 8.932. As to matters not expressly addressed by the new rules on writs in limited jurisdiction matters, the rules addressing writs filed in the courts of appeal (Cal Rules of Ct 8.485-8.493) provide some guidance.

NOTE: The rules on the format and content of a writ petition filed in the appellate division mirror those for petitions filed in the courts of appeal, discussed in §§18.5-18.48. Given the often simpler nature of limited jurisdiction matters, writ petitions filed in the appellate division generally will be simpler and shorter than their counterparts filed in the court of appeal. On writ petitions in the court of appeal, see chap 18. On the possible bases for appellate writ relief, see chaps 15-17, App A. On the basic requirements a petitioner must meet for appellate writ relief, see chaps 15, 17. On the showing a petitioner must make for appellate writ relief, see chaps 15-17.

Appellate division writ petitions filed by counsel must comply with the form and content requirements of Cal Rules of Ct 8.932(b). These writ petitions must include supporting documents as provided for in Rule 8.931(b). Unrepresented parties must use an approved form—Petition for Writ (Misdemeanor, Infraction, or Limited Civil Case) (Judicial Council form APP-151)—to seek writ review (Cal Rules of Ct 8.931(a)), but are required to provide an adequate record to support their petition (Cal Rules of Ct 8.931(b)). See §13.16.

PRACTICE TIP: A petitioner initiating a writ petition in a limited jurisdiction civil case should consult the Judicial Council's pamphlet Information on Writ Proceedings in Misdemeanor, Infraction, and Limited Civil Cases (form APP-150-INFO). See §13.17. This pamphlet contains step-by-step instructions on filing writ petitions in the appellate division of the superior court.

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Source: Civil Litigation/California Civil Writ Practice/12 Writ Petitions in Limited Civil and Small Claims Cases/§12.5 2. Supporting Memorandum

§12.5 2. Supporting Memorandum

Every appellate division writ petition filed by counsel must include a supporting memorandum setting forth the legal arguments explaining why the superior court's order or ruling was in error and why the appellate division should grant writ relief. See Cal Rules of Ct 8.932(b)(5) (petition filed by counsel must be accompanied by memorandum, which need not repeat facts alleged in petition).

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3. Supporting Record

§12.6 a. Contents of Record

In addition to the writ petition, the petitioner must file supporting exhibits (the record), which should include all of the following (see Cal Rules of Ct 8.931(b)(1)):

- The order or ruling from which the petition seeks relief;
- All documents and exhibits submitted to the superior court that support and oppose the petitioner's position;
- Any other relevant documents necessary for a complete understanding of the issues under review; and
- A reporter's transcript or electronic recording of the oral proceedings that resulted in the order or ruling that is the subject of the petition, or if a transcript or recording is unavailable, a declaration by counsel (or, if the petitioner is unrepresented by counsel, by the petitioner) (1) explaining why it is unavailable and summarizing the proceedings or (2) stating that the transcript or recording has been ordered and the date it is expected to be filed.

PRACTICE TIP: If any of the above documents are unavailable, the petitioner should file a declaration explaining why the documents are unavailable and fairly summarizing their contents. Cal Rules of Ct 8.931(b)(2).

See Cal Rules of Ct 8.931(b) (requirements for contents of record for writ petitions filed by unrepresented petitioners in limited civil cases).

A petitioner seeking to have the appellate division consider original exhibits that were neither copied in the clerk's transcript nor included in the original file must serve and file a notice in the trial court designating such exhibits with a copy to the appellate division. Cal Rules of Ct 8.843(a). On transmittal of such exhibits, see Cal Rules of Ct 8.843(d).

For further discussion of the contents of the supporting record in the context of writ petitions filed in the courts of appeal, see §§20.6-20.9.

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§12.7 b. Format of Record

The documents that constitute the record should (see Cal Rules of Ct 8.931(c)(1) (applicable to both unrepresented and represented parties)):

- Be bound together at the end of the petition or in separate volumes not exceeding 300 pages each and consecutively numbered.
- Be index-tabbed by number or letter.
- 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.

For further discussion of the format of the record in the context of writ petitions filed in the courts of appeal, see §§20.11-20.14.

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§12.8 c. Inadequate or Nonconforming Record

If the petitioner does not provide an adequate record, or does not explain why an adequate record is not available, the court may summarily deny the writ petition. See, *e.g.*, *Lantz v Superior Court* (1994) 28 CA4th 1839, 1847 n8, 34 CR2d 358. The clerk must file any documents supporting a petition (or a petition itself) that do not comply with these requirements. However, the court may notify the petitioner that it will strike or summarily deny the petition unless petitioner brings the documents into compliance within a stated period of time of at least 5 days. See Cal Rules of Ct 8.931(c)(2).

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§12.9 4. Requesting a Stay

There is no automatic stay of superior court proceedings pending the disposition of writ proceedings in the appellate division of the superior court. However, issuance of an alternative writ of prohibition or a writ of review (certiorari) effectively acts as a stay unless the court orders otherwise. See §19.5. A petitioner is not first required to ask the superior court for a stay. However, it is expected as a matter of practice. See CCP §128(a)(3) ("Every court shall have the power… [t]o provide for the orderly conduct of proceedings before it, or its officers"). If the superior court refuses to stay the limited jurisdiction proceedings, the petitioner may seek a stay from the appellate division.

PRACTICE TIP: If a stay is requested from the appellate division, the front cover of the writ petition should conspicuously state that a stay is requested, and the petition itself should include a section that explains why there is good cause and urgency for the stay. See Cal Rules of Ct 8.932(b)(7). See also Cal Rules of Ct 8.116 (rule on cover information for petitions filed in court of appeal, discussed in §§18.19, 18.58, 18.60).

On stays during appellate writ review generally, see chap 19.

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Source: Civil Litigation/California Civil Writ Practice/12 Writ Petitions in Limited Civil and Small Claims Cases/§12.10 5. Filing and Service

§12.10 5. Filing and Service

Under Cal Rules of Ct 8.931(d)):

- The petition and one set of supporting documents must be served on any named real party in interest (*i.e.,* the opposing parties in the action), but only the petition need be served on the respondent (*i.e.,* the lower court that issued the challenged opinion);
- The proof of service must give the telephone number of each attorney or unrepresented party served;
- The petition must be served on a public officer or agency when required by statute or Cal Rules of Ct 8.29;
- The clerk must file the petition even if the proof of service is defective, but if the petitioner fails to correct the deficiency within 5 days after the clerk gives notice of the defect, the court may strike the petition or impose some other sanction; and
- The court may allow the petition to be filed without proof of service.

PRACTICE TIP: A writ petition should be filed as soon as possible and in any event no later than 30 days after the decision or action being challenged.

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§12.11 D. Initial Action by Appellate Division

The appellate division can take the following initial actions on a writ petition:

- Summarily deny it;
- Issue an alternative writ or order to show cause;
- Issue notice that the court may grant a peremptory writ in the first instance.

The most likely action is a summary denial. On the likelihood of and on the bases for appellate writ relief, see chaps 15, 17.

The appellate division may take any of these actions without waiting for opposition by the real party in interest (usually the opposing party in the underlying limited jurisdiction case). On real parties in interest, see §23.21. On the types of actions that an appellate court may take on the filing of a writ petition, see §§22.9-22.29; Cal Rules of Ct 8.933(a)(4); see also Information on Writ Proceedings in Misdemeanor, Infraction, and Limited Civil Cases (Form APP-150-INFO). See §13.17.

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E. Opposition to Writ Petition

1. Preliminary Opposition

§12.12 a. Format and Contents of Preliminary Opposition

When served with a writ petition, either the real party in interest or the respondent may file a preliminary opposition. Cal Rules of Ct 8.933(a). The purpose of preliminary opposition is to help the appellate division weed out writ petitions that are procedurally infirm or clearly without merit, thus summarily ending the proceedings without further expenditure of judicial resources and additional expense to the parties.

NOTE: Rule 8.933(a)(2) provides that the preliminary opposition must include a memorandum and any statement of material fact not included in the petition. In other words, it should alert the court to any patent procedural or substantive defect in the petition so the court can dispense with the petition summarily if that is appropriate. The format and contents of a preliminary opposition should resemble (albeit in shorter form) the format and contents of a preliminary opposition filed in a writ proceeding in the court of appeal. See Cal Rules of Ct 8.204, 8.487(a)(2), discussed in §§21.8-21.13.

In addition, the court may, without requesting preliminary opposition or waiting for a reply, grant or deny a request for a 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. Cal Rules of Ct 8.933(a)(4). On the similar types of actions the courts of appeal may take on a writ petition, see §§22.9-22.29.

PRACTICE TIP: The preliminary opposition can be used to point out any factual inaccuracies or omissions in the record filed by the petitioner. It also can be used to point out that there is neither irreparable harm to the petitioner nor any need for writ review. On the showing a petitioner must make for appellate court writ relief, see chaps 15, 17.

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Source: Civil Litigation/California Civil Writ Practice/12 Writ Petitions in Limited Civil and Small Claims Cases/§12.13 b. Time for Filing Preliminary Opposition

§12.13 b. Time for Filing Preliminary Opposition

Preliminary oppositions must be filed within 10 days after filing, not service, of a writ petition. Cal Rules of Ct 8.933(a)(1). It is not clear whether additional time is added to the 10 days to take into account the mailing of a writ petition. It likely is not since the "mail extension" provisions of CCP §1013(a) apply where action is triggered by "service," not by "filing" as specified in writ and appellate rules.

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§12.14 2. Opposition When Appellate Division Considers Issuing Peremptory Writ in First Instance

If the appellate division notifies the parties that it is considering issuing a peremptory writ in the first instance (*i.e.,* a *Palma* notice; see §§22.18-22.22), the respondent or real party in interest may, within 30 days after the court's notification, serve and file an opposition. See Cal Rules of Ct 8.933(b)(1)-(2).

The format and contents of the opposition should resemble the format and contents of an opposition filed in a writ proceeding in the court of appeal. See *e.g.,* Cal Rules of Ct 8.40, 8.204, 8.485-8.493, discussed in §§23.3-23.10.

A respondent or real party in interest cannot raise new issues for interlocutory appellate review in an opposition to a writ petition. See *Campbell v Superior Court* (2005) 132 CA4th 904, 922, 34 CR3d 68.

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§12.15 3. Opposition and Return When Appellate Division Issues Alternative Writ

If the appellate division issues an alternative writ or order to show cause (see §§22.23-22.29), the respondent or real party in interest may, within 30 days after the court issues the alternative writ or order to show cause, serve and file a return by demurrer, verified answer, or both. See Cal Rules of Ct 8.933(b)(1)-(2).

The format and contents of a demurrer or verified answer should resemble the format and contents of a demurrer or answer filed in a writ proceeding in the court of appeal. See Cal Rules of Ct 8.40, 8.204, 8.485-8.493, discussed in §§23.19-23.38.

CAUTION: If the return is by demurrer alone and the demurrer is not sustained, the court may issue a peremptory writ without granting the respondent or real party in interest leave to answer. Cal Rules of Ct 8.933(b)(4). Thus, a respondent or real party in interest should accompany a demurrer with an answer. See §23.34.

Just as the petition must be accompanied by a supporting memorandum (Cal Rules of Ct 8.932(b)(5)), a return also should include a memorandum making the legal arguments in support of the return and in opposition to the petition. On returns filed in the courts of appeal, see §23.37.

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F. Petitioner's Reply

§12.16 1. Reply to Preliminary Opposition

Within 10 days after a preliminary opposition is filed, the petitioner may file and serve a reply. See Cal Rules of Ct 8.933(a)(3).

PRACTICE TIP: A petitioner generally should take advantage of the opportunity to have the "last word" on the matter and respond to points made in the opposition.

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§12.17 2. Reply to Opposition and Return

Within 15 days after the filing of a return or opposition to the court's notification that it is considering issuing a peremptory writ in the first instance, the petitioner may serve and file a reply. See Cal Rules of Ct 8.933(b)(3). On the similar rules and practice for replies filed in the courts of appeal, see §§23.17-23.18, 23.48-23.50.

PRACTICE TIP: A petitioner generally should take advantage of the opportunity to have the "last word" on the matter and respond to points made in the opposition. This is especially true when the court has indicated enough interest in the petition to issue an alternative writ or notice indicating it may issue a peremptory writ in the first instance.

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G. Review of Appellate Division's Decision on Writ Petition

1. Mandate and Prohibition

§12.18 a. Filing New Petition in Court of Appeal

A decision (judgment) of the appellate division of the superior court granting or denying a petition for a writ of mandate or prohibition does not constitute an appealable order. CCP §904.3. The aggrieved party may, however, file a new writ petition in the court of appeal. In such cases, the appellate court may exercise its discretion to grant review. CCP §904.3. See *Chavez v Superior Court* (1984) 153 CA3d 130, 132, 200 CR 75 (court of appeal exercised its discretion to review superior court judgment in municipal court case); *Strand Prop. Corp. v Municipal Court* (1983) 148 CA3d 882, 886 n4, 200 CR 47 (noting that no appeal lies from order denying petition for writ of prohibition in pending municipal court case), disapproved on other grounds in *People v Superior Court* (1989) 49 C3d 14, 28 n10, 259 CR 740.

NOTE: Some statutes and many older cases refer to the municipal court, which used to hear limited jurisdiction civil cases. However, the municipal and superior courts in all counties are now "unified" as superior courts (see *General Elec. Capital Auto Fin. Servs. v Appellate Div.* (2001) 88 CA4th 136, 145, 105 CR2d 552).

On determining whether to file appellate court writ proceedings, see chap 17. On initiating a writ proceeding in the court of appeal, see chap 18.

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§12.19 b. Court of Appeal May Treat Erroneous Appeal as Writ Petition

If a party erroneously files an appeal from a nonappealable decision from the superior court's appellate division, the court of appeal may, in its discretion, treat the impermissible "appeal" as a petition for writ of mandate or prohibition (see CCP §904.3 (appellate division decision on writ petition not appealable)) or as a writ petition. See *Morehart v County of Santa Barbara* (1994) 7 C4th 725, 744, 29 CR2d 804; *Stonewall Ins. Co. v City of Palos Verdes Estates* (1996) 46 CA4th 1810, 1831, 54 CR2d 176. However, an aggrieved party should not rely on the court of appeal to "save" an invalid appeal by deeming it a writ petition. An appellate court will treat an invalid appeal as a writ only in unusual circumstances, *e.g.*:

- California Supreme Court treated an improper appeal as a petition for a writ of mandate because (1) the briefs and the record contained "all the [necessary] elements… for an original mandate proceeding"; (2) the case presented "unusual circumstances making it appropriate to ascertain from the record whether there are substantive errors that the Court of Appeal should, by writ, order the trial court to correct"; and (3) judicial economy would be served by resolving the issue that was the subject of the appeal, rather than waiting until final judgment on all of the plaintiff's claims. *Morehart*, 7 C4th at 745.
- Court of appeal treated improper appeal as a petition for extraordinary relief because case involved a novel interpretation of the dismissal statutes and there was no objection by the other party. *Nassif v Municipal Court* (1989) 214 CA3d 1294, 1297, 263 CR 195.
- Court of appeal treated improper appeal as writ petition because the issue presented was one of first impression, was fully briefed, and presented a pure question of law. *Rogers v Municipal Court* (1988) 197 CA3d 1314, 1317, 243 CR 530.
- Court of appeal treated improper appeal as writ petition because case "involve[d] a question of public importance appropriate for resolution," action was fully briefed, and the respondent did not object. *Heldt v Municipal Court* (1985) 163 CA3d 532, 534 n1, 209 CR 579.

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§12.20 2. Filing Appeal in Writ of Review (Certiorari) Cases

A decision (judgment) of the appellate division granting or denying a petition for a writ of review (certiorari) can be appealed to the court of appeal. CCP §904.3; see *Bermudez v Municipal Court* (1992) 1 C4th 855, 860, 4 CR2d 609 (amendments to CCP §904.1 only limited right of appeal for writs of mandate and prohibition, not certiorari).

NOTE: The right of appeal includes decisions on petitions for writs of review (certiorari) arising from contempt rulings, even though a contempt order is not appealable. See CCP §904.1(a); Bermudez, at 1 C4th 864. The legislative scheme thus effectively allows appeal in limited civil case contempt matters but not in superior court contempt matters. 1 C4th at 860.

On prosecuting an appeal, see California Civil Appellate Practice (3d ed Cal CEB 1996).

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§12.21 3. Writ Petition to California Supreme Court May Be Appropriate in Rare Cases

In extraordinary cases, a party may want to seek review of a superior court appellate division writ decision (judgment) by filing a new writ petition directly in the California Supreme Court. See *Serna v Superior Court* (1985) 40 C3d 239, 245, 219 CR 420 (supreme court granted alternative writ after superior court denied petition for writ of mandate to "review two novel and important questions of statewide application"). Such petitions, however, are very rarely granted. On original writ proceedings filed in the California Supreme Court, see chap 27.

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H. Review of Appellate Division's Judgment on Appeal

§12.22 1. By Writ Petition to Court of Appeal

A party aggrieved by the superior court's judgment in a limited jurisdiction civil matter must appeal to the appellate division. CCP §904.2.

A party aggrieved by the appellate division's decision (judgment) on appeal may seek writ review of that decision by the court of appeal. However, the court of appeal will grant writ relief only in exceptional circumstances. See, *e.g., Auto Equity Sales, Inc. v Superior Court* (1962) 57 C2d 450, 453-62, 20 CR 321 (review of appellate division's reversal of a new trial order by way of petition for writ of prohibition; petition granted and appellate division's judgment annulled); *Mahdavi v Superior Court* (2008) 166 CA4th 32, 82 CR3d 121 (review of appellate division's dismissal of notice of appeal from judgment in unlawful detainer case); *Greene v Municipal Court* (1975) 51 CA3d 446, 448, 124 CR 139 (review of appellate division's affirmance of unlawful detainer judgment and denial of motion to vacate by way of petition for writ of review (certiorari); petition granted and appellate division directed to reverse unlawful detainer judgment).

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2. By Certification or Transfer to Court of Appeal

§12.23 a. Certification to Court of Appeal

Rather than seeking writ relief from the court of appeal, parties more commonly request certification or transfer of the case to the court of appeal. See CCP §911 (authorizing transfer to court of appeal); Cal Rules of Ct 8.1000-1018 (setting forth procedures for certification and transfer). The requirements for certification and transfer are stringent, and limited jurisdiction cases are rarely certified or transferred to the court of appeal.

The appellate division may on its own motion certify a case for transfer to the court of appeal. Cal Rules of Ct 8.1005(a). Alternatively, a party may file an application for certification by the appellate division within 15 days after the appellate division pronounces its judgment (affirming or reversing the superior court's judgment in the limited jurisdiction matter). Cal Rules of Ct 8.1005(b). The application for certification can be included in a petition for rehearing by the appellate division. Cal Rules of Ct 8.1005(b)(1). The application must explain why a transfer is necessary either to secure uniformity of the law or to settle an important question of law. Cal Rules of Ct 8.1005(b)(2). Opposition must be filed within 5 days of the filing of the certification application. Cal Rules of Ct 8.1005(b)(3).

A case may be certified for transfer any time after the record on appeal has been filed in the appellate division until the appellate division's decision on the appeal (judgment) is final. Cal Rules of Ct 8.1005(d). Finality is determined by Rule 8.888. Cal Rules of Ct 8.1005(c). A certification order must: (1) briefly describe any conflict in the applicable law or any important question of law to be settled and (2) state whether there was a judgment on appeal from the appellate division and, if so, its date and disposition. Cal Rules of Ct 8.1005(e). Upon certification, further proceedings in the appellate division, except to prepare and transfer the record (Cal Rules of Ct 8.1010), are stayed. Cal Rules of Ct 8.1014.

If the appellate division orders certification, the clerk must promptly send a copy of the order to the parties, the court of appeal, and, in a criminal case, the Attorney General. Cal Rules of Ct 8.1005(f)(1). If the appellate division denies a certification request, the clerk must promptly send a copy to the parties. Cal Rules of Ct 8.1005(f)(2).

It is entirely within the court of appeal's discretion whether to accept a case certified to it by the appellate division. Cal Rules of Ct 8.1002. If the court of appeal accepts the certification, the case is transferred to the court and proceeds in accordance with the rules on transfer. See §12.24.

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§12.24 b. Transfer to Court of Appeal

The court of appeal may, on its own motion or on a party's petition, transfer to itself a case that is on appeal to the appellate division. Cal Rules of Ct 8.1008(a).

A party may petition for transfer if the appellate division declines to certify the case to the court of appeal. Cal Rules of Ct 8.1008(b). A petition for transfer must be filed and served (including on the appellate division) within 15 days of when the appellate division's decision on appeal is final. Cal Rules of Ct 8.1008(b)(2). The petition must explain why transfer is necessary either to secure uniformity of the law or to settle an important question of law. Cal Rules of Ct 8.1008(b)(3). No party may file an answer to the petition for transfer unless the court of appeal requests an answer. Cal Rules of Ct 8.1008(b)(4). Any answer must be filed within 10 days after the order asking for opposition is filed, unless the court of appeal orders otherwise. Cal Rules of Ct 8.1008(b)(4). The petition and any answer must comply as nearly as possible with Rule 8.504 (governing petitions for review by the supreme court). Cal Rules of Ct 8.1008(b)(5).

The court of appeal may order a transfer: (1) after certification by the appellate division or on its own motion within 20 days after the record on transfer is filed with the court of appeal; or (2) on petition for transfer within 20 days after the petition if filed (which time the court of appeal can extend by another 20 days). Cal Rules of Ct 8.1008(c)(1)-(2). If the court of appeal does not timely order a transfer the petition is deemed denied. Cal Rules of Ct 8.1008(c)(3). The court of appeal may limit the issues to be considered by the court. Cal Rules of Ct 8.1008(e).

The record on transfer is governed by Cal Rules of Ct 8.1010. Briefing by the parties is governed by Cal Rules of Ct 8.1012. The court of appeal may vacate the transfer order and retransfer to the appellate division (Cal Rules of Ct 8.1016(b)(1)), or decide fewer than all the issues raised by the parties (Cal Rules of Ct 8.1016(a)). The issuance of remittiturs by the appeal court and the appellate division is governed by Cal Rules of Ct 8.1018. On petitions for rehearing by the court of appeal, see §§25.16-25.25. On petitions for review by the supreme court, see §§27.12-27.33.

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§12.25 I. Costs

Unless the interests of justice dictate otherwise, the prevailing party in a writ proceeding in the appellate division of the superior court is entitled to costs if the court resolves the proceeding after issuing an alternative writ, an order to show cause, or a peremptory writ in the first instance. Cal Rules of Ct 8.936(a). On the procedure for claiming costs, see Cal Rules of Ct 8.891(c).

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III. SMALL CLAIMS COURT CASES

§12.26 A. Writ Review Unavailable to Challenge Small Claims Court Judgment

A party cannot challenge a small claims court judgment by filing a writ petition in the superior court. Other rules apply to the availability of further review in a small claims case:

- **Plaintiff.** A plaintiff is bound by the judgment in a small claims action and may not challenge it by filing an appeal in the superior court. CCP §116.710(a). The plaintiff cannot get around this statutory prohibition by filing a writ petition in the superior court. See *Parada v Small Claims Court* (1977) 70 CA3d 766, 769, 139 CR 87 (allowing plaintiff to challenge adverse judgment by filing writ petition "would emasculate the prohibition against appeals by plaintiffs from judgments rendered by a small claims court").
- **Defendant.** The defendant in a small claims court action may appeal an adverse judgment to the superior court in the county in which the action was heard. CCP §116.710(b). Thus, because there is an adequate remedy at law, writ relief is unavailable to the defendant to challenge an adverse small claims court judgment. See CCP §§1068(a), 1086, 1103(a). On the adequate remedy at law limitation, see §§15.56-15.60.

NOTE: In small claims court cases in which a defendant files a cross-complaint against the plaintiff, the parties' positions become reversed with respect to challenging the judgment on the cross-complaint. CCP §116.710(b); see *Upson Metal Fabricators v Superior Court* (1988) 203 CA3d 67, 69, 251 CR 304 ("as plaintiff has not selected the forum in which to litigate defendant's claim against him, he may not be deprived of his right to appeal an unfavorable decision"); *Davis v Superior Court* (1980) 102 CA3d 164, 170, 162 CR 167 (noting that defendant filing cross-complaint in small claims action "gives up his right to appeal on the cross-complaint").

On the jurisdiction of the small claims court, see California Civil Procedure Before Trial §6.19 (4th ed Cal CEB 2004). On the procedures for appealing from small claims court judgments, see California Civil Appellate Practice §§10.103-10.131 (3d ed Cal CEB 1996).

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§12.27 B. Writ Review May Be Available to Challenge Superior Court Judgment After Appeal

The decision (judgment) of the superior court in an appeal from a small claims court judgment is final and not appealable. CCP §116.780(a). However, in an unusual case, the superior court's judgment on appeal may be reviewed by means of a writ petition filed in the court of appeal. See *Houghtaling v Superior Court* (1993) 17 CA4th 1128, 1131, 21 CR2d 855 (due to informal nature of small claims court proceedings, precedential decisions cannot be made; thus, appellate courts must have jurisdiction to grant writ petitions to settle significant issues of small claims law or procedure); *Davis v Superior Court* (1980) 102 CA3d 164, 168, 162 CR 167 (writ review available in small claims cases to "secure uniformity in the operations of the small claims courts and uniform interpretation of the statutes governing them").

NOTE: The superior court appellate division has jurisdiction to issue writ relief regarding *postjudgment* enforcement orders of the small claims court. See *General Elec. Capital Auto Fin. Servs. v Appellate Div*. (2001) 88 CA4th 136, 144, 105 CR2d 552.

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§12.28 IV. WRITS OF SUPERSEDEAS

In some cases, filing a notice of appeal automatically stays enforcement of the challenged ruling. CCP §916. See §§26.5-26.9. If the superior court nevertheless allows further proceedings in a limited jurisdiction civil matter, a surprisingly common event often driven by a misunderstanding of the automatic-stay rule, the appealing party should petition the appellate division for a writ of supersedeas. On the format and contents of a petition for a writ of supersedeas filed in the court of appeal, see §§26.22-26.26.

California Rules of Court 8.824 governs petitions for writs of supersedeas filed in the appellate division. Under that rule, writ of supersedeas petitions must bear the same title as the appeal, explain the necessity for the writ, include a supporting memorandum, and be verified. Cal Rules of Ct 8.824(a). The petition may request a temporary stay pending the appellate division's ruling, although a separate application for a temporary stay must be filed and served on the respondent. Cal Rules of Ct 8.824(c).

If the record has not yet been filed in the appellate division, the petition must include a statement of the case showing that the petitioner will raise a substantial issue on appeal (*i.e.,* a summary of the material facts, the issues that are likely to be raised on appeal, and any oral statement by the court supporting its ruling related to these issues) as well as (Cal Rules of Ct 8.824(a)(4)):

- The judgment or order, showing its date of entry;
- The notice of appeal, showing its date of filing;
- Any application for a stay filed in the superior court and any opposition; and
- Any other document from the superior court proceeding that is necessary for consideration of the petition.

For the format of these documents, see Cal Rules of Ct 8.824(a)(4)(C).

Opposition must be served and filed within 15 days after the petition is filed. Cal Rules of Ct 8.824(b)(1). It must state any material facts not included in the petition and contain a memorandum. Cal Rules of Ct 8.824(b)(2). For discussion of the format and contents of an opposition filed in the court of appeal, see §§26.28-26.29.

The court may issue a writ of supersedeas in a limited civil case "on any conditions it deems just." Cal Rules of Ct 8.824(d)(1).

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13

Superior Court Forms

I. FORM: VERIFIED PETITION FOR ALTERNATIVE WRIT OF MANDATE AND VERIFIED COMPLAINT FOR DECLARATORY RELIEF §13.1

II. EX PARTE APPLICATION FOR ALTERNATIVE WRIT OF MANDATE AND ORDER TO SHOW CAUSE
- A. Form: Ex Parte Application for Alternative Writ of Mandate and Order to Show Cause §13.2
- B. Form: Memorandum in Support of Ex Parte Application for Alternative Writ of Mandate and Order to Show Cause §13.3
- C. Form: Declaration of Notice in Support of Ex Parte Application for Alternative Writ of Mandate and Order to Show Cause §13.4
- D. Form: Proposed Order Directing Issuance of Alternative Writ of Mandate §13.5
- E. Form: Alternative Writ of Mandate §13.6
- F. Form: Notice of Hearing on Petition for Writ of Mandate §13.7

III. APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE
- A. Form: Ex Parte Application for Temporary Restraining Order and Order to Show Cause §13.8
- B. Form: Proposed Temporary Restraining Order and Order to Show Cause §13.9

IV. DEMURRER TO PETITION FOR WRIT OF MANDATE
- A. Form: Demurrer to Petition for Writ of Mandate §13.10
- B. Form: Memorandum in Support of Demurrer to Petition for Writ of Mandate §13.11

V. OPPOSITION TO PETITION FOR WRIT OF MANDATE
- A. Form: Opposition to Petition for Writ of Mandate §13.12
- B. Form: Request for Judicial Notice in Opposition to Petition for Writ of Mandate §13.13
- C. Form: Declaration in Opposition to Petition for Writ of Mandate §13.14
- D. Form: Proposed Order Denying Petition for Writ of Mandate §13.15

VI. LIMITED CIVIL CASES
- A. Form: Information on Writ Proceedings in Misdemeanor, Infraction, and Limited Civil Cases (Judicial Council Form APP-150-INFO) §13.16
- B. Form: Petition for Writ (Misdemeanor, Infraction, or Limited Civil Case) (Judicial Council Form APP-151) §13.17

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Source: Civil Litigation/California Civil Writ Practice/13 Superior Court Forms/§13.1 I. FORM: VERIFIED PETITION FOR ALTERNATIVE WRIT OF MANDATE AND VERIFIED COMPLAINT FOR DECLARATORY RELIEF

NOTE: The following forms are illustrative only. When drafting papers in writ proceedings, counsel should use their own independent legal and professional judgment in light of the particular client and factual situation. As always, counsel should consult all applicable statutes, rules of court, and local rules before filing any papers with the court.

§13.1 I. FORM: VERIFIED PETITION FOR ALTERNATIVE WRIT OF MANDATE AND VERIFIED COMPLAINT FOR DECLARATORY RELIEF

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Attorneys for Plaintiff and Petitioner

ABC CORPORATION

SUPERIOR COURT OF THE STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO—
UNLIMITED JURISDICTION

ABC CORPORATION, Plaintiff and Petitioner, vs. THE CITY & COUNTY OF SAN FRANCISCO, and DOES 1-30, Defendants and Respondents.	**CASE NO. _ _ _ _ _ _** **VERIFIED PETITION FOR WRIT OF MANDATE (CCP §1085); EX PARTE APPLICATION FOR ALTERNATIVE WRIT; AND VERIFIED COMPLAINT FOR DECLARATORY RELIEF (CCP §526(a))** **_____** **Date: February 7, 2008** **Time: 11:00 a.m.** **Dept.: 301 or 302** **Judge:** **Date of first filing: February 7, 2008** **Trial date:**

Plaintiff and Petitioner ABC Corporation ("ABC") hereby petitions this court for an alternative writ of mandate and a peremptory writ of mandate under Code of Civil Procedure section 1085, directed to Respondents and Defendants the City & County of San Francisco ("the City") and Does 1-30, and hereby complains against Respondents and Defendants as follows:

THE PARTIES

1. Plaintiff and Petitioner ABC is a California corporation with its principal places of business in San Francisco and Oakland, California. It is in the business of construction trucking and materials and is authorized, qualified, and licensed to perform this business in California.

2. Defendant and Respondent the City is a charter city, within the state of California, subject to the court's power to compel compliance with a legal duty under Code of Civil Procedure section 1085.

3. ABC is ignorant of the true names and capacities of Defendants and Respondents sued herein as Does 1-30, inclusive, and therefore sues these Defendants and Respondents by such fictitious names. ABC will amend this Complaint and Petition to allege their true capacities when ascertained. ABC is informed and believes and thereon alleges that each of the fictitiously named Defendants and Respondents is responsible in some manner for the occurrences herein alleged.

STATEMENT OF FACTS

4. The City has contracted for biosolids and grit hauling services with one contractor—We-Haul Company—under a sole source contract since the 1950s. In the past year, the City decided to end this practice and put these services out for competitive bidding for the first time in 50 years.

5. In February 2007, the City, by and through the San Francisco Office of Contract Administration ("SFOCA"), issued an Invitation For Bids ("IFB") for the San Francisco Public Utilities Commission ("SFPUC") for a contract to perform biosolids and grit hauling services for the SFPUC ("the Contract"). A true and correct copy of relevant excerpts from the IFB is attached as Exhibit A.

6. The IFB provided, among other things, that the Contract term would be 5 years. (Exhibit A, General Conditions, ¶28, Contract Term.) Bidders were required to provide a fixed price for that period. The IFB also provided that the parties could, by mutual agreement, extend the contract twice for up to 2 years for each extension. Any such extension would be on terms agreed to by the parties at the time. (*Id.,* ¶29.)

7. The IFB also provided that SFPUC would award the Contract to the low responsive and responsible bidder. (*Id.,* Special Conditions, ¶79.)

8. ABC timely submitted a bid in response to the IFB. See Exhibit B, which is a true and correct copy of the City's Budget Analyst recommendation that the Budget and Finance Committee approve the Contract, at p. 35.

9. ABC bid to perform the 5-year Contract for $3.32 per mile for biosolids hauling, and $3.14 for grit hauling, which equated to an estimated $8,577,092 for the 5-year term of the Contract. (*Id.*, p. 33.)

10. Under the existing sole source contract for the same services, the incumbent provider, We-Haul, was performing at an estimated cost to the City approximately 26 percent higher than ABC's bid price. (*Id.*, p. 37.)

11. Four bidders other than ABC, including We-Haul, submitted bids in response to the IFB. (*Id.*, p. 35.)

12. In May 2007, SFPUC held a bid opening. (*Id.*)

13. SFPUC determined that ABC was responsible and the second lowest priced bidder and that its bid was fully responsive to the IFB. (*Id.*)

14. SFPUC determined that the bids submitted by the other four bidders were materially nonresponsive to the IFB. (*Id.*)

15. Based on its determination that ABC was the lowest responsive and responsible bidder, SFOCA (SFPUC Purchasing Division) issued a Notice of Intent to Award the Contract to ABC on October 5, 2007. A true and correct copy of the Notice is attached as Exhibit C.

16. Two of the other bidders, We-Haul and American Hauling, protested SFPUC's intended award to ABC. American Hauling was the low bidder, but its bid was nonresponsive. We-Haul, the incumbent provider, not only submitted the highest-priced bid (at $4.74 per mile for biosolids hauling and $4.69 per mile for grit hauling) but also one that was nonresponsive. The City Attorney's office reviewed and denied both protests. (Exhibit B (City Budget Analyst Report), pp. 35-36.)

17. SFOCA (SFPUC Purchasing Division) issued a conditional award of the Contract to ABC and, on November 7, 2007, sent to ABC a Notice of Conditional Award, stating that the award was conditioned on ABC's timely submission of a performance bond, insurance certificates, and additional insured endorsements and on its confirmation that it would comply with applicable prevailing wage requirements. The Notice also stated that SFPUC would issue a Notice to Proceed to ABC upon SFPUC's receipt of the documents and confirmation required by SFPUC in its conditional award. A true and correct copy of the Notice is attached as Exhibit D.

18. ABC bought and paid for the performance bond and insurance coverage required by SFPUC in its conditional award, and it timely provided to SFPUC the documents and confirmation required by the conditional award. A true and correct copy of SFPUC and ABC e-mails confirming ABC's satisfaction of the conditions is attached as Exhibit E.

19. SFPUC did not then execute the Contract or issue a Notice to Proceed to ABC, and, to date, it still has done neither.

20. SFPUC informed ABC that the Contract term would begin on April 1, 2008, and ABC is prepared to begin service on that date.

21. On December 20, 2007, SFOCA submitted a proposed resolution to the City Board of Supervisors ("the Board") for approval of the Contract. A true and correct copy of the SFOCA submission is attached as Exhibit F.

22. On January 9, 2008, the City's Budget Analyst recommended to the Board's Budget & Finance Committee that the SFOCA's proposed resolution be approved. (Exhibit B.)

23. On January 16, 2008, the Board's Budget & Finance Committee heard arguments from the San Francisco Labor Council, Teamsters Union, and We-Haul's representatives. No ABC representatives were present at that meeting. The Committee recommended against Board approval of the Contract.

24. On January 28, 2008, the Board disapproved the Contract.

25. Based on the Board's disapproval of the Contract, SFPUC has refused to execute the Contract and to issue a Notice to Proceed to ABC.

26. SFPUC has informed ABC that SFPUC intends to extend its existing contract with We-Haul to perform the same work that ABC would perform under the Contract. The We-Haul contract is set to expire on February 29, 2008.

FIRST CAUSE OF ACTION
(WRIT OF MANDATE—Code Civ. Proc. §1085)

27. ABC refers to and realleges all of the above paragraphs and by this reference incorporates those paragraphs as though fully set forth at length.

28. Having properly awarded the Contract to ABC, the City, by and through SFPUC, had a legal ministerial duty to execute the Contract, to timely issue a Notice to Proceed allowing ABC to begin performance under the Contract, and not to interfere with ABC's rights and obligations under the Contract.

29. The City, by and through the Board, also had a legal duty not to interfere with SFPUC's award, execution, and procession of the Contract.

30. The City violated its legal duties in that the City, by and through SFPUC, has refused to execute the Contract and timely issue a Notice to Proceed allowing ABC to begin performance under the Contract. The City also intends to violate its legal duties further by extending its contract with We-Haul.

31. The City, by and through the Board, has interfered with SFPUC's award, execution, and procession of the Contract. The Board is not authorized, under the City Charter, to approve or disapprove SFPUC contracts having a term of 10 years or less and requiring anticipated expenditures of less than $10 million. Since the Contract term is 5 years and the anticipated expenditures under the Contract are less than $8.6 million, the Board's disapproval of the Contract was unauthorized interference with SFPUC's ability to contract.

32. ABC has a beneficial pecuniary interest in the issuance of a writ of mandate, apart from that of the public at large, in that if this petition is granted, ABC will be allowed to perform under the Contract and to enjoy the rights granted to it under the Contract, including the right to payments for services it will perform under the Contract.

33. ABC does not have a plain, speedy, and adequate remedy at law. ABC is informed and believes that there are no available legal procedures to redress the harm that ABC will suffer if its requested relief is denied.

34. If the Court allows the Board's disapproval of the Contract to stand and allows SFPUC to continue in its refusal to execute and proceed with the Contract and to extend its contract with We-Haul, ABC will be irreparably harmed because ABC will be denied the opportunity to perform any work completed by the incumbent contractor, We-Haul, before this matter can be tried, and there is no legal remedy that would allow ABC to recover damages from the City to compensate it for this loss.

SECOND CAUSE OF ACTION
(DECLARATORY RELIEF—Code Civ. Proc. §526(a))

35. ABC refers to and realleges all of the above paragraphs and by this reference incorporates those paragraphs as though fully set forth at length.

36. An actual controversy exists between ABC and the City as to whether the City, by and through the SFOCA and SFPUC, has awarded an enforceable contract to ABC and whether the City, by and through the Board, was authorized to disapprove the Contract.

37. ABC contends that SFOCA awarded the Contract to ABC, that the Contract became enforceable upon award, and that the Board had no authority to disapprove the Contract, because the Contract has a term of less than 10 years and requires anticipated expenditures of less than $10 million. ABC is informed and believes that the City disputes this contention.

38. ABC requests a judicial determination that SFOCA and SFPUC awarded an enforceable contract to ABC and that the Board lacked authority to disapprove the Contract and, as a result, the Board's resolution disapproving the Contract is null and void.

39. This determination is necessary and proper because the City, by and through SFPUC, is refusing to execute and proceed with the Contract based on its contention that SFOCA and SFPUC did not award an enforceable contract to ABC and based on the Board's unauthorized disapproval of the Contract.

PRAYER FOR RELIEF

WHEREFORE, ABC respectfully prays that the court enter judgment against Defendants and Respondents as follows:

1. For an Alternative Writ of Mandate to be issued under Code of Civil Procedure section 1085, ex parte under the seal of this court, ordering:

a. The City, by and through SFPUC, to execute and proceed with the Contract immediately and not to extend the City's contract with We-Haul for the same services or, if it has already extended that contract, to terminate that extension; and

b. The City, by and through the Board, to vacate immediately its resolution disapproving the Contract; or

c. The City to show cause before this court, by February 21, 2008, or as soon thereafter as possible, at a time and place specified by court order, why the City has not done so and why a peremptory writ should not issue;

2. On return of the alternative writ and hearing on the order to show cause, for a peremptory writ of mandate to be issued under the seal of this court ordering:

a. The City, by and through SFPUC, to execute and proceed with the Contract and not to extend the City's contract with We-Haul for the same services or, if it has already extended that contract, to terminate that extension; and

b.; The City, by and through the Board, to vacate its resolution disapproving the Contract;

5. For a declaration, under Code of Civil Procedure section 526(a), that the Board was not authorized to disapprove the Contract and that its resolution purporting to disapprove the Contract is null and void;

6. For ABC's cost in this action; and

7. For such other relief as the court considers just and proper.

Dated: February 7, 2008 **JONES & PETERS LLP**

By: _____
ROBERTA JONES

Attorneys for Plaintiff and Petitioner
ABC CORPORATION

VERIFICATION

I, John Doe, the undersigned, say:

I am the General Manager of Plaintiff and Petitioner ABC Corporation. I have read the above VERIFIED PETITION FOR WRIT OF MANDAMUS (Code Civ. Proc. §1085); EX PARTE APPLICATION FOR ALTERNATIVE WRIT; and VERIFIED COMPLAINT FOR DECLARATORY RELIEF (Code Civ. Proc. §526(a)), and I am familiar with its contents. I am informed and believe that the matters stated therein are true and on that basis verify that the matters stated therein are true.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this verification is executed on February 6, 2008, in Oakland, California.

_____

JOHN DOE

Note: This sample brief has not been updated for substantive legal accuracy. It is presented as an example of form, not content, and should not be presumed accurate with regard to the state of the law. The names of the parties and attorneys have been changed for publication.

Comment: The format of attorney-drafted court papers is generally governed by Cal Rules of Ct 2.100-2.119. See also Cal Rules of Ct 3.1110-3.1116 (format requirements for civil law and motion papers, made applicable to writ petitions by Cal Rules of Ct 3.1100 and 3.1103(a)(2)).

On drafting writ petitions, see §§5.20-5.70. On the procedures for bringing a petition for an alternative writ on hearing, see §§5.108-5.118.

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II. EX PARTE APPLICATION FOR ALTERNATIVE WRIT OF MANDATE AND ORDER TO SHOW CAUSE

§13.2 A. Form: Ex Parte Application for Alternative Writ of Mandate and Order to Show Cause

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Attorneys for Plaintiff and Petitioner

ABC CORPORATION

SUPERIOR COURT OF THE STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO—
UNLIMITED JURISDICTION

ABC CORPORATION, Plaintiff and Petitioner,	**CASE NO. _ _ _ _ _ _**
vs.	**PLAINTIFF AND PETITIONER ABC CORPORATION'S EX PARTE APPLICATION FOR ALTERNATIVE WRIT OF MANDATE AND ORDER TO SHOW CAUSE WHY PEREMPTORY WRIT SHOULD NOT ISSUE**
THE CITY & COUNTY OF SAN FRANCISCO, and DOES 1-30, Defendants and Respondents.	**Date: February 7, 2008** **Time: 11:00 a.m.** **Dept.: 301 or 302** **Judge:** **Date of first filing: February 7, 2008** **Trial date:**

Plaintiff and Petitioner ABC Corporation ("ABC") hereby applies ex parte for an alternative writ of mandate under the seal of this court and an order to show cause why a peremptory writ should not issue. Specifically, ABC seeks an alternative writ compelling Defendant and Respondent the City & County of San Francisco ("the City") either to execute the contract awarded by the San Francisco Office of Contract Administration to ABC under the Invitation For Bids for the San Francisco Public Utilities Commission ("SFPUC") for a contract to perform biosolids and grit hauling services for the SFPUC ("the Contract"), issue to ABC a Notice to Proceed under the Contract, and vacate the resolution by the Board of Supervisors disapproving the Contract, immediately after receipt of alternative writ of mandate or, in the alternative, to show cause before this court at a specified time and place why it has not done so.

This application will be based on ABC's verified petition and complaint, supporting memorandum, alternative writ, notice of writ hearing, proposed order, and the Declaration of Robert Jones, all filed herewith, and such oral argument as the court allows ABC to present to the court.

Dated: February 7, 2008 **JONES & PETERS LLP**

By: _____

ROBERTA JONES

Attorneys for Plaintiff and Petitioner ABC CORPORATION

Note: This sample application is presented as an example of form, not content. The names of the parties and attorneys have been changed for publication.

Comment: The format of attorney-drafted court papers is generally governed by Cal Rules of Ct 2.100-2.119. See also Cal Rules of Ct 3.1110-3.1116 (format requirements for civil law and motion papers, made applicable to writ petitions by Cal Rules of Ct 3.1100 and 3.1103(a)(2)); Cal Rules of Ct 3.1200-3.1207 (requirements for ex parte applications).

On drafting an ex parte application for an alternative writ, see §§5.113-5.117.

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§13.3 B. Form: Memorandum in Support of Ex Parte Application for Alternative Writ of Mandate and Order to Show Cause

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Attorneys for Plaintiff and Petitioner

ABC CORPORATION

SUPERIOR COURT OF THE STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO—
UNLIMITED JURISDICTION

ABC CORPORATION, Plaintiff and Petitioner, vs. THE CITY & COUNTY OF SAN FRANCISCO, and DOES 1-30, Defendants and Respondents.	**CASE NO. _ _ _ _ _ _** **MEMORANDUM IN SUPPORT OF PLAINTIFF AND PETITIONER ABC CORPORATION'S EX PARTE APPLICATION FOR ALTERNATIVE WRIT OF MANDATE AND ORDER TO SHOW CAUSE WHY PEREMPTORY WRIT SHOULD NOT ISSUE** **Date: February 7, 2008** **Time: 11:00 a.m.** **Dept.: 301 or 302** **Judge:** **Date of first filing: February 7, 2008** **Trial date:**

I. INTRODUCTION

ABC Corporation ("ABC") requires immediate court action to prevent the irreparable injury that it will suffer if the City & County of San Francisco ("the City") continues its refusal to execute and proceed with the contract it awarded to ABC for hauling services ("the Contract") and extends its existing contract with We-Haul Company ("We-Haul") to perform the same work.

In February 2007, the City determined that the contract for hauling biosolids and grit from the City's wastewater treatment facilities, performed sole source by We-Haul since the 1950s, should be put out to competitive bid. In its solicitation for the work, the City stated that it would award the Contract to the lowest responsive and responsible bidder.

After the City received bids and correctly determined that ABC was the lowest (and the only) responsive and responsible bidder, it conditionally awarded the Contract to ABC. ABC satisfied all of the conditions stated in the conditional award (by submitting the required documents and confirmation), the award became final, and the Contract became effective and enforceable. All that remained to be done was for the City to execute the Contract—a ministerial act.

Rather than executing the Contract as it was legally obligated to do, the City submitted the Contract to the City's Board of Supervisors for approval. The Board disapproved the award, and, based on that disapproval, the City has refused to execute the Contract and issue a Notice to Proceed allowing ABC to start performance and intends to extend its contract with We-Haul, set to expire February 29, 2008. The City's actions are illegal because the Board had no authority to disapprove the Contract. Under the City Charter, the Board's contract approval authority applies only to contracts for more than $10 million or longer than 10 years. The Contract between ABC and the City is neither.

Under these circumstances, the court should order the City to execute and proceed with the Contract. *Transdyn/Cresci JV v City & County of San Francisco* (1999) 72 CA4th 746, and the California Supreme Court cases on which it relies, are directly on point. Unless the court takes immediate action, the City will cause ABC irreparable harm by preventing ABC from performing under the Contract. Instead the City will have We-Haul continue to perform for an indefinite period under its existing, higher-priced contract, even though We-Haul submitted a non-responsive and higher-priced bid in this competition, and even though ABC was awarded the new Contract. As a result, the court should issue an alternative writ compelling the City to execute and proceed with the Contract with ABC and an order to show cause by February 21, 2008, or as soon thereafter as possible, why a peremptory writ of mandamus should not issue.

II. STATEMENT OF FACTS

The City has contracted for biosolids and grit hauling services with one contractor—We-Haul—under a sole source contract since the 1950s. (Verified Petition, Exh. B (City Budget Analyst Report).) In the past year, the City decided to end this practice and put these services out for competitive bidding for the first time in 50 years.

In February 2007, the City, by and through the San Francisco Office of Contract Administration ("SFOCA"), issued an Invitation For Bids ("IFB") for the San Francisco Public Utilities Commission ("SFPUC") for a contract to perform biosolids and grit hauling services for the SFPUC ("the Contract"). (Verified Petition, Exh. A (IFB).) The IFB provided, among other things, that the Contract term would be 5 years. (*Id.,* Exh. A, General Conditions, ¶28 (Contract Term).) Bidders were required to provide a fixed price for that period. The IFB also provided that the parties could, by mutual agreement, extend the contract twice for up to 2 years for each extension. Any such extension would be on terms agreed to by the parties at the time. (*Id.,* Exh. A, General Conditions, ¶29.) The IFB also stated that SFPUC would award the Contract to the low responsive and responsible bidder. (*Id.,* Exh. A, Special Conditions, ¶79.)

ABC timely submitted a bid in response to the IFE. ABC bid to perform the 5-year Contract for $3.32 per mile for biosolids hauling, and $3.14 for grit hauling, which equated to an estimated $8,577,092 for the 5-year term of the Contract. (Verified Petition, Exh. B (City Budget Analyst Report, pp. 33, 35).)

Under the existing sole source contract for the same services, the incumbent provider, We-Haul, was performing at an estimated cost to the City that was approximately 26 percent higher than ABC's bid price. (Verified Petition, Exh. B (City Budget Analyst Report, p. 37).)

[*Remainder of text of Statement of Facts omitted.*]

III. ARGUMENT

A. The Court Should Grant ABC's Ex Parte Application for an Alternative Writ.

1. This Court Is Responsible for Determining Whether the City's Actions Are Illegal or Prejudicial Abuses of Discretion.

A court may issue a writ of mandate "to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust or station." (Code Civ. Proc. §1085.) Mandate lies when (1) the respondent has a clear, present duty to act, and (2) the petitioner has a beneficial right to performance of that duty. *People ex. rel. Younger v County of El Dorado* (1971) 5 C3d 480, 491; *TransdynlCresci JV v City & County of San Francisco* (1999) 72 CA4th 746, 752. Code of Civil Procedure section 1086 provides that when a verified petition is submitted by a party "beneficially interested," a writ "must issue where there is not a plain, adequate speedy remedy in the ordinary course of law."

In this proceeding, the court must "determine whether [the City's] actions have been arbitrary or capricious, entirely lacking in evidentiary support, or whether it failed to follow the proper procedures." *Boydston v Napa Sanitation Dist.* (1990) 222 CA3d 1362, 1369. The refusal of a California public entity to execute a contract that it had already properly awarded based on competitive bidding is an abuse of discretion, properly remedied by issuance of a writ of mandate. (*Transdyn/Cresci JV v. City & County of San Francisco, supra,* 72 CA4th at p. 758.)

Here, the City, by and through SFPUC, abused its discretion and failed to follow its announced procedures by refusing to execute and proceed with the Contract after the City awarded it to ABC. In addition, the City, by and through the Board, acted illegally by disapproving the Contract even though both the amount and term of the Contract were below the minimums stated in the City Charter provision that authorizes Board review of SFPUC contracts. This proceeding is ABC's only recourse.

As explained below, SFPUC had a clear and present duty to execute and proceed with the Contract with ABC, and the Board had a clear and present duty not to interfere with the Contract. Enforcement of these criteria would benefit ABC because it would allow it to start performing the Contract and enjoying the benefit of its bargain with the City. Accordingly, the court should order the City to execute the Contract and to issue a Notice to Proceed to ABC or to show cause why a peremptory writ should not issue.

[*Remainder of text of Section 1 omitted.*]

2. ABC Is a Beneficially Interested Party and Has No Adequate Remedy at Law.

As the low responsive and responsible bidder for the Contract, ABC is clearly a "party beneficially interested" with standing to seek a writ. (See, *e.g., Transdyn/Cresci JV v City & County of San Francisco, supra,* 72 CA4th 746.) Because the Contract has been awarded to ABC but the City has allowed performance by We-Haul to continue, ABC has no adequate remedy at law. (*Id.*; see also *Pozar v Department of Transp. (*1983) 145 CA3d 269, 271 [pending contract award and performance established that losing bidder had no adequate remedy at law other than issuance of a writ of mandate].)

An illegal extension of the City's contract with We-Haul will cause ABC to suffer loss of potential profits. ABC will also lose the prestige, publicity, good will, and other potential business opportunities that might arise by virtue of performing the Contract. Moreover, even if ABC could establish its monetary damages with reasonable certainty, lost profits are not recoverable against the City. (*Kajima/Ray Wilson v L.A. County Metro.* (2000) 23 C4th 305, 315-21; *Swinerton & Walberg Co. v City of Inglewood-L.A. County Civic Ctr. Auth.* (1974) 40 CA3d 98, 103)

Therefore, as a matter of law, ABC will suffer irreparable injury because it will not be able to recover damages for the City's blatant violation of law. The City's refusal to execute the Contract and its threatened extension of the contract with We-Haul irreparably harm both ABC and the public. Unless restrained by the court, the City will undermine public confidence in the accountability of government and the integrity of its laws, and a nonresponsive higher-priced incumbent will have been allowed to continue hauling biosolids and grit for the City instead of ABC as the lowest responsible and responsive bidder.

IV. CONCLUSION

For the foregoing reasons, ABC respectfully requests that this court issue an alternative writ and an order to show cause why a peremptory writ should not issue. Because the City's contract with We-Haul will expire (unless extended) on February 29, 2008, and ABC will start incurring irreparable harm immediately thereafter, ABC requests that the court set the hearing on the order to show cause by February 21, 2008.

Dated: February 7, 2008 **JONES & PETERS LLP**

By:_____
ROBERTA JONES

Attorneys for Plaintiff and Petitioner
ABC CORPORATION

Note: This sample brief has not been updated for substantive legal accuracy. It is presented as an example of form, not content, and should not be presumed accurate with regard to the state of the law. The names of the parties and attorneys have been changed for publication.

Comment: The format of attorney-drafted court papers is generally governed by Cal Rules of Ct 2.100-2.119. See also Cal Rules of Ct 3.1110-3.1116 (format requirements for civil law and motion papers, made applicable to writ petitions by Cal Rules of Ct 3.1100 and 3.1103(a)(2)); Cal Rules of Ct 3.1200-3.1207 (requirements for ex parte applications).

On drafting an ex parte application for an alternative writ, see §§5.113-5.117.

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§13.4 C. Form: Declaration of Notice in Support of Ex Parte Application for Alternative Writ of Mandate and Order to Show Cause

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Attorneys for Plaintiff and Petitioner

ABC CORPORATION

SUPERIOR COURT OF THE STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO—
UNLIMITED JURISDICTION

ABC CORPORATION, Plaintiff and Petitioner,	**CASE NO. _ _ _ _ _ _**
vs.	**DECLARATION OF ROBERTA JONES IN SUPPORT OF PLAINTIFF AND PETITIONER'S EX PARTE APPLICATION FOR AN ALTERNATIVE WRIT OF MANDATE AND ORDER TO SHOW CAUSE WHY PEREMPORY WRIT SHOULD NOT ISSUE**
THE CITY & COUNTY OF SAN FRANCISCO, and DOES 1-30, Defendants and Respondents.	**Date: February 7, 2008** **Time: 11:00 a.m.** **Dept.: 301 or 302** **Judge:** **Date of first filing: February 7, 2008** **Trial date:**

I, ROBERTA JONES, declare:

1. I am an attorney at law duly licensed to practice before all courts of the State of California and am a shareholder in the law firm of Jones & Peters LLP, counsel of record for Plaintiff and Petitioner ABC Corporation ("ABC"). I make this declaration in support of ABC's ex parte application for an alternative writ of mandate. I have personal knowledge of the facts set forth herein, and if called as a witness, could and would testify competently hereto.

2. At approximately 9:20 a.m. on Wednesday, February 6, 2008, I notified the City Attorney's Office for the City & County of San Francisco that ABC would be appearing ex parte at 11:00 a.m. on February 7, 2008, in Department 301 or 302 of this court, as assigned, to apply for an alternative writ of mandate and an order to show cause why a peremptory writ of mandate should not issue. Specifically, I spoke to Rachel Smythe, whom I understand to be the City Attorney responsible for the contract awarded to ABC and the subject of ABC's application and petition.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge.

Executed this 6th day of February 2008, at San Francisco, California.

_____
ROBERTA JONES

Note: This sample declaration is presented as an example of form, not content. The names of the parties and attorneys have been changed for publication.

Comment: The format of attorney-drafted court papers is generally governed by Cal Rules of Ct 2.100-2.119. See also Cal Rules of Ct 3.1110-3.1116 (format requirements for civil law and motion papers, made applicable to writ petitions by Cal Rules of Ct 3.1100 and 3.1103(a)(2)); Cal Rules of Ct 3.1200-3.1207 (requirements for ex parte applications).

On drafting an ex parte application for an alternative writ, see §§5.113-5.117.

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§13.5 D. Form: Proposed Order Directing Issuance of Alternative Writ of Mandate

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Attorneys for Plaintiff and Petitioner

ABC CORPORATION

SUPERIOR COURT OF THE STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO—
UNLIMITED JURISDICTION

ABC CORPORATION, Plaintiff and Petitioner,	**CASE NO. _ _ _ _ _ _**
vs.	**[PROPOSED] ORDER DIRECTING ISSUANCE OF ALTERNATIVE WRIT OF MANDATE**
THE CITY & COUNTY OF SAN FRANCISCO, and DOES 1-30, Defendants and Respondents.	**_____ Date: February 7, 2008 Time: 11:00 a.m. Dept.: 301 or 302 Judge: Date of first filing: February 7, 2008 Trial date:**

Good cause appearing, the ex parte application for an alternative writ of mandate of Plaintiff and Petitioner ABC Corporation ("ABC") on file in this proceeding is GRANTED.

IT IS ORDERED that an alternative writ of mandate issue under the seal of this court compelling Defendant and Respondent the City & County of San Francisco ("the City") either to execute the contract awarded by the San Francisco Office of Contract Administration to ABC under the Invitation For Bids for the San Francisco Public Utilities Commission ("SFPUC") for a contract to perform biosolids and grit hauling services for the SFPUC ("the Contract"), issue to ABC a Notice to Proceed under the Contract, and vacate the resolution by the Board of Supervisors disapproving the Contract, immediately after receipt of alternative writ of mandate or, in the alternative, to show cause before this court in Department ____ on _____ at _____ o'clock why it has not done so.

IT IS SO ORDERED.

Dated: February 7, 2008 **By: _____**
Superior Court Judge

Note: This sample order is presented as an example of form, not content. The names of the parties and attorneys have been changed for publication.

Comment: The format of attorney-drafted court papers is generally governed by Cal Rules of Ct 2.100-2.119. See also Cal Rules of Ct 3.1110-3.1116 (format requirements for civil law and motion papers, made applicable to writ petitions by Cal Rules of Ct 3.1100 and 3.1103(a)(2)); Cal Rules of Ct 3.1200-3.1207 (requirements for ex parte applications).

In addition to the date for the return, counsel can include a proposed briefing schedule and date for the hearing on the merits of the petition. Counsel may also wish to confer beforehand on possible briefing schedules and hearing dates and propose them to the court.

On drafting an ex parte application for an alternative writ, see §§5.113-5.117.

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§13.6 E. Form: Alternative Writ of Mandate

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Attorneys for Plaintiff and Petitioner

ABC CORPORATION

SUPERIOR COURT OF THE STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO—
UNLIMITED JURISDICTION

ABC CORPORATION, Plaintiff and Petitioner, vs. THE CITY & COUNTY OF SAN FRANCISCO, and DOES 1-30, Defendants and Respondents.	**CASE NO. _ _ _ _ _ _** **ALTERNATIVE WRIT OF MANDATE** **_____** **Date: February 7, 2008** **Time: 11:00 a.m.** **Dept.: 301 or 302** **Judge:** **Date of first filing: February 7, 2008** **Trial date:**

TO THE CITY & COUNTY OF SAN FRANCISCO ("THE CITY"), RESPONDENTS:

Good cause appearing, the ex parte application of Plaintiff and Petitioner ABC Corporation ("ABC") for an alternative writ of mandate on file in this proceeding is GRANTED.

THE CITY IS HEREBY COMPELLED by order of this court made on February 8, 2008, either to execute the contract awarded by the San Francisco Office of Contract Administration to ABC under the Invitation For Bids for the San Francisco Public Utilities Commission ("SFPUC") for a contract to perform biosolids and grit hauling services for the SFPUC ("the Contract"), issue to ABC a Notice to Proceed under the Contract, and vacate the resolution by the Board of Supervisors disapproving the Contract, immediately after receipt of alternative writ of mandate or, in the alternative, to show cause before this court in Department ____ on _____ at _____ o'clock why it has not done so.

Dated: February 7, 2008 **By:_____**
Deputy Clerk

Note: This sample alternative writ is presented as an example of form, not content. The names of the parties and attorneys have been changed for publication.

Comment: The format of attorney-drafted court papers is generally governed by Cal Rules of Ct 2.100-2.119. See also Cal Rules of Ct 3.1110-3.1116 (format requirements for civil law and motion papers, made applicable to writ petitions by Cal Rules of Ct 3.1100 and 3.1103(a)(2)); Cal Rules of Ct 3.1200-3.1207 (requirements for ex parte applications).

In addition to the date for the return, the court may include a briefing schedule and date for the hearing on the

merits of the petition.

On drafting an ex parte application for an alternative writ, see §§5.113-5.117.

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§13.7 F. Form: Notice of Hearing on Petition for Writ of Mandate

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Attorneys for Plaintiff and Petitioner ABC CORPORATION

SUPERIOR COURT OF THE STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO—
UNLIMITED JURISDICTION

ABC CORPORATION, Plaintiff and Petitioner,	**CASE NO. _ _ _ _ _ _**
vs.	**NOTICE OF HEARING ON PLAINTIFF AND PETITIONER ABC CORPORATION'S PETITION FOR WRIT OF MANDATE (Code Civ. Proc. §1085)**
THE CITY & COUNTY OF SAN FRANCISCO, and DOES 1-30, Defendants and Respondents.	**_____**
	Date:
	Time:
	Dept.:
	Date of first filing: February 7, 2008
	Trial date:

TO ALL PARTIES AND THE COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on _____, at _____, in Department ____ of the above-named court located at 400 McAllister Street, San Francisco, CA 94102, Plaintiff and Petitioner ABC Corporation's petition for a writ of mandate under Code of Civil Procedure section 1085 will be heard by the Honorable Superior Court Judge _____.

Dated: February 7, 2008 **JONES & PETERS LLP**

By:_____
ROBERTA JONES

Attorneys for Plaintiff and Petitioner
ABC CORPORATION

Note: This sample notice is presented as an example of form, not content. The names of the parties and attorneys have been changed for publication.

Comment: The format of attorney-drafted court papers is generally governed by Cal Rules of Ct 2.100-2.119. See also Cal Rules of Ct 3.1110-3.1116 (format requirements for civil law and motion papers, made applicable to writ petitions by Cal Rules of Ct 3.1100 and 3.1103(a)(2)); Cal Rules of Ct 3.1200-3.1207 (requirements for ex parte applications).

Counsel can use this form following the issuance of an alternative writ to give notice to the opposing party of the hearing date on the merits of the petition. It can be completed when the court issues the alternative writ and served with it or served at a later date.

On drafting an ex parte application for an alternative writ, see §§5.113-5.117.

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III. APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE

§13.8 A. Form: Ex Parte Application for Temporary Restraining Order and Order to Show Cause

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Attorneys for Petitioner JANE DOE

SUPERIOR COURT OF THE STATE OF CALIFORNIA
CITY AND COUNTY OF SAN DIEGO, NORTH COUNTY DIVISION

JANE DOE,	)	**CASE NO. 123456**
	)	
Petitioner,	)	**PETITIONER'S EX PARTE**
	)	**APPLICATION FOR**
vs.	)	**TEMPORARY RESTRAINING**
	)	**ORDER AND ORDER TO**
CITY OF SAN DIEGO,	)	**SHOW CAUSE;**
	)	**MEMORANDUM IN SUPPORT**
Respondent;	)	**THEREOF**
	)	_____
	)	**Date: April 25, 2008**
	)	**Time: 8:30 a.m.**
	)	**Dept.: 00**
_____	)	**Judge: Honorable Robert Smith**
ABC Corporation,		
		Action filed: April 18, 2008
Real Party in Interest.		**Trial date: Not set**

Petitioner Jane Doe does hereby move ex parte for a temporary restraining order to rescind project approval and stop construction on the project at issue in this proceeding pending this Court's consideration of petitioner's motion for a preliminary injunction.

Petitioner has provided Respondent City of San Diego and Real Party in Interest ABC Corporation with notice of her intention to seek ex parte relief. (Declaration of Roberta Jones in Support of Petitioner's Ex Parte Application for Temporary Restraining Order and Order to Show Cause, ¶1.) Petitioner is informed and believes that respondent is represented by:

Brian Thomas, City Attorney
City of San Diego
15 Circle Drive, Suite 100
San Diego, CA 92101
619-123-4567
619-456-7891 (fax)

Real Party in Interest is represented by:

Lucy Adams
100 University Avenue
San Diego, CA 92101

619-987-6543
619-654-3219 (fax)

MEMORANDUM

This action challenges the failure of Respondent City of San Diego to comply with its own municipal code and building requirements by allowing Real Party in Interest ABC Corporation to build homes several feet higher than allowed. Respondent approved a Design Review and Coastal Development Permit for ABC that allows construction of nine single-family residences within the Coastal Zone on a 2.3-acre site at 100 Main Street in the City of San Diego ("the Project"). The Project approvals allow the homes to be built several feet higher than allowed by code—specifically, the pads for the homes are to be raised by several feet and the height of the homes will be measured from that raised elevation, in direct violation of code requirements.

Although the site remained inactive for many months, just 2 days after this proceeding was filed, substantial grading, surveying, and other construction work began occurring at the site. Petitioner seeks a temporary restraining order to halt the Project approvals and ensure that construction does not proceed in direct violation of City requirements.

STATEMENT OF FACTS

On October 22, 2007, the City's Planning Commission approved a tentative map, major use permit, and coastal development permit for development of nine homes on the approximately 2.3-acre site (Resolution No. 2007-00). (Jones Decl., Exh. 1.) The findings for this approval indicated, among other things, that "[f]uture construction of single-family residences must comply with all applicable development standards, including but not limited to *building height*." (Jones Decl., Exh. 1, p. 5 [emphasis added].) The approved Tentative Map did not establish the elevation from which the heights of the buildings would be measured. (Jones Decl., Exh. 2.)

[*Remainder of text of Statement of Facts omitted.*]

ARGUMENT

I. Legal Standards

This Court has "inherent power" to "exercise reasonable control over litigation before it." (*Venice Canals Resident Home Owners Ass'n v Superior Court* (1977) 72 CA3d 675, 679.) A court may issue a temporary restraining order when the relief consists of restraining the commission or continuance of an act; when money damage would be inadequate; or when it is extremely difficult to measure the full extent of damages suffered by the plaintiff. (Code Civ. Proc. §526(a)(1), (4)-(5).)

The granting of such relief involves the evaluation of two interrelated factors. First, the Court must evaluate the likelihood that the plaintiff will prevail on the merits at trial. Second, the Court must evaluate the interim harm that the plaintiff is likely to suffer if the injunction is denied, as compared to the harm that the defendant is likely to suffer if the injunction is issued. (*Butt v State of California* (1992) 4 C4th 668, 678.) In weighing the relative hardships, the Court must also balance the respective equities of the parties. (*Robbins v Superior Court* (1985) 38 C3d 199, 206.)

II. Petitioner Is Likely to Prevail on the Merits

San Diego Municipal Code section 30.04 defines the term "building height" to mean: "[t]he vertical distance of the *lower* of the natural or finished exterior grade adjacent to the structure, to the highest point of the structure immediately above." (Jones Decl., Exh. 6 [emphasis added].) Respondent approved the Project allowing for raised pad heights from which the 26-foot building heights would be measured. The pads will be raised by four or five feet (and possibly more), in effect resulting in even taller homes in the community. (Jones Decl., Exh. 4, pp. 1-4.) Respondent did not require ABC to measure the building heights from the natural grade, even though the natural grade is five feet or more below the planned finished grade. (Jones Decl, Exh. 5, p. A-2.)

[*Remainder of text of Section II omitted.*]

III. The Balance of Equities Tips Sharply in Favor of Granting a Restraining Order

A restraining order will ensure that work is not performed at the site that precludes an appropriate remedy. The building pads should not be raised and finished now, and construction begun, such that a remedy after a hearing on the merits would require the tearing down of buildings and removal of other structures to ensure compliance with the City's height limitations. Allowing the Project to proceed would jeopardize the ability of petitioner to obtain adequate relief after a hearing on the merits.

Allowing the Project would also impact the existing community by allowing homes that are substantially greater in height than the homes currently there. The area is known for its eclectic, even "funky," community character. (Declaration of John Doe in Support of Ex Parte Application for Temporary Restraining Order, ¶2-5; Jones Decl., Exh. 15, pp. 1-3 [October 2004 staff report stating: "The surrounding neighborhood maintains an eclectic mix of residential types and lot sizes, and a variety of old and new residences"].) Allowing large homes to be built several feet above the existing ground level would substantially impact the community's character. (Doe Decl., ¶5.) It would also impact views. (Doe Decl., ¶6.)

Furthermore, allowing the Project to proceed would reward illegal behavior by allowing the City to violate its own municipal code. Respondent and real party in interest have no good argument against a brief delay until petitioner's motion for a preliminary injunction can be heard. There is nothing a brief delay would prevent that needs to be accomplished in the short term.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the Court grant a temporary restraining order withdrawing the Project's approval and prohibiting respondent and real party in interest from taking any steps to further the Project.

Dated: April 24, 2008 **JONES & PETERS LLP**

By:_____
ROBERTA JONES

Attorneys for Petitioner
JANE DOE

Note: This sample application has not been updated for substantive legal accuracy. It is presented as an example of form, not content, and should not be presumed accurate with regard to the state of the law. The names of the parties and attorneys have been changed for publication.

Comment: The format of attorney-drafted court papers is generally governed by Cal Rules of Ct 2.100-2.119. See also Cal Rules of Ct 3.1110-3.1116 (format requirements for civil law and motion papers, made applicable to writ petitions by Cal Rules of Ct 3.1100 and 3.1103(a)(2)); Cal Rules of Ct 3.1200-3.1207 (requirements for ex parte applications).

On drafting an application for a temporary restraining order and order to show cause, see §§6.31-6.32.

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Source: Civil Litigation/California Civil Writ Practice/13 Superior Court Forms/§13.9 B. Form: Proposed Temporary Restraining Order and Order to Show Cause

§13.9 B. Form: Proposed Temporary Restraining Order and Order to Show Cause

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JONES & PETERS LLP
ROBERTA JONES (State Bar No. 00000)
DANIEL PETERS (State Bar No. 12222)
10 Main Street, 2nd Floor
San Diego, California 92101
Telephone: 619-123-4567
Facsimile: 619-456-7891

Attorneys for Petitioner JANE DOE

SUPERIOR COURT OF THE STATE OF CALIFORNIA
CITY AND COUNTY OF SAN DIEGO, NORTH COUNTY DIVISION

JANE DOE,	)	**CASE NO. 123456**
	)	
Petitioner,	)	**[PROPOSED] TEMPORARY**
	)	**RESTRAINING ORDER AND**
vs.	)	**ORDER TO SHOW CAUSE**
	)	_____
CITY OF SAN DIEGO,	)	**Date: April 25, 2008**
	)	**Time: 8:30 a.m.**
Respondent;	)	**Dept.: 00**
_____	)	**Judge: Honorable Robert Smith**
ABC Corporation,		**Action filed: April 18, 2008**
		Trial date: Not set
Real Party in Interest.		

RESPONDENT CITY OF SAN DIEGO AND REAL PARTY IN INTEREST ABC CORPORATION ARE HEREBY ORDERED TO SHOW CAUSE on _____, 2008, or as soon thereafter as counsel may be heard in Department 00 of this Court, why you, your agents, servants, assigns, and all those acting in concert with you should not be restrained and enjoined pending a hearing on the merits of the petition from issuing any permits, authorizations, or any other action to authorize any grading or soil disturbing or any construction of building pads or homes on the site and are further ordered to revoke the Design Review and Coastal Development Permit issued to real party in interest ABC Corporation, and any other steps that have been taken to date to allow grading or soil disturbing or any construction of building pads or homes on the site at 100 Main Street in San Diego, California.

PENDING HEARING on the above Order to Show Cause, RESPONDENT CITY OF SAN DIEGO AND REAL PARTY IN INTEREST ABC CORPORATION, any agents, servants, assigns, and anyone acting in concert with you, ARE HEREBY RESTRAINED AND ENJOINED from taking any action, including grading, demolition, or construction activities, that would disturb, destroy, or remove any existing feature on the site at 100 Main Street in San Diego, California, developing any building pads or homes on the site, or otherwise altering the status quo, except site maintenance for the control of stormwater runoff.

The following briefing schedule shall apply: Any opposition papers to the Order to Show Cause shall be filed and served on petitioner no later than _____. Any reply papers shall be filed and served on respondent and real party in interest no later than _____.

IT IS SO ORDERED.

Dated: _____ By: _____ Superior Court Judge

Note: This sample temporary restraining order and order to show cause is presented as an example of form, not content. The names of the parties and attorneys have been changed for publication.

Comment: The format of attorney-drafted court papers is generally governed by Cal Rules of Ct 2.100-2.119. See also Cal Rules of Ct 3.1110-3.1116 (format requirements for civil law and motion papers, made applicable to writ petitions by Cal Rules of Ct 3.1100 and 3.1103(a)(2)); Cal Rules of Ct 3.1200-3.1207 (requirements for ex parte applications).

On drafting an application for a temporary restraining order and order to show cause, see §§6.31-6.32.

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IV. DEMURRER TO PETITION FOR WRIT OF MANDATE

§13.10 A. Form: Demurrer to Petition for Writ of Mandate

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GINGER FRANKLIN
STATE LABOR COMMISSIONER
BY: OLIVER DENNIS, Senior Counsel [State Bar No. 8000000]
525 Golden Gate Avenue
San Francisco, California 94102
Telephone: 123-678-9012
Attorney for Respondent

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR SAN FRANCISCO COUNTY

Mary Jones, Frank Fuentes, and Angela Goetz, Petitioners,	**CASE NO. 123456**
vs.	**DEMURRER TO PETITION FOR WRIT OF MANDATE**
California State Labor Commissioner, Respondent.	**Date:** **Time:** **Dept:**
Hank Duval and Nancy Brower, Center Restaurant Association; Hotel and Restaurant Employees and Bartenders' Union, Local A, Real Parties in Interest.	

Ginger Franklin, Labor Commissioner and Chief, Division of Labor Standards Enforcement, Department of Industrial Relations, demurs to the Petition for a Writ of Mandate herein on the following grounds:

1. This Court is without jurisdiction to hear this matter because this Petition fails to state facts showing entitlement to relief in that the petitioners have failed to show that a writ of mandate is necessary to protect a substantial right.

2. This Court is without jurisdiction to hear this matter because this Petition fails to state facts showing entitlement to relief in that the petitioners have a plain, speedy, and adequate remedy in the ordinary course of law.

3. The Petition does not state facts sufficient to constitute a cause of action in that the order the petitioners seek cannot be granted because it would be contrary to law.

WHEREFORE, respondent prays that this demurrer be sustained without leave to amend, that the petition be dismissed, and that the Court grant all the relief it considers proper.

DIVISION OF LABOR STANDARDS ENFORCEMENT

Dated: _ _ _ _ _ _

_____
OLIVER DENNIS
Attorney for Respondent

Note: This sample demurrer is presented as an example of form, not content, and should not be presumed accurate with regard to the state of the law. The names of the parties and attorneys have been changed for publication.

Comment: The format of attorney-drafted court papers is generally governed by Cal Rules of Ct 2.100-2.119. See also Cal Rules of Ct 3.1110-3.1116 (format requirements for civil law and motion papers, made applicable to writ petitions and demurrers by Cal Rules of Ct 3.1100 and 3.1103(a)(2), (c)).

On drafting a demurrer to a writ petition, see §§8.40-8.44.

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§13.11 B. Form: Memorandum in Support of Demurrer to Petition for Writ of Mandate

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GINGER FRANKLIN
STATE LABOR COMMISSIONER
BY: OLIVER DENNIS, Senior Counsel, State Bar No. 80000
525 Golden Gate Avenue
San Francisco, California 94102
Telephone: 123-678-9012
Attorney for Respondent

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR SAN FRANCISCO COUNTY

Mary Jones, Frank Fuentes, and Angela Goetz, Petitioners,	**CASE NO. 123456**
vs.	**MEMORANDUM IN SUPPORT OF DEMURRER TO PETITION FOR WRIT OF MANDATE**
California State Labor Commissioner, Respondent.	**Date:** **Time:** **Dept:**
Hank Duval and Nancy Brower, Center Restaurant Association; Hotel and Restaurant Employees and Bartenders' Union, Local A, Real Parties in Interest.	

MANDATE WILL NOT LIE WHERE THERE IS A PLAIN, SPEEDY, AND ADEQUATE ALTERNATIVE REMEDY

Generally, a writ of mandate will lie only when there is no plain, speedy, and adequate alternative remedy, when the Respondent has a clearly defined duty to perform, and when the Petitioner has a clear and beneficial right to performance. (*Payne v Superior Court* (1976) 17 C3d 908, 925.)

It is the Petitioner's burden to establish the inadequacy of other relief. (*Phelan v Superior Court* (1950) 35 C2d 363, 366.) A remedy is not inadequate merely because more time would be consumed by pursuing it through the ordinary channels.

[*Text omitted.*]

A writ must be issued in all cases where there is no plain, speedy, and adequate remedy in the ordinary course of law. It must be issued upon the verified petition of the party beneficially interested.

The verification of the Petition herein is signed by an attorney who also represented one of the real parties in this matter.

The verification purports to be based upon the attorney's personal knowledge. The verification does not explain how the facts contained in paragraph 6 of the Petition can be based on the personal knowledge of the attorney. Nor does it explain how it can be within the personal knowledge of the attorney that petitioners first learned of the underpayment of the collectively bargained rate of pay in December of 1983 as alleged in paragraph 8 of the Petition.

The verification fails to comply with Code of Civil Procedure section 446 in that it does not explain why the attorney and not the beneficially interested Petitioners signed the verification.

CONCLUSION

For all the reasons outlined above, the demurrer of Respondent should be sustained without leave to amend.

Dated: _ _ _ _ _ _ **Respectfully submitted,**

_____
OLIVER DENNIS
Senior Counsel

Note: This sample memorandum has not been updated for substantive legal accuracy. It is presented as an example of form, not content, and should not be presumed accurate with regard to the state of the law. The names of the parties and attorneys have been changed for publication.

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On drafting a demurrer to a writ petition, see §§8.40-8.44.

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V. OPPOSITION TO PETITION FOR WRIT OF MANDATE

§13.12 A. Form: Opposition to Petition for Writ of Mandate

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Attorneys for Defendant and Respondent

CITY AND COUNTY OF SAN FRANCISCO

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO—
UNLIMITED JURISDICTION

ABC CORPORATION, Plaintiff and Petitioner, vs. THE CITY & COUNTY OF SAN FRANCISCO, and DOES 1-30, Defendants and Respondents.	**CASE NO. 123-456** **CITY AND COUNTY OF SAN FRANCISCO'S OPPOSITION TO PETITION FOR WRIT OF MANDATE** **Hearing date: March 10, 2008** **Time: 9:30 a.m.** **Place: 302** **Action filed: February 7, 2008** **Trial date: N/A**

INTRODUCTION

San Francisco Charter Section 9.118 requires City departments to submit for Board of Supervisors approval any contract involving anticipated expenditures of more than $10 million. Of course, in the real world, it is sometimes difficult to estimate precisely how much a contract will require the City to spend. The question presented by this case is as follows: When a City department cannot definitively predict the City's total expenditures under the contract, but believes there is a significant possibility that they will exceed $10 million, may the department submit that contract to the Board of Supervisors for approval?

The only sensible answer to this question is "yes." The San Francisco voters enacted Charter Section 9.118 with the singular purpose of imposing a measure of oversight and fiscal accountability in City contracting. They sought to ensure that if a contract requires the City to spend such a large amount of taxpayer dollars, the final decision would rest with the elected body responsible for the City's budget, not with an unelected departmental employee. A rule preventing departments from submitting contracts to the Board for approval unless those contracts are certain to exceed $10 million would run contrary to the voters' intent.

The contract at issue here was not readily subject to a cost projection. The bid submitted by ABC Corporation ("ABC") was based not on a specific dollar figure but rather on an amount to be charged per mile traveled over the next 5 years hauling biosolids and grit from the City's wastewater treatment plants to sites outside San Francisco. Although the Public Utilities Commission ("PUC") assigned a rough dollar value to the bid ($8.32 million), it made clear from the start that this estimate was unreliable, that the true amount that the City would ultimately be required to pay under the contract was likely to deviate greatly from the estimate, and that there was a significant possibility that the cost of the contract would exceed $10 million over the 5-year term. That is because, among other things, the number of miles to be traveled under the hauling contract was

subject to numerous variables. While the estimate provided a useful tool for the policymakers to compare one bid against the other, it was not very useful for projecting the total cost of the contract.

Having been made aware of the uncertainty of the estimate by the PUC, and having been made aware from the start that there was a significant possibility the contract would exceed $10 million, the Office of Contract Administration ("OCA") decided from the start of the process to submit the contract for Board approval. Moreover, OCA informed ABC of the need for Board approval months before the vote, and ABC never questioned the Board's jurisdiction to consider the contract until it became dissatisfied with the Board's decision. Now, ABC appears to seek a ruling that would effectively prevent a department from submitting a contract to the Board for approval if the department is not certain that the contract will exceed $10 million. Because this would be contrary to the purposes of Charter Section 9.118, the Court should deny the petition for a writ of mandate.

BACKGROUND

In this Section, the City will address three key misimpressions left by ABC's opening papers: (A) the misimpression that the Board of Supervisors jumped in at the eleventh hour to disapprove the contract, thereby "interfering" with the ability of OCA to make the award; (B) the misimpression that ABC was somehow blindsided by OCA's submission of the contract to the Board; and, most importantly (C) the misimpression that the 5-year contract could not require expenditures of more than $10 million by the City.

[*Remainder of text of Background omitted.*]

LEGAL STANDARD

The legal standard cited by ABC is accurate, and it is very important given the facts of this case. The Court must "determine whether [the City's] actions have been arbitrary or capricious, *entirely lacking in evidentiary support,* or whether it failed to follow the proper procedures." (*Boydston v Napa Sanitation Dist.* (1990) 222 CA3d 1362, 1369 [emphasis added].)

DISCUSSION

I. THE PURPOSE OF CHARTER SECTION 9.118(b) IS TO PREVENT DEPARTMENTS FROM COMMITTING THE CITY TO SPENDING LARGE SUMS OF CITY DOLLARS WITHOUT FISCAL OVERSIGHT FROM ACCOUNTABLE POLICYMAKERS.

In 1988, the San Francisco voters imposed on City departments a measure of fiscal accountability. Previously, departments could enter into contracts with private companies involving payment of unlimited amounts of taxpayer dollars, for unlimited periods of time, without any oversight from the City's elected policymakers. Indeed, the San Francisco Charter had completely excluded the Board from involvement in contracting decisions by stating: "Neither the Board of Supervisors, its committees, nor any of its members, shall have any power or authority, nor shall they dictate, suggest or interfere with respect to any… contract or requisition for purchase or other administrative actions or recommendations of the City Administrator or of department heads under the City Administrator…." (San Francisco Charter, at §2.114.)

[*Remainder of text of Section I omitted.*]

II. WHEN THERE IS A SIGNIFICANT POSSIBILITY THAT A CONTRACT WILL FALL WITHIN THE TERMS OF CHARTER SECTION 9.118, CITY DEPARTMENTS MAY SUBMIT THE CONTRACT TO THE BOARD OF SUPERVISORS FOR APPROVAL.

Although it is understandable that the voters wished to draw a line at contracts requiring the expenditure of $10 million, in the real world it is not always easy to draw such lines. In some cases, it may be clear from the outset that the City will spend more than $10 million (such as, for example, when a contract explicitly states that the City is required to pay the contractor an amount greater than $10 million). In other cases—indeed, in the great majority of cases—it will be equally clear that the City has no chance to spend such a large amount. But in some cases, as here, the amount the City will end up spending under the terms of a contract is not subject to precise measurement. This case presents the question of how the Charter should be applied in those situations.

[*Remainder of text of Section II omitted.*]

III. BECAUSE THE CONTRACT WAS SUBJECT TO BOARD APPROVAL, THE CITY WAS NOT UNDER A MINISTERIAL DUTY TO EXECUTE AND PROCEED WITH THE CONTRACT.

Under Code of Civil Procedure section 1085, a writ may issue to require the government to fulfill its ministerial duty. *American Fed. of State, County & Municipal Employees v Metropolitan Water Dist. of So. Cal.*

(2005) 126 CA4th 247, 261. It is true that once a contract has been awarded, "a public official's duty to execute such a contract is ministerial." *TransdynlCresci JV v City and County of San Francisco* (1999) 72 CA4th 746, 758. But ABC's argument that the City has a ministerial duty to execute the proposed contract is based entirely on the assumption that the Board lacked the jurisdiction to reject it. As discussed above, this assumption is incorrect as a matter of law—DCA properly submitted the contract to the Board for exercise of its authority under the Charter. Thus, there simply could be no contract until the Board approved it. Once the Board rejected the contract, the City was under no duty—ministerial or otherwise—to proceed. To the contrary, it would have been illegal for the City to proceed with a contract that was not formed in accordance with the Charter. (See, *e.g., San Francisco Int'l Yachting Ctr. Devel. Group v City & County of San Francisco* (1992) 9 CA4th 672, 693-94; *Dynamic Indus. Co. v City of Long Beach* (1958) 159 CA2d 294, 298-99.)

CONCLUSION

The Court should deny the petition for a writ of mandate.

Dated: February 29, 2008

BRIAN THOMAS
City Attorney
LUCY ADAMS
Deputy City Attorney

By_____
LUCY ADAMS

Attorneys for Defendant and Respondent
CITY AND COUNTY OF SAN FRANCISCO

Note: This sample brief has not been updated for substantive legal accuracy. It is presented as an example of form, not content, and should not be presumed accurate with regard to the state of the law. The names of the parties and attorneys have been changed for publication.

Comment: The format of attorney-drafted court papers is generally governed by Cal Rules of Ct 2.100-2.119. See also Cal Rules of Ct 3.1110-3.1116 (format requirements for civil law and motion papers, made applicable to writ petitions and demurrers by Cal Rules of Ct 3.1100 and 3.1103(a)(2), (c)).

On drafting an opposition to a writ petition, see §§8.16-8.20.

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§13.13 B. Form: Request for Judicial Notice in Opposition to Petition for Writ of Mandate

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Facsimile: 415-456-7891
Attorneys for Defendant and Respondent

CITY AND COUNTY OF SAN FRANCISCO

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO—
UNLIMITED JURISDICTION

ABC CORPORATION, Plaintiffs and Petitioner,	**CASE NO. 123-456**
vs.	**REQUEST FOR JUDICIAL NOTICE IN OPPOSITION TO PETITION FOR WRIT OF MANDATE**
THE CITY & COUNTY OF SAN FRANCISCO, and DOES 1-30, Defendants and Respondents.	**Hearing date: March 10, 2008** **Time: 9:30 a.m.** **Place: 302** **Action filed: February 7, 2008** **Trial date: N/A** **Attached documents: Exhibits A-D**

Pursuant to California Evidence Code sections 451 and 452, Defendant City and County of San Francisco respectfully requests that the Court take judicial notice of the following materials:

Exhibit A: Letter to the San Francisco Board of Supervisors from ABC Corporation, dated November 12, 2007 (taken from San Francisco Board of Supervisors Legislative File No. 00000).

Exhibit B: Appendix B and Appendix B-1 to the proposed Contract for Biosolids and Grit Hauling Services (taken from San Francisco Board of Supervisors Legislative File No. 01111).

Exhibit C: Budget Analyst Memorandum to the Budget and Finance Committee of the San Francisco Board of Supervisors (taken from San Francisco Board of Supervisors Legislative File No. 01111).

Exhibit D: Excerpts of Ballot Pamphlet from November 1998 election (downloaded from the San Francisco Department of Elections website at http://www.sfp14.sfpl.orgllibrarylocations/mainlgic/voterpamp/votepamp.htm).

Dated: February 29, 2008

BRIAN THOMAS
City Attorney
LUCY ADAMS
Deputy City Attorney

By_____

LUCY ADAMS

Attorneys for Defendant and Respondent
CITY AND COUNTY OF SAN FRANCISCO

Note: This sample request for judicial notice is presented as an example of form, not content. The names of the parties and attorneys have been changed for publication.

Comment: The format of attorney-drafted court papers is generally governed by Cal Rules of Ct 2.100-2.119. See also Cal Rules of Ct 3.1110-3.1116 (format requirements for civil law and motion papers, made applicable to writ petitions and demurrers by Cal Rules of Ct 3.1100 and 3.1103(a)(2), (c)).

On drafting an opposition to a writ petition, see §§8.16-8.20.

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§13.14 C. Form: Declaration in Opposition to Petition for Writ of Mandate

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Attorneys for Defendant and Respondent

CITY AND COUNTY OF SAN FRANCISCO

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO—
UNLIMITED JURISDICTION

ABC CORPORATION,	**CASE NO. 123-456**
Plaintiffs and Petitioner,	**DECLARATION OF JOHN SMITH IN OPPOSITION TO PETITION FOR WRIT OF MANDATE**
vs.	**_____**
THE CITY & COUNTY OF SAN FRANCISCO, and DOES 1-30, Defendants and Respondents.	**Hearing date: March 10, 2008** **Time: 9:30 a.m.** **Place: 302** **Action filed: February 7, 2008** **Trial date: N/A** **Attached documents: Exhibits A-B**

I, John Smith, declare as follows:

1. I have personal knowledge of the matters stated herein, except for those matters set forth on information and belief, which I believe to be true, and if called to testify, I can and will testify competently as to all matters set forth herein.

2. I am employed as a Supervising Purchaser in the Office of Contract Administration ("OCA") for the City & County of San Francisco. I have served in this capacity for 5 years. Overall, I have been employed with OCA since 1985.

3. During 2007, I was responsible for implementing and overseeing the bid process for the grit and biosolids hauling contract that is the subject of this litigation.

4. It has always been my understanding and assumption that OCA, before finally awarding the contract, would submit it to the Board of Supervisors for approval, because of the significant possibility that the contract would require the City to expend in excess of $10 million during the 5-year term.

5. Even after OCA conditionally awarded the contract to ABC Corporation, it was my understanding and assumption that the contract would require Board approval. Although Jane Doe of the Public Utilities Commission estimated that the price of the potential contract with ABC over the 5-year term to be $8.32 million, she made clear to me that this estimate was extremely rough and subject to so many variables as to make it an unreliable predictor of whether the cost would actually exceed $10 million. Accordingly, Ms. Doe's estimate did not change our belief that there was a significant possibility the contract would exceed $10 million over the 5-year term, and for this reason it did not change my belief that the contract required Board approval.

6. My understanding about the need for Board approval was in no way influenced by any interference by members of the Board of Supervisors or its staff. At no time did any member of the Board of Supervisors or its staff contact me to urge that DCA submit the contract to the Board. Nor am I aware of any member of the Board or its staff having contacted anyone at OCA or PUC in an attempt to ensure that the Board would have the opportunity to consider the contract.

7. Although I do not specifically recall the first time I told bidders that the contract was subject to Board approval, I do recall that I informed them of that fact.

8. Attached hereto as Exhibit A is a true and correct copy of an e-mail exchange between me and Joe Barnes of ABC, which I retrieved from my computer and printed on December 4, 2007. This e-mail reflects that I informed Mr. Barnes on August 10, 2007, of the need for Board approval. Mr. Barnes responded to this e-mail but did not question the need for Board approval. Nor did anyone at ABC ever inform me that it believed Board approval was not required.

9. I believe that I informed ABC and the other bidders of the need for Board approval before this date, but this is the earliest documentary evidence I can find that demonstrates that they were made aware of this requirement.

10. Attached hereto as Exhibit B is a true and correct copy of an e-mail I sent to Joe Barnes of ABC as well as to the subcontractors to ABC, which I retrieved from my computer and printed on December 4, 2007. This e-mail reflects my continued understanding that the contract required Board approval because of the significant possibility that it would involve expenditures of more than $10 million.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed in San Francisco, California on February 28, 2008.

By:_____
JOHN SMITH

INDEX TO EXHIBITS

Exhibit	Description
A	8/10/07 e-mail between John Smith and Joe Barnes
B	10/25/07 e-mail from John Smith to ABC Corporation

Note: This sample declaration is presented as an example of form, not content. The names of the parties and attorneys have been changed for publication.

Comment: The format of attorney-drafted court papers is generally governed by Cal Rules of Ct 2.100-2.119. See also Cal Rules of Ct 3.1110-3.1116 (format requirements for civil law and motion papers, made applicable to writ petitions and demurrers by Cal Rules of Ct 3.1100 and 3.1103(a)(2), (c)).

On drafting an opposition to a writ petition, see §§8.16-8.20.

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§13.15 D. Form: Proposed Order Denying Petition for Writ of Mandate

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Attorneys for Defendant and Respondent

CITY AND COUNTY OF SAN FRANCISCO

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO—
UNLIMITED JURISDICTION

ABC CORPORATION,	**CASE NO. 123-456**
Plaintiffs and Petitioner,	**[PROPOSED] ORDER DENYING PETITION FOR WRIT OF MANDATE**
vs.	_____
THE CITY & COUNTY OF SAN FRANCISCO, and DOES 1-30, Defendants and Respondents.	**Hearing date: March 10, 2008** **Time: 9:30 a.m.** **Place: 302** **Action filed: February 7, 2008** **Trial date: N/A**

The Petition for a Writ of Mandate in the above-captioned matter came on for hearing at 9:30 a.m. on March 10, 2008, in Department 302 of this Court, located at 400 McAllister Street, San Francisco, before the Honorable Jane Doe. Roberta Jones appeared on behalf of Petitioner ABC CORPORATION. Lucy Adams appeared on behalf of Respondent CITY AND COUNTY OF SAN FRANCISCO.

Having considered the memorandum and supporting documents, and having heard oral argument of counsel, the Court orders that the Petition is DENIED. As a matter of law, a City department may submit a proposed contract to the Board of Supervisors for approval under San Francisco Charter Section 9.118 if there is a significant possibility that the cost of the contract will exceed $10 million. Because that possibility existed with respect to the contract at issue in this case, the Board acted within its jurisdiction in rejecting the contract, and the City was under no ministerial duty to proceed with it.

IT IS SO ORDERED.

Dated: _____

_____
JANE DOE
Judge of the Superior Court

Note: This sample order is presented as an example of form, not content. The names of the parties and attorneys have been changed for publication.

Comment: The format of attorney-drafted court papers is generally governed by Cal Rules of Ct 2.100-2.119. See also Cal Rules of Ct 3.1110-3.1116 (format requirements for civil law and motion papers, made applicable to writ petitions and demurrers by Cal Rules of Ct 3.1100 and 3.1103(a)(2), (c)).

On drafting an opposition to a writ petition, see §§8.16-8.20.

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Source: Civil Litigation/California Civil Writ Practice/13 Superior Court Forms/ VI. LIMITED CIVIL CASES/§13.16 A. Form: Information on Writ Proceedings in Misdemeanor, Infraction, and Limited Civil Cases (Judicial Council Form APP-150-INFO)

VI. LIMITED CIVIL CASES

§13.16 A. Form: Information on Writ Proceedings in Misdemeanor, Infraction, and Limited Civil Cases (Judicial Council Form APP-150-INFO)

APP-150-INFO Information on Writ Proceedings in Misdemeanor, Infraction, and Limited Civil Cases

GENERAL INFORMATION

1 What does this information sheet cover?

This information sheet tells you about **writ proceedings**—proceedings in which a person is asking for a writ of mandate, prohibition, or review—in misdemeanor, infraction, and limited civil cases. Please read this information sheet before you fill out *Petition for Writ (Misdemeanor, Infraction, or Limited Civil Case)* (form APP-151). This information sheet does not cover everything you may need to know about writ proceedings. It is only meant to give you a general idea of the writ process. To learn more, you should read rules 8.930–8.936 of the California Rules of Court, which set out the procedures for writ proceedings in the appellate division. You can get these rules at any courthouse or county law library or online at *www.courtinfo.ca.gov/rules*.

This information sheet does NOT provide information about appeals or proceedings for writs of supersedeas or habeas corpus.

- For information about appeals, please see the box on the top of this page.
- For information about writs of habeas corpus, please see rules 4.550–4.552 of the California Rules of Court and *Petition for Writ of Habeas Corpus* (form MC-275).
- For information about writs of supersedeas, please see rule 8.824 of the California Rules of Court.

You can get these rules and forms at any courthouse or county law library or online at *www.courtinfo.ca.gov/rules* for the rules or *www.courtinfo.ca.gov/forms* for the forms.

2 What is a writ?

A writ is an order from a higher court telling a lower court to do something the law says the lower court must do or not to do something the law says the lower court does not have the power to do. In writ proceedings in the appellate division, the lower court is the superior court that took the action or issued the order being challenged.

For information about appeal procedures, see:

- *Information on Appeal Procedures for Misdemeanors* (form CR-131-INFO)
- *Information on Appeal Procedures for Infractions* (form CR-141-INFO)
- *Information on Appeal Procedures for Limited Civil Cases* (form APP-101-INFO)

You can get these forms at any courthouse or county law library or online at *www.courtinfo.ca.gov/forms*.

In this information sheet, we call the lower court the "trial court."

3 Are there different kinds of writs?

Yes. There are three main kinds of writs:

- Writs of mandate (sometimes called "mandamus"), which are orders telling the trial court to do something.
- Writs of prohibition, which are orders telling the trial court not to do something.
- Writs of review (sometimes called "certiorari"), which are orders telling the trial court that the appellate division will review certain kinds of actions already taken by the trial court.

There are laws (statutes) that you should read concerning each type of writ: see California Code of Civil Procedure sections 1084–1097 about writs of mandate, sections 1102–1105 about writs of prohibition, and sections 1067–1077 about writs of review. You can get copies of these statutes at any county law library or online at *www.leginfo.ca.gov/calaw.html*.

4 Is a writ proceeding the same as an appeal?

No. In an **appeal,** the appellate division *must* consider the parties' arguments and decide whether the trial court made the legal error claimed by the appealing party and whether the trial court's decision should be overturned

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based on that error (this is called a "decision on the merits"). In a **writ proceeding,** the appellate division is *not* required to make a decision on the merits; even if the trial court made a legal error, the appellate division can decide not to consider that error now, but to wait and consider the error as part of any appeal from the final judgment. Most requests for writs are denied without a decision on the merits (this is called a "summary denial"). Because of this, appeals are the ordinary way that decisions made by a trial court are reviewed and writ proceedings are often called proceedings for "extraordinary" relief.

Appeals and writ proceedings are also used to review different kinds of decisions by the trial court. Appeals can be used only to review a trial court's final judgment and a few kinds of orders. Most rulings made by a trial court before it issues its final judgment cannot be appealed right away; they can only be appealed after the trial court case is over, as part of an appeal of the final judgment. Unlike appeals, writ proceedings can be used to ask for review of certain kinds of important rulings made by a trial court before it issues its final judgment.

5 Is a writ proceeding a new trial?

No. **A writ proceeding is NOT a new trial.** The appellate division will not consider new evidence, such as the testimony of new witnesses. Instead, if it does not summarily deny the request for a writ, the appellate division reviews a record of what happened in the trial court and the trial court's ruling to see if the trial court made the legal error claimed by the person asking for the writ. When it conducts its review, the appellate division presumes that the trial court's ruling is correct; the person who requests the writ must show the appellate division that the trial court made the legal error the person is claiming.

6 Can a writ be used to address *any* errors made by a trial court?

No.

Writs can only address certain legal errors: Writs can only address the following types of legal errors made by a trial court:

- The trial court has a legal duty to act but:
  - Refuses to act
  - Has not done what the law says it must do
  - Has acted in a way the law says it does not have the power to act
- The trial court has performed or says it is going to perform a judicial function (like deciding a person's rights under law in a particular case) in a way that the court does not have the legal power to do.

There must be no other adequate remedy: The trial court's error must also be something that can be fixed only with a writ. The person asking for the writ must show the appellate division that there is no adequate way to address the trial court's error other than with the writ (this is called having "no adequate remedy at law"). As mentioned above, appeals are the ordinary way that trial court decisions are reviewed. If the trial court's ruling can be appealed, the appellate division will generally consider an appeal to be good enough (an "adequate remedy") unless the person asking for the writ can show the appellate division that he or she will be harmed in a way that cannot be fixed by the appeal if the appellate division does not issue the writ (this is called "irreparable" injury or harm).

Statutory writs: There are laws (statutes) that provide that certain kinds of rulings can or must be challenged using a writ proceeding. These are called "statutory writs." Here is a list of some of the most common rulings that a statute says can or must be challenged using a writ:

- A ruling on a motion to disqualify a judge (see California Code of Civil Procedure section 170.3(d))
- Denial of a motion for summary judgment (see California Code of Civil Procedure section 437c(m)(l))
- A ruling on a motion for summary adjudication of issues (see California Code of Civil Procedure section 437c(m)(l))
- Denial of a stay in an unlawful detainer matter (see California Code of Civil Procedure section 1176)
- An order disqualifying the prosecuting attorney (see California Penal Code section 1424)

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You can get copies of these statutes at any county law library or online at *www.leginfo.ca.gov/calaw.html.* You will need to check whether there is a statute providing that the specific ruling you want to challenge can or must be reviewed using a writ proceeding. (Note that just because there is a statute requiring or allowing you to ask for a writ to challenge a ruling does not mean that the court must grant your request; the appellate division can still deny a request for a statutory writ.)

Common law writs: Even if there is not a statute specifically providing for a writ proceeding to challenge a particular ruling, most trial court rulings other than the final judgment can potentially be challenged using a writ proceeding if the trial court made the type of legal error described above and the petitioner has no other adequate remedy at law. These writs are called "common law" writs.

(7) Can the appellate division consider a request for a writ in *any* case?

No. Different courts have the power (called "jurisdiction") to consider requests for writs in different types of cases. The appellate division can only consider requests for writs in limited civil, misdemeanor, and infraction cases. A limited civil case is a civil case in which the amount claimed is $25,000 or less (see California Code of Civil Procedure sections 85 and 88). Misdemeanor cases are cases in which a person has been charged with or convicted of a crime for which the punishment can include jail time of up to one year but not time in state prison (see California Penal Code sections 17 and 19.2). (If the person was also charged with or convicted of a felony in the same case, it is considered a felony case, not a misdemeanor case.) Infraction cases are cases in which a person has been charged with or convicted of a crime for which the punishment can be a fine, traffic school, or some form of community service but cannot include any time in jail or prison (see California Penal Code sections 17 and 19.8). Examples of infractions include traffic tickets or citations for violations of some city or county ordinances. (If a person was also charged with or convicted of a misdemeanor in the same case, it is considered a misdemeanor case, not an infraction case.) You can get copies of these statutes at any county law library or online at *www.leginfo.ca.gov/calaw.html.*

The appellate division does NOT have jurisdiction to consider requests for writs in either unlimited civil cases (civil cases in which the amount claimed is more than $25,000) or felony cases (cases in which a person has been charged with or convicted of a crime for which the punishment can include time in state prison). Requests for writs in these cases can be made in the Court of Appeal. The appellate division also does NOT have the jurisdiction to consider requests for writs of habeas corpus; requests for these writs can be made in the superior court.

(8) Who are the parties in a writ proceeding?

If you are asking for the writ, you are called the PETITIONER. You should read "Information for the Petitioner," beginning on page 4.

The court the petitioner is asking to be ordered to do or not to do something is called the RESPONDENT. In appellate division writ proceedings, the trial court is the respondent.

Any other party in the trial court case who would be affected by a ruling regarding the request for a writ is a REAL PARTY IN INTEREST. If you are a real party in interest, you should read "Information for a Real Party in Interest," beginning on page 9.

(9) Do I need a lawyer to represent me in a writ proceeding?

You do not *have* to have a lawyer; you are allowed to represent yourself in a writ proceeding in the appellate division. But writ proceedings can be very complicated and you will have to follow the same rules that lawyers have to follow. If you have any questions about the writ procedures, you should talk to a lawyer. In limited civil cases and infraction cases, you must hire a lawyer at your own expense if you want one (the court cannot provide one). You can get information about finding a lawyer on the California Courts Online Self-Help Center at *www.courtinfo.ca.gov/selfhelp/lowcost.*

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INFORMATION FOR THE PETITIONER

This part of the information sheet is written for the petitioner—the party asking for the writ. It explains some of the rules and procedures relating to asking for a writ. The information may also be helpful to a real party in interest. There is more information for a real party in interest starting on page 9 of this information sheet.

(10) Who can ask for a writ?

Only a party in the trial court proceeding—the plaintiff or defendant in a civil case or the defendant or prosecuting agency in a misdemeanor or infraction case—can ask for a writ challenging a ruling on a motion to disqualify a judge (see California Code of Civil Procedure section 170.3(d)). Parties are also usually the only ones that ask for writs challenging other kinds of trial court rulings. However, in most cases, a person who was not a party does have the legal right to ask for a writ if that person has a "beneficial interest" in the trial court's ruling. A "beneficial interest" means that the person has a specific right or interest affected by the ruling that goes beyond the general rights or interests the public may have in the ruling.

(11) How do I ask for a writ?

To ask for a writ you must serve and file a petition for a writ (see below for an explanation of how to "serve and file" a petition). A petition is a formal request that the appellate division issue a writ. A petition for a writ explains to the appellate division what happened in the trial court, what legal error you (the petitioner) believe the trial court made, why you have no other adequate remedy at law, and what order you are requesting the appellate division to make.

(12) How do I prepare a writ petition?

If you are represented by a lawyer, your lawyer will prepare your petition for a writ. If you are not represented by a lawyer, you must use *Petition for Writ (Misdemeanor, Infraction, or Limited Civil Case)* (form APP-151) to prepare your petition. You can get form APP-151 at any courthouse or county law library or online at *www.courtinfo.ca.gov/forms*. This form asks you to fill in the information that needs to be in a writ petition.

a. Description of your interest in the trial court's ruling

Your petition needs to tell the appellate division why you have a right to ask for a writ in the case. As discussed above, usually only a person who was a party in the trial court case—the plaintiff or defendant in a civil case or the defendant or prosecuting agency in a misdemeanor or infraction case—asks for a writ challenging a ruling in that case. If you were a party in the trial court case, say that in your petition. If you were not a party, you will need to describe what "beneficial interest" you have in the trial court's ruling. A "beneficial interest" means that you have a specific right or interest affected by the ruling that goes beyond the general rights or interests the public may have in the ruling. To show the appellate division that you have a beneficial interest in the ruling you want to challenge, you must describe how the ruling will affect you in a direct and negative way.

b. Description of the legal error you believe the trial court made

Your petition will need to tell the appellate division what legal error you believe the trial court made. Not every mistake a trial court might make can be addressed by a writ. You must show that the trial court made one of the following types of legal errors:

- The trial court has a legal duty to act but:
  - Refuses to act
  - Has not done what the law says it must do
  - Has acted in a way the law says it does not have the power to act
- The trial court has performed or says it is going to perform a judicial function (like deciding a person's rights under law in a particular case) in a way that the court does not have the legal power to do.

To show the appellate division that the trial court made one of these legal errors, you will need to:

- Show that the trial court has the legal duty or the power to act or not act in a particular way. You will need to tell the appellate division what legal

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authority—what constitutional provision, statute, rule, or published court decision—establishes the trial court's legal duty or power to act or not act in that way.

- Show the appellate division that the trial court has not acted in the way that this legal authority says the court is required to act. You will need to tell the appellate division exactly where in the record of what happened in the trial court it shows that the trial court did not act in the way it was required to.

c. Description of why you need the writ

One of the most important parts of your petition is explaining to the appellate division why you need the writ you have requested. Remember, the appellate division does not have to grant your petition just because the trial court made an error. You must convince the appellate division that it is important for it to issue the writ.

Your petition needs to show that a writ is the only way to fix the trial court's error. To convince the court you need the writ, you will need to show the appellate division that you have no way to fix the trial court's error other than through a writ (this is called having "no adequate remedy at law").

This will be hard if the trial court's ruling can be appealed. If the ruling you are challenging can be appealed, either immediately or as part of an appeal of the final judgment in your case, the appellate division will generally consider this appeal to be a good enough way to fix the trial court's ruling (an "adequate remedy"). To be able to explain to the appellate division why you do not have an adequate remedy at law, you will need to find out if the ruling you want to challenge can be appealed, either immediately or as part of an appeal of the final judgment.

Here are some trial court rulings that can be appealed. There are laws (statutes) that say that certain kinds of trial court rulings ("orders") can be appealed immediately. In limited civil cases, California Code of Civil Procedure section 904.2 lists orders that can be appealed immediately, including orders:

- Changing or refusing to change the place of trial (venue)
- Granting a motion to quash service of summons
- Granting a motion to stay or dismiss the action on the ground of inconvenient forum
- Granting a new trial
- Denying a motion for judgment notwithstanding the verdict
- Granting or dissolving an injunction or refusing to grant or dissolve an injunction
- Appointing a receiver
- Made after final judgment in the case

In misdemeanor and infraction cases, orders made after the final judgment that affect the substantial rights of the defendant can be appealed immediately (California Penal Code section 1466).

In misdemeanor cases, orders granting or denying a motion to suppress evidence can also be appealed immediately (California Penal Code section 1538.5(j)).

You can get copies of these statutes at any county law library or online at *www.leginfo.ca.gov/calaw.html.* You should also check to see if there are published court decisions that indicate whether you can or must use an appeal or a writ petition to challenge the type of ruling you want to challenge in your case.

If the ruling can be appealed, you will need to show that an appeal will not fix the trial court's error. If the trial court ruling you want to challenge can be appealed, you will need to show the appellate division why that appeal is not good enough to fix the trial court's error. To do that, you will need to show the appellate division how you will be harmed by the trial court's error in a way that cannot be fixed by the appeal if the appellate division does not issue the writ (this is called "irreparable" injury or harm). For example, because of the time it takes for an appeal, the harm you want to prevent may happen before an appeal can be finished.

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d. Description of the order you want the appellate division to make

Your petition needs to describe what you are asking the appellate division to order the trial court to do or not do. Writ petitions usually ask that the trial court be ordered to cancel ("vacate") its ruling, issue a new ruling, or not take any steps to enforce its ruling.

If you want the appellate division to order the trial court not to do anything more until the appellate division decides whether to grant the writ you are requesting, you must ask for a "stay." If you want a stay, you should first ask the trial court for a stay. You should tell the appellate division whether you asked the trial court for a stay. If you did not ask the trial court for a stay, you should tell the appellate division why you did not do this.

If you ask the appellate division for a stay, make sure you also fill out the "Stay requested" box on the first page of the *Petition for Writ (Misdemeanor, Infraction, or Limited Civil Case)* (form APP-151).

e. Verifying the petition

Petitions for writs must be "verified." This means that either the petitioner or the petitioner's attorney must declare under penalty of perjury that the facts stated in the petition are true and correct, must sign the petition, and must indicate the date that the petition was signed. On the last page of the *Petition for Writ (Misdemeanor, Infraction, or Limited Civil Case)* (form APP-151), there is a place for you to verify your petition.

(13) Is there anything else that I need to serve and file with my petition?

Yes. Along with the petition, you must serve and file a record of what happened in the trial court (see below for an explanation of how to serve and file the petition). Since the appellate division judges were not there in the trial court, a record of what happened must be sent to the appellate division for its review. The materials that make up this record are called "supporting documents."

What needs to be in the supporting documents: The supporting documents must include:

- A record of what was said in the trial court about the ruling that you are challenging (this is called the "oral proceedings") and
- Copies of certain important documents from the trial court.

Read below for more information about these two parts of the supporting documents.

Record of the oral proceedings: There are several ways a record of what was said in the trial court may be provided to the appellate division:

- **A transcript**—A transcript is a written record (often called the "verbatim" record) of the oral proceedings in the trial court. If a court reporter was in the trial court and made a record of the oral proceedings, you can have the court reporter prepare a transcript of those oral proceedings, called a "reporter's transcript," for the appellate division. If a reporter was not there, but the oral proceedings were officially recorded on approved electronic recording equipment, you can have a transcript prepared for the appellate division from the official electronic recording of these proceedings. You (the petitioner) must pay for preparing a transcript, unless the court orders otherwise.
- **A copy of an electronic recording**—If the oral proceedings were officially recorded on approved electronic recording equipment, the court has a local rule for the appellate division permitting this recording to be used as the record of the oral proceedings, and all the parties agree ("stipulate"), a copy of the official electronic recording itself can be used as the record of the oral proceedings instead of a transcript. You (the petitioner) must pay for preparing a copy of the official electronic recording, unless the court orders otherwise.
- **A summary**—If a transcript or official electronic recording of what was said in the trial court is not available, your petition must include a declaration (a statement signed by the petitioner under penalty of perjury) either:
  - Explaining why the transcript or official electronic recording is not available and providing a fair summary of the proceedings,

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including the petitioner's arguments and any statement by the court supporting its ruling or
- Stating that the transcript or electronic recording has been ordered, the date it was ordered, and the date it is expected to be filed.

Copies of documents from the trial court: Copies of the following documents from the trial court must also be included in the supporting documents:

- The trial court ruling being challenged in the petition
- All documents and exhibits submitted to the trial court supporting and opposing the petitioner's position
- Any other documents or portions of documents submitted to the trial court that are necessary for a complete understanding of the case and of the ruling being challenged

What if I cannot get copies of the documents from the trial court because of an emergency? Rule 8.931 of the California Rules of Court provides that in extraordinary circumstances the petition may be filed without copies of the documents from the trial court. If the petition is filed without these documents, you must explain in your petition the urgency and the circumstances making the documents available.

Format of the supporting documents: Supporting documents must be put in the format required by rule 8.931 of the California Rules of Court. Among other things, there must be a tab for each document and an index listing the documents that are included. You should carefully read rule 8.931. You can get a copy of rule 8.931 at any courthouse or county law library or online at *www.courtinfo.ca.gov/rules*.

(14) Is there a deadline to ask for a writ?

Yes. For statutory writs, the statute usually sets the deadline for serving and filing the petition. Here is a list of the deadlines for filing petitions for some of the most common statutory writs (you can get copies of these statutes at any county law library or online at *www.leginfo.ca.gov/calaw.html*).

Statutory Writ	Filing Deadline
Writ challenging a ruling on a motion to disqualify a judge (see California Code of Civil Procedure section 170.3(d))	10 days after notice to the parties of the decision
Writ challenging the denial of a motion for summary judgment (see California Code of Civil Procedure section 437c(m)(l))	20 days after service of written notice of entry of the order
Writ challenging a ruling on a motion for summary adjudication of issues (see California Code of Civil Procedure section 437c(m)(l))	20 days after service of written notice of entry of the order

For common law writs or statutory writs where the statute does not set a deadline, you should file the petition as soon as possible and not later than 30 days after the court makes the ruling that you are challenging in the petition. While there is no absolute deadline for filing these petitions, writ petitions are usually used when it is urgent that the trial court's error be fixed. Remember, the court is not required to grant your petition even if the trial court made an error. If you delay in filing your petition, it may make the appellate division think that it is not really urgent that the trial court's error be fixed and the appellate division may deny your petition. If there are extraordinary circumstances that delayed the filing of your petition, you should explain these circumstances to the appellate division in your petition.

(15) How do I "serve" my petition?

Rule 8.931(d) requires that the petition and one set of supporting documents be served on any named real party in interest and that just the petition be served on the respondent trial court. "Serving" a petition on a party means that you must:

- Have somebody over 18 years old who is not a party to the case—so not you—mail or deliver ("serve") the petition to the real party in interest and the respondent court in the way required by law.

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- Make a record that the petition has been served. This record is called a "proof of service." *Proof of Service (Appellate Division)* (form APP-109) can be used to make this record. The proof of service must show who served the petition, who was served with the petition, how the petition was served (by mail or in person), and the date the petition was served.

You can get more information about how to serve court documents and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California Courts Online Self-Help Center at *www.courtinfo.ca.gov /selfhelp/lowcost/getready.htm#serving.*

(16) How do I file my petition?

To file a petition for a writ in the appellate division, you must bring or mail the original petition, including the supporting documents, and the proof of service to the clerk for the appellate division of the superior court that made the ruling you are challenging. If the superior court has more than one courthouse location, you should call the clerk at the courthouse where the ruling you are challenging was made to ask where to file your petition. You should make a copy of all the documents you are planning to file for your own records before you file them with the court. It is a good idea to bring or mail an extra copy of the petition to the clerk when you file your original and ask the clerk to stamp this copy to show that the original has been filed.

(17) Do I have to pay to file a petition?

There is no fee to file a petition for a writ in a misdemeanor or infraction case, but there is a fee to file a petition for a writ in a limited civil case. You should ask the clerk for the appellate division where you are filing the petition what this fee is. If you cannot afford to pay this filing fee, you can ask the court to waive this fee. To do this, you must fill out an *Application for Waiver of Court Fees and Costs* (form FW-001). You can get form FW-001 at any courthouse or county law library or online at *www.courtinfo.ca.gov/forms.* You can file this application either before you file your petition or with your petition. The court will review this application and decide whether to waive the filing fee.

(18) What happens after I file my petition?

Within 10 days after you serve and file your petition, the respondent or any real party in interest can serve and file preliminary opposition to the petition. Within 10 days after an opposition is filed, you may serve and file a reply to that opposition.

The appellate division does not have to wait for an opposition or reply before it can act on a petition for a writ, however. Without waiting, the appellate division can:

a. Issue a stay

b. Summarily deny the petition

c. Issue an alternative writ or order to show cause

d. Notify the parties that it is considering issuing a preemptory writ in the first instance

Read below for more information about these options.

a. Stay of trial court proceedings

A stay is an order from the appellate division telling the trial court not to do anything more until the appellate division decides whether to grant your petition. A stay puts the trial court proceedings on temporary hold.

b. Summary denial

A "summary denial" means that the appellate division denies the petition without deciding whether the trial court made the legal error claimed by the petitioner or whether the writ requested by the petitioner should be issued based on that error. Remember, even if the trial court made a legal error, the appellate division can decide not to consider that error now but to wait and consider the error as part of any appeal from the final judgment. No reasons need to be given for a summary denial. Most petitions for writs are denied in this way.

c. Alternative writ or order to show cause

An "alternative writ" is an order telling the trial court either to do what the petitioner has requested in the petition (or some modified form of what the petitioner

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requested) or to show the appellate division why the trial court should not be ordered to do what the petitioner requested. An "order to show cause" is similar; it is an order telling the trial court to show the appellate division why the trial court should not be ordered to do what the petitioner requested in the petition (or some modified form of what the petitioner requested). The appellate division will issue an alternative writ or an order to show cause only if the petitioner has shown that he or she has no adequate remedy at law and the appellate division has decided that the petitioner may have shown that the trial court made a legal error that needs to be fixed.

If the appellate division issues an alternative writ and the trial court does what the petitioner requested (or a modified form of what the petitioner requested as ordered by the appellate division), then no further action by the appellate division is needed and the appellate division may dismiss the petition.

If the trial court does not comply with an alternative writ, however, or if the appellate division issues an order to show cause, then the respondent court or a real party in interest can file a response to the appellate division's order (called a "return") that explains why the trial court should not be ordered to do what the petitioner requested. The return must be served and filed within the time specified by the appellate division or, if no time is specified, within 30 days from the date the alternative writ or order to show cause was issued. The petitioner will then have an opportunity to serve and file a reply within 15 days after the return is filed. The appellate division may set the matter for oral argument. When all the papers have been served and filed (or the time to serve and file them has passed) and oral argument is completed, the appellate division will decide the case.

d. Peremptory writ in the first instance

A "peremptory writ in the first instance" is an order telling the trial court to do what the petitioner has requested (or some modified form of what the petitioner requested) that is issued without the appellate division first issuing an alternative writ or order to show cause. It is very rare for the appellate division to issue a peremptory writ in the first instance, and it will not do so without first notifying the parties and giving the respondent court and any real party in interest a chance to file an opposition.

The respondent court or a real party in interest can file a response to the appellate division's notice (called an "opposition") that explains why the trial court should not be ordered to do what the petitioner has requested. The opposition must be served and filed within the time specified by the appellate division or, if no time is specified, within 30 days from the date the notice was issued. The petitioner will then have a chance to serve and file a reply within 15 days after the opposition is filed. The appellate division may then set the matter for oral argument. When all the papers have been served and filed (or the time to serve and file them has passed) and oral argument is completed, the appellate division will decide the case.

(19) What should I do if the court denies my petition?

If the court denies your petition, it may be helpful to talk to a lawyer. In a limited civil or infraction case, you must hire a lawyer at your own expense if you want one (the court cannot provide one). You can get information about finding an attorney on the California Courts Online Self-Help Center at *www.courtinfo.ca.gov /selfhelp/lowcost.*

INFORMATION FOR A REAL PARTY IN INTEREST

This part of the information sheet is written for a real party in interest—a party from the trial court case other than the petitioner who will be affected by a ruling on a petition for a writ. It explains some of the rules and procedures relating to responding to a petition for a writ. The information may also be helpful to the petitioner.

(20) I have received a copy of a petition for a writ in a case in which I am a party. Do I need to do anything?

You do not *have* to do anything. The California Rules of Court give you the right to file a preliminary opposition to a petition for a writ within 10 days after the petition is served and filed, but you are not required to do this. The appellate division can take certain actions without waiting for any opposition, including:

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- Summarily denying the petition
- Issuing an alternative writ or order to show cause
- Notifying the parties that it is considering issuing a peremptory writ in the first instance

Read the response to question (18) for more information about these options.

Most petitions for writs are summarily denied, often within a few days after they are filed. If you have not already received something from the appellate division saying what action it is taking on the petition, it is a good idea to call the appellate division to see if the petition has been denied before you decide whether and how to respond.

This would also be a good time to talk to a lawyer. You do not *have* to have a lawyer; you are allowed to represent yourself in a writ proceeding in the appellate division. But writ proceedings can be very complicated and you will have to follow the same rules that lawyers have to follow. If you have any questions about writ proceedings or about whether and how you should respond to a writ petition, you should talk to a lawyer. In a limited civil case or infraction case, you must hire a lawyer at your own expense if you want one (the court cannot provide one). You can get information about finding an attorney on the California Courts Online Self-Help Center at *www.courtinfo.ca.gov/selfhelp/lowcost.*

If the petition has not already been summarily denied, you may, but are not required to, serve and file a preliminary opposition to the petition within 10 days after the petition was served and filed. In general, it is a good idea to consider filing a preliminary opposition if the petition misstates the facts or if you think the petition shows that the trial court made a legal error that may need to be fixed. However, the appellate division will not grant a writ without first issuing an alternative writ, an order to show cause, or a notice that it is considering issuing a peremptory writ. In all these circumstances, you will get notice from the court and have a chance to file a response. A preliminary opposition is therefore typically used to explain to the appellate division why you believe it should not grant an alternative writ or order to show cause.

If you decide to file a preliminary opposition, you must serve that preliminary opposition on all the other parties to the writ proceeding. "Serving and filing" an opposition means that you must:

- Have somebody over 18 years old who is not a party to the case—so not you—mail or deliver ("serve") the preliminary opposition to the other parties in the way required by law.
- Make a record that the preliminary opposition has been served. This record is called a "proof of service." *Proof of Service (Appellate Division)* (form APP-109) can be used to make this record. The proof of service must show who served the preliminary opposition, who was served with the preliminary opposition, how the preliminary opposition was served (by mail or in person), and the date the preliminary opposition was served.
- File the original preliminary opposition and the proof of service with the appellate division. You should make a copy of the preliminary opposition you are planning to file for your own records before you file it with the court. It is a good idea to bring or mail an extra copy of the preliminary opposition to the clerk when you file your original and ask the clerk to stamp this copy to show that the original has been filed.

You can get more information about how to serve court documents and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California Courts Online Self-Help Center at *www.courtinfo.ca.gov /selfhelp/lowcost/getready.htm#serving.*

(21) I have received a copy of an alternative writ or an order to show cause issued by the appellate division. Do I need to do anything?

Yes. Unless the trial court has already done what the alternative writ told it to do, you should serve and file a response called a "return."

As explained above, the appellate division will issue an alternative writ or an order to show cause only if the appellate division has decided that the petitioner may have shown that the trial court made a legal error that

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needs to be fixed. An "alternative writ" is an order telling the trial court either to do what the petitioner has requested in the petition (or some modified form of what the petitioner requested) or to show the appellate division why the trial court should not be ordered to do what the petitioner requested. An "order to show cause" is similar; it is an order telling the trial court to show the appellate division why the trial court should not be ordered to do what the petitioner requested in the petition (or some modified form of what the petitioner requested).

If the appellate division issues an alternative writ and the trial court does what the petitioner requested (or a modified form of what the petitioner requested as ordered by the appellate division), then no further action by the appellate division is needed and the appellate division may dismiss the petition. If the trial court does not comply with an alternative writ, however, or if the appellate division issues an order to show cause, then the respondent court or the real party in interest may serve and file a response to the appellate division's order, called a "return."

A return is your argument to the appellate division about why the trial court should not be ordered to do what the petitioner has requested. If you are represented by a lawyer in the writ proceeding, your lawyer will prepare your return. If you are not represented by a lawyer, you will need to prepare your own return. A return is usually a legal response called an "answer." An answer is used to admit or deny the facts alleged in the petition, to add to or correct the facts, and to explain any legal defenses to the legal arguments made by the petitioner. You should read California Code of Civil Procedure sections 430.10–430.80 for more information about answers. You can get copies of these statutes at any county law library or online at *www.leginfo.ca.gov/calaw.html*. A return can also include additional supporting documents not already filed by the petitioner.

If you do not file a return when the appellate division issues an alternative writ or order to show cause, it does not mean that the appellate division is required to issue the writ requested by the petitioner. However, the appellate division will treat the facts stated by the petitioner in the petition as true, which makes it more likely the appellate division will issue the requested writ.

Unless the appellate division sets a different filing deadline in its alternative writ or order to show cause, you must serve and file your return within 30 days after the appellate division issues the alternative writ or order to show cause. The return must be served on all the other parties to the writ proceeding. "Serving and filing" the return means that you must:

- Have somebody over 18 years old who is not a party to the case—so not you—mail or deliver ("serve") the return to the other parties in the way required by law.
- Make a record that the return has been served. This record is called a "proof of service." *Proof of Service (Appellate Division)* (form APP-109) can be used to make this record. The proof of service must show who served the return, who was served with the return, how the return was served (by mail or in person), and the date the return was served.
- File the original return and the proof of service with the appellate division. You should make a copy of the return you are planning to file for your own records before you file it with the court. It is a good idea to bring or mail an extra copy of the return to the clerk when you file your original and ask the clerk to stamp this copy to show that the original has been filed.

You can get more information about how to serve court documents and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California Courts Online Self-Help Center at *www.courtinfo.ca.gov /selfhelp/lowcost/getready.htm#serving*.

(22) I have received a copy of a notice from the appellate division indicating it is considering issuing a peremptory writ in the first instance. Do I need to do anything?

Yes. You should serve and file a response called an "opposition."

As explained in the answer to question (18), a "peremptory writ in the first instance" is an order telling the trial court to do what the petitioner has requested (or

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some modified form of what the petitioner requested as ordered by the appellate division) that is issued without the appellate division first issuing an alternative writ or order to show cause. The appellate division will not issue a peremptory writ in the first instance without first giving the parties notice and a chance to file an opposition. However, when the appellate division issues such a notice, it means that the appellate division is strongly considering granting the writ requested by the petitioner.

An opposition is your argument to the appellate division about why the trial court should not be ordered to do what the petitioner has requested. If you are represented by a lawyer in the writ proceeding, your lawyer will prepare your opposition. If you are not represented by a lawyer, you will need to prepare your own opposition. Like a return discussed above, an opposition is usually a legal response called an "answer." An answer is used to admit or deny the facts alleged in the petition, to add to or correct the facts, and to explain any legal defenses to the legal arguments made by the petitioner. You should read California Code of Civil Procedure sections 430.10–430.80 for more information about answers. You can get copies of these statutes at any county law library or online at *www.leginfo.ca.gov/calaw.html.*

Unless the appellate division sets a different deadline in its notice that it is considering issuing a peremptory writ, you must serve and file your opposition within 30 days after the appellate division issues the notice. The opposition must be served on all the other parties to the writ proceeding. "Serving and filing" the opposition means that you must:

- Have somebody over 18 years old who is not a party to the case—so not you—mail or deliver ("serve") the opposition to the other parties in the way required by law.
- Make a record that the opposition has been served. This record is called a "proof of service." *Proof of Service (Appellate Division)* (form APP-109) can be used to make this record. The proof of service must show who served the opposition, who was served with the opposition, how the opposition was served (by mail or in person), and the date the opposition was served.
- File the original opposition and the proof of service with the appellate division. You should make a copy of the opposition you are planning to file for your own records before you file it with the court. It is a good idea to bring or mail an extra copy of the opposition to the clerk when you file your original, and ask the clerk to stamp this copy to show that the original has been filed.

You can get more information about how to serve court documents and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California Courts Online Self-Help Center at *www.courtinfo.ca.gov /selfhelp/lowcost/getready.htm#serving.*

(23) What happens after I serve and file my return or opposition?

After you file a return or opposition, the petitioner has 15 days to serve and file a reply. The appellate division may also set the matter for oral argument. When all the papers have been filed (or the time to file them has passed) and oral argument is completed, the appellate division will decide the case.

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Source: Civil Litigation/California Civil Writ Practice/13 Superior Court Forms/§13.17 B. Form: Petition for Writ (Misdemeanor, Infraction, or Limited Civil Case) (Judicial Council Form APP-151)

§13.17 B. Form: Petition for Writ (Misdemeanor, Infraction, or Limited Civil Case) (Judicial Council Form APP-151)

APP-151 Petition for Writ (Misdemeanor, Infraction, or Limited Civil Case)

_____
Petitioner
(fill in the name of the person asking for the writ)

v.

Superior Court of California, County of _____

_____
Respondent
(fill in the name of the court whose action or ruling you are challenging)

_____
Real Party in Interest
(fill in the name of any other parties in the trial court case)

Clerk stamps date here when form is filed.

Clerk will fill in the number below:

Appellate Division Case Number:

☐ **Stay requested**
(see item (12) c. on page 6)

Instructions

- This form is only for requesting a **writ** in a misdemeanor, infraction, or limited civil case. You can get forms for other writs and for appeals at any courthouse or county law library or online at *www.courtinfo.ca.gov/forms.*
- Before you fill out this form, read *Information on Writ Proceedings in Misdemeanor, Infraction, and Limited Civil Cases* (form APP-150-INFO) to know your rights and responsibilities. You can get form APP-150-INFO at any courthouse or county law library or online at *www.courtinfo.ca.gov/forms*.
- Unless a special statute sets an earlier deadline, you should file this form no later than **30 days** after the date the superior court took the action or issued the ruling you are challenging in this petition (see form APP-150-INFO, page 7, for more information about the deadline for filing a writ petition). It is your responsibility to find out if a special statute sets an earlier deadline. If your petition is filed late, the appellate division may deny it.
- Fill out this form and make a copy of the completed form for your records and for the respondent (the trial court whose action or ruling you are challenging) and each of the real parties in interest (the other party or parties in the trial court case).
- Serve a copy of the completed form on the respondent and on each real party in interest and keep proof of this service. *Proof of Service (Appellate Division)* (form APP-109) can be used to make this record. You can get information about how to serve court papers and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California Courts Online Self-Help Center at *www.courtinfo.ca.gov/selfhelp/lowcost/getready.htm#serving*.
- Take or mail the completed form and your proof of service on the respondent and each real party in interest to the clerk's office for the appellate division of the superior court that took the action or issued the ruling you are challenging.

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Appellate Division Case Name: _____

Appellate Division Case Number:

1 Your Information

a. Petitioner (the party who is asking for the writ):

Name: _____

Street address: _____
Street *City* *State* *Zip*

Mailing address *(if different)*: _____
Street *City* *State* *Zip*

Phone: ( ) _____ E-mail *(optional)*: _____

b. Petitioner's lawyer *(skip this if the petitioner does not have a lawyer for this petition)*:

Name: _____ State Bar number: _____

Street address: _____
Street *City* *State* *Zip*

Mailing address *(if different)*: _____
Street *City* *State* *Zip*

Phone: ( ) _____ E-mail *(optional)*: _____

Fax *(optional)*: ( ) _____

The Trial Court Action or Ruling You Are Challenging

2 I am/My client is filing this petition to challenge an action taken or ruling made by the trial court in the following case:

a. Case name *(fill in the trial court case name)*: _____

b. Case number *(fill in the trial court case number)*: _____

3 The trial court action or ruling I am/my client is challenging is *(describe the action taken or ruling made by the trial court)*: _____

4 The trial court took this action or made this ruling on the following date *(fill in the date)*: _____

5 *If you are filing this petition more than 60 days after the date that you listed in 4, explain the extraordinary circumstances that caused the delay in filing this petition:*

Print

Appellate Division Case Name:_____

Appellate Division Case Number:

The Parties in the Trial Court Case

6 I/My client *(check and fill in a or b):*

a. ☐ was a party in the case identified in 2.

b. ☐ was not a party in the case identified in 2 but will be directly and negatively affected in the following way by the action taken or ruling made by the trial court *(describe how you/your client will be directly and negatively affected by the trial court's action or ruling):*

_____

_____

_____

7 The other party or parties in the case identified in 2 was/were *(fill in the names of the parties):*

_____

Appeals or Other Petitions for Writs in This Case

8 Did you or anyone else file an appeal about the same trial court action or ruling you are challenging in this petition? *(Check and fill in a or b):*

a. ☐ No

b. ☐ Yes *(fill in the appellate division case number of the appeal):*_____

9 Have you filed a previous petition for a writ challenging this trial court action or ruling? *(Check and fill in a or b):*

a. ☐ No

b. ☐ Yes *(Please provide the following information about this previous petition).*

(1) Petition title *(fill in the title of the petition):*_____

(2) Date petition filed *(fill in the date you filed this petition):* _____

(3) Case number *(fill in the case number of the petition):* _____

If you/your client filed more than one previous petition, attach another page providing this information for each additional petition. At the top of each page, write "APP-151, item 9.")

Reasons for This Petition

10 The trial court made the following legal error or errors when it took the action or made the ruling described in 3 *(check and fill in at least one):*

a. ☐ The trial court has not done or has refused to do something that the law says it *must* do.

(1) *Describe what you believe the law says the trial court must do:*_____

_____

_____

_____

(2) *Identify the law (the section of the Constitution or statute, published court decision, or other legal authority) that says the trial court must do this:*_____

_____

_____

_____

Print

10 (continued)

(3) *Identify where in the supporting documents (the record of what was said in the trial court and the documents from the trial court) it shows that the court did not do or refused to do this:*

_____

_____

_____

☐ *Check here if you need more space to describe the reason for your petition and attach a separate page or pages describing it. At the top of each page, write "APP-151, item 10a."*

b. ☐ The trial court has done something that the law says the court *cannot or must not* do.

(1) *Describe what the trial court did:*_____

_____

_____

_____

(2) *Identify where in the supporting documents (the record of what was said in the trial court and the documents from the trial court) it shows that the court did this:* _____

_____

_____

_____

(3) *Identify the law (the section of the Constitution or statute, published court decision, or other legal authority) that says the trial court cannot or must not do this:* _____

_____

_____

_____

☐ *Check here if you need more space to describe the reason for your petition and attach a separate page or pages describing it. At the top of each page, write "APP-151, item 10b."*

c. ☐ The trial court has performed or said it is going to perform a judicial function (like deciding a person's rights under law in a particular situation) in a way the court does not have the legal power to do.

(1) *Describe what the trial court did or said it is going to do:* _____

_____

_____

_____

(2) *Identify where in the supporting documents (the record of what was said in the trial court and the documents from the trial court) it shows that the court did or said it was going to do this:*

_____

_____

_____

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10 (continued)

(3) *Identify the law (the section of the Constitution or statute, published court decision, or other legal authority) that says the trial court does not have the power to do this:*

_____

_____

_____

☐ *Check here if you need more space to describe this reason for your petition and attach a separate page or pages describing it. At the top of each page, write "APP-151, item 10c."*

☐ *Check here if there are more reasons for this petition and attach an additional page or pages describing these reasons. At the top of each page, write "APP-151, item 10d."*

11 This petition will be granted only if there is no other adequate way to address the trial court's action or ruling other than by issuing the requested writ.

a. *Explain why there is no way other than through this petition for a writ—through an appeal, for example—for your arguments to be adequately presented to the appellate division:*

_____

_____

_____

_____

b. *Explain how you/your client will be irreparably harmed if the appellate division does not issue the writ you are requesting:* _____

_____

_____

_____

_____

Order You Are Asking the Appellate Division to Make

12 I request that this court *(check and fill in all that apply):*

a. ☐ order the trial court to do the following *(describe what, if anything, you want the trial court to be ordered to do):* _____

_____

_____

_____

b. ☐ order the trial court not to do the following *(describe what, if anything, you want the trial court to be ordered NOT to do)*: _____

_____

_____

_____

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12 (continued)

c. ☐ issue a stay ordering the trial court not to take any further action in this case until this court decides whether to grant or deny this petition *(describe below why it is urgent that the trial court not take any further action and check the Stay requested box on page 1 of this form):*

_____

_____

_____

_____

I/My client:

(1) ☐ asked the trial court to stay these proceedings, but the trial court denied this request *(include in your supporting documents a copy of the trial court's order denying your request for a stay).*

(2) ☐ did not ask the trial court to stay these proceedings for the following reasons *(describe below why you did not ask the trial court to stay these proceedings):*

_____

_____

_____

_____

d. ☐ take other action *(describe):* _____

_____

_____

_____

_____

e. ☐ grant any additional relief that the appellate division decides is fair and appropriate.

Supporting Documents

13 Is a record of what was said in the trial court about the action or ruling you are challenging attached as required by rule 8.931(b)(1)(D) of the California Rules of Court?

a. ☐ Yes, a transcript or an official electronic recording of what was said in the trial court is attached.

b. ☐ No, a transcript or official electronic recording is not attached, but I have attached a declaration (a statement signed under penalty of perjury) *(Check (1) or (2):*

(1) ☐ stating the transcript or electronic recording has been ordered, the date it was ordered, and the date it is expected to be filed

(2) ☐ explaining why the transcript or official electronic recording is not available and providing a fair summary of what was said in the trial court, including the petitioner's arguments and any statement by the trial court supporting its ruling.

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14 Are the following documents attached as required by rule 8.931(b)(1)(A)–(C):

- The trial court ruling being challenged in this petition
- All documents and exhibits submitted to the trial court supporting and opposing the petitioner's position
- 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 being challenged? *(Check a or b):*

a. ☐ Yes, these documents are attached.

b. ☐ No, these documents are not attached for the following reasons *(explain why these documents are not attached and give a fair summary of the substance of these documents. Note that rule 8.931 provides that, in extraordinary circumstances, the petition may be filed without these documents, but the petitioner must explain the urgency and the circumstances making the documents unavailable):*

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

Verification

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _____

_____ ▶ _____

Type or print your name *Signature of petitioner or attorney*

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14

Overview of Appellate Court Writ Practice

The Hon. Kathleen M. Banke

I. INTRODUCTION §14.1

II. PROCEDURES FOR PROSECUTING APPELLATE COURT WRITS §14.2

III. COVERAGE OF APPELLATE COURT WRIT PRACTICE §14.3

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§14.1 I. INTRODUCTION

The courts of appeal and the California Supreme Court can issue the same kinds of civil writs as the superior courts. However, writ practice in the appellate courts is very different from writ practice in the superior courts. In contrast with superior court writ proceedings, which generally challenge actions by nonjudicial bodies or officials, most appellate court writ proceedings challenge *judicial* action taken by a superior court in an underlying civil lawsuit. Thus, writ review by the appellate courts is almost always in the nature of immediate interlocutory appellate review, bypassing the usual requirement that there be only one appeal at the end of a case following entry of final judgment.

Accordingly, writ review by the courts of appeal is almost always highly discretionary, and that discretion is rarely exercised. The vast majority of appellate court writ petitions are summarily denied in one- or two-sentence orders without any reasons stated. See chaps 15, 17. In the superior courts, in contrast, writ petitions generally are treated as another species of operative pleading and almost always heard on the merits, with the court issuing a final judgment (granting or denying the petition) that can be appealed to the court of appeal.

The staggering denial rate of appellate court writ petitions is not surprising. As the appellate courts see it, the petitioning party wants to cut in line ahead of hundreds of other parties who duly filed notices of appeal after entry of final judgment and are patiently waiting for the court to hear their cases. The appellate courts therefore agree to hear the merits of a writ petition only in exceptional circumstances, *e.g.*, if a writ proceeding is the designated and exclusive means of appellate review, if the petitioner is threatened with immediate and irreparable injury, or if the trial court plainly erred and further trial court proceedings would be a needless waste of the court's and parties' resources. See chaps 15, 17.

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§14.2 II. PROCEDURES FOR PROSECUTING APPELLATE COURT WRITS

As one would expect given the fundamentally different ways in which superior and appellate courts treat writ petitions, the writ procedures in these courts also differ significantly. The writ statutes provide little guidance as to procedures in the appellate courts. The rules of court, however, do provide considerable guidance, making writ practice in the courts of appeal much more uniform than writ practice in the superior courts. See chap 18.

An appellate court writ petition consists of a single bound document, the format of which is governed by the appellate rules of court. This document includes the formal petition (which can, and often does, include a request for an immediate stay of the lower court proceedings), verification, and a supporting memorandum. See chap 18. The petition must be supported by all relevant superior court documents and the reporter's transcript of the superior court hearing. This supporting documentation usually is bound in a separate volume of exhibits, the format of which is also governed by the rules of court. See chap 20.

The appellate courts also generally control the timing of writ proceedings. When an immediate stay is requested, the court usually acts on the request within a day or two and may grant or deny it, or issue an emergency stay and ask for opposition before granting or denying a stay pending the outcome of the writ proceeding. See chap 19. As for the writ petition, the rules of court allow, but do not require, a respondent or real party in interest to file preliminary opposition within 10 days. See chap 21. However, the appellate courts can deny a writ petition before any opposition is filed. Alternatively, either before or after preliminary opposition is filed, the appellate court can issue what is known as a *Palma* notice, asking for opposition and giving notice that the court may issue a peremptory writ without further briefing and without oral argument. See chap 22. Or, either before or after preliminary opposition is filed, the court can issue an alternative writ or order to show cause, setting a date for the "return" by the respondent and the real party in interest and a briefing schedule. If the court issues an alternative writ or order to show cause, this means the court has made the writ proceeding a full-fledged "cause" that it likely will decide on the merits after oral argument (the court might later decide that the alternative writ or order to show cause was improvidently granted and summarily dismiss the petition). See chap 24. Thus, in contrast to superior court writ proceedings, the vast majority of appellate court writ proceedings are handled and disposed of entirely on the papers and without oral argument.

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§14.3 III. COVERAGE OF APPELLATE COURT WRIT PRACTICE

Part II provides a practical guide to appellate court writ practice. The initial chapters of Part II discuss when a trial court ruling must be challenged by way of a writ proceeding either as the exclusive means of appellate review or as a prerequisite to seeking post-judgment appellate review, when discretionary writ review is authorized by statute, and other instances in which the appellate courts have exercised their discretion to grant writ review. See chaps 15-17. Subsequent chapters provide a detailed nuts-and-bolts discussion of appellate court writ procedures, including the content and format of papers filed by petitioners (see chaps 18-19), respondents, and real parties in interest (see chaps 21, 23), the timing and nature of actions that may be taken by the courts of appeal, and seeking further appellate review of a court of appeal's action on a writ petition (see chaps 22, 24-25).

Several chapters focus on specialized appellate writ proceedings, including petitions for writs of review challenging certain administrative actions (see chap 16), petitions for writs of supersedeas seeking to stay a superior court's judgment pending appeal (see chap 26), and petitions for review by the California Supreme Court (see chap 27).

Part II concludes with a collection of exemplar appellate court writ forms. See chap 28.

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15

Common Writs and Basic Requirements

Grace K. Won
David K. Ismay

I. SCOPE OF CHAPTER §15.1

II. WRIT OF MANDATE §15.2
- A. Description and Purpose §15.3
- B. Issuance Within Appellate Court's Discretion §15.4
- C. Substantive Requirements §15.5
- D. Function of Mandate
  - 1. To Compel Performance of Ministerial Duty §15.6
    - a. "Ministerial Duty" Defined §15.7
    - b. Examples of Ministerial Trial Court Actions §15.8
    - c. Examples of Nonjudicial Court Officer's Ministerial Duties §15.9
  - 2. To Compel Exercise of Discretion §15.10
  - 3. To Correct Abuse of Discretion §15.11
    - a. When Facts Dictate Particular Result §15.12
    - b. When Trial Court Has Made Error of Law §15.13

III. WRIT OF PROHIBITION
- A. Description and Purpose §15.14
- B. Substantive Requirements
  - 1. Challenged Action Must Be Judicial §15.15
    - a. Most Court Action Is Judicial §15.16
    - b. Ministerial Court Actions Do Not Qualify §15.17
  - 2. Challenged Action Must Be Threatened But Not Completed §15.18
    - a. Prohibition Does Not Restrain Merely Possible Action §15.19
    - b. Prohibition Can Restrain Continuing or Incomplete Judicial Action §15.20
    - c. When Trial Court Completes Act Before Appellate Court Rules on Petition §15.21
  - 3. Jurisdictional Defect Must Exist §15.22
    - a. Test for Determining Existence of Jurisdictional Defect §15.23
    - b. When Only Portion of Threatened Judicial Action Exceeds Court's Jurisdiction §15.24
- C. Seek Relief in Trial Court First §15.25
- D. Examples of Threatened Judicial Acts in Excess of Jurisdiction §15.26

IV. WRIT OF REVIEW (CERTIORARI)
- A. Description and Purpose §15.27
- B. Writ Brings Up Record From Lower Court §15.28
- C. Substantive Requirements for Writ of Review (Certiorari)
  - 1. Act to Be Reviewed Must Be Judicial §15.29
  - 2. Judicial Act Must Be Completed §15.30
  - 3. Act Must Be in Excess of Court's Jurisdiction §15.31
  - 4. No Right of Appeal §15.32
    - a. Requirement Strictly Applied §15.33
    - b. Requirement Applies Even if Appeal Is Not Speedy or Adequate Remedy §15.34
    - c. Remote Appeal May Justify Writ §15.35
    - d. Exception When Right to Appeal Lost Through No Fault of Petitioner §15.36
- D. Examples of Completed Judicial Action Subject to Writ of Review (Certiorari)
  - 1. Rulings in Contempt Proceedings §15.37
  - 2. Other Judicial Actions §15.38

V. OTHER WRITS
- A. Habeas Corpus
  - 1. Description and Purpose
    - a. Inquires Into Cause of Imprisonment or Restraint §15.39

b. Used Mostly in Criminal Context §15.40
2. Uses in Civil Proceedings
a. Civil Contempt §15.41
b. Child Custody §15.42
c. Civil Commitment §15.43
B. Coram Nobis and Coram Vobis
1. Description and Purpose
a. Correct Errors of Fact §15.44
b. Case Law Governs §15.45
c. Used Mostly in Criminal Cases §15.46
2. Requirements for Issuance §15.47
3. Availability in Civil Cases §15.48
C. Writ of Supersedeas §15.49
D. Quo Warranto §15.50

VI. BASIC REQUIREMENTS FOR WRIT RELIEF
A. Petitioner Must Have Beneficial Interest
1. "Beneficial Interest" Defined §15.51
2. Party Aggrieved by Trial Court Ruling Has Beneficial Interest §15.52
3. Petitioner Need Not Be Party to Underlying Action §15.53
4. When Petitioner Challenges Nonjudicial Action in Court of Appeal §15.54
5. Trial Court Usually Not Beneficially Interested §15.55
B. Petitioner Must Have No Other Adequate Remedy
1. Appeal Is Usually Adequate Remedy §15.56
a. Appealable Interlocutory Orders and Judgments §15.57
b. Appeal From Final Judgment §15.58
c. If Writ Proceeding Is Exclusive Means of Appellate Review §15.59
2. Petitioner's Burden to Show Inadequacy of Other Remedies §15.60
C. Petitioner Must Face Irreparable Injury §15.61
1. Specific and Immediate Harm §15.62
a. When Ruling Deprives Petitioner of Opportunity to Present Case §15.63
b. When Ruling Is Clearly Erroneous and Substantially Prejudicial §15.64
2. Petitioner's Burden to Show Irreparable Injury §15.65
D. Issue Must Not Be Moot
1. Writ Generally Will Not Issue When Case Is Moot §15.66
2. Public Interest May Override Mootness §15.67
E. Issue Usually Must Have Been Raised in Trial Court §15.68
F. Other Factors §15.69
1. Issue of Widespread Public Importance or First Impression §15.70
2. Trial Courts in Conflict §15.71

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§15.1 I. SCOPE OF CHAPTER

This chapter begins with an overview of the writs most frequently sought in the appellate courts: traditional mandate (see §§15.2-15.13), prohibition (see §§15.14-15.26), and review (certiorari) (see §§15.27-15.38). This is a general discussion of the basic character and uses of these writs. On specific contexts in which the appellate courts issue mandate, prohibition, and review, see chap 16 and App A. The chapter also discusses other writs that may be sought from the appellate courts, including habeas corpus (see §§15.39-15.43) and coram nobis and coram vobis (see §§15.44-15.48). Again, this is a general overview of the nature and general uses of these writs. On specific contexts in which the appellate courts issue these writs, see chap 16 and App A. On writs of supersedeas to obtain a stay during the pendency of an appeal, see chap 26.

The chapter next addresses the basic requirements for writ relief in the appellate courts, *i.e.*:

- The petitioner must have a beneficial interest in the outcome of the proceedings (see §§15.51-15.55);
- The petitioner must have no other adequate legal remedy (see §§15.56-15.60);
- The petitioner will sustain irreparable injury if writ relief is not granted (see §§15.61-15.65);
- The issue generally must not be moot (see §§15.66-15.67); and
- The issue usually must have been raised in the trial court (see §15.68).

This discussion also includes other factors that appellate courts consider in determining whether to hear a writ petition on the merits. See §§15.69-15.71. On drafting an appellate court writ petition and alleging the requirements for writ relief, see §§18.5-18.60.

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§15.2 II. WRIT OF MANDATE

A writ of mandate issued by an appellate court under CCP §1085 orders the respondent to take some specified action within a specified period of time. The vast majority of writ petitions filed in the appellate courts seek to compel action by a trial court in an ongoing civil action. In exceedingly rare circumstances, a party aggrieved by nonjudicial action (*e.g.,* by a governmental or private body) may file a mandate proceeding in an appellate court in the first instance, bypassing the superior court. In such cases, the nature of the appellate court writ proceeding is largely the same as a superior court writ proceeding, although the procedures for prosecuting a writ proceeding in the appellate court differ significantly from those applicable to prosecuting a writ proceeding in the superior court. Compare chap 5 (initiating superior court writ proceeding) with chap 18 (initiating appellate court writ proceeding).

NOTE: The terms "mandate" and "mandamus" are used interchangeably. CCP §1084. Mandate under CCP §1085 is sometimes referred to as traditional mandate to distinguish it from administrative mandamus under CCP §1094.5. Administrative mandamus is a statutorily created type of mandate used to review most administrative adjudicatory decisions. Accordingly, most administrative mandamus actions are commenced in the superior courts, and the courts of appeal usually consider such writ actions only on appeal from a superior court judgment. See chap 3; California Administrative Mandamus §§1.5-1.12 (3d ed Cal CEB 2003).

For discussion of superior court mandate proceedings challenging nonjudicial action, see chaps 2 (traditional mandate under CCP §1085) and 3 (administrative mandamus under CCP §1094.5).

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§15.3 A. Description and Purpose

The writ of mandate is "the principal extraordinary writ surviving under California law." *City of King City v Community Bank* (2005) 131 CA4th 913, 925, 32 CR3d 384. See Comment, *Appellate Review in California with the Extraordinary Writs*, 36 Cal L Rev 75, 79 (March 1948) (reviewing history of writ of mandate). A writ of mandate is a prerogative writ that (a) compels the performance of a mandatory ministerial duty on the part of a subordinate court, corporation, board, agency, or officer (see §§15.6-15.9), (b) compels a subordinate court, corporation, board, agency, or officer to exercise its discretion (see §15.10), or (c) corrects a clear abuse of discretion by a subordinate court, corporation, board, agency, or officer (see §§15.11-15.13). See CCP §1085(a).

On specific contexts in which the appellate courts have issued writs of mandate, see chap 16 and App A. On seeking a writ of mandate from the superior courts, see chap 2.

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§15.4 B. Issuance Within Appellate Court's Discretion

True to its historical roots as a prerogative of the English royal courts, there is no right to issuance of a writ of mandate. *Fisherman's Wharf Bay Cruise Corp. v Superior Court* (2003) 114 CA4th 309, 319, 7 CR3d 628. In appellate court writ practice in particular, the issuance of writs of mandate is highly discretionary, and in the vast majority of cases—about 90 percent—the appellate courts decline to exercise their original jurisdiction. See Judicial Council of California, Court Statistics Report, Courts of Appeal, Table 5 (2007), available at http://www.courtinfo.ca.gov/reference/documents/csr2007.pdf. On factors appellate courts consider in deciding whether to exercise their discretion to grant writ review, see §§15.51-15.71. On specific contexts in which appellate courts have issued writs of mandate, see chap 16 and App A.

In the rare instance in which a writ proceeding is the exclusive means of obtaining appellate review of an order or judgment (see §§16.2-16.48), the appellate court's discretion with respect to writ relief is limited. In such cases, the court may not deny a meritorious writ petition merely because it presents no important public issue or because the court considers the case less worthy of its attention than other pending cases. See *Powers v City of Richmond* (1995) 10 C4th 85, 114, 40 CR2d 839 (because writ relief is exclusive means of appellate review under Public Records Act, appellate court's refusal to entertain otherwise meritorious writ petition would likely constitute abuse of discretion).

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Source: Civil Litigation/California Civil Writ Practice/15 Common Writs and Basic Requirements/§15.5 C. Substantive Requirements

§15.5 C. Substantive Requirements

The substantive requirements for issuance of a writ of mandate are (CCP §1085(a)):

- A clear and present ministerial duty of the respondent to do an act that the law specially enjoins; and
- A clear, present, and beneficial right of the petitioner to the performance of that duty.

See *Moran v Department of Motor Vehicles* (2006) 139 CA4th 688, 691, 43 CR3d 116; *Fisherman's Wharf Bay Cruise Corp. v Superior Court* (2003) 114 CA4th 309, 319, 7 CR3d 628.

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D. Function of Mandate

§15.6 1. To Compel Performance of Ministerial Duty

The primary purpose of a writ of mandate issued by an appellate court is to compel the performance of a ministerial legal duty, whether before, during, or after trial, by a subordinate court. See CCP §1085(a) (mandate issues "to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station"); *Fisherman's Wharf Bay Cruise Corp. v Superior Court* (2003) 114 CA4th 309, 319, 7 CR3d 628 ("mandate will lie if the trial court has a clear, present and usually ministerial duty and the petitioner has a clear, present and beneficial right to performance of that duty").

NOTE: In writ proceedings challenging trial court actions, the courts of appeal rarely specifically discuss the concept of ministerial duty. Compare *Henry v Superior Court* (2008) 160 CA4th 440, 72 CR3d 808 (no discussion), *California Pub. Employees' Retirement Sys. v Superior Court* (2008) 160 CA4th 174, 72 CR3d 561 (same), *Zevnik v Superior Court* (2008) 159 CA4th 76, 70 CR3d 817 (same), and *Snyder v Superior Court* (2007) 157 CA4th 1530, 69 CR3d 600 (same), with *Fisherman's Wharf Bay Cruise Corp. v Superior Court* (2003) 114 CA4th 309, 319, 7 CR3d 628 (discussing requirements for writ relief). Rather, the appellate courts generally focus on whether the factors warranting immediate appellate review are present (*e.g.,* irreparable harm, issue of first impression or of widespread public importance; see §§15.51-15.71) and then decide whether the trial court erred as a matter of law or clearly abused its discretion.

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§15.7 a. "Ministerial Duty" Defined

A ministerial duty is one that does not require the exercise of judgment and discretion. *Jenkins v Knight* (1956) 46 C2d 220, 223, 293 P2d 6. See *Kavanaugh v West Sonoma County Union High Sch. Dist.* (2003) 29 C4th 911, 916, 129 CR2d 811 ("[A] ministerial act is an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning such act's propriety or impropriety, when a given state of facts exists"). See also §§2.5-2.7.

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§15.8 b. Examples of Ministerial Trial Court Actions

Mandate has issued to compel trial courts to:

- Give an unlawful detainer action pretrial calendar preference, as required by statute. *Cohen v Superior Court* (1967) 248 CA2d 551, 554, 56 CR 813.
- Grant a motion for preference according to mandatory statutory language. *Peters v Superior Court* (1989) 212 CA3d 218, 227, 260 CR 426.
- Permit an indigent plaintiff to proceed without prepayment of jury fees (*Isrin v Superior Court* (1965) 63 C2d 153, 154, 45 CR 320) or to hold a required evidentiary hearing before denying an in forma pauperis application (*Cruz v Superior Court* (2004) 120 CA4th 175, 180, 14 CR3d 917).
- Accept for filing a substitution-of-attorney document. *Hock v Superior Court* (1990) 221 CA3d 670, 671, 270 CR 579.
- Hear and determine a motion to bifurcate a trial. *Trickey v Superior Court* (1967) 252 CA2d 650, 655, 60 CR 761.

For further discussion of specific contexts in which appellate courts have issued writs of mandate, see chap 16 and App A.

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§15.9 c. Examples of Nonjudicial Court Officer's Ministerial Duties

In rare instances, a party to a trial court proceeding may be aggrieved by the action (or inaction) of a nonjudicial court officer. Mandate has issued to compel:

- The clerk and the court reporter to prepare, certify, and transmit transcripts. *Sullivan v Superior Court* (1954) 128 CA2d 476, 477, 275 P2d 595.
- The clerk to enter a default judgment. *W. A. Rose Co. v Municipal Court* (1959) 176 CA2d 67, 74, 1 CR 49.
- The clerk to issue subpoenas compelling witnesses to attend and testify. *Patterson v Sharp* (1967) 253 CA2d 838, 841, 61 CR 517.

For discussion of specific contexts in which appellate courts have issued writs of mandate, see chap 16 and App A.

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§15.10 2. To Compel Exercise of Discretion

Mandate can issue to compel a trial court to exercise its discretion if the court is required, but has refused, to do so. See, *e.g., Payne v Superior Court* (1976) 17 C3d 908, 925, 132 CR 405 (trial court erroneously refused to consider whether incarcerated defendant was indigent and entitled to counsel; writ issued to compel trial court to vacate default judgment and to exercise its discretion to ensure meaningful opportunity to be heard); *Thurmond v Superior Court* (1967) 66 C2d 836, 840, 59 CR 273 (trial court erroneously viewed continuance statute as mandatory; writ issued to compel trial court to reconsider motion to continue and to exercise its discretion in connection therewith).

The corollary to the rule that mandate issues to compel the performance of a ministerial duty (see §15.6) is that mandate generally will not issue to compel a trial court to exercise its discretion in a particular way. See, *e.g., Fisherman's Wharf Bay Cruise Corp. v Superior Court* (2003) 114 CA4th 309, 319, 7 CR3d 628.

For discussion of specific contexts in which appellate courts have issued writs of mandate, see chap 16 and App A.

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§15.11 3. To Correct Abuse of Discretion

Mandate also will issue to correct an abuse of discretion. See, *e.g., Bell v Superior Court* (2007) 158 CA4th 147, 164, 69 CR3d 328 (trial court abused its discretion in denying class certification; writ issued); *Biosense Webster, Inc. v Superior Court* (2006) 135 CA4th 827, 834, 37 CR3d 759 (trial court abused its discretion in issuing temporary restraining order; writ issued).

In writ proceedings, the appellate courts often use the phrase "abuse of discretion" to mean more than simply whether the trial court "exceeded the bounds of reason," which is the traditional formulation of the abuse of discretion standard on appeal. See, *e.g., Bell v Superior Court, supra* (review of class certification ruling for abuse of discretion included whether trial court used improper criteria or made erroneous legal assumptions); *Biosense Webster, Inc. v Superior Court, supra* (review of temporary restraining order included whether trial court "exceeded the bounds of reason" as well as whether under facts discretion could be exercised "in only one way"); *Fisherman's Wharf Bay Cruise Corp. v Superior Court* (2003) 114 CA4th 309, 319, 7 CR3d 628 (review of order granting summary adjudication included whether trial court made error of law, which "automatically" would constitute abuse of discretion).

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§15.12 a. When Facts Dictate Particular Result

If the issue in question is committed to the trial court's sound discretion but the facts are such that that discretion can be exercised in only one way and the trial court has ruled otherwise, the trial court has committed an abuse of discretion that may be corrected by writ. See, *e.g.*, *Robbins v Superior Court* (1985) 38 C3d 199, 205, 211 CR 398 ("If, on the basis of undisputed facts, it is clear that the trial court abused its discretion in failing to issue the preliminary injunction, a writ of mandamus to compel issuance of the injunction is appropriate"); *Ombudsman Servs. of N. Cal. v Superior Court* (2007) 154 CA4th 1233, 1239, 65 CR3d 456 (trial court abused discretion in ordering disclosure of confidential records); *TSI Seismic Tenant Space, Inc. v. Superior Court* (2007) 149 CA4th 159, 165, 56 CR3d 751 ("where the exercise of discretion on the basis of established criteria may yield but one conclusion, an abuse of discretion may be found"); *Pacific Indem. Co. v Superior Court* (1966) 246 CA2d 63, 72, 54 CR 470 ("[S]ince under the circumstances the discretion of the trial court could be legally exercised in only one way, it was an abuse of discretion for the court to deny a preliminary injunction").

For discussion of specific contexts in which appellate courts have issued writs of mandate, see chap 16 and App A.

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§15.13 b. When Trial Court Has Made Error of Law

The courts of appeal also sometimes characterize legal error by the trial court as an abuse of discretion. See, *e.g., Bell v Superior Court* (2007) 158 CA4th 147, 164, 69 CR3d 328 (review of class certification ruling for abuse of discretion included whether trial court used improper criteria or made erroneous legal assumptions); *Fisherman's Wharf Bay Cruise Corp. v Superior Court* (2003) 114 CA4th 309, 319, 7 CR3d 628 (on motion for summary adjudication, "the trial court has no discretion to exercise," *i.e.,* there either is or is not a triable issue of material fact; if trial court errs in ruling on motion, "it has made an error of law, which automatically constitutes an abuse of discretion"); *Mason v Superior Court* (1985) 163 CA3d 989, 993, 210 CR 63 (trial court abused its discretion because "the only proper way the trial court could exercise its discretion was to deny both the motion for summary judgment and the motion to expunge the lis pendens"). See also CCP §1094.5(b) (defining abuse of discretion for purposes of administrative mandamus to include not proceeding in manner required by law).

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III. WRIT OF PROHIBITION

§15.14 A. Description and Purpose

Prohibition is used to prevent or restrain an inferior tribunal from erroneously assuming jurisdiction or acting in excess of its jurisdiction. CCP §1102; *C. S. Smith Metro. Mkt. Co. v Superior Court* (1940) 16 C2d 226, 228, 105 P2d 587 (prohibition "provide[s] a remedy when rigidity of the ordinary procedure fails to protect a litigant from the wrongful exercise of jurisdiction by a court"). Because prohibition restrains only judicial action (see §§15.14-15.17), the writ has more vitality in the appellate courts than it does in the superior courts.

On the rare use of prohibition in the superior courts to restrain judicial action by a body other than a court, see §§4.5-4.8. For discussion of specific contexts in which appellate courts have issued writs of mandate and prohibition, see chap 16 and App A.

NOTE: The writ of prohibition is a preventive remedy, rather than a corrective or remedial one. *Evans v Superior Court* (1939) 14 C2d 563, 580, 96 P2d 107; *Schoenfeldt v Municipal Court* (1960) 187 CA2d 748, 750, 9 CR 912. Thus, it can only be used to challenge threatened, but not completed, judicial actions. See §§15.18-15.21. Completed judicial actions in excess of jurisdiction can be challenged by a writ of review (certiorari). See §§15.27-15.38.

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B. Substantive Requirements

§15.15 1. Challenged Action Must Be Judicial

A writ of prohibition will lie only as to judicial acts. CCP §1102 (prohibition "arrests the proceedings of any tribunal… exercising judicial functions").

PRACTICE TIP: Because the definition of judicial action is the same for writs of prohibition and writs of review (certiorari), prohibition and review cases can be cited interchangeably on this point. See *Auto Equity Sales, Inc. v Superior Court* (1962) 57 C2d 450, 454, 20 CR 321; 8 Witkin, California Procedure, *Extraordinary Writs* §52 (5th ed 2008). To show that such citations are purposeful and knowledgeable, and not the result of carelessness, a petition should make clear that review cases are being cited in a prohibition proceeding because the issue of judicial action is the same in both contexts.

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§15.16 a. Most Court Action Is Judicial

Most court action is judicial. Therefore, the trial courts and courts of appeal are generally subject to prohibition. See, *e.g., Housing Auth. of the City of Eureka v Superior Court* (1950) 35 C2d 550, 556, 219 P2d 457, superseded by statute on other grounds (trial court's issuance of alternative writ of mandate and order to show cause were judicial acts subject to prohibition).

On the rare use of prohibition in the superior courts to restrain judicial action by a body other than a court, see §§4.5-4.8.

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§15.17 b. Ministerial Court Actions Do Not Qualify

Ministerial acts performed by a court or its officers do not qualify as judicial acts for purposes of prohibition. *Duke v Justice's Court* (1940) 42 CA2d 178, 179, 108 P2d 707. The character of the act, not of the actor, determines whether the challenged act is judicial. For example, hearing and deciding a motion or rendering a decision on the merits of a case, are judicial actions. However, issuing a writ of execution after entry of judgment is a ministerial act that prohibition cannot reach. *Duke v Justice's Court, supra*. Court clerks usually perform ministerial functions and therefore are not subject to prohibition. Mandate, rather than prohibition, is the proper vehicle for challenging or enforcing a ministerial act. See §§15.6-15.9.

PRACTICE TIP: If there is any doubt whether a threatened act is judicial or ministerial, the petitioner should alternatively pray for both prohibition and mandate. See §18.3.

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§15.18 2. Challenged Action Must Be Threatened But Not Completed

A writ of prohibition "arrests the proceedings." CCP §1102. Accordingly, it issues to enjoin only a threatened, but not completed, exercise of judicial power. *Aronoff v Franchise Tax Bd.* (1963) 60 C2d 177, 181, 32 CR 1; see *Melancon v Superior Court* (1954) 42 C2d 698, 704, 268 P2d 1050 (prohibition not available to challenge trial court's order granting plaintiff's motion to furnish security); *City of Santa Barbara v Superior Court* (1966) 240 CA2d 612, 614, 49 CR 798 (prohibition issued to prevent new trial when motion for new trial was invalid and order directing new trial was void).

PRACTICE TIP: Completed judicial actions must be challenged by way of a petition for a writ of review (certiorari). See *Duke v Justice's Court* (1940) 42 CA2d 178, 179, 108 P2d 707 (writ of review, not prohibition, was proper vehicle to challenge order granting motion to enforce judgment); *Chase v Superior Court* (1962) 210 CA2d 872, 878, 27 CR 383 (petition for writ of prohibition deemed one for review because trial court had already issued challenged order); *Lambert v Municipal Court* (1960) 179 CA2d 682, 3 CR 894 (prohibition not available to annul trial court's entry of judgment). On writs of review challenging completed judicial actions, see §§15.27-15.38.

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§15.19 a. Prohibition Does Not Restrain Merely Possible Action

Prohibition will not restrain judicial action that is merely possible. The petitioner must affirmatively show that the lower court has actually decided or ruled that it will take the challenged action. Compare *Lee v Superior Court* (1961) 196 CA2d 161, 163, 16 CR 268 (prohibition issued to restrain trial court from proceeding with new trial after court gave notice of pretrial procedures for retrial), and *Blache v Superior Court* (1939) 35 CA2d 740, 741, 96 P2d 970 (prohibition issued to arrest proceedings to hold petitioner in contempt for refusal to give deposition because, during oral argument, respondents indicated that they contemplated further action), with *Chodos v Superior Court* (1964) 226 CA2d 703, 714, 38 CR 301 (prohibition not available because trial court had not threatened to act to reset case for new trial).

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§15.20 b. Prohibition Can Restrain Continuing or Incomplete Judicial Action

If the challenged judicial action is continuing, such as when the court has granted an injunction whose effect continues into the future, the court's act is viewed as incomplete and prohibition may issue. For example, prohibition issued to:

- Restrain the trial court from further proceedings after the court sanctioned nonparty attorneys for their refusal to make discovery, except to recall a writ of execution. *Lund v Superior Court* (1964) 61 C2d 698, 715, 39 CR 891.
- Restrain the trial court from further proceedings after the court issued a temporary restraining order that was in excess of its jurisdiction. *City & County of San Francisco v Superior Court* (1959) 53 C2d 236, 244, 1 CR 158.
- Restrain the trial court from enforcing a preliminary injunction. *Evans v Superior Court* (1939) 14 C2d 563, 581, 96 P2d 107.

For further discussion of specific contexts in which appellate courts have issued writs of prohibition, see chap 16 and App A.

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§15.21 c. When Trial Court Completes Act Before Appellate Court Rules on Petition

If prohibition is an appropriate remedy when the writ is sought, but the lower court completes the challenged act before the appellate court rules on the petition, the appellate court may treat the proceeding as one for a writ of review (certiorari). *Chase v Superior Court* (1962) 210 CA2d 872, 878, 27 CR 383; *Wallace v Superior Court* (1956) 141 CA2d 771, 298 P2d 69, disapproved on other grounds in *Knoll v Davidson* (1974) 12 C3d 335, 343, 116 CR 97. On writs of review, see §§15.27-15.38. The appellate court may also treat the petition as one for a writ of mandate. *Miller v Superior Court* (1968) 69 C2d 14, 17, 69 CR 583 (parties stipulated to changing requested relief from prohibition to mandate in vacated opinion; trial court had signed and filed challenged order by time oral argument occurred).

PRACTICE TIP: If there is any doubt as to the appropriate remedy, counsel should request more than one type of writ. *Dresser v Superior Court* (1964) 231 CA2d 68, 74, 41 CR 473 (either mandate to compel dismissal or prohibition to prevent further proceedings was appropriate). See §18.3.

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§15.22 3. Jurisdictional Defect Must Exist

Prohibition is called a "jurisdictional" writ because it is not available to correct mere error or abuse of discretion, but is limited to restraining proceedings that are "without or in excess of" the jurisdiction of an inferior tribunal when no other adequate remedy is available. CCP §§1102-1103; *Running Fence Corp. v Superior Court* (1975) 51 CA3d 400, 432, 124 CR 339. Although most jurisdictional errors and defects are reviewable on appeal, thus generally precluding writ relief (see §§15.56-15.60), a writ of prohibition may still issue if the petitioner can show that an appeal is not an adequate remedy. See §15.61.

PRACTICE TIP: Because the substantive basis for a writ of prohibition—action in excess of jurisdiction—is the same as that for a writ of review (certiorari), cases involving prohibition and review may be cited interchangeably on this point. See *Auto Equity Sales, Inc. v Superior Court* (1962) 57 C2d 450, 454, 20 CR 321; 8 Witkin, California Procedure, *Extraordinary Writs* §52 (5th ed 2008). To show that such citations are purposeful and knowledgeable, and not the result of carelessness, a petition should make clear that review cases are being cited in a prohibition proceeding because the jurisdictional principles are the same.

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§15.23 a. Test for Determining Existence of Jurisdictional Defect

In a series of cases starting with *Abelleira v District Court of Appeal* (1941) 17 C2d 280, 109 P2d 942, the California Supreme Court established that the phrase "without or in excess of jurisdiction," as used in the context of a petition for a writ of prohibition, includes any act exceeding the power or competency of a court, board, or tribunal as defined by constitutional provisions, statutes, or judicially developed rules under the doctrine of stare decisis (17 C2d at 288):

> For the purpose of determining the right to… restraint by prohibition,… a much broader meaning [of jurisdiction] is recognized. Here it may be applied to a case where, though the court has jurisdiction over the subject matter and the parties in the fundamental sense, it has no "jurisdiction" (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites.

See also *Corona Unified Hosp. Dist. v Superior Court* (1964) 61 C2d 846, 852, 40 CR 745; *Auto Equity Sales, Inc. v Superior Court* (1962) 57 C2d 450, 454, 20 CR 321; *City & County of San Francisco v Superior Court* (1959) 53 C2d 236, 243, 1 CR 158; *The Rescue Army v Municipal Court* (1946) 28 C2d 460, 464, 171 P2d 8; *Redlands High Sch. Dist. v Superior Court* (1942) 20 C2d 348, 358, 125 P2d 490.

PRACTICE TIP: If there is any doubt whether the challenged trial court action is an erroneous exercise of the court's discretion (subject to mandate) or an act in excess of its jurisdiction (subject to prohibition), counsel should request issuance of a writ of mandate or prohibition. *Dresser v Superior Court* (1964) 231 CA2d 68, 74, 41 CR 473 (either mandate to compel dismissal or prohibition to prevent further proceedings was appropriate). See §18.3.

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§15.24 b. When Only Portion of Threatened Judicial Action Exceeds Court's Jurisdiction

When only a portion of a threatened judicial act exceeds the court's jurisdiction, prohibition is the appropriate remedy to restrain that portion. See *Wong v Superior Court* (1966) 246 CA2d 541, 550, 54 CR 782 (in divorce proceeding, writ of prohibition issued to restrain enforcement of portion of judgment requiring payment of attorney fees from community property); *American Radio Ass'n v Superior Court* (1965) 237 CA2d 891, 898, 47 CR 419 (writ of prohibition issued solely against injunction banning picketing, not against all further proceedings).

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§15.25 C. Seek Relief in Trial Court First

An appellate court will not presume that a lower court would erroneously overrule a valid objection to its jurisdiction. Therefore, a party challenging a trial court's action as beyond its jurisdiction should always raise a jurisdictional challenge in the trial court before seeking writ relief from the court of appeal. See *Huson v Superior Court* (1963) 220 CA2d 140, 142, 33 CR 568 (prohibition not available because record did not show that trial court arbitrarily refused to comply with mandatory dismissal statute); *MacFarland v Superior Court* (1934) 3 CA2d 173, 176, 38 P2d 800 (prohibition not available because petitioner failed to first attempt to intervene in trial court action and object to lower court's jurisdiction).

On the general requirement that a petitioner seeking writ relief from an appellate court first raise the issue in the trial court, see §15.68.

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§15.26 D. Examples of Threatened Judicial Acts in Excess of Jurisdiction

A court may exceed its jurisdiction for purposes of a writ of prohibition (or a writ of review (certiorari); see §§15.27-15.38) if it attempts to:

- Proceed after the defendant fails to answer or demur and the plaintiff has requested a default judgment. *W. A. Rose Co. v Municipal Court* (1959) 176 CA2d 67, 73, 1 CR 49.
- Deny a trial by jury if a jury has been timely requested. *Turlock Golf & Country Club v Superior Court* (1966) 240 CA2d 693, 695, 50 CR 70.
- Enforce a judgment or order that is void (*De Luca v Superior Court* (1968) 262 CA2d 254, 255, 68 CR 535; *Maben v Superior Court* (1967) 255 CA2d 708, 712, 63 CR 439; *Cubalevic v Superior Court* (1966) 240 CA2d 557, 563, 49 CR 698) or partially void (*Wong v Superior Court* (1966) 246 CA2d 541, 550, 54 CR 782).
- Try an action or make an order that is barred by a jurisdictional time limit, such as an order for new trial (see CCP §660; *City of Santa Barbara v Superior Court* (1966) 240 CA2d 612, 615, 49 CR 798 (motion premature; thus, order granting new trial void)) or a mandatory dismissal statute (see CCP §§583.110-583.160; *Dresser v Superior Court* (1964) 231 CA2d 68, 74, 41 CR 473 (either mandate to compel dismissal or prohibition to prevent further proceedings appropriate); *Mass v Superior Court* (1961) 197 CA2d 430, 433, 17 CR 549)). But see *General Motors Corp. v Superior Court* (1966) 65 C2d 88, 96, 52 CR 460 (if judicially implied exception to time period exists, prohibition will be denied).
- Award costs not provided by statute, entertain an action without requiring the posting of security for costs when such security is prescribed by statute, or dismiss an action for failure to comply with a statutory security provision when the provision does not apply. *Hagan v Superior Court* (1960) 53 C2d 498, 502, 2 CR 288.
- Enjoin the enactment or enforcement of a valid public statute or ordinance (*Crittenden v Superior Court* (1964) 61 C2d 565, 567, 39 CR 380; *City of Los Angeles v Superior Court* (1959) 51 C2d 423, 430, 333 P2d 745; *City of Santa Monica v Superior Court* (1964) 231 CA2d 223, 227, 41 CR 824) or enjoin the functioning of another branch of government (*Santa Clara County v Superior Court* (1949) 33 C2d 552, 559, 203 P2d 1; *Alden v Superior Court* (1963) 212 CA2d 764, 768, 28 CR 387).
- Obviate court-developed law and the doctrine of stare decisis. *Auto Equity Sales, Inc. v Superior Court* (1962) 57 C2d 450, 455, 20 CR 321; *Abelleira v District Court of Appeal* (1941) 17 C2d 280, 288, 109 P2d 942.

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IV. WRIT OF REVIEW (CERTIORARI)

§15.27 A. Description and Purpose

A writ of review (also called a writ of certiorari; see CCP §1067) issues to review a completed judicial action allegedly taken without or in excess of jurisdiction, when there is no right of appeal and no other adequate remedy. CCP §§1068(a), 1074; *Auto Equity Sales, Inc. v Superior Court* (1962) 57 C2d 450, 454, 20 CR 321. On the rare use of writs of review in the superior courts to restrain judicial action by a body other than a court, see §§4.13-4.15.

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§15.28 B. Writ Brings Up Record From Lower Court

Unlike a writ of mandate or prohibition, a writ of review (certiorari) merely orders the tribunal to which the writ is directed (*e.g.,* the trial court) to certify or return to the reviewing court a record of the proceedings below and to desist from further proceedings in the matter under review. CCP §§1070-1071; *Rondon v Alcoholic Beverage Control Appeals Bd.* (2007) 151 CA4th 1274, 1286, 60 CR3d 295.

NOTE: When the superior court appellate division grants a writ of review in a limited civil case directed to the superior court, the superior court is an inferior tribunal for the purposes of review. CCP §1068(b). On writ petitions in limited civil cases, see chap 12.

After issuing the writ, the appellate court reviews the record and enters a judgment affirming, annulling, or modifying the proceedings below. CCP §1075. That judgment, rather than the writ, is the ultimate relief sought.

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C. Substantive Requirements for Writ of Review (Certiorari)

§15.29 1. Act to Be Reviewed Must Be Judicial

Like a writ of prohibition, a writ of review (certiorari) lies only as to judicial action. Whether an action is judicial depends on the "character of the act or determination sought to be reviewed, rather than of the tribunal or officer by which the act or determination is made." *Quinchard v Board of Trustees of Alameda* (1896) 113 C 664, 668, 45 P 856.

PRACTICE TIP: Because the definition of judicial action is the same for writs of review and prohibition, review and prohibition cases can be cited interchangeably on this point. See *Auto Equity Sales, Inc. v Superior Court* (1962) 57 C2d 450, 454, 20 CR 321; 8 Witkin, California Procedure, *Extraordinary Writs* §52 (5th ed 2008). To show that such citations are purposeful and knowledgeable, and not the result of carelessness, a petition should make clear that prohibition cases are being cited in a review case because the issue of judicial action is the same in both contexts.

For further discussion of what constitutes judicial action, see §§15.15-15.17.

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§15.30 2. Judicial Act Must Be Completed

Only completed judicial acts are subject to a writ of review (certiorari). See CCP §§1067-1068; Comment, *Appellate Review in California with the Extraordinary Writs*, 36 Cal L Rev 75, 79 (March 1948) (writ of review is historical predecessor to general appellate review, surviving with only limited function of jurisdictional review). This contrasts with writs of prohibition, which reach threatened judicial action. See 8 Witkin, California Procedure, *Extraordinary Writs* §40 (5th ed 2008). See also §§15.18-15.21.

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§15.31 3. Act Must Be in Excess of Court's Jurisdiction

Like a writ of prohibition, a writ of review (certiorari) is a "jurisdictional" writ and issues to restrain or correct completed judicial action in excess of the lower court's jurisdiction. CCP §§1068(a), 1074; see *Howard v Superior Court* (1944) 25 C2d 784, 788, 154 P2d 849 (writ of review was unavailable to challenge trial court's order vacating fee award; even if trial court acted without sufficient grounds, that was error in exercise of its jurisdiction, not action in excess of its jurisdiction); *Redlands High Sch. Dist. v Superior Court* (1942) 20 C2d 348, 360, 125 P2d 490 (writ of review was unavailable to challenge trial court's allowance of case to proceed when plaintiffs failed to file verified claim; action was legal error, but not in excess of court's jurisdiction).

The test for determining whether a lower court exceeded its jurisdiction for purposes of a writ of review is the same as the test for determining whether a lower court has threatened to act in excess of its jurisdiction for purposes of a writ of prohibition (CCP §1102). See §§15.22-15.24.

PRACTICE TIP: Because the basis for a writ of review—action in excess of jurisdiction—is the same as that for a writ of prohibition, cases involving review and prohibition may be cited interchangeably on this point. See *Auto Equity Sales, Inc. v Superior Court* (1962) 57 C2d 450, 454, 20 CR 321; 8 Witkin, California Procedure, *Extraordinary Writs* §52 (5th ed 2008). To show that such citations are purposeful and knowledgeable, and not the result of carelessness, a petition should make clear that prohibition cases are being cited in a review case because the jurisdictional principles are the same.

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§15.32 4. No Right of Appeal

A writ of review (certiorari) will issue only when there is no right of appeal from the challenged action of the lower tribunal, board, or officer. CCP §1068(a); *Ivory v Superior Court* (1938) 12 C2d 455, 459, 85 P2d 894; *Stoner v Superior Court* (1945) 67 CA2d 760, 762, 155 P2d 697.

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§15.33 a. Requirement Strictly Applied

The requirement that there be no right of appeal from the challenged action is not limited to a right of immediate appeal. If the complained-of judicial action can be challenged on appeal from a final judgment, a writ of review (certiorari) will not issue. See *Howard v Superior Court* (1944) 25 C2d 784, 787, 154 P2d 849 (writ of review would not issue to review trial court order vacating allowance of attorney fees because "the matter will be reviewable upon an appeal from a subsequent order"); *Bank of Am. Nat'l Trust & Sav. Ass'n v Superior Court* (1942) 20 C2d 697, 703, 128 P2d 357 (writ of review would not issue because order allowing plaintiffs to amend complaint was reviewable on appeal from the final judgment; review will not lie "if the effect of the order sought to be annulled can be reviewed and nullified on an appeal from the final judgment even though the order itself is not appealable").

Nor is a writ of review available when a right to appeal existed but was lost through the aggrieved party's neglect. *Simmons v Superior Court* (1959) 52 C2d 373, 375, 341 P2d 13; *Goble v Municipal Court* (1956) 138 CA2d 725, 726, 292 P2d 585.

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§15.34 b. Requirement Applies Even if Appeal Is Not Speedy or Adequate Remedy

If a right of appeal exists, a writ of review (certiorari) is not available even if an appeal fails to provide a plain, speedy, or adequate remedy. See *State Bd. of Equalization v Superior Court* (1937) 9 C2d 252, 255, 70 P2d 482; *Monterey Club v Superior Court* (1941) 44 CA2d 351, 355, 112 P2d 321; *Hughson v Superior Court* (1932) 120 CA 658, 659, 8 P2d 227.

NOTE: This is in contrast with writs of mandate and prohibition, both of which are available when an appeal is available but is not an adequate remedy. See CCP §§1086, 1103(a).

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§15.35 c. Remote Appeal May Justify Writ

That there is a right of appeal from a related ruling or order may not foreclose issuance of a writ of review (certiorari). In *Estate of Bodger* (1954) 128 CA2d 710, 276 P2d 83, the court of appeal held that the trial court exceeded its jurisdiction in appointing an unwanted attorney for the petitioner. The respondent argued that a writ of review was unavailable because the petitioner could appeal from the court's later order granting attorney fees. Dismissing this proposed remedy as "obscure" and "tenuous," the court of appeal annulled the appointment order. 128 CA2d at 715; see also *Howard v Superior Court* (1944) 25 C2d 784, 787, 154 P2d 849 ("there may be situations in which an appeal from a subsequent order or from the final judgment may not be an adequate remedy").

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§15.36 d. Exception When Right to Appeal Lost Through No Fault of Petitioner

The courts have created a very limited exception to the no-right-to-appeal requirement when the opportunity to appeal is lost through no fault of the aggrieved party because of lack of knowledge or notice of the proceedings or of the entry of judgment. See *Grinbaum v Superior Court* (1923) 192 C 528, 556, 221 P 635 (court of appeal annulled trial court order adjudging nonresident petitioner incompetent and appointing guardian of her estate on ground that she had no notice of proceedings).

PRACTICE TIP: This is an extremely limited exception and not one on which parties should rely. In *Simmons v Superior Court* (1959) 52 C2d 373, 377, 341 P2d 13, the petitioner sought to have an order dismissing his action annulled because he failed to file an amended complaint after the defendant's demurrer was sustained and the time to appeal from the subsequent dismissal had expired. The petitioner was present at the hearing, but did not receive notice of the court's ruling. The supreme court denied relief because the petitioner could easily have learned of the ruling; his lack of knowledge resulted solely from his failure to stay informed as to the status of the case. See also *Arens v Superior Court* (1955) 45 C2d 623, 625, 290 P2d 257 (relief denied to petitioner who claimed lack of notice of probate order because statute did not require actual notice).

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D. Examples of Completed Judicial Action Subject to Writ of Review (Certiorari)

§15.37 1. Rulings in Contempt Proceedings

Because most judgments are appealable and most orders can be challenged on appeal after entry of a final judgment, the major use of the writ of review (certiorari) in California today is to review contempt proceedings, because judgments and orders in those proceedings are not appealable. CCP §§904.1(a)(1)(B), 1222; *Moffat v Moffat* (1980) 27 C3d 645, 656, 165 CR 877; see also 8 Witkin, California Procedure, *Extraordinary Writs* §35 (5th ed 2008). For a detailed discussion of contempt, see California Trial Objections, chap 57 (Cal CEB Annual); California Trial Practice: Civil Procedure During Trial §§16.99-16.129 (3d ed Cal CEB 1995); California Criminal Law Procedure and Practice, chap 58 (Cal CEB Annual). See also §§16.130-16.142.

If the petitioner has been incarcerated for contempt, the proper procedure is a petition for writ of habeas corpus. See *In re Buckley* (1973) 10 C3d 237, 240 n1, 110 CR 121; see also *Fine v Superior Court* (2002) 97 CA4th 651, 661 n4, 119 CR2d 376 (because jail sentence for contempt was stayed pending writ review, court treated writ "as one for certiorari").

PRACTICE TIP: It is permissible to alternatively request review or habeas relief. "A writ of habeas corpus or in the alternative a writ of certiorari is properly invoked where… a petitioner seeks to annul an order adjudging him in direct contempt of court." *Fine*, 97 CA4th at 661 n4; *Davidson v Superior Court* (1999) 70 CA4th 514, 522, 82 CR2d 739.

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§15.38 2. Other Judicial Actions

There are very few judicial actions (besides rulings in contempt proceedings; see §15.37) subject to review by writ of review (certiorari):

- Certain nonappealable probate and guardianship orders. See §§16.143-16.144.
- Public Utility Commission (PUC) rulings. See *Hillsboro Props. v Public Utils. Comm'n* (2003) 108 CA4th 246, 254, 133 CR2d 343 (discussing scope of review); *Pacific Bell v Public Utils. Comm'n* (2000) 79 CA4th 269, 280, 93 CR2d 910. See §§16.33-16.45.
- Certain orders for immediate possession of disputed premises in a condemnation proceeding. *County of Marin v Superior Court* (1960) 53 C2d 633, 636, 2 CR 758.
- Orders extending time to plead beyond the period authorized by CCP §1054. *Thelander v Superior Court* (1962) 58 C2d 811, 813 n3, 26 CR 643; *Baker v Superior Court* (1887) 71 C 583, 12 P 685.
- Orders denying exceptions to a court reporter's charge for preparing a transcript on appeal. *Summers v Superior Court* (1959) 53 C2d 295, 297, 1 CR 324.

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V. OTHER WRITS

A. Habeas Corpus

1. Description and Purpose

§15.39 a. Inquires Into Cause of Imprisonment or Restraint

The writ of habeas corpus permits a person who is unlawfully imprisoned or restrained to challenge the lawfulness of the imprisonment or restraint. Pen C §1473(a). Habeas corpus is also available to challenge aspects of constructive restraint such as bail, parole, probation, and release on recognizance, because such restraints can lead to incarceration. *People v Villa* (2009) 45 C4th 1063, 1069, 90 CR3d 344; *In re Catalano* (1981) 29 C3d 1, 8, 171 CR 667; *In re Paul W.* (2007) 151 CA4th 37, 53, 60 CR3d 329.

For a comprehensive discussion of the procedures in habeas corpus proceedings in trial and reviewing courts, see Appeals and Writs in Criminal Cases, chap 10 (3d ed Cal CEB 2007).

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§15.40 b. Used Mostly in Criminal Context

Although habeas corpus is not itself a criminal proceeding (Part II, Title XII of the Penal Code classifies habeas corpus as a "special proceeding of a criminal nature"), it is most commonly used by those charged with, or convicted of, criminal offenses. If a person "is not in prison or on probation or parole or otherwise in constructive custody, the remedy of habeas corpus is not available to him—and it is immaterial that lingering noncustodial collateral consequences are still attached to his conviction." *Mendez v Superior Court* (2001) 87 CA4th 791, 796, 104 CR2d 839. See *In re Stier* (2007) 152 CA4th 63, 82, 61 CR3d 181 (habeas corpus not available to litigate requirement that petitioner register as sex offender, even though registration could lead to loss of medical license and failure to register could lead to imprisonment).

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2. Uses in Civil Proceedings

§15.41 a. Civil Contempt

A person wrongfully imprisoned for contempt may seek review of the contempt judgment or order by a writ of review (certiorari) or a writ of habeas corpus. *In re Buckley* (1973) 10 C3d 237, 240 n1, 110 CR 121. See *Fine v Superior Court* (2002) 97 CA4th 651, 661 n4, 119 CR2d 376 (writ of habeas corpus or, alternatively, writ of review (certiorari) "is properly invoked where… a petitioner seeks to annul an order adjudging him in direct contempt of court"). For further discussion of writ proceedings challenging contempt orders, see §§16.130-16.142.

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§15.42 b. Child Custody

Habeas corpus is available in certain child custody matters. *In re Paul W.* (2007) 151 CA4th 37, 53, 60 CR3d 329. For a detailed discussion, see §§4.18-4.20.

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§15.43 c. Civil Commitment

Habeas corpus can be used to challenge commitment to a psychiatric facility. *In re Lois M.* (1989) 214 CA3d 1036, 1038, 263 CR 100; *In re Azzarella* (1989) 207 CA3d 1240, 1244, 254 CR 922. For a detailed discussion, see §§4.21-4.25.

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B. Coram Nobis and Coram Vobis

1. Description and Purpose

§15.44 a. Correct Errors of Fact

Coram nobis and coram vobis are writs of error used to obtain relief from errors of fact that are unrecognized before final disposition of the action—*i.e.*, the errors are not reflected in the trial record and could not have been considered at trial or during appeal—but which point unerringly to the conclusion the judgment should be reversed. *People v Kim* (2009) 45 C4th 1078, 1091, 90 CR3d 355; *In re Derek W.* (1999) 73 CA4th 828, 831, 86 CR2d 742. These writs are not a means of revising or reversing findings based on known facts, or facts that should have been known by the exercise of ordinary and reasonable diligence. *In re Derek W., supra*.

The writs are essentially identical, except that a petition for writ of coram nobis is addressed to the trial court and a petition for writ of coram vobis is addressed to the appellate court. *Betz v Pankow* (1993) 16 CA4th 931, 941, 20 CR2d 841 (when evidence of extrinsic fraud is discovered during pendency of appeal, "an appellate court can issue a writ of error *coram vobis* commanding the trial court to reconsider its decision in light of the newly discovered evidence"). Once a notice of appeal has been filed, the superior court loses jurisdiction and an application for a writ of error (in the form of a petition for a writ of coram vobis) must be made to the appellate court. See *People v Brady* (1973) 30 CA3d 81, 83, 105 CR 280.

For a comprehensive discussion of coram nobis, see Prickett, *The Writ of Error Coram Nobis in California*, 30 Santa Clara L Rev 1 (1990). On coram nobis and coram vobis in criminal cases, see Appeals and Writs in Criminal Cases, chap 11 (3d ed Cal CEB 2007).

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§15.45 b. Case Law Governs

The only statutory recognition of these writs is a brief reference to the writ of error coram nobis in Pen C §1265, which provides that, once a judgment has been affirmed on appeal, a party can bring a petition for a writ of error coram nobis to vacate the judgment only in the court that affirmed it. Thus, case law governs most aspects of these writs.

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§15.46 c. Used Mostly in Criminal Cases

The writs of coram nobis and coram vobis are very rare in civil matters and are used almost exclusively in criminal cases. One civil use of coram vobis might be to obtain relief in a marital dissolution case in which a spouse concealed assets and effectively obtained a judgment by fraud. On the use of coram nobis and coram vobis in civil cases, see §15.48. On the use of coram nobis and coram vobis in criminal cases, see Appeals and Writs in Criminal Cases, chap 11 (3d ed Cal CEB 2007).

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§15.47 2. Requirements for Issuance

The court will issue a writ of error coram nobis or coram vobis only when the petitioner shows that (*Los Angeles Airways, Inc. v Hughes Tool Co.* (1979) 95 CA3d 1, 8, 156 CR 805):

- Some fact existed that, not owing to any fault or negligence by the petitioner, was not presented to the court at the trial on the merits, and that if the fact had been presented, it would have prevented rendition of the judgment;
- The newly discovered evidence does not go to the merits of the issues tried; and
- The newly discovered evidence was unknown to him or her and could not in the exercise of reasonable diligence have been discovered at any time substantially earlier than the time of making the writ petition.

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§15.48 3. Availability in Civil Cases

Even though coram nobis or coram vobis are available to vacate a judgment based on newly discovered evidence after the time to move for a new trial has expired, a court is unlikely to grant the writ unless the petitioner can make an exceptionally strong showing of injustice. See *People v Gallardo* (2000) 77 CA4th 971, 982, 92 CR2d 161 (noting that terms "motion to vacate" and "petition for writ of error coram nobis" are often used interchangeably, but courts have applied more precise rules to appeals from denials of coram nobis petitions). Some courts hold that the writ is available only if the omissions from the trial record were attributable to extrinsic fraud. See *Philippine Export & Foreign Loan Guarantee Corp. v Chuidian* (1990) 218 CA3d 1058, 1090, 267 CR 457; *Los Angeles Airways, Inc. v Hughes Tool Co.* (1979) 95 CA3d 1, 9, 156 CR 805.

The court considered coram nobis and coram vobis in the following civil cases:

- The court of appeal refused to treat as a petition for a writ of error coram vobis defendant's motion under CCP §909 to take new evidence of attorney fraud; under CCP §1008(b), defendant could renew, based on new facts, his earlier CCP §473 motion. *Monsan Homes, Inc. v Pogrebneak* (1989) 210 CA3d 826, 831, 258 CR 676.
- After entry of judgment for defendant, the trial court denied plaintiff's motion for a new trial; while plaintiff's appeal was pending, plaintiff discovered documents that had not been produced during discovery and asked the appellate court for an order directing the trial court to reconsider its denial of a new trial; the court of appeal denied the request, holding that an aggrieved party can obtain relief by coram vobis only if there has been extrinsic fraud, *i.e.,* if the party has been entirely prevented from obtaining hearing. *Los Angeles Airways, Inc. v Hughes Tool Co.* (1979) 95 CA3d 1, 8, 156 CR 805. But see *Rollins v City & County of San Francisco* (1974) 37 CA3d 145, 149, 112 CR 168 (court allowed introduction of addendum to autopsy report that had not been produced with decedent's medical records without requiring showing of extrinsic fraud because justice demanded relief; court treated motion as petition for writ of error coram vobis).
- The trial court granted respondent's petition for a writ of error coram nobis and vacated its judgment dismissing respondent's cause of action; the court of appeal reversed on the grounds that respondent had not exercised due diligence in discovering his new evidence and that he could not state a cause of action even with the new evidence. *Page v Insurance Co. of N. Am.* (1969) 3 CA3d 121, 128, 83 CR 44.
- The court of appeal stated that a writ of error coram nobis could be used following judgment in a civil proceeding, but affirmed the trial court's denial of relief in this case. *In re Dyer* (1948) 85 CA2d 394, 400, 193 P2d 69.

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§15.49 C. Writ of Supersedeas

A writ of supersedeas is a procedural tool that may be used to secure a stay on appeal. Thus, it is unlike the other writs discussed in this chapter, which are original proceedings. By its nature, supersedeas is always ancillary to a pending appeal and suspends the trial court's power to act on an appealed order or judgment until the appeal has run its course. CCP §923; Cal Rules of Ct 8.112(a)(1); *People ex rel San Francisco Bay Conserv. & Dev. Comm'n v Town of Emeryville* (1968) 69 C2d 533, 538, 72 CR 790 (courts have inherent power to preserve their own jurisdiction by issuing writs of supersedeas). For a detailed discussion of supersedeas, see chap 26; California Civil Appellate Practice §§6.68-6.85 (3d ed Cal CEB 1996).

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§15.50 D. Quo Warranto

In California, the writ of quo warranto no longer exists, although a statutory action, identical in purpose and effect to quo warranto, was established in 1872. CCP §§803-811. For a detailed discussion, see §4.27.

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VI. BASIC REQUIREMENTS FOR WRIT RELIEF

A. Petitioner Must Have Beneficial Interest

§15.51 1. "Beneficial Interest" Defined

A party seeking writ relief in an appellate court must have a beneficial interest in the outcome of the proceeding. CCP §§1069, 1086, 1103(a). The beneficial interest requirement is essentially a standing requirement—only a person who is affected both practically and legally by the challenged order or ruling has standing to seek extraordinary relief by way of prerogative writ. See *Sonoma County Nuclear Free Zone '86 v Superior Court* (1987) 189 CA3d 167, 175, 234 CR 357 (beneficially interested party is one who "has some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large").

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§15.52 2. Party Aggrieved by Trial Court Ruling Has Beneficial Interest

Most appellate court writ proceedings challenge trial court rulings in ongoing proceedings. Thus, the beneficial interest requirement is usually readily met because the party seeking writ relief is a party to the trial court proceedings and directly affected by the lower court's ruling. See *Ra v Superior Court* (2007) 154 CA4th 142, 147 n4, 64 CR3d 539 (ruling on one plaintiff's cause of action affected cause of action asserted by other plaintiff, so latter had beneficial interest in outcome and could seek writ relief); *Daro v Superior Court* (2007) 151 CA4th 1079, 1092, 61 CR3d 716 (ruling directed to co-defendant's property affected other defendants, so latter had beneficial interest in outcome and could seek writ relief).

NOTE: Because the beneficial interest requirement is so easily met, many courts of appeal never even mention the requirement in denying or granting a writ petition challenging an order or ruling by a trial court. See, *e.g.*, *Henry v Superior Court* (2008) 160 CA4th 440, 72 CR3d 808 (no discussion); *California Pub. Employees' Retirement Sys. v Superior Court* (2008) 160 CA4th 174, 72 CR3d 561 (same); *Zevnik v Superior Court* (2008) 159 CA4th 76, 70 CR3d 817 (same); *Snyder v Superior Court* (2007) 157 CA4th 1530, 69 CR3d 600 (same). This does not mean that the petition need not allege a beneficial interest in the challenged ruling; on the contrary, a petition must include this allegation. See §18.28.

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§15.53 3. Petitioner Need Not Be Party to Underlying Action

An individual or entity who is not a party to the trial court proceedings can have a beneficial interest in the outcome of those proceedings and seek writ relief in the court of appeal. A nonparty may seek writ relief if he or she is "directly and prejudicially affected" by the trial court's challenged order or ruling. *Burlingame v Justice's Court of the City of Berkeley* (1934) 1 C2d 71, 75, 33 P2d 669; see *Ombudsman Servs. of N. Cal. v Superior Court* (2007) 154 CA4th 1233, 1239, 65 CR3d 456 (nonparty successfully petitioned for writ of mandate compelling trial court to vacate order requiring production of records); *Seven Up Bottling Co. v Superior Court* (1951) 107 CA2d 75, 76, 236 P2d 623 (nonparty sought writ of prohibition following trial court's denial of nonparty's motion to quash service of subpoena and subpoena duces tecum); *Monterey Club v Superior Court* (1941) 48 CA2d 131, 143, 119 P2d 349 (nonparty obtained writ to prohibit trial court from enjoining alleged gambling operations; petitioner was private club where alleged gambling occurred, but was not party to trial court proceeding).

JUDICIAL PERSPECTIVE: A nonparty petitioner should explain in the petition why it did not first seek relief from the trial court.

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§15.54 4. When Petitioner Challenges Nonjudicial Action in Court of Appeal

In rare instances, an original writ proceeding challenging nonjudicial action (*e.g.,* action taken by a governmental body or private entity) may be filed in the court of appeal in the first instance, bypassing the superior court. See §§16.18-16.48. In such cases, whether the petitioner has a beneficial interest in the proceedings may be a more nuanced inquiry, analogous to the inquiry that would be made if the proceeding had been brought in the superior court. On the beneficial interest of a petitioner in a superior court writ proceeding, see §§2.12-2.14.

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§15.55 5. Trial Court Usually Not Beneficially Interested

The trial court, although named as the respondent, is usually a neutral party with no beneficial interest in the outcome of the case, even though its ruling is being challenged in the writ proceeding. *Solberg v Superior Court* (1977) 19 C3d 182, 189, 137 CR 460; see also *Curle v Superior Court* (2001) 24 C4th 1057, 1064, 103 CR2d 751 (trial judge does not have standing to initiate writ proceeding to challenge disqualification order). "This is true even where the subject matter of the [writ] proceeding is a ruling which significantly affects the operations of the petitioning court." *Municipal Court v Superior Court* (1993) 5 C4th 1126, 1129, 22 CR2d 504. See also *Municipal Court v Superior Court* (1988) 202 CA3d 957, 961, 249 CR 182 (municipal court could not seek writ challenging procedures employed for peremptory challenges). On the designation of parties, see §18.18.

NOTE: An individual trial judge might be a beneficially interested party if he or she was personally named as a party in the proceedings below.

JUDICIAL PERSPECTIVE: Whether or not deemed beneficially interested, the trial court can have county counsel file opposition if the petition attacks the court's procedure or if the court is otherwise interested in the outcome. See *People v Superior Court (Williams)* (1992) 8 CA4th 688, 695, 10 CR2d 873 (in writ proceeding challenging denial of peremptory challenge, court filed opposition to writ and response to supplemental briefing). But see *Ng v Superior Court* (1997) 52 CA4th 1010, 1019, 61 CR2d 49 (striking trial judge's return to writ petition; trial judge had no standing to defend ruling on criminal defendant's substitution of counsel because issue did not affect court's operating procedures or budget), overruled on other grounds in *Curle v Superior Court* (2001) 24 C4th 1057, 1069 n6, 103 CR2d 751.

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B. Petitioner Must Have No Other Adequate Remedy

§15.56 1. Appeal Is Usually Adequate Remedy

"To obtain writ review, a petitioner generally must show his or her remedy in the ordinary course of law is inadequate or that petitioner would suffer irreparable injury were the writ not granted." *Interinsurance Exch. of the Automobile Club v Superior Court* (2007) 148 CA4th 1218, 1225, 56 CR3d 421. See *County of Sonoma v Superior Court* (2009) 173 CA4th 322, 336 n6, 93 CR3d 39 (case involved novel, significant constitutional question that generated conflicting trial court decisions, and petitioner lacked adequate remedy at law and would suffer irreparable harm absent writ review). Generally the right of appeal is considered an adequate remedy. *Kawasaki Motors Corp. v Superior Court* (2000) 85 CA4th 200, 205, 101 CR2d 863. However, even when there is a right of appeal, there are considerations that may weigh in favor of immediate appellate review. See, *e.g.*, *CashCall, Inc. v Superior Court* (2008) 159 CA4th 273, 285 n6, 71 CR3d 441 (rejecting adequate remedy on appeal argument "because the petition raises a question of first impression"). On specific contexts in which the appellate courts have issued writs of mandate, see chap 16 and App A.

NOTE: When the other factors justifying writ review are present (see §§15.51-15.55, 15.61-15.71), the courts of appeal often do not specifically discuss whether the petitioner lacks an adequate legal remedy. See, *e.g.*, *Henry v Superior Court* (2008) 160 CA4th 440, 72 CR3d 808 (no discussion); *California Pub. Employees' Retirement Sys. v Superior Court* (2008) 160 CA4th 174, 72 CR3d 561 (same); *Zevnik v Superior Court* (2008) 159 CA4th 76, 70 CR3d 817 (same); *Heritage Provider Network, Inc. v Superior Court* (2008) 158 CA4th 1146, 70 CR3d 645 (same); *Bell v Superior Court* (2007) 158 CA4th 147, 69 CR3d 328 (same); *Snyder v Superior Court* (2007) 157 CA4th 1530, 69 CR3d 600 (same). This does not mean that the petition need not allege lack of an adequate legal remedy; on the contrary, this is a required allegation. See §18.34.

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§15.57 a. Appealable Interlocutory Orders and Judgments

Some interlocutory orders and judgments are immediately appealable. See CCP §§904.1-904.2. The right of immediate appeal will generally be deemed an adequate remedy, foreclosing mandate and prohibition absent extraordinary circumstances. See CCP §§1086, 1103(a); *Marriage of Skelley* (1976) 18 C3d 365, 369, 134 CR 197 (interlocutory order reducing temporary spousal support was immediately appealable, thus foreclosing writ review). There may be cases, however, in which even an immediate appeal from an interlocutory order may not be an adequate remedy. For example, although an order granting or denying a motion to disqualify an adversary's attorney is appealable, the reviewing court may deem an appeal to be an inadequate remedy, because it is not as expeditious as a writ proceeding and because the right to counsel is involved. See §16.102.

In the case of writs of review (certiorari), the existence of a right to appeal wholly forecloses writ relief because the absence of a right of appeal is a substantive requirement for issuance of the writ. CCP §1068(a). For discussion, see §§15.32-15.36.

On determining whether an interlocutory order or judgment is appealable, see California Civil Appellate Practice, chap 3 (3d ed Cal CEB 1996).

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§15.58 b. Appeal From Final Judgment

Most rulings made during trial court proceedings can be reviewed on appeal after entry of final judgment. See CCP §§904.1-904.2. Accordingly, this right of appeal will usually be deemed an adequate remedy, foreclosing mandamus and prohibition. See *Omaha Indem. Co. v Superior Court* (1989) 209 CA3d 1266, 1273, 258 CR 66.

In the case of writs of review (certiorari), the existence of a right to appeal wholly forecloses writ relief because the absence of a right of appeal is a substantive requirement for issuance of the writ. CCP §1068(a); see §§15.32-15.36.

CAUTION: Appeal does not become an inadequate remedy merely because a party fails to file a timely notice of appeal. *Phelan v Superior Court* (1950) 35 C2d 363, 370, 217 P2d 951; see *Annette F. v Sharon S.* (2005) 130 CA4th 1448, 1459, 30 CR3d 914 (untimely appeal not construed as petition for writ relief). Courts have permitted a party to seek relief by way of writ petition after the time to appeal has expired only in extremely limited circumstances, such as when the trial court has acted in excess of its jurisdiction or when fundamental constitutional rights have been violated. See *Mauro B. v Superior Court* (1991) 230 CA3d 949, 954, 281 CR 507 (listing cases in which exceptions have been permitted). But see *In re Meranda P.* (1997) 56 CA4th 1143, 1164, 65 CR2d 913 (disagreeing with *Mauro B.*'s approval of allowing party to seek writ relief after time to appeal has expired).

On determining when a judgment is final and appealable, see California Civil Appellate Practice, chap 3 (3d ed Cal CEB 1996).

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§15.59 c. If Writ Proceeding Is Exclusive Means of Appellate Review

In extremely limited circumstances, a writ proceeding is the exclusive means of obtaining appellate review of an order or judgment. See §§16.2-16.48. In such cases, the appellate court may not deny an apparently meritorious writ petition merely because the petition presents no important issue or because the reviewing court considers the case less worthy of its attention than other pending matters. *Powers v City of Richmond* (1995) 10 C4th 85, 114, 40 CR2d 839 (because writ relief is exclusive means of appellate review under Public Records Act, appellate court's refusal to entertain otherwise meritorious writ petition would likely constitute abuse of discretion); *PG&E Corp. v PUC* (2004) 118 CA4th 1174, 1193, 13 CR3d 630 (when petition for review "apparently" had merit, court could not summarily deny it merely because it presented no "important" issues).

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§15.60 2. Petitioner's Burden to Show Inadequacy of Other Remedies

The petitioner must allege and explain why no other remedy is available or, if another remedy is available, why it is inadequate. See *Phelan v Superior Court* (1950) 35 C2d 363, 366, 217 P2d 951; *Hogya v Superior Court* (1977) 75 CA3d 122, 128, 142 CR 325. On drafting the no-other-remedy allegations of an appellate court writ petition, see §18.34.

NOTE: Even though a petitioner must include these allegations in the writ petition, the courts of appeal often do not specifically address the no-other-adequate-relief requirement. See, *e.g.*, *Henry v Superior Court* (2008) 160 CA4th 440, 72 CR3d 808 (no discussion); *California Pub. Employees' Retirement Sys. v Superior Court* (2008) 160 CA4th 174, 72 CR3d 561 (same); *Snyder v Superior Court* (2007) 157 CA4th 1530, 69 CR3d 600 (same).

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§15.61 C. Petitioner Must Face Irreparable Injury

A petitioner must show that he or she will suffer irreparable injury if the appellate court fails to immediately intervene. See *County of Sonoma v Superior Court* (2009) 173 CA4th 322, 336 n6, 93 CR3d 39 (under circumstances of case, petitioner "lacks an adequate remedy at law and would suffer irreparable harm absent writ review"); *Interinsurance Exch. of the Automobile Club v Superior Court* (2007) 148 CA4th 1218, 1225, 56 CR3d 421 (to obtain writ review, "a petitioner generally must show his or her remedy in the ordinary course of law is inadequate or that petitioner would suffer irreparable injury were the writ not granted"). Irreparable injury can take a variety of forms, *e.g.,* the disclosure of privileged information, the loss of the ability to present substantial portions of a case, or the unnecessary expenditure of significant resources. See §§15.62-15.64. On specific contexts in which the appellate courts have issued writs of mandate, see chap 16 and App A.

NOTE: Like the no-adequate-remedy-at-law requirement (see §§15.56-15.60), the courts of appeal often do not specifically address the irreparable injury requirement. Instead, irreparable injury is merely implicit from the circumstances. See, *e.g.*, *Henry v Superior Court* (2008) 160 CA4th 440, 72 CR3d 808 (no discussion; injury implicit from potentially needless expenditure of significant time and resources); *California Pub. Employees' Retirement Sys. v Superior Court* (2008) 160 CA4th 174, 72 CR3d 561 (same from overruling demurrer); *Zevnik v Superior Court* (2008) 159 CA4th 76, 70 CR3d 817 (same from order denying motion to disqualify counsel); *Heritage Provider Network, Inc. v Superior Court* (2008) 158 CA4th 1146, 70 CR3d 645 (same from denial of statutory stay of trial court proceedings pending completion of arbitration); *Bell v Superior Court* (2007) 158 CA4th 147, 69 CR3d 328 (same from partial denial of class certification motion); *Snyder v Superior Court* (2007) 157 CA4th 1530, 69 CR3d 600 (same from dismissal without prejudice); *CenterPoint Energy, Inc. v Superior Court* (2007) 157 CA4th 1101, 69 CR3d 202 (same from order denying motion to quash service of summons).

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§15.62 1. Specific and Immediate Harm

The prospect of imminent, irreparable injury is one of the most common bases on which the appellate courts grant writ relief. See *Science Applications Int'l Corp. v Superior Court* (1995) 39 CA4th 1095, 1100, 46 CR2d 332 (writ relief available when "lower court's determination imposes unusually harsh and unfair results for which ordinary appellate review is inadequate").

Irreparable injury is often found, for example, in discovery cases when an order granting discovery allegedly violates a privilege of the party against whom discovery is granted. *Costco Wholesale Corp. v Superior Court* (2009) 47 C4th 725, 101 CR3d 758 (appellate court should have granted writ of mandate vacating order compelling discovery because it violated attorney-client privilege; petitioner not required to establish that its case would be harmed by disclosure of evidence), citing *Roberts v Superior Court* (1973) 9 C3d 330, 336, 107 CR 309.

For representative cases, see, *e.g.*:

- *Ombudsman Servs. of N. Cal. v Superior Court* (2007) 154 CA4th 1233, 1239, 65 CR3d 456 (writ review of order compelling nonparty to produce confidential records);
- *People ex rel Lockyer v Superior Court* (2004) 122 CA4th 1060, 1071, 19 CR3d 324 (writ review of order compelling production of potentially privileged documents); and
- *Davis v Superior Court* (1992) 7 CA4th 1008, 9 CR2d 331 (writ review of order denying motion to quash a subpoena requesting 10 years' worth of plaintiff's medical records "[t]o avoid the possibility of irreparable injury").

On specific contexts in which the appellate courts have issued writs of mandate, see chap 16 and App A.

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§15.63 a. When Ruling Deprives Petitioner of Opportunity to Present Case

An appellate court may grant writ relief when a trial court's ruling has deprived the petitioner of the opportunity to present a significant portion of its case. Immediate appellate review may save the trial court and parties substantial time and resources. See, *e.g.*, *Henry v Superior Court* (2008) 160 CA4th 440, 448, 72 CR3d 808 (pretrial evidentiary ruling precluded defendants from presenting evidence of contributory negligence); *Bell v Superior Court* (2007) 158 CA4th 147, 159, 69 CR3d 328 (partial denial of class certification motion); *Snyder v Superior Court* (2007) 157 CA4th 1530, 1535, 69 CR3d 600 (dismissal of complaint without prejudice); *Johnson v Superior Court* (2006) 143 CA4th 297, 304, 49 CR3d 52 (writ review of order granting summary judgment for some, but not all, defendants appropriate because immediate review preferable to obviating possible multiple trials). On specific contexts in which the appellate courts have issued writs of mandate, see chap 16 and App A.

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§15.64 b. When Ruling Is Clearly Erroneous and Substantially Prejudicial

An appellate court may grant writ relief when a trial court's ruling is clearly erroneous and substantially prejudices the petitioner's case. Immediate appellate review may save the trial court and parties substantial time and resources. See, *e.g., California Pub. Employees' Retirement Sys. v Superior Court* (2008) 160 CA4th 174, 187, 72 CR3d 561 (writ review of order overruling demurrer); *Wells Fargo Bank v Superior Court* (2008) 159 CA4th 381, 385, 71 CR3d 506 (writ review of order overruling demurrer); *CenterPoint Energy, Inc. v Superior Court* (2007) 157 CA4th 1101, 1106, 69 CR3d 202 (writ review of order denying motion to quash service of summons); *Fair Employment & Hous. Comm'n v Superior Court* (2004) 115 CA4th 629, 633, 9 CR3d 409 (writ review of order overruling demurrer). On specific contexts in which the appellate courts have issued writs of mandate, see chap 16 and App A.

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§15.65 2. Petitioner's Burden to Show Irreparable Injury

The petitioner must allege and explain why it faces irreparable injury if the court of appeal fails to immediately intervene and review the challenged trial court order or ruling. See *Phelan v Superior Court* (1950) 35 C2d 363, 370, 217 P2d 951. On drafting the irreparable injury allegations of an appellate court writ petition, see §18.34.

PRACTICE TIP: Counsel cannot assume that the court of appeal understands the ramifications of permitting an erroneous ruling to stand.

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D. Issue Must Not Be Moot

§15.66 1. Writ Generally Will Not Issue When Case Is Moot

A writ will not issue "to enforce an abstract or moot right …, and certainly the writ never should issue to compel an act which will tend to an unlawful purpose." *Slater v City Council of City of Los Angeles* (1965) 238 CA2d 864, 868, 47 CR 837. See, *e.g., Gridley v Gridley* (2008) 166 CA4th 1562, 83 CR3d 715 (writ relief denied because challenge to means by which petition was transferred to judge was moot); *Cooke v Superior Court* (1989) 213 CA3d 401, 417, 261 CR 706 (writ relief denied after county passed resolution making changes sought by writ petition), disapproved on other grounds by *County of San Diego v State* (1997) 15 C4th 68, 106 n30, 61 CR2d 134.

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§15.67 2. Public Interest May Override Mootness

If the petition raises an issue of public interest, particularly one likely to recur in future cases, an appellate court may decide the case, even though the issue is otherwise moot. See, *e.g.*, *Independent Energy Producers Ass'n v McPherson* (2006) 38 C4th 1020, 1024, 44 CR3d 644 (although challenge to initiative was rendered moot when the initiative was defeated, case raised important legal issues regarding preelection review of initiatives); *NBC Subsidiary (KNBC-TV), Inc. v Superior Court* (1999) 20 C4th 1178, 1190 n6, 86 CR2d 778 (although case technically moot, it presented important question affecting public's interest in access to courtroom proceedings); *Green v Superior Court* (1974) 10 C3d 616, 622 n6, 111 CR 704 (although case was moot, it presented important issues regarding the warranty of habitability that would frequently arise); *Jonathan L. v Superior Court* (2008) 165 CA4th 1074, 1088 n15, 81 CR3d 571 (even if dependency issues were moot, home schooling issues were of public interest and in need of clarification); *Ombudsman Servs. of N. Cal. v Superior Court* (2007) 154 CA4th 1233, 1239, 65 CR3d 456 (even if conditional settlement had made case moot, court would have decided petition because issue was important and of continuing public interest); *Corrales v Bradstreet* (2007) 153 CA4th 33, 46, 62 CR3d 440 (although supreme court opinion rendered case moot, case still presented important issues concerning agency practice of designating decisions as precedent); *TSI Seismic Tenant Space, Inc. v Superior Court* (2007) 149 CA4th 159, 168 n4, 56 CR3d 751 (despite stipulation to withdraw writ petitions, court decided issue "to resolve a matter of continuing public interest"); *Oaks Mgmt. Corp. v Superior Court* (2006) 145 CA4th 453, 458 n1, 51 CR3d 561 (although parties reached settlement, issue of the attorneys' disqualification was of general public interest and there was "dearth of published opinions" on issue); *Black Diamond Asphalt, Inc. v Superior Court* (2003) 114 CA4th 109, 115, 7 CR3d 466 (despite parties' settlement and request for dismissal, court decided issue in the interest of public policy and clarification of the law).

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§15.68 E. Issue Usually Must Have Been Raised in Trial Court

An appellate court will not issue a writ of mandate, prohibition, or review (certiorari) unless the petitioner has asked the trial court to act on the issue in question and the lower court has either refused to do so or ruled against the petitioner. *Phelan v Superior Court* (1950) 35 C2d 363, 372, 217 P2d 951; see also *Citizens Utils. Co. of Cal. v Superior Court* (1963) 59 C2d 805, 814, 31 CR 316 (requirement that petitioner raise issue in trial court is judicially created rule of practice adopted to prevent unnecessary litigation and as courtesy to trial courts); *Howell v Superior Court* (1962) 211 CA2d 487, 490, 27 CR 149 (prohibition denied for failure to seek relief in second of two superior courts having concurrent jurisdiction).

Typically, the issue in dispute is raised in the trial court in the moving or opposing papers. See also *Los Angeles Times v Superior Court* (2003) 114 CA4th 247, 254, 7 CR3d 524 (informal letters to superior court referee treated as motion sufficient to warrant writ consideration).

In rare circumstances, an appellate court may entertain a writ petition raising a new issue. See *Vannier v Superior Court* (1982) 32 C3d 163, 175, 185 CR 427 (court ruled on electronic surveillance issue despite lack of ruling by trial court; because trial judge had ruled on ultimate issue of petitioners' mandatory appearance as witnesses in Florida, petitioners were not required to demand separate ruling on what reviewing court viewed as evidentiary matter); *Civil Serv. Employees Ins. Co. v Superior Court* (1978) 22 C3d 362, 374 n6, 149 CR 360 (important constitutional issue); *Sheller v Superior Court* (2008) 158 CA4th 1697, 1709, 71 CR3d 207 (to avoid miscarriage of justice, appellate court reached "purely legal issue" of trial court's authority to formally reprimand attorney and order him to pay attorney fees, despite petitioner's failure to raise issue in trial court); *Monterey Club v Superior Court* (1941) 48 CA2d 131, 143, 119 P2d 349 (petitioner had no timely and appropriate opportunity to make the objection in the trial court).

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§15.69 F. Other Factors

In addition to the basic requirements discussed above (see §§15.51-15.68), the supreme court and courts of appeal have identified several other factors that they consider in determining whether to hear the merits of a writ petition. See *Omaha Indem. Co. v Superior Court* (1989) 209 CA3d 1266, 1270, 258 CR 66 (surveying decisions and listing factors, including basic requirements, that appellate courts weigh in deciding whether to consider merits of writ petition). The appellate courts and appellate practitioners sometimes collectively refer to the basic requirements and the other factors as the "*Omaha* factors." See, *e.g., Nguyen v Superior Court* (2007) 150 CA4th 1006, 1009, 58 CR3d 802; *Smith v Superior Court* (1996) 41 CA4th 1014, 1020, 49 CR2d 20.

The extent to which these factors apply depends on the facts and circumstances of the particular case. See, *e.g., Nguyen v Superior Court, supra* (noting that most *Omaha* factors were not applicable to case); *Roden v AmerisourceBergen Corp.* (2005) 130 CA4th 211, 218, 29 CR3d 810 (discussing applicable *Omaha* factors). On specific contexts in which the appellate courts have issued writs of mandate, see chap 16 and App A. Two of the most important of these factors are discussed below.

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§15.70 1. Issue of Widespread Public Importance or First Impression

In deciding whether to hear the merits of a writ petition, the appellate courts often give considerable weight to whether the petitioner raises an issue of public importance that should be resolved promptly. See, *e.g.*, *Yamaha Motor Co. v Superior Court* (2009) 174 CA4th 264, 94 CR3d 494 (court issued order to show cause because writ petition presented "an issue of some public importance that has not yet been squarely faced by a California state court); *County of Sonoma v Superior Court* (2009) 173 CA4th 322, 336 n6, 93 CR3d 39 (case "involves a novel and significant constitutional question which has generated conflicting trial court decisions"); *Southern Cal. Reg'l Rail Auth. v Superior Court* (2008) 163 CA4th 712, 717, 77 CR3d 765 (trial court certified pretrial preemption issue under CCP §166.1 as involving controlling question of law on which there were substantial grounds for difference of opinion and appellate resolution would materially advance conclusion of litigation); *Henry v Superior Court* (2008) 160 CA4th 440, 448, 72 CR3d 808 (interpreting Proposition 51's impact on evidence of nonparty's contributory negligence); *County of Los Angeles v Superior Court* (2008) 159 CA4th 353, 358, 71 CR3d 485 (deciding writ petition challenging class certification order "in order to decide the important legal question presented"); *Snyder v Superior Court* (2007) 157 CA4th 1530, 1533, 69 CR3d 600 (holding Los Angeles Superior Court General Order invalid); *CenterPoint Energy, Inc. v Superior Court* (2007) 157 CA4th 1101, 1120, 69 CR3d 202 (discussing jurisdiction on successor liability theory); *Interinsurance Exch. of the Automobile Club v Superior Court* (2007) 148 CA4th 1218, 1225, 56 CR3d 421 (meaning of statutory term "premium" was issue affecting all Californians).

Similarly, the appellate courts give weight to whether the petition raises an issue of first impression that should be decided immediately rather than after entry of a final judgment. See, *e.g., CashCall, Inc. v Superior Court* (2008) 159 CA4th 273, 285 n6, 71 CR3d 441 (precertification discovery issue was one of first impression); *Interinsurance Exch. of the Automobile Club,* 148 CA4th at 1226 (meaning of statutory term "premium" was issue of first impression); *California Highway Patrol v Superior Court* (2006) 135 CA4th 488, 496, 38 CR3d 16 (interlocutory writ review of summary adjudication order appropriate because issue was one of first impression); *Anderson v Superior Court* (1989) 213 CA3d 1321, 1328, 262 CR 405 (writ review appropriate because issue was one of first impression, and review was necessary to prevent multiplicity of appeals raising same issue). On specific contexts in which the appellate courts have issued writs of mandate, see chap 16 and App A.

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§15.71 2. Trial Courts in Conflict

In deciding whether to hear a writ petition, the appellate courts also give considerable weight to whether the petition raises an issue on which the trial courts have reached conflicting results, particularly if the trial courts are within the same appellate district. *Omaha Indem. Co. v Superior Court* (1989) 209 CA3d 1266, 1273, 258 CR 66. Immediate appellate review could result in a significant savings of time and judicial resources. See, *e.g., County of Sonoma v Superior Court* (2009) 173 CA4th 322, 336 n6, 93 CR3d 39 (case "involves a novel and significant constitutional question which has generated conflicting trial court decisions"); *Corbett v Superior Court* (2002) 101 CA4th 649, 657, 125 CR2d 46 (trial courts were in conflict on whether class actions could be brought under unfair competition law); *Smith v Superior Court* (1996) 41 CA4th 1014, 1020, 49 CR2d 20 (trial courts had issued conflicting rulings on effect of injunction entered in out-of-state wrongful termination case). On specific contexts in which the appellate courts have issued writs of mandate, see chap 16 and App A.

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16

Availability of Writ Relief

Paul D. Fogel

I. SCOPE OF CHAPTER §16.1

II. STATUTES SPECIFYING USE OF WRIT PETITION TO OBTAIN APPELLATE REVIEW
A. Writ Petition as Exclusive Means of Obtaining Appellate Review §16.2
1. CCP §170.3: Grant or Denial of Judicial Disqualification or Challenge
a. Writ Proceeding Exclusive Means of Obtaining Appellate Review §16.3
(1) Only Parties May File Writ Petition §16.4
(2) Request Mandate §16.5
b. Deadline to File Writ Petition Under CCP §170.3(d) §16.6
c. Standard of Review if Writ Petition Accepted §16.7
2. CCP §404.6: Order Concerning Coordination of Actions
a. Writ Proceeding Exclusive Means of Obtaining Appellate Review §16.8
b. Deadline to File Writ Petition §16.9
c. Standard on Review if Writ Petition Accepted §16.10
3. CCP §405.39: Grant or Denial of Motion to Expunge Lis Pendens
a. Writ Proceeding Exclusive Means of Obtaining Appellate Review §16.11
b. Deadline to File Writ Petition §16.12
c. Standard of Review if Writ Petition Accepted §16.13
4. Govt C §6259(c): Public Records Act
a. Writ Proceeding Exclusive Means of Obtaining Appellate Review §16.14
b. Court Has Limited Discretion to Deny Writ Petition §16.15
c. Deadline to File Writ Petition and Trial Court Stay §16.16
d. Standard of Review if Writ Petition Accepted §16.17
5. Special Provisions for Writ Review of Certain Administrative Proceedings
a. Petition for Review of Final Order of Agricultural Labor Relations Board
(1) Writ Proceeding Exclusive Means of Obtaining Appellate Review §16.18
(2) Deadline to File Writ Petition §16.19
(3) Discretion to Deny Petition §16.20
(4) Standard of Review if Writ Petition Accepted §16.21
b. Decisions of Alcoholic Beverage Control Appeals Board
(1) Petition for Writ of Review of Adjudicatory Order of Alcoholic Beverage Control Appeals Board §16.22
(2) Deadline to File Writ Petition §16.23
(3) Standard of Review if Writ Petition Accepted §16.24
(4) Petition for Writ of Mandate Challenging Nonadjudicatory Action §16.25
c. Petition for Writ of Review of Decisions of Energy Resources Conservation and Development Commission §16.26
(1) Deadline to File Writ Petition §16.27
(2) Standard on Review if Writ Petition Accepted §16.28
d. Petition for Writ of Review of Decisions of Public Employment Relations Board §16.29
(1) Deadline to File Writ Petition §16.30
(2) Standard of Review if Writ Petition Accepted §16.31
(3) Compare Board Petition to Enforce Decision §16.32
e. Petition for Writ of Review of Decisions of Public Utilities Commission
(1) Petition for Writ of Review §16.33
(a) Application for Rehearing Prerequisite to Judicial Review §16.34
(b) No Petition for Rehearing Required After Decision on Rehearing §16.35
(c) Application for Rehearing Deemed Denied §16.36
(2) Deadline to File Petition for Writ of Review §16.37
(3) Parties and Venue §16.38
(4) Standard of Review if Writ Petition Accepted §16.39
(a) In Complaint, Enforcement, Ratemaking, or Licensing Proceedings Under Pub Util C §1757 §16.40

(b) In Cases in Which Pub Util C §1757 Does Not Apply §16.41
(c) In Cases Pertaining to Water Corporations §16.42
(d) No New Evidence in Writ Proceeding §16.43
(e) In Cases Involving Constitutional Questions §16.43A
(5) Summary Denial of Writ Is on Merits §16.44
(6) PUC's Exercise of Legislative Power Not Res Judicata §16.45
f. Decisions of Workers' Compensation Appeals Board
(1) Writ of Review Exclusive Means of Obtaining Appellate Review §16.46
(2) Deadline to File Petition for Writ of Review §16.47
(3) Standard of Review if Writ Petition Accepted §16.48
B. Writ Petition as Prerequisite to Appeal
1. CCP §877.6(e): Grant or Denial of Motion for "Good Faith Settlement" Determination
a. Writ Proceeding May Be Prerequisite to Obtaining Appellate Review §16.49
b. Deadline to File Writ Petition §16.50
c. Standard of Review if Writ Petition Accepted §16.51
2. Challenge to Setting Termination Hearing Under Welf & I C §366.26(*l*) or Post-Termination Placement Order Under Welf & I C §366.28(b) §16.52

III. OTHER STATUTES AUTHORIZING WRIT REVIEW
A. Overview §16.53
B. CCP §418.10(c): Denial of Motion to Quash Service; to Stay or Dismiss for Inconvenient Forum; to Dismiss for Delay in Prosecution
1. Overview §16.54
2. Deadline to File Writ Petition Under CCP §418.10(c) §16.55
3. Standard of Review if Writ Petition Accepted §16.56
4. Filing Writ Petition Extends Time to File Responsive Pleading in Superior Court §16.57
C. CCP §403.080: Grant or Denial of Superior Court Motion to Reclassify Action or Proceeding
1. Overview §16.58
2. Deadline to File Writ Petition Under CCP §403.080 §16.59
3. Filing Requirements and Possible Stay §16.60
4. Standard of Review if Writ Petition Accepted §16.61
D. CCP §400: Grant or Denial of Superior Court Motion to Change Venue
1. Overview §16.62
2. Exception: Venue Order in Limited Civil Cases Directly Appealable §16.63
3. Deadline to File Writ Petition Under CCP §400 §16.64
4. Standard of Review if Writ Petition Accepted §16.65
E. CCP §437c: Denial of Motion for Summary Judgment; Violation of Summary Judgment Motion Procedures; Grant or Denial of Motion for Summary Adjudication
1. Overview §16.66
2. Denial of Motion for Summary Judgment §16.67
3. Grant or Denial of Summary Adjudication §16.68
4. Basis for Writ Petition
a. Court Erred in Denying Motion §16.69
b. Court Failed to Specify Issues and Evidence Relied on §16.70
c. Court Erred in Taking Motion Off Calendar §16.71
d. Court Erred by Shortening Notice Period §16.72
e. Court Erred by Depriving Party of Right to File Motion §16.73
f. Court Erred by Denying Oral Argument §16.74
g. Court Erred by Refusing to Consider Summary Adjudication in Alternative §16.75
5. Deadline to File Writ Petition §16.76
6. Standard of Review if Writ Petition Accepted §16.77
F. CCP §1176: Denial of Stay in Unlawful Detainer Action
1. Overview §16.78
2. Deadline to File Writ Petition §16.79
3. Standard of Review if Writ Petition Accepted §16.80
G. CCP §904.1(a)(11)-(12): Monetary Sanction Judgment or Order of $5000 or Less
1. Overview §16.81
2. Request Writ of Mandate or Prohibition in Alternative §16.82
3. No Statutory Deadline for Petition §16.83
4. Standard of Review if Writ Petition Accepted §16.84
5. Discovery Sanctions §16.85

IV. OTHER CONTEXTS IN WHICH WRIT RELIEF HAS BEEN GRANTED
A. Overview §16.86
B. Time to File Nonstatutory Writ Petition §16.87

C. To Challenge Jurisdiction of Superior Court on Basis of Invalidity of Statute or Ordinance
1. Overview §16.88
2. Use of Prohibition to Test Validity of Law §16.89
3. Use of Mandate to Test Validity of Law §16.90
4. Standard of Review if Writ Petition Accepted §16.91
D. In Cases of Exclusive, Conflicting, or Concurrent Jurisdiction
1. Exclusive Jurisdiction §16.92
2. Conflicting or Concurrent Jurisdiction
a. Trial Courts With Conflicting or Concurrent Jurisdiction §16.93
b. Determining Which Trial Court Has Jurisdiction §16.94
c. Determining Choice of Law §16.95
d. Other Tribunals With Conflicting or Concurrent Jurisdiction §16.96
3. Objecting Before Seeking Writ §16.97
4. Standard of Review if Writ Petition Accepted §16.98
E. To Review Arbitration Issues
1. Questions of First Impression §16.99
2. Orders Compelling Arbitration §16.100
3. Standard of Review if Writ Petition Accepted §16.101
F. To Remedy Orders Concerning Counsel
1. Disqualification Motions §16.102
2. Other Issues Involving Counsel §16.103
3. Standard of Review if Writ Petition Accepted §16.104
G. To Review Orders on Pleadings
1. When Issue Is Substantial or Resolution Would Result in Final Disposition of Case as to Party §16.105
2. When Ruling on Pleading Would Dramatically Affect Scope or Nature of Action §16.106
3. Standard of Review if Writ Petition Accepted §16.107
H. To Review Rulings on Demurrer
1. When Demurrer Is Overruled in Its Entirety §16.108
2. When Demurrer Is Partially Sustained §16.109
3. When Court Sustains Demurrer §16.110
4. Standard of Review if Writ Petition Accepted §16.111
I. When Court Denies Motion to Dismiss
1. Overview §16.112
2. Writ of Prohibition to Prevent Trial §16.113
3. Standard of Review if Writ Petition Accepted §16.114
J. To Correct Discovery Order
1. Overview §16.115
2. Significant Issues of First Impression Arising During Discovery §16.116
3. Constitutional Issues Arising During Discovery
a. Overview §16.117
b. Right to Privacy §16.118
4. Recurring Procedural Issues §16.119
5. Issues of Privilege
a. Overview §16.120
b. Examples of Writ Review of Privilege Issues §16.121
c. Attorney-Client Privilege and Work Product Doctrine §16.122
6. Issues Involving Denial of Discovery §16.123
7. Issues Involving Grant of Discovery §16.124
8. Issues Involving Orders Imposing Discovery Sanctions §16.125
a. Review of Discovery Sanctions of $5000 or Less §16.126
b. Review of Discovery Sanctions of More Than $5000 §16.127
9. Time to File Writ Petition §16.128
10. Standard of Review if Writ Petition Accepted §16.129
K. To Review Class Certification Orders §16.129A
1. Class Notification Issues §16.129B
2. Time to File Writ Petition §16.129C
3. Standard of Review if Writ Petition Accepted §16.129D
L. To Review Judgments and Orders in Contempt Cases §16.130
1. Review of Order Before Contempt Adjudication
a. Writ of Prohibition Before Contempt Adjudication §16.131
b. State Newspersons' Shield Law Does Not Provide Relief Before Contempt Adjudication §16.132
2. Writ Review of Contempt Judgment or Order
a. Overview §16.133
b. Scope of Review §16.134

c. Review by Writ of Review (Certiorari) §16.135
d. Review by Writ of Habeas Corpus §16.136
e. Review by Writ of Prohibition
(1) Writ of Prohibition Not Available After Fine Has Been Paid or Jail Sentence Has Been Served §16.137
(2) Writ of Prohibition Restrains Court That Failed to Comply With Prescribed Contempt Procedures §16.138
(3) Using Writ of Prohibition to Challenge Defective Affidavits §16.139
f. Review by Writ of Mandate §16.140
3. Time to File Writ Petition §16.141
4. Standard of Review if Writ Petition Accepted §16.142
M. To Review Probate Proceedings §16.143
N. To Review Family Law and Dependency Matters §16.143A
O. To Review Guardianship and Conservatorship Proceedings §16.144
P. To Review Orders on Motions in Limine §16.145
1. Time to File Writ Petition §16.146
2. Standard of Review if Writ Petition Accepted §16.147
Q. To Review Order Requiring Jury Trial
1. Overview §16.148
2. Standard of Review if Writ Petition Accepted §16.149
R. To Review Injunctions
1. Overview §16.150
2. Standard of Review if Writ Petition Accepted §16.151

V. EXTRAORDINARY CIRCUMSTANCES THAT REQUIRE FILING BOTH WRIT AND APPEAL §16.152

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§16.1 I. SCOPE OF CHAPTER

Most appellate court writ proceedings challenge trial court rulings in ongoing civil actions. See chap 15. This chapter discusses the kinds of interlocutory rulings that appellate courts have reviewed through writ proceedings. It also discusses the limited instances in which appellate courts have reviewed, in the first instance, decisions of certain state agencies by way of original writ proceedings.

In some contexts, a writ proceeding is the only means of obtaining appellate review of a superior court ruling (see §§16.3-16.48) or is a prerequisite to seeking postjudgment appellate review (see §§16.49-16.52). In other contexts, statutes authorize discretionary writ review. See §§16.54-16.86. In still other contexts, appellate courts exercise their discretion to issue a common law writ (*e.g.,* mandate, prohibition, or review (also called certiorari)). See §§16.87-16.152. The chapter concludes with a discussion of the rare instances in which a party aggrieved by an appealable order or final judgment should file both a writ petition and a notice of appeal. See §16.152.

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II. STATUTES SPECIFYING USE OF WRIT PETITION TO OBTAIN APPELLATE REVIEW

§16.2 A. Writ Petition as Exclusive Means of Obtaining Appellate Review

A number of statutes authorize writ review. These statutes often specify which type of writ the petitioner should seek (usually a writ of mandate). Some of these statutes specify that writ review is the sole means of obtaining appellate review. See §§16.2-16.48. Others make seeking writ review a prerequisite to later raising the issue on appeal from a final judgment. See §§16.49-16.52. Still other statutes provide for, but do not mandate, writ review. See §§16.53-16.85. On the requirements of the most common writs (*i.e.,* mandate, prohibition, and review (certiorari)), and how to select the proper writ, see chap 15.

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1. CCP §170.3: Grant or Denial of Judicial Disqualification or Challenge

§16.3 a. Writ Proceeding Exclusive Means of Obtaining Appellate Review

A party aggrieved by the grant or denial of a disqualification motion for cause (CCP §§170.1-170.5) or of a peremptory challenge to a judge (CCP §170.6) must seek appellate review by way of a petition for a writ of mandate under CCP §170.3(d). See, *e.g.*, *People v Hull* (1991) 1 C4th 266, 269, 2 CR2d 526 (CCP §170.3(d) applies equally to challenges for cause and peremptory challenges); *In re Sheila B.* (1993) 19 CA4th 187, 193, 23 CR2d 482 (CCP §170.3(d) is exclusive remedy for party aggrieved by grant of disqualification request). Such orders are not appealable. CCP §170.3(d); *Sheila B.*, *supra*. Even a party's waiver of a nonwaivable disqualification under CCP §170.3(b)(2)(B) can only be reviewed by writ. *People v Barrera* (1999) 70 CA4th 541, 551, 82 CR2d 755.

Review by writ promotes (1) judicial economy by eliminating the waste of time and money that would result if the matter proceeded to final judgment only to be reversed because proceedings after a wrongfully denied disqualification motion were void, and (2) fairness by preventing a party from obtaining a windfall by waiting until after there is an unfavorable outcome of the litigation before challenging a disqualification. See *Tri Counties Bank v Superior Court* (2008) 167 CA4th 1332, 1338, 84 CR3d 835 (objection under CCP §170.3(c) was untimely and properly stricken); *Sears, Roebuck & Co. v Nat'l Union Fire Ins. Co.* (2005) 131 CA4th 1342, 1348, 32 CR3d 717 (CCP §170.3 writ review is exclusive avenue of appellate review for rulings regarding disqualification of discovery referee).

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§16.4 (1) Only Parties May File Writ Petition

Only a party to the trial court proceeding, not the judge, may file a writ petition under CCP §170.3(d). In *Curle v Superior Court* (2001) 24 C4th 1057, 1067, 103 CR2d 751, the supreme court held that the court of appeal has authority to hear a petition under CCP §170.3(d) only if a party has filed the petition; because a superior court judge disqualified under former CCP §170.1(a)(6)(C) (now CCP §170.1(a)(6)(A)(iii)) is not a party to the proceeding under CCP §170.3(d), he or she cannot challenge the disqualification order by writ petition.

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§16.5 (2) Request Mandate

Because CCP §170.3(d) provides that a disqualification order may be reviewed "only by a writ of mandate," the petitioner must seek mandate rather than prohibition. See *People v Hull* (1991) 1 C4th 266, 269, 2 CR2d 526. Although a few courts have indicated that a writ of prohibition will lie to review an order denying a peremptory judicial challenge, most of these cases predate CCP §170.3(d) as well as the supreme court's decision in *Hull*. See, *e.g.*, *Calhoun v Superior Court* (1958) 51 C2d 257, 331 P2d 648; *Kohn v Superior Court* (1966) 239 CA2d 428, 48 CR 832. For cases illustrating the availability of mandate to review judicial challenge orders, see:

- *Swift v Superior Court* (2009) 172 CA4th 878, 91 CR3d 504 (writ of mandate compelling trial court to vacate order striking CCP §170.6 peremptory challenge);
- *C.C. v Superior Court* (2008) 166 CA4th 1019, 1023, 83 CR3d 225 (writ of mandate compelling trial court to vacate order accepting CCP §170.6 challenge);
- *Guardado v Superior Court* (2008) 163 CA4th 91, 77 CR3d 149 (petition challenging trial court's acceptance of CCP §170.6 challenge denied on merits);
- *First Fed. Bank. v Superior Court* (2006) 143 CA4th 310, 49 CR3d 296 (writ of mandate compelling trial court to honor CCP §170.6 challenge on remanded motion for attorney fees);
- *Jonathon M. v Superior Court* (2006) 141 CA4th 1093, 46 CR3d 798 (writ of mandate compelling trial court to accept peremptory challenge; juvenile court judge's refusal to follow earlier court of appeal decision on same issue and accept timely peremptory challenge was error);
- *Pfeiffer Venice Props. v Superior Court* (2003) 107 CA4th 761, 132 CR2d 400 (writ of mandate compelling trial court to honor challenge after remand to determine entitlement to attorney fees);
- *Pandazos v Superior Court* (1997) 60 CA4th 324, 70 CR2d 669 (writ of mandate compelling trial court to honor CCP §170.6 challenge to trial judge made after reversal of judgment on jury verdict);
- *La Seigneurie U.S. Holdings, Inc. v Superior Court* (1994) 29 CA4th 1500, 35 CR2d 175 (writ of mandate compelling trial court to grant peremptory challenge made more than 15 days after petitioner had made special appearance);
- *Farmers Ins. Exch. v Superior Court* (1992) 10 CA4th 1509, 13 CR2d 449 (writ of mandate compelling trial court to accept CCP §170.6 challenge to coordination judge that was properly made under former Cal Rules of Ct 1515 (now Cal Rules of Ct 3.516);
- *Stegs Invs. v Superior Court* (1991) 233 CA3d 572, 284 CR 495 (writ of mandate compelling trial court to accept post-appeal CCP §170.6 challenge on remand for partial trial).

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§16.6 b. Deadline to File Writ Petition Under CCP §170.3(d)

A party must file and serve a writ petition "within 10 days after service of written notice of entry of the court's order determining the question of disqualification." CCP §170.3(d); *Carl v Superior Court* (2007) 157 CA4th 73, 75, 68 CR3d 566 (summarily denying petition for writ of mandate filed almost 2 months after service of written notice of entry of order striking statement of disqualification). Section 170.3(d) does not provide for any extension of this deadline. Although CCP §170.3(d) is part of a code section concerning challenges for cause, the supreme court has held that it applies to peremptory challenges as well. See *People v Hull* (1991) 1 C4th 266, 270, 2 CR2d 526. On who qualifies as a party under CCP §170.3(d), see §16.4.

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§16.7 c. Standard of Review if Writ Petition Accepted

An appellate court reviews an order granting or denying a motion for judicial disqualification for abuse of discretion. See, *e.g.*, *Daniel V. v Superior Court* (2006) 139 CA4th 28, 39, 42 CR3d 471; *Hemingway v Superior Court* (2004) 122 CA4th 1148, 1153, 19 CR3d 363.

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2. CCP §404.6: Order Concerning Coordination of Actions

§16.8 a. Writ Proceeding Exclusive Means of Obtaining Appellate Review

A petition for a writ of mandate is the exclusive means of obtaining appellate review of an order concerning the coordination of previously unrelated actions. CCP §404.6; Cal Rules of Ct 3.505(b). Such orders are not appealable. *Lautrup, Inc. v Trans-West Discount Corp.* (1976) 64 CA3d 316, 134 CR 348.

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§16.9 b. Deadline to File Writ Petition

A party must file a writ petition within 20 days after service of a written notice of entry of the trial court's order. CCP §404.6. Before the 20-day period expires, the trial court may for "good cause" grant the petitioner up to 10 additional days within which to file the petition. CCP §404.6.

Subject to the rules concerning transfer of causes among the courts of appeal, a writ petition relating to an order granting or denying coordination may be filed in any reviewing court having jurisdiction under the rules applicable to civil actions generally. Cal Rules of Ct 3.505(b), 10.1000. If the actions to be coordinated are within the jurisdiction of more than one reviewing court, the order granting the petition for coordination must specify the court in which any petition for a writ relating to any subsequent order in the coordination proceeding must be filed. CCP §404.2; Cal Rules of Ct 3.505(a).

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§16.10 c. Standard on Review if Writ Petition Accepted

The standard of review of an order granting or denying coordination of previously unrelated actions depends on the nature of the determination under review. The trial court's application of law to undisputed facts is subject to de novo review. When the trial court's ruling is a mixed question of fact and law, the appellate court gives deference to the trial court's factual findings and reviews de novo the trial court's application of law to facts. See *McGhan Med. Corp. v Superior Court* (1992) 11 CA4th 804, 809, 14 CR2d 264.

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3. CCP §405.39: Grant or Denial of Motion to Expunge Lis Pendens

§16.11 a. Writ Proceeding Exclusive Means of Obtaining Appellate Review

A petition for a writ of mandate is the exclusive means of obtaining appellate review of an order granting or denying expungement of a lis pendens; such orders are not appealable. CCP §405.39. A writ petition is also the vehicle by which a party challenges an attorney fee order made under CCP §405.38. *Castro v Superior Court* (2004) 116 CA4th 1010, 1016 n10, 10 CR3d 865, citing CCP §405.39. See also *Shah v McMahon* (2007) 148 CA4th 526, 529, 55 CR3d 792 (dismissing purported appeal because challenge to fee order following order expunging lis pendens could be reviewed only by petition for writ of mandate).

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§16.12 b. Deadline to File Writ Petition

A writ petition must be filed and served within 20 days after service of written notice of the trial court's order by the court or any party. CCP §405.39. A petitioner may seek up to 10 additional days in which to file the petition if the extension is sought within the original 20-day period. CCP §405.39.

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§16.13 c. Standard of Review if Writ Petition Accepted

The standard of review is much like the abuse of discretion standard applicable to the review of an order granting or denying a preliminary injunction. *Howard S. Wright Constr. Co. v Superior Court* (2003) 106 CA4th 314, 320, 130 CR2d 641.

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4. Govt C §6259(c): Public Records Act

§16.14 a. Writ Proceeding Exclusive Means of Obtaining Appellate Review

A petition for an extraordinary writ, including a writ of mandate, is the exclusive means of obtaining appellate review of a trial court order under the California Public Records Act (Govt C §§6250-6276.48), either directing disclosure of a public record or supporting the decision of a public official refusing disclosure. Govt C §6259(c); *Filarsky v Superior Court* (2002) 28 C4th 419, 426, 121 CR2d 844; *Powers v City of Richmond* (1995) 10 C4th 85, 89, 40 CR2d 839; *County of Santa Clara v Superior Court* (2009) 170 CA4th 1301, 1311 n2, 89 CR3d 374; *Los Angeles Unified Sch. Dist. v Superior Court* (2007) 151 CA4th 759, 764 n2, 60 CR3d 445.

The limitation of judicial review in Govt C §6259(c) to review by extraordinary writ rather than by appeal does not violate the appellate jurisdiction clause of the California Constitution, Cal Const art VI, §11. *Powers*, 10 C4th at 93. The appellate jurisdiction vested in the courts by Cal Const art VI, §11, encompasses review by extraordinary writ as well as review by direct appeal. *Leone v Medical Bd.* (2000) 22 C4th 660, 667, 94 CR2d 61; *Powers v City of Richmond, supra*.

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§16.15 b. Court Has Limited Discretion to Deny Writ Petition

Because a writ petition under Govt C §6259(c) is the sole method of obtaining appellate review of a trial court order under the Public Records Act, a reviewing court does not have unfettered discretion to deny such a petition. A court "may not deny an apparently meritorious writ petition, timely presented in a formally and procedurally sufficient manner, merely because, for example, the petition presents no important issue of law or because the court considers the case less worthy of its attention than other matters." *Powers v City of Richmond* (1995) 10 C4th 85, 114, 40 CR2d 839. See, *e.g., Los Angeles Unified Sch. Dist. v Superior Court* (2007) 151 CA4th 759, 764, 60 CR3d 445 (writ denied on merits). This is in contrast to most other contexts in which appellate courts can, and usually do, summarily deny writ petitions for any number of reasons. See §§22.14-22.17.

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§16.16 c. Deadline to File Writ Petition and Trial Court Stay

A party must file a writ petition within 20 days after service of written notice of entry of an order under Govt C §6259. Govt C §6259(c). If the notice is served by mail, the period within which to file the petition is increased by 5 days. Govt C §6259(c). The trial court may, for good cause, grant the petitioner up to an additional 20 days within which to file the petition as long as the petitioner makes the request within 20 days after service of written notice of the entry of order. Govt C §6259(c).

A court will not stay an order under the Public Records Act unless the petitioner "demonstrates it will otherwise sustain irreparable damage and probable success on the merits." Govt C §6259(c). On requesting a stay in an appellate court writ proceeding, see chap 19.

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§16.17 d. Standard of Review if Writ Petition Accepted

The standard of review of an order under Govt C §6259 is "independent review." A trial court's interpretation of the Public Records Act and its application to undisputed facts present questions of law subject to de novo review, whereas a reviewing court will uphold the trial court's factual findings if based on substantial evidence. *County of Santa Clara v Superior Court* (2009) 170 CA4th 1301, 1311 n2, 89 CR3d 374 ("scope of review is the same as for direct appeals"); *Los Angeles Unified Sch. Dist. v Superior Court* (2007) 151 CA4th 759, 764, 60 CR3d 445.

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5. Special Provisions for Writ Review of Certain Administrative Proceedings

a. Petition for Review of Final Order of Agricultural Labor Relations Board

§16.18 (1) Writ Proceeding Exclusive Means of Obtaining Appellate Review

The court of appeal may review a final order of the Agricultural Labor Relations Board (ALRB) by way of a petition asking that the order be modified or set aside. *Artesia Dairy v ALRB* (2008) 168 CA4th 598, 86 CR3d 91 (because employer could not challenge union certification, it engaged in "technical" unfair labor practice to generate unfair labor practice decision reviewable under Lab C §1160.8). The petition must be filed in the court of appeal that has jurisdiction over the county in which the unfair labor practice allegedly occurred or in which the petitioner resides or transacts business. Lab C §1160.8. A writ petition is the exclusive means of appellate review of an ALRB final order. Lab C §1160.9.

On enforcement of ALRB orders in superior court, see §4.28.

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§16.19 (2) Deadline to File Writ Petition

A petition under Lab C §1160.8 must be filed within 30 days from the date of the issuance of the Agricultural Labor Relations Board's (ALRB) order. Lab C §1160.8. This time limit is jurisdictional. *United Farm Workers v Agricultural Labor Relations Bd.* (1977) 74 CA3d 347, 350, 141 CR 437. Code of Civil Procedure §1013(a) does not apply to extend the time within which to file a petition under Lab C §1160.8. *Mario Saikhon, Inc. v ALRB* (1983) 140 CA3d 581, 584, 189 CR 632.

The ALRB must file the certified record of the proceeding in the court of appeal within 10 days after it receives notice that the petition has been filed. Lab C §1160.8. Procedures are set forth in Cal Rules of Ct 8.498.

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§16.20 (3) Discretion to Deny Petition

The court of appeal has discretion to summarily deny the petition. *Tex-Cal Land Mgmt., Inc. v ALRB* (1979) 24 C3d 335, 350, 156 CR 1. However, the court will likely allow the petitioner a reasonable time to file points and authorities based on the record of the proceeding filed with the court by the Agricultural Labor Relations Board (ALRB). By placing the burden to furnish a sufficient record on the ALRB, Lab C §1160.8 "impliedly assures the petitioner an opportunity to present written arguments based on the board-certified record." 24 C3d at 351. See also *Powers v City of Richmond* (1995) 10 C4th 85, 113, 40 CR2d 839 ("reviewing court's discretion is quite restricted" when writ review is exclusive avenue of appellate review).

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§16.21 (4) Standard of Review if Writ Petition Accepted

On writ review, the ALRB's findings with respect to questions of fact are conclusive if supported by substantial evidence in the record. Lab C §1160.8. See *Tex-Cal Land Mgmt., Inc. v ALRB* (1979) 24 C3d 335, 342, 156 CR 1 (upholding constitutionality of substantial evidence standard prescribed by Lab C §1160.8); *Artesia Dairy v ALRB* (2008) 168 CA4th 598, 604, 86 CR3d 91 (as to ALRB's findings of fact, court applies substantial evidence standard and does not reweigh evidence, although evidence must be of "ponderable legal significance"; however, ALRB decisions that "rest on erroneous legal foundations will be set aside").

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b. Decisions of Alcoholic Beverage Control Appeals Board

§16.22 (1) Petition for Writ of Review of Adjudicatory Order of Alcoholic Beverage Control Appeals Board

The Alcoholic Beverage Control Appeals Board is an appellate agency within the Department of Alcoholic Beverage Control. Bus & P C §23077. The board reviews, among other things, the department's findings to determine whether they are supported by substantial evidence. See Bus & P C §23084.

The exclusive method of obtaining review of the board's adjudicatory orders is by a writ of review. The procedures are set forth in Bus & P C §§23090-23090.7. Bus & P C §§23089, 23090.5.

An aggrieved party may apply to the court of appeal for a writ of review of a final order of the board. Bus & P C §23090. Although Bus & P C §23090 also provides for application to the supreme court, applications filed there are routinely transferred to the courts of appeal without consideration of the merits. See, *e.g., Rondon v Alcoholic Beverage Control Appeals Bd.* (2007) 151 CA4th 1274, 1280, 60 CR3d 295. The procedures for seeking this statutory writ of review are those prescribed for a petition for a writ of review (certiorari) in CCP §§1067-1077. Bus & P C §23090.4. Procedures in the courts of appeal and the supreme court are discussed in chaps 18, 27.

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§16.23 (2) Deadline to File Writ Petition

The application for a writ of review must be filed and served "within 30 days after the filing of the final order of the board." Bus & P C §23090.

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§16.24 (3) Standard of Review if Writ Petition Accepted

The scope of review of the board's order is similar to review under CCP §1094.5. See Bus & P C §23090.2. Therefore, counsel can use the administrative mandamus format for the petition and responsive pleadings. The title of the petition, however, should be "Petition for Writ of Review." See the forms in California Administrative Mandamus (3d ed Cal CEB 2003). When reviewing the board's order, courts apply the same substantial evidence test that the board applies to the department's findings. Bus & P C §23090.2(d); *Kirby v Alcoholic Beverage Control Appeals Bd.* (1968) 261 CA2d 119, 121, 67 CR 628. See also *Rondon v Alcoholic Beverage Control Appeals Bd.* (2007) 151 CA4th 1274, 1283, 60 CR3d 295 (in absence of clear abuse of discretion, court will uphold decision to suspend license for violation of liquor laws; however, some situations call for de novo review, including whether administrative proceeding was fundamentally fair, which is question of law).

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§16.25 (4) Petition for Writ of Mandate Challenging Nonadjudicatory Action

A writ of mandate is available to review the Department of Alcoholic Beverage Control's nonadjudicatory actions; this writ also must be sought in the court of appeal or the supreme court. Bus & P C §23090.5; *Schenley Affiliated Brands Corp. v Kirby* (1971) 21 CA3d 177, 195, 98 CR 609 (review of department rule making); *Samson Mkt. Co. v Kirby* (1968) 261 CA2d 577, 580, 68 CR 130 (review of department order denying extension of time before cancellation of liquor license became effective). On writs of mandate, see §§15.2-15.13.

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§16.26 c. Petition for Writ of Review of Decisions of Energy Resources Conservation and Development Commission

Decisions of the Energy Resources Conservation and Development Commission on applications for the certification of sites and related facilities can be reviewed only through a petition for a writ of review in the California Supreme Court. Pub Res C §25531(a). See *County of Sonoma v State Energy Resources Conserv. & Dev. Comm'n* (1985) 40 C3d 361, 363, 220 CR 114 (upholding constitutionality of statutory restriction on method of review); *Santa Teresa Citizen Action Group v State Energy Resources Conserv. & Dev. Comm'n* (2003) 105 CA4th 1441, 1450, 130 CR2d 392 (supreme court had exclusive jurisdiction regarding judicial review of Energy Commission's decision on power plant).

Review is limited to whether the Commission acted under its statutory authority and in conformity with constitutional safeguards. The Commission's findings of fact are final and not subject to review. Pub Res C §25531(b).

For further discussion of the review of State Energy Resources Conservation and Development Commission decisions and for a sample form, see 20 California Forms of Pleading and Practice §247.279 (2007).

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§16.27 (1) Deadline to File Writ Petition

No statutory deadline exists for filing the petition for a writ of review.

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§16.28 (2) Standard on Review if Writ Petition Accepted

The supreme court may determine whether the commission acted under its statutory authority and in conformity with constitutional safeguards, but the commission's findings of fact are final and not subject to review, except as provided in Pub Res C §§25500-25543. Pub Res C §25531(b).

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§16.29 d. Petition for Writ of Review of Decisions of Public Employment Relations Board

Review of decisions by the Public Employment Relations Board (PERB) is through a "petition for a writ of extraordinary relief." Govt C §3542(b). The writ has also been referred to as a "writ of review." *Regents of Univ. of Cal. v PERB* (1986) 41 C3d 601, 606, 224 CR 631; *California Faculty Ass'n v PERB* (2008) 160 CA4th 609, 615, 72 CR3d 654. Procedures are set out in Cal Rules of Ct 8.498.

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§16.30 (1) Deadline to File Writ Petition

The petition must "be filed within 30 days after issuance of the board's final order, order denying reconsideration, or order joining in the request for judicial review, as applicable." Govt C §3542(c). The time limit for seeking judicial review prescribed by Govt C §3542(c) is jurisdictional and is not extended by CCP §1013(a) when the board's decision is served by mail. *San Mateo Fed'n of Teachers v Public Employment Relations Bd.* (1994) 28 CA4th 150, 155, 33 CR2d 387.

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§16.31 (2) Standard of Review if Writ Petition Accepted

The board's findings on "questions of fact, including ultimate facts, if supported by substantial evidence on the record considered as a whole, are conclusive." Govt C §3542(c). See *California Faculty Ass'n v PERB* (2008) 160 CA4th 609, 616, 72 CR3d 654 (appellate court defers to board's determination of whether matter is within scope of representation unless clearly erroneous).

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§16.32 (3) Compare Board Petition to Enforce Decision

If the time to petition for extraordinary relief has expired, the board may seek enforcement of its final decision or order, by writ of mandamus, in the court of appeal or the superior court. Govt C §3542(d).

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e. Petition for Writ of Review of Decisions of Public Utilities Commission

§16.33 (1) Petition for Writ of Review

The method for seeking judicial review of a decision of the Public Utilities Commission (PUC), an agency of state constitutional origin, is a petition for a writ of review filed in the court of appeal or the supreme court. Pub Util C §1756. In rare circumstances, however, a writ of mandate directed at the PUC may issue in the supreme court or the court of appeal as prescribed in CCP §1085. Pub Util C §1759(b).

No court, except the court of appeal or supreme court in review proceedings, may review, reverse, correct, or annul PUC orders or decisions. The superior court may not interfere with the PUC's regulation of public utilities. Pub Util C §1759(a); *Hartwell Corp. v Superior Court* (2002) 27 C4th 256, 275, 115 CR2d 874; *San Diego Gas & Elec. Co. v Superior Court* (1996) 13 C4th 893, 916, 55 CR2d 724; but see *People ex rel Orloff v Pacific Bell* (2003) 31 C4th 1132, 1138, 7 CR3d 315 (PUC does not have exclusive jurisdiction over all actions against public utilities; Pub Util C §1759(a) does not insulate public utilities from all civil actions brought in superior court).

A petition for a writ of review pertaining solely to water corporations may be filed only in the supreme court, which must grant expedited consideration to any petition alleging that the court of appeal has assumed jurisdiction over such a proceeding. Pub Util C §§1756(f), 1758(d). The supreme court may review decisions of the court of appeal on a petition for a writ of review in the manner provided for other civil actions. Pub Util C §1758(c).

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§16.34 (a) Application for Rehearing Prerequisite to Judicial Review

Filing an application for rehearing within 30 calendar days of the effective date of a PUC decision is a jurisdictional prerequisite to filing a petition for a writ of review. Pub Util C §1731; *Albin v Railroad Comm'n* (1932) 216 C 655, 15 P2d 860. The application for rehearing must set forth with specificity the grounds on which the applicant believes the PUC decision is unlawful; no ground may be urged in any court unless set forth in the application for rehearing. Pub Util C §1732. If an application for rehearing is filed 10 days or more before the effective date of the challenged order, the application must be granted or denied before the effective date, or the order will stand suspended until the application is granted or denied, up to a period of 60 days from the date the application is filed. Pub Util C §1733(a).

PRACTICE TIP: Except in very rare circumstances, the PUC makes its decisions effective on the date of issuance, mooting Pub Util C §1733(a).

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§16.35 (b) No Petition for Rehearing Required After Decision on Rehearing

An aggrieved party desiring judicial review is not obliged to seek rehearing of a decision on rehearing before petitioning for a writ of review. *Toward Util. Rate Normalization v PUC* (1978) 22 C3d 529, 536, 149 CR 692.

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Source: Civil Litigation/California Civil Writ Practice/16 Availability of Writ Relief/§16.36 (c) Application for Rehearing Deemed Denied

§16.36 (c) Application for Rehearing Deemed Denied

An application for rehearing not granted within 60 days may be deemed denied by the applicant, unless the PUC extends the effective date of the order for the period of the pendency of the application. Pub Util C §1733.

PRACTICE TIP: It is generally unwise to deem the application for rehearing denied and file a petition for a writ of review, because the PUC can simply inform the court that an order on the application for rehearing is imminent and include in its order a discussion addressing the points made in the petition for review.

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§16.37 (2) Deadline to File Petition for Writ of Review

A petition for a writ of review must be filed within 30 calendar days after the PUC issues its decision denying the application for rehearing or, if the application is granted, within 30 calendar days after issuance of the decision on rehearing. Pub Util C §1756(a). For decisions for which the rehearing application is granted but no decision on rehearing has been issued, the petition for a writ of review must be filed at least 120 days after the application for rehearing was granted. Pub Util C §1756(a).

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§16.38 (3) Parties and Venue

A petitioner seeking a writ of review must be "a party that is aggrieved" by the PUC's decision and must have filed a timely application for rehearing. Pub Util C §§1731(b), 1756(a). See §§16.33-16.37. The PUC is the respondent in the review proceeding and generally appears as a party. Pub Util C §§1756.2, 1758(a). Other parties to the PUC proceeding may appear and are often designated real parties in interest. Venue for a petition for a writ of review is in the judicial district in which the petitioner resides or, if the petitioner is a business, the judicial district in which the petitioner has its principal place of business in California. Pub Util C §1756(d).

PRACTICE TIP: When the petitioner has its principal place of business outside California, the petition should allege that fact and the reasons the particular venue was chosen, *e.g.,* the petitioner has business connections to the judicial district, counsel makes its office in the district, or the PUC's decision or the underlying transaction occurred in the district.

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§16.39 (4) Standard of Review if Writ Petition Accepted

As a general matter, the PUC's interpretation of the Public Utilities Code "should not be disturbed unless it fails to bear a reasonable relation to statutory purposes and language." *Greyhound Lines, Inc. v PUC* (1968) 68 C2d 406, 410, 67 CR 97. However, the PUC does not receive such deference on questions relating to the scope of its own jurisdiction.

To the extent not inconsistent with the Public Utilities Code, the provisions of the Code of Civil Procedure relating to writs of review (certiorari) (CCP §§1067-1077) apply to the review proceeding. Pub Util C §1758(b).

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Source: Civil Litigation/California Civil Writ Practice/16 Availability of Writ Relief/§16.40 (a) In Complaint, Enforcement, Ratemaking, or Licensing Proceedings Under Pub Util C §1757

§16.40 (a) In Complaint, Enforcement, Ratemaking, or Licensing Proceedings Under Pub Util C §1757

In complaint or enforcement proceedings, and in ratemaking or licensing proceedings addressed to particular parties, judicial review, based on the entire record certified by the PUC, is limited to whether any of the following occurred (Pub Util C §1757(a)):

- The PUC acted without, or in excess of, its powers or jurisdiction;
- The PUC did not proceed in the manner required by law;
- The PUC's decision was not supported by the findings;
- The findings in the decision were not supported by substantial evidence in light of the whole record;
- The order or decision of the PUC was procured by fraud or was an abuse of discretion; or
- The order or decision of the PUC violated any federal or state constitutional right of the petitioner.

See *Utility Reform Network v PUC* (2008) 166 CA4th 522, 533, 82 CR3d 791 (setting out court's standard of review of PUC decisions).

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Source: Civil Litigation/California Civil Writ Practice/16 Availability of Writ Relief/§16.41 (b) In Cases in Which Pub Util C §1757 Does Not Apply

§16.41 (b) In Cases in Which Pub Util C §1757 Does Not Apply

In cases in which Pub Util C §1757 does not apply, such as rulemaking cases or industrywide investigations, judicial review, based on the entire record certified by the PUC, is limited to whether any of the following occurred (Pub Util C §1757.1(a)):

- The order or decision of the PUC was an abuse of discretion;
- The PUC did not proceed in the manner required by law;
- The PUC acted without, or in excess of, its powers or jurisdiction;
- The decision of the PUC was not supported by the findings;
- The order or decision of the PUC was procured by fraud; or
- The order or decision of the PUC violated a federal or state constitutional right of the petitioner.

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Source: Civil Litigation/California Civil Writ Practice/16 Availability of Writ Relief/§16.42 (c) In Cases Pertaining to Water Corporations

§16.42 (c) In Cases Pertaining to Water Corporations

Review of PUC decisions pertaining solely to water corporations is limited to determining whether the PUC regularly pursued its authority, including whether the order or decision violates any state or federal constitutional right of the petitioner. Pub Util C §1757.1(b).

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§16.43 (d) No New Evidence in Writ Proceeding

No new or additional evidence may be presented in the writ proceeding. Apart from constitutional questions, the findings of the PUC, including its findings of ultimate fact and its findings and conclusions on reasonableness and discrimination, are final. Pub Util C §1757.1(c).

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§16.43A (e) In Cases Involving Constitutional Questions

When a PUC order or decision is challenged on the ground that it violates any state or federal constitutional right of the petitioner, the reviewing court exercises "independent judgment on the law and the facts, and the findings or conclusions of the [PUC] material to the determination of the constitutional question" are not final. Pub Util C §1760.

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§16.44 (5) Summary Denial of Writ Is on Merits

A summary denial of a petition for a writ of review is a decision on the merits as to the law and the facts presented in the review proceedings. *In re Rose* (2000) 22 C4th 430, 444, 93 CR2d 298, following the holding in *Consumers Lobby Against Monopolies v PUC* (1979) 25 C3d 891, 901, 160 CR 124. That is because a petition to the supreme court for a writ of review is the sole means provided by law for judicial review of a PUC decision and the petition serves the same function as an appeal. 25 C3d at 901. Thus, unlike a summary denial of a petition for mandate, prohibition, or other prerogative writ, the summary denial of a petition for a writ of review under Pub Util C §1756 is normally res judicata. 25 C3d at 901 n3. See chaps 22, 24 on summary denial and res judicata.

PRACTICE TIP: A summary denial of a petition for review by the court of appeal is immediately final. See Cal Rules of Ct 8.490(b)(1); *Pacific Bell v Public Utils. Comm'n* (2000) 79 CA4th 269, 284 n12, 93 CR2d 910. This gives the petitioner just 10 days to file a petition for review in the supreme court. Cal Rules of Ct 8.500(e)(1).

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§16.45 (6) PUC's Exercise of Legislative Power Not Res Judicata

In *Camp Meeker Water Sys. v PUC* (1990) 51 C3d 845, 274 CR 678, the PUC looked at the deeds of the parties to determine whether the petitioner, a private water system, was entitled to a rate increase. The supreme court ruled that the PUC did not attempt to adjudicate incidents of title or to enforce rights between parties. The PUC's rate increase decision was binding in all collateral actions or proceedings under Pub Util C §1709 but did not otherwise have res judicata effect. 51 C3d at 852 n3. It is well settled that when the PUC exercises its judicial power, its orders or decisions are res judicata as to the issues involved "in subsequent proceedings between the same parties." When the PUC fixes rates, however, it exercises its legislative, not its judicial, power. 21 C3d at 852 n3.

On review of PUC decisions and forms, see also 42 California Forms of Pleading and Practice, Public Utilities §§480.140-480.147, 480.200.

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f. Decisions of Workers' Compensation Appeals Board

§16.46 (1) Writ of Review Exclusive Means of Obtaining Appellate Review

The exclusive method for obtaining review of decisions of the Workers' Compensation Appeals Board (WCAB) is by a special statutory writ of review. Lab C §5950. See, *e.g., Gelson's Mkts., Inc. v WCAB* (2009) 179 CA4th 201, 208, 101 CR3d 548 (court of appeal granted writ of review and annulled WCAB's decision); *Bensen v WCAB* (2009) 170 CA4th 1535, 89 CR3d 166 (court of appeal granted writ of review and upheld WCAB's decision); *Department of Corrections & Rehabilitation v WCAB* (2008) 166 CA4th 911, 916, 82 CR3d 920 (treating petition for writ of mandate or prohibition as petition for writ of review). A petition for reconsideration by the WCAB is a necessary prerequisite for judicial review. Lab C §5901.

The petition for review should be filed in the court of appeal for the appellate district in which the petitioner resides. Lab C §5950. As with other writs, although the petition can be filed first in the supreme court (Lab C §5950), that court routinely transfers such petitions to the court of appeal without considering the merits.

The supreme court and the courts of appeal are also authorized by Lab C §5955 to issue mandate to the WCAB (*i.e.,* to compel a legal duty) in "all proper cases." *Loustalot v Superior Court* (1947) 30 C2d 905, 908, 186 P2d 673. Under Lab C §5955, mandate may be available to challenge the constitutionality of workers' compensation legislation if the petitioner can meet the criteria in CCP §1085. *Greener v WCAB* (1993) 6 C4th 1028, 1046, 25 CR2d 539 (trial court had personal jurisdiction over WCAB but lacked subject matter jurisdiction to declare Workers' Compensation Act provisions invalid and enjoin their enforcement; although challenge to validity of statute before its application in effect sought declaratory relief over which appellate courts do not have original jurisdiction, petitioner could petition appellate court for writ of mandate).

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§16.47 (2) Deadline to File Petition for Writ of Review

The petition must be filed within 45 calendar days after a petition for reconsideration is denied; or, if reconsideration is granted, within 45 calendar days after filing of the order, decision, or award following reconsideration. Lab C §5950. The prescribed time limit is jurisdictional. *Southwest Airlines v WCAB* (1991) 234 CA3d 1421, 1424, 286 CR 347 (when petition was not filed within time specified by Lab C §5950, appellate court lacked jurisdiction and petition was denied). Code of Civil Procedure §1013 does not extend the time within which a party must file a petition for a writ of review under Lab C §5950 if the Workers' Compensation Appeals Board's decision is served by mail. *Camper v WCAB* (1992) 3 C4th 679, 690, 12 CR2d 101, citing *Paneno v WCAB* (1992) 4 CA4th 136, 148, 5 CR2d 461.

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§16.48 (3) Standard of Review if Writ Petition Accepted

An appellate court reviews interpretation of governing statutes or application of the law to undisputed facts de novo, although "the WCAB's interpretation is entitled to great weight unless clearly erroneous." *Zenith Ins. Co. v WCAB* (2008) 159 CA4th 483, 490, 71 CR3d 724. See *Bensen v WCAB* (2009) 170 CA4th 1535, 1543, 89 CR3d 166; *Brodie v WCAB* (2007) 40 C4th 1313, 1331, 57 CR3d 644; *Medrano v WCAB* (2008) 167 CA4th 56, 64, 83 CR3d 802; *Tomlin v WCAB* (2008) 162 CA4th 1423, 1427, 76 CR3d 672. The WCAB's findings on questions of fact are conclusive when supported by substantial evidence, based on review of the entire record. Lab C §§5952-5953; *Braewood Convalescent Hosp. v WCAB* (1983) 34 C3d 159, 164, 193 CR 157; *Verga v WCAB* (2008) 159 CA4th 174, 183, 70 CR3d 871. See *Gelson's Mkts., Inc. v WCAB* (2009) 179 CA4th 201, 208, 101 CR3d 548 (court "defer[s] to the Board's determination of facts if supported by substantial evidence").

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B. Writ Petition as Prerequisite to Appeal

1. CCP §877.6(e): Grant or Denial of Motion for "Good Faith Settlement" Determination

§16.49 a. Writ Proceeding May Be Prerequisite to Obtaining Appellate Review

At least two courts have held that a petition for a writ of mandate is the proper method to seek *prejudgment* review of a trial court's determination that settlement by one of several joint tortfeasors or co-obligors on a contract was or was not in good faith. A party seeking *postjudgment* review of a good faith settlement determination may do so on appeal, at least if it has already unsuccessfully sought a writ prejudgment. See CCP §877.6(e); *Maryland Cas. Co. v Andreini & Co.* (2000) 81 CA4th 1413, 1425, 97 CR2d 752. See also *Wilshire Ins. Co. v Tuff Boy Holding, Inc.* (2001) 86 CA4th 627, 636, 103 CR2d 480.

In *Maryland Cas.*, an insured brought an action against his insurer and his broker. The insured settled with the broker, and the trial court found that the settlement was made in good faith. The insured's prejudgment petition for a writ of mandate was summarily denied, and the insurer again sought review, postjudgment, on appeal as a matter of right. The court of appeal held that mandate is the exclusive procedure for obtaining immediate review of a good faith determination, and any party wishing to challenge the merits of such an order must do so within the time prescribed in CCP §877.6(e). However, a summary denial of such a petition does not foreclose postjudgment review of the determination on appeal. *Wilshire Ins. Co. v Tuff Boy Holding, Inc, supra,* is to the same effect, except that the writ petition was brought by an insurer whose indemnity claim against the manufacturer was extinguished by the good faith settlement. The insurer later appealed from a stipulated judgment but was unable to change the outcome.

PRACTICE TIP: Counsel should seek the writ immediately, so as not to foreclose the ability to raise the issue on appeal from a final judgment.

The failure to seek immediate writ review of a good faith settlement determination possibly forecloses a party from later challenging the determination on appeal. In *Maryland Cas.*, for example, the court noted that the appellant had timely petitioned the court for writ review, which was summarily denied. *Maryland Cas. Co. v Andreini & Co.* (2000) 81 CA4th 1413, 1425 n13, 97 CR2d 752. The court thus did not decide whether an aggrieved party may choose to forgo writ review of a good faith settlement determination and raise the issue for the first time on appeal. In *Main Fiber Prods., Inc. v Morgan & Franz Ins. Agency* (1999) 73 CA4th 1130, 1135, 87 CR2d 108, the applicant did not seek writ review, and the appellate court held that the good faith settlement determination could not be challenged on appeal. See also *O'Hearn v Hillcrest Gym & Fitness Ctr., Inc.* (2004) 115 CA4th 491, 499, 9 CR3d 342 (same result due to strong policy of encouraging early finality).

NOTE: On the other hand, *Rohr Indus., Inc. v First State Ins. Co.* (1997) 59 CA4th 1480, 69 CR2d 872, considered the applicability of CCP §§877-877.6 to a third party (in *Rohr*, an insurer), concluding that the appropriate remedy in that case was an appeal: "[W]hen a party wishes to challenge the legality or appropriateness of extending the applicability of sections 877 and 877.6 to settlements not involving 'joint tortfeasors' or 'co-obligors on a contract debt,' as the terms are used in these statutes, they may do so by way of appeal." 59 CA4th at 1486.

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§16.50 b. Deadline to File Writ Petition

The writ petition must be filed within 20 days of service after written notice of the determination on the good faith hearing. CCP §877.6(e). The notice may be served by one of the parties or the clerk of the court. The trial court may grant up to an additional 20 days for filing the petition. CCP §877.6(e).

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§16.51 c. Standard of Review if Writ Petition Accepted

Ordinarily, the determination of whether a settlement is in good faith is reviewed for abuse of discretion. *Tech-Bilt, Inc. v Woodward-Clyde & Assoc.* (1985) 38 C3d 488, 502, 213 CR 256. See *Long Beach Mem. Med. Ctr. v Superior Court* (2009) 172 CA4th 865, 872, 91 CR3d 494 (reviewing factors in making good faith settlement determination under CCP §877.6 and concluding court abused discretion in approving doctors' settlement; writ issued directing trial court to vacate order finding settlement was in good faith); *TSI Seismic Tenant Space, Inc. v Superior Court* (2007) 149 CA4th 159, 165, 56 CR3d 751 (when exercise of discretion on basis of established criteria can yield only one conclusion, abuse of discretion will be found). However, an issue of statutory interpretation and application of the statute to undisputed facts is a question of law subject to de novo review. *Be v Western Truck Exch.* (1997) 55 CA4th 1139, 1143, 64 CR2d 527.

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§16.52 2. Challenge to Setting Termination Hearing Under Welf & I C §366.26(*l*) or Post-Termination Placement Order Under Welf & I C §366.28(b)

In juvenile dependency proceedings, the trial court may set a hearing to terminate parental rights under Welf & I C §366.26 or order post-termination placement of the child under Welf & I C §366.28. Writ review under Cal Rules of Ct 8.450-8.452 or 8.454-8.456 is the exclusive means to challenge an order setting a hearing to terminate parental rights or a post-termination placement order. Cal Rules of Ct 8.450(a), 8.454(a). See *Jennifer T. v Superior Court* (2007) 159 CA4th 254, 255 n2, 71 CR3d 293 (purported appeal of juvenile court order terminating family reunification services and setting permanent planning hearing treated as writ petition); *Wayne F. v Superior Court* (2006) 145 CA4th 1331, 1334, 1345, 52 CR3d 519 (petition for extraordinary relief granted to caretakers who qualified as prospective adoptive parents, affirming that they had standing to participate in removal hearing). These juvenile court orders are not appealable unless a petition for a writ of extraordinary relief, substantively addressing the specific issues and supported by the record, is timely filed but not resolved on the merits by the appellate court. Welf & I C §§366.26(*l*)(1)(A)-(C), 366.28(b)(1); Cal Rules of Ct 8.450-8.452, 8.454-8.456.

On writ review to challenge an order setting a hearing to terminate parental rights or a post-termination placement order, see California Juvenile Dependency Practice §§10.92-10.108 (Cal CEB Annual).

On further review of writs in juvenile proceedings, see Cal Rules of Ct 8.406, 8.470 (courts of appeal), and 8.472 (supreme court).

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III. OTHER STATUTES AUTHORIZING WRIT REVIEW

§16.53 A. Overview

This section discusses the various statutes authorizing writ review (sometimes referred to as "statutory writs"). In spite of such authorization, the appellate courts retain discretion to hear the merits or summarily deny the petition. On factors the courts of appeal consider in deciding whether to grant writ review, see chaps 15, 17. If the court chooses to decide the matter on the merits, its disposition will turn on the substantive law applicable to the issue presented and the record before it.

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B. CCP §418.10(c): Denial of Motion to Quash Service; to Stay or Dismiss for Inconvenient Forum; to Dismiss for Delay in Prosecution

§16.54 1. Overview

A litigant may seek a writ of mandate to overturn an order denying a motion to: (1) quash the service of summons; (2) stay or dismiss an action on the ground of inconvenient forum; or (3) dismiss the action "pursuant to the applicable provisions of Chapter 1.5 (commencing with Section 583.110) of Title 8." CCP §418.10(a), (c). See, *e.g., Agua Caliente Band of Cahuilla Indians v Superior Court* (2006) 40 C4th 239, 52 CR3d 659 (motion to quash); *Kumar v Superior Court* (1982) 32 C3d 689, 186 CR 772 (same); *Ameriloan v Superior Court* (2008) 169 CA4th 81, 88, 86 CR3d 572 (same); *Anglo Irish Bank Corp. v Superior Court* (2008) 165 CA4th 969, 977, 81 CR3d 535 (same). Expeditious review makes sense; if a trial court has erroneously denied such a motion, the remaining proceedings as to the defendant who made the motion are for naught and would waste judicial resources. See, *e.g.*, *Reid v Balter* (1993) 14 CA4th 1186, 1196, 18 CR2d 287 ("counterproductive" for defendants to wait until after trial and judgment to request review of denial of motion to dismiss for delay in prosecution; on appeal, court refused to disturb plaintiffs' victory on merits by considering issue of delay; case predates addition to CCP §418.10(a) of motion to dismiss for delay in prosecution); see discussion in §16.55.

NOTE: It is not clear that every motion to dismiss for delay in prosecution is included within "the applicable provisions of Chapter 1.5 (commencing with Section 583.110) of Title 8," as provided in CCP §418.10(c). It may be that only a motion to dismiss for failure to timely serve the summons and complaint (see CCP §§583.210-583.250) comes within CCP §418.10(a), (c); only this motion is a likely substitute for the defendant's pleading at the beginning of the case.

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§16.55 2. Deadline to File Writ Petition Under CCP §418.10(c)

A defendant must file the writ petition *before* filing a responsive pleading (see §16.57) and within 10 days after service of a written notice of entry of the order denying the motion. CCP §418.10(c). Service by mail extends the period within which the petition must be filed by 5 days under CCP §1013(a). *Shearer v Superior Court* (1977) 70 CA3d 424, 426, 138 CR 824. The trial court may extend the period within which the petition must be filed by a maximum of 20 days for "good cause." CCP §418.10(c). *Cornell Univ. Med. College v Superior Court* (1974) 38 CA3d 311, 313, 113 CR 291.

The defendant must serve the notice of the petition for a writ of mandate on the adverse party and file it with trial court. CCP §418.10(c).

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§16.56 3. Standard of Review if Writ Petition Accepted

The standard of review turns in part on the showing the defendant made in the trial court. When a nonresident defendant challenges personal jurisdiction, the plaintiff must prove, by a preponderance of the evidence, the factual basis justifying the exercise of jurisdiction. See, *e.g.*, *Pavlovich v Superior Court* (2002) 29 C4th 262, 273, 127 CR2d 329; *Anglo Irish Bank Corp. v Superior Court* (2008) 165 CA4th 969, 980, 81 CR3d 535; *Dorel Indus., Inc. v Superior Court* (2005) 134 CA4th 1267, 1273, 36 CR3d 742. If the plaintiff meets this burden, the defendant must then show "that the exercise of jurisdiction would be unreasonable." *Vons Cos. v Seabest Foods, Inc.* (1996) 14 C4th 434, 449, 58 CR2d 899.

On review, the question of jurisdiction is one of law. When the jurisdictional facts are conflicting, the reviewing court reviews the trial court's factual determinations for substantial evidence and then independently reviews the trial court's conclusions as to the legal significance of the facts. See, *e.g.*, *Vons Cos.*, 14 C4th at 449; *Dorel Indus., Inc.*, 134 CA4th at 1273. When the jurisdictional facts are not in dispute, the question of personal jurisdiction is purely one of law that the appellate court reviews de novo. See, *e.g.*, *Pavlovich*, 29 C4th at 273; *Anglo Irish Bank*, 165 CA4th at 977; *CenterPoint Energy, Inc. v Superior Court* (2007) 157 CA4th 1101, 1116, 69 CR3d 202 (legal question turning on rules of successor liability); *Dorel Indus., Inc. v Superior Court, supra*; *Sonora Diamond Corp. v Superior Court* (2000) 83 CA4th 523, 540, 99 CR2d 824.

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§16.57 4. Filing Writ Petition Extends Time to File Responsive Pleading in Superior Court

Serving and filing a petition for a writ of mandate extends the defendant's time to file a responsive pleading until 10 days after service of written notice of the final judgment in the mandate proceeding. CCP §418.10(c). See also Cal Rules of Ct 8.491 (time for filing responsive pleading extended until 10 days after supreme court files its order denying writ of review after court of appeal denies writ of mandate). The trial court may extend the time to plead for an additional period, not exceeding 20 days, on a showing of good cause. CCP §418.10(c).

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C. CCP §403.080: Grant or Denial of Superior Court Motion to Reclassify Action or Proceeding

§16.58 1. Overview

A party aggrieved by an order granting or denying a motion to reclassify an action or proceeding may obtain review of that order by a petition for a writ of mandate filed in the court of appeal. CCP §403.080. These orders are not directly appealable. *Garau v Torrance Unified Sch. Dist.* (2006) 137 CA4th 192, 199, 40 CR3d 108.

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§16.59 2. Deadline to File Writ Petition Under CCP §403.080

The petitioner must file the petition in the court of appeal within 20 days after service of written notice of the order granting or denying the motion to reclassify the case. CCP §403.080. The trial court may extend this deadline for an additional 10 days for good cause, provided that the petitioner seeks the extension before the 20-day period expires. CCP §403.080.

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§16.60 3. Filing Requirements and Possible Stay

The petitioner must also file a copy of the writ petition in the trial court immediately after the petition is filed in the court of appeal. CCP §403.080. The court of appeal may stay all proceedings in the case pending the finality of its decision on the writ petition. CCP §403.080. Immediately after the decision on the petition becomes final, the clerk of the court of appeal must file a copy of the final order or judgment with the clerk of the trial court. CCP §403.080.

On requesting a stay in an appellate court writ proceeding, see chap 19.

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§16.61 4. Standard of Review if Writ Petition Accepted

The appellate court reviews an order granting or denying a motion to reclassify for abuse of discretion. See, *e.g.*, *Ytuarte v Superior Court* (2005) 129 CA4th 266, 276, 28 CR3d 474.

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D. CCP §400: Grant or Denial of Superior Court Motion to Change Venue

§16.62 1. Overview

A petition for a writ of mandate is the proper method to obtain review of a superior court order granting *or* denying a motion to change venue. CCP §400. See, *e.g.*, *San Francisco Found. v Superior Court* (1984) 37 C3d 285, 208 CR 31 (denying); *Alexander v Superior Court* (2003) 114 CA4th 723, 8 CR3d 111 (denying); *Hamilton v Superior Court* (1974) 37 CA3d 418, 112 CR 450 (granting). Such orders are not directly appealable. See, *e.g.*, *Calhoun v Vallejo City Unified Sch. Dist.* (1993) 20 CA4th 39, 41, 24 CR2d 337; *Hennigan v Boren* (1966) 243 CA2d 810, 815, 52 CR 748. It is unclear whether an order granting or denying a change of venue can be reviewed on appeal from a final judgment. Compare *Hennigan v Boren, supra* (denial of motion to change venue not subject to review on appeal from final judgment) to *Calhoun v Vallejo City Unified Sch. Dist., supra* (appeal of denial of motion to change venue can occur after rendition of final judgment). As a practical matter, the statutory writ is the most useful method of review because it is doubtful that on appeal, the aggrieved party could show prejudice resulted from trial in the wrong court.

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Source: Civil Litigation/California Civil Writ Practice/16 Availability of Writ Relief/§16.63 2. Exception: Venue Order in Limited Civil Cases Directly Appealable

§16.63 2. Exception: Venue Order in Limited Civil Cases Directly Appealable

An order granting or denying a motion to change venue in a limited civil case is an appealable order. CCP §904.2(c).

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§16.64 3. Deadline to File Writ Petition Under CCP §400

The petitioner must file the writ petition in the court of appeal within 20 days after service of written notice of the order granting or denying the change of venue motion. CCP §400. Before the 20-day period expires, the trial court, for good cause, may extend the time within which to file the writ petition for up to an additional 10 days. CCP §400. The petitioner must file a copy of the writ petition in the trial court "immediately after the petition is filed in the court of appeal." CCP §400.

The court of appeal may stay all proceedings in the case pending finality of its judgment on the writ petition. CCP §400. On requesting a stay in an appellate court writ proceeding, see chap 19.

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§16.65 4. Standard of Review if Writ Petition Accepted

If the petitioner sought a change of venue as a matter of right (*e.g.,* the action was pending in the wrong court), the reviewing court will uphold the trial court's determination even if there were conflicting affidavits or testimony unless that determination was arbitrary. See, *e.g.*, *Swartz v California Olive Growers' Packing Corp.* (1942) 56 CA2d 168, 170, 133 P2d 20. If the petitioner sought a change of venue as a matter of discretion (*e.g.,* convenience of witnesses, impartial trial), the reviewing court will uphold the order unless the trial court clearly abused its discretion. See, *e.g.*, *Garrett v Superior Court* (1967) 248 CA2d 263, 268, 56 CR 418 (court found abuse of discretion). See 3 Witkin, California Procedure, *Actions* §948 (5th ed 2008).

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E. CCP §437c: Denial of Motion for Summary Judgment; Violation of Summary Judgment Motion Procedures; Grant or Denial of Motion for Summary Adjudication

§16.66 1. Overview

A party may appeal a judgment entered after an order granting a motion for summary judgment under CCP §437c. CCP §437c(m)(1). All other orders entered under CCP §437c are reviewable by writ. See CCP §437c(m)(1), which states: "Upon entry of any order pursuant to this section, except the entry of summary judgment, a party may… petition an appropriate reviewing court for a peremptory writ." That is, if the trial court did anything other than grant summary judgment, CCP §437c(m)(1) authorizes a party to petition for a peremptory writ (in practice, usually mandate) to review the court's order. Thus, a party may seek a writ to review an order denying summary judgment, an order granting summary judgment of a complaint that leaves a cross-complaint pending, an order granting or denying summary adjudication, or an order that violates the procedural provisions of CCP §437c.

NOTE: Although the Consumers Legal Remedies Act (CLRA) precludes a motion for summary judgment or adjudication under CCP §437c, CCP §1781(c)(3) empowers a court to determine if a CLRA action "is without merit or there is no defense to the action." In ruling on a CLRA "no merit" motion, the courts "[i]n practice," have applied the "standards applicable to motions for summary judgment and summary adjudication." *Princess Cruise Lines, Ltd. v Superior Court* (2009) 179 CA4th 36, 101 CR3d 323 (issuing writ requiring trial court to vacate order denying summary judgment).

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§16.67 2. Denial of Motion for Summary Judgment

Although one decision suggests that a reviewing court usually considers the merits of the summary judgment motion when deciding whether to grant writ relief from an order denying the motion (see *Leyva v Superior Court* (1985) 164 CA3d 462, 468, 210 CR 545), in practice, writ review on the merits is not easy to obtain when summary judgment has been denied. See, *e.g., Lompoc Unified Sch. Dist. v Superior Court* (1993) 20 CA4th 1688, 1692, 26 CR2d 122 (courts "reluctant" to review denials of summary judgment by writ); *Whitney's at the Beach v Superior Court* (1970) 3 CA3d 258, 265, 83 CR 237. But see *State Dep't of Health Servs. v Superior Court* (2003) 31 C4th 1026, 1037, 6 CR3d 441 (reversing appellate court's denial of writ of mandate to overturn order denying summary judgment, allowing defendant to raise defense to action under Fair Employment and Housing Act); *Kentucky Fried Chicken v Superior Court* (1997) 14 C4th 814, 828, 59 CR2d 756 (reversing appellate court's denial of writ of mandate to overturn order denying summary judgment because defendant owed no duty to plaintiff); *Greenberg v Superior Court* (2009) 172 CA4th 1339, 92 CR3d 96 (same); *California Highway Patrol v Superior Court* (2008) 162 CA4th 1144, 76 CR3d 578 (ruling CHP owed no statutory duty to plaintiff and issuing writ of mandate directing trial court to enter summary judgment for CHP); *City of San Diego v Superior Court* (2006) 137 CA4th 21, 28, 40 CR3d 26 (peremptory writ of mandate issued directing trial court to enter summary judgment for defendant; question of fact "can be decided as a matter of law if reasonable minds can come to only one conclusion concerning" issue); *Balloon v Superior Court* (1995) 39 CA4th 1116, 1119, 46 CR2d 161 (peremptory writ of mandate issued directing trial court to grant defendants' summary judgment motion for failure to exhaust administrative remedies), superseded by statute on other grounds as stated in *McDonald v Antelope Valley Community College Dist.* (2008) 45 C4th 88, 110, 84 CR3d 734.

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§16.68 3. Grant or Denial of Summary Adjudication

Under CCP §437c, a party may move for summary adjudication on one or more causes of action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty. CCP §437c(f)(1). The trial court must grant summary adjudication "only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." CCP §437c(f)(1). See *DeCastro West Chodorow & Burns, Inc. v Superior Court* (1996) 47 CA4th 410, 422, 54 CR2d 792 (petition for writ of mandate denied because CCP §437c(f)(1) does not allow summary adjudication of single component of compensatory damages that does not dispose of entire cause of action). Because CCP §437c provides for writ review of *any order* other than an order granting summary judgment, orders granting or denying summary adjudication are reviewable by writ. See, *e.g., The MEGA Life & Health Ins. Co. v Superior Court* (2009) 172 CA4th 1522, 1534, 92 CA4th 399 (granting writ petition challenging denial of summary adjudication on fraud cause of action); *Ra v Superior Court* (2007) 154 CA4th 142, 147, 64 CR3d 539 (denying on merits writ petition challenging summary adjudication as to one of several causes of action).

In *Fisherman's Wharf Bay Cruise Corp. v Superior Court* (2003) 114 CA4th 309, 7 CR3d 628, the court of appeal explained the reasons for considering the merits of a writ petition contesting an order granting summary adjudication: (1) an erroneous ruling created a likelihood of the necessity of two trials rather than one, allowing some causes of action to go forward while omitting significant legal issues that arose out of the same facts and that quite likely should be tried together; and (2) the issues raised in the petition were questions of law, making their immediate resolution on writ review appropriate. 114 CA4th at 319. Although mandate does not lie to control the exercise of trial court discretion, on a motion for summary adjudication, a trial court has no discretion to exercise. "If the trial court errs, it has made an error of law, which automatically constitutes an abuse of discretion." 114 CA4th at 320. See also *Marron v Superior Court* (2003) 108 CA4th 1049, 1056, 134 CR2d 358 (finding irreparable injury if second trial were required).

In *City of Oakland v Superior Court* (1996) 45 CA4th 740, 53 CR2d 120, the court issued a writ of mandate directing the trial court to grant summary adjudication on two of six causes of action. The court issued the writ because the case presented significant legal questions of constitutional and statutory interpretation, public interest supported a speedy resolution of the issues, and the issues presented were questions of law. 45 CA4th at 750.

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4. Basis for Writ Petition

§16.69 a. Court Erred in Denying Motion

If both sides have moved for summary judgment and no facts are disputed, a writ petition lies to require the trial court to grant the motion of one of the parties. *Burke Concrete Accessories, Inc. v Superior Court* (1970) 8 CA3d 773, 775, 87 CR 619. That is because the trial court is *required* to grant the motion under CCP §437c if there is no triable issue and the moving party is entitled to judgment as a matter of law. *B & E Convalescent Ctr. v State Compensation Ins. Fund* (1992) 8 CA4th 78, 88, 9 CR2d 894.

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§16.70 b. Court Failed to Specify Issues and Evidence Relied on

A writ petition lies to compel the trial court to comply with summary judgment motion procedures, *e.g.,* to specify the issues and evidence it relied on in ruling on the motion. See CCP §437c(g); *Vineyard Springs Estates, LLC v Superior Court* (2004) 120 CA4th 633, 642, 15 CR3d 587 (court of appeal vacated denial of summary judgment, ordered trial court to reconsider motion after discharging its duty to rule on evidentiary objections); *Continental Ins. Co. v Superior Court* (1985) 165 CA3d 1069, 1072, 212 CR 140 (court of appeal vacated denial of summary judgment on ground that trial court had not identified material conflicts in evidence by reference to evidence in support of and in opposition to particular asserted facts); *Greater Irvine Credit Union v Superior Court* (1986) 186 CA3d 1189, 1192, 231 CR 296 (same effect). The requirement that the trial court specify the issues and evidence it relied on in ruling on the motion is a task the court often shifts to counsel. See, *e.g.*, *Tera Pharms., Inc. v Superior Court* (1985) 170 CA3d 530, 532, 215 CR 923.

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§16.71 c. Court Erred in Taking Motion Off Calendar

A writ petition lies to challenge an order taking a motion for summary judgment off calendar that fails to comply with the timing requirements of local court rules. See, *e.g., Wells Fargo Bank v Superior Court* (1988) 206 CA3d 918, 922, 254 CR 68 (summary judgment motion was timely under CCP §437c, but local rule required that motion be specially set, preventing hearing no later than 30 days before trial as specified in CCP §437c(a); appellate court issued writ directing trial court to vacate order taking motion off calendar and to hear motion before trial date).

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§16.72 d. Court Erred by Shortening Notice Period

A writ petition lies to vacate a trial court order shortening the notice period for a summary judgment motion. In *McMahon v Superior Court* (2003) 106 CA4th 112, 130 CR2d 407, the court of appeal issued a writ directing the trial court to vacate an order shortening such period on the ground that, in enacting CCP §437c, the Legislature did not give trial courts such authority. 106 CA4th at 118. The court recognized that a motion for summary judgment is potentially case-dispositive and usually requires considerable time and effort to prepare and oppose.

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§16.73 e. Court Erred by Depriving Party of Right to File Motion

A writ petition lies to ensure that a party can exercise the statutory right to bring a summary judgment motion. In *Polibrid Coatings, Inc. v Superior Court* (2003) 112 CA4th 920, 923, 6 CR3d 7, the trial court cited fast-track rules when it denied a trial continuance that would have allowed a cross-defendant brought into the case 14 months after the complaint was filed sufficient time to file a summary judgment motion. The court of appeal issued a writ, agreeing with the petitioner that the fast-track rules must yield to the statutory right to bring a summary judgment motion.

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§16.74 f. Court Erred by Denying Oral Argument

A writ petition lies to ensure that a party has a right to oral argument on a motion for summary judgment. In *Brannon v Superior Court* (2004) 114 CA4th 1203, 8 CR3d 491, the trial court issued a telephonic order denying summary judgment and stating that it would not entertain oral argument. The defendants filed a writ petition. After examining the statutory language and the Legislature's view of the importance of the summary judgment process, the court of appeal concluded that a trial court may not refuse to hear oral argument on a summary judgment motion, although it has substantial discretion to impose reasonable limitations. It therefore issued a writ directing the trial court to hear the matter. 114 CA4th at 1211.

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§16.75 g. Court Erred by Refusing to Consider Summary Adjudication in Alternative

A writ petition lies to direct the trial court to consider a party's alternative motion for summary adjudication. In *Hope Int'l Univ. v Superior Court* (2004) 119 CA4th 719, 14 CR3d 643, the trial court denied the plaintiff's motion for summary judgment or summary adjudication. Because the plaintiff's memorandum of points and authorities was not organized by cause of action, and despite the absence of any rule or decision requiring the trial court's preferred organization, the trial court refused to consider summary adjudication. Petitioner sought a writ of mandate. The court of appeal concluded that the trial court erred in not considering the summary adjudication motion but denied the petition because triable issues of fact existed. 119 CA4th at 744.

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§16.76 5. Deadline to File Writ Petition

A party seeking writ review of an order denying summary judgment, granting or denying summary adjudication, or violating summary judgment motion procedures must file the petition within 20 days after service of "written notice of entry of the order." CCP §437c(m)(1). The deadline runs from the service date of the writing that makes petitioner aware of the trial court's ruling; that is, "written notice of entry of the order." As used in CCP §437c(m)(1), this can mean the date on which the court clerk mailed a copy of the order rather than the date on which the prevailing party mailed notice of its entry. *Eldridge v Superior Court* (1989) 208 CA3d 1350, 1353, 256 CR 724; *Schmidt v Superior Court* (1989) 207 CA3d 56, 60, 254 CR 827 (because petitioner became aware of trial court's ruling through minute order mailed by court, that order, not later notice of order, triggered filing period).

The initial 20-day period is extended if the notice of entry of order is served by mail. CCP §437c(m)(1). If the notice is served by fax, express mail, or another method providing for overnight delivery, the initial period is extended by 2 court days. CCP §437c(m)(1). Code of Civil Procedure §§1005 and 1013 (extending times within which to act) do *not* apply to extend the time within which to file the writ petition. CCP §437c(b)(6).

PRACTICE TIP: Unless the petitioner is certain of the date of mailing, fax, or express mail, it is safest to calendar the date to file the writ petition from the date of the order.

Filing a motion for reconsideration does not extend the period for seeking writ review. *Bensimon v Superior Court* (2003) 113 CA4th 1257, 1259, 7 CR3d 151 (time limits to file writ petition to review denial of motion for summary judgment are strictly construed; motion for reconsideration does not extend time to file writ petition); *Schmidt*, 207 CA3d at 61.

Before the 20-day period within which to file the petition expires, the trial court may for good cause extend the time for one additional period not to exceed 10 days. CCP §437c(m)(1).

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§16.77 6. Standard of Review if Writ Petition Accepted

On writ review, the court of appeal reviews de novo the trial court's decision to grant summary adjudication or deny summary judgment or summary adjudication. It is not bound by the trial court's stated reasons or rationales. See, *e.g.*, *Travelers Cas. & Sur. Co. v Superior Court* (1998) 63 CA4th 1440, 1450, 75 CR2d 54 (denial of summary adjudication); *Scripps Clinic v Superior Court* (2003) 108 CA4th 917, 927, 134 CR2d 101 (same); *West Shield Investigations & Sec. Consultants v Superior Court* (2000) 82 CA4th 935, 946, 98 CR2d 612 (same). With respect to an order denying a defendant's motion for summary adjudication, the appellate court first reviews the motion to determine whether the defendant met its initial burden to establish that one or more causes of action in the complaint had no merit, by showing that one or more elements of the cause of action could not be established, or that there was a complete defense thereto. If the defendant met that burden, the court then examines whether the plaintiff showed, by setting forth specific facts, that a triable issue of fact existed as to that cause of action or defense. 82 CA4th at 946.

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F. CCP §1176: Denial of Stay in Unlawful Detainer Action

§16.78 1. Overview

Code of Civil Procedure §1176(a) authorizes a defendant in an unlawful detainer action whose petition for a stay of judgment pending appeal has been denied by the trial court to file a petition for an extraordinary writ with the appropriate court of appeal.

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§16.79 2. Deadline to File Writ Petition

A party seeking writ review of an order denying a petition for a stay of judgment in an unlawful detainer proceeding pending appeal must file the petition "forthwith." CCP §1176(a). The statute does not impose any more specific deadline for filing the petition.

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§16.80 3. Standard of Review if Writ Petition Accepted

On writ review, an order denying a stay of judgment pending appeal is reviewed under the abuse of discretion standard. See, *e.g.*, *Mehr v Superior Court* (1983) 139 CA3d 1044, 1050, 189 CR 138 (court abused discretion in denying tenants' motion for stay of execution of judgment pending appeal).

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G. CCP §904.1(a)(11)-(12): Monetary Sanction Judgment or Order of $5000 or Less

§16.81 1. Overview

In an unlimited jurisdiction civil case, an immediate appeal may be taken from an interlocutory judgment or order directing payment of sanctions of more than $5000. CCP §904.1(a)(11)-(12). A sanctions order or judgment of *$5000 or less* against a party or a party's attorney "may be reviewed on an appeal by that party after entry of final judgment in the main action, or, at the discretion of the court of appeal, may be reviewed upon petition for an extraordinary writ." CCP §904.1(b).

Because a sanction order or judgment of $5000 or less may be reviewed on appeal after final judgment or on petition for extraordinary writ, the failure to petition for writ relief from such an order or judgment should not affect the right to appeal after final judgment. Because CCP §904.1(a)(11)-(12) provides the right to appeal a sanctions order or judgment that exceeds $5000, a court may deny a writ petition that seeks review of an order or judgment of $5000 or less on the ground that appeal is an adequate remedy. For discussion of appeal as an adequate remedy, see §§15.56-15.60.

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§16.82 2. Request Writ of Mandate or Prohibition in Alternative

In requesting writ review of sanctions, the attorney should request issuance of a writ of mandate or prohibition in the alternative. A writ of mandate is an appropriate remedy to prevent or to obtain the imposition of sanctions. See, *e.g., Kirschenman v Superior Court* (1994) 30 CA4th 832, 835, 36 CR2d 166 (writ of mandate issued ordering trial court to vacate order imposing sanctions on attorney and client for failing to personally attend mediation session and ordering further mediation; trial court had no statutory authority to mandate mediation, and no enforceable agreement to mediate existed); *Yarnell & Assocs. v Superior Court* (1980) 106 CA3d 918, 923, 165 CR 421.

Prohibition is also appropriate to prevent an award of sanctions that exceeds the trial court's jurisdiction, even when execution on the order for sanctions has already issued. *Lund v Superior Court* (1964) 61 C2d 698, 709, 39 CR 891.

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Source: Civil Litigation/California Civil Writ Practice/16 Availability of Writ Relief/§16.83 3. No Statutory Deadline for Petition

§16.83 3. No Statutory Deadline for Petition

The statute does not specify a deadline within which to file the writ petition. CCP §904.1(b).

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§16.84 4. Standard of Review if Writ Petition Accepted

In general, an appellate court reviews a sanctions award for abuse of discretion. See, *e.g.*, *City & County of San Francisco v Ballard* (2006) 136 CA4th 381, 404, 39 CR3d 1.

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§16.85 5. Discovery Sanctions

There is a split of authority over the appealability of discovery sanctions. For discussion of special issues involving review of discovery sanctions, see §§16.125-16.127. See also California Civil Appellate Practice §§3.24, 3.41 (3d ed Cal CEB 1996).

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IV. OTHER CONTEXTS IN WHICH WRIT RELIEF HAS BEEN GRANTED

§16.86 A. Overview

This section discusses the various contexts in which appellate courts have granted writ relief despite the absence of a statute authorizing such relief. As with so-called statutory writs, the appellate courts retain the discretion to determine whether to entertain a writ petition on the merits. On factors the appellate courts consider in deciding whether to consider a petition on the merits, see chaps 15, 17. If the court entertains a writ petition on the merits, its decision turns on the applicable substantive law and the record.

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§16.87 B. Time to File Nonstatutory Writ Petition

When there is no statutory deadline for filing a writ petition, the appellate courts often apply an "unwritten" 60-day deadline from the date of the challenged order or ruling. See *People v Superior Court (Brent)* (1992) 2 CA4th 675, 682, 3 CR2d 375 (60 days is time limit within which petition "usually" must be filed). Many cases articulate this 60-day rule. See, *e.g.*, *Planned Parenthood Golden Gate v Superior Court* (2000) 83 CA4th 347, 356, 99 CR2d 627 ("[w]here there is otherwise no statutory time limit in filing a writ petition, it must usually be filed within 60 days"); *Popelka, Allard, McCowan & Jones v Superior Court* (1980) 107 CA3d 496, 499, 165 CR 748 ("[a]n appellate court *may* consider a petition for an extraordinary writ at any time [citation], but has discretion to deny a petition filed after the 60-day period applicable to appeals, and *should* do so absent 'extraordinary circumstances' justifying the delay"). But see *Good v Superior Court* (2008) 158 CA4th 1494, 1505 n9, 71 CR3d 125 (although 60-day rule is generally recognized, petition filed beyond 60-day deadline will not be denied unless respondent can show prejudice).

Some cases recognize exceptions to this "unwritten" rule. See, *e.g., Planned Parenthood Golden Gate v Superior Court*, *supra* (60-day rule relaxed because privacy rights of third parties implicated); *Irwin Mem. Blood Ctrs. v Superior Court* (1991) 229 CA3d 151, 156, 279 CR 911 (same).

A petition filed toward the end of the 60-day period is not necessarily timely if the petitioner has "slept on" his or her rights to the real party in interest's prejudice. In such cases, laches may apply and result in denial of the writ petition. See*, e.g.*, *H.D. Arnaiz, Ltd. v County of San Joaquin* (2002) 96 CA4th 1357, 1368, 118 CR2d 71 (laches principles govern timeliness of nonstatutory writ petition); *Wagner v Superior Court* (1993) 12 CA4th 1314, 1317, 16 CR2d 534 ("There is no absolute deadline for filing a petition for writ of mandamus, although the equitable doctrine of laches may bar relief when the petitioner has unreasonably delayed in filing the petition to the prejudice of the opposing party"; petition filed 4 months after challenged discovery order held timely); *People v Superior Court (Clements)* (1988) 200 CA3d 491, 496, 246 CR 122 ("the approach of the Supreme Court to the timeliness of a petition has been one of laches"), citing *Peterson v Superior Court* (1982) 31 C3d 147, 163, 181 CR 784.

The governing principle is reasonableness: if speedy appellate review of a trial court order is necessary, waiting until the 60th day to seek writ relief is risky.

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C. To Challenge Jurisdiction of Superior Court on Basis of Invalidity of Statute or Ordinance

§16.88 1. Overview

The appellate courts have entertained writ petitions by parties threatened with the enforcement of an unconstitutional or inapplicable statute or ordinance. A party may challenge the court's attempt to assume jurisdiction based on an unconstitutional law (see *Mendoza v Small Claims Court* (1958) 49 C2d 668, 321 P2d 9 (mandamus proceeding)), a law that has expired or been repealed without a savings clause (see *Charrot v Municipal Court* (1968) 260 CA2d 208, 66 CR 903), a law that is inapplicable to the petitioner's conduct (*In re Zerbe* (1964) 60 C2d 666, 668, 36 CR 286 (habeas corpus proceeding) (see §§4.17-4.26, 15.39-15.43 for discussion of habeas corpus), or a law that would be unconstitutional if applied in the manner contemplated (*Wetteland v Superior Court* (1967) 251 CA2d 607, 59 CR 605; *Patterson v Municipal Court* (1965) 232 CA2d 289, 293, 42 CR 769; see *In re Bevill* (1968) 68 C2d 854, 862, 69 CR 599 (habeas corpus proceeding)).

As these cases illustrate, the courts are somewhat flexible about the relief sought, and a petitioner may alternatively request either prohibition or mandate. Depending on the timing of the challenge, a writ of review (certiorari) also may be available. Depending on the circumstances, habeas relief may be appropriate. On the time for filing writ petition, see §16.87.

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§16.89 2. Use of Prohibition to Test Validity of Law

Prohibition has been used to test the constitutionality of a law on the ground that its invalidity deprives the trial court of jurisdiction to hear the case. See, *e.g.*, *Melancon v Superior Court* (1954) 42 C2d 698, 703, 268 P2d 1050 (civil statute; rule recognized but statute upheld), citing *Rescue Army v Municipal Court* (1946) 28 C2d 460, 171 P2d 8 (criminal ordinance). This rule applies to statutes (*Canon v Justice Court* (1964) 61 C2d 446, 39 CR 228), ordinances (*Lambert v Municipal Court* (1960) 53 C2d 690, 3 CR 168), and court rules (*Turlock Golf & Country Club v Superior Court* (1966) 240 CA2d 693, 50 CR 70).

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§16.90 3. Use of Mandate to Test Validity of Law

The appellate courts have also entertained challenges to the constitutionality of a statute by way of a petition for a writ of mandate. See, *e.g., Anderson v Superior Court* (1995) 11 C4th 1152, 1155, 48 CR2d 766 (original proceeding in court of appeal challenging local rule divesting county clerk of superior court clerk duties before expiration of elected term); *Zumwalt v Superior Court* (1989) 49 C3d 167, 170, 260 CR 545 (original proceeding in court of appeal challenging constitutionality of local court rule divesting county clerk of superior court clerk duties); *State Route 4 Bypass Auth. v Superior Court* (2007) 153 CA4th 1546, 1549, 64 CR3d 286 (authority filed mandate petition challenging trial court's pretrial ruling declaring right-of-way dedication requirement unconstitutional); *Hatch v Superior Court* (2000) 80 CA4th 170, 182, 94 CR2d 453 (writ petition challenging trial court's denial of motion to dismiss information on several grounds, including that statute was unconstitutional).

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§16.91 4. Standard of Review if Writ Petition Accepted

If the petition challenges the constitutionality of a statute, the appellate court will review the matter de novo because the issue presents a pure question of law. See, *e.g., Wells Fargo Bank v Superior Court* (2008) 159 CA4th 381, 385, 71 CR3d 506 (appellate courts "independently construe statutory law, as its interpretation is a question of law on which [the courts] are not bound by the trial court's analysis"); *County of Orange v Superior Court* (2007) 155 CA4th 1253, 1258, 66 CR3d 689 (on question of whether trial court correctly interpreted scope of its statutory authority, appellate court reviews issue de novo).

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D. In Cases of Exclusive, Conflicting, or Concurrent Jurisdiction

§16.92 1. Exclusive Jurisdiction

A trial court acts without or in excess of its jurisdiction if it attempts to act in a case over which another court or administrative tribunal has exclusive jurisdiction or over which another court first obtained jurisdiction. A writ of prohibition may issue to restrain that court from proceeding with the action. For examples of cases in which appellate courts have considered whether to issue a writ of prohibition under such circumstances, see:

- *Musicians Union, Local No. 6 v Superior Court* (1968) 69 C2d 695, 700, 73 CR 201 (prohibition issued restraining all further proceedings, including enforcement of any orders or injunctions previously issued; National Labor Relations Board and not superior court had jurisdiction because labor dispute affected interstate commerce);
- *People v Superior Court* (*Dyke Water Co.*) (1965) 62 C2d 515, 42 CR 849 (prohibition issued; trial court precluded from adjudicating same issues pending before Public Utilities Commission);
- *City & County of San Francisco v Small Claims Court* (1983) 141 CA3d 470, 190 CR 340 (prohibition unavailable to restrain small claims court from joining 183 claims against airport);
- *Commercial Ins. Co. v Superior Court* (1969) 272 CA2d 321, 77 CR 769 (prohibition issued; trial court had no jurisdiction when plaintiff insured employee was relegated exclusively to federal remedies under Defense Bases Act and Longshoremen's and Harbor Workers' Compensation Act);
- *Vick v Superior Court* (1965) 239 CA2d 105, 47 CR 840 (prohibition issued restraining trial court from hearing order to show cause why interlocutory judgment of divorce should not be modified to show husband was entitled to income tax deduction for minor's support; federal courts have exclusive jurisdiction to determine factual questions concerning deductions, exclusions, and exemptions).

On time to file writ petition, see §16.87.

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2. Conflicting or Concurrent Jurisdiction

§16.93 a. Trial Courts With Conflicting or Concurrent Jurisdiction

When two trial courts have concurrent jurisdiction over the same parties and the same subject matter in actions brought in different counties, the court in which jurisdiction of the defendant is first obtained is entitled to try the action. *Stearns v Los Angeles City School Dist.* (1966) 244 CA2d 696, 708, 53 CR 482. A writ of prohibition lies to restrain the second court from proceeding with the case until the first court renders a final decision. *People ex rel Garamendi v American Autoplan, Inc.* (1993) 20 CA4th 760, 771, 25 CR2d 192 ("rule of exclusive concurrent jurisdiction" requires second court to acquire jurisdiction to stay proceedings pending resolution of first action). For other examples, see:

- *Kresteller v Superior Court* (1967) 248 CA2d 545, 56 CR 771 (prohibition issued in action for child support; court with jurisdiction of dissolution action had concurrent and continuing primary jurisdiction);
- *Morrisette v Superior Court* (1965) 236 CA2d 597, 599, 46 CR 153 (prohibition issued to restrain trial court from proceeding in second adoption action filed by paternal grandparents pending finality of proceedings in first adoption action filed by maternal grandparents);
- *Adolph v Municipal Court* (1960) 181 CA2d 198, 5 CR 212 (because order overruling demurrer was not appealable, prohibition was proper to test municipal court's jurisdiction to try case on ground of prior action pending in superior court between same parties for same cause).

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§16.94 b. Determining Which Trial Court Has Jurisdiction

The preliminary question is often which trial court assumed jurisdiction first. The answer is found by determining in which action process was first served, not in which court the action was first filed. CCP §410.50; *Torrey Pines Inn, Inc. v Superior Court* (1964) 227 CA2d 265, 38 CR 565 (discussing former CCP §416, now CCP §410.50). See *People ex rel Garamendi v American Autoplan, Inc*. (1993) 20 CA4th 760, 770, 25 CR2d 192; *Figgs v Superior Court* (1962) 204 CA2d 231, 22 CR 199 (discussing former CCP §416, now CCP §410.50); *Cade v Superior Court* (1961) 191 CA2d 554, 12 CR 847.

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§16.95 c. Determining Choice of Law

A writ of mandate lies to determine the appropriate law among competing jurisdictions. In *State Farm Mut. Auto. Ins. Co. v Superior Court* (2003) 114 CA4th 434, 438, 8 CR3d 56, after certification of a nationwide class action, the court issued a writ of mandate determining that Illinois, not California, law governed.

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§16.96 d. Other Tribunals With Conflicting or Concurrent Jurisdiction

The rule of exclusive concurrent jurisdiction is not confined to trial courts, but applies to all tribunals exercising judicial functions. When two or more state tribunals have concurrent jurisdiction, the first to assume jurisdiction retains it to the exclusion of all others. *Scott v Industrial Acc. Comm'n* (1956) 46 C2d 76, 81, 293 P2d 18 (in conflict between California tribunals, prohibition, not mandate, is proper remedy). Note, however, that prohibition is available against *judicial* action only, and that most statewide administrative agencies are of legislative origin and do not exercise judicial functions. See discussion of judicial action in §§15.15-15.17.

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§16.97 3. Objecting Before Seeking Writ

Before seeking a writ of prohibition to restrain the second tribunal from proceeding, the petitioner must first object in the second tribunal, by motion or demurrer, to *that* tribunal's jurisdiction to hear and determine the action or proceeding. See, *e.g.*, *Howell v Superior Court* (1962) 211 CA2d 487, 27 CR 149 (priority rule recognized, but prohibition denied because petitioner failed to seek relief in second court before seeking writ relief). For discussion of the basic requirement that the petitioner perfect or exhaust other available remedies before seeking a writ, see §§2.15-2.16, 15.56-15.60.

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§16.98 4. Standard of Review if Writ Petition Accepted

Questions of jurisdiction and choice of law typically present pure questions of law that an appellate court reviews de novo. See, *e.g. State Farm Mut. Auto. Ins. Co. v Superior Court (2003) 114 CA4th 434, 439, 8 CR3d 56.*

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E. To Review Arbitration Issues

§16.99 1. Questions of First Impression

It is difficult to obtain writ review in an arbitration case. In Moncharsh v Heily & Blase (1992) 3 C4th 1, 12, 10 CR2d 183, the supreme court held that judicial review of private arbitration awards is limited to the grounds set out in CCP §§1286.2 (vacating awards) and 1286.6 (correcting awards). The supreme court specifically disapproved a line of cases permitting judicial review when an error appears on the face of the award and causes substantial injustice. 3 C4th at 28. But see Burlage v Superior Court (2009) 178 CA4th 524, 100 CR3d 531 (in denying writ petition, appellate court held that trial court properly vacated arbitrator's award based on arbitrator's wrongful refusal to consider material evidence; under Moncharsh, arbitrators have much, but not absolute, power). See also Cable Connection, Inc. v DIRECTV, Inc. (2008) 44 C4th 1334, 1340, 82 CR3d 229 (if parties limit arbitrators' authority by requiring dispute to be decided by rule of law, and make intention plain that award is reviewable for legal error, general rule of limited review is displaced by parties' agreement).

The Moncharsh court also held that claims of illegality of an arbitration provision are not sufficient to obtain judicial review, except in rare cases in which arbitration finality is incompatible with the protection of statutory rights. 3 C4th at 33. See, e.g., Board of Educ. v Round Valley Teachers Ass'n (1996) 13 C4th 269, 52 CR2d 115. See also Advanced Micro Devices, Inc. v Intel Corp. (1994) 9 C4th 362, 36 CR2d 581, in which a divided court upheld the arbitrator's remedy as rationally related to the underlying contract as interpreted by the arbitrator. But see California Faculty Ass'n v Superior Court (1998) 63 CA4th 935, 75 CR2d 1 (court denied petition for writ of mandate and upheld the trial court's vacation of an arbitrator's award when it determined that arbitrator had exceeded his authority under a collective bargaining agreement).

Many arbitration issues are reviewable by appeal (see CCP §§1294-1294.2) and thus not subject to writ review. For discussion of availability of appeal, see California Civil Appellate Practice §§3.23, 3.42 (3d ed Cal CEB 1996). See also §§15.57-15.61.

Successful petitions for writs involving arbitration issues are usually restricted to questions of first impression. See, e.g., Jevne v Superior Court (2005) 35 C4th 935, 28 CR3d 685 (on issue of first impression, affirming appellate court's denial of writ seeking to set aside trial court's denial of motion to set aside order compelling arbitration, supreme court held that Securities and Exchange Act preempts California Ethics Standards for Neutral Arbitrators in National Association of Securities Dealers arbitrations); Jakks Pac., Inc. v Superior Court (2008) 160 CA4th 596, 600, 72 CR3d 914 (challenging trial court's ruling as to when arbitrator's disclosures are required; affirming trial court and denying writ on merits); Blue Cross v Superior Court (1998) 67 CA4th 42, 78 CR2d 779 (application of California classwide arbitration rule not preempted by Federal Arbitration Act); Trump v Superior Court (1981) 118 CA3d 411, 173 CR 403 (trial de novo must include all issues); Depretto v Superior Court (1981) 116 CA3d 36, 171 CR 810 (writ issued because transfer order denied petitioner's right to establish that damages brought case within court's jurisdiction when initiated). But see Heritage Provider Network, Inc. v Superior Court (2008) 158 CA4th 1146, 1152, 70 CR3d 645 (writ issued to enforce stay of judicial proceedings pending arbitration).

On time to file writ petition, see §16.87.

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§16.100 2. Orders Compelling Arbitration

Orders compelling arbitration are not appealable (Wheeler v St. Joseph Hosp. (1976) 63 CA3d 345, 353, 133 CR 775), so writ review is the only mechanism for seeking review of such orders. Writ review of orders compelling arbitration "'is proper in at least two circumstances: (1) if the matters ordered arbitrated fall clearly outside the scope of the arbitration agreement or (2) if the arbitration would appear to be unduly time consuming or expensive.'" Parada v Superior Court (2009) 176 CA4th 1554, 1566, 98 CR3d 743, quoting Zembsch v Superior Court (2006) 146 CA4th 153, 160, 53 CR3d 69. For example, see:

- *Rodriquez v Superior Court (2009) 176 CA4th 1461, 98 CR3d 728 (writ of mandate issued directing trial court to vacate order compelling plaintiff to arbitrate wrongful death claim);*
- *County of Sonoma v Superior Court (2009) 173 CA4th 322, 329, 93 CR3d 39 (writ of mandate issued directing trial court to vacate order compelling county to arbitrate law enforcement union);*
- *Roman v Superior Court (2009) 172 CA4th 1462, 92 CR3d 153 (deciding writ petition on merits and upholding trial court's order compelling arbitration);*
- *Mercuro v Superior Court (2002) 96 CA4th 167, 173, 116 CR2d 671 (writ of mandate overturned trial court order compelling arbitration of employment-related tort claims based on finding that employee had been coerced into signing arbitration agreement);*
- *Rosenfield v Superior Court (1983) 143 CA3d 198, 191 CR 611 (writ of mandate directed trial court to vacate order staying action and requiring arbitration; arbitration agreement was unenforceable because it did not provide mandatory specific advisement of plaintiff patient's waiver of right to jury trial under CCP §1295).*

Mandate or prohibition may be invoked to reverse an order compelling arbitration if the matters ordered for arbitration fall clearly outside the scope of the arbitration agreement or if the arbitration would appear to be unduly time consuming or expensive. See Atlas Plastering, Inc. v Superior Court (1977) 72 CA3d 63, 68, 140 CR 59 (trial court had jurisdiction to order arbitration but exceeded its jurisdiction in joining parties not in privity). Mandate or prohibition is also appropriate to reverse an order compelling arbitration when enforcement of the arbitration provision would be unconscionable. In Discover Bank v Superior Court (2005) 36 C4th 148, 162, 30 CR3d 76, the supreme court reversed the court of appeal's issuance of a writ of mandate to compel arbitration of a consumers' class action claim. The court held that the waiver of class arbitration contained in a consumer contract of adhesion was unconscionable and thus unenforceable. See also Gentry v Superior Court (2007) 42 C4th 443, 467, 64 CR3d 773, in which the court of appeal denied a writ and found that a class action arbitration agreement provided to employees was not unconscionable; the employees were given an opportunity to opt out and the terms were clearly spelled out. The supreme court reversed, concluding that, despite the opt-out provision, the agreement was procedurally unconscionable because the employer's explanation of it was misleading. See also Trend Homes, Inc. v Superior Court (2005) 131 CA4th 950, 32 CR3d 411 (writ of mandate directed trial court to grant petitioner's motion to compel judicial reference; court of appeal found that clause in homebuyers' purchase contract requiring that disputes be submitted to judicial reference was not unconscionable).

Because arbitration reduces the judicial workload, a court might be more likely to issue a writ in support of arbitration. See, e.g., San Jose Fed'n of Adult Educ. Teachers v Superior Court (1982) 132 CA3d 861, 183 CR 410 (writ of mandate directed trial court to set aside order vacating arbitration award). See also Helzel v Superior Court (1981) 123 CA3d 652, 176 CR 740 (writ of mandate directed trial court to grant petition to compel arbitration); Dinong v Superior Court (1981) 120 CA3d 300, 174 CR 590 (writ of mandate directed trial court to vacate order disqualifying arbitrators).

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§16.101 3. Standard of Review if Writ Petition Accepted

The standard of review depends on the issue the writ petition presents. For example, the meaning and scope of an arbitration clause in a contract is generally a question of law reviewed de novo. See, e.g., Titolo v Cano (2007) 157 CA4th 310, 316, 68 CR3d 616. The same holds true for whether an arbitration clause is unenforceable due to unconscionability. Higgins v Superior Court (2006) 140 CA4th 1238, 1249, 45 CR3d 293 (whether arbitration agreement is unconscionable is a question of law; when facts are undisputed, appellate court reviews arbitration agreement de novo to determine unconscionability); see also Flores v Transamerica HomeFirst, Inc. (2001) 93 CA4th 846, 851, 113 CR2d 376 (same). The de novo standard also applies to whether the statute governing arbitration requires the disclosures that a party claimed. See Hayden v Robertson Stephens, Inc. (2007) 150 CA4th 360, 58 CR3d 333 (bank was not party to proceedings for arbitrator's disclosure purposes). See also Cardiff Equities, Inc. v Superior Court (2008) 166 CA4th 1541, 1548, 83 CR3d 699 (ordinarily trial court's decision to stay action pending arbitration is reviewed for abuse of discretion, but because underlying facts were undisputed and stay issue turned on legal question, court applied de novo standard of review).

On occasion, interpretation and enforceability issues present factual questions when the parties have introduced conflicting extrinsic evidence requiring resolution by the trier of fact. In such circumstances, the appellate court reviews the trial court's factual determinations under the substantial evidence standard. See, e.g., Baker v Osborne Dev. Corp. (2008) 159 CA4th 884, 892, 71 CR3d 854 (arbitration agreement reviewed de novo for enforceability; trial court's factual determinations bearing on unconscionability reviewed for substantial evidence).

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F. To Remedy Orders Concerning Counsel

§16.102 1. Disqualification Motions

An order granting or denying a motion to disqualify an adversary's attorney is appealable. See Jacuzzi v Jacuzzi Bros., Inc. (1963) 218 CA2d 24, 32 CR 188. However, the reviewing court may deem appeal to be an inadequate remedy because it is not as expeditious as a writ proceeding and because the right to counsel is involved. Thus, courts have issued writs to overturn orders concerning attorney disqualifications. See, e.g., Chambers v Superior Court (1981) 121 CA3d 893, 896, 175 CR 575 (state obtained disqualification of plaintiff's firm because one of its lawyers had previously worked for state; court issued writ of mandate vacating disqualification order based on plaintiff's right to counsel of her choice). Compare Shadow Traffic Network v Superior Court (1994) 24 CA4th 1067, 29 CR2d 693 (writ of mandate denied; trial court properly removed defense counsel for having retained experts who had received confidential information from plaintiff's counsel regarding lawsuit), to Western Digital Corp. v Superior Court (1998) 60 CA4th 1471, 71 CR2d 179 (writ of mandate issued directing trial court to vacate order disqualifying defense counsel and expert witness when plaintiff failed to establish that expert actually possessed attorney-client information, as opposed to merely having potential access to it). See also Baker Manock & Jensen v Superior Court (2009) 175 CA4th 1414, 96 CR3d 785 (writ of mandate issued directing trial court to vacate order disqualifying law firm; trial court erred in finding that case facts constituted conflict of interest); Gong v RFG Oil, Inc. (2008) 166 CA4th 209, 213, 82 CR3d 416 (party filed both notice of appeal and writ petition challenging order denying disqualification motion; court of appeal treated writ petition as petition for writ of supersedeas, stayed further proceedings in trial court, decided appeal, and reversed order); Cal W. Nurseries, Inc. v Superior Court (2005) 129 CA4th 1170, 29 CR3d 170 (writ of mandate issued directing trial court to disqualify law firm that continued to represent party adverse to another client in unrelated proceeding); Lyle v Superior Court (1981) 122 CA3d 470, 175 CR 918 (plaintiff's law firm disqualified because attorneys in firm were scheduled to testify for plaintiff; writ of mandate issued directing trial court to vacate disqualification order).

On time to file writ petition, see §16.87.

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§16.103 2. Other Issues Involving Counsel

Other issues involving attorney representation that have been resolved in writ proceedings include:

- *Propriety of appearing pro hac vice and trial court's authority to issue sanctions for misconduct. Sheller v Superior Court (2008) 158 CA4th 1697, 1701 n1, 71 CR3d 207 (writ of mandate issued).*
- *Discharged attorney's retention of files. Academy of Cal. Optometrists, Inc. v Superior Court (1975) 51 CA3d 999, 124 CR 668 (writ of mandate issued).*
- *Denial of representation by counsel of client's own choosing. See Meadow v Superior Court (1963) 59 C2d 610, 616, 30 CR 824 (writ of mandate issued); Golden State Glass Corp. v Superior Court (1939) 13 C2d 384, 90 P2d 75 (writ of mandate issued to compel recognition of attorney); Cloer v Superior Court (1969) 271 CA2d 143, 76 CR 217 (writ of mandate issued).*
- *Potential deprivation of counsel. Adams v Superior Court (1992) 2 CA4th 521, 532, 3 CR2d 49 (existence of malicious prosecution and abuse of process lawsuit would drive wedge between petitioner attorneys and their clients; writ issued to require trial court to sustain petitioners' demurrer to malicious prosecution and all other causes of action without leave to amend).*

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§16.104 3. Standard of Review if Writ Petition Accepted

The standard of review in these proceedings depends on the issue presented. Generally, an appellate court reviews an order on a disqualification motion for abuse of discretion. People ex rel Dep't of Corporations v SpeeDee Oil Change Sys., Inc. (1999) 20 C4th 1135, 1143, 86 CR2d 816. But when "there are no material disputed factual issues, the appellate court reviews the trial court's determination as a question of law." 20 C4th at 1144; see also Cal W. Nurseries, Inc. v Superior Court (2005) 129 CA4th 1170, 1174, 29 CR3d 170.

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G. To Review Orders on Pleadings

§16.105 1. When Issue Is Substantial or Resolution Would Result in Final Disposition of Case as to Party

Although appellate courts prefer to review cases on a full record and resolve the entire case at one time, in rare cases an appellate court may invoke mandate or prohibition to review rulings at the pleading stage. Courts may grant such review in instances of a serious nature, when the issue is of substantial legal importance, or when resolution of the issue would result in final disposition as to a party. For examples, see:

- *Covenant Care, Inc. v Superior Court (2004) 32 C4th 771, 776, 11 CR3d 222 (supreme court reviewed trial court ruling allowing fourth amended complaint to resolve conflict in courts of appeal regarding whether procedural prerequisites to seeking punitive damages against health care provider under CCP §425.13(a) applied to elder abuse actions);*
- *Brandt v Superior Court (1985) 37 C3d 813, 816, 210 CR 211 (court reviewed ruling at pleading stage because issue was of widespread interest, courts of appeal were in conflict, and trial court's ruling "effectively deprived petitioner of the opportunity to present a substantial portion of his cause of action");*
- *Coulter v Superior Court (1978) 21 C3d 144, 148, 145 CR 534, superseded by statute on other grounds ("mandamus will lie when it appears that the trial court has deprived a party of an opportunity to plead his cause of action or defense, and when that extraordinary relief may prevent a needless and expensive trial and reversal");*
- *Babb v Superior Court (1971) 3 C3d 841, 851, 92 CR 179 (court unwilling to endorse use of prerogative writ to review rulings on pleadings except in "instances of such grave nature or of such significant legal impact that we feel compelled to intervene through the issuance of an extraordinary writ");*
- *Los Angeles County Metro. Transp. Auth. v Superior Court (2004) 123 CA4th 261, 265, 20 CR3d 92 ("[d]ue to the novelty of the factual context in which this issue was raised," court issued order to show cause on petition for writ of mandate to reverse trial court order denying motion to strike allegations supporting claim for civil penalty under the Unruh Act, but then denied writ); and*
- *Campbell v Superior Court (1996) 44 CA4th 1308, 1315, 52 CR2d 385 (alternative writ issued to decide "novel and important question" in case in which demurrer was sustained without leave to amend with respect to less than all causes of action).*

On time to file writ petition, see §16.87.

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§16.106 2. When Ruling on Pleading Would Dramatically Affect Scope or Nature of Action

Appellate courts continue to exercise their discretion to hear writ petitions at the pleading stage in the interest of judicial economy, particularly when the trial court ruling may have a dramatic effect on the scope or the nature of the action. Some examples are:

- *Issuance of mandate to compel a trial court to permit an amendment or amended complaint. See, e.g., Peterson v Superior Court (1982) 31 C3d 147, 181 CR 784; Cuadros v Superior Court (1992) 6 CA4th 671, 8 CR2d 18 (allowing plaintiff to name correct defendant). See also 5 Witkin, California Procedure, Pleading §1197 (5th ed 2008).*
- *Issuance of mandate to compel a trial court to deny a motion to strike a pleading. See, e.g., Grafton Partners L.P. v Superior Court (2005) 36 C4th 944, 32 CR3d 5 (affirming writ of mandate issued to reverse trial court's order striking demand for jury trial on ground that predispute jury waivers by contract are unenforceable); Bruno v Superior Court (1981) 127 CA3d 120, 179 CR 342 (mandate issued to compel vacation of order striking certain requested remedies from complaint); Blegen v Superior Court (1981) 125 CA3d 959, 178 CR 470 (mandate issued to compel vacation of order striking claim for punitive damages).*
- *Issuance of mandate to compel trial court to vacate order allowing amendment to add punitive damages claim. See Freedman v Superior Court (2008) 166 CA4th 198, 201, 82 CR3d 563 (writ relief warranted to set aside trial court's ruling that excused plaintiff from statutory deadline for filing motion to amend complaint to add punitive damages claim).*
- *Issuance of mandate to compel trial court to vacate order denying motion to strike punitive damages claim for failure to make threshold showing on merits. Little Co. of Mary Hosp. v Superior Court (2008) 162 CA4th 261, 265, 75 CR3d 519 (trial court erred in concluding pretrial mechanism provided in CCP §425.14 does not apply in elder abuse cases seeking exemplary damages against religious organizations).*
- *Issuance of mandate to compel trial court to grant demurrer and motion to strike portions of class action complaint. TJX Cos. v Superior Court (2008) 163 CA4th 80, 83, 77 CR3d 114.*
- *Issuance of mandate to ensure a defendant's opportunity to defend the action. See Mediterranean Exports, Inc. v Superior Court (1981) 119 CA3d 605, 174 CR 169 (mandate issued to ensure corporation's opportunity to defend action; its answer and cross-complaint had been stricken in breach of lease action instituted against it).*
- *Issuance of mandate to compel trial court to partially vacate case management order. See Fire Ins. Exch. v Superior Court (2004) 116 CA4th 446, 10 CR3d 617 (construing case management order as denial of motion for judgment on the pleadings because order resolved disputed issues raised by the pleadings); Hernandez v Superior Court (2003) 112 CA4th 285, 303, 4 CR3d 883.*
- *Issuance of mandate to compel trial court to vacate order granting or denying motion for judgment on the pleadings. See Fire Ins. Exch. v Superior Court, supra; American Int'l Group, Inc. v Superior Court (1991) 234 CA3d 749, 755, 285 CR 765 (denial of motion for judgment on the pleadings may be reviewed by writ of mandate).*
- *Issuance of mandate in consolidation and severance matters. See State Farm Mut. Auto. Ins. Co. v Superior Court (1956) 47 C2d 428, 304 P2d 13 (mandate issued to compel severance; trial judge abused discretion in ordering consolidation); Omaha Indem. Co. v Superior Court (1989) 209 CA3d 1266, 1274, 258 CR 66 (mandate appropriate when severance motion denied with prejudice to bringing motion at later time).*
- *Issuance of order to show cause why mandate should not issue to determine collateral estoppel effect of prior court of appeal opinion. Zevnik v Superior Court (2008) 159 CA4th 76, 83, 70 CR3d 817 (important issue of law as to which there was uncertainty and which would significantly impact case).*

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§16.107 3. Standard of Review if Writ Petition Accepted

The standard of review of an order concerning a pleading issue depends on the particular issue that the writ petition presents. Generally, a court reviews an order denying or granting leave to amend for abuse of discretion. It reviews an order overruling or sustaining a demurrer, or an order granting or denying a motion for judgment on the pleadings, de novo, because the court assumes the truth of the allegations in the complaint. See, e.g., Poway Royal Mobilehome Owners Ass'n v City of Poway (2007) 149 CA4th 1460, 1470, 58 CR3d 153 (demurrer); Lazar v Hertz Corp. (1999) 69 CA4th 1494, 1501, 82 CR2d 368 (demurrer); see also Angelucci v Century Supper Club (2007) 41 C4th 160, 166, 59 CR3d 142 (judgment on the pleadings); Mendoza v. Continental Sales Co. (2006) 140 CA4th 1395, 1401, 45 CR3d 525 (same).

A court generally reviews other rulings on procedural matters (e.g., severance, consolidation, case management) for abuse of discretion. See Hernandez v Superior Court (2003) 112 CA4th 285, 294, 4 CR3d 883 (case management order); Omaha Indem. Co. v Superior Court (1989) 209 CA3d 1266, 1271, 258 CR 66 (severance); McLellan v McLellan (1972) 23 CA3d 343, 353, 100 CR 258 (severance); State Farm Mut. Auto. Ins. Co. v Superior Court (1956) 47 C2d 428, 304 P2d 13 (consolidation).

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H. To Review Rulings on Demurrer

§16.108 1. When Demurrer Is Overruled in Its Entirety

If a trial court erroneously overrules a demurrer there may be a needless and significant expenditure of resources absent immediate appellate review. Accordingly, in the interest of judicial economy, a writ may issue to review an order overruling a demurrer. For example:

- *State v Superior Court (2004) 32 C4th 1234, 1245, 13 CR3d 534 (in prison inmate's action against state, state agencies, and employees for inadequate medical treatment, supreme court granted review and held that failure to plead facts demonstrating or excusing compliance with claim presentation requirement of Government Claims Act (formerly known as the Tort Claims Act) (Govt C §§810-997.6) may be raised on general demurrer to complaint);*
- *Farb v Superior Court (2009) 174 CA4th 678, 682, 94 CR3d 586 (writ of mandate issued directing trial court to vacate order overruling demurrer on statute of limitations grounds and dismiss case);*
- *Wells Fargo Bank v Superior Court (2008) 159 CA4th 381, 385, 71 CR3d 506 (legal issue of preemption is "properly raised by demurrer and an order overruling a demurrer on that ground is properly reviewed by petition for a writ of mandate");*
- *Stavropoulos v Superior Court (2006) 141 CA4th 190, 193, 45 CR3d 705 (writ review appropriate on significant issue of first impression; court of appeal held malicious prosecution complaint was subject to 2-year limitations period of CCP §335.1, not 1-year period of CCP §340(c), and was timely filed);*
- *Big Valley Band of Pomo Indians v Superior Court (2005) 133 CA4th 1185, 1189, 35 CR3d 357 (writ review appropriate because tribe effectively would have lost sovereign immunity defense if required to proceed to trial on casino employees' breach of contract action);*
- *Mitsubishi Materials Corp. v Superior Court (2003) 113 CA4th 55, 60, 6 CR3d 159 (writ of mandate issued directing trial court to dismiss cases in which World War II prisoners of war asserted claims against Japanese companies for whom they were forced to do slave labor; case merited expeditious consideration because plaintiffs were World War II veterans and permitting lengthy trial only to reverse judgment years later would unfairly create false hope of monetary recovery).*

On time to file writ petition, see §16.87.

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§16.109 2. When Demurrer Is Partially Sustained

If a trial court sustains a demurrer to only part of a complaint or answer, writ relief may be available. See, e.g., Coulter v Superior Court (1978) 21 C3d 144, 148, 145 CR 534 (demurrer to portion of complaint); Alch v Superior Court (2004) 122 CA4th 339, 351, 19 CR3d 29 (in class action age discrimination case, plaintiffs appealed and petitioned for writs of mandate from trial court's grant of demurrer with leave to amend; court consolidated appeals and petitions and issued mandate to set aside trial court's rulings); Campbell v Superior Court (1996) 44 CA4th 1308, 1315, 52 CR2d 385 (demurrer sustained without leave to amend with respect to less than all causes of action; but writ issued to decide "novel and important question").

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§16.110 3. When Court Sustains Demurrer

If a trial court sustains a demurrer with leave to amend, appellate review in any form is usually premature. If a trial court sustains a demurrer to the entire complaint without leave to amend, appeal from the resulting judgment of dismissal is normally an adequate remedy, because appeal is immediately available. See, e.g., Babb v Superior Court (1971) 3 C3d 841, 850, 92 CR 179 (rule stated, but writ of mandate issued because issue presented could have significant impact on other cases).

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§16.111 4. Standard of Review if Writ Petition Accepted

Because a demurrer tests the complaint's legal sufficiency, an appellate court reviews an order on a demurrer de novo, exercising its independent judgment about whether the complaint states a cause of action. See, e.g., Zenith Ins. Co. v O'Connor (2007) 148 CA4th 998, 1006, 55 CR3d 911; Flying Dutchman Park, Inc. v City & County of San Francisco (2001) 93 CA4th 1129, 1134, 113 CR2d 690.

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I. When Court Denies Motion to Dismiss

§16.112 1. Overview

An order denying a motion to dismiss an action under the mandatory dismissal statutes (CCP §§583.210-583.250, 583.310-583.360) may be reviewable by petition for writ of mandate. For examples, see:

- *Moran v Superior Court (1983) 35 C3d 229, 240, 197 CR 546 (medical malpractice action was not brought to trial within 5-year period under former CCP §583(b), because clerk's office mistakenly sent case file to storage instead of resetting it for trial after arbitration; trial court denied motion to dismiss, and supreme court refused to issue writ of mandate because failure to meet statutory requirements was beyond plaintiff's control);*
- *Tunis v Superior Court (1963) 59 C2d 465, 466, 30 CR 135 (writ of mandate granted; failure to go to trial within 5 years);*
- *New W. Fed. Sav. & Loan Ass'n v Superior Court (1990) 223 CA3d 1145, 1152, 273 CR 37 (writ of mandate denied; 5-year statutory period in which to bring case to trial was tolled while writ petition challenging denial of summary judgment motion was pending);*
- *Kerr-McGee Chem. Corp. v Superior Court (1984) 160 CA3d 594, 597, 206 CR 654 (writ of mandate granted to quash service; defendant must be directly named or named and served as fictitious defendant within 3-year period of former CCP §581a);*
- *Lesko v Superior Court (1982) 127 CA3d 476, 485, 179 CR 595 (writ of mandate granted; failure to serve complaint within 3-year period of former CCP §581a).*

NOTE: *When reviewing older opinions involving motions to dismiss, counsel should be aware that the statute requiring service and filing of summons within 3 years, former CCP §581a, was in effect from 1982 until it was repealed and replaced by CCP §§583.210-583.250. Former CCP §581a excused compliance with the 3-year period only if there was a basis for estoppel or if the noncompliance was beyond the party's control. Counsel should also be aware that the statute requiring commencement of trial within 5 years, former CCP §583, was repealed in 1984 and replaced by CCP §§583.310-583.360.*

If the motion to dismiss is based on inconvenient forum or delay in prosecution and is made in lieu of the defendant's responsive pleading, writ review of denial of the motion may fall within CCP §418.10. See discussion in §§16.54-16.57.

On time to file writ petition, see §16.87.

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§16.113 2. Writ of Prohibition to Prevent Trial

Although mandate is available to compel a dismissal, prohibition may be used to prevent a trial. J. C. Penney Co. v Superior Court (1959) 52 C2d 666, 669, 343 P2d 919 (either writ of mandate to compel dismissal or writ of prohibition to prevent trial of action is appropriate remedy after expiration of time prescribed by former CCP §583). See also Rio Del Mar Country Club, Inc. v Superior Court (1948) 84 CA2d 214, 217, 190 P2d 295 (attempt to proceed with trial after meritorious motion to dismiss under mandatory dismissal statutes exceeds court's jurisdiction).

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§16.114 3. Standard of Review if Writ Petition Accepted

The standard of review for trial court orders denying a motion for mandatory dismissal is abuse of discretion. See New W. Fed. Sav. & Loan Ass'n v Superior Court (1990) 223 CA3d 1145, 1156, 273 CR 37 (writ of mandate denied; trial court did not abuse its discretion by denying motion to dismiss under CCP §583.310); Baccus v Superior Court (1989) 207 CA3d 1526, 1531, 255 CR 781 (writ of mandate issued; trial court denied motion to dismiss under CCP §583.310).

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J. To Correct Discovery Order

§16.115 1. Overview

As a general rule, appellate courts disfavor writ review of discovery orders because it is potentially disruptive of trial court proceedings and because routine review of such orders would overwhelm the appellate courts. This is so even though it is virtually impossible to obtain meaningful review of a discovery order on appeal after judgment. See, e.g., Sav-On Drugs, Inc. v Superior Court (1975) 15 C3d 1, 5, 123 CR 283; Pacific Tel. & Tel. Co. v Superior Court (1970) 2 C3d 161, 169, 84 CR 718; Catanese v Superior Court (1996) 46 CA4th 1159, 1163, 54 CR2d 280; Oceanside Union Sch. Dist. v Superior Court (1962) 58 C2d 180, 185 n4, 23 CR 375 (writ review of discovery orders should be limited to important matters of first impression and situations in which general guidelines can be established for future cases). In Roden v AmerisourceBergen Corp. (2005) 130 CA4th 211, 29 CR3d 810, the court denied a petition for a writ of mandate addressing a postjudgment discovery issue because the defendant had an adequate remedy at law. The court noted that "extraordinary relief is supposed to be extraordinary" and that writ relief "is not available as a matter of course just because a particular postjudgment order is nonappealable." 130 CA4th at 213.

Despite the general rule, courts sometimes grant writ review of a discovery order if it: (1) compels production of privileged information; (2) prevents a party from having a fair opportunity to litigate a case; or (3) involves unresolved issues of first impression and importance to the trial courts and bar. OXY Resources Cal. LLC v Superior Court (2004) 115 CA4th 874, 886, 9 CR3d 621. Often, the discovery order at issue in cases in which courts have granted review implicated several of these important considerations. See Paterno v Superior Court (2008) 163 CA4th 1342, 1357, 78 CR3d 244 (writ issued to reverse discovery order that delayed anti-SLAPP motion to enforce protections of anti-SLAPP statute (CCP §425.16) against harassing litigation and avoid irreparable injury); San Joaquin County Local Agency Formation Comm'n v Superior Court (2008) 162 CA4th 159, 166, 76 CR3d 93 (writ issued to prohibit discovery that would implicate privilege).

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§16.116 2. Significant Issues of First Impression Arising During Discovery

Courts may relax their general reluctance to review discovery orders (see §16.115) when an order presents a generally important question of first impression. See Oceanside Union Sch. Dist. v Superior Court (1962) 58 C2d 180, 185 n4, 23 CR 375; CashCall, Inc. v Superior Court (2008) 159 CA4th 273, 285 n6, 71 CR3d 441 (considering question of first impression regarding precertification discovery of identities of potential class members). For example, in Catanese v Superior Court (1996) 46 CA4th 1159, 54 CR2d 280, following 8 days of deposition, the plaintiff propounded a series of five interrogatories, asking the defendant whether he contended that any of the plaintiff's deposition answers were untruthful and what evidence supported those contentions. The defendant objected to the interrogatories as not being self-contained, and as violating the "Rule of 35" (CCP §2030.030), limiting the number of interrogatories without a declaration of good cause. The court of appeal issued a writ of mandate directing the trial court to vacate its order compelling further responses, noting that the discovery tactic tested the proper dividing line between protected work product and compelled contention interrogatories. Because such a tactic would have a major impact on litigation and litigation expenses and would likely achieve prevalence in practice, the issue merited review by writ. 46 CA4th at 1163. Additional examples include:

- *Urban Pac. Equities Corp. v Superior Court (1997) 59 CA4th 688, 693, 69 CR2d 635 (reviewing order quashing plaintiff's business records subpoena of court reporter to obtain copy of plaintiff's own deposition transcript; although intrigued by issue of first impression, court denied writ petition because transcript was "product," not "record," of court reporter's business);*
- *Palay v Superior Court (1993) 18 CA4th 919, 934, 22 CR2d 839 (writ of mandate denied regarding order compelling production of guardian ad litem's medical records; petition involved conflict between litigant's right to discovery and nonlitigant's right to invoke physician-patient privilege);*
- *Daly v Superior Court (1977) 19 C3d 132, 140, 137 CR 14 (writ review granted because power of trial court to grant prospective witness immunity to facilitate discovery by private party was important issue of first impression and general guidelines could be established).*

For other examples of issues of first impression, see discussion of procedural issues in §16.119.

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3. Constitutional Issues Arising During Discovery

§16.117 a. Overview

An appellate court may be persuaded to review the merits of a writ petition seeking review of a discovery order that presents a constitutional issue. Examples include:

- ***Immunity from criminal prosecution.*** *Compare Fremont Indem. Co. v Superior Court (1982) 137 CA3d 554, 187 CR 137 (writ of mandate issued directing trial court to order plaintiff to appear for deposition; plaintiff could not sue insurance company for bad faith settlement of claim for loss of restaurant by fire, then resist deposition on ground of self-incrimination after indictment for arson) to Gonzales v Superior Court (1980) 117 CA3d 57, 72, 178 CR 358 (writ of mandate issued to control interrogatories in civil paternity action to provide immunity to putative fathers whose answers to questions to establish paternity might also result in criminal prosecution for nonsupport).*
- ***Illegal search and seizure.*** *See Barnes v Molino (1980) 103 CA3d 46, 50, 162 CR 786 (writ of mandate issued to modify order regarding subpoena duces tecum alleged to interfere with freedom from unreasonable search and seizure). But see Tom v Schoolhouse Coins, Inc. (1987) 191 CA3d 827, 828 n1, 236 CR 541 (declining to treat appeal from order requiring compliance with subpoena duces tecum as petition for writ of mandate).*
- ***Freedom of speech.*** *See Maggi v Superior Court (2004) 119 CA4th 1218, 1226, 15 CR3d 161 (writ of mandate issued directing trial court to vacate restraining order; prohibiting petitioner and counsel from discussing lawsuit with third parties without court's permission, which was sought and denied, violated constitutional right to free speech and was not appropriate discovery sanction). See also Paterno v Superior Court (2008) 163 CA4th 1342, 1357, 78 CR3d 244 (writ of mandate issued to enforce protections of anti-SLAPP statute (CCP §425.16) against harassing litigation and reverse discovery order that delayed anti-SLAPP motion).*

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§16.118 b. Right to Privacy

In determining whether to grant writ review, courts continue to place emphasis on the right to privacy embodied in Cal Const art I, §1. For example, in Palay v Superior Court (1993) 18 CA4th 919, 22 CR2d 839, the court issued an alternative writ because the case involved an issue of first impression in the areas of privilege and constitutional privacy that was also "of general importance to the trial court and the profession." 18 CA4th at 925. The question presented was whether a nonlitigant mother may, in an action by her son for negligence against a hospital and doctors, assert her statutory privilege and constitutional right of privacy to prevent discovery of her prenatal records. See also Alch v Superior Court (2008) 165 CA4th 1412, 1422, 82 CR3d 470 (trial court denied discovery on privacy grounds; writ issued because trial court failed to properly weigh interests and should have allowed some discovery); Kahn v Superior Court (1987) 188 CA3d 752, 769, 233 CR 662 (trial court ordered university professor to be deposed about confidential faculty meeting concerning petitioner's possible permanent appointment to teaching position; mandate issued to set aside that order based on professor's right to privacy).

Courts have issued writs on a wide range of privacy issues, including:

- ***Financial privacy.*** *Courts have held that the right to privacy gives a litigant a presumptive right to a protective order restricting the use of discovered personal financial data. Moskowitz v Superior Court (1982) 137 CA3d 313, 317, 187 CR 4; Richards v Superior Court (1978) 86 CA3d 265, 272, 150 CR 77. But see GT, Inc. v Superior Court (1984) 151 CA3d 748, 754, 198 CR 892 (no presumption applied when corporate financial information sought concerning antitrust and unfair competition allegations).*
- ***Tax data.*** *A writ may issue to overturn an order requiring disclosure of data contained in sales tax returns. Sav-On Drugs, Inc. v Superior Court (1975) 15 C3d 1, 5, 123 CR 283 (writ of prohibition issued).*
- ***Sexual privacy.*** *A plaintiff does not surrender her right to privacy by bringing a sexual harassment suit. Vinson v Superior Court (1987) 43 C3d 833, 842, 239 CR 292 (writ of mandate issued limiting discovery of plaintiff's sexual history and setting standards for such inquiries in future cases). See also Fults v Superior Court (1979) 88 CA3d 899, 903, 152 CR 210 (writ of mandate issued limiting inquiry into mother's sexual history in paternity suit). In John B. v Superior Court (2006) 38 C4th 1177, 1181, 45 CR3d 316, a wife sought discovery of her husband's medical records and sexual history to confirm her allegations that he knowingly or negligently infected her with HIV. The husband filed a writ petition after the trial court permitted broad discovery into his sexual history and medical records. The supreme court limited discovery to protect the identities of the husband's previous sexual partners, denied requests for admissions concerning his lifestyle, and temporally limited discovery to the period of possible infection.*
- ***Marital privacy.*** *The marital relationship is a foundation for the right to privacy. Tylo v Superior Court (1997) 55 CA4th 1379, 1388, 64 CR2d 731 (in wrongful termination suit based on pregnancy discrimination, court of appeal issued writ of mandate; trial court erred in ordering plaintiff to answer deposition questions relating to possible emotional distress arising out of her marital relationship).*
- ***Associational privacy.*** *The right to associational privacy may also be protected by a writ. See Britt v Superior Court (1978) 20 C3d 844, 859, 143 CR 695 (writ of mandate issued to prevent forced disclosure of information on political affiliation, which violated freedom of association); Church of Hakeem, Inc. v Superior Court (1980) 110 CA3d 384, 387, 168 CR 13 (writ of prohibition issued nullifying contempt order and discovery order for refusal to disclose membership list in answer to interrogatories, on ground that disclosure order violated right of associational privacy of innocent nonlitigant church members). But see Bodenheimer v Superior Court (1980) 108 CA3d 885, 889, 167 CR 26 (writ petition denied; in defamation action, question concerning petitioner's membership in defendant organization did not violate right to associational privacy); Davies v Superior Court (1984) 36 C3d 291, 300, 204 CR 154 (petition for writ of mandate denied because trial court and real party in interest complied with alternative writ; nonetheless, in automobile accident case, court of appeal decided that information about other accidents at that location that did not disclose identifying material was not privileged, disapproving long line of contrary cases).*
- ***Medical privacy.*** *See Ombudsman Servs. of N. Cal. v Superior Court (2007) 154 CA4th 1233, 1239, 65 CR3d*

456 (mandate issued to prevent disclosure of records of long-term care facility not involving deceased plaintiff and his representatives); Doyle v Superior Court (1996) 50 CA4th 1878, 1887, 58 CR2d 476 (writ of mandate issued; plaintiff's allegation of past emotional distress did not place her mental condition in controversy and did not justify order for mental exam); Jones v Superior Court (1981) 119 CA3d 534, 544, 174 CR 148 (writs denied; right to privacy; physician-patient privilege). See also John B. v Superior Court, supra.

- ***Juvenile records.*** *See R.S. v Superior Court (2009) 172 CA4th 1049, 91 CR3d 546 (denying writ challenging order permitting disclosure of Child Abuse Services Team's tape of victim in juvenile's court file subject to protective order; trial court did not abuse its discretion in balancing competing interests).*
- ***Privileged communications or information.*** *On possible writ review of discovery orders impinging on privileged communications or information, see §§16.120-16.122.*

PRACTICE TIP: *It is essential to ask the appellate court to stay a discovery order requiring the disclosure of private or privileged information in connection with the filing of a writ petition. Without a stay, compliance with the discovery order may render the matter moot. On requesting a stay in appellate court writ proceedings, see chap 19.*

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§16.119 4. Recurring Procedural Issues

If the discovery order presents a recurring issue of discovery procedure, an appellate court may entertain the writ petition on the merits. Examples:

- *Sexton v Superior Court (1997) 58 CA4th 1403, 1406, 68 CR2d 708 (written opposition to motion to compel production of documents under former CCP §2031(l) (now CCP §2031.300) failed to raise timeliness; writ of mandate issued directing trial court to deny motion as untimely because time limit was mandatory and at least quasi-jurisdictional).*
- *Standon Co. v Superior Court (1990) 225 CA3d 898, 902, 275 CR 833 (writ review of order finding motion to compel further response to demand for inspection of documents under former CCP §2031(l) (now CCP §2031.300), filed more than 45 days after response date, untimely; 45-day period ran from service of written response, not from date set for production or inspection; petition denied, except to compel trial court to exercise its discretion on issue of sanctions).*
- *Roe v Superior Court (1990) 224 CA3d 642, 646, 273 CR 745 (writ of mandate issued directing trial court to require answers to interrogatories and production of documents; discovery automatically reopened when court-ordered arbitration proceedings were vacated by striking of at-issue memorandum; because question was one of first impression, trial court had discretion to deny sanctions).*
- *Carter v Superior Court (1990) 218 CA3d 994, 996, 267 CR 290 (writ of mandate issued directing trial court to vacate protective order and reconsider ruling on motion; party who missed deadline for compelling inspection of documents under former CCP §2031(l) (now CCP §2031.300) was not barred from requesting that same documents be brought to deposition under former CCP §2025 (now CCP §§2025.010-2025.620); failure of one procedure did not bar use of other procedure). See also Carpenter v Superior Court (2006) 141 CA4th 249, 252, 45 CR3d 821 (writ of mandate issued directing trial court to vacate order granting mental examination of plaintiff because order did not specify psychological tests to be administered, in violation of CCP §2032.320); Rancho Bernardo Dev. Co. v Superior Court (1992) 2 CA4th 358, 363, 2 CR2d 878 (writ review granted because petition concerning interpretation of former CCP §2034(i)(2) (now CCP §§2034.430-2034.450), limiting expert witness fees for depositions, raised issues of general concern that should receive early resolution).*

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5. Issues of Privilege

§16.120 a. Overview

Courts may grant writ review of discovery orders when privileged communications are at issue. See, e.g., Pacific Tel. & Tel. Co. v Superior Court (1970) 2 C3d 161, 170 n11, 84 CR 718; Marcus v Superior Court (1971) 18 CA3d 22, 23, 95 CR 545. In fact, interlocutory review of discovery orders by writ of mandate is the only adequate remedy when a court orders production of documents that may be subject to a privilege, because "once privileged matter has been disclosed there is no way to undo the harm which consists in the very disclosure." Crab Addison, Inc. v Superior Court (2008) 169 CA4th 958, 965, 87 CR3d 400, quoting People ex rel Lockyer v Superior Court (2004) 122 CA4th 1060, 1071, 19 CR 3d 324. See also Valley Bank v Superior Court (1975) 15 C3d 652, 657, 125 CR 553 (right to discover confidential bank records must be balanced against customer's right to privacy under Cal Const art I, §1).

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Source: *Civil Litigation/California Civil Writ Practice/16 Availability of Writ Relief/§16.121 b. Examples of Writ Review of Privilege Issues*

§16.121 b. Examples of Writ Review of Privilege Issues

Privileges that have been the subject of writ review of discovery orders include the following:

- ***Physician-patient privilege; psychotherapist-patient privilege.*** *Britt v Superior Court (1978) 20 C3d 844, 862, 143 CR 695 (although Evid C §§996 and 1016 provide exceptions to physician-patient and psychotherapist-patient privileges when patient puts medical condition at issue in lawsuit, mandate will issue to prevent discovery of unrelated past medical or psychotherapeutic treatment); Manela v Superior Court (2009) 177 CA4th 1139, 1143, 99 CR3d 736 (writ of mandate issued directing trial court to vacate order quashing subpoena for medical records on grounds father had waived privilege); Palay v Superior Court (1993) 18 CA4th 919, 925, 22 CR2d 839 (first impression issue of whether mother may assert physician-patient privilege to prevent disclosure of her prenatal medical records in child's negligence action against doctors and hospital); Rittenhouse v Superior Court (1991) 235 CA3d 1584, 1591, 1 CR2d 595 (writ of mandate issued directing trial court to quash deposition subpoenas for records protected by physician-patient and psychotherapist-patient privileges).*
- ***Law enforcement agency personnel records*** *(see Evid C §§1043, 1045). Shepherd v Superior Court (1976) 17 C3d 107, 116, 130 CR 257 (in police misconduct suit, supreme court discussed numerous privileges and statutory exemptions claimed by defendants resisting discovery; writ of mandate issued directing trial court to further consider petitioner's motion to compel), overruled on other grounds by People v Holloway (2004) 33 C4th 96, 131, 14 CR3d 212; County of Orange v Superior Court (2000) 79 CA4th 759, 763, 94 CR2d 261 (explaining analysis in Shepherd); Hackett v Superior Court (1993) 13 CA4th 96, 98, 16 CR2d 405 (writ of mandate issued directing trial court to deny motion to compel; privilege extends to answers to interrogatories seeking such information as officer's home address, telephone number, and driver's license number, even though information could be found outside officer's personnel file).*
- ***Official information.*** *City of Fresno v Superior Court (1988) 205 CA3d 1459, 1464, 253 CR 296 (writ review of document production order that might have caused police officers unnecessary annoyance, embarrassment, or oppression).*
- ***Deliberative process privilege.*** *San Joaquin County Local Agency Formation Comm'n v Superior Court (2008) 162 CA4th 159, 76 CR3d 93 (writ issued to prohibit discovery that would implicate legislative process).*
- ***Mediation privilege.*** *Rojas v Superior Court (2004) 33 C4th 407, 415, 15 CR3d 643 (tenants of apartment complex sought to compel production of photos and other raw data in possession of developers, who opposed motion on ground that items were exchanged in mediation in prior litigation and were protected by mediation privilege (Evid C §1119); supreme court held documents were protected); Doe 1 v Superior Court (2005) 132 CA4th 1160, 1173, 34 CR3d 248 (writ of mandate issued prohibiting church from publicly releasing written summaries of personnel files of priests accused of childhood sexual abuse that were prepared for submission in ongoing mediation because disclosure would violate mediation confidentiality privilege; disclosure of underlying information used in creating summaries, which existed before mediation proceeding, was not prohibited). But see Saeta v Superior Court (2004) 117 CA4th 261, 267, 11 CR3d 610 (petition for writ of mandate denied; mediation privilege did not apply to statements made during hearing conducted by employment termination review panel).*

NOTE: *As the current update to this publication was going to press, the California Supreme Court granted a petition for review in Cassel v Superior Court (review granted Feb. 3, 2010, B215215; superseded opinion at 179 CA4th 152, 101 CR3d 501). In a now-superseded opinion, the court of appeal granted a writ petition challenging an order excluding evidence, finding that the mediation privilege did not apply in an attorney malpractice case. On review, the supreme court will consider the following issues: (1) are the private conversations of an attorney and client for the purpose of mediation entitled to confidentiality under Evid C §§1115-1128, and (2) is an attorney a "participant" in a mediation such that communications between the attorney and his or her client for purposes of mediation must remain confidential under Evid C §§1119(c) and 1122(a)(2)? This publication will discuss the outcome of this case in a forthcoming update.*

- ***State newspersons' shield law.*** *KSDO v Superior Court (1982) 136 CA3d 375, 385, 186 CR 211 (writ of mandate issued nullifying trial court order requiring production of newsperson's notes in libel action; under qualified privilege of freedom of press, because newsperson was party to suit, information that went to "heart of the claim" was not discoverable, because it was available from other sources). On state newspersons' shield law (Cal Const art I, §2; Evid C §1070), see discussion of contempt in §16.132.*
- ***Confidential reporting required by law.*** *Union Bank of Cal. v Superior Court (2005) 130 CA4th 378, 385, 29 CR3d 894 (writ of mandate issued directing trial court to deny production of bank's internal suspicious activity forms used to file suspicious activity reports (SARs) required by federal law; under 12 CFR §21.11(k), bank was prohibited from producing SAR or providing any information that could disclose whether it prepared or filed SAR).*
- ***Miscellaneous matters.*** *County of Los Angeles v Superior Court (1975) 13 C3d 721, 732, 119 CR 631 (writ of prohibition issued restraining trial court from requiring members of board of supervisors to answer deposition questions concerning their motives for enacting legislation); American Airlines, Inc. v Superior Court (2003) 114 CA4th 881, 892, 8 CR3d 146 (writ of mandate issued directing trial court to compel deposition testimony of union representative; no privilege against disclosure of union representative's discussions with represented workers).*

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§16.122 c. Attorney-Client Privilege and Work Product Doctrine

If a discovery order presents an attorney-client privilege issue, an appellate court may grant writ review. For example:

- *Mitchell v Superior Court (1984) 37 C3d 591, 599, 208 CR 886 (writ of mandate issued; deposition questions about what plaintiff's attorneys told her concerning chemical alleged to have contaminated groundwater were clearly within purview of attorney-client privilege);*
- *Tritek Telecom, Inc. v Superior Court (2009) 169 CA4th 1385, 87 CR3d 455 (writ of mandate issued to protect corporate records generated in defense of suit brought by disgruntled director);*
- *Snyder v Superior Court (2007) 157 CA4th 1530, 1533, 69 CR3d 600 (writ of mandate issued; local general order requiring case discovery information in reports in asbestos cases infringed on work product doctrine);*
- *Best Prods., Inc. v Superior Court (2004) 119 CA4th 1181, 1190, 15 CR3d 154 (writ of mandate issued directing trial court to set aside order overruling defendant's boilerplate attorney-client privilege objections to document request; statutory law did not recognize failure to file privilege log as waiver of attorney-client privilege);*
- *OXY Resources Cal. v Superior Court (2004) 115 CA4th 874, 886, 9 CR3d 621 (writ of mandate issued when trial court erred by denying discovery based on common interest doctrine without first concluding that information was protected from disclosure by attorney-client privilege or work product doctrine, then determining whether disclosure was reasonably necessary to accomplish purpose for which attorneys were consulted);*
- *McKesson HBOC, Inc. v Superior Court (2004) 115 CA4th 1229, 1238, 9 CR3d 812 (petition for writ of mandate denied; despite written confidentiality agreement stating lack of intent to waive privileges, McKesson waived attorney-client and work product privileges by sharing documents with Securities and Exchange Commission for use in investigation of alleged securities fraud because McKesson and government were not aligned in litigation, did not share same stake, and did not have same goal); but see County of Los Angeles v Superior Court (2005) 130 CA4th 1099, 1107, 30 CR3d 708 (writ of mandate issued directing trial court to deny motion to compel production of documents; privilege not waived when legislative body disclosed closed session minutes to another governmental agency under confidentiality agreement, as provided by Govt C §6254.5(e));*
- *Shooker v Superior Court (2003) 111 CA4th 923, 929, 4 CR3d 334 (writ of mandate issued; plaintiff did not waive attorney-client privilege by designating himself as expert, then withdrawing before disclosing any confidential communications).*

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§16.123 6. Issues Involving Denial of Discovery

Mandate alone (rather than mandate and prohibition) usually will provide sufficient relief from an improper order denying discovery. In Burke v Superior Court (1969) 71 C2d 276, 78 CR 481, petitioners requested both mandate and prohibition to halt further trial court proceedings until they had received proper discovery responses, but the supreme court ultimately granted only mandate. The court reasoned that, because discovery ordinarily must be completed before trial, "it is implicit in a writ of mandate… that the trial should not proceed until discovery has been satisfactorily completed or appropriate sanctions have been imposed." 71 C2d at 277 n1. Selection of the appropriate writ or writs will depend on the circumstances of the case. On types of writs available, see chap 15.

The following cases illustrate situations in which courts issued writs of mandate to ensure proper discovery:

- *Emerson Elec. Co. v Superior Court (1997) 16 C4th 1101, 1111, 68 CR2d 883 (affirming mandate to compel personal injury plaintiff to demonstrate at videotaped deposition how injury occurred; "answer" in former CCP §2025 (now CCP §§2025.010-2025.620) includes nonverbal as well as verbal responses at videotaped deposition);*
- *Beesley v Superior Court (1962) 58 C2d 205, 208, 23 CR 390 (writ of mandate issued directing trial court to compel inspection of statements of independent witnesses taken by adjuster of defendant, an insurance company; trial court abused discretion in denying discovery when plaintiff presented facts showing good cause as a matter of law and defendant opposed only on ground that no good cause was shown);*
- *Wagner v Superior Court (1993) 12 CA4th 1314, 1316, 16 CR2d 534 (mandate issued directing trial court to vacate orders setting discovery cutoff date in "fast-track" case when no trial date had yet been set; trial court abused discretion as a matter of law by denying petitioner's statutory right under former CCP §2024(a) (now CCP §2024.020(a)) to conduct discovery up to 30 days before initial trial date);*
- *Abex Corp. v Superior Court (1989) 209 CA3d 755, 756, 257 CR 498 (writ of mandate issued; trial court clearly abused discretion by denying motion to compel physical exam of plaintiff in personal injury case).*

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§16.124 7. Issues Involving Grant of Discovery

Although writ review of orders granting discovery appears to be less favored than writ review of orders denying discovery, writs are available in egregious or important cases. For example:

- *City of Los Angeles v Superior Court (2002) 29 C4th 1, 10, 124 CR2d 202 (writ of mandate issued directing trial court not to disclose information in police officer's personnel records because material was more than 5 years old and, thus, not discoverable under Evid C §1045(b)(1));*
- *City of Santa Cruz v Municipal Court (1989) 49 C3d 74, 86, 260 CR 520 (writ of mandate issued upholding trial court order compelling discovery of prior incidents of police brutality under Evid C §1043(b) without affidavit based on personal knowledge);*
- *Pomona Valley Hosp. Med. Ctr. v Superior Court (1997) 55 CA4th 93, 100, 63 CR2d 743 (writ of mandate issued to set aside order permitting petitioner in administrative mandamus proceeding to depose witness and augment record because testimony sought was not reasonably calculated to produce evidence admissible under CCP §1094.5(e));*
- *Doyle v Superior Court (1996) 50 CA4th 1878, 1883, 58 CR2d 476 (writ of mandate issued vacating order compelling sexual harassment plaintiff to undergo mental exam for past emotional distress and to pay sanctions; writ review appropriate to resolve tension between defendant's right to discovery and plaintiff's constitutional right to privacy);*
- *Bridgestone/Firestone, Inc. v Superior Court (1992) 7 CA4th 1384, 1393, 9 CR2d 709 (writ of mandate issued to compel trial court to set aside order requiring defendant to provide tire rubber formula; opinion set stringent standards for trial courts that require disclosure of trade secrets);*
- *Olympic Club v Superior Court (1991) 229 CA3d 358, 362, 282 CR 1 (writ of mandate issued to vacate broad-based discovery order compelling private club to supply city with names and business addresses of applicants denied membership; although city's need for disclosure to prove prohibited discrimination outweighed rejected applicants' First Amendment right to associational privacy, trial court was required to establish notification procedures to give rejected applicants prior notice and opportunity to seek protective order).*

On writ review of orders granting discovery that involve issues of privilege, see §§16.120-16.122.

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§16.125 8. Issues Involving Orders Imposing Discovery Sanctions

Although trial courts are increasingly willing to impose sanctions to control the discovery process, appellate courts are unlikely to become involved in reviewing such orders by writ, because the trial court's ruling in discovery matters is often a matter within its discretion and many lawsuits produce a large number of discovery orders. The petitioner must show a serious abuse of discretion to obtain writ review. See, e.g., Newland v Superior Court (1995) 40 CA4th 608, 615, 47 CR2d 24 (terminating sanction issued solely because of failure to pay monetary discovery sanction was abuse of discretion). Nevertheless, courts have granted writ petitions from orders imposing sanctions, including discovery sanctions. See, e.g., Lund v Superior Court (1964) 61 C2d 698, 709, 39 CR 891; Maggi v Superior Court (2004) 119 CA4th 1218, 1226, 15 CR3d 161 (terminating restraining order prohibiting counsel from discussing lawsuit with third parties without court's permission as unconstitutional discovery sanction). See also Fairfield v Superior Court (1966) 246 CA2d 113, 121, 54 CR 721 (writ of mandate issued directing trial court to vacate order imposing sanctions; mandate and prohibition equally appropriate remedies to circumvent imposition of invalid sanctions).

In at least one instance, a court of appeal has issued a writ following an order denying discovery sanctions. In Do v Superior Court (2003) 109 CA4th 1210, 1218, 135 CR2d 855, pro bono counsel for an indigent defendant sought monetary sanctions for plaintiff's failure to appear at deposition. The trial court denied sanctions for the sole reason that counsel had taken the case pro bono. The appellate court granted defendant's petition for writ of mandate and ordered the trial court to award sanctions in an amount based on the reasonable value of counsel's services.

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§16.126 a. Review of Discovery Sanctions of $5000 or Less

If the sanctions imposed are $5000 or less, CCP §904.1(b) makes clear that the affected party may petition for writ review or wait until after a final judgment and appeal. See §§16.81-16.85.

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§16.127 b. Review of Discovery Sanctions of More Than $5000

In general, in an unlimited civil case, an order imposing sanctions over $5000 is immediately appealable. CCP §904.1(a)(11)-(12). A split of authority remains, however, about whether a party can immediately appeal from an interlocutory judgment or order directing payment of monetary discovery sanctions by a party or an attorney if the amount exceeds $5000.

Several cases hold that an order imposing discovery sanctions in excess of $5000 is appealable. Sears, Roebuck & Co. v Nat'l Union Fire Ins. Co. (2005) 131 CA4th 1342, 1352, 32 CR3d 717 (discovery sanctions in excess of $5000 appealable under CCP §904.1(a)(11)); Mileikowsky v Tenet Healthsystem (2005) 128 CA4th 262, 264, 26 CR3d 831 (monetary discovery sanctions in excess of $5000 immediately appealable under CCP §904.1(a)(12)); Rail-Transport Employees Ass'n v Union Pac. Motor Freight (1996) 46 CA4th 469, 475, 54 CR2d 713 (discovery sanctions in excess of $5000 directly appealable under CCP §904.1). See also California Civil Appellate Practice §3.41 (3d ed Cal CEB 1996).

There is also a line of cases, generally decided before the 1993 amendments to CCP §904.1, which holds that, although sanctions awards in excess of $5000 are appealable under CCP §904.1(11), discovery sanctions are not. See Ballard v Taylor (1993) 20 CA4th 1736, 25 CR2d 384; Hanna v Bankamerica Bus. Credit, Inc. (1993) 16 CA4th 913, 20 CR2d 430; Russell v General Motors Corp. (1992) 3 CA4th 1114, 4 CR2d 750; Ghanooni v Super Shuttle (1992) 2 CA4th 380, 3 CR2d 43; Rao v Campo (1991) 233 CA3d 1557, 285 CR 691; Imuta v Nakano (1991) 233 CA3d 1570, 285 CR 681.

PRACTICE TIP: *Although most recent authority holds that discovery sanctions in excess of $5000 are appealable, because of this split of authority, counsel seeking review should file both a notice of appeal and a writ petition, explaining in the papers that counsel has filed both in an abundance of caution to avoid loss of the right to immediate review. This will allow the court to determine the appropriate method of review.*

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§16.128 9. Time to File Writ Petition

Because a writ petition from a discovery order is not governed by statute, the "60-day rule" generally applies. See §16.87. However, if there is a looming deadline for production of discoverable evidence or if the need for expeditious discovery is compelling, counsel should file the petition well before the 60-day time period expires.

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§16.129 10. Standard of Review if Writ Petition Accepted

The standard of review that applies to a discovery order depends on the issues that the order presents. Courts review questions of privilege, privacy, and other pure questions of law de novo, while they review questions concerning motions to compel discovery, the burdensomeness of discovery, the timeliness of a discovery request, sanctions, and similar subjects for abuse of discretion. See, e.g., Britts v Superior Court (2006) 145 CA4th 1112, 1123, 52 CR3d 185.

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§16.129A K. To Review Class Certification Orders

Class certification rulings can dramatically affect the nature of a case. Accordingly, writ relief may be granted on a compelling showing that the trial court abused its discretion in granting or denying class certification. See, e.g., Sav-On Drug Stores, Inc. v Superior Court (2004) 34 C4th 319, 17 CR3d 906 (granting review and reversing court of appeal's decision granting writ relief as to class comprised of managerial employees in wage and hour case); Hewlett-Packard Co. v Superior Court (2008) 167 CA4th 87, 83 CR3d 836 (court of appeal issued order to show cause, stayed further trial court proceedings, reviewed class certification ruling on merits, and denied writ petition); County of Los Angeles v Superior Court (2008) 159 CA4th 353, 358, 71 CR3d 485 (same); Alch v Superior Court (2004) 122 CA4th 339, 19 CR3d 29 (issuing writ in 23 consolidated class action age discrimination cases to reverse three rulings: (1) dismissal of class claims under Govt C §12965(b) of Fair Employment and Housing Act when previous class action had been filed but dismissed in federal court, (2) dismissal of certain job applicants' claims as time-barred, and (3) requiring all individual claims to be pled with particularity); Corbett v Superior Court (2002) 101 CA4th 649, 654, 125 CR2d 46 (issuing writ directing trial court to vacate order refusing to consider class action under Unfair Competition Law); Stern v Superior Court (2003) 105 CA4th 223, 129 CR2d 275 (issuing writ directing trial court to vacate reclassification order entered without giving parties notice or opportunity to present facts and argument).

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§16.129B 1. Class Notification Issues

Writ relief may also be granted to correct rulings on class notice. See, e.g., Hypertouch, Inc. v Superior Court (2005) 128 CA4th 1527, 27 CR3d 839 (peremptory writ issued directing trial court to vacate order approving class notice requiring individual members of certified class to "opt in" to participate in action).

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§16.129C 2. Time to File Writ Petition

Because a writ petition from a class certification order is not governed by statute, the "60-day rule" generally applies. See §16.87.

PRACTICE TIP: *If there are pressing trial court matters that depend on the certification order, counsel should file the petition well before the 60-day time period expires.*

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§16.129D 3. Standard of Review if Writ Petition Accepted

An order on class certification generally is reviewed for abuse of discretion. See, e.g., County of Los Angeles v Superior Court (2008) 159 CA4th 353, 359, 71 CR3d 485; Capitol People First v State Dep't of Dev. Servs. (2007) 155 CA4th 676, 689, 66 CR3d 300; Reese v Wal-Mart Stores, Inc. (1999) 73 CA4th 1225, 1229, 87 CR2d 346. An abuse of discretion includes applying an incorrect legal standard.

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Source: *Civil Litigation/California Civil Writ Practice/16 Availability of Writ Relief/§16.130 L. To Review Judgments and Orders in Contempt Cases*

§16.130 L. To Review Judgments and Orders in Contempt Cases

When the court orders counsel or a party to do something that counsel or the party does not wish to do, there are two choices: (1) attack the order immediately by a petition for writ of prohibition or mandate; or (2) violate the order and mount a collateral attack on it by seeking review of the resulting contempt judgment or order, usually by petition for a writ of review (certiorari) (see §16.135) or habeas corpus (see §16.136). The latter course is obviously risky because, if the underlying order is correct, the contempt will stand. In some circumstances (usually counsel contempt), there may not be an underlying order to challenge.

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1. Review of Order Before Contempt Adjudication

§16.131 a. Writ of Prohibition Before Contempt Adjudication

When the court makes an invalid order, prohibition is appropriate to prevent the court from enforcing the order under penalty of contempt and from adjudging the person subject to the order to be in contempt for disobeying it. See, e.g.:

- *Lund v Superior Court (1964) 61 C2d 698, 708, 39 CR 891 (writ of prohibition issued; invalid contempt order based on nonattendance at deposition);*
- *Franchise Tax Bd. v Superior Court (1950) 36 C2d 538, 545, 225 P2d 905 (writ of prohibition issued to restrain enforcement of invalid orders for inspection of privileged information);*
- *Nelson v Superior Court (1937) 9 C2d 729, 731, 73 P2d 232 (writ of prohibition issued to prevent contempt proceedings for failure to comply with invalid deposition subpoena duces tecum);*
- *McMahon v Superior Court (1967) 255 CA2d 363, 62 CR 873 (writ of prohibition issued to prevent hearing on order to show cause why petitioner should not be committed for contempt);*
- *Farnham v Superior Court (1961) 188 CA2d 451, 455, 10 CR 615 (writ of prohibition issued to prevent contempt proceedings for disobedience of defective minute order in discovery proceedings);*
- *Hunter v Superior Court (1939) 36 CA2d 100, 110, 97 P2d 492 (writ of prohibition issued; violation of void injunction: "If the trial court is about to imprison or fine petitioner for contempt under a void judgment, prohibition is a proper remedy").*

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§16.132 b. State Newspersons' Shield Law Does Not Provide Relief Before Contempt Adjudication

A newsperson seeking extraordinary relief from an adverse trial court order under the state newspersons' shield law (Cal Const art I, §2(b) and Evid C §1070) must violate the adverse order and be adjudged guilty of contempt before he or she can claim the protection of the shield law. New York Times Co. v Superior Court (1990) 51 C3d 453, 273 CR 98. The shield law protects a newsperson who is not a party to civil litigation from contempt for failure to disclose unpublished information. It provides only immunity from contempt, not a privilege, and a petition for extraordinary relief under the shield law is premature until an order or judgment of contempt has been entered. 51 C3d at 458.

Although in New York Times the supreme court held that the appellate court's issuance of a writ of mandate was premature, it nonetheless ruled on the merits to avoid remanding the case merely to obtain a contempt judgment. The dissent noted that the decision makes possible precontempt and postcontempt writ review if the newsperson's resistance to disclosure is based on a qualified privilege under the First Amendment and on the shield law. 51 C3d at 469. On writ review of discovery orders involving issues of privilege and constitutional rights, see §§16.14-16.15, 16.120-16.122.

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2. Writ Review of Contempt Judgment or Order

§16.133 a. Overview

The judgments or orders in contempt cases that are made final and conclusive (CCP §1222) are not appealable (CCP §904.1(a)(1)(B)). They may be reviewed in a writ proceeding, however. See, e.g., McComb v Superior Court (1977) 68 CA3d 89, 93 n1, 137 CR 233. In In re Buckley (1973) 10 C3d 237, 259, 110 CR 121, the supreme court implied that the appellate courts should review all contempt orders challenged by writ petition, particularly if the person held in contempt is threatened with jail. This does not, however, appear to be the practice.

Writ review of contempt judgments and orders has been by way of petition for writ of review (certiorari) (see McComb v Superior Court, supra; Fontana v Superior Court (1977) 72 CA3d 159, 139 CR 851), writ of prohibition (see Lister v Superior Court (1979) 98 CA3d 64, 159 CR 280), writ of mandate (see Ramirez v Superior Court (1977) 72 CA3d 351, 140 CR 108), and writ of habeas corpus for individuals "in custody" (see In re Buckley, supra; see generally Appeals and Writs in Criminal Cases §9.21 (3d ed Cal CEB 2007)).

Writ petitions should include the allegations necessary to obtain the appropriate writ. On the requirements of mandate, prohibition, writ of review, and habeas corpus, see chap 15. On drafting the petition, see chaps 18, 27.

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§16.134 b. Scope of Review

Although the reviewing court is generally confined to determining whether substantial evidence supports the trial court's jurisdiction to adjudge the petitioner in contempt (see In re Buckley (1973) 10 C3d 237, 247, 110 CR 121; see also §16.142), the court may review the procedures by which the finding of contempt was made, the validity of the underlying order whose violation led to the contempt, or both. See, e.g., In re Berry (1968) 68 C2d 137, 150, 65 CR 273 (when contempt proceedings challenged, court reviews underlying order as well). See also 6 Witkin, California Procedure, Provisional Remedies §409 (5th ed 2008). A frequent basis for invalidating a judgment or order of contempt is the intrusion of that adjudication on constitutionally protected rights. See Church of Hakeem, Inc. v Superior Court (1980) 110 CA3d 384, 387, 168 CR 13 (writ of prohibition; court of appeal prohibited contempt for refusing to disclose membership list in answers to interrogatories on grounds that disclosure order violated right of associational privacy of innocent nonlitigant church members).

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§16.135 c. Review by Writ of Review (Certiorari)

When the contempt judgment or order imposes a fine, rather than custody or constructive custody, a writ of review (certiorari) may be used to challenge the contempt judgment. See In re Coleman (1974) 12 C3d 568, 572 n2, 116 CR 381; Anderson v Superior Court (1998) 68 CA4th 1240, 1245, 80 CR2d 891; Miller v Municipal Court (1967) 249 CA2d 531, 532, 57 CR 578. See also Moffat v Moffat (1980) 27 C3d 645, 656, 165 CR 877. On the definition, purpose, and requirements of a writ of review, see §§15.27-15.38. A writ of review is the writ most commonly used to review contempt judgments and orders.

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§16.136 d. Review by Writ of Habeas Corpus

If the petitioner is incarcerated or threatened with incarceration, rather than subject to a fine, he or she should seek a writ of habeas corpus. See Pen C §1473; In re Buckley (1973) 10 C3d 237, 259, 110 CR 121. On the definition, purposes, and requirements of habeas corpus, see §§15.39-15.43. The alleged contemner may apply for habeas corpus even though he or she is not in actual custody; habeas corpus relief is available to a person in constructive as well as in actual custody. See In re Berry (1968) 68 C2d 137, 146 n7, 65 CR 273.

If habeas corpus is unavailable, a writ of review (certiorari) may be appropriate. See Miller v Municipal Court (1967) 249 CA2d 531, 532, 57 CR 578 (petition for writ of habeas corpus had been changed to petition for writ of review because only fine was imposed). Because the scope of review on habeas corpus is "precisely the same" as that for writ of review (Wilde v Superior Court (1942) 53 CA2d 168, 176, 127 P2d 560), habeas corpus and writ of review cases are sometimes cited interchangeably. On scope of review in writ of review cases, see §§15.27-15.38.

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e. Review by Writ of Prohibition

§16.137 (1) Writ of Prohibition Not Available After Fine Has Been Paid or Jail Sentence Has Been Served

Prohibition usually issues to prevent enforcement of the contempt judgment or order after the adjudication of contempt, but before enforcement, at a time when a writ of review (certiorari) is also available. Because prohibition requires that the challenged action be threatened rather than completed, a prohibition petition must be filed before the fine has been paid or the jail sentence has been served. See §§15.18-15.21. Once punishment is more than threatened, only writ of review or habeas corpus is available.

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§16.138 (2) Writ of Prohibition Restrains Court That Failed to Comply With Prescribed Contempt Procedures

The procedures for imposing a contempt order under CCP §§1211-1218 are mandatory and jurisdictional. Thus, prohibition is appropriate when other remedies are inadequate to restrain a court that attempts to adjudge a person guilty of contempt when it lacks jurisdiction to do so because of failure to comply with the prescribed procedures. CCP §§1102-1103; Lund v Superior Court (1964) 61 C2d 698, 712, 39 CR 891 (writ of prohibition issued because trial court did not follow contempt procedures but instead imposed "sanctions"; supreme court held that under discovery statutes, trial court must proceed as contempt when proposed sanction is for refusal of nonparty witness to obey duly issued and served subpoena, or for failure of any person properly brought before court to obey order made to compel discovery).

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§16.139 (3) Using Writ of Prohibition to Challenge Defective Affidavits

If the contempt was not committed in the immediate presence of the court (indirect contempt), the facts constituting the contempt are presented to the court in an affidavit. CCP §1211(a). A petition for a writ of prohibition can be the appropriate means to challenge such affidavits on the ground that they are defective and cannot support an adjudication of contempt. See, e.g., McMahon v Superior Court (1967) 255 CA2d 363, 62 CR 873; Farnham v Superior Court (1961) 188 CA2d 451, 455, 10 CR 615. When challenging a defective affidavit, counsel should attach it as an exhibit to and incorporate it by reference in the writ petition. If the affidavit is not made a part of the record, the defect is not properly before the court and prohibition may be denied. See Morelli v Superior Court (1969) 1 C3d 328, 333, 82 CR 375.

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§16.140 f. Review by Writ of Mandate

Mandate is also available to review the contempt order. See, e.g., Ramirez v Superior Court (1977) 72 CA3d 351, 140 CR 108 (appellate court issued writ of mandate because trial court refused to consider evidence that petitioner did not have financial ability to comply with trial court's order). On definition, purpose, and requirements of mandate, see §§15.2-15.13. On requesting a stay in appellate court writ proceedings, see chap 19.

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§16.141 3. Time to File Writ Petition

Because a petition for a writ review of a contempt order is not governed by statute, the "60-day rule" generally applies (see §16.87), although it is inadvisable to wait until the 60th day if it is reasonable for the appellate court to expect more expeditious action.

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§16.142 4. Standard of Review if Writ Petition Accepted

The substantial evidence standard applies to an adjudication of contempt, although the ultimate question is whether the trial court had jurisdiction to render the contempt order. See, e.g., In re Marcus (2006) 138 CA4th 1009, 1015, 41 CR3d 861 ("In writ proceedings to review an adjudication of contempt, our inquiry is whether there was any substantial evidence before the trial court to prove the elements of the contempt. Absent such evidence, the order must be annulled"), citing Board of Supervisors v Superior Court (1995) 33 CA4th 1724, 1736, 39 CR2d 906 (review of contempt adjudication limited to determining whether substantial evidence sustained jurisdiction of trial court).

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§16.143 M. To Review Probate Proceedings

Probate Code §1300 (former Prob C §§7240, 1297, and 1240) sets out appealable probate proceeding orders. Orders that do not appear in Prob C §1300 may not be appealed (see McDonald v Structured Asset Sales, LLC (2007) 154 CA4th 1068, 1073, 65 CR3d 366), except for orders granting new trials, which case law has made appealable. See Estate of Wilhelm (1957) 152 CA2d 803, 805, 313 P2d 161, citing Estate of Noonan (1952) 113 CA2d 899, 249 P2d 306.

Some courts have held that a writ of review (certiorari) is the method for reviewing probate orders that are not appealable under Prob C §1300, if the other requirements for a writ of review are met (see §§15.27-15.38). See, e.g., Fredrickson v Superior Court (1952) 38 C2d 593, 597, 241 P2d 541; Kramer v Superior Court (1950) 36 C2d 159, 161, 222 P2d 874; Estate of Vai (1959) 168 CA2d 147, 335 P2d 501. For examples of nonappealable probate orders, see Estate of Vose (1970) 4 CA3d 454, 84 CR 347 (order allowing filing of an amended claim), disapproved on other grounds in Nathanson v Superior Court (1974) 12 C3d 355, 370, 115 CR 783; Estate of Cuneo (1963) 214 CA2d 381, 29 CR 497 (order denying petition to set aside prior allowance of claim); Estate of Windiate (1961) 197 CA2d 560, 17 CR 297 (order denying petition to revoke and annul letters of special administration); 9 Witkin, California Procedure, Appeal §205 (5th ed 2008).

On writ review of probate proceedings, see also 8 Witkin, California Procedure, Extraordinary Writs §36 (5th ed 2008).

On time to file writ petition, see §16.87.

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§16.143A N. To Review Family Law and Dependency Matters

Writ review may be sought in a variety of family law matters. For example:

- *Decision to dismiss dependency petition. Los Angeles County Dep't of Children & Family Servs. (2008) 162 CA4th 1408, 77 CR3d 52 (department challenged trial court order dismissing dependency petition; writ issued).*
- *Order denying reunification services and scheduling a permanent plan hearing. See S.T. v Superior Court (2009) 177 CA4th 1009, 99 CR3d 412 (parent challenged order terminating reunification services and setting permanency planning hearing; writ granted); Amanda H. v Superior Court (2008) 166 CA4th 1340, 83 CR3d 229 (same); David L. v Superior Court (2008) 166 CA4th 387, 83 CR3d 14 (father challenged order setting new permanent plan selection and implementation hearing; writ denied); Mardardo F. v Superior Court (2008) 164 CA4th 481, 78 CR3d 884 (father challenged order denying reunification services; writ denied).*
- *Order removing minors from parents' custody and denying reunification services. See Justin L. v Superior Court (2008) 165 CA4th 1406, 1411, 81 CR3d 884 (both parents challenged orders; writ issued "solely for purpose of ensuring compliance with [Indian Child Welfare Act]").*
- *Dependency ruling involving home schooling. See Jonathan L. v Superior Court (2008) 165 CA4th 1074, 81 CR3d 571 (children's counsel challenged trial court's refusal to order parents to send children to public or private school, instead of home schooling; writ granted).*
- *Order in Uniform Parentage Act (UPA) case. See Scott v Superior Court (2009) 171 CA4th 540, 89 CR3d 843 (woman who previously lived with children's father successfully petitioned to reopen and join UPA case seeking custody and visitation; writ granted overturning order allowing joinder).*

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§16.144 O. To Review Guardianship and Conservatorship Proceedings

Probate Code §§1300-1301 (former Prob C §1630) set out appealable guardianship or conservatorship orders. Those guardianship or conservatorship orders not appealable by the terms of §§1300-1301 may be subject to writ review. See, e.g., Greene v Superior Court (1951) 37 C2d 307, 310, 231 P2d 821 (writ of prohibition granted; decided under former Prob C §1630). See also 9 Witkin, California Procedure, Appeal §203 (5th ed 2008); California Conservatorship Practice §24.2 (Cal CEB 2005); and California Guardianship Practice §17.2 (Cal CEB Annual).

On time to file writ petition, see §16.87.

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§16.145 P. To Review Orders on Motions in Limine

A writ petition may be filed to challenge an in limine ruling. In Fatica v Superior Court (2002) 99 CA4th 350, 120 CR2d 904, for example, the court of appeal issued a writ of mandate directing the trial court to vacate its order granting a motion in limine which, if left standing, would have deprived petitioners of a fair and reasonable opportunity to present a substantial portion of their case. Plaintiffs filed the petition on the third day of trial; the court of appeal immediately ordered the trial stayed and issued the writ the following day.

In Cox v Superior Court (2002) 98 CA4th 670, 120 CR2d 45, by contrast, the court of appeal, citing judicial economy, intervened before the start of trial, directing the trial court to grant plaintiffs' motion in limine. See also Aguiar v Superior Court (2009) 170 CA4th 313, 87 CR3d 813 (petition challenging in limine ruling that regulation did not conflict with living wage ordinance; court issued order to show cause, stayed proceedings, determined regulation was invalid, and issued writ); State Farm Fire & Cas. Co. v Superior Court (2008) 164 CA4th 317, 320, 78 CR3d 828 (petition challenging order finding duty to defend after trial of that issue in "trifurcated" case); Southern Cal. Reg'l Rail Auth. v Superior Court (2008) 163 CA4th 712, 715, 77 CR3d 765 (petition challenging pre-trial ruling on preemption issue); Employers Reinsurance Co. v Superior Court (2008) 161 CA4th 906, 912, 74 CR3d 733 (petition challenging in limine ruling precluding evidence of 30 years of claims handling on issue of meaning of insurance policies; court issued order to show cause, stayed proceedings, and issued writ in part); Henry v Superior Court (2008) 160 CA4th 440, 449, 72 CR3d 808 (petition challenging pretrial ruling in premises liability case excluding evidence of medical malpractice in treating injuries; court stayed trial proceedings and subsequently issued writ); State Route 4 Bypass Auth. v Superior Court (2007) 153 CA4th 1546, 1549, 64 CR3d 286 (petition challenging trial court's determination as to dedication requirement in phase one of bifurcated condemnation cases; court stayed further trial proceedings and subsequently issued writ).

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§16.146 1. Time to File Writ Petition

As with other nonstatutory writs, there is no express deadline. See §16.87. However, because a motion in limine is usually heard and ruled on immediately before trial, if the ruling is erroneous and will inject reversible error into the case, the aggrieved party should ask the trial court for an immediate stay and seek writ review immediately, renewing the stay request if the trial court denies it.

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§16.147 2. Standard of Review if Writ Petition Accepted

The applicable standard of review depends on the nature of the in limine motion. In general, an appellate court reviews evidentiary rulings and orders on motions in limine for abuse of discretion. See, e.g., KB Home v Superior Court (2003) 112 CA4th 1076, 5 CR3d 587. However, when the facts are undisputed, pure questions of law are subject to independent review. See, e.g., Aas v Superior Court (2000) 24 C4th 627, 634, 101 CR2d 718.

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Q. To Review Order Requiring Jury Trial

§16.148 1. Overview

In Southern Pac. Transp. Co. v Superior Court (1976) 58 CA3d 433, 435, 129 CR 912, the court of appeal, without discussing why writ review was the appropriate remedy, issued a writ prohibiting the trial court from enforcing its order requiring a jury trial. The action was a suit for damages brought under CCP §871.1 by a good-faith improver of land that the petitioner owned. The petitioner contended that, because the good-faith improver action originated in equity, there was no right to a jury trial. Deciding an issue of first impression, the court of appeal determined that the legislature did not intend that a jury determine the issues under the statute and issued the writ.

In Hodge v Superior Court (2006) 145 CA4th 278, 282, 51 CR3d 519, the court, citing Southern Pac. Transp. Co. v Superior Court, supra, stated that a "petition for a writ of prohibition was a proper method" to challenge a trial court determination that a party was entitled to a jury trial. The court also noted that the case raised an important legal issue (the right to a jury trial in a suit alleging violation of the Unfair Competition Law (Bus & P C §§17200-17210)) and that an appeal would not provide plaintiffs with an adequate remedy if the trial court's determination was erroneous.

Conversely, in Jogani v Superior Court (2008) 165 CA4th 901, 81 CR3d 503, the court of appeal, without discussing why writ review was the appropriate remedy, issued a writ of mandate ordering the trial court to vacate its order denying the plaintiff a jury trial on a quantum meruit claim.

On time to file writ petition, see §16.87.

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§16.149 2. Standard of Review if Writ Petition Accepted

Whether a statute affords a party a jury trial is a pure question of law that an appellate court reviews de novo. See DiPirro v Bondo Corp. (2007) 153 CA4th 150, 179, 62 CR3d 722.

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R. To Review Injunctions

§16.150 1. Overview

Injunctive and preliminary injunctive orders, whether granting or denying relief, are appealable. CCP §§904.1(a)(6), 904.2(g); O'Connor v Superior Court (1979) 90 CA3d 107, 110, 153 CR 306 (preliminary injunction); District Election of Supervisors Comm. v O'Connor (1978) 78 CA3d 261, 264 n1, 144 CR 442 ("injunction" in former CCP §904.1(f) (now CCP §904.1(a)(6)) includes preliminary injunction).

In unusual situations, however, counsel may be able to obtain writ review rather than review on appeal. Some examples are:

- *United Farm Workers of Am. v Superior Court (1975) 14 C3d 902, 122 CR 877 (restraining order infringed on constitutionally protected free speech);*
- *O'Connell v Superior Court (2006) 141 CA4th 1452, 47 CR3d 147 (writ of mandate issued directing trial court to vacate preliminary injunction restraining Board of Education from denying diplomas to public high school students qualified to graduate but for their failure of high school exit exam);*
- *Biosense Webster, Inc. v Superior Court (2006) 135 CA4th 827, 37 CR3d 759 (writ of mandate issued directing trial court to vacate temporary restraining order enjoining employer from enforcing noncompetition agreement against former employees on ground that order improperly enjoined sister-state and federal actions outside California);*
- *American Booksellers Ass'n v Superior Court (1982) 129 CA3d 197, 205, 181 CR 33 (writ of mandate issued requiring entry of injunction because overbroad ordinance affected First Amendment right regarding display of explicit materials).*

Writs also can be used to direct a trial court to weigh the evidence and determine whether the facts warrant issuing an injunction (Kaplan's Fruit & Produce Co. v Superior Court (1979) 26 C3d 60, 80, 160 CR 745), or to direct the trial court to vacate its denial of a preliminary injunction and to grant the injunction (Robbins v Superior Court (1985) 38 C3d 199, 211 CR 398). If the trial court grants summary adjudication of issues and dismisses a count for injunctive relief, a petition for a writ of mandate, not an appeal, is the proper method of reviewing the order. Art Movers, Inc. v Ni W., Inc. (1992) 3 CA4th 640, 4 CR2d 689 (although an order granting a permanent injunction is appealable under former CCP §904.1(f) (now CCP §904.1(a)(6)), an interlocutory order dismissing a count for permanent injunctive relief is not). On writ relief from grant or denial of motions for summary adjudication, see §§16.66-16.77.

On time to file writ petition, see §16.87.

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§16.151 2. Standard of Review if Writ Petition Accepted

The abuse of discretion standard applies to the review of an injunction ruling. See, e.g., Robbins v Superior Court (1985) 38 C3d 199, 205, 211 CR 398. However, to the extent the trial court's assessment of probable success on the merits depends on legal rather than factual questions, review is de novo. See, e.g., O'Connell v Superior Court (2006) 141 CA4th 1452, 1463, 47 CR3d 147.

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§16.152 V. EXTRAORDINARY CIRCUMSTANCES THAT REQUIRE FILING BOTH WRIT AND APPEAL

In most cases, counsel will be able to determine whether a particular order is appealable. In rare cases, however, counsel may conclude that an appeal will not afford an adequate remedy, because of the more leisurely pace at which an appeal proceeds and the inability or difficulty of obtaining an interim stay that preserves the status quo. See, e.g., State Water Resources Control Bd. v Superior Court (2002) 97 CA4th 907, 913, 118 CR2d 784, quoting Reed v Superior Court (2001) 92 CA4th 448, 455, 111 CR2d 842 (petition for extraordinary relief on merits of attorney disqualification order is preferable to appeal because extraordinary writs are generally determined more speedily than appeals and "[t]he specter of [improper] disqualification of counsel should not be allowed to hover over the proceedings for an extended period of time for an appeal"). If this situation arises, counsel should file both a notice of appeal and a writ petition and advise the trial court of the filing of the notice of appeal so the court can determine whether it may continue to exercise jurisdiction.

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17

Determining Whether to File an Appellate Court Writ Petition

Robert H. Wright

I. SCOPE OF CHAPTER §17.1

II. EXPLORING ALTERNATIVES TO SEEKING WRIT RELIEF §17.2

III. HANDLING APPELLATE COURT WRIT PROCEEDING §17.3
- A. Ethical Considerations for Trial Counsel §17.4
- B. Ethical Considerations for Appellate Specialist
  - 1. Duty to Practice Competently §17.5
  - 2. Duty to Ensure That Client Is Aware of Appellate Counsel's Involvement in the Case §17.6
- C. Allocation of Responsibility Between Counsel §17.7

IV. CHECKING FOR CONFLICTS OF INTEREST §17.8
- A. Checking for Conflicts Before Discussing Case §17.9
- B. Potential Conflicts
  - 1. Conflict With the Interests of Another Current Client §17.10
  - 2. Conflict Arising From Receipt of Confidential Information From a Client or Former Client §17.11
  - 3. Conflict Arising From Attorney's Interests and Relationships §17.12
  - 4. Conflict Arising From Payment for Legal Services §17.13
  - 5. Conflict Arising From Legal Position Taken §17.14

V. GATHERING INFORMATION TO EVALUATE AND PREPARE WRIT PETITION
- A. Obtaining Copy of Order to Be Challenged §17.15
- B. Obtaining Register of Actions §17.16
- C. Obtaining All Potentially Relevant Pleadings and Trial Court Documents §17.17
- D. Obtaining Reporter's Transcript §17.18
- E. Preparing Declaration if Hearing Transcript Unavailable §17.19
- F. Obtaining Sample Writ Petition §17.20

VI. PRELIMINARY RESEARCH ON CHALLENGED ORDER OR RULING
- A. Determining if Challenged Order or Ruling Is Appealable
  - 1. Writ Relief Is Presumptively Unavailable if Order Is Appealable §17.21
  - 2. Exceptions to Presumption Against Writ Relief for Appealable Orders §17.22
- B. Determining Whether Statute Provides for Writ Review §17.23
  - 1. Is Order Reviewable Only by Writ Petition? §17.24
  - 2. Is Writ Petition Prerequisite for Postjudgment Review on Appeal? §17.25
- C. Calculating Deadline to File Writ Petition §17.26

VII. DETERMINING WHETHER APPELLATE COURT IS LIKELY TO GRANT EXTRAORDINARY RELIEF §17.27
- A. Most Writ Petitions Are Denied §17.28
- B. Is Writ Review on the Merits Required? §17.29
- C. Is There an Adequate Remedy at Law? §17.30
- D. Does Petitioner Face Irreparable Injury? §17.31
- E. Is Writ Relief Necessary to Decide Important Issue? §17.32
- F. What Is the Standard of Appellate Review? §17.33

VIII. POTENTIAL BENEFITS AND RISKS OF SEEKING WRIT
- A. Benefits of Seeking Writ §17.34
- B. Risks of Seeking Writ §17.35

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§17.1 I. SCOPE OF CHAPTER

This chapter provides a practitioner's "checklist" for determining whether to file an appellate court writ petition. It begins by discussing whether seeking further relief in the trial court is preferable to seeking writ relief in the court of appeal (see §17.2). The chapter next discusses ethical issues counsel should consider, including hiring an appellate specialist to handle the writ proceedings and allocating responsibility between trial counsel and appellate counsel (see §§17.3-17.7). It also covers potential conflicts of interest that may arise in handling an appellate court writ proceeding (see §§17.8-17.14). The chapter then turns to the information counsel must gather to evaluate and prosecute an appellate court writ proceeding (see §§17.15-17.20). This includes preliminary research to determine whether appellate review should be by appeal or writ petition (see §§17.21-17.26). The chapter next discusses factors to consider in evaluating the likelihood that the appellate court will grant extraordinary relief (see §§17.27-17.33), and concludes with a discussion of the potential risks and benefits of seeking immediate appellate review by way of a writ petition (see §§17.34-17.35).

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§17.2 II. EXPLORING ALTERNATIVES TO SEEKING WRIT RELIEF

The courts of appeal rarely grant writ relief; most claims of error or abuse of discretion will be decided on appeal from the final judgment unless immediate appellate action is required to prevent irreparable injury. See §§17.28, 22.15. Indeed, the courts of appeal summarily deny the vast majority of writ petitions in one- or two-sentence orders giving no reasons for the denial. See §§22.14-22.16. The appellate courts are not being uncharitable; they have a full docket of appeals and, absent extraordinary circumstances, do not have the resources to devote to interlocutory matters that can be reviewed on appeal. Accordingly, counsel should determine whether there are other means to obtain the relief sought before incurring the time and expense of preparing a writ petition.

For example, counsel might seek redress from an erroneous trial court ruling by a motion for reconsideration, although there are stringent statutory requirements for such motions. See CCP §1008, limiting motions for reconsideration to those based on new or different facts, circumstances, or law. On filing a motion for reconsideration, see California Civil Procedure Before Trial §§12.113-12.118 (4th ed Cal CEB 2004). Similarly, an issue raised on demurrer might be raised again in a summary judgment motion. Even if the motion is denied, the issue may be in a better procedural posture to interest the court of appeal, because there will be a more complete record. See §§16.66-16.77.

CAUTION: Certain statutory time limits for filing a writ petition (*e.g.,* review of the denial of a motion for summary judgment or summary adjudication) are strictly construed. Filing a motion for reconsideration does not change those limits. *Bensimon v Superior Court* (2003) 113 CA4th 1257, 1258, 7 CR3d 151 (motion for reconsideration does not extend jurisdictional time for writ petition when trial court has denied summary judgment motion).

JUDICIAL PERSPECTIVE: Petitions seeking relief from an order denying a motion for summary judgment or summary adjudication are rarely granted; when they are, it is usually because there is a case-dispositive legal issue that can be decided before the record is fully developed.

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§17.3 III. HANDLING APPELLATE COURT WRIT PROCEEDING

Appellate court writ proceedings differ significantly from any trial court proceeding. Trial counsel must candidly assess whether he or she has the time, expertise, and resources necessary to handle an appellate court writ proceeding.

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§17.4 A. Ethical Considerations for Trial Counsel

Trial counsel must consider:

- **The duty to practice competently.** Trial counsel must have the knowledge, time, and resources necessary to handle competently an appellate court writ proceeding. See Cal Rules of Prof Cond 3-110. On the duty to represent clients competently, see California Trial Practice: Civil Procedure During Trial §16.36 (3d ed Cal CEB 1995).

PRACTICE TIP: Regardless of how well qualified counsel may be to handle a trial, special concerns arise in the context of appellate court writ proceedings in which short deadlines and procedural requirements can become traps for the unwary. On appellate court writ practice, see chaps 18 (initiating writ proceeding in court of appeal), 21 (preliminary opposition), 22 (initial action by court of appeal), 23 (formal opposition and reply), 24 (action taken by court of appeal), 25 (review of court of appeal's decision).

- **The duty to bring in a specialist when necessary.** Trial counsel should consider whether an appellate lawyer would more fully and objectively advise the client about the merits of seeking writ relief, particularly if trial counsel may have committed error. Trial counsel is required to associate or consult with an appellate specialist when trial counsel lacks sufficient skill and experience to handle a writ petition. See Cal Rules of Prof Cond 3-110(C).

JUDICIAL PERSPECTIVE: Trial counsel should consult an appellate specialist early in any case of sufficient substance.

- **The duty to keep the client closely advised on the status of the matter.** Trial counsel should invite the client's input on whether the actual or potential costs of seeking writ review are justified by the chances (usually very low, see §17.28) of obtaining writ relief. See Cal Rules of Prof Cond 3-500. On the duty to communicate with the client and make the client part of the decision-making process, see A Litigator's Guide to Effective Use of ADR in California §§4.4-4.5 (Cal CEB 2005).

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B. Ethical Considerations for Appellate Specialist

§17.5 1. Duty to Practice Competently

Like trial counsel, appellate counsel has the obligation to provide competent representation. Cal Rules of Prof Cond 3-110(C). Although an appellate lawyer may have general expertise in appellate writ practice, he or she may not be familiar with a particular substantive area. In such cases, appellate counsel must work closely with the trial attorney or other counsel with expertise in the substantive area. Appellate counsel also must assess other time commitments, and candidly determine whether he or she can turn immediately to a writ petition. Finally, appellate counsel must ensure that he or she has all the information necessary to assess the merits and chances of success of a writ petition. On the duty to represent clients competently, see California Trial Practice: Civil Procedure During Trial §16.36 (3d ed Cal CEB 1995).

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§17.6 2. Duty to Ensure That Client Is Aware of Appellate Counsel's Involvement in the Case

Appellate counsel also has a duty to ensure that the client is aware of his or her involvement in the case. See Cal Rules of Prof Cond 3-500. An appellate specialist who is new to the case and was contacted by trial counsel rather than by the client should confirm with trial counsel that the client is aware of and has authorized the involvement of new counsel. Appellate counsel should participate in conversations with the client about seeking writ relief and, if relief is sought, about the status of the proceedings. On the duty to communicate with the client, see A Litigator's Guide to Effective Use of ADR in California §4.4 (Cal CEB 2005).

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Source: Civil Litigation/California Civil Writ Practice/17 Determining Whether to File an Appellate Court Writ Petition/ §17.7 C. Allocation of Responsibility Between Counsel

§17.7 C. Allocation of Responsibility Between Counsel

If the client retains an appellate specialist, trial counsel and appellate counsel must discuss and allocate the following tasks as soon as possible:

- Who will decide whether a writ petition is filed;
- Who will take the lead in drafting the petition;
- Who will obtain the necessary supporting documents; and
- Who will complete the final version of the petition and file it with the accompanying exhibits.

Practical considerations in making this allocation include the relative resources counsel can devote to the tasks and where the documents must be filed and served.

PRACTICE TIP: If an appellate specialist is retained, there should be from the outset frequent communication between trial and appellate counsel to ensure that all procedural minutiae are properly handled. For example, counsel should discuss the need to obtain verification from trial counsel or the client of the petition's allegations and, if a transcript of the hearing is unavailable, to prepare a declaration under Cal Rules of Ct 8.486(b)(3).

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§17.8 IV. CHECKING FOR CONFLICTS OF INTEREST

Trial and appellate counsel must ensure that there is no conflict of interest in representing the client in an appellate court writ proceeding. Cal Rules of Prof Cond 3-300.

JUDICIAL PERSPECTIVE: Losing a client is not the only concern for counsel with a conflict. Conflicts can fatally derail a case.

On avoiding conflicts of interest generally, see California Civil Procedure Before Trial, chap 2 (4th ed Cal CEB 2004).

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§17.9 A. Checking for Conflicts Before Discussing Case

To avoid conflicts of interest, counsel must identify all parties to the action and their counsel as soon as possible and, at the very least, before discussing the details of the case. Appellate counsel must be particularly vigilant because writ proceedings have relatively short deadlines. Trial counsel will want and need to communicate substantive information about the case very quickly. Despite time pressures, appellate counsel must obtain a complete list of *all* parties and their counsel and run a conflicts check before discussing any details about the case.

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B. Potential Conflicts

§17.10 1. Conflict With the Interests of Another Current Client

An attorney cannot represent more than one client in a matter in which the interests of the clients are actually or potentially in conflict without the informed written consent of each client. Cal Rules of Prof Cond 3-310(C)(1)-(2). Moreover, the attorney cannot represent a client in a matter and, at the same time in a separate matter, accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter. Cal Rules of Prof Cond 3-310(C)(3).

NOTE: In applying this rule, it is important to identify and evaluate the interests of *all* parties to the action, even if it appears that only one party has a direct interest in the order to be challenged in the writ proceeding.

On conflicting concurrent representation, see California Civil Procedure Before Trial §§2.25-2.34 (4th ed Cal CEB 2004).

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§17.11 2. Conflict Arising From Receipt of Confidential Information From a Client or Former Client

An attorney cannot, without the informed written consent of the client (or former client), accept employment adverse to the client if, as a result of representing the client, the attorney obtained confidential information material to the employment. Cal Rules of Prof Cond 3-310(E).

The receipt of confidential information will be presumed, and the attorney's disqualification is mandatory, if counsel represented the client or former client in any matter "substantially related" to the matter out of which the proposed writ proceedings arise. See *People ex rel Dept. of Corporations v SpeeDee Oil Change Sys., Inc.* (1999) 20 C4th 1135, 1146, 86 CR2d 816; *Flatt v Superior Court* (1994) 9 C4th 275, 283, 36 CR2d 537. See also, *e.g., Knight v Ferguson* (2007) 149 CA4th 1207, 1213, 57 CR3d 823 (substantial relationship between prior and current representation); *Fremont Indem. Co. v Fremont Gen. Corp.* (2006) 143 CA4th 50, 66, 49 CR3d 82 (substantial relationship not present); *Brand v 20th Century Ins. Co./21st Century Ins. Co.* (2004) 124 CA4th 594, 605, 21 CR3d 380 (substantial relationship between current and prior engagements mandates disqualification of attorney as expert witness against his former client); *Jessen v Hartford Cas. Ins. Co.* (2003) 111 CA4th 698, 712, 3 CR3d 877 (successive representations will be "substantially related" when information material to "evaluation, prosecution, settlement or accomplishment" of prior representation is also material to "evaluation, prosecution, settlement or accomplishment" of current representation).

On an attorney's use of confidential information against a present or former client, see California Civil Procedure Before Trial §§2.13-2.24 (4th ed Cal CEB 2004).

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§17.12 3. Conflict Arising From Attorney's Interests and Relationships

Conflicts of interest may arise from an attorney's interests in the subject matter of the representation or from an attorney's relationship with other parties or witnesses. All of these types of conflicts require written disclosure to the client. The Rules of Professional Responsibility define disclosure for these purposes as "informing the client… of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client." Cal Rules of Prof Cond 3-310(A).

An attorney cannot accept or continue representation of a client without written disclosure to the client if:

- The attorney has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter (Cal Rules of Prof Cond 3-310(B)(1));
- The attorney knows or reasonably should know that he or she (1) had a legal business, financial, professional, or personal relationship with a party or witness in the same matter, and (2) the previous relationship would substantially affect the attorney's representation (Cal Rules of Prof Cond 3-310(B)(2));
- The attorney has or had a legal, business, financial, professional, or personal relationship with another person or entity whose interest would be affected substantially by the matter (Cal Rules of Prof Cond 3-310(B)(3)); or
- The attorney has or had a legal, business, financial, or professional interest in the subject matter of the representation. Cal Rules of Prof Cond 3-310(B)(4).

Further, without written disclosure to the client, an attorney cannot represent a client in a matter in which another party's lawyer is a spouse, parent, child, or sibling of the attorney, lives with the attorney, is a client of the attorney, or has an intimate personal relationship with the attorney. Cal Rules of Prof Cond 3-320.

NOTE: This rule does not apply when an attorney fails to advise the client of a relationship with another lawyer who is merely a partner or associate in the same law firm as the adverse party's counsel, and who is not directly involved in the matter. Comment to Cal Rules of Prof Cond 3-320.

On conflicts arising from relationships with other persons, see California Civil Procedure Before Trial §§2.35-2.42 (4th ed Cal CEB 2004).

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Source: Civil Litigation/California Civil Writ Practice/17 Determining Whether to File an Appellate Court Writ Petition/ §17.13 4. Conflict Arising From Payment for Legal Services

§17.13 4. Conflict Arising From Payment for Legal Services

Generally, an attorney cannot accept payment for representing a client from anyone other than the client. Cal Rules of Prof Cond 3-310(F). This rule guards against possible conflicts of interest when the client and the party paying the attorney have adverse interests in the litigation.

NOTE: This rule may raise a particular concern for appellate specialists who are contacted by trial counsel to prepare a writ petition at trial counsel's expense. Appellate counsel should scrutinize any proposed fee arrangement with this rule in mind.

Payment can be accepted from someone other than the client only if (Rule 3-310(F)(1)-(3)):

- The payment does not interfere with the independence of the attorney's professional judgment or the attorney-client relationship;
- Information relating to the representation is protected under Bus & P C §6068(e) (requiring attorneys to maintain client confidences); and
- The client has given informed written consent.

On conflicts arising from payment for legal services, see California Civil Procedure Before Trial §2.21 (4th ed Cal CEB 2004).

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§17.14 5. Conflict Arising From Legal Position Taken

An attorney is not prohibited from representing in different cases parties with adverse positions on the same legal question. See Comment to Cal Rules of Prof Cond 3-310. As a practical matter, however, counsel should be wary of doing so, particularly when the legal issue in both cases is important, novel, and specific. Accepting clients with adverse positions on the same legal question and advancing dramatically different positions in these different actions can result in:

- Clients losing confidence in the attorney's commitment to their case; and
- Counsel losing credibility with the court.

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V. GATHERING INFORMATION TO EVALUATE AND PREPARE WRIT PETITION

§17.15 A. Obtaining Copy of Order to Be Challenged

Counsel should obtain and carefully review the trial court order or ruling that will be challenged in the anticipated writ proceeding. Trial counsel usually has a copy of the order or ruling in hand. If not, counsel can obtain a copy from the court or, if the court has an online register of actions, simply by pulling up and printing out the applicable document. If an appellate specialist is involved, trial counsel usually provides a copy of the pertinent order or ruling by fax or e-mail.

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§17.16 B. Obtaining Register of Actions

Counsel should also obtain a copy of the register of actions (also known as the docket sheet) if one is maintained by the superior court. This can be a useful document for newly retained appellate counsel because it should list every filing in the case. It can also be a handy document for trial counsel and acts as a double-check to ensure that trial counsel's files are complete. Many superior courts now provide online access to registers of actions, making it easy to pull up and print a copy.

PRACTICE TIP: Registers of actions are not infallible and may omit some documents filed in the case. If there is uncertainty about what has been filed, counsel should review the court file itself or send an attorney service to do so.

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§17.17 C. Obtaining All Potentially Relevant Pleadings and Trial Court Documents

Counsel must identify and review all documents relevant to seeking writ review. This includes the operative pleadings and all moving and opposing papers relevant to the order or ruling that may be challenged. Other documents may be relevant as well, providing background to or context for the challenged order or ruling. Trial counsel should have a complete file of these documents. If not, counsel must obtain copies from the court, or print them if the court has online access. Counsel must amass the relevant documents quickly, given the speed with which writ relief must be sought. See §§18.61-18.76.

PRACTICE TIP: Even if counsel is already familiar with these documents, it is best to assemble them chronologically as early as possible so that counsel can conveniently review them as a group. This will also facilitate preparation of the exhibits accompanying the writ petition. On preparation of exhibits to the petition, see chap 20.

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§17.18 D. Obtaining Reporter's Transcript

An appellate court writ petition must be accompanied by a transcript of the proceedings (if available) that led to the challenged order or ruling. See Cal Rules of Ct 8.486(b)(1)(D). Given the relatively short time period in which an appellate court writ petition should be filed, it is important to order any relevant hearing transcript as soon as possible. Hearings usually last only part of a day, and a transcript can be obtained relatively quickly at moderate cost. Early review of the transcript may reveal some nuance about the order or ruling undercutting a claim of error or prejudice, foreclosing any basis for writ relief.

On obtaining the reporter's transcript for the record in an appellate court writ proceeding, see §20.9.

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§17.19 E. Preparing Declaration if Hearing Transcript Unavailable

If a transcript of the proceedings that led to the ruling below is unavailable, the petition must be accompanied by a declaration from counsel including both (Cal Rules of Ct 8.486(b)(3)):

- An explanation of why a transcript is unavailable; and
- A fair summary of the proceedings, including oral arguments by both sides and any court statements on the basis for its ruling.

PRACTICE TIP: Take care of this housekeeping matter as soon as possible to avoid a last-minute scramble to obtain the materials necessary for the writ petition.

On preparing a declaration when the transcript is unavailable, see §20.9.

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§17.20 F. Obtaining Sample Writ Petition

If counsel has little experience in appellate court writ proceedings, it may be helpful to obtain an exemplar from another case to serve as a guide for format and style. For an example of a writ petition, see form in §28.1.

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VI. PRELIMINARY RESEARCH ON CHALLENGED ORDER OR RULING

A. Determining if Challenged Order or Ruling Is Appealable

§17.21 1. Writ Relief Is Presumptively Unavailable if Order Is Appealable

If the challenged order or ruling is appealable under CCP §904.1, a writ petition almost certainly will be denied because the court of appeal will conclude that the petitioner has an adequate remedy at law (*i.e.,* the right to immediate appeal). See also *Powers v City of Richmond* (1995) 10 C4th 85, 112, 40 CR2d 839 (remedy by direct appeal presumed adequate); *Marriage of Skelley* (1976) 18 C3d 365, 369, 134 CR 197 (right to immediate review by appeal is generally adequate remedy).

On determining whether an order is immediately appealable, see chaps 11, 15-16. On appealability of orders generally, see California Civil Appellate Practice, chap 3 (3d ed Cal CEB 1996). On the requirement that a petitioner have no adequate remedy at law, see §§15.56-15.60, 17.30.

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§17.22 2. Exceptions to Presumption Against Writ Relief for Appealable Orders

Writ review is sometimes available even when an order is immediately appealable. For example, courts have frequently reviewed attorney disqualification orders by writ even though such orders are appealable. Courts generally act more quickly on writ petitions, and the "specter of disqualification of counsel should not be allowed to hover over the proceedings for an extended period of time." *Apple Computer, Inc. v Superior Court* (2005) 126 CA4th 1253, 1263, 24 CR3d 818, quoting *Reed v Superior Court* (2001) 92 CA4th 448, 455, 111 CR2d 842. See *State Water Resources Control Bd. v Superior Court* (2002) 97 CA4th 907, 913, 118 CR2d 784 (order disqualifying counsel appropriate for extraordinary writ review).

Appellate courts may also grant writ review if an otherwise appealable order raises an important issue of first impression. See *Rodrigues v Superior Court* (2005) 127 CA4th 1027, 1032, 26 CR3d 194 (writ review of order vacating default judgment appropriate to promptly resolve issue of first impression and to establish guidelines for bench and bar). On writ review for issues of public or jurisprudential significance, see §17.32.

JUDICIAL PERSPECTIVE: If petitioner is seeking writ relief from an appealable order, the petition's introduction should say so and explain why an appeal will not provide an adequate remedy.

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§17.23 B. Determining Whether Statute Provides for Writ Review

In most cases, a party can challenge an interlocutory order on appeal either immediately or after entry of final judgment, without having sought writ relief. See *Premium Commercial Servs. Corp. v National Bank* (1999) 72 CA4th 1493, 1499, 86 CR2d 65 (trial court order setting aside CCP §998 settlement may be challenged on appeal even though plaintiff did not seek writ review of order). In some limited circumstances, however, there is no right of appeal, and by statute, writ review is the sole means of appellate review. See §17.24. In other limited circumstances, seeking writ review is a prerequisite to a subsequent challenge on appeal. See §17.25.

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§17.24 1. Is Order Reviewable Only by Writ Petition?

A statute may provide that the sole means of appellate review is by way of a writ proceeding. See, *e.g.*, Govt C §6259(c) (writ petition sole mode of appellate review in Public Record Act cases); CCP §170.3(d) (judicial disqualification ruling must be challenged by writ petition); *Curle v Superior Court* (2001) 24 C4th 1057, 1063, 103 CR2d 751 (noting that CCP §170.3(d) specifies exclusive manner of appellate review of ruling on judicial disqualification). But see *People v Brown* (1993) 6 C4th 322, 335, 24 CR2d 710 (§170.3(d) does not apply to appellate review of *nonstatutory* claim that final judgment is constitutionally invalid because of judicial bias). See also *O'Hearn v Hillcrest Gym & Fitness Ctr., Inc.* (2004) 115 CA4th 491, 498, 9 CR3d 342, quoting *Main Fiber Prods., Inc. v Morgan & Franz Ins. Agency* (1999) 73 CA4th 1130, 87 CR2d 108 (party must challenge merits of good faith settlement determination under CCP §877.6(e) by way of writ petition, not by way of appeal from final judgment).

NOTE: The California Supreme Court has rejected constitutional challenges to statutes allowing appellate review only by writ petition. *Leone v Medical Bd.* (2000) 22 C4th 660, 668, 94 CR2d 61 (legislature may restrict appellate review to extraordinary writ petition, rather than appeal, provided it does not substantially impair court's constitutional powers); *Powers v. City of Richmond* (1995) 10 C4th 85, 112, 40 CR2d 839 (upholding state constitutionality of writ review as sole mode of appellate review).

On writ petition as exclusive means of obtaining appellate review, see §§16.2-16.48.

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§17.25 2. Is Writ Petition Prerequisite for Postjudgment Review on Appeal?

A statute may provide that the filing of a timely writ petition is a prerequisite to postjudgment review on appeal. See, *e.g.*, Welf & I C §366(*l*)(1)(a) (order setting hearing to terminate parental rights is not appealable unless petition for extraordinary writ review was timely filed); see also *Premium Commercial Servs. Corp. v National Bank* (1999) 72 CA4th 1493, 1499, 86 CR2d 65 (trial court order setting aside CCP §998 settlement could be challenged on appeal because no statute or other authority required plaintiff to seek writ review). In *Reid v Balter* (1993) 14 CA4th 1186, 1196, 18 CR2d 287, the court of appeal rejected the defendants' appeal on several grounds, including that they had not sought writ relief from an order denying their motion for a discretionary dismissal. The appellate court observed that their failure to challenge the order and allowing the case to proceed to trial thwarted the public policies underlying the dismissal statute.

PRACTICE TIP: Counsel should always consider seeking immediate writ review of an order implicating public policies favoring speedy appellate review, rather than waiting for postjudgment review on appeal.

On when writ petition is a prerequisite for appellate review, see §§16.49-16.52.

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§17.26 C. Calculating Deadline to File Writ Petition

Counsel must calculate when a writ petition would be due and consider whether there is sufficient time in which to prepare it competently. On the duty to represent clients competently, see §17.5.

Many statutes providing for writ review also specify deadlines within which a party must file a writ petition. See §18.62). These deadlines can be extremely short (see §18.63). As a result, counsel should immediately calculate the deadline for filing the writ petition. On when to file an appellate writ petition, see §§18.61-18.76.

PRACTICE TIP: Counsel should immediately consider whether to seek an extension of any statutory deadline for filing a petition if the statute provides for one. See, *e.g.*, CCP §418.10(e) (trial court may extend by 20 days the deadline to file writ petition after order denying motion to quash service of summons for lack of jurisdiction).

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§17.27 VII. DETERMINING WHETHER APPELLATE COURT IS LIKELY TO GRANT EXTRAORDINARY RELIEF

The courts of appeal deny most writ petitions. See §17.28. Accordingly, counsel must weigh the chances of success against the time spent and costs incurred in going forward to determine whether it is prudent to file a writ petition.

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§17.28 A. Most Writ Petitions Are Denied

The appellate courts summarily deny about 90 percent of all writ petitions. See Judicial Council of California, Court Statistics Report, Courts of Appeal, Table 5 (2007), available at http://www.courtinfo.ca.gov/reference/documents/csr2007.pdf; *Premium Commercial Servs. Corp. v National Bank* (1999) 72 CA4th 1493, 1498, 86 CR2d 65. See also *Omaha Indem. Co. v Superior Court* (1989) 209 CA3d 1266, 1272, 258 CR 66 (denial rate shows "courts will not use their scarce resources to second-guess every ruling and order of the trial court, particularly when to do so would save neither time nor aid in the resolution of a lawsuit"). Thus, counsel should carefully consider whether the interim ruling to be challenged, *even if clearly erroneous*, warrants extraordinary relief.

PRACTICE TIP: The courts of appeal vary in the percentage of writ petitions that are not summarily denied. See Judicial Council of California, Court Statistics Report, Courts of Appeal, Tables 11, 13 (2007), available at http://www.courtinfo.ca.gov/reference/ documents/csr2007.pdf. In evaluating the chances of success, counsel might think about which appellate district will consider the petition. Within multi-division districts, summary denial rates also vary from division to division. Usually counsel will not know to which division a writ petition will be assigned unless there has been a prior writ proceeding or appeal in the case, in which case a new writ petition will be assigned to the same division.

Appellate courts are reluctant to grant discretionary writ relief for a number of reasons:

- **Interference with case management.** Writ review can interfere with both appellate and trial court case management. Appellate courts have cautioned that too relaxed a view of the extraordinary nature of prerogative writs "run[s] the risk of fostering the delay of trials, vexing litigants and trial courts with multiple proceedings, and adding to the delay of judgment appeals pending in the appellate court." *Omaha Indem. Co. v Superior Court* (1989) 209 CA3d 1266, 1272, 258 CR 66.
- **Appeal likely to provide better vehicle for review.** An appeal on a fully developed record may provide the court of appeal with a much better vehicle to review the challenged ruling. In contrast to appeals, which are "examined with slow deliberation on a full record after the trial is over," writ petitions are considered when "the record is developing and emotions are running high, often when reporters' transcripts are not ready and additional facts may be necessary." *Jones v Superior Court* (1994) 26 CA4th 92, 100, 31 CR2d 264.
- **Writ may be unnecessary.** Writ review ultimately may prove unnecessary, *e.g.,* when the issue presented is cured or rendered moot before or by the final judgment. *Science Applications Int'l Corp. v Superior Court* (1995) 39 CA4th 1095, 1100, 46 CR2d 332 ("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").

PRACTICE TIP: To highlight the need for extraordinary relief, counsel should consider requesting the trial court to certify under CCP §166.1 "that there is a controlling question of law as to which there are substantial grounds for difference of opinion, appellate resolution of which may materially advance the conclusion of the litigation." Although the trial court's certification is not binding on the appellate court, it may cause the appellate court to give more consideration to entertaining a writ petition.

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§17.29 B. Is Writ Review on the Merits Required?

If a statute provides that writ review is the sole avenue of appellate review (see §§16.2-16.48, 17.24), the appellate court must consider the merits of the petition. *Leone v Medical Bd.* (2000) 22 C4th 660, 670, 94 CR2d 61 (when writ petition is, by statute, exclusive means for appellate review, "an appellate court must judge the petition on its procedural and substantive merits"). In *Powers v City of Richmond* (1995) 10 C4th 85, 114, 40 CR2d 839, the supreme court explained that when the exclusive means of appellate review is by writ petition,

> an appellate court may not deny an apparently meritorious writ petition, timely presented in a formally and procedurally sufficient manner, merely because, for example, the petition presents no important issue of law or because the court considers the case less worthy of its attention than other matters.

Although the appellate court must consider the merits, it remains free to deny the petition summarily without explanation and without oral argument. See *Leone,* 22 C4th at 669.

PRACTICE TIP: When a writ petition is the only authorized mode of appellate review, the petitioner should always stress that point in the petition.

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§17.30 C. Is There an Adequate Remedy at Law?

Writ relief is ordinarily available only when the petitioner lacks an adequate remedy at law, *i.e.,* when an appeal is inadequate. CCP §§1086 (writ of mandate), 1103 (writ of prohibition); see also CCP §1068 (writ of review (certiorari)) (lack of any right to appeal is substantive requirement of writ). In determining whether there is an adequate remedy at law, courts consider the following:

- **Review on appeal is usually adequate remedy.** *Rescue Army v Municipal Court* (1946) 28 C2d 460, 466, 171 P2d 8 (courts usually view as adequate petitioner's remedy of proceeding to trial and appealing from judgment); *Running Fence Corp. v Superior Court* (1975) 51 CA3d 400, 409, 124 CR 339 (right to immediate appeal is adequate remedy absent showing that particular circumstances of case render remedy inadequate).
- **Immediate appeal is presumptively adequate.** The difficulty of showing that a remedy is inadequate is even greater when the challenged order is immediately appealable. See, *e.g., Powers v City of Richmond* (1995) 10 C4th 85, 112, 40 CR2d 839 (party seeking review by extraordinary writ bears burden of showing that appeal would not be adequate remedy under particular circumstances presented). See §§17.21-17.22.
- **Mere delay and expense usually do not make a remedy inadequate.** *Jollie v Superior Court* (1951) 38 C2d 52, 56, 237 P2d 641 (appeal not inadequate simply because it entails large expenditure of time and money); *Rescue Army v Municipal Court* (1946) 28 C2d 460, 466, 171 P2d 8 (remedy not inadequate merely because more time would be consumed by pursuing it than would be required by use of writ of prohibition); *Running Fence Corp. v Superior Court* (1975) 51 CA3d 400, 410, 124 CR 339 (citing *Jollie* and *Rescue Army*).

For further discussion of appeal as an adequate remedy, see §§15.56-15.60.

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§17.31 D. Does Petitioner Face Irreparable Injury?

The prospect of irreparable injury usually goes hand in hand with the absence of any adequate legal remedy (see §17.30). The strongest basis for seeking discretionary writ relief is often when there has been a clear error that will cause irreparable harm to petitioner absent extraordinary relief. Appellate courts are sympathetic to legitimate claims of irreparable injury and will grant writ review in such cases "because the lower court's determination imposes unusually harsh and unfair results for which ordinary appellate review is inadequate." *Science Applications Int'l Corp. v Superior Court* (1995) 39 CA4th 1095, 1100, 46 CR2d 332. See also *Roberts v Superior Court* (1973) 9 C3d 330, 336, 107 CR 309 (writ relief proper when discovery order forces petitioner either to disclose privileged information or be subjected to charge of contempt for refusing to obey court's order pending appeal); *Omaha Indem. Co. v Superior Court* (1989) 209 CA3d 1266, 1272, 258 CR 66 (extensive discussion of factors appellate courts consider in deciding whether to hear a writ petition on the merits).

For further discussion of irreparable injury, see §§15.61-15.65.

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§17.32 E. Is Writ Relief Necessary to Decide Important Issue?

In determining whether extraordinary relief is appropriate, the appellate courts have looked to the public and jurisprudential significance of the issue presented, such as whether:

- The issue is of widespread interest or presents a significant and novel constitutional question; or
- There are conflicting trial court interpretations of the law requiring resolution by the appellate court.

See *Southern Cal. Reg'l Rail Auth. v Superior Court* (2008) 163 CA4th 712, 717, 77 CR3d 765 (trial court certified pre-trial preemption issue under CCP §166.1 as involving controlling question of law on which there were substantial grounds for difference of opinion and appellate resolution would materially advance conclusion of litigation); *Roden v AmerisourceBergen Corp.* (2005) 130 CA4th 211, 218, 29 CR3d 810; *Science Applications Int'l Corp. v Superior Court* (1995) 39 CA4th 1095, 1100, 46 CR2d 332.

A writ petition may meet these criteria when it involves an important legal issue affecting a large number of parties or cases. See, *e.g., California Highway Patrol v Superior Court* (2006) 135 CA4th 488, 496, 38 CR3d 16 (writ review appropriate because petition raised issue of first impression and of widespread interest); *K.R.L. Partnership v Superior Court* (2004) 120 CA4th 490, 494, 15 CR3d 517 (writ review to consider issue of first impression—whether CCP §396b permits party to transfer venue based on allegations in cross-complaint purportedly rendering venue improper); *Smith v Superior Court* (1996) 41 CA4th 1014, 1020, 49 CR2d 20 (writ review proper to consider matter that had been subject of conflicting rulings); *Aktar v Anderson* (1997) 58 CA4th 1166, 1173, 68 CR2d 595 (writ review proper "[d]ue to the statewide importance of the issues presented"). See also *Omaha Indem. Co. v Superior Court* (1989) 209 CA3d 1266, 1272, 258 CR 66 (extensive discussion of factors appellate courts consider in deciding whether to hear a writ petition on the merits).

For further discussion of writ relief to decide novel or important issues, see §§15.67, 15.70.

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§17.33 F. What Is the Standard of Appellate Review?

The chances of success on a writ petition also depend on the standard of review that the appellate court will apply to the challenged order. If the issue is primarily factual rather than legal, and the courts will apply the abuse of discretion or substantial evidence standard, the appellate court will be particularly reluctant to address the issue in a writ proceeding. If the challenged order raises a pure legal question subject to de novo review, the court of appeal may be more willing to consider the issue on a limited record.

On circumstances in which courts have entertained and granted writ petitions, see §§16.86-16.151.

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VIII. POTENTIAL BENEFITS AND RISKS OF SEEKING WRIT

§17.34 A. Benefits of Seeking Writ

There are several significant benefits to seeking writ review. An extraordinary writ can:

- **Dispose of or narrow issues.** If an appellate court issues a writ, it may dispose of the dispute and avoid a costly trial. Even if a writ does not resolve all issues, it may narrow them so the dispute is more readily settled or tried, or it may provide the trial court with guidance to avoid error at trial.
- **Promote settlement.** A writ petition that persuasively shows weakness in the adversary's case can promote settlement even if the court of appeal summarily denies the petition.
- **Test new legal theories.** Important issues of widespread public interest and issues of first impression are properly raised in petitions for extraordinary relief. *California Highway Patrol v Superior Court* (2006) 135 CA4th 488, 496, 38 CR3d 16. If such an issue is raised by an order sustaining a demurrer without leave to amend or granting a summary judgment motion, and the plaintiff can appeal from the resulting judgment, an appellate court will likely be inclined to deny the petition because the appeal is an adequate remedy. When such issues arise in other contexts, however, counsel should consider filing an appellate court writ petition to urge the court to adopt a well-reasoned, innovative solution to an important legal issue, especially if it is an issue of widespread importance.

JUDICIAL PERSPECTIVE: When applicable, the writ petition should discuss the policy reasons calling for writ relief in that particular case, *e.g.*, the resolution of conflicts in the law, the avoidance of a costly trial, or the inadequacy of a resolution by appeal. Whatever the argument, the petition should be direct, concise, and to the point.

CAUTION: A writ may win a battle but lose the war. For example, mandate may be available to enforce a right to priority setting for trial (see CCP §1062.3), but it should not be used unless the case is in its strongest trial posture. Similarly, prohibition may be available to prevent a particular judge from trying a case (see CCP §170.6), but counsel should first ascertain who is likely to be the successor judge. Counsel should try to obtain a writ only if it will help win the case at the end of the day.

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§17.35 B. Risks of Seeking Writ

The most important risk to consider is the strong likelihood that the court of appeal will summarily deny the writ petition. Given that fact, counsel must weigh:

- **Financial costs.** Before undertaking the significant amount of work required to prepare an appellate court writ petition, counsel should attempt a realistic evaluation of the fees and costs that will be incurred (including the filing fee and the cost of preparing exhibits and transcripts). Counsel should also reexamine the original fee agreement with the client to ascertain whether a revised or additional fee agreement is necessary to account for proceedings in the court of appeal. On fee agreements generally, see Fee Agreement Forms Manual (2d ed Cal CEB 2007).
- **Strategic costs.** Counsel should consider the intangible costs of filing a writ petition, *e.g.,* costs that might result from a delay in the trial court proceedings or from a lack of cooperation from opposing counsel and the trial judge.
- **Sanctions.** If the appellate court concludes that a writ petition is wholly without merit or has been filed solely for tactical reasons, it may impose sanctions, including attorney fees. CCP §907; *Jones v Superior Court* (1994) 26 CA4th 92, 96, 31 CR2d 264 (under CCP §1109, CCP §907 is applicable to writs of mandate). See also Cal Rules of Ct 8.492. On sanctions for filing frivolous appeals, see California Attorney Fee Awards §§8.16, 20.28 (2d ed Cal CEB 1994).

JUDICIAL PERSPECTIVE: The court may impose sanctions on its own motion for the filing of a frivolous or dilatory writ petition. Cal Rules of Ct 8.492(a)(1).

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Contents

Volume 1

Preface
Foreword
Acknowledgments
About the Consulting Editor
About the Authors
About the Judicial Consultants
About the Consultants
Contributors to Prior Editions
Selected Developments
Cutoff Dates and CEB Citation

Part I: Superior Court Writ Practice

1 Overview of Superior Court Writ Practice
The Hon. Kathleen M. Banke

2 Traditional Mandate
The Hon. Kathleen M. Banke

3 Administrative Mandamus
Mitchell E. Abbott
Ginetta L. Giovinco

4 Other Superior Court Writs
Mark Fogelman

5 Initiating a Superior Court Writ Proceeding
Mitchell E. Abbott
T. Peter Pierce
Brian D. Mabee

6 Requesting a Stay in a Superior Court Writ Proceeding
Jeffrey Chine
Jennifer La Fond Chavez

7 The Record in Superior Court Writ Proceedings
David de Jesus

8 Responsive Pleadings and Petitioner's Reply
Kelly J. Savage

9 Action by Superior Court

The Hon. Kathleen M. Banke
Maureen M. Home

10 Enforcing Writs Issued by Superior Court
Judy L. McKelvey

11 Challenging the Superior Court's Decision
The Hon. Margaret M. Grignon (Ret.)
Judith E. Posner

12 Writ Petitions in Limited Civil and Small Claims Cases
Efrat M. Cogan

13 Superior Court Forms

Part II: Appellate and Supreme Court Writ Practice

14 Overview of Appellate Court Writ Practice
The Hon. Kathleen M. Banke

15 Common Writs and Basic Requirements
Grace K. Won
David K. Ismay

16 Availability of Writ Relief
Paul D. Fogel

Volume 2

Part II: Appellate and Supreme Court Writ Practice (continued)

17 Determining Whether to File an Appellate Court Writ Petition
Robert H. Wright

18 Initiating a Writ Proceeding in the Court of Appeal
Terry P. Anastassiou
Susan H. Handelman

19 Requesting a Stay in an Appellate Court Writ Proceeding
Christina J. Imre
Douglas J. Collodel

20 The Record in Appellate Court Writ Proceedings
David de Jesus

21 Preliminary Opposition Authorized by Rules of Court
M.C. Sungaila

22 Initial Action by Court of Appeal
Mitchell E. Abbott

James C. Nielsen

23 Opposition and Reply
M.C. Sungaila

24 Action by Court of Appeal After Issuance of *Palma* Notice, Alternative Writ, or Order to Show Cause
Mitchell E. Abbott
James C. Nielsen

25 Review of Court of Appeal's Action on Writ Petition
H. Thomas Watson

26 Petition for Writ of Supersedeas
Jeremy B. Rosen

27 Petitions in the California Supreme Court
Robert M. Dato

28 Court of Appeal and Supreme Court Forms

Appendix A: Chart: Review Method for Superior Court Orders
Appendix B: Sacramento Superior Court Guide to the Procedures for Prosecuting Petitions for Prerogative Writs
Table of Statutes, Regulations, and Rules
Table of Cases
Table of References
Table of Forms
Index

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Preface

CEB published its one-volume first edition of California Civil Writ Practice in 1970 as one of the only books on writ practice in California. In the intervening years, the frequency with which judicial and nonjudicial decisions have been subject to writ review has increased dramatically. This two-volume, fourth edition of California Civil Writ Practice reflects the expansion of writ practice in California and provides a practical, nuts-and-bolts guide for attorneys handling writ proceedings in the trial courts, the courts of appeal, and the California Supreme Court. Parts I and II, on superior court and appellate court writ practice, respectively, each begin with a chapter that discusses the general nature of writ practice, quickly enabling counsel to understand and to conceptualize writ issues specific to those courts. Subsequent chapters address all facets of writ practice and are organized to track the manner in which a civil writ proceeding generally unfolds in either a superior or an appellate court. For more details, see the Foreword.

The format of the book provides ready access to practical information. Comprehensive chapter outlines and a thorough index help practitioners find topics quickly. Practice Tips, Notes, Cautions, and Judicial Perspectives call attention to significant points in civil writ practice.

A companion CD includes forms from the final chapters of Part I (superior court exemplars) and Part II (appellate and supreme court exemplars), which are derived from actual writ documents drafted by the authors and other practicing attorneys.

This publication is also available on OnLAW, CEB's web-based practice library, allowing practitioners to conduct word searches and to view the exact language of citations through online links.

CEB gratefully acknowledges the Honorable Kathleen M. Banke, currently an Associate Justice of the California Court of Appeal, First District, for working with CEB attorneys to develop the concept of the new edition and each of its chapter outlines, for writing several chapters, for reviewing the manuscript for the entire book, and for assisting with the editing of every chapter. Bringing to this project the perspective of both a jurist and an experienced appellate practitioner who has handled writs in the superior and appellate courts, Justice Banke contributed generously to the creation of a new edition that fully reflects current civil writ practice in California. See About the Consulting Editor.

The authors who wrote chapters for this book are all experienced jurists, or trial court or appellate court practitioners, who have regularly handled sophisticated writ proceedings. Without exception, CEB admires both their depth of knowledge and their extraordinary generosity in sharing that knowledge in the pages of this new text. Their names appear on the contents page and, with biographical information, in the About the Authors section.

CEB Attorney Editors Karen Frasier-Kolligs (Managing Editor), Norma Piatt, and Francesca Bannerman, and Legal Editors Julie Brook, Matthew Mandelbaum, Enrique De Anda, Andrew Rosner, and Carolyn Valley contributed to this title. Roberta Klein, Nancy Lawlor, and Claire Morel-Setoux provided additional legal editing support. Administrative support was provided by Cynthia Kimberlin, Debby Harrison, and Nila Kanzaria. The book was designed by Grier Thornburg. Dorie Riepe and Joseph Curran were responsible for copy editing and production. Robert Burke wrote the index. Composition was performed by CEB's Electronic Publishing staff.

April 2010 Update

CEB wishes to thank the Honorable Kathleen M. Banke, Associate Justice of the Court of Appeal, First District, for her contributions as the author of this 2010 update.

CEB Attorney Editor Jon Heywood and Legal Editors Julie Hammel Brook, Enrique De Anda, Karen Nutter, and Dorothy M. Robins contributed to this update. Administrative support was provided by Kenya Denman and Nila Kanzaria. Laura Linden handled copyediting and production. Kathryn Te Selle updated the index. Composition was performed by CEB's Electronic Publishing staff.

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Foreword

Scarcely another area of civil practice contains more arcane terminology than civil writ practice, *e.g.,* "mandamus," "prohibition," "corum vobis," "corum nobis," "alternative writ," "peremptory writ," "return," "replication," "*Palma* notice," "postcard denial." And what exactly is it that one is supposed to do after determining that one needs to file a writ petition to challenge a nonjudicial action in the superior court or a judicial action in the court of appeal, or after one has been served with a writ petition in either venue? Relatively few procedural rules exist, and local rules and practice still play a particularly important role in how the superior courts manage writ proceedings. This two-part text demystifies writ practice and serves as a practical nuts-and-bolts guide to handling writ proceedings in the trial and appellate courts, including the California Supreme Court.

Trial and appellate courts are empowered to issue the same panoply of civil writs, *e.g.,* mandate, prohibition, habeas corpus. But the nature of writ proceedings and the way in which they unfold in these courts differ significantly. Accordingly, Part I covers writ practice in the superior courts. Part II focuses on writ practice in the courts of appeal and the supreme court.

The chapters in each part track the usual progression of a writ proceeding. Thus, the initial chapters in Part I discuss when a party should file a writ petition in the superior court rather than, or in conjunction with, a civil complaint. See chaps 2-4. Later chapters discuss drafting a superior court writ petition and the supporting memorandum (see chap 5), seeking a stay of the challenged action (see chap 6), compiling and lodging the record or filing supporting documentation (see chap 7), opposing a writ petition (see chap 8), filing a reply (see chap 8), the scope and nature of superior court hearings on writ petitions (see chap 9), the ruling options available to the court (see chap 9), enforcing a writ (see chap 10), and challenging a superior court's judgment in a writ proceeding (see chap 11). The final substantive chapter in Part I covers writ petitions filed in the appellate division of the superior court, a discrete and relatively rare procedure. See chap 12. The concluding chapter of Part I contains exemplar pleadings and documents commonly filed in superior court writ proceedings. See chap 13.

The initial chapters in Part II discuss when a party should consider filing, or in some cases must file, a writ petition in the court of appeal to obtain immediate appellate review of an interlocutory ruling by a trial court in an ongoing civil lawsuit and, in rare cases, review of nonjudicial action. See chaps 15-17. Subsequent chapters discuss drafting an appellate court writ petition and supporting memorandum (see chap 18), seeking a stay of the challenged action (see chap 19), compiling and filing the record (see chap 20), filing opposition (including preliminary opposition permitted by the Rules of Court, opposition after the court of appeal issues a "*Palma*" notice, and formal opposition after the appellate court issues an alternative writ or order to show cause) (see chaps 21, 23), filing a replication or reply (see chap 23), the various procedural options available to the court of appeal (ranging from summary denial before any opposition is filed, to deciding the writ petition on the merits after full briefing and oral argument) (see chaps 22, 24), and challenging the court of appeal's decision (see chap 25). Part II also includes chapters on petitions for writs of supersedeas (which seek a stay of a superior court judgment on appeal) (see chap 26) and petitions for review by the California Supreme Court. See chap 27. The final chapter of Part II includes exemplar pleadings and documents commonly filed in appellate court writ proceedings. See chap 28.

Although writ lexicon retains some of the archaic terminology and conventions of tradition-bound English common law practice, modern trial and appellate court writ proceedings follow a logical progression. This comprehensive practice guide will help practitioners and courts alike to more quickly and successfully navigate this specialized, but increasingly common, area of civil practice.

Kathleen M. Banke
Associate Justice,
California Court of
Appeal, First District

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CEB wishes to acknowledge the generosity of the members of the California appellate and superior court bench who reviewed and commented on one or more chapters and added their perspectives to this book: Justice Arthur Gilbert, Justice James R. Lambden, Justice Ronald B. Robie, Justice Miriam A. Vogel, Judge Steven A. Brick, Judge Dzintra Janavs (Ret.), Judge Richard A. Kramer, and Judge Socrates Peter Manoukian. For biographical notes about these jurists, see About the Judicial Consultants.

Many practicing attorneys and court attorneys reviewed and commented on one or more chapters of the book. Their contributions have made the book more reflective of current civil writ practice in California. See About the Consultants.

CEB would particularly like to thank Nancy Fleischer, an attorney at the Sacramento Superior Court, who reviewed several chapters on superior court writ practice and who assisted CEB with its request for permission to reprint the Sacramento Superior Court Guide to the Procedures for Prosecuting Petitions for Prerogative Writs (see App B).

The following judges and attorneys helped develop the outline for the new fourth edition, ensuring that it covers all important aspects of both superior court and appellate court writ practice: Justice Arthur Gilbert, Second District Court of Appeal; Justice Miriam A. Vogel, Second District Court of Appeal; Judge Dzintra Janavs (Ret.), Los Angeles County Superior Court; Judge Socrates Peter Manoukian, Santa Clara County Superior Court; Mitchell E. Abbott, Richards, Watson & Gershon; Elliot Bien, Bien & Summers, LLP; Robert M. Dato, Buchalter Nemer; Paul D. Fogel, Reed Smith LLP; Christina J. Imre, Sedgwick, Detert, Moran & Arnold; James C. Martin, Reed Smith LLP; Gregory Orland, Office of the City Attorney of Los Angeles; T. Peter Pierce, Richards, Watson & Gershon; Susan M. Popik, Chapman, Popik & White, LLP; Michael S. Sorgen, San Francisco; and the law firm of Horvitz & Levy, Encino (coordinated by Julie Woods).

The fourth edition includes many new exemplar forms for both superior court and appellate court writ practice. The following attorneys provided the forms on which CEB based the exemplars provided in chapters 13 and 28: Mitchell E. Abbott and T. Peter Pierce, Richards, Watson & Gershon; Jennifer La Fond Chavez and Jeffrey Chine, Luce, Forward, Hamilton & Scripps LLP, San Diego; Vince Chhabria, Office of the City Attorney of San Francisco; Paul D. Fogel and David de Jesus, Reed Smith LLP; and the law firm of Horvitz & Levy, Encino (coordinated by Julie Woods).

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Selected Developments

April 2010 Update

Summarized below are some of the more important developments since the 2009 update of this publication:

For cases on abuse of discretion in granting a writ petition, see *Golden Drugs Co. v Maxwell-Jolly* (2009) 179 CA4th 1455, 102 CR3d 446 (Department of Health Care Services did not abuse its discretion in terminating pharmacy's Medi-Cal provider status for violation of regulations in way that threatens public welfare), and *Munroe v Los Angeles County Civil Serv. Comm'n* (2009) 173 CA4th 1295, 1300, 93 CR3d 716 (superior court erred in granting writ petition because Commission did not abuse discretion in not extending time to request appeal hearing), in §2.9.

On the use of mandate to compel performance of a ministerial duty, as opposed to a discretionary act, the court in *Daily Journal Corp. v County of Los Angeles* (2009) 172 CA4th 1550, 1558, 92 CR3d 219 found that the governmental entity's decision not to pursue a legal claim involves discretion that cannot be enjoined by mandate. See §2.20.

For recent cases in which mandate issued to invalidate legislative acts in excess of a governing body's authority, see *Citizens for Planning Responsibly v County of San Luis Obispo* (2009) 176 CA4th 357, 364, 97 CR3d 636 (writ issued invalidating initiative measure amending county's general plan and zoning regulations; reversed on appeal); *California Sch. Bds. Ass'n v State of California* (2009) 171 CA4th 1183, 1193, 90 CR3d 501 (writ issued directing Commission to set aside and reconsider certain decisions); *Rental Hous. Ass'n v City of Oakland* (2009) 171 CA4th 741, 90 CR3d 181 (writ issued to invalidate certain provisions of initiative measure that placed limits and requirements on evictions), in §2.24.

In *Y.K.A. Indus., Inc. v Redevelopment Agency* (2009) 174 CA4th 339, 94 CR3d 424, the court of appeal held that, because there is no evidence of administrative proceedings that possessed judicial character and yielded a result that could have been subject of review in mandate, a trial court erred in concluding that plaintiff had failed to exhaust mandatory judicial remedies—in the form of petition for writ of mandate—before filing a legal action. See §2.31.

On the necessity of exhausting administrative remedies, see *Thomas v Shewry* (2009) 170 CA4th 1480, 1480, 89 CR3d 105, in which a traditional mandamus action was barred because petitioner failed to exhaust administrative remedies. See §2.34.

On the due process requirement that an administrative hearing be "fair," the supreme court in *Morongo Band of Mission Indians v State Water Resources Control Bd.* (2009) 45 C4th 731, 737, 88 CR3d 610 found no violation of a licensee's due process rights for the attorney prosecuting its license revocation matter before a board to be simultaneously serving as an advisor to the board on an unrelated matter. See §3.11.

In *The Termo Co. v Luther* (2008) 169 CA4th 394, 399, 86 CR3d 687, the court held that an administrative order directing the plugging and abandonment of oil wells that were in operation or in idle status for many years implicates a fundamental, vested right and is thus reviewed under the independent judgment standard. See §3.17.

On laches as a defense to a writ petition, see *Schellinger Bros. v City of Sebastopol* (2009) 179 CA4th 1245, 102 CR3d 394 (court found "abundant support" for determination that petitioner acted with unreasonable delay and acquiesced in City taking more than 1 year to certify environmental impact report), in §§3.19, 5.74.

For a case denying admission of extra-record evidence in a traditional mandamus action challenging adjudicatory decisions, see *Golden Drugs Co. v Maxwell-Jolly* (2009) 179 CA4th 1455, 102 CR3d 446, in §7.12.

In an application of the rule that a superior court's order on a writ petition must be *final* to be appealable, the court in *Canandaigua Wine Co. v County of Madera* (2009) 177 CA4th 298, 302, 99 CR3d 264 held that, because only one out of three causes of action in a writ petition was disposed of, the writ order granting partial summary adjudication was not appealable. See §11.9.

In *Silverbrand v County of Los Angeles* (2009) 46 C4th 106, 92 CR3d 595, the California Supreme Court reiterated that timely filing a notice of appeal is mandatory and jurisdictional, and held that the "prison-delivery rule," governing filing of notice of appeal by self-represented prisoners, applies to civil cases. See §§11.22-11.23.

For recent cases in which the California Supreme Court has granted petitions for review and exercised its discretionary review authority, see *Ste. Marie v Riverside County Reg'l Park & Open-Space Dist.* (2009) 46 C4th 282,

93 CR3d 369 and *Spielbauer v County of Santa Clara* (2009) 45 C4th 704, 88 CR3d 590, in §11.35.

The availability of habeas corpus relief to challenge aspects of constructive restraint was reiterated in *People v Villa* (2009) 45 C4th 1063, 1069, 90 CR3d 344. See §15.39.

In *County of Sonoma v Superior Court* (2009) 173 CA4th 322, 336 n6, 93 CR3d 39, the court found writ review appropriate because the case involved a novel and significant constitutional question that had generated conflicting trial court decisions, and the petitioner lacked an adequate remedy at law and would suffer irreparable harm absent writ review. See §§15.56, 15.61, 15.70.

The California Supreme Court has noted that irreparable injury, necessitating writ review, is often found in discovery cases when a trial court's order granting discovery allegedly violates a privilege of the party against whom discovery is granted. See *Costco Wholesale Corp. v Superior Court* (2009) 47 C4th 725, 101 CR3d 758, in §15.62.

For another case illustrating the availability of mandate to review judicial challenge orders, see *Swift v Superior Court* (2009) 172 CA4th 878, 91 CR3d 504 (involving writ of mandate compelling trial court to vacate order striking CCP §170.6 peremptory challenge), in §16.5.

For another case in which a litigant sought a writ of mandate to overturn an order denying a motion to quash, see *Ameriloan v Superior Court* (2008) 169 CA4th 81, 88, 86 CR3d 572, in §16.54.

In *Burlage v Superior Court* (2009) 178 CA4th 524, 100 CR3d 531, the court of appeal denied a writ petition and upheld a trial court's order vacating an arbitrator's award based on the arbitrator's wrongful refusal to consider material evidence. See §16.99.

In *Cable Connection, Inc. v DIRECTV, Inc.* (2008) 44 C4th 1334, 1340, 82 CR3d 229, the supreme court held that the general rule of limited review of private arbitration awards (*Moncharsh v Heily & Blase* (1992) 3 C4th 1, 12, 10 CR2d 183) may be displaced by the parties' agreement. See §16.99.

Another court has issued a writ to overturn an order concerning attorney disqualification. See *Baker Manock & Jensen v Superior Court* (2009) 175 CA4th 1414, 96 CR3d 785 (writ of mandate issued directing trial court to vacate order disqualifying law firm; trial court erred in finding that circumstances of case constituted conflict of interest), in §16.102.

The court in *Crab Addison, Inc. v Superior Court* (2008) 169 CA4th 958, 965, 87 CR3d 400 reiterated that interlocutory review of discovery orders by writ of mandate is the only adequate remedy when a court orders production of documents that may be subject to a privilege. See §16.120.

The California Supreme Court, in a case that was not final as this update went to press, has upheld the use of "suggestive *Palma* notices" in *Brown, Winfield & Canzoneri, Inc. v Superior Court* (Feb. 1, 2010, S156598), 2010 Cal Lexis 588, discussed in §22.22.

For an example of the use of a writ of supersedeas seeking to reduce the amount of the appeal bond under CCP §917.1, see *Leung v Verdugo Hills Hosp.* (2008) 168 CA4th 205, 212, 85 CR3d 203, cited in §§26.3, 26.12.

In *Hollywood Park Land Co. v Golden State Transp. Fin. Corp.* (2009) 178 CA4th 924, 928, 100 CR3d 752, the court held unconstitutional a statute dictating that an original writ in the supreme court is the exclusive means for direct review of a reverse validation action concerning contracts and bonds authorized by amended Indian gaming compacts because it abridges the jurisdiction of appellate courts. See §27.3.

The California Supreme Court exercised its original writ jurisdiction in *Strauss v Horton* (2009) 46 C4th 364, 398, 93 CR3d 591, regarding an initiative to add a new section to the California Constitution providing: "Only marriage between a man and a woman is valid or recognized in California." See §27.8.

On the method of review for Government Claims Act claims, see *Sparks v Kern County Bd. of Supervisors* (2009) 173 CA4th 794, 798, 93 CR3d 173 (public employee seeking reimbursement for defense costs must satisfy claims statutes before filing petition for writ of mandate), in App A.

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1

Overview of Superior Court Writ Practice

The Hon. Kathleen M. Banke

I. INTRODUCTION §1.1

II. TYPES OF WRITS AVAILABLE §1.2

III. RULES AND PROCEDURES §1.3

IV. COVERAGE OF SUPERIOR COURT WRIT PRACTICE AND PROCEDURE §1.4

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§1.1 I. INTRODUCTION

Nearly all writ petitions filed in the superior courts challenge an action or decision by a *nonjudicial* body, such as a governing board or a private body, an administrative agency, or a public official.

It is helpful to think of a writ petition as analogous to a civil complaint; it is the operative pleading in a writ action. Thus, a petition must set forth all the allegations necessary to support the relief sought. The allegations must identify the parties, spell out how and why the challenged action or decision is wrong or an abuse of discretion, state why the petitioner is entitled to writ relief, and specify the relief sought.

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§1.2 II. TYPES OF WRITS AVAILABLE

Most writ petitions filed in the superior courts seek a writ of mandate under CCP §1085 (traditional or ordinary mandate) (see chap 2) or CCP §1094.5 (administrative mandamus) (see chap 3). The requirements for these types of mandate differ, as do some of the court procedures. However, the fundamental character of mandate, whether traditional or administrative, is the same—the writ compels the respondent to take a specified action.

The superior courts also have jurisdiction over other kinds of writ proceedings, including habeas corpus, prohibition, and review (certiorari) (see chap 4). Civil habeas corpus proceedings usually arise in the context of civil commitment proceedings. Prohibition is similar to mandate, except the writ prohibits rather than compels action by the respondent. However, prohibition as well as review apply only to judicial action, which is exercised by only a couple of constitutionally created state agencies. Thus, prohibition and review are rarely sought in the superior courts.

Occasionally there may be a question about which writ applies in a given situation or whether a writ alone will provide complete relief. For example, it may be unclear whether the petitioner should pursue traditional or administrative mandamus, or should seek declaratory relief as well as writ relief. Thus, it is not unusual to seek alternative forms of writ relief or to file a combined writ petition and complaint. Even when a petitioner prays for the "wrong" writ, many superior courts will not consider this fatal and will issue the appropriate writ if the petitioner otherwise demonstrates entitlement to relief. Similarly, many superior courts will grant leave to amend to add causes of action for declaratory relief or damages if necessary to provide complete relief.

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§1.3 III. RULES AND PROCEDURES

There are very few statutes and rules of court that spell out the procedures for writ proceedings in the superior courts, so a number of courts have filled the gap with local rules or published guidelines. In some courts, local writ practice may be dictated by historical convention, by the presiding judge, or by a dedicated writ department. Thus, more so than in other contexts, litigants in superior court writ proceedings must check local rules and often must consult with the court clerk regarding basic writ procedure.

Over the years, two basic procedures have developed for prosecuting superior court writ actions: the noticed motion procedure and the alternative writ procedure (see chap 5). Some superior courts have a clear preference, usually for the noticed motion procedure. In these courts, the petitioner commences the writ proceeding by filing and serving only the writ petition (see chap 5). The respondent and any real party in interest file a responsive pleading (usually a demurrer or an answer) (see chap 8). After the pleadings are settled, the petitioner files a notice of motion for issuance of a peremptory writ and supporting documentation, which usually consists of an administrative record or other evidentiary showing by way of declarations and exhibits and a memorandum of points and authorities (see chaps 5, 7). The respondent files an opposing memorandum and in some cases opposing evidence (see chap 8). The nature of the hearing on the motion depends on the type of writ that is sought and the character of the challenged action or decision. Usually, the hearing is akin to a law-and-motion hearing (see chap 9). After the hearing, the superior court issues a ruling granting or denying the motion and subsequently enters judgment; and, if applicable, it issues a writ. Even under the noticed motion procedure, specific writ procedures vary from county to county, so it is important to check local rules and also to check with the court clerk.

The alternative writ procedure is somewhat more cumbersome and generally involves more paperwork, which is why some courts prefer the noticed motion procedure. Under the alternative writ procedure, the petitioner not only files and serves the writ petition at the outset of the writ proceeding, but also files an application for issuance of an alternative writ and some supporting documentation (usually heard through ex parte procedures). Thus, the petitioner must show and the court must determine at the outset of the proceeding that the writ petition has some colorable merit. However, a number of courts treat alternative writ applications as little more than requests for hearing dates (see chap 5). These courts routinely grant such applications and specify when the respondent and any real party in interest must file a "return" (which may be by demurrer or answer or both) and when the writ petition will be heard on the merits (see chap 8). The parties subsequently brief the matter and either provide the complete administrative record or make a full evidentiary showing, and the superior court rules de novo on the merits of the writ petition (see chap 9). The nature of the hearing on the petition and the superior court's possible actions are the same as in the noticed motion procedure described above.

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§1.4 IV. COVERAGE OF SUPERIOR COURT WRIT PRACTICE AND PROCEDURE

Part I of this book focuses on writ practice in the superior court and provides a pragmatic, nuts-and-bolts discussion of all facets of superior court writ proceedings, *i.e.*:

- The basic requirements for writ relief (see chaps 2-4);
- The kinds of writs superior courts are empowered to issue (see chaps 2-4);
- How to prepare a writ petition (see chap 5);
- The two basic approaches to prosecuting a superior court writ proceeding (the noticed motion and alternative writ approaches) (see chap 5);
- Requesting a stay in a superior court writ proceeding (see chap 6);
- Preparing the documentation supporting a writ petition (see chaps 5, 7);
- Preparing the documentation in opposition to a writ petition (see chap 8); and
- The scope and nature of superior court writ hearings (see chap 9).

The final chapters of Part I discuss how to enforce a writ issued by a superior court (see chap 10), appellate review of a superior court's judgment in a writ action (see chap 11), and the relatively rare circumstance of writ review by a superior court appellate division of judicial action in a limited jurisdiction civil matter (see chap 12). Part I concludes with a collection of exemplar superior court writ forms (see chap 13). The Sacramento Superior Court Guide to the Procedures for Prosecuting Petitions for Prerogative Writs is reprinted in App B.

Part II of this book focuses on writ proceedings in the courts of appeal and the California Supreme Court (see chaps 14-28).

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2

Traditional Mandate

The Hon. Kathleen M. Banke

I. NATURE OF TRADITIONAL MANDATE PROCEEDINGS IN THE SUPERIOR COURTS
- A. Overview §2.1
- B. Scope of Chapter §2.2

II. REQUIREMENTS FOR ISSUANCE OF TRADITIONAL MANDATE §2.3
- A. Statutorily Available Relief §2.4
  - 1. Clear and Present Ministerial Duty §2.5
    - a. Ministerial Duty Defined §2.6
    - b. Ministerial Duty Distinguished From Discretionary Action §2.7
  - 2. Duty to Exercise Discretion §2.8
  - 3. Abuse of Discretion §2.9
  - 4. Entitlement to Office §2.10
- B. Prerequisites for Mandate Relief §2.11
  - 1. Substantial Beneficial Interest §2.12
    - a. Beneficial Interest Requirement Relaxed When Public Right Is at Stake §2.13
    - b. Loss of Beneficial Interest While Proceeding Is Pending §2.14
  - 2. No Plain, Speedy, or Adequate Remedy at Law
    - a. Action at Law Available §2.15
    - b. Other Administrative Remedies Available §2.16

III. ACTS AND DECISIONS SUBJECT TO CHALLENGE THROUGH TRADITIONAL MANDATE PROCEEDINGS IN THE SUPERIOR COURTS
- A. Acts and Decisions of Governmental Bodies and Public Officials and Employees §2.17
  - 1. To Compel Performance of Ministerial Duty §2.18
    - a. Governmental Body or Public Official or Employee Required to Act §2.19
    - b. No Judgment or Discretion Exercised §2.20
    - c. Statutory Act Believed to Be Unconstitutional §2.21
  - 2. To Compel Exercise of Discretion, But Not Manner in Which Discretion Is Exercised §2.22
  - 3. Legislative Actions Generally Not Subject to Mandate §2.23
    - a. Exception: Legislative and Quasi-Legislative Action in Excess of Authority §2.24
    - b. Exception: Implementation of Legislation §2.25
    - c. Exception: Legislative Action Depriving Agency of Funds to Perform Mandatory Duty §2.26
- B. Actions and Decisions of Administrative Agencies §2.27
  - 1. To Compel Agency, Official, or Employee to Perform Mandatory Duty
    - a. Legally Required Ministerial Duties §2.28
    - b. Statutory Duty to Issue Regulations §2.29
    - c. Duty to Exercise Discretion §2.30
    - d. Duty to Hold Administrative Hearing or Otherwise Comply With Administrative Review Requirements §2.31
  - 2. To Review Quasi-Judicial Agency Decisions §2.32
    - a. Traditional Mandate Applies When Statutory Requirements of CCP §1094.5 Not Met §2.33
    - b. Exhaustion of Administrative Remedies §2.34
    - c. Other Statutory Forms of Writ Review of Agency Decisions §2.35
  - 3. To Compel Agency to Comply With Administrative Decision §2.36
  - 4. To Review Quasi-Legislative Acts §2.37
- C. Decisions of Nongovernmental Corporations, Associations, and Officers §2.38

IV. EXAMPLES OF SPECIFIC CONTEXTS IN WHICH NONJUDICIAL ACTIONS REVIEWED BY TRADITIONAL MANDATE
- A. Issuance of Professional Licenses and Certificates §2.39
- B. DMV Suspension or Revocation §2.40
- C. Land Use Decisions and Issuance of Permits or Variances §2.41
- D. Assignment, Classification, and Discipline of Teachers and Students

1. Teachers §2.42
2. Students §2.43
E. Election Issues
1. Reapportionment and Redistricting Issues §2.44
2. Election Processes §2.45
3. Certification of Initiative or Referendum Petition
a. Challenging Placement on Ballot §2.46
b. Compelling Processing of Initiative Petition §2.47
c. Pre- or Post-Election Review of Initiative §2.48
F. Admission or Restoration of Right to Office §2.49
G. Unions and Employee Organizations
1. Compelling Negotiation §2.50
2. Compelling Arbitration §2.51
3. Holding Hearings §2.52
4. Inspecting Records §2.53
H. Corporations and Corporate Officers §2.54
I. Private Organizations and Associations §2.55
J. Enforcement of Civil Rights §2.56
K. Taxes §2.57
1. Compelling Taxation or Assessment §2.58
2. Compelling Record-Keeping and Handling Duties §2.59
3. Compelling Tax Authority to Review Claim or Hear Appeal §2.60
4. Reviewing Assessment Practices §2.61
5. Exception: Mandate Will Not Lie to Challenge Assessment §2.62
6. Exception: Mandate Will Not Lie to Prevent Collection of Property Taxes §2.63
L. Statutory Payment Obligations §2.64
M. Issuance of Subpoenas §2.65
N. Consideration of Claim §2.66
O. Publication of Notice §2.67
P. Public Records Act
1. Mandate for Denial of Disclosure §2.68
2. No Requirement of Inadequate Remedy at Law §2.69

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I. NATURE OF TRADITIONAL MANDATE PROCEEDINGS IN THE SUPERIOR COURTS

§2.1 A. Overview

Mandate is "the principal extraordinary writ surviving under California law." *City of King City v Community Bank* (2005) 131 CA4th 913, 925, 32 CR3d 384. The writ statutes provide for two types of mandate: traditional (CCP §1085, also called ordinary) and administrative (CCP §1094.5). *Bunnett v Regents of Univ. of Cal.* (1995) 35 CA4th 843, 848, 41 CR2d 567. The terms "mandate" and "mandamus" are used interchangeably in practice and are synonymous. CCP §1084. This text uses the terminology "traditional mandamus," "traditional mandate," and "mandate" to refer to writ proceedings under CCP §1085 and "administrative mandamus" to refer to writ proceedings under CCP §1094.5.

Determining which writ to seek in a superior court writ action depends on the nature of the challenged action or decision: traditional mandate generally applies to ministerial and quasi-legislative acts (see §§2.17-2.26), and administrative mandamus generally applies to quasi-judicial (or adjudicatory) acts (see §§2.27-2.36). *Katosh v Sonoma County Employees' Retirement Ass'n* (2008) 163 CA4th 56, 62 n4, 77 CR3d 324; *California Water Impact Network v Newhall County Water Dist.* (2008) 161 CA4th 1464, 1482, 75 CR3d 393; *Ohton v Board of Trustees of Cal. State Univ.* (2007) 148 CA4th 749, 766, 56 CR3d 111; *McGill v Regents of the Univ. of Cal.* (1996) 44 CA4th 1776, 1785, 52 CR2d 466. On administrative mandamus, see chap 3.

NOTE: A party may be entitled to both types of mandate. See, *e.g.*, *Mileikowsky v Tenet Healthsystem* (2005) 128 CA4th 531, 554, 27 CR3d 171 (traditional mandate to review whether hearing officer had authority to terminate peer review hearing, and administrative mandamus to review whether hearing officer's sanction for doctor's misconduct during hearing was abuse of discretion), disapproved in part on other grounds in *Mileikowsky v West Hills Hosp. & Med. Ctr.* (2009) 45 C4th 1259, 1273, 91 CR3d 516; *Conlan v Bonta* (2002) 102 CA4th 745, 751, 125 CR2d 788 (traditional mandate to compel DHS to reimburse Medi-Cal recipients as required by law, and administrative mandamus to challenge decision denying reimbursement to petitioner).

In nearly all instances, a writ of mandate issued by a superior court compels action by a *nonjudicial* body, *i.e.,* a governmental body, administrative agency, private corporation, or association, or by an official or employee of a governmental body or private entity. See, *e.g.*, *Santa Clara County Counsel Attorneys Ass'n v Woodside* (1994) 7 C4th 525, 541, 28 CR2d 617 (writ issued to compel public employer to meet and confer with county counsel attorneys as required by statute); *Mission Hosp. Reg'l Med. Ctr. v Shewry* (2008) 168 CA4th 460, 469, 85 CR3d 639 (court of appeal directed trial court to issue writ compelling Department of Health Care Services to comply with federal law); *SN Sands Corp. v City & County of San Francisco* (2008) 167 CA4th 185, 190, 83 CR3d 885 (writ issued to compel city's public utilities commission to execute contract); *Adair v Stockton Unified Sch. Dist.* (2008) 162 CA4th 1436, 77 CR3d 62 (writ issued to invalidate school district's salary schedule); *Fiscal v City & County of San Francisco* (2008) 158 CA4th 895, 902, 70 CR3d 324 (writ issued to invalidate local proposition); *Corrales v Bradstreet* (2007) 153 CA4th 33, 47, 62 CR3d 440 (writ issued to compel Labor Commissioner to process wage and hour claims in timely manner as specified by statute); *Morris v Harper* (2001) 94 CA4th 52, 58, 114 CR2d 62 (writ issued to compel acting director of California Youth Authority to obtain licensing for its correctional treatment centers). See also §§2.39-2.69.

The superior court appellate division may issue a writ of mandate to a superior court acting in a limited jurisdiction civil or small claims case. See chap 12.

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§2.2 B. Scope of Chapter

This chapter discusses traditional mandate proceedings under CCP §§1085-1094 to challenge actions and decisions of nonjudicial public and private entities, and of public and private officials and employees. It first discusses the basic requirements for mandate (see §§2.3-2.16), including the threshold requirements that a petitioner must meet to seek writ relief. See §2.3. The chapter concludes with two case overview sections: The first includes case exemplars of mandate actions against (a) governmental bodies, officials, and employees; (b) administrative agencies, officials, and employees; and (c) private bodies, officers, and employees. See §§2.17-2.38. The second includes case exemplars of traditional mandate actions in a variety of substantive contexts. See §§2.39-2.69.

Chapter 3 provides an overview of administrative mandamus. For a full discussion of this topic, see California Administrative Mandamus (3d ed Cal CEB 2003). Chapter 12 discusses the instances in which a superior court, generally the court's appellate panel, may issue a writ of mandate to compel judicial action in a limited jurisdiction civil case.

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§2.3 II. REQUIREMENTS FOR ISSUANCE OF TRADITIONAL MANDATE

The basic requirements for traditional mandate are threefold:

- Traditional mandate will issue to compel only certain kinds of action. Thus, a petitioner must ensure that he or she is seeking statutorily available relief. CCP §1085(a); see §§2.4-2.10.
- To seek relief, a petitioner must have a beneficial interest in the outcome of the proceedings. CCP §1086; see §2.11.
- To obtain writ relief, a petitioner must not have any other plain, speedy, or adequate remedy at law. CCP §1086; see §§2.15-2.16.

NOTE: Although these requirements must all be met, appellate court opinions in writ cases originating in the trial courts seldom discuss them at length unless the issue on appeal involves the petitioner's beneficial interest or inadequacy of other relief. See *Mission Hosp. Reg'l Med. Ctr. v Shewry* (2008) 168 CA4th 460, 478, 85 CR3d 639 (respondent argued petitioners lacked "standing" to seek writ relief). Usually, appellate opinions address the substantive merits of the trial court's judgment in a writ proceeding. Nevertheless, some of the more recent appellate decisions have discussed them. See, *e.g.*, *Munroe v Los Angeles County Civil Serv. Comm'n* (2009) 173 CA4th 1295, 1300, 93 CR3d 716 (reciting basic requirements); *Mednik v State Dep't of Health Care Servs.* (2009) 175 CA4th 631, 639, 96 CR3d 112 (same); *V.S. v Allenby* (2008) 169 CA4th 665, 670, 87 CR3d 143 (same); *County of San Diego v State* (2008) 164 CA4th 580, 593, 79 CR3d 489 (same). On appellate review see §§11.7-11.36.

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Source: Civil Litigation/California Civil Writ Practice/2 Traditional Mandate/§2.4 A. Statutorily Available Relief

§2.4 A. Statutorily Available Relief

A writ of mandate will issue "to any inferior tribunal, corporation, board, or person" to compel (CCP §1085(a)):

- "[T]he performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station" (see §§2.5-2.9); or
- "[T]he admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by such inferior tribunal, corporation, board, or person" (see §2.10).

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§2.5 1. Clear and Present Ministerial Duty

A writ of traditional mandate is most often sought to compel a clear, present and usually ministerial duty on the part of the respondent. *Munroe v Los Angeles County Civil Serv. Comm'n* (2009) 173 CA4th 1295, 1300, 93 CR3d 716 quoting *American Fed'n of State, County & Mun. Employees v Metropolitan Water Dist.* (2005) 126 CA4th 247, 261, 24 CR3d 285 (traditional writ of mandate under CCP §1085 is "'a method for compelling a public entity to perform a legal and usually ministerial duty'"); *V.S. v Allenby* (2008) 169 CA4th 665, 670, 87 CR3d 143 (mandate to compel director of Department of Social Services to direct DSS's agents to take action within specified time so federal foster case funding would not be lost). See, *e.g., City of Dinuba v County of Tulare* (2007) 41 C4th 859, 868, 62 CR3d 614 (mandate to compel duty to correctly calculate and distribute tax revenue); *Kavanaugh v West Sonoma County Union High Sch. Dist.* (2003) 29 C4th 911, 916, 129 CR2d 811 (mandate to compel school district to notify teacher of job classification in timely manner); *Mission Hosp. Reg'l Med. Ctr. v Shewry* (2008) 168 CA4th 460, 469, 85 CR3d 639 (mandate to compel Department of Health Care Services to comply with federal law); *Sustainability of Parks, Recycling & Wildlife Legal Defense Fund v County of Solano Dep't of Resource Mgmt.* (2008) 167 CA4th 1350, 84 CR3d 889 (mandate to compel county department to hold hearing); *SN Sands Corp. v City & County of San Francisco* (2008) 167 CA4th 185, 190, 83 CR3d 885 (mandate to compel ministerial duty to award contract); *California Ass'n for Health Servs. at Home v State Dep't of Health Servs.* (2007) 148 CA4th 696, 704, 56 CR3d 102 (mandate to compel DHS to conduct annual rate reviews as required by statute); *Corrales v Bradstreet* (2007) 153 CA4th 33, 47, 62 CR3d 440 (mandate to compel Labor Commissioner to process wage and hour claims in timely manner); *American Fed'n of State, County & Mun. Employees v Metropolitan Water Dist.* (2005) 126 CA4th 247, 260, 24 CR3d 285 (mandate to compel water district to select hearing officer and conduct hearing on grievance); *Morris v Harper* (2001) 94 CA4th 52, 58, 114 CR2d 62 (mandate to compel acting director of California Youth Authority to obtain licensing for correctional treatment centers).

For examples of cases in which traditional mandate has been sought, see §§2.39-2.69.

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§2.6 a. Ministerial Duty Defined

A ministerial duty is imposed on a person in public office who, by virtue of that position, is obligated to perform in a legally prescribed manner when a given state of facts exists. *City of King City v Community Bank* (2005) 131 CA4th 913, 926, 32 CR3d 384. It is a duty that a governmental or private body, by or through a public or private board, agency, official, or employee, is required to perform without the exercise of independent judgment or opinion. *County of San Diego v State* (2008) 164 CA4th 580, 593, 79 CR3d 489. Compare *Kavanaugh v West Sonoma County Union High Sch. Dist.* (2003) 29 C4th 911, 916, 129 CR2d 811 (school district had duty to notify teacher of her job classification in timely manner, enforceable by mandate), with *US Ecology, Inc. v State* (2001) 92 CA4th 113, 137, 111 CR2d 689 (whether to designate site as low-level radioactive waste disposal site was discretionary decision, not reviewable by mandate). Ministerial actions "'are essentially automatic based on whether certain fixed standards and objective measurements have been met.'" *Sustainability of Parks, Recycling & Wildlife Legal Defense Fund v County of Solano Dep't of Resource Mgmt.* (2008) 167 CA4th 1350, 84 CR3d 889 quoting *Calvert v County of Yuba* (2006) 145 CA4th 613, 623, 51 CR3d 797.

When "a statute requires an officer to do a prescribed act upon a prescribed contingency, his functions are ministerial, and upon the happening of the contingency the writ may be issued." *Drummey v State Bd. of Funeral Dirs. & Embalmers* (1939) 13 C2d 75, 83, 87 P2d 848. In general, a ministerial act does not entail the exercise of judgment or discretion. See, *e.g., Jenkins v Knight* (1956) 46 C2d 220, 223, 293 P2d 6 (governor's constitutional duty to call special election to fill legislative vacancies was ministerial and subject to mandate). A ministerial act is one "that a public officer is required to perform in a prescribed manner in obedience to the mandate of a legal authority" and without regard to his or her own judgment or opinion as to the act's propriety or impropriety. *Ridgecrest Charter Sch. v Sierra Sands Unified Sch. Dist.* (2005) 130 CA4th 986, 1002, 30 CR3d 648, quoting *Morris v Harper* (2001) 94 CA4th 52, 62, 114 CR2d 62.

For examples of cases in which traditional mandate has been sought, see §§2.39-2.69.

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§2.7 b. Ministerial Duty Distinguished From Discretionary Action

Unlike a ministerial duty, which is an act that the law compels under a given set of facts, an exercise of discretion involves the use of judgment in deciding what action to take. See, *e.g., Ridgecrest Charter Sch. v Sierra Sands Unified Sch. Dist.* (2005) 130 CA4th 986, 1003, 30 CR3d 648, quoting *Morris v Harper* (2001) 94 CA4th 52, 62, 114 CR2d 62 ("discretion is the power conferred on public functionaries to act officially according to the dictates of their own judgment"); *Carrancho v California Air Resources Bd.* (2003) 111 CA4th 1255, 1266, 4 CR3d 536 (agency action in preparing diversion plan and progress report involved exercise of discretion in quasi-legislative capacity). The exercise of discretion in reaching a decision is not susceptible to mandate except for a refusal to exercise it or an abuse of discretion. See §§2.8-2.9.

EXAMPLE: A county ordinance requires the county to negotiate in good faith with an employee union. The county must thus meet and confer. The county's performance of its meet and confer obligation can be compelled by mandate. However, mandate will not lie to compel the county to agree to specific terms, because that is matter as to which the county exercises discretion. See, *e.g.*, *Los Angeles County Employees Ass'n, Local 660 v County of Los Angeles* (1973) 33 CA3d 1, 8, 108 CR 625.

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§2.8 2. Duty to Exercise Discretion

If a nonjudicial body or entity, or an official or employee, has a clear duty to exercise discretion but refuses to do so, mandate will lie to compel the exercise of that discretion. However, the court will not "'compel the exercise of that discretion in a particular manner or to reach a particular result.'" *Daily Journal Corp. v County of Los Angeles* (2009) 172 CA4th 1550, 1555, 92 CR3d 219, quoting *Building Indus. Ass'n v Marin Mun. Water Dist.* (1991) 235 CA3d 1641, 1646, 1 CR2d 625. See, *e.g., California Ass'n for Health Servs. at Home v State Dep't of Health Servs.* (2007) 148 CA4th 696, 708, 56 CR3d 102 (mandate issued to compel DHS to conduct annual rate reviews but not to compel DHS to set specific rates in absence of rate review); *Shamsian v Department of Conserv.* (2006) 136 CA4th 621, 639, 39 CR3d 62 (mandate would not issue to control department's discretion in establishing recycling centers); *Los Angeles County Employees Ass'n, Local 660 v County of Los Angeles* (1973) 33 CA3d 1, 8, 108 CR 625 (mandate issued to compel county to negotiate in good faith but not to agree to specific terms).

For examples of cases in which traditional mandate has been sought, see §§2.39-2.69.

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§2.9 3. Abuse of Discretion

Although mandate will not lie to control the exercise of discretion in a particular way, it will issue to correct an abuse of discretion. *Saleeby v State Bar* (1985) 39 C3d 547, 562, 216 CR 367 ("mandamus will lie to correct an *abuse* of discretion or the actions of an administrative agency which exceed the agency's legal powers") (emphasis in original); *Neighbors in Support of Appropriate Land Use v County of Tuolumne* (2007) 157 CA4th 997, 1004, 68 CR3d 882 ("trial court may not substitute its judgment for that of a public agency or force the agency to exercise its discretion in a particular manner, but may correct abuses of discretion"). See *e.g., Munroe v Los Angeles County Civil Serv. Comm'n* (2009) 173 CA4th 1295, 1300, 93 CR3d 716 (superior court erred in granting writ petition because commission did not abuse discretion in not extending time to request appeal hearing); *Ridgecrest Charter Sch. v Sierra Sands Unified Sch. Dist.* (2005) 130 CA4th 986, 1006, 30 CR3d 648 (superior court found that school district abused its discretion by failing to show that it could not accommodate charter school at single school site).

The superior court's inquiry regarding abuse of discretion in a traditional mandate proceeding is limited to whether the agency's action was "arbitrary, capricious or entirely without evidentiary support," and whether it conformed to legally required procedures. *Neighbors in Support of Appropriate Land Use v County of Tuolumne, supra*. See, *e.g., SN Sands Corp. v City & County of San Francisco* (2008) 167 CA4th 185, 192, 83 CR3d 885 (writ sought on ground that board abused its discretion by interfering with award of contract); *State Bldg. & Constr. Trades Council v Duncan* (2008) 162 CA4th 289, 300, 76 CR3d 507 (writ sought on grounds director had abused his discretion by misinterpreting and misapplying law).

The appropriate degree of judicial scrutiny in any particular case lies along a continuum with nonreviewability at one end and independent judgment at the other; because "the ultimate question is whether the agency has abused its discretion, the answer is one of degree." *Shapell Indus., Inc. v Governing Bd.* (1991) 1 CA4th 218, 233, 1 CR2d 818. See *Golden Drugs Co. v Maxwell-Jolly* (2009) 179 CA4th 1455, 102 CR3d 446 (applying *Shapell* and holding that Department of Health Care Services did not abuse discretion in terminating pharmacy's Medi-Cal provider status for violation of regulations in way that threatens public welfare).

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§2.10 4. Entitlement to Office

Mandate will lie to compel a governmental or private entity to admit an individual to an office or position to which the individual is legally entitled. See, *e.g., Woodmansee v Lowery* (1959) 167 CA2d 645, 648, 334 P2d 991 (petitions for mandate for payment of salary filed by two parties, each of whom claimed to hold same municipal court judgeship; court determined which party was de facto officeholder by examining, but not deciding, legal title to office). This is essentially another instance in which an entity can be compelled by mandate to comply with a clear legal duty.

An action to test title or right to office, formerly known as quo warranto, is governed by CCP §§803-811; mandate cannot be used to decide title to an office. On quo warranto, see §4.27. See, *e.g.*, *Hallinan v Mellon* (1963) 218 CA2d 342, 347, 32 CR 446 (taxpayer suit to compel repayment of salary by officeholder who was allegedly appointed illegally; writ denied because remedy to try title to office is quo warranto action). Although mandate cannot be used to decide title to an office, it can be used to determine which party has the best claim to legal title and, thus, is the de facto officer. See *Woodmansee v Lowery, supra*; *Klose v Superior Court* (1950) 96 CA2d 913, 920, 217 P2d 97 (prohibition action filed by officeholder to restrain mandate action filed by taxpayer to compel city council to fill officeholder's seat because of alleged vacancy).

For examples of cases in which traditional mandate has been sought, see §§2.39-2.69.

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Source: Civil Litigation/California Civil Writ Practice/2 Traditional Mandate/§2.11 B. Prerequisites for Mandate Relief

§2.11 B. Prerequisites for Mandate Relief

In addition to ensuring that the challenged action or decision is the kind reviewable by traditional mandate (see §§2.3-2.10), a petitioner also must satisfy two threshold requirements for writ relief (see CCP §1086):

- A beneficial interest in the outcome of the proceeding, concomitant to the duty to be performed (see §2.12); and
- No plain, speedy, or adequate legal remedy. See §§2.15-2.16.

NOTE: Although these two requirements must be specifically alleged in a petition seeking writ relief (on contents of petition, see §§5.38-5.62), court of appeal opinions in writ cases originating in the trial courts seldom discuss them in detail unless the issue on appeal involves the petitioner's beneficial interest or inadequacy of other relief. See *Mission Hosp. Reg'l Med. Ctr. v Shewry* (2008) 168 CA4th 460, 480, 85 CR3d 639 (ruling that petitioners had beneficial interest and could seek writ relief). Appellate opinions more often address the substantive merits of a trial court's judgment in a writ proceeding. Some courts, however, have addressed requirements in more detail, as discussed in §2.3. See also §§11.7-11.36 on appellate review of a trial court judgment.

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§2.12 1. Substantial Beneficial Interest

The petitioner must have "a clear, present and beneficial right" to the performance of the duty allegedly owed by the respondent. *Mission Hosp. Reg'l Med. Ctr. v Shewry* (2008) 168 CA4th 460, 478, 85 CR3d 639; *County of San Diego v State* (2008) 164 CA4th 580, 593, 79 CR3d 489; *California Ass'n for Health Servs. at Home v State Dep't of Health Servs.* (2007) 148 CA4th 696, 704, 56 CR3d 102. See CCP §1086 (writ "must be issued upon the verified petition of the party beneficially interested"). This is in the nature of a "standing" requirement, ensuring that the party seeking relief has a direct interest in the outcome of the writ proceeding. See *Syngenta Crop Protection, Inc. v Helliker* (2006) 138 CA4th 1135, 1181, 42 CR3d 191 (pesticide manufacturers had standing to seek writ challenging agency's nonpermissive use of their data to evaluate registrations of other companies); *City of Gilroy v State Bd. of Equalization* (1989) 212 CA3d 589, 604, 260 CR 723 (city had standing to collaterally challenge tax board's refund decision that precipitated board's demand that city return tax revenues).

"A beneficial interest means the petitioner has a special interest over and above the interest of the public at large." *People ex rel. Dept. of Conserv. v El Dorado County* (2005) 36 C4th 971, 986, 32 CR3d 109 (director of department had beneficial interest in seeing that the Surface Mining and Reclamation Act was adequately enforced). See, *e.g., Mission Hosp. Reg'l Med. Ctr. v Shewry* (2008) 168 CA4th 460, 469, 85 CR3d 639 (hospitals had beneficial interest in Department of Health Services' compliance with federal law); *Associated Builders & Contractors, Inc. v San Francisco Airports Comm'n* (1999) 21 C4th 352, 362, 87 CR2d 654 (association members had beneficial interest in validity of project stabilization agreement); *California Ass'n for Health Servs. at Home v State Dep't of Health Servs.,* 148 CA4th at 706 (association members had beneficial interest in forcing DHS to carry out ministerial duty to conduct annual rate reviews); *Savient Pharms., Inc. v Department of Health Servs.* (2007) 146 CA4th 1457, 1468, 53 CR3d 689 (drug company lacked standing to attack contract).

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§2.13 a. Beneficial Interest Requirement Relaxed When Public Right Is at Stake

The beneficial interest requirement is relaxed somewhat when a public right is at stake. See, *e.g., Green v Obledo* (1981) 29 C3d 126, 144, 172 CR 206 (mandate to challenge AFDC travel reimbursement regulation that allegedly violated federal law). In *Green*, the supreme court held that a citizen's interest in having laws executed and public duties enforced was sufficient to meet the beneficial interest requirement. This exception to the general rule that a petitioner must have more than a general interest in the outcome (see §2.12) promotes the public policy of citizens ensuring that a governmental entity does not impair or defeat a legislatively created public right. See *Hogar Dulce Hogar v Community Dev. Comm'n* (2003) 110 CA4th 1288, 1294, 2 CR3d 497 (nonprofit agency created after governmental agency began disregarding law had sufficient interest to enforce statutory obligations); *Timmons v McMahon* (1991) 235 CA3d 512, 518, 286 CR 620 (sufficient interest to compel county to properly determine eligibility requirements for AFDC-FC benefits).

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§2.14 b. Loss of Beneficial Interest While Proceeding Is Pending

If circumstances change during the pendency of a mandate proceeding such that the petitioner no longer has a beneficial interest in the outcome, the superior court will deny writ relief. See, *e.g.*, *County of San Luis Obispo v Superior Court* (2001) 90 CA4th 288, 292, 108 CR2d 753 (petitioner suffered foreclosure before court ruled on challenge to adverse administrative decision and consequently lost "standing" to obtain writ and declaratory relief).

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2. No Plain, Speedy, or Adequate Remedy at Law

§2.15 a. Action at Law Available

Mandate will issue only when the petitioner has no plain, speedy, or adequate remedy at law. CCP §1086. See, *e.g., Barratt Am., Inc. v City of Rancho Cucamonga* (2005) 37 C4th 685, 704, 37 C3d 149 (validation action was adequate remedy to challenge city's failure to conduct fee review and set future fee rates to avoid excessive surplus); *Little v Los Angeles County Assessment Appeals Bds.* (2007) 155 CA4th 915, 922, 66 CR3d 401 (tax refund action was adequate remedy); *Canova v Trustees of Imperial Irrig. Dist. Employee Pension Plan* (2007) 150 CA4th 1487, 1494, 59 CR3d 587 (claim for breach of contract was adequate remedy).

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§2.16 b. Other Administrative Remedies Available

It is not only a legal action in court that will provide an adequate remedy foreclosing writ relief. Other administrative remedies may foreclose writ relief. See, *e.g.*, *American Employers Group, Inc. v Employment Dev. Dep't* (2007) 154 CA4th 836, 843, 65 CR3d 233 (petition for tax reassessment by California Unemployment Insurance Appeals Board provided adequate remedy); *Imagistics Int'l, Inc. v Department of Gen. Servs.* (2007) 150 CA4th 581, 590, 59 CR3d 18 (bid protest procedures provided adequate remedy). When the petitioner is pursuing traditional mandate, "the exhaustion requirement speaks to whether there exists an adequate legal remedy. If an administrative remedy is available and has not yet been exhausted, an adequate remedy exists and the petitioner is not entitled to extraordinary relief." *Eight Unnamed Physicians v Medical Exec. Comm. of the Med. Staff of Washington Township Hosp.* (2007) 150 CA4th 503, 510, 59 CR3d 100, quoting *Unnamed Physician v Board of Trustees of St. Agnes Med. Ctr.* (2001) 93 CA4th 607, 620, 113 CR2d 309. See *California Water Impact Network v Newhall County Water Dist.* (2008) 161 CA4th 1464, 1484, 75 CR3d 393 (regardless of whether writ petition was for administrative or traditional mandamus review, it failed because petitioner did not exhaust administrative remedies). But see *O.W.L. Found. v City of Rohnert Park* (2008) 168 CA4th 568, 583, 86 CR3d 1 (explaining that exhaustion requirement does not implicate subject matter jurisdiction; under unique circumstances of case, failure to exhaust administrative remedies did not preclude review).

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III. ACTS AND DECISIONS SUBJECT TO CHALLENGE THROUGH TRADITIONAL MANDATE PROCEEDINGS IN THE SUPERIOR COURTS

§2.17 A. Acts and Decisions of Governmental Bodies and Public Officials and Employees

Traditional mandate will issue to compel action by a governmental body or public official or employee when:

- The action is a ministerial duty (see §§2.18-2.21);
- The governmental body or public official or employee is required to exercise discretion but has refused to do so (see §2.22); or
- A legislative or quasi-legislative act is unlawful or an abuse of discretion (see §§2.23-2.26).

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§2.18 1. To Compel Performance of Ministerial Duty

Mandate will issue to compel a governmental body or public official or employee to perform a ministerial duty. See §§2.19-2.21.

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§2.19 a. Governmental Body or Public Official or Employee Required to Act

A ministerial duty is one that a public agency, board, official, or employee is *required* to perform. See, *e.g., City of Dinuba v County of Tulare* (2007) 41 C4th 859, 868, 62 CR3d 614 (county may be compelled to correctly allocate and distribute tax revenues); *Santa Clara County Counsel Attorneys Ass'n v Woodside* (1994) 7 C4th 525, 541, 28 CR2d 617 (public employer compelled to comply with statutory obligation to meet and confer with county counsel attorneys); *Mission Hosp. Reg'l Med. Ctr. v Shewry* (2008) 168 CA4th 460, 469, 85 CR3d 639 (mandate to compel Department of Health Care Services to comply with federal law); *SN Sands Corp. v City & County of San Francisco* (2008) 167 CA4th 185, 190, 83 CR3d 885 (city had no authority to reject contract and public utilities commission had ministerial duty, and could be compelled, to approve contract); *Norton v San Bernardino City Unified Sch. Dist.* (2008) 158 CA4th 749, 756, 69 CR3d 917 (school district compelled to comply with administrative decision to reinstate employee); *Alliance for a Better Downtown Millbrae v Wade* (2003) 108 CA4th 123, 128, 133 CR2d 249 (city clerk compelled to certify initiative petition based on compliance with submission requirements, and without regard to extrinsic evidence); *Stationary Eng'rs Local 39 v County of Sacramento* (1997) 59 CA4th 1177, 69 CR2d 598 (county compelled to comply with civil service employment rules); *Terminal Plaza Corp. v City & County of San Francisco* (1986) 186 CA3d 814, 836, 230 CR 875 (zoning administrator compelled to enforce planning commission resolution requiring developer to build pedestrian way as condition of development permit). See also *Defend Bayview Hunters Point Comm. v City & County of San Francisco* (2008) 167 CA4th 846, 858, 84 CR3d 486 (writ denied because clerk had ministerial duty to reject petition to force referendum); *Vasquez v Happy Valley Union Sch. Dist.* (2008) 159 CA4th 969, 981, 72 CR3d 15 (writ denied because district complied with statutory classification requirements; affirmed on other grounds); *Capo for Better Representation v Kelley* (2008) 158 CA4th 1455, 1462, 71 CR3d 354 (writ denied because registrar met statutory duty); *Friends of Bay Meadows v City of San Mateo* (2007) 157 CA4th 1175, 1192, 68 CR3d 916 (writ denied because registrar met statutory duty in invalidating signatures); *Women Organized for Employment v Stein* (1980) 114 CA3d 133, 139, 170 CR 176 (writ denied when no statute required officials to collect data petitioners sought). See also §§2.5-2.7.

For additional examples of cases in which traditional mandate has been sought, see §§2.39-2.69.

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§2.20 b. No Judgment or Discretion Exercised

A ministerial duty does not require the exercise of judgment and discretion. Rather, it is an act that must be performed under a certain set of circumstances and in a specific manner. Compare *South Dakota v Brown* (1978) 20 C3d 765, 779, 144 CR 758 (writ denied because governor's refusal to extradite was discretionary), with *California Correctional Peace Officers Ass'n v State Personnel Bd.* (1995) 10 C4th 1133, 1148, 43 CR2d 693 (State Personnel Board had ministerial duty to hear and decide case by date certain). See also, *e.g., Kavanaugh v West Sonoma County Union High Sch. Dist.* (2003) 29 C4th 911, 916, 129 CR2d 811 (school district had duty to notify teacher of job classification in timely manner); *Daily Journal Corp. v County of Los Angeles* (2009) 172 CA4th 1550, 1558, 92 CR3d 219 (governmental entity's decision not to pursue legal claim involves discretion that cannot be enjoined by mandate); *Alliance for a Better Downtown Millbrae v Wade* (2003) 108 CA4th 123, 128, 133 CR2d 249 (city election official had duty to certify initiative petition based on its compliance with submission requirements, and without regard to extrinsic evidence). See also §§2.5-2.7.

For additional examples of cases in which traditional mandate has been sought, see §§2.19, 2.39-2.69.

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§2.21 c. Statutory Act Believed to Be Unconstitutional

Even if a governmental body or public official believes that a statutorily required duty is unconstitutional, mandate will lie to compel performance of that duty if no court has declared the statute unconstitutional. See, *e.g.*, *Lockyer v City & County of San Francisco* (2004) 33 C4th 1055, 1068, 17 CR3d 225 (mayor's belief that state constitution prohibited discrimination against gay men and lesbians with respect to marriage did not allow county clerk to disregard statutory marriage licensing requirements; writ issued compelling city officials to cease issuing marriage licenses to same-sex couples).

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§2.22 2. To Compel Exercise of Discretion, But Not Manner in Which Discretion Is Exercised

If a governmental body or public official or employee has a duty to exercise discretion but refuses to do so, mandate will issue to compel the exercise of that discretion. See, *e.g., California Water Impact Network v Newhall County Water Dist.* (2008) 161 CA4th 1464, 1483, 75 CR3d 393 (mandate will lie to require exercise of discretion but not particular manner in which discretion is exercised); *Sego v Santa Monica Rent Control Bd.* (1997) 57 CA4th 250, 255, 67 CR2d 68 (mandate to compel rent control board to issue certificates of rent levels). See also §2.8.

Mandate will not lie, however, to compel a governmental body or public official to exercise discretion in a particular way. See, *e.g., People v Karriker* (2007) 149 CA4th 763, 774, 57 CR3d 412 (mandate to compel public conservator to investigate defendant for possible conservatorship, but not to select particular conservatorship); *Ridgecrest Charter Sch. v Sierra Sands Unified Sch. Dist.* (2005) 130 CA4th 986, 1002, 30 CR3d 648 (mandate to compel school district to provide reasonably equivalent and contiguous facilities to charter school, but district had discretion to decide how to comply with that duty); *Los Angeles County Employees Ass'n, Local 660 v County of Los Angeles* (1973) 33 CA3d 1, 8, 108 CR 625 (mandate to compel county to negotiate in good faith, but not to agree to specific terms). See also §2.8.

When discretion is exercised in the context of making a quasi-adjudicatory decision (usually made by an agency), courts sometimes characterize the standard of judicial review as "abuse of discretion." *O.W.L. Found. v City of Rohnert Park* (2008) 168 CA4th 568, 585, 86 CR3d 1 (comparing and contrasting standard of review in traditional and administrative mandamus cases). Generally, this means judicial review is limited to determining whether the decision was "arbitrary, capricious, or entirely lacking in evidentiary support." *American Bd. of Cosmetic Surgery v Medical Bd.* (2008) 162 CA4th 534, 547, 75 CR3d 574. As to legal issues, however, the courts apply de novo review. See §2.19.

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§2.23 3. Legislative Actions Generally Not Subject to Mandate

Legislative action is the formulation of a rule to be applied in future cases. *McGill v Regents of the Univ. of Cal.* (1996) 44 CA4th 1776, 1785, 52 CR2d 466, citing *Strumsky v San Diego County Employees Retirement Ass'n* (1974) 11 C3d 28, 35 n2, 112 CR 805. Such action is usually not subject to control by mandate. The courts will not interfere with legislative (or budgeting) processes unless the action exceeds the scope of the governmental body's authority or is so unreasonable as to be an abuse of discretion as a matter of law. See, *e.g., Carmel Valley Fire Protection Dist. v State* (2001) 25 C4th 287, 300, 105 CR2d 636 (denying writ to compel Commission on State Mandates to grant fire district's claim for reimbursement; legislature statutorily empowered to suspend operation of statutes and executive orders that mandate local programs and to withdraw funding); *Carrancho v California Air Resources Bd.* (2003) 111 CA4th 1255, 1266, 4 CR3d 536 (denying writ to compel agency's preparation of diversion plan and progress report; acts involved exercise of discretion in quasi-legislative capacity); *Sklar v Franchise Tax Bd.* (1986) 185 CA3d 616, 622, 230 CR 42 (denying writ to compel legislative action by Franchise Tax Board); *Gilliland v County of Los Angeles* (1981) 126 CA3d 610, 614, 179 CR 73 (denying writ to compel zoning change because zoning is legislative act).

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§2.24 a. Exception: Legislative and Quasi-Legislative Action in Excess of Authority

Mandate will issue to invalidate legislative acts in excess of a governing body's authority. This is a significant use of traditional mandamus. See, *e.g.*, *Tobe v City of Santa Ana* (1995) 9 C4th 1069, 1084, 40 CR2d 402 (challenge to constitutionality of city ordinance); *Saleeby v State Bar* (1985) 39 C3d 547, 562, 216 CR 367 (challenge to "quasi-legislative" action of adopting rules; writ issued compelling State Bar to reformulate rules); *Walker v County of Los Angeles* (1961) 55 C2d 626, 639, 12 CR 671 (writ issued compelling board to fix workers' wages on basis of those prevailing); *American Distilling Co. v City Council* (1950) 34 C2d 660, 667, 213 P2d 704 (writ issued ordering city to terminate proceedings to annex contiguous territory); *Citizens for Planning Responsibly v County of San Luis Obispo* (2009) 176 CA4th 357, 364, 97 CR3d 636 (writ issued invalidating initiative measure amending county's general plan and zoning regulations; reversed on appeal); *California Sch. Bds. Ass'n v State* (2009) 171 CA4th 1183, 1193, 90 CR3d 501 (writ issued directing commission to set aside and reconsider certain decisions); *Rental Hous. Ass'n v City of Oakland* (2009) 171 CA4th 741, 90 CR3d 181 (writ issued to invalidate certain provisions of initiative measure that placed limits and requirements on evictions); *Mission Hosp. Reg'l Med. Ctr. v Shewry* (2008) 168 CA4th 460, 469, 85 CR3d 639 (writ will issue to require Legislature to comply with laws); *SN Sands Corp. v City & County of San Francisco* (2008) 167 CA4th 185, 191, 83 CR3d 885 (challenge to city's refusal to award contract; acts leading up to award and award of contract are legislative in character); *Hernandez v County of Los Angeles* (2008) 167 CA4th 12, 84 CR3d 10 (post-election challenge to local ballot measure); *County of San Diego v State* (2008) 164 CA4th 580, 593, 79 CR3d 489 (writ issued invalidating Secretary of State's rules not adopted in accordance with APA); *Adair v Stockton Unified Sch. Dist.* (2008) 162 CA4th 1436, 77 CR3d 62 (writ issued to invalidate school district's salary schedule); *San Joaquin County Local Agency Formation Comm'n v Superior Court* (2008) 162 CA4th 159, 166, 76 CR3d 93 (writ issued preventing depositions of commissioners; commission's actions are quasi-legislative in nature and reviewed by ordinary mandamus, rather than administrative mandamus); *California Water Impact Network v Newhall County Water Dist.* (2008) 161 CA4th 1464, 1483, 75 CR3d 393 (quasi-legislative actions must be challenged by traditional mandate); *Fiscal v City & County of San Francisco* (2008) 158 CA4th 895, 902, 70 CR3d 324 (writ declaring local ordinance invalid).

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§2.25 b. Exception: Implementation of Legislation

Implementation of legislation, once passed, is a ministerial duty that can be compelled by mandate. See, *e.g., Woodland Hills Residents Ass'n, Inc. v City Council* (1980) 26 C3d 938, 944, 164 CR 255 (writ compelling city to hold public discussions and follow proper procedures required by California Environmental Quality Act); *Stationary Eng'rs Local 39 v County of Sacramento* (1997) 59 CA4th 1177, 69 CR2d 598 (writ compelling civil service commission to grant exam preference points in accordance with civil service rules); *Glendale City Employees Ass'n v City of Glendale* (1975) 15 C3d 328, 343, 124 CR 513 (writ compelling city to increase employee pay); *Environmental Council v Board of Supervisors* (1982) 135 CA3d 428, 440, 185 CR 363 (writ compelling supervisors to make statutorily required findings on mitigation factors); *Rivera v Division of Indus. Welfare* (1968) 265 CA2d 576, 605, 71 CR 739 (writ compelling enforcement of wage, hour, and working condition regulations). But see *Mendoza v State* (2007) 149 CA4th 1034, 1049, 57 CR3d 505 (writ prohibiting implementation or enforcement of statute deemed unconstitutional).

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§2.26 c. Exception: Legislative Action Depriving Agency of Funds to Perform Mandatory Duty

If local legislative action deprives a local agency of the resources it needs to carry out its functions, mandate may lie. In *Scott v Common Council* (1996) 44 CA4th 684, 689, 52 CR2d 161, a writ issued compelling the city council to reinstate and fund two investigator positions, the functions of which were mandated by the city charter. *Scott* held that judicial intervention in the budgeting process is appropriate when the superior court makes the factual finding that budget cuts prevented an official from carrying out mandated duties.

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Source: Civil Litigation/California Civil Writ Practice/2 Traditional Mandate/§2.27 B. Actions and Decisions of Administrative Agencies

§2.27 B. Actions and Decisions of Administrative Agencies

Traditional mandate will issue in connection with administrative actions to:

- Compel an administrative agency, official, or employee to perform a mandatory duty (see §§2.28-2.30);
- Compel an administrative agency to hold a required administrative hearing (see §2.31);
- Review an adjudicatory decision when CCP §1094.5 requirements are not met (§§2.32-2.33);
- Compel an administrative agency to comply with a final administrative decision (see §2.36); and
- Compel an administrative agency to take required quasi-legislative action or to review such action for abuse of discretion (see §2.37).

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1. To Compel Agency, Official, or Employee to Perform Mandatory Duty

§2.28 a. Legally Required Ministerial Duties

Traditional mandate will issue to compel administrative agencies and their officials and employees to perform legally required ministerial duties. On ministerial duties, see §§2.5-2.7, 2.18-2.21. See, *e.g.*, *Mission Hosp. Reg'l Med. Ctr. v Shewry* (2008) 168 CA4th 460, 469, 85 CR3d 639 (mandate compelling Department of Health Care Services to comply with federal law); *Sustainability of Parks, Recycling & Wildlife Legal Defense Fund v County of Solano Dep't of Resource Mgmt.* (2008) 167 CA4th 1350, 84 CR3d 889 (mandate compelling county department to hold hearing); *Fonseca v Fong* (2008) 167 CA4th 922, 84 CR3d 567 (petition to compel police department to comply with state law); *California Ass'n for Health Servs. at Home v State Dep't of Health Servs.* (2007) 148 CA4th 696, 704, 56 CR3d 102 (mandate compelling DHS to comply with federal Medicaid and state Medi-Cal laws); *Benjamin G. v California Special Educ. Hearing Office* (2005) 131 CA4th 875, 883, 32 CR3d 366 (mandate compelling agency to allow parents' expert to observe district's proposed placement of child before placement hearing); *Jackson v Gourley* (2003) 105 CA4th 966, 970, 130 CR2d 72 (mandate compelling DMV to accept certificates of completion from students who took private school driver education correspondence course); *Lomeli v Department of Corrections* (2003) 108 CA4th 788, 797, 134 CR2d 179 (mandate compelling agency to provide reinstatement and payment of back pay and benefits); *Conlan v Bonta* (2002) 102 CA4th 745, 751, 125 CR2d 788 (mandate compelling DHS to establish and implement reasonable procedures as required by law for Medi-Cal beneficiaries to obtain reimbursement for covered services incurred during retroactivity period).

For examples of cases in which traditional mandate has been sought, see §§2.39-2.69.

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§2.29 b. Statutory Duty to Issue Regulations

Traditional mandate will issue to compel administrative agencies to adopt statutorily required regulations. See, *e.g., Newland v Kizer* (1989) 209 CA3d 647, 652, 257 CR 450 (mandate compelling DHS to adopt regulations). However, mandate will not issue to dictate the specific content of regulations or to otherwise compel a governmental agency to exercise its administrative discretion in a particular manner. See, *e.g.*, *Sklar v Franchise Tax Bd.* (1986) 185 CA3d 616, 622, 230 CR 42 (denying writ to compel Franchise Tax Board to adopt specific procedures to control use of alcohol entertainment expense as business deduction).

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§2.30 c. Duty to Exercise Discretion

Traditional mandate will lie to compel administrative agencies or their officials or employees to exercise discretion when they are required, but have refused, to do so. See, *e.g.*, *Belridge Farms v ALRB* (1978) 21 C3d 551, 559, 147 CR 165 (mandate can compel official to exercise discretion when refusal to do so is based on erroneous view of powers vested in official). See also §§2.8, 2.19-2.20.

However, mandate will not issue to compel the exercise of discretion in a particular way or to reach a particular result. *Daily Journal Corp. v County of Los Angeles* (2009) 172 CA4th 1550, 1555, 92 CR3d 219. See, *e.g.*, *California Water Impact Network v Newhall County Water Dist.* (2008) 161 CA4th 1464, 1483, 75 CR3d 393 (mandate lies to require exercise of discretion but not manner in which discretion exercised); *Shamsian v Department of Conserv*. (2006) 136 CA4th 621, 39 CR3d 62 (mandate denied when department's decision to establish recycling centers within certain areas was discretionary); *Sklar v Franchise Tax Bd.* (1986) 185 CA3d 616, 230 CR 42 (mandate denied to compel Franchise Tax Board to adopt specific procedures to control use of alcohol entertainment expense as business deduction). See also §§2.8, 2.22.

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§2.31 d. Duty to Hold Administrative Hearing or Otherwise Comply With Administrative Review Requirements

Traditional mandate will issue to compel administrative agencies to hold legally required hearings or otherwise to comply with required administrative procedures (even if the agency's final decision is reviewable by way of administrative, rather than traditional, mandamus). See, *e.g.*, *Sustainability of Parks, Recycling & Wildlife Legal Defense Fund v County of Solano Dep't of Resource Mgmt.* (2008) 167 CA4th 1350, 84 CR3d 889 (county department compelled to hold hearing); *State Personnel Bd. v Department of Personnel Admin.* (2005) 37 C4th 512, 523, 36 CR3d 142 (mandate compelling compliance with existing disciplinary provisions); *California Correctional Peace Officers Ass'n v State Personnel Bd.* (1995) 10 C4th 1133, 1148, 43 CR2d 693 (mandate compelling State Personnel Board to hold hearing or render decision by date certain); *Forrest v Trustees of Cal. State Univ. & Colleges* (1984) 160 CA3d 357, 360, 206 CR 595 (mandate compelling hearing on grievance). See also *Saleeby v State Bar* (1985) 39 C3d 547, 561, 216 CR 367 (mandate compelling State Bar to provide hearings in which findings would be sufficient to allow judicial review); *Y.K.A. Indus., Inc. v Redevelopment Agency* (2009) 174 CA4th 339, 94 CR3d 424 (lacking evidence there were administrative proceedings of judicial character, with outcome subject to review in mandate, court erred in finding that plaintiff failed to exhaust mandatory judicial remedies—in form of petition for writ of mandate—before filing legal action).

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§2.32 2. To Review Quasi-Judicial Agency Decisions

Adjudicatory administrative decisions (*i.e.*, quasi-judicial decisions) are usually reviewed by way of administrative mandamus under CCP §1094.5. *Western States Petroleum Ass'n v Superior Court* (1995) 9 C4th 559, 566, 38 CR2d 139; *Katosh v Sonoma County Employees' Retirement Ass'n* (2008) 163 CA4th 56, 62 n4, 77 CR3d 324; *California Water Impact Network v Newhall County Water Dist.* (2008) 161 CA4th 1464, 1482, 75 CR3d 393. Administrative mandamus requires that the challenged decision result from a proceeding in which (1) a hearing is required to be held; (2) evidence is required to be taken; and (3) discretion in the determination of the facts is vested in the agency. CCP §1094.5(a). See §§3.3-3.6. See *McGill v Regents of the Univ. of Cal.* (1996) 44 CA4th 1776, 1785, 52 CR2d 466 (appeal of writ directing university to set aside decision denying tenure; court found no legal requirement that tenure decision result from evidentiary hearing, thus, traditional mandate applied). See also *Ohton v Board of Trustees of Cal. State Univ.* (2007) 148 CA4th 749, 766, 56 CR3d 111 (discussing administrative mandamus requirements in reversing summary judgment in civil action with directions to (1) permit motion for leave to amend complaint to add claim for writ of mandate, and (2) decide issues arising from that motion). Courts characterize the standard of review of quasi-adjudicatory decisions (usually made by agencies) as "abuse of discretion." *O.W.L. Found. v City of Rohnert Park* (2008) 168 CA4th 568, 585, 86 CR3d 1 (comparing and contrasting standard of review in traditional and administrative mandamus cases). Generally, this means review is limited to determining whether the decision was "arbitrary, capricious, or entirely lacking in evidentiary support." *American Bd. of Cosmetic Surgery v Medical Bd.* (2008) 162 CA4th 534, 547, 75 CR3d 574. As to legal issues, however, the courts apply de novo review. See §2.19.

For examples of cases in which traditional mandate has been sought, see §§2.39-2.69.

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§2.33 a. Traditional Mandate Applies When Statutory Requirements of CCP §1094.5 Not Met

If any of the three statutory criteria of CCP §1094.5 are not met (see §2.32), administrative adjudicatory decisions are reviewed by way of traditional mandate under CCP §1085. See, *e.g.*, *O.W.L. Found. v City of Rohnert Park* (2008) 168 CA4th 568, 585, 86 CR3d 1; *McGill v Regents of the Univ. of Cal.* (1996) 44 CA4th 1776, 1785, 52 CR2d 466.

The requirement that is most often not met is a "legally required" hearing. See *Keeler v Superior Court* (1956) 46 C2d 596, 600, 297 P2d 967 (hearing only as "deemed necessary"; thus review by traditional mandate); *Blue Cross v Department of Health Care Servs.* (2007) 153 CA4th 322, 329, 62 CR3d 772 (although informal oral presentation allowed, review procedures did not require hearing; thus review by traditional mandate); *Excelsior College v Board of Registered Nursing* (2006) 136 CA4th 1218, 1236, 39 CR3d 618 (no right to evidentiary hearing and thus no right to administrative mandamus; board's action was discretionary and not an abuse of discretion; thus no right to traditional mandate); *McGill v Regents of the Univ. of Cal.* (1996) 44 CA4th 1776, 1785, 52 CR2d 466 (hearing not required in connection with decision denying tenure; thus review by traditional mandate); *Bunnett v Regents of Univ. of Cal.* (1995) 35 CA4th 843, 848, 41 CR2d 567 (no provision in pension plan for evidentiary hearing if application for benefits was denied; thus review by traditional mandate); *Motors Ins. Corp. v Division of Fair Employment Practices* (1981) 118 CA3d 209, 215, 173 CR 332 (no provision for hearing or taking of evidence in connection with issuance of accusation by California Division of Fair Employment Practices; thus review by traditional mandate).

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§2.34 b. Exhaustion of Administrative Remedies

To obtain writ relief, a petitioner must have no other plain, speedy, or adequate remedy. See §§2.15-2.16. Thus, generally, administrative remedies must be exhausted before an administrative decision can be challenged through a mandate proceeding. See, *e.g.*, *Thomas v Shewry* (2009) 170 CA4th 1480, 1480, 89 CR3d 105 (traditional mandamus action barred because petitioner failed to exhaust administrative remedies); *California Water Impact Network v Newhall County Water Dist.* (2008) 161 CA4th 1464, 1484, 75 CR3d 393 (court did not need to decide whether traditional or administrative mandate applied because petitioner failed to exhaust administrative remedies); *Eight Unnamed Physicians v Medical Exec. Comm. of the Med. Staff of Washington Township Hosp.* (2007) 150 CA4th 503, 510, 59 CR3d 100 (petitioners should have appealed to board from decision denying request to consolidate disciplinary hearings); *Imagistics Int'l, Inc. v Department of Gen. Servs.* (2007) 150 CA4th 581, 590, 59 CR3d 18 (petitioner failed to exhaust administrative bid protest remedy). But see *O.W.L. Found. v City of Rohnert Park* (2008) 168 CA4th 568, 583, 86 CR3d 1 (explaining that exhaustion requirement does not implicate subject matter jurisdiction; under unique circumstances of case, failure to exhaust administrative remedies did not preclude review).

NOTE: In the class action context, a court may deem exhaustion of remedies by some of the putative class members as sufficient to satisfy the exhaustion requirement. *Tarkington v California Unemployment Ins. Appeals Bd.* (2009) 172 CA4th 1494, 92 CR3d 131, quoting *Friends of Mammoth v Board of Supervisors* (1972) 8 C3d 247, 268, 104 CR 761 ("requiring all putative class members [in administrative mandamus proceeding] to exhaust their remedies 'would serve no additional useful purpose'"). Although *Tarkington* arose in the administrative mandamus context it also would apply in the traditional mandamus context.

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§2.35 c. Other Statutory Forms of Writ Review of Agency Decisions

Special writ proceedings (*e.g.,* through a "writ of review") apply to some administrative agencies, such as the Public Utilities Commission, the Alcoholic Beverage Control Appeals Board, and the Workers' Compensation Appeals Board. On these proceedings and the agencies to which they apply, see §§4.28, 16.18-16.48.

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§2.36 3. To Compel Agency to Comply With Administrative Decision

Traditional mandate will issue to compel an agency to comply with a final administrative decision. See, *e.g.*, *Lomeli v Department of Corrections* (2003) 108 CA4th 788, 794, 134 CR2d 179 (mandate issued to compel agency to abide by State Personnel Board decision to reinstate employee with back pay).

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§2.37 4. To Review Quasi-Legislative Acts

Mandate generally will not lie to control legislative action unless such action is invalid (*i.e.,* exceeds the scope of the agency's authority) or is an abuse of discretion as a matter of law. See, *e.g.*, *Saleeby v State Bar* (1985) 39 C3d 547, 561, 216 CR 367 (challenge to reimbursement decision from State Bar's client security fund reviewed under traditional mandate because (1) no requirement that hearing be held or record made and (2) claim was fundamentally challenge to bar's promulgation of rules, which was quasi-legislative act); *Pacific Legal Found. v California Coastal Comm'n* (1982) 33 C3d 158, 168, 188 CR 104 (challenge to quasi-legislative act of adopting guidelines interpreting Coastal Act's access provisions); *Woods v Superior Court* (1981) 28 C3d 668, 678, 170 CR 484 (challenge to regulation's validity in adjudicatory hearing on relocation benefits); *Mission Hosp. Reg'l Med. Ctr. v Shewry* (2008) 168 CA4th 460, 85 CR3d 639, (writ issued invalidating rate freeze on health care reimbursements); *County of San Diego v Bowen* (2008) 166 CA4th 501, 82 CR3d 818 (writ issued invalidating Secretary of State's rules not adopted in accordance with Administrative Procedure Act); *State Bldg. & Constr. Trades Council v Duncan* (2008) 162 CA4th 289, 300, 76 CR3d 507 (writ sought on grounds director had misinterpreted and misapplied law); *California Water Impact Network v Newhall County Water Dist.* (2008) 161 CA4th 1464, 1483, 75 CR3d 393 (quasi-legislative actions must be challenged by traditional mandate); *County Sanitation Dist. No. 2 v County of Kern* (2005) 127 CA4th 1544, 1578, 27 CR3d 28 (CEQA petition challenging agency action that is legislative or quasi-legislative reviewed by traditional mandate); *Wilson v Hidden Valley Mun. Water Dist.* (1967) 256 CA2d 271, 276, 63 CR 889 (challenge to board's quasi-legislative decision to deny petitions to exclude land from water district). See also *20th Century Ins. Co. v Garamendi* (1994) 8 C4th 216, 275, 32 CR2d 807 (discussing what makes administrative action quasi-legislative as opposed to quasi-judicial in context of challenges to insurance regulations promulgated for implementation of Proposition 103).

For examples of cases in which traditional mandate has been sought, see §§2.39-2.69.

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§2.38 C. Decisions of Nongovernmental Corporations, Associations, and Officers

Traditional mandate lies to compel a nongovernmental entity ("corporation, board, or person") to perform a legal duty or to admit or reinstate a party to a right or office. CCP §1085. See, *e.g., Lee v Blue Shield* (2007) 154 CA4th 1369, 1378, 65 CR3d 612 (declaratory relief complaint should have been treated as mandate petition, and mandate issued compelling health care insurer to reinstate provider contract and conduct peer review hearing before terminating provider's contract); *Mileikowsky v Tenet Healthsystem* (2005) 128 CA4th 531, 554, 27 CR3d 171, disapproved in part on other grounds in *Mileikowsky v West Hills Hosp. & Med. Ctr.* (2009) 45 C4th 1259, 1273, 91 CR3d 516 (mandate sought to review conduct of hospital disciplinary hearing); *Unnamed Physician v Board of Trustees of St. Agnes Med. Ctr.* (2001) 93 CA4th 607, 619, 113 CR2d 309 (mandate sought to review hearing officer's prehearing rulings).

For examples of cases in which traditional mandate has been sought, see §§2.39-2.69.

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IV. EXAMPLES OF SPECIFIC CONTEXTS IN WHICH NONJUDICIAL ACTIONS REVIEWED BY TRADITIONAL MANDATE

§2.39 A. Issuance of Professional Licenses and Certificates

Traditional mandate will lie to challenge licensing and certificating decisions when the statutory requirements for administrative mandamus are not met. For example:

- California licensing board stopped evaluating out-of-state programs prospectively. See *Excelsior College v Board of Registered Nursing* (2006) 136 CA4th 1218, 1236, 39 CR3d 618 (no hearing required).
- Agency required to issue permit to operate hospital pharmacy. See *Warrack Med. Ctr. Hosp. v California State Bd. of Pharmacy* (1967) 249 CA2d 118, 122, 57 CR 85 (individual licensees barred from operating pharmacy, but no prohibition against corporate applicants comprised of licensees).
- Agency compelled to issue branch office licenses to optometrists. See *Rich v State Bd. of Optometry* (1965) 235 CA2d 591, 604, 45 CR 512 (no hearing required).

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§2.40 B. DMV Suspension or Revocation

Ordinarily, Department of Motor Vehicles (DMV) decisions to suspend or revoke a driver's license are reviewed under CCP §1094.5. See, *e.g.*, *Coombs v Pierce* (1991) 1 CA4th 568, 574, 2 CR2d 249 (driving under influence (DUI) suspension or revocation order reviewed under CCP §1094.5 unless Veh C §13559 specifies otherwise).

The DMV has a mandatory duty to impose suspensions or revocations in some DUI cases. It has no authority to review the underlying conviction precipitating the suspension or revocation. Accordingly, administrative mandamus will not lie to challenge the DMV's reliance on an underlying criminal conviction, including out-of-state convictions. If a driver wants to challenge the validity of that underlying conviction, the driver must do so: (1) in the court in which that decision was rendered; (2) in a mandate proceeding directed to the court that rendered that decision; or (3) in a criminal proceeding in which that conviction is used as a prior offense. *Thomas v DMV* (1970) 3 C3d 335, 337, 90 CR 586. See *Larsen v DMV* (1995) 12 C4th 278, 285, 48 CR2d 151 (same rule applies if conviction obtained in another state).

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Source: Civil Litigation/California Civil Writ Practice/2 Traditional Mandate/§2.41 C. Land Use Decisions and Issuance of Permits or Variances

§2.41 C. Land Use Decisions and Issuance of Permits or Variances

Traditional mandate is frequently used to challenge various land use decisions, including issuance or denial of permits or variances. For example:

- Regional park's acquisition of land did not constitute "dedication" of land for park or open space triggering statutory restrictions on disposition. *Ste. Marie v Riverside County Reg'l Park & Open-Space Dist.* (2009) 46 C4th 282, 93 CR3d 369.
- City prepared sufficient new water supply assessment during environmental review process. *O.W.L. Found. v City of Rohnert Park* (2008) 168 CA4th 568, 586, 86 CR3d 1.
- Coastal Commission properly denied development permit. *Charles A. Pratt Constr. Co. v California Coastal Comm'n* (2008) 162 CA4th 1068, 1072, 76 CR3d 466.
- City lacked authority to issue use exemption contrary to zoning. *Neighbors in Support of Appropriate Land Use v County of Tuolumne* (2007) 157 CA4th 997, 1004, 68 CR3d 882.
- Caltrans lacked authority to require compliance with local zoning ordinance as requirement for issuing state billboard permit. *Traverso v Department of Transp.* (1996) 46 CA4th 1197, 1204, 54 CR2d 434.
- City had ministerial duty to issue building permit in the absence of any discretionary provision in ordinance or law. *Prentiss v City of S. Pasadena* (1993) 15 CA4th 85, 89, 18 CR2d 641.
- City required to withhold building permits until it fixed amount of and imposed fees on developers. *Fontana Unified Sch. Dist. v City of Rialto* (1985) 173 CA3d 725, 734, 219 CR 254.

NOTE: Mandate cannot compel a zoning change, because zoning is a legislative act. *Gilliland v County of Los Angeles* (1981) 126 CA3d 610, 614, 179 CR 73.

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D. Assignment, Classification, and Discipline of Teachers and Students

§2.42 1. Teachers

Traditional mandate will lie to review decisions and actions concerning teachers when the statutory requirements of administrative mandamus are not met. For example:

- Professor's demotion was improper because collective bargaining agreement did not authorize dean to require a tenured professor to engage in any activity; agreement authorized dean only to make suggestions for improvement. *Moosa v State Personnel Bd.* (2002) 102 CA4th 1379, 1384, 126 CR2d 321.
- "Compressed" salary schedule violated state statute. *Adair v Stockton Unified Sch. Dist.* (2008) 162 CA4th 1436, 77 CR3d 62.
- Teacher entitled to be reclassified as regular employee. *Stryker v Antelope Valley Community College Dist*. (2002) 100 CA4th 324, 329, 122 CR2d 489.
- Transfer of teacher cannot violate teacher's constitutional rights. *Finot v Pasadena City Bd. of Educ.* (1967) 250 CA2d 189, 202, 58 CR 520.

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Source: Civil Litigation/California Civil Writ Practice/2 Traditional Mandate/§2.43 2. Students

§2.43 2. Students

Traditional mandate may also be appropriate to challenge decisions involving students. For example:

- Challenge to high school's refusal to allow student to play sports. *Zuehlsdorf v Simi Valley Unified Sch. Dist.* (2007) 148 CA4th 249, 251, 55 CR3d 467.
- Challenge to school district's policy of assigning late-enrolling students to alternative schools until space became available at student's school of residence. *Helena F. v West Contra Costa Unified Sch. Dist.* (1996) 49 CA4th 1793, 1796, 57 CR2d 605.
- Challenge to school board's student grooming requirements. *Akin v Board of Educ. of Riverside Unified Sch. Dist.* (1968) 262 CA2d 161, 163, 68 CR 557.

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E. Election Issues

§2.44 1. Reapportionment and Redistricting Issues

Traditional mandate can be appropriate to challenge a reapportionment plan. For example:

- Alternative writ of mandate issued and appointment of special masters to hear evidence at public hearings on proposed reapportionment plans and draft recommendations. Court retained jurisdiction and invited an application to dismiss if the reapportionment plans were enacted. Court subsequently accepted plans prepared by special masters, discharged the alternative writ of mandate, and denied the writ petition on ground there was no reason to believe parties would not accept the court's holding. *Wilson v Eu* (1991) 54 C3d 471, 286 CR 280.
- Mandate sought to resolve impasse created by legislature's failure to pass legislative and congressional reapportionment bills acceptable to governor in time for 1972 election; court retained jurisdiction to draft plans for 1974 and 1980 elections if legislature failed to act by end of 1972 legislative session. *Legislature v Reinecke* (1972) 6 C3d 595, 603, 99 CR 481; see also *Silver v Brown* (1965) 63 C2d 270, 282, 46 CR 308 (writ petition denied without prejudice to seek similar relief if legislature did not enact new congressional districting measure by close of regular 1967 session).
- Mandate sought to compel redistricting of supervisor districts. Writ denied but jurisdiction retained for further hearing and to enter further orders as necessary if board failed to act within 90 days. *Wiltsie v Board of Supervisors* (1966) 65 C2d 314, 317, 54 CR 320.

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§2.45 2. Election Processes

Traditional mandate can be appropriate to challenge election processes. For example:

- To compel an officer to conduct an election. *Hoffman v State Bar* (2003) 113 CA4th 630, 634, 6 CR3d 592.
- To compel the county registrar to accept a municipal judge candidate's designation of her occupation on the ballot as an administrative law judge. *Andrews v Valdez* (1995) 40 CA4th 492, 493, 46 CR2d 744.
- To compel the registrar of voters to accept a ballot argument and include it in voter information pamphlets. *Barnes v Wong* (1995) 33 CA4th 390, 394, 39 CR2d 417 (mandate denied because ballot argument was submitted after filing deadline).
- To prevent an election limited to members of a proposed district. *Fullerton Joint Union High Sch. Dist. v State Bd. of Educ.* (1982) 32 C3d 779, 787, 187 CR 398.
- To compel the governor to call a special election. *Jenkins v Knight* (1956) 46 C2d 220, 224, 293 P2d 6 (duty to call special election ministerial; mandate denied on facts).

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3. Certification of Initiative or Referendum Petition

§2.46 a. Challenging Placement on Ballot

Traditional mandate will lie to challenge the placement of initiatives or referendums on the ballot. For example:

- To compel the county clerk to certify that a referendum has the requisite number of signatures. *Wheelwright v County of Marin* (1970) 2 C3d 448, 451, 85 CR 809 (mandate denied); *Friends of Bay Meadows v City of San Mateo* (2007) 157 CA4th 1175, 1181, 68 CR3d 916 (mandate denied).
- To compel the city council to submit an initiative ordinance on firefighter's compensation to voters. *Kugler v Yocum* (1968) 69 C2d 371, 373, 71 CR 687.
- To compel the registrar of voters and county clerk to determine the sufficiency of a petition's signatures and, if sufficient, to place the initiative on the local ballot. *Farley v Healey* (1967) 67 C2d 325, 326, 62 CR 26; *Friends of Bay Meadows v City of San Mateo* (2007) 157 CA4th 1175, 1186, 68 CR3d 916.
- To direct the Secretary of State to refrain from verifying signatures gathered on an initiative petition, and from certifying and placing the initiative on the ballot, because the initiative violated the single-subject requirement. *California Trial Lawyers Ass'n, Inc. v Eu* (1988) 200 CA3d 351, 357 n2, 245 CR 916.
- To direct city clerk to refrain from certifying referendum petition based on failure to comply with statutory "text" requirement. *Lin v City of Pleasanton* (2009) 176 CA4th 408, 96 CR3d 730.

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§2.47 b. Compelling Processing of Initiative Petition

Traditional mandate can be used to compel election officials to process initiative and referendum petitions. For example:

- To direct city elections official to certify an initiative for the ballot unless the initiative's noncompliance with election requirements is manifest on the face of the petition. *Alliance for a Better Downtown Millbrae v Wade* (2003) 108 CA4th 123, 129, 133 CR2d 249 (mandate issued; election official exceeded scope of ministerial duties by using evidence extrinsic to initiative petition to justify refusal to certify initiative).
- To compel the city clerk to accept and process an initiative petition. *Friends of Bay Meadows v City of San Mateo* (2007) 157 CA4th 1175, 1186, 68 CR3d 916 (mandate denied because initiative petition did not contain enough valid signatures); *Duran v Cassidy* (1972) 28 CA3d 574, 579, 104 CR 793 (mandate issued compelling city clerk to accept and process initiative petition).
- To compel the acceptance of a referendum petition. *Defend Bayview Hunters Point Comm. v City & County of San Francisco* (2008) 167 CA4th 846, 858, 84 CR3d 486 (mandate denied; clerk had ministerial duty to reject petition to force referendum that failed to include copy of redevelopment plan); *Billig v Voges* (1990) 223 CA3d 962, 963, 273 CR 91 (mandate denied; referendum petition rejected for failure to comply with election statute that required text of ordinance to be printed in referendum petition).

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§2.48 c. Pre- or Post-Election Review of Initiative

Traditional mandate generally will not lie to challenge the legality of an initiative measure before an election unless the measure clearly is invalid on its face. *Brosnahan v Eu* (1982) 31 C3d 1, 4, 181 CR 100 (petitions for writ of mandate and prohibition to prevent Secretary of State from certifying initiative and taking other steps to submit initiative denied). In *Independent Energy Producers Ass'n v McPherson* (2006) 38 C4th 1020, 1024, 44 CR3d 644, the court held that the *Brosnahan* presumption against pre-election review did not apply when the challenge to a measure was based on the grounds that the conferral of additional regulatory authority could not be enacted by initiative. The supreme court noted that this type of challenge is one that can be raised post election—when there is more time for briefing and deliberation—and that deferring a challenge often will be the wiser course.

Pre-election review is warranted for challenges based on the failure to comply with essential procedural requirements necessary to qualify an initiative for the ballot. See, *e.g., Costa v Superior Court* (2006) 37 C4th 986, 1005, 39 CR3d 470 (challenge to petition circulation process). A challenge to an initiative based on a violation of the single-subject rule may be heard before the election because of the constitutional prohibition against submitting an initiative that addresses more than one subject to the electorate. *Senate v Jones* (1999) 21 C4th 1142, 1154, 90 CR2d 810 (mandate issued restraining Secretary of State and county registrars from placing initiative on ballot because it violated single-subject rule contained in Cal Const art II, §8(d)). Compare *Hernandez v County of Los Angeles* (2008) 167 CA4th 12, 84 CR3d 10 (appellate court refused pre-election challenge to local ballot measure and considered merits on appeal from denial of writ petition). For examples of writ actions challenging validity of legislative actions, see §2.24.

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§2.49 F. Admission or Restoration of Right to Office

Traditional mandate may be appropriate to determine who holds a particular office. See, *e.g., Woodmansee v Lowery* (1959) 167 CA2d 645, 648, 334 P2d 991 (mandate proper to determine which claimant to judgeship was de facto officer; legal title was not adjudicated, but court examined question of legal title). However, mandate is not ordinarily the proper remedy to determine title to public office. See §2.10.

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G. Unions and Employee Organizations

§2.50 1. Compelling Negotiation

Other than some statutory exceptions (see, *e.g.*, Govt C §3542 (writ review allowed only under specified circumstances) and Cal Rules of Ct 8.495-8.498), traditional mandate may lie to compel governmental entities to negotiate with unions and other employee organizations. See, *e.g.*, *Santa Clara County Counsel Attorneys Ass'n v Woodside* (1994) 7 C4th 525, 541, 28 CR2d 617 (mandate issued compelling county to meet and confer with county counsel's union); *Huntington Beach Police Officers Ass'n v City of Huntington Beach* (1976) 58 CA3d 492, 495, 129 CR 893 (mandate issued directing city to reinstate 4-day workweek); *Los Angeles County Employees Ass'n, Local 660 v County of Los Angeles* (1973) 33 CA3d 1, 8, 108 CR 625 (mandate issued compelling county to negotiate with unions as to size of worker caseloads).

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§2.51 2. Compelling Arbitration

Arbitration can be compelled by petition. See, *e.g., Butchers' Union Local 229 v Cudahy Packing Co.* (1967) 66 C2d 925, 927, 59 CR 713 (compelling arbitration of grievance under terms of collective bargaining agreement); *American Fed'n of State, County & Mun. Employees, Local 1902, AFL-CIO v Metropolitan Water Dist.* (2005) 126 CA4th 247, 261, 24 CR3d 285 (mandate denied because grievance was untimely and memorandum of understanding did not contain agreement to arbitrate).

NOTE: As the current update to this publication was going to press, the California Supreme Court accepted review of *United Teachers Los Angeles v Los Angeles Unified Sch. Dist.* (review granted Dec. 23, 2009, S177403; superseded opinion at 177 CA4th 863, 99 CR3d 524). In a now-superseded opinion, the court of appeal reversed an order denying a petition to compel arbitration. On review, the supreme court will consider the following issue: Can a school district be required to arbitrate disputes over the granting of a charter school petition under the terms of a collective bargaining agreement, or does Ed C §47611.5(e) preclude referring such a dispute to arbitration? The outcome of this case will be included in a future update.

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§2.52 3. Holding Hearings

In certain circumstances, an expelled union member may use mandate to obtain a fair hearing on the charges against him or her. See, *e.g., Cason v Glass Bottle Blowers Ass'n* (1951) 37 C2d 134, 140, 231 P2d 6 (mandate issued ordering labor union to afford member full and fair hearing or to reinstate member in union).

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§2.53 4. Inspecting Records

Mandate may lie to compel a labor union to permit a member to inspect certain union financial records when the member has a substantial private interest to protect. *Deacon v International Union of Operating Eng'rs, Local No. 12* (1965) 236 CA2d 302, 46 CR 11.

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§2.54 H. Corporations and Corporate Officers

Traditional mandate may lie to:

- Compel a corporation to call an annual shareholders' meeting to elect a board of directors. *Dedrick v California Whaling Co.* (1936) 16 CA2d 284, 288, 60 P2d 551.
- Compel a corporation to file amended articles of incorporation. *Pratt-Low Preserving Co. v Jordan* (1933) 217 C 292, 295, 18 P2d 676.
- Compel a former officer to return corporate records (*Potomac Oil Co. v Dye* (1909) 10 CA 534, 537, 102 P 677) and other personal property (*Liberal Catholic Church v Rogers* (1944) 65 CA2d 196, 198, 150 P2d 486) to the corporation.
- Compel the examination of corporate property. *Hobbs v Tom Reed Gold Mining Co.* (1913) 164 C 497, 502, 129 P 781.
- Compel the inspection of corporate books. *Johnson v Langdon* (1902) 135 C 624, 625, 67 P 1050; *Most v First Nat'l Bank* (1966) 246 CA2d 425, 426, 54 CR 669. See *Hartman v Hollingsworth* (1967) 255 CA2d 579, 582, 63 CR 563 (reversing issuance of writ ordering inspection of dissolved corporation's books and records because petitioner had no statutory right to inspect books and records).

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§2.55 I. Private Organizations and Associations

Traditional mandate will lie to:

- Challenge hearing procedures and dismissal from medical staff. *Mileikowsky v Tenet Healthsystem* (2005) 128 CA4th 531, 554, 27 CR3d 171, disapproved in part on other grounds in *Mileikowsky v West Hills Hosp. & Med. Ctr.* (2009) 45 C4th 1259, 1273, 91 CR3d 516 (traditional mandate to review whether hearing officer has authority to terminate peer review hearing).
- Compel a health care insurer to reinstate a provider contract and hold peer review hearing process before terminating provider's contract. *Lee v Blue Shield* (2007) 154 CA4th 1369, 1378, 65 CR3d 612.
- Challenge prehearing rulings by hearing officer. *Unnamed Physician v Board of Trustees of St. Agnes Med. Ctr.* (2001) 93 CA4th 607, 619, 113 CR2d 309.
- Challenge more lenient member discipline imposed by parent organization, which reversed state organization's expulsion. *California Dental Ass'n v American Dental Ass'n* (1979) 23 C3d 346, 350, 152 CR 546 (mandate issued to vacate discipline decision imposed by parent organization and to rehear matter in light of ethical rules of state organization).
- Challenge a hospital's refusal to consolidate disciplinary hearings for individual doctors who, as a group, decided to move their practice from one hospital to another. *Eight Unnamed Physicians v Medical Exec. Comm. of the Med. Staff of Washington Township Hosp.* (2007) 150 CA4th 503, 510, 59 CR3d 100.

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§2.56 J. Enforcement of Civil Rights

A claim involving federal constitutional rights may be joined with a mandate action. *Lockyer v County of Santa Cruz* (2006) 416 F Supp 2d 797, 799 (mandate sought to compel county to comply with accessibility requirements for individuals with physical disabilities and injunction sought for compliance with Americans with Disabilities Act). Traditional mandate may lie to enforce a civil right. See, *e.g.*, *City & County of San Francisco v State* (2008) 43 C4th 757, 857, 76 CR3d 683 (mandate issued to compel state officials to ensure that local officials perform their duty to enforce marriage statutes without making distinction between opposite-sex and same-sex couples); *League of Women Voters v McPherson* (2006) 145 CA4th 1469, 1473, 52 CR3d 585 (mandate issued to compel Secretary of State to issue memorandum to county clerks and election officials informing them that only persons convicted of felony and on parole after felony conviction, but not persons on felony probation, were disenfranchised by Cal Const art II, §4); *Stone v Board of Dirs.* (1941) 47 CA2d 749, 754, 118 P2d 866 (mandate issued to compel board and city officials to admit black petitioners to privileges and facilities of municipal bath houses and swimming pool).

Mandate also may be appropriate to challenge governmental practices that are discriminatory or prior restraints on the exercise of First Amendment rights, including restraints on political activities of students, teachers, and other public employees. See, *e.g.*, *Adcock v Board of Educ.* (1973) 10 C3d 60, 65, 109 CR 676 (mandate used to invalidate teacher's transfer to different school, based on teacher's exercise of free speech); *Los Angeles Teachers Union, Local 1021 v Los Angeles City Bd. of Educ.* (1969) 71 C2d 551, 553, 78 CR 723 (mandate used to restrain board and other school administrators from interfering with teachers' right to circulate petition during non-work time); *Hegwer v Board of Civil Serv. Comm'rs* (1992) 5 CA4th 1011, 1015, 7 CR2d 389 (mandate used to challenge weight requirements for paramedics as sex discrimination; denied); *Hardy v Stumpf* (1974) 37 CA3d 958, 960, 112 CR 739 (mandate used to challenge height and weight requirements for police officers as impermissible sex discrimination; granted).

PRACTICE TIP: In most civil rights cases and many cases involving constitutional rights, the court will deny writ review because there is likely an adequate legal remedy by way of a complaint for damages or injunctive relief. See §2.15.

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§2.57 K. Taxes

Mandate can be used by one governmental entity to compel another entity or its taxing officials to perform duties required by tax laws, *e.g.*, to release funds for use as required by statute. See, *e.g.*, *City of Dinuba v County of Tulare* (2007) 41 C4th 859, 868, 62 CR3d 614 (redevelopment agency sought mandate to compel county to pay retroactively taxes due to agency after audit corrected tax rate codes assigned to parcels within redevelopment project); *Redevelopment Agency of the City of San Bernardino v County of San Bernardino* (1978) 21 C3d 255, 262, 145 CR 886 (redevelopment agency sought mandate to compel county to reassess taxes on property acquired by city and to reallocate tax revenues based on reassessment).

Mandate is not available when a tax refund action can test the legality of an action. See, *e.g.*, *Malibu W. Swimming Club v Flournoy* (1976) 60 CA3d 161, 164, 131 CR 279 (review of additional tax rate hike could be had by paying extra tax, then filing tax refund suit).

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§2.58 1. Compelling Taxation or Assessment

Traditional mandate will lie to compel taxing authorities to comply with tax laws, including levying taxes and making assessments as required by law. See, *e.g.*, *Huntington Park Redev. Agency v Martin* (1985) 38 C3d 100, 103, 211 CR 133 (mandate issued compelling redevelopment agency administrator to publish sales and use tax ordinance adopted by agency); *City & County of San Francisco v Farrell* (1982) 32 C3d 47, 51, 184 CR 713 (city sought writ compelling controller to certify availability of funds generated from proceeds of tax increase); *County of Sacramento v Hickman* (1967) 66 C2d 841, 845, 59 CR 609 (mandate issued compelling county assessor to comply with statute requiring assessment of all taxable property at announced fraction of its full cash value); *May v Board of Dirs. of El Camino Irrigation Dist.* (1949) 34 C2d 125, 130, 208 P2d 661 (mandate issued compelling directors of irrigation district to levy assessments to pay bonds and interest). See also *City of Dinuba v County of Tulare* (2007) 41 C4th 859, 868, 62 CR3d 614 (city and redevelopment agency could seek writ of mandate to compel county to comply with statutory duty to calculate and distribute tax revenue correctly, and to recover tax revenue mistakenly distributed to wrong agencies); *Santa Clara County Local Transp. Auth. v Guardino* (1995) 11 C4th 220, 228, 45 CR2d 207 (original writ proceeding initiated in appellate court by local transportation agency to validate sales tax that passed with less than 60-percent vote; writ denied because tax was invalid).

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§2.59 2. Compelling Record-Keeping and Handling Duties

Traditional mandate will lie to compel compliance with statutory duties in connection with documents and records. See, *e.g.*, *State Bd. of Equalization v Watson* (1968) 68 C2d 307, 312, 66 CR 377 (mandate issued compelling assessor to comply with statutory duty to make available to board records pertaining to assessing commercial airlines). When tax is duly and fully paid, mandate will lie to compel collector to issue official receipt. See, *e.g., Consolidated Title Sec. Co. v Hopkins* (1934) 1 C2d 414, 416, 35 P2d 320 (writ denied because amount tendered was insufficient).

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§2.60 3. Compelling Tax Authority to Review Claim or Hear Appeal

Traditional mandate will lie to compel a board of equalization that has unlawfully refused to hear an appeal challenging an assessment to hear the merits of the appeal. See, *e.g., Sunset Retirement Villa v Dear* (1997) 58 CA4th 948, 955, 68 CR2d 416 (mandate issued compelling local tax assessment board to hear taxpayer's appeal on merits). See also *Little v Los Angeles County Assessment Appeals Bds.* (2007) 155 CA4th 915, 922, 66 CR3d 401 (discussing *Sunset*'s limited application; suit for refund of taxes adequate remedy, thus no need for writ of mandate).

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§2.61 4. Reviewing Assessment Practices

Some county assessment practices can be challenged through traditional mandate. See, *e.g.*, *Smith v Anderson* (1967) 67 C2d 635, 637, 63 CR 391 (reversing dismissal of writ proceeding to compel county tax collector to request separate valuations from county assessor for undivided interests in property owned by state as payment for delinquent taxes); *County of Sacramento v Hickman* (1967) 66 C2d 841, 845, 59 CR 609 (mandate issued compelling county assessor to comply with statute requiring assessment of all taxable property at announced fraction of its full cash value); *Board of Educ. v Watson* (1966) 63 C2d 829, 831, 48 CR 481 (writ proceeding to compel county assessor to supply school boards within county with written estimated total assessed valuation of taxable property in their districts; writ denied, but assessor directed to supply such information on future requests).

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§2.62 5. Exception: Mandate Will Not Lie to Challenge Assessment

Mandate will not lie to challenge an assessment. A taxpayer must avail itself of the equalization appeals process, and if that process is unsuccessful, pay the tax owed and file a refund action. See, *e.g.*, *PG&E v State Bd. of Equalization* (1980) 27 C3d 277, 281, 165 CR 122 (writ denied because adequate remedy for error in assessment process existed at law); *Little v Los Angeles County Assessment Appeals Bds.* (2007) 155 CA4th 915, 922, 66 CR3d 401 (suit for refund of taxes adequate remedy, thus no need for writ of mandate). The assessment decision is an exercise of the taxing agency's discretion, and the agency cannot be compelled to exercise its discretion in a particular way. See, *e.g.*, *Stevens v Fox Realty Corp.* (1972) 23 CA3d 199, 206, 100 CR 63 (mandate will not lie to compel different result after lawful exercise of discretion in setting assessment amount).

If, however, a statute provides for a method of property assessment in the event a taxing agency fails to assess property as required, then mandate may lie to compel the assessor to accept an assessment using that method. See, *e.g.*, *Bunker v County of Orange* (2002) 103 CA4th 542, 550, 126 CR2d 825 (mandate available to force county to accept taxpayer's assessment of property value if (as per statute) county failed to respond to request for reassessment for 2 years).

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§2.63 6. Exception: Mandate Will Not Lie to Prevent Collection of Property Taxes

Mandate will not lie to prevent the collection of property taxes. Rev & T C §4807. See, *e.g.*, *Connolly v County of Orange* (1992) 1 C4th 1105, 1113, 4 CR2d 857 (mandate did not lie, for additional reasons that no timely claim was filed and neither county nor assessor had duty to grant claimed property tax exemption); *Community Facilities Dist. v Harvill* (1999) 74 CA4th 876, 882, 88 CR2d 405 (policy underlying statute prohibiting prepayment use of mandate is to permit revenue collection during pendency of litigation). A tax refund action is an adequate remedy at law to challenge an overpayment, thus mandate is not available. See §2.15. See also *Merced County Taxpayers Ass'n v Cardella* (1990) 218 CA3d 396, 400, 267 CR 62 (mandate denied because taxpayers sought assessment adjustment to avoid payment of future taxes; taxpayers' disclaimer of refund for past taxes did not change nature of claim).

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§2.64 L. Statutory Payment Obligations

Traditional mandate will lie to enforce a statutory payment obligation, if the law fixes the amount of the obligation and if payment involves the performance of a ministerial duty. See 8 Witkin, California Procedure, *Extraordinary Writs* §§90-91 (5th ed 2008). For example, mandate is proper to compel:

- Retroactive payment of taxes due to an agency after an audit corrected the tax rate codes assigned to parcels within a redevelopment project. *City of Dinuba v County of Tulare* (2007) 41 C4th 859, 867, 62 CR3d 614.
- Payment of a salary when a dispute concerns the construction of legislation giving rise to the duty to pay it. *Coan v California* (1974) 11 C3d 286, 291, 113 CR 187; *Veguez v Governing Bd. of Long Beach Unified Sch. Dist.* (2005) 127 CA4th 406, 413, 25 CR3d 526 (mandate challenging school district's denial of differential-pay sick leave).
- A controller and other officials to certify the availability of funds for payment on a public improvements contract as set forth in the city charter. *Flora Crane Serv., Inc. v Ross* (1964) 61 C2d 199, 201, 37 CR 425.
- City officials to certify and approve payrolls showing that petitioners were entitled to vacation pay for services provided before discharge. *Tevis v City & County of San Francisco* (1954) 43 C2d 190, 200, 272 P2d 757.

Mandate generally will not lie, however, to enforce a contractual obligation against, or to compel payment of money by, a public entity. In such situations, an action at law for damages is usually adequate and thus mandate is unavailable. See, *e.g., Wenzler v Municipal Court* (1965) 235 CA2d 128, 132, 45 CR 54.

PRACTICE TIP: Although a mandate action against a public entity may result in the entity's payment or release of money, the action is not one for money and the judgment is not "damages" as contemplated by the Government Claims Act. Understanding the nature of the requested action that may result in the payment of money by the public agency will eliminate any misconceptions as to the judgment. See *City of Dinuba v County of Tulare* (2007) 41 C4th 859, 867, 62 CR3d 614 (city redevelopment agency sought mandate to compel county to pay retroactively taxes due to agency after audit corrected tax rate codes assigned to parcels within redevelopment project).

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Source: Civil Litigation/California Civil Writ Practice/2 Traditional Mandate/§2.65 M. Issuance of Subpoenas

§2.65 M. Issuance of Subpoenas

Traditional mandate will lie to challenge the issuance of or failure to issue subpoenas:

- In administrative proceedings. *Mosk v Superior Court* (1979) 25 C3d 474, 479, 159 CR 494 (mandate issued to order superior court to quash subpoena issued to associate supreme court justice by Commission on Judicial Performance to compel testimony at public hearing); *Shively v Stewart* (1966) 65 C2d 475, 481, 55 CR 217 (mandate issued to enforce prehearing discovery rights in administrative proceedings before State Board of Medical Examiners; traditional mandate proper because subpoena issuance is mandatory before, though not during, hearing under Administrative Procedure Act). See California Administrative Mandamus §5.28 (3d ed Cal CEB 2003).
- By county clerk. *Patterson v Sharp* (1967) 253 CA2d 838, 61 CR 517 (mandate issued compelling clerk to issue subpoenas to city police officers without payment of witness fees; officers were participants in (*i.e.*, defendants) and eyewitnesses to accident that formed basis of underlying action).

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§2.66 N. Consideration of Claim

Traditional mandate will issue to compel consideration of a claim. See, *e.g., Hobbs v Northeast Sacramento County Sanitation Dist.* (1966) 240 CA2d 552, 49 CR 606 (mandate issued to compel agency to consider petitioner's wrongful death claim).

Mandate will not lie to enforce a claim or judgment against the state, state officers, or state employees, by attachment, garnishment, execution, or mandate to reach state funds or property. Govt C §§965.5-965.6.

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§2.67 O. Publication of Notice

Traditional mandate will lie to compel publication of required public notices. See, *e.g.*, *City of Santa Clara v Von Raesfeld* (1970) 3 C3d 239, 243, 90 CR 8 (mandate issued compelling city manager to mail notice of sale of bonds under city resolution); *City of Santa Monica v Grubb* (1966) 245 CA2d 718, 720, 54 CR 210 (mandate issued compelling city clerk to publish notice inviting sealed bids for purchase of water revenue bonds).

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P. Public Records Act

§2.68 1. Mandate for Denial of Disclosure

If a public entity denies a request for disclosure of public records under the California Public Records Act (PRA) (Govt C §§6250-6276.48), the requesting party can seek review of that action by filing an action for injunctive or declaratory relief, or by way of mandate. Govt C §6258. See, *e.g.*, *BRV, Inc. v Superior Court* (2006) 143 CA4th 742, 758, 49 CR3d 519 (mandate issued compelling disclosure of private investigator's report on school superintendent's alleged misconduct and school board's alleged "sweetheart deal" with superintendent to keep report confidential); *Bakersfield City Sch. Dist. v Superior Court* (2004) 118 CA4th 1041, 1046, 13 CR3d 517 (mandate issued compelling disclosure of disciplinary records of school district employee when complaints against employee were "of a substantial nature" and reasonable cause existed to believe complaints were well founded).

The superior court's order in such an action is reviewable solely by writ of mandate. Govt C §6259.

A public entity is not entitled to initiate proceedings under the PRA to determine its disclosure obligations. See, *e.g. Filarsky v Superior Court* (2002) 28 C4th 419, 434, 121 CR2d 844.

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§2.69 2. No Requirement of Inadequate Remedy at Law

In *Wilder v Superior Court* (1998) 66 CA4th 77, 77 CR2d 629, the court of appeal held that a petitioner does not need to establish lack of an adequate remedy at law to obtain public documents under Govt C §6258. The court noted that the legislature had expressly made legal proceedings and mandate available to review a denial of a disclosure request, holding that the statutory enforcement provision is not the equivalent of ordinary mandate. The court of appeal issued a writ compelling the superior court to set aside its dismissal order and reconsider the merits of the writ petition. 66 CA4th at 82.

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3

Administrative Mandamus

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I. SCOPE OF CHAPTER §3.1

II. NATURE OF ADMINISTRATIVE MANDAMUS §3.2
- A. Requirements for Administrative Mandamus §3.3
  - 1. Hearing Required by Law §3.4
  - 2. Evidence Required to Be Taken §3.5
  - 3. Discretion Vested in Hearing Officer or Decision-Maker §3.6
- B. Review Generally Limited to Administrative Record §3.7
- C. Scope of Judicial Review in Administrative Mandamus Proceedings §3.8
  - 1. Did the Administrative Body Proceed Without or in Excess of Jurisdiction?
    - a. Jurisdiction Limited by Statute or Constitution §3.9
    - b. Administrative Reconsideration or Modification of Decision §3.10
  - 2. Was the Petitioner Provided a Fair Hearing? §3.11
  - 3. Did the Administrative Body Prejudicially Abuse Its Discretion? §3.12
    - a. Administrative Body Did Not Proceed as Required by Law §3.13
    - b. Agency's Decision Not Supported by the Findings §3.14
    - c. Agency's Findings Not Supported by Evidence §3.15
      - (1) Substantial Evidence Standard §3.16
      - (2) Independent Judgment Standard §3.17

III. DIFFERENCES BETWEEN TRADITIONAL AND ADMINISTRATIVE MANDAMUS PROCEEDINGS
- A. Nature and Fundamental Requisites of the Writs §3.18
- B. Filing Deadlines §3.19

IV. CHOOSING BETWEEN WRIT OF TRADITIONAL AND ADMINISTRATIVE MANDAMUS
- A. Checklist: Determining Appropriate Writ §3.20
- B. Pleading in the Alternative §3.21

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§3.1 I. SCOPE OF CHAPTER

This chapter compares traditional and administrative mandamus and provides analytical tools for determining which writ a petitioner should seek in a particular case. In doing so, the chapter provides only a summary overview of administrative mandamus, describing the requirements for and limitations of its use. A detailed discussion of administrative mandamus appears in California Administrative Mandamus (3d ed Cal CEB 2003). On traditional mandamus (mandate), see chap 2 of this book.

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§3.2 II. NATURE OF ADMINISTRATIVE MANDAMUS

Administrative mandamus is a statutorily created species of mandamus used to review certain administrative decisions. Administrative mandamus is authorized and governed by CCP §1094.5, not the traditional mandamus statute, CCP §1085. However, many of the procedural rules applicable to traditional mandamus also apply to administrative mandamus. On traditional mandamus, see chap 2.

NOTE: The terms "mandamus" and "mandate" are used interchangeably in practice and are synonymous. CCP §1084. This text uses the terminology "administrative mandamus" to refer to writ proceedings under CCP §1094.5, and "traditional mandamus," "traditional mandate," or "mandate" to refer to writ proceedings under CCP §1085.

Administrative mandamus is akin to an appeal in a civil case. In seeking writ review under §1094.5, a petitioner is essentially "appealing" from an administrative adjudicatory decision to the superior court. There are three requirements, set out in §1094.5, that must be met for writ review to be proper by way of administrative mandamus, rather than traditional mandamus. See §3.3.

On the nature of administrative mandamus proceedings, see California Administrative Mandamus, chap 1 (3d ed Cal CEB 2003).

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§3.3 A. Requirements for Administrative Mandamus

An administrative decision is reviewable by way of administrative mandamus under CCP §1094.5, rather than traditional mandamus under CCP §1085, when:

- A hearing in the underlying administrative proceeding is required by law (see §3.4);
- Evidence is required to be taken at the hearing (see §3.5); and
- Discretion in the determination of contested factual issues is vested in the administrative decision-maker. See §3.6.

Broadly speaking, the type of administrative decision reviewable by administrative mandamus is called an adjudicatory or quasi-judicial decision. Other types of actions and decisions by governmental and private bodies, such as quasi-legislative actions and ministerial actions, are reviewed by way of traditional mandamus under CCP §1085. See *Katosh v Sonoma County Employees' Retirement Ass'n* (2008) 163 CA4th 56, 62 n4, 77 CR3d 324. Traditional mandamus also applies to administrative adjudicatory decisions when §1094.5's three statutory requirements for administrative mandamus are not met, *e.g.*, when a hearing is not required by law. See §3.18. On traditional mandamus, see chap 2.

PRACTICE TIP: Some statutory schemes specifically require review of administrative decisions under CCP §1094.5. See, *e.g.*, Welf & I C §14171(j) (review of director's decision on social service benefits audit); *Phelps v State Water Resources Control Bd.* (2007) 157 CA4th 89, 98, 68 CR3d 350 (under Water C §1126, orders of SWRCB are reviewed via CCP §1094.5); *County of Sonoma v Commission on State Mandates* (2000) 84 CA4th 1264, 1278, 101 CR2d 784 (under Govt C §17559, decisions of Commission on State Mandates reviewed via CCP §1094.5). When seeking writ review of an administrative decision, check applicable statutes, operating procedures, and organizational documents to determine whether they specify a particular method of judicial review. See §3.20 and chaps 2, 4.

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§3.4 1. Hearing Required by Law

The first requirement for writ review under CCP §1094.5 is that a hearing in the underlying administrative proceeding is required by law. See CCP §1094.5(a). If a hearing is not legally required, review by administrative mandamus is unavailable. See, *e.g., Keeler v Superior Court* (1956) 46 C2d 596, 599, 297 P2d 967 (CCP §1094.5 inapplicable because hearing not required by statute or agency's own rules); *O.W.L. Found. v City of Rohnert Park* (2008) 168 CA4th 568, 585, 86 CR3d 1 (although city chose to hold public hearing, no hearing was required to be held as matter of law; thus, case was properly pursued as traditional mandamus action); *Blue Cross v State Dep't of Health Servs.* (2007) 153 CA4th 322, 329, 62 CR3d 772 (traditional mandamus applied to hearing officer's decision because hearing was not required); *Bunnett v Regents of Univ. of Cal.* (1995) 35 CA4th 843, 848, 41 CR2d 567 (when hearing is not required, administrative adjudicatory decision is reviewed by way of traditional mandamus, not administrative mandamus).

The "required" administrative hearing need not be a formal, trial-type proceeding, but may be comparatively casual, sometimes conducted in the hearing officer's office or a conference room. See, *e.g., Topanga Ass'n for a Scenic Community v City & County of Los Angeles* (1974) 11 C3d 506, 518, 113 CR 836 (noting that land-use decisions often arise out of quasi-judicial proceedings that may be characterized as "casual"). In fact, a required hearing can be on documents only. *Friends of the Old Trees v Department of Forestry & Fire Protection* (1997) 52 CA4th 1383, 1391, 61 CR2d 297 (hearing requirement satisfied by purely documentary proceedings). But see *State Bd. of Chiropractic Exam'rs v Superior Court* (2009) 45 C4th 963, 978 n3, 89 CR3d 576 (noting court of appeal relied on *Friends of Trees* and one earlier case to conclude that CCP §1094.5 applied and expressing "no view as to the validity of these decisions").

A hearing is required if mandated by statute or administrative regulations and procedures. Compare, *e.g., Pomona College v Superior Court* (1996) 45 CA4th 1716, 1729, 53 CR2d 662 (hearing requirement in faculty handbook for review of tenure decisions sufficient for §1094.5), with *Bunnett v Regents of Univ. of Cal.* (1995) 35 CA4th 843, 848, 41 CR2d 567 (optional hearing not sufficient for §1094.5).

The hearing need not have taken place for §1094.5 to apply, as long as it was legally required. See, *e.g., Helene Curtis, Inc. v Los Angeles County Assessment Appeals Bds.* (2004) 121 CA4th 29, 37, 16 CR3d 658 (CCP §1094.5 applicable even if hearing not held).

On the legally required hearing requirement, see §2.33; California Administrative Mandamus §§5.8-5.9 (3d ed Cal CEB 2003).

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§3.5 2. Evidence Required to Be Taken

The second requirement for writ review under CCP §1094.5 is that it is legally required that evidence be taken at the administrative hearing. See CCP §1094.5(a). If the presentation of evidence is not legally required, review must be by traditional mandamus rather than administrative mandamus. See, *e.g., Burt v County of Orange* (2004) 120 CA4th 273, 282, 15 CR3d 373 (CCP §1094.5 review not applicable when there was no clear requirement that evidence be taken); *Taylor v State Personnel Bd.* (1980) 101 CA3d 498, 502, 161 CR 677 (CCP §1094.5 not applicable when disciplinary procedures did not require that evidence be taken).

JUDICIAL PERSPECTIVE: In "real life" this issue rarely arises because most administrative schemes provide for the taking of evidence, both oral and documentary.

On the presentation of evidence requirement, see California Administrative Mandamus §§1.14, 5.8 (3d ed Cal CEB 2003).

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§3.6 3. Discretion Vested in Hearing Officer or Decision-Maker

The third requirement for writ review under CCP §1094.5 is that discretion in the determination of contested factual issues is vested in the administrative decision-maker. See CCP §1094.5(a). Indeed, the essence of administrative mandamus is judicial review of a discretionary, adjudicatory *decision* by an administrative decision-maker. See, *e.g., Ocean Park Assoc. v Santa Monica Rent Control Bd.* (2004) 114 CA4th 1050, 1061, 8 CR3d 421. If the administrative decision-maker has no discretion in the determination of the facts, *i.e.*, if the decision-maker's action is ministerial, writ review must be by way of traditional mandamus under CCP §1085 rather than by way of administrative mandamus under §1094.5. On ministerial decisions and traditional mandate, see §§2.5-2.7. On ministerial decisions requiring no exercise of discretion, see California Administrative Mandamus §§5.23-5.24 (3d ed Cal CEB 2003).

There are many types of adjudicatory decisions in which discretion in the determination of contested factual issues is vested in the administrative decision-maker. Examples can include: whether a professional's license should be revoked, whether a public employee or school teacher should be disciplined or terminated, and whether a local governing body should approve or deny a conditional use permit. On the types of adjudicatory decisions subject to review by administrative mandamus, see California Administrative Mandamus §§5.2-5.18 (administrative mandamus), 5.19-5.29 (traditional mandamus) (3d ed Cal CEB 2003).

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§3.7 B. Review Generally Limited to Administrative Record

The hearing on a superior court writ petition is often called a "trial." However, in an administrative mandamus proceeding, there are no live witnesses or proffered exhibits. Instead, there is an administrative record, consisting of the documentary and testimonial evidence presented during the administrative proceedings, which is lodged in the superior court and provides the evidentiary universe considered by the court. Thus, like an appeal, in which the appellate court's review is limited to the record on appeal, a superior court's review of an administrative adjudicatory decision under CCP §1094.5 usually is confined to the record in the administrative proceedings. CCP §1094.5(a). See *Moore v City of Los Angeles* (2007) 156 CA4th 373, 382, 67 CR3d 218 (trial court properly ruled that statute of limitations defense was forfeited by failure to raise it before Board because review of administrative proceedings under §1094.5 is confined to issues appearing in record of that body). On the record in administrative mandamus proceedings, see California Administrative Mandamus, chap 4 (3d ed Cal CEB 2003). On the record in traditional mandamus proceedings, see chap 7 of this book.

In exceptional circumstances, evidence outside the administrative record may be introduced in an administrative mandamus proceeding. See CCP §1094.5(e) (evidence must be relevant and "in the exercise of reasonable diligence, could not have been produced or… was improperly excluded at the hearing"). This is an exceedingly narrow exception, and courts usually deny requests to submit evidence outside the administrative record. See, *e.g., Eureka Citizens for Responsible Gov't v City of Eureka* (2007) 147 CA4th 357, 367, 54 CR3d 485 (extra-record evidence allowed only if unavailable at trial or improperly excluded). See also *Voices of Wetlands v California State Water Resources Control Bd.* (review granted Mar. 19, 2008 superseded opinion at 157 CA4th 1268, 69 CR3d 487) (court may not consider extra-record evidence not presented to agency, but court has authority to remand decision to administrative agency to obtain additional evidence)). As a practical matter, if something does not appear in the administrative record, it does not exist for purposes of administrative mandamus. On using extra-record evidence in administrative mandamus proceedings, see California Administrative Mandamus §4.2 (3d ed Cal CEB 2003). On using extra-record evidence in traditional mandamus proceedings, see §§7.9-7.12.

PRACTICE TIP: Because parties may not retain counsel in connection with administrative proceedings, the administrative record may not be fully developed, which limits issues the superior court can consider on writ review. Counsel retained after an initial administrative hearing but before a final decision should check agency rules and procedures for ways to augment the record before the decision becomes final (*e.g.,* some agencies permit additional evidence in connection with a request for reconsideration or during an appeal at the agency level). On augmenting the administrative record, see California Administrative Mandamus §14.18 (3d ed Cal CEB 2003).

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§3.8 C. Scope of Judicial Review in Administrative Mandamus Proceedings

The scope of judicial review in an administrative mandamus proceeding is delineated by statute. CCP §1094.5(b). A superior court can determine only whether the administrative body has done one of the following:

- Proceeded without or in excess of its jurisdiction (see §§3.9-3.10);
- Afforded the petitioner a fair hearing (see §3.11); or
- Prejudicially abused its discretion (see §3.12).

On the superior court's scope of judicial review under CCP §1094.5, see California Administrative Mandamus, chap 6 (3d ed Cal CEB 2003). See also *Manufactured Home Communities, Inc. v County of San Luis Obispo* (2008) 167 CA4th 705, 84 CR3d 367 (proceeding violated standards of due process because administrative agency's findings rested on testimony of individuals who were not subject to cross-examination); *Antelope Valley Press v Poizner* (2008) 162 CA4th 839, 849, 75 CR3d 887 (discussing scope of review under §1094.5).

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1. Did the Administrative Body Proceed Without or in Excess of Jurisdiction?

§3.9 a. Jurisdiction Limited by Statute or Constitution

Administrative bodies can exercise adjudicatory authority only to the extent they are authorized to do so. See, *e.g., Brooks v State Personnel Bd.* (1990) 222 CA3d 1068, 1075, 272 CR 292 (university not authorized to amend notice of dismissal). Thus, jurisdictional issues arise when an administrative body acts outside the scope of its constitutional, statutory, or regulatory authority. See, *e.g., California Correctional Peace Officers Ass'n v State Personnel Bd.* (1995) 10 C4th 1133, 1151, 43 CR2d 693 (when constitutional due process or statute requires hearing, agency's action without hearing may be in excess of its jurisdiction); *Horner v Board of Trustees* (1964) 61 C2d 79, 86, 37 CR 185 (failure to hold required hearing within reasonable period of time may deprive agency of jurisdiction to act); *Zuniga v Los Angeles County Civil Serv. Comm'n* (2006) 137 CA4th 1255, 1259, 40 CR3d 863 (commission had no jurisdiction to adjudicate claims of former employee). An agency can also act in excess of its jurisdiction by failing to follow procedural rules and regulations it has established. See, *e.g., Langan v City of El Monte* (2000) 79 CA4th 608, 617, 94 CR2d 254.

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§3.10 b. Administrative Reconsideration or Modification of Decision

Absent express authorization, an administrative body cannot reconsider or modify a decision that has become final under applicable procedural rules. See, *e.g., Hollywood Circle, Inc. v Department of Alcoholic Beverage Control* (1961) 55 C2d 728, 732, 13 CR 104. This restriction on further administrative action is intended to protect a party's rights to a decision based solely on the evidence and to prevent a redetermination of its rights or privileges without due process. Further administrative action that consists merely of reducing or mitigating the punishment imposed is permissible, because it does not implicate due process rights. See, *e.g., Guilbert v Regents of Univ. of Cal.* (1979) 93 CA3d 233, 243, 155 CR 583.

NOTE: Most agencies operating under the Administrative Procedure Act (Govt C §§11340-11529) are expressly permitted to reconsider a decision or to grant a rehearing. Govt C §11521(a).

On administrative jurisdictional issues challenged in administrative mandamus proceedings, see California Administrative Mandamus §§6.16-6.35 (3d ed Cal CEB 2003).

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Source: Civil Litigation/California Civil Writ Practice/3 Administrative Mandamus/§3.11 2. Was the Petitioner Provided a Fair Hearing?

§3.11 2. Was the Petitioner Provided a Fair Hearing?

Due process principles determine whether an administrative hearing was "fair." *Morongo Band of Mission Indians v State Water Resources Control Bd.* (2009) 45 C4th 731, 737, 88 CR3d 610. State statutes may impose additional procedural protections, but they cannot constrict or limit constitutionally mandated due process protections. See *Cleveland Bd. of Educ. v Loudermill* (1985) 470 US 532, 541, 84 L Ed 2d 494, 105 S Ct 1487 (constitutional guarantee of due process operates independently of state statutes granting substantive rights).

What constitutes a fair hearing under due process varies with the factual circumstances. See *Gilbert v Homar* (1997) 520 US 924, 930, 138 L Ed 2d 120, 117 S Ct 1807 ("due process is flexible and calls for such procedural protections as the particular situation demands").

NOTE: Whether an administrative complainant has received a fair hearing is generally a legal issue for the superior court to decide. See *Manufactured Home Communities, Inc. v County of San Luis Obispo* (2008) 167 CA4th 705, 84 CR3d 367 (court found that party was denied fair hearing). The question of whether there was a fair hearing may include issues related to prehearing and posthearing proceedings, as well as issues arising during the administrative hearing itself.

A fair hearing was *not* held when:

- The accusation in a license revocation hearing did not give fair notice of the charges. *Smith v California State Bd. of Pharmacy* (1995) 37 CA4th 229, 241, 43 CR2d 532 (agency counsel switched theory during hearing from personal wrongful conduct to negligence for conduct of others).
- The hearing officer refused to grant a short continuance despite good cause. *Wood v City Civil Serv. Comm'n* (1975) 45 CA3d 105, 110, 119 CR 175 (complainant's attorney was engaged in criminal trial; denial of short continuance deprived claimant of fair hearing).
- Party to administrative proceeding was not allowed to cross-examine witnesses. *Manufactured Home Communities, Inc. v County of San Luis Obispo* (2008) 167 CA4th 705, 84 CR3d 367.
- The hearing officer had a financial interest in the outcome or other bias for or against one of the parties. *Haas v County of San Bernardino* (2002) 27 C4th 1017, 1024, 119 CR2d 341 (temporary hearing officer whose selection for future work depended entirely on goodwill of county had pecuniary interest that required disqualification); *Nasha, LLC v City of Los Angeles* (2004) 125 CA4th 470, 483, 22 CR3d 772 (complainant's authorship of article opposing project by member of hearing panel established unacceptable probability of bias).
- Persons involved in the investigation or prosecution of the administrative proceeding also were involved in the adjudicatory process. *Department of Alcoholic Beverage Control v Alcoholic Beverage Control Appeals Bd.* (2006) 40 C4th 1, 9, 50 CR3d 585 (ex parte contacts between agency's prosecutor and ultimate decision-maker before decision was rendered created bias problem); *Quintero v City of Santa Ana* (2003) 114 CA4th 810, 812, 7 CR3d 896 (city failed to show that attorney who acted as advisor to board in past and who was acting as prosecutor in instant administrative proceeding was not biased); *Nightlife Partners, Ltd. v City of Beverly Hills* (2003) 108 CA4th 81, 87, 133 CR2d 234 (hearing officer's announcement that city's attorney would be advising him was sufficient to show bias); *Department of Alcoholic Beverage Control v Alcoholic Beverage Control Appeals Bd.* (2002) 99 CA4th 880, 885, 121 CR2d 729 (administrative law judge's employment by agency, alone, was insufficient to establish actual bias). Compare *Morongo Band of Mission Indians v State Water Resources Control Bd.* (2009) 45 C4th 731, 737, 88 CR3d 610 (no violation of licensee's due process rights when attorney prosecuting its license revocation matter before board simultaneously served as advisor to board on unrelated matter); *Witt Home Ranch, Inc. v County of Sonoma* (2008) 165 CA4th 543, 568, 81 CR3d 123 (no evidence that deputy county counsel acted as advocate in connection with plaintiff's proceedings; fact that she reached conclusions and provided advice to board before hearing did not convert her from adviser to advocate, and did not demonstrate bias).

On the fair hearing requirement, see California Administrative Mandamus §§6.36-6.54 (3d ed Cal CEB 2003).

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Source: Civil Litigation/California Civil Writ Practice/3 Administrative Mandamus/§3.12 3. Did the Administrative Body Prejudicially Abuse Its Discretion?

§3.12 3. Did the Administrative Body Prejudicially Abuse Its Discretion?

The most frequent challenge to an administrative adjudicatory decision is that the administrative body prejudicially "abused its discretion." An abuse of discretion is established if (CCP §1094.5(b)):

- The agency did not proceed as required by law (see §3.13);
- The administrative decision is not supported by the findings (see §3.14); or
- The findings are not supported by the evidence (§§3.15-3.17).

Establishing an abuse of discretion, alone, is not enough. A petitioner also must demonstrate that the abuse of discretion was prejudicial, *i.e.,* that it resulted in a miscarriage of justice. See, *e.g., Leal v Gourley* (2002) 100 CA4th 963, 968, 123 CR2d 220 (court found no evidence of prejudice stemming from Department of Motor Vehicles' violation of rule requiring that it give notification of right to have translator at hearings).

On the abuse of discretion standard, see California Administrative Mandamus §§6.55-6.175 (3d ed Cal CEB 2003).

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§3.13 a. Administrative Body Did Not Proceed as Required by Law

Under this prong of the statutory abuse of discretion standard, a petitioner can challenge the legality of the adjudicatory decision (*i.e.,* Did the tribunal follow the applicable law?) or attack the validity of the administrative body's procedural rules and regulations applicable to that decision. See, *e.g., Young v Gannon* (2002) 97 CA4th 209, 221, 118 CR2d 187 (petitioner unsuccessfully argued WCAB abused its discretion by failing to proceed in manner required by law); *Usher v County of Monterey* (1998) 65 CA4th 210, 220, 76 CR2d 274 (agency did not proceed in manner required by law when it delegated its decision-making authority to hearing officer).

Determining whether an administrative body failed to proceed in the manner required by law requires identification of the procedural and substantive law governing the administrative body's action. The location of such law depends on the context and circumstances. Constitutional or statutory provisions, case law, or regulatory provisions may apply. On some of the laws and regulations applicable to administrative agency practice, see California Administrative Hearing Practice §§1.18-1.34 (2d ed Cal CEB 1997).

NOTE: Regardless of the "abuse of discretion" nomenclature, whether an administrative body failed to act as required by law is a legal issue for the superior court to decide. See *Katosh v Sonoma County Employees' Retirement Ass'n* (2008) 163 CA4th 56, 62 n4, 77 CR3d 324 (interpretation and application of statute to undisputed facts presented legal question); *Moss v County of Humboldt* (2008) 162 CA4th 1041, 1053, 76 CR3d 428 (when issue in California Environmental Quality Act case is one of law, de novo standard applies).

On the failed-to-act-in-accordance-with-law prong of the statutory abuse of discretion standard, see California Administrative Mandamus §§6.55-6.105 (3d ed Cal CEB 2003).

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§3.14 b. Agency's Decision Not Supported by the Findings

Under this prong of the statutory abuse of discretion standard, a petitioner can challenge an adjudicatory decision as not supported by the administrative fact-finder's findings. A petitioner's ability to make such a challenge depends on the particular issue in the administrative proceeding, the evidence presented, and the administrative decision-maker's findings.

The Administrative Procedure Act (APA) traditionally has required that the finder of fact make written findings. See Govt C §11425.50. Whether written findings were also required in non-APA cases was unclear until the supreme court's landmark decision in *Topanga Ass'n for a Scenic Community v City & County of Los Angeles* (1974) 11 C3d 506, 515, 113 CR 836. In *Topanga*, the court held that CCP §1094.5 implicitly requires an agency rendering a decision to "set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order." See, *e.g., Saad v City of Berkeley* (1994) 24 CA4th 1206, 1212, 30 CR2d 95 (agency findings sufficient under *Topanga*). The written findings need not be extensive or detailed. *Environmental Protection & Info. Ctr. v California Dep't of Forestry & Fire Protection* (2008) 44 C4th 459, 515, 80 CR3d 28, citing *Topanga, supra* (although agency's findings should have referred more specifically to those portions of report that support its conclusion, there was no trouble discerning "the analytic route [it] traveled from evidence to action").

Findings that fail to bridge the analytic gap between the evidence and the final decision are insufficient. See, *e.g.*, *Glendale Mem. Hosp. & Health Ctr. v State Dep't of Mental Health* (2001) 91 CA4th 129, 110 CR2d 101 (findings that were terse boilerplate statements did not provide sufficient detail to bridge analytic gap between evidence presented and agency's ultimate decision).

NOTE: Regardless of the "abuse of discretion" nomenclature, whether the findings are adequate to support the administrative decision is a legal issue for the superior court to decide.

On the decision-not-supported-by-the-findings prong of the statutory abuse of discretion standard, see California Administrative Hearing Practice §§8.52-8.67 (2d ed Cal CEB 1997).

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§3.15 c. Agency's Findings Not Supported by Evidence

Under this prong of the statutory abuse of discretion standard, a petitioner can challenge the administrative fact-finder's findings as not being supported by the evidence.

Depending on the circumstances, the courts use one of two standards to determine whether administrative findings are supported by the evidence in the administrative record:

- The substantial evidence standard (see §3.16); or
- The independent judgment standard (see §3.17).

On determining whether a superior court applies the substantial evidence or independent judgment standard, see California Administrative Mandamus §§6.129-6.155 (3d ed Cal CEB 2003).

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§3.16 (1) Substantial Evidence Standard

The court applies the substantial evidence standard in all cases in which the law does not require use of the independent judgment standard. See *Strumsky v San Diego County Employees Retirement Ass'n* (1974) 11 C3d 28, 32, 112 CR 805 (court's inquiry is limited to determination of whether findings are supported by substantial evidence unless agency's order or decision substantially affects fundamental vested right, in which case court uses independent judgment standard); *Auerbach v Los Angeles County Assessment Appeals Bd. No. 2* (2008) 167 CA4th 1415, 1420, 85 CR3d 118 (same); *Antelope Valley Press v Poizner* (2008) 162 CA4th 839, 850, 75 CR3d 887 (same). On the independent judgment standard, see §3.17.

In assessing whether substantial evidence supports administrative findings, the court accords significant deference to the administrative fact-finder. See, *e.g., Committee to Save the Hollywoodland Specific Plan v City of Los Angeles* (2008) 161 CA4th 1168, 1182, 74 CR3d 665 (court gives deference to administrative findings and will uphold decision supported by substantial evidence); *Patterson Flying Serv. v Department of Pesticide Regulation* (2008) 161 CA4th 411, 419, 74 CR3d 290 (under deferential substantial evidence standard, court must presume correctness of administrative ruling); *Young v Gannon* (2002) 97 CA4th 209, 221, 225, 118 CR2d 187 (court views evidence in light most favorable to administrative findings). The court neither reassesses the credibility of witnesses and other evidence nor weighs the supporting and contrary evidence. The testimony of even a single witness believed by the fact-finder can be sufficient to support a finding. See, *e.g., Duncan v Department of Personnel Admin.* (2000) 77 CA4th 1166, 1174 n6, 92 CR2d 257.

Substantial evidence is not synonymous with *any* evidence; rather it is defined as evidence of "ponderable legal significance… reasonable in nature, credible, and of solid value [, and] relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Young v Gannon, supra*.

Administrative decisions reviewed under the substantial evidence standard can include: establishment of employment practices and procedures, including for employee discipline (see, *e.g., County of Los Angeles v Civil Serv. Comm'n* (1995) 39 CA4th 620, 633, 46 CR2d 256), the denial of a variance or use permit (see, *e.g., BreakZone Billiards v City of Torrance* (2000) 81 CA4th 1205, 1244, 97 CR2d 467), compliance with the California Environmental Quality Act (CEQA) (see, *e.g., San Franciscans Upholding the Downtown Plan v City & County of San Francisco* (2002) 102 CA4th 656, 673, 125 CR2d 745). But see *Moss v County of Humboldt* (2008) 162 CA4th 1041, 1053, 76 CR3d 428 (when issue in CEQA case is one of law, de novo standard applies).

On the substantial evidence standard, see California Administrative Mandamus §6.141 (3d ed Cal CEB 2003).

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§3.17 (2) Independent Judgment Standard

In some contexts, the court must employ the independent judgment standard and reweigh the evidence, affording no deference to the factual assessments of the administrative fact-finder. *Auerbach v Los Angeles County Assessment Appeals Bd. No. 2* (2008) 167 CA4th 1415, 1420, 85 CR3d 118; *Antelope Valley Press v Poizner* (2008) 162 CA4th 839, 850, 75 CR3d 887. In *Strumsky v San Diego County Employees Retirement Ass'n* (1974) 11 C3d 28, 34, 112 CR 805, quoting *Bixby v Pierno* (1971) 4 C3d 130, 144, 93 CR 234, the supreme court held that

> [w]hen an administrative decision affects a right which has been legitimately acquired or is otherwise "vested," and when that right is of a fundamental nature from the standpoint of its economic aspect or its "effect… in human terms and the importance… to the individual in the life situation," then a full and independent judicial review of that decision is indicated because "[the] abrogation of the right is too important to the individual to relegate it to exclusive administrative extinction."

Administrative decisions reviewed under the independent judgment standard can include:

- The revocation or suspension of a professional license (see, *e.g., Griffiths v Superior Court* (2002) 96 CA4th 757, 767, 117 CR2d 445);
- The suspension or revocation of a driver's license (see, *e.g., Elizabeth D. v Zolin* (1993) 21 CA4th 347, 353, 25 CR2d 852); and
- Discipline or termination of a public employee for failing to comply with employment rules or conditions (see, *e.g., Barber v Long Beach Civil Serv. Comm'n* (1996) 45 CA4th 652, 658, 53 CR2d 4; see also *The Termo Co. v Luther* (2008) 169 CA4th 394, 399, 86 CR3d 687 (administrative order directing plugging and abandonment of oil wells that were in operational or idle status for many years implicates fundamental, vested right and is reviewed under "independent judgment" standard)).

On the independent judgment standard, see California Administrative Mandamus §6.134 (3d ed Cal CEB 2003).

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III. DIFFERENCES BETWEEN TRADITIONAL AND ADMINISTRATIVE MANDAMUS PROCEEDINGS

§3.18 A. Nature and Fundamental Requisites of the Writs

Traditional mandamus under CCP §1085 is available when:

- The respondent has a clear, present, and usually ministerial duty to perform; and
- The petitioner has a clear, present, and beneficial right to performance.

See, *e.g., Conlan v Bonta* (2002) 102 CA4th 745, 752, 125 CR2d 788. On traditional mandamus and case examples, see §§2.3-2.16, 2.39-2.69. Thus, traditional mandamus may be used to challenge an administrative body's failure to perform an act required by law (*Conlan v Bonta, supra*) as well as to review an adjudicatory decision when the administrative body is not legally required to hold an evidentiary hearing. See, *e.g., O.W.L. Found. v City of Rohnert Park* (2008) 168 CA4th 568, 586, 86 CR3d 1; *DeCuir v County of Los Angeles* (1998) 64 CA4th 75, 81, 75 CR2d 102; *Bunnett v Regents of Univ. of Cal.* (1995) 35 CA4th 843, 848, 41 CR2d 567. On requirements for and uses of traditional mandamus, see §§2.3-2.38.

In contrast, administrative mandamus under CCP §1094.5 is available only to challenge a final adjudicatory decision resulting from an administrative proceeding in which by law:

- A hearing is required to be given;
- Evidence is required to be taken; and
- Discretion in the determination of facts is vested in the inferior tribunal.

Conlan, 102 CA4th at 752. See §§3.3-3.6.

PRACTICE TIP: If an administrative agency's action could potentially be challenged by traditional mandate or administrative mandate, or if it is unclear which writ is applicable, a petitioner should request both writs as alternative remedies in the same petition. See §3.21.

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§3.19 B. Filing Deadlines

There are few specific statutory deadlines for traditional mandamus proceedings. On traditional mandamus, see chaps 2 and 5. In contrast, there are numerous statutory deadlines for filing administrative mandamus proceedings, depending on the type of administrative decision involved. All the deadlines tend to be relatively short. See CCP §1094.6. See also, *e.g., FEHC v Superior Court (Las Brisas Apartment, Ltd.)* (2004) 115 CA4th 629, 9 CR3d 409 (30-day statute of limitations under Govt C §11523 to challenge Fair Employment and Housing Commission decisions); Govt C §65009(c)(1) (challenge to land-use decisions generally must be filed within 90 days of notice of decision). On the sometimes complex limitation periods applicable to administrative mandamus proceedings, see California Administrative Mandamus, chap 9 (3d ed Cal CEB 2003).

There is some uncertainty as to whether the statutory periods within which mandamus proceedings must be brought are jurisdictional in nature or are statutes of limitations that can be waived. Compare *Ginns v Savage* (1964) 61 C2d 520, 524, 39 CR 377 (holding statutory periods not jurisdictional and waived if not raised as affirmative defense), with *Donnellan v City of Novato* (2001) 86 CA4th 1097, 1103, 103 CR2d 882 (CCP §1094.6 is procedural limitations period and consequently jurisdictional). Thus, it is important to know the applicable deadline and comply with it to avoid any risk that a writ petition is jurisdictionally defective.

PRACTICE TIP: Because laches or unreasonable delay can be a defense to a writ petition, even if filed within the statutory period, a petitioner should seek writ relief without undue delay. See, *e.g., Schellinger Bros. v City of Sebastopol* (2009) 179 CA4th 1245, 102 CR3d 394 (court found "abundant support" for determination that petitioner acted with unreasonable delay and acquiesced in city taking over 1 year to certify environmental impact report); *Vernon Fire Fighters Ass'n v City of Vernon* (1986) 178 CA3d 710, 727, 223 CR 871 (delay of over 5 years between petitioner's discharge from employment and writ proceeding was unreasonable and trial court was justified in finding prejudice had resulted to public employer and laches barred action).

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IV. CHOOSING BETWEEN WRIT OF TRADITIONAL AND ADMINISTRATIVE MANDAMUS

§3.20 A. Checklist: Determining Appropriate Writ

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The following checklist may be used to analyze the facts and procedural context of a case to determine whether traditional or administrative mandamus is the appropriate remedy.

- Is there statutory or regulatory law that governs the substantive area?
- Review governing law for provisions that specify what procedure should be used to obtain judicial review.
- Research cases decided under the governing statutes or regulations to determine which method of writ review is appropriate.
- When preparing a challenge to a decision of an agency or organization:
- Review relevant procedures and policy statements for information about challenging decision.
- Contact agency counsel, decision-making body, or other agency contact to find out how decisions are reviewed, but verify information received to avoid possibility of accidental misinformation.

PRACTICE TIP: Counsel must be careful not to engage in improper ex parte communications concerning the specifics of the case.

- Research case law for precedent on method of review.
- Analyze the administrative decision to determine if it is:
- *Legislative* in nature (*e.g.*, a formulation of a rule to be applied in future cases). If the decision is a legislative action, then it is reviewed by traditional mandate. See *Strumsky v San Diego County Employees Retirement Ass'n* (1974) 11 C3d 28, 35 n2, 112 CR 805; *Mike Moore's 24-Hour Towing v City of San Diego* (1996) 45 CA4th 1294, 1303, 53 CR2d 355; §§2.17-2.38.
- A *policy* decision (*e.g.*, one that affects all similarly situated persons). Decisions about statements of policy or procedures that affect all similarly situated persons are usually reviewed by traditional mandate. See §2.13.
- *Ministerial* in nature (*e.g.*, is the decision limited to the agency's application of its rules or regulations to the petitioner?). If so, then traditional mandate probably applies. See §2.5.
- *Adjudicatory* in nature (*e.g.*, does the decision purport to evaluate or adjudicate the complaint or claim of just the petitioner?). Decisions that evaluate and adjudicate an individual's situation are usually reviewed by administrative mandate if the requirements of CCP §1094.5 have been met. See item 4, below.
- If the decision is *adjudicatory* in nature, then ascertain whether (CCP §1094.5(a)):
- A hearing was required by law.
- If a hearing is not required by law, even if one was held, the decision must be reviewed by traditional mandate. See, *e.g., Coelho v State Personnel Bd.* (1989) 209 CA3d 968, 257 CR 557 (traditional mandate must be used if agency not required by law to hold hearing). See §3.4. On traditional mandate, see chap 2.
- If a hearing was required but no hearing was held, then administrative mandate applies. See, *e.g., Helene Curtis, Inc. v Los Angeles County Assessment Appeals Bds.* (2004) 121 CA4th 29, 37, 16 CR3d 658. See §3.4.
- The taking of evidence was required by law. If there is no requirement that evidence be taken, then the decision must be reviewed by traditional mandate. See, *e.g., DeCuir v County of Los Angeles* (1998) 64 CA4th 75, 81, 75 CR2d 102 (traditional mandate appropriate when agency not required to hold evidentiary

hearing). See §3.5.

- The administrative agency or decision-maker has discretion in determination of contested factual issues. If the decision-maker, whether the agency board itself or a hearing officer designated to hear the matter on behalf of the agency or organization, does not have discretion to make determinations of contested factual issues, then the decision must be reviewed by traditional mandate. See §3.6.

- If administrative mandamus is not available (see item 4 above), have the requirements of traditional mandate been met? including (CCP §1085-1086; §§2.3-2.16):

- The respondent must be an inferior tribunal, corporation, board, or person.
- The respondent must have failed to perform a clear, present duty, having had the legal authority and ability to do so.
- The duty involved must entail ministerial action, the assumption of, or refusal to assume, jurisdiction, or the refusal to exercise, or the abuse of, discretion.
- The petitioner must have a clear, present right to, and a beneficial interest in, the performance of the real party in interest's or the respondent's duty.
- Either the petitioner must have no other remedy at law or the other remedy must be inadequate.

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Source: Civil Litigation/California Civil Writ Practice/3 Administrative Mandamus/§3.21 B. Pleading in the Alternative

§3.21 B. Pleading in the Alternative

When in doubt about whether traditional mandamus (CCP §1085) or administrative mandamus (CCP §1094.5) is the proper remedy, a petitioner should request both. Pleading for relief in the alternative ensures that the court has jurisdiction over the controversy and can issue the appropriate form of relief. Thus, when in doubt, a petitioner should:

- Title the pleading to alert the court and opposing counsel that relief is being sought under either statute, *e.g.*:

Petition for Writ of Mandate (CCP §1085 or CCP §1094.5);

- Include essential allegations for *each* form of relief requested; and
- Meet the earliest filing deadline if different ones are proscribed under CCP §§1085 and 1094.5.

If a petition seeks an inapplicable form of mandate without pleading in the alternative, the petition may be denied (see, *e.g.*, *Tielsch v City of Anaheim* (1984) 160 CA3d 570, 574, 206 CR 738 (grounds for denying relief included that petitioner requested CCP §1085 relief when he should have proceeded under §1094.5)) or the court may decide the case using incorrect standards (see, *e.g.*, *Eureka Teachers Ass'n v Board of Educ. of the Eureka City Schs.* (1988) 199 CA3d 353, 361, 244 CR 240 (trial court applied wrong standard of review (under CCP §1085) and did not consider appropriate evidence (under CCP §1094.5)).

JUDICIAL PERSPECTIVE: In many cases, courts will overlook a request for the "wrong" writ and issue the appropriate writ if the record supports relief, but it is not worth the risk of being wrong: If there is any doubt as to the appropriate writ, the better practice is to ask for traditional and administrative mandamus in the alternative.

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4

Other Superior Court Writs

Mark Fogelman

I. SCOPE OF CHAPTER §4.1

II. WRIT OF PROHIBITION
- A. Description and Purpose §4.2
- B. Limited Scope of Review §4.3
- C. How Prohibition Differs From Other Primary Common Law Writs §4.4
- D. Applicability of Prohibition
  - 1. Most Administrative Bodies Not Subject to Prohibition §4.5
  - 2. Prohibition Available to Review Adjudicatory Decisions of Constitutional Statewide Agencies §4.6
  - 3. Applicability of Prohibition to Corporations §4.7
  - 4. Applicability of Prohibition to Persons §4.8
- E. Specific Requirements for Prohibition §4.9

III. WRIT OF REVIEW (CERTIORARI)
- A. Description and Purpose §4.10
- B. Scope of Review §4.11
- C. Hearing Required §4.12
- D. Applicability of Writ of Review (Certiorari)
  - 1. Most Administrative Bodies Not Subject to Review (Certiorari) §4.13
  - 2. Most Local Agencies Not Subject to Review (Certiorari) §4.14
  - 3. Writ of Review (Certiorari) Available to Review Adjudicatory Decisions of Constitutional Statewide Agencies §4.15
- E. Specific Requirements for Writ of Review (Certiorari) §4.16

IV. WRIT OF HABEAS CORPUS
- A. Description and Purpose §4.17
- B. Habeas Corpus in Civil Cases
  - 1. Habeas Corpus in Proceedings Involving Children
    - a. Habeas Corpus in Child Custody Context §4.18
    - b. Habeas Corpus in Juvenile Dependency Proceedings §4.19
    - c. Habeas Corpus for Ineffective Assistance of Counsel in Proceedings Involving Children §4.20
  - 2. Civil Commitment Proceedings §4.21
    - a. Commitment Under Lanterman-Petris-Short Act §4.22
    - b. Parental Commitment of Minor to State Hospital §4.23
    - c. Commitment to State Hospital for Mentally Disordered §4.24
    - d. Commitment to State Hospital for Developmentally Disabled §4.25
- C. Specific Requirements for Habeas Corpus §4.26

V. QUO WARRANTO PROCEEDINGS §4.27

VI. ENFORCEMENT OF ORDERS IN AGRICULTURAL LABOR RELATIONS BOARD PROCEEDINGS §4.28

VII. OTHER SUPERIOR COURT WRITS
- A. Attachment §4.29
- B. Execution, Possession, and Sale
  - 1. Writ of Execution §4.30
  - 2. Writ of Possession §4.31
  - 3. Writ of Sale §4.32
- C. Injunction §4.33

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§4.1 I. SCOPE OF CHAPTER

This chapter provides an overview of writs other than mandamus that may be sought in the superior court, specifically:

- Prohibition. See §§4.2-4.9.
- Review (certiorari). See §§4.10-4.16.
- Habeas Corpus. See §§4.17-4.26.
- Quo Warranto. See §4.27.
- Enforcement of Orders in Agricultural Labor Relations Board Proceedings. See §4.28.
- Attachment. See §4.29.
- Execution, Possession, and Sale. See §§4.30-4.32.
- Injunction. See §4.33.

On traditional mandamus, see chap 2. On administrative mandamus, see chap 3. On writs in limited jurisdiction civil cases, see chap 12.

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II. WRIT OF PROHIBITION

§4.2 A. Description and Purpose

A writ of prohibition issues to an inferior tribunal, body, or person (*i.e.,* a governmental or private body or official) that exercises quasi-judicial functions (see Cal Const art VI, §11). The primary purpose of prohibition is to prevent or restrain the inferior tribunal, body, or person from erroneously assuming jurisdiction or acting in excess of its jurisdiction. See CCP §1102 (writ of prohibition "arrests the proceedings of any tribunal, corporation, board, or person exercising judicial functions, when such proceedings are without or in excess of [its] jurisdiction"). A writ of prohibition generally preserves the status quo because it addresses jurisdictional error that is threatened but not completed. See *Union Pac. R.R. v State Bd. of Equalization* (1989) 49 C3d 138, 158, 260 CR 565.

The appellate division of the superior court may issue a writ of prohibition directed to the superior court in a limited jurisdiction civil case, a misdemeanor case, or an infraction case. In such cases, the superior court is deemed an inferior tribunal to the superior court appellate division. CCP §1103(b). On writ petitions in limited jurisdiction civil cases, see chap 12.

On writs of prohibition issued by the appellate courts, see §§15.14-15.26.

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§4.3 B. Limited Scope of Review

The writ of prohibition addresses only "jurisdictional error," *i.e.,* threatened actions that are without or in excess of jurisdiction. The concept of jurisdictional error is quite broad in this context and allows a court to prevent or restrain the exercise of unauthorized power even when an inferior tribunal, body, or person has jurisdiction over the subject matter and the parties. Any act exceeding the defined power of the inferior tribunal, body, or person—whether defined by a constitutional provision, statute, rule, or by the courts and followed under the doctrine of stare decisis—is in excess of jurisdiction for purposes of a writ of prohibition. See *Abelleira v District Court of Appeal* (1941) 17 C2d 280, 291, 109 P2d 942.

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§4.4 C. How Prohibition Differs From Other Primary Common Law Writs

A writ of prohibition differs from a writ of review (certiorari) in that prohibition lies to restrain or prevent a threatened judicial act without or in excess of jurisdiction, while review lies to correct a completed judicial act without or in excess of jurisdiction. Compare CCP §1068 with CCP §1102. See §4.3. A writ of mandate, in contrast, compels the performance of a ministerial duty or corrects an abuse of discretion. CCP §1085. On traditional mandamus, see chap 2. On administrative mandamus, see chap 3.

PRACTICE TIP: Although the distinctions between the common law writs have been codified and a petitioner should seek the writ that applies to the particular circumstances, many courts will grant writ relief if it is warranted even if the petitioner has sought the "wrong" writ. See, *e.g.*, *Babb v Superior Court* (1971) 3 C3d 841, 850, 92 CR 179 (although petition sought writ of prohibition, court decided mandate was more appropriate remedy and treated petition as one for mandate). However, a petitioner should not rely on such indulgent treatment from the court. When in doubt as to the appropriate writ, it is better practice to seek alternative forms of writ relief and "all other appropriate relief." On seeking alternative relief, see §§5.36-5.37.

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D. Applicability of Prohibition

§4.5 1. Most Administrative Bodies Not Subject to Prohibition

A tribunal, body, or person is subject to prohibition only if exercising a judicial function. CCP §1102; see §§15.15-15.17. The legislature is powerless, however, to grant judicial power to state agencies. Thus, prohibition does not lie to restrain state agencies of legislative origin. See, *e.g., Whitten v California State Bd. of Optometry* (1937) 8 C2d 444, 445, 65 P2d 1296. The legislature likewise lacks power to invest local agencies with judicial functions. Thus, prohibition also does not lie to restrain the actions of local agencies. See, *e.g., Strumsky v San Diego County Employees Retirement Ass'n* (1974) 11 C3d 28, 42, 112 CR 805. See also California Administrative Mandamus §1.17 (3d ed Cal CEB 2003).

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§4.6 2. Prohibition Available to Review Adjudicatory Decisions of Constitutional Statewide Agencies

Certain statewide *constitutional* agencies are subject to prohibition if they have constitutionally invested adjudicatory power. See *O'Brien v Olson* (1941) 42 CA2d 449, 109 P2d 8 (writ of prohibition used to restrain governor from investigating charges or removing state prison board directors from office). On this same point developed in the context of writs of review (certiorari), see §4.15. Even as to those few state agencies subject to prohibition, petitioners generally seek review of their decisions by way of administrative mandamus, if it is available, because the scope of judicial review is broader. On the scope of judicial review in administrative mandamus, see §§3.8-3.17.

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§4.7 3. Applicability of Prohibition to Corporations

Although CCP §§1102-1103 indicate prohibition is applicable to "corporations," the writ is used rarely, if ever, in this context. This is probably because corporations do not engage in judicial acts, and a person dissatisfied with corporate action normally has an adequate legal remedy, *e.g.*, action for injunctive relief, action on contract, or the various statutory remedies available to stockholders.

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§4.8 4. Applicability of Prohibition to Persons

The reference in CCP §§1102-1103 to "persons" is likely a reference to public officials or individual members of inferior tribunals or boards imbued with adjudicatory power and threatening to act without or in excess of jurisdiction.

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§4.9 E. Specific Requirements for Prohibition

In addition to meeting the basic requirements for extraordinary relief, *e.g.*, a beneficially interested petitioner and the absence of a plain, speedy, and adequate remedy (see §§2.2-2.16), the petitioner seeking a writ of prohibition must show that (CCP §§1102-1103):

- The act at issue is judicial in nature;
- The act is actually threatened but not completed;
- The adjudicatory tribunal lacked or acted in excess of its jurisdiction.

The requirements for prohibition are the same in superior court as in the court of appeal. On writs of prohibition in the court of appeal, see §§15.14-15.26.

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III. WRIT OF REVIEW (CERTIORARI)

§4.10 A. Description and Purpose

A writ of review is also called a writ of certiorari. CCP §1067. As originally enacted, §1067 mandated use of the term writ of review. Thus, many statutes continue to refer to the writ of certiorari as the writ of review. However, Cal Const art VI, §10 uses the terminology writ of certiorari.

The purpose of the writ of review is to review completed adjudicatory action taken without or in excess of jurisdiction when there is no appeal and no other adequate remedy. CCP §§1068(a), 1074. Thus, a writ of review, like prohibition (and unlike mandate), is a jurisdictional writ. A writ of review sought from the superior court issues to a tribunal of inferior jurisdiction or to a nonjudicial body or officer that exercises judicial functions. CCP §1068(a). The writ orders the party to whom the writ is directed to certify or return to the court a record of the underlying proceedings and to desist from further proceedings pending judicial review. CCP §§1070-1071.

The appellate division of the superior court may grant a writ of review directed to the superior court in a limited jurisdiction civil matter, a misdemeanor case, or an infraction case. In such cases, the superior court is an inferior tribunal to the superior court appellate division for purposes of the writ of review. CCP §1068(b). On writ petitions in limited civil cases, see chap 12.

On writs of review issued by the appellate courts, see §§15.27-15.38.

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§4.11 B. Scope of Review

The superior court's scope of review of the inferior tribunal's action is limited to whether the tribunal, board, or officer "regularly pursued" its authority. CCP §1074. This entails determining whether the tribunal, board, or officer exceeded its jurisdiction. See CCP §1068 (authorizing writ when tribunal, board, or officer "has exceeded the jurisdiction of such tribunal, board or officer").

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§4.12 C. Hearing Required

After the superior court issues a writ of review (certiorari), the court holds a hearing and enters judgment affirming, annulling, or modifying the challenged action. CCP §1075. The judgment, rather than the writ, is the ultimate relief sought. On the superior court's action on a petition for writ of review, see §§9.49-9.52

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D. Applicability of Writ of Review (Certiorari)

§4.13 1. Most Administrative Bodies Not Subject to Review (Certiorari)

Although the writ of review (certiorari) historically was used to review adjudicatory actions of legislatively created statewide administrative agencies (see *State Bd. of Chiropractic Exam'rs v Superior Court* (1927) 201 C 108, 255 P 749), the California Supreme Court held in 1936 that the legislature cannot confer judicial power on a state agency. *Standard Oil Co. v State Bd. of Equalization* (1936) 6 C2d 557, 559, 59 P2d 119. Because a writ of review lies only as to judicial actions, the writ is not available to review adjudicatory decisions of statutorily created state agencies.

PRACTICE TIP: In practice, administrative adjudicatory decisions are generally reviewed by way of administrative mandamus under CCP §1094.5. On administrative mandamus, see chap 3; California Administrative Mandamus §1.7 (3d ed Cal CEB 2003).

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§4.14 2. Most Local Agencies Not Subject to Review (Certiorari)

Even after *Standard Oil Co. v State Bd. of Equalization* (1936) 6 C2d 557, 559, 59 P2d 119, courts assumed local agencies could exercise judicial functions (see *Irvine v Citrus Pest Dist. No. 2* (1944) 62 CA2d 378, 385, 144 P2d 857) and their adjudicatory determinations could thus be reviewed either on writ of review (certiorari) or by way of administrative mandamus. See, *e.g., La Prade v Department of Water & Power* (1945) 27 C2d 47, 53, 162 P2d 13; *DeLucia v County of Merced* (1968) 257 CA2d 620, 622, 65 CR 177.

In *Strumsky v San Diego County Employees Retirement Ass'n* (1974) 11 C3d 28, 44, 112 CR 805, however, the California Supreme Court held local agencies cannot exercise judicial power. *Strumsky* concerned the scope of review of adjudicatory determinations of local agencies under CCP §1094.5. See also *McHugh v Santa Monica Rent Control Bd.* (1989) 49 C3d 348, 372, 261 CR 318 (rent control board lacked judicial authority to impose punitive damages). The supreme court in *Strumsky* did not specifically address whether a writ of review will lie against a local agency. However, it necessarily follows that if local agencies cannot exercise judicial functions, their adjudicatory determinations are no more reviewable by a writ of review than those legislatively created state agencies.

PRACTICE TIP: In practice, local agency adjudicatory decisions generally are reviewed by way of administrative mandamus under §1094.5. On administrative mandamus, see chap 3.

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§4.15 3. Writ of Review (Certiorari) Available to Review Adjudicatory Decisions of Constitutional Statewide Agencies

A writ of review (certiorari) is available to review adjudicatory actions of statewide agencies of constitutional origin. *Boren v State Personnel Bd.* (1951) 37 C2d 634, 637, 234 P2d 981. Constitutional agencies derive their adjudicatory power directly from the California Constitution, and thus are not subject to the rule of *Standard Oil Co. v State Bd. of Equalization* (1936) 6 C2d 557, 559, 59 P2d 119. See, *e.g., Strumsky v San Diego County Employees Retirement Ass'n* (1974) 11 C3d 28, 35, 112 CR 805; *Koehn v State Bd. of Equalization* (1958) 166 CA2d 109, 117, 333 P2d 125; §4.13. Examples of constitutional statewide agencies include the Public Utilities Commission, the Workers' Compensation Appeals Board, the Agricultural Labor Relations Board, the Public Employment Relations Board, and the State Water Resources Control Board.

In practice, however, adjudicatory decisions of constitutional statewide agencies are usually reviewed by way of administrative mandamus because the scope of review is broader. On the scope of judicial review on a writ of review, see §4.11; on the scope of judicial review under administrative mandamus, see §3.8.

PRACTICE TIP: Specific statutory provisions establish exclusive procedures for review of the orders and decisions of certain statewide constitutional agencies. For example, California Public Utilities Commission (PUC) orders and decisions are reviewable only by the court of appeal and supreme court under the procedures established by the Public Utilities Code. See Pub Util C §§1756-1768. On statutes authorizing writ review of the decisions of particular administrative agencies, see §§16.18-16.48.

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§4.16 E. Specific Requirements for Writ of Review (Certiorari)

Besides meeting the basic requirements for extraordinary relief, *i.e.,* a beneficially interested petitioner and the absence of a plain, speedy, and adequate remedy (see §§2.3-2.16), the petitioner seeking a writ of review (certiorari) must demonstrate that:

- The act at issue is judicial in nature;
- The act has been completed;
- The lower tribunal lacked or acted in excess of its jurisdiction; and
- There is no right to appeal.

The requirements for writs of review are the same in superior court as in the court of appeal. On writs of review in the court of appeal, see §§15.27-15.38.

PRACTICE TIP: If the challenged act is incomplete, *e.g.,* if the inferior tribunal has reached a decision but has not yet acted on it, prohibition may be available to restrain the threatened act. On writs of prohibition, see §§4.2-4.9.

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IV. WRIT OF HABEAS CORPUS

§4.17 A. Description and Purpose

The writ of habeas corpus permits a person who is unlawfully imprisoned or restrained to challenge the lawfulness of the confinement or restraint. Pen C §1473(a). All California courts have original jurisdiction in habeas corpus proceedings. Cal Const art VI, §10.

The writ of habeas corpus originally was used to secure the petitioner's release from actual imprisonment or other illegal confinement. In modern practice, the petitioner need not be physically confined; a petitioner released on bail or on his or her own recognizance may seek habeas corpus relief because such restraints are sufficient to constitute constructive custody. See, *e.g., In re Catalano* (1981) 29 C3d 1, 9, 171 CR 667 (defendants were under sufficient restraint to permit habeas corpus when judgment required them to pay fine or face incarceration); *In re Smiley* (1967) 66 C2d 606, 612, 58 CR 579 (habeas corpus was available to defendant released on his own recognizance). See also *Gray v Superior Court* (2005) 125 CA4th 629, 636 n3, 23 CR3d 50 (court of appeal chose to treat petition challenging bail condition as one for writ of mandate instead of writ of habeas corpus because trial court allegedly exceeded its jurisdiction, issue was purely legal, and there was no need for evidentiary hearing); Appeals and Writs in Criminal Cases §§9.3-9.6 (3d ed Cal CEB 2007).

Although habeas corpus is not itself a criminal proceeding (Part 2, Title 12 of the Penal Code classifies habeas corpus as a "special proceeding of a criminal nature"), it is most commonly used by those charged with, or convicted of, criminal offenses. The following sections summarize use of the writ in civil proceedings only. On habeas corpus in criminal proceedings, see Appeals & Writs, chap 9.

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B. Habeas Corpus in Civil Cases

1. Habeas Corpus in Proceedings Involving Children

§4.18 a. Habeas Corpus in Child Custody Context

Habeas corpus may be used when a person entitled to custody of a minor child is denied possession. See, *e.g., In re Barr* (1952) 39 C2d 25, 27, 243 P2d 787; *In re Paul W.* (2007) 151 CA4th 37, 53, 60 CR3d 329. In child custody and adoption-related matters, however, just as in all other matters, "habeas corpus cannot serve as a substitute for an appeal, and, in the absence of special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment." *Adoption of Alexander S.* (1988) 44 C3d 857, 865, 245 CR 1, quoting *In re Dixon* (1953) 41 C2d 756, 759, 264 P2d 513.

PRACTICE TIP: Under Welf & I C §366.26, an order permanently terminating parental rights is conclusive and once final the court cannot modify it. Some authorities hold this means the order cannot be modified even on habeas corpus (see, *e.g., In re Meranda P.* (1997) 56 CA4th 1143, 1161, 65 CR2d 913), but other decisions have held that it is a restriction only on the ordering court and not on the habeas power of appellate courts. See, *e.g., In re Darlice C.* (2003) 105 CA4th 459, 464, 129 CR2d 472.

In *Adoption of Alexander S.* (1988) 44 C3d 857, 866, 245 CR 1, the California Supreme Court listed six grounds for using habeas corpus in child custody matters. These include: (1) enforcement of an existing right to physical custody established by prior order, (2) determination of physical custody when no previous custody order has issued, (3) modification of a modifiable order, (4) protecting a child from imminent danger, (5) allowing a natural parent lacking physical custody to bring an original action in habeas corpus when his or her consent to an adoption was required but not obtained, and (6) a collateral attack on a prior order issued by a court without jurisdiction. See also *In re Meranda P.* (1997) 56 CA4th 1143, 1164 n15, 65 CR2d 913.

PRACTICE TIP: Family law courts rarely hear habeas corpus proceedings. Before initiating a habeas proceeding, a complainant should consider more common remedies, such as an order modifying custody or an order for return of the child.

On challenging child custody rulings, see California Child Custody Litigation and Practice, chap 19 (Cal CEB 2006).

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§4.19 b. Habeas Corpus in Juvenile Dependency Proceedings

Habeas corpus is the proper vehicle for challenging a dependency order. See, *e.g., In re Paul W.* (2007) 151 CA4th 37, 53, 60 CR3d 329. See also *In re Emilye A.* (1992) 9 CA4th 1695, 1707 n9, 12 CR2d 294 ("reversal of an order in a dependency proceeding does not necessarily mean that the status quo is reinstated and that the child can no longer be protected").

On habeas corpus in juvenile dependency proceedings, see California Juvenile Dependency Practice §§10.109-10.117 (Cal CEB 2002).

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§4.20 c. Habeas Corpus for Ineffective Assistance of Counsel in Proceedings Involving Children

Often in habeas cases focusing on jurisdiction over children, the challenged custody order or order terminating parental rights is final, and the habeas petition is based on a claim of ineffective assistance of counsel. See, *e.g., In re O. S.* (2002) 102 CA4th 1402, 1409, 126 CR2d 571; *In re Carrie M.* (2001) 90 CA4th 530, 533, 108 CR2d 856. This is an appropriate use of habeas corpus because the issues in an ineffective assistance claim go beyond the trial record. See, *e.g., In re Emilye A.* (1992) 9 CA4th 1695, 1707 n9, 12 CR2d 294 (reversal because ineffective assistance of counsel does not preclude further dependency proceedings in juvenile court; it simply requires that proceedings be reconducted because parents were not properly represented).

An indigent parent has a liberty interest in the care, custody, and management of his or her child. Thus, in some parental right termination cases, the parent may have a due process right to appointment of competent counsel. See, *e.g., In re Kristin H*. (1996) 46 CA4th 1635, 1642, 54 CR2d 722. See also *In re Darlice C.* (2003) 105 CA4th 459, 462, 129 CR2d 472; Welf & I C §§317, 317.5. The parent may, by inaction, waive the rights to appointed counsel and to contest a determination for ineffective assistance of counsel. See, *e.g., In re Meranda P.* (1997) 56 CA4th 1143, 1157, 65 CR2d 913. The right to counsel, cognizable on habeas corpus, may also implicate other due process rights, such as the right to notice. See, *e.g., In re O. S.* (2002) 102 CA4th 1402, 1407, 126 CR2d 571.

On habeas relief based on ineffective assistance of counsel, see California Juvenile Dependency Practice §10.111 (Cal CEB 2002).

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§4.21 2. Civil Commitment Proceedings

Habeas corpus is available in a variety of proceedings involving the commitment of mentally disordered or other developmentally disabled persons.

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§4.22 a. Commitment Under Lanterman-Petris-Short Act

The Lanterman-Petris-Short Act (Welf & I C §§5000-5550) establishes procedures for the involuntary commitment of persons who, as the result of mental disorders, are dangerous to themselves or others, or who are gravely disabled. Any person certified for an additional 14 days of intensive treatment beyond the initial 72-hour treatment and evaluation period of Welf & I C §5150 automatically receives a certification review proceeding (Welf & I C §§5254, 5256-5256.8) unless the person elects to seek judicial review by a writ of habeas corpus. Welf & I C §§5254.1, 5275-5277.

The detained person, or anyone acting on his or her behalf, obtains habeas review by requesting release from the person delivering the copy of the notice of certification or from any other member of the facility's treatment staff. Welf & I C §5275.

Judicial review takes place in the superior court in the county in which the detaining facility is located. Welf & I C §5276. The detained person is entitled to counsel (appointed, if necessary) to prepare the petition and provide representation at the hearing. Welf & I C §5276. The court must release the detained person or order that an evidentiary hearing be held within 2 court days after the petition is filed. Welf & I C §5276.

On civil commitment proceedings under the Lanterman-Petris-Short Act, see California Conservatorship Practice, chap 23 (Cal CEB 2005) and California Guardianship Practice §11.20 (Cal CEB Annual).

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§4.23 b. Parental Commitment of Minor to State Hospital

A minor committed to a state hospital by a parent can challenge his or her commitment by a writ of habeas corpus. See, *e.g., In re Roger S.* (1977) 19 C3d 921, 937, 141 CR 298 (holding 14-year-old could challenge commitment to state mental hospital by parents under Welf & I C §6000(b) through writ of habeas corpus in superior court).

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§4.24 c. Commitment to State Hospital for Mentally Disordered

Anyone committed to a state hospital for the mentally disordered may apply for a writ of habeas corpus to the superior court in the county in which the hospital is located. Welf & I C §7250. The patient, anyone acting on his or her behalf, the State Department of Mental Health, or the State Department of Developmental Services may apply for the writ. The court inquires into and determines "the truth of the allegations under which he or she was committed." Welf & I C §7250.

On judicial review of commitment to a state hospital, see California Conservatorship Practice §23.97 (Cal CEB 2005).

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§4.25 d. Commitment to State Hospital for Developmentally Disabled

A developmentally disabled adult committed to a state hospital may apply for a writ of habeas corpus to the superior court to challenge the lawfulness of the commitment. Welf & I C §4800(a). See, *e.g., In re Hop* (1981) 29 C3d 82, 94, 171 CR 721 (holding that adult could challenge commitment to state hospital by filing habeas corpus petition in superior court of county in which she was confined); *In re Violet C.* (1989) 213 CA3d 86, 261 CR 470. In addition, a petition for habeas corpus, filed in the superior court of the county of confinement, is "an appropriate vehicle to inquire into the conditions of an institution which would endanger the health and safety of a conservatee… or which deprive a conservatee of fundamental rights." *In re Gandolfo* (1984) 36 C3d 889, 898 n7, 206 CR 149.

On judicial review of commitment to a state hospital, see California Conservatorship Practice §23.97 (Cal CEB 2005).

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§4.26 C. Specific Requirements for Habeas Corpus

The procedures in habeas corpus proceedings in superior court generally are governed by Pen C §§1473-1508 and Cal Rules of Ct 4.550-4.552. There are also special procedures concerning civil commitment established by Welf & I C §5276, discussed in §4.22. On procedures for obtaining a writ of habeas corpus, see Appeals and Writs in Criminal Cases, chap 10 (3d ed Cal CEB 2007).

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§4.27 V. QUO WARRANTO PROCEEDINGS

At common law, the writ of quo warranto issued to bring a defendant before the court to show by what authority he or she claimed an office, franchise, or liberty of the Crown. See, *e.g., People v Dashaway Ass'n* (1890) 84 C 114, 118, 24 P 277; *International Ass'n of Fire Fighters v City of Oakland* (1985) 174 CA3d 687, 695, 220 CR 256.

In California, the writ of quo warranto no longer exists. See 8 Witkin, California Procedure, *Extraordinary Writs* §27 (5th ed 2008). A statutory action, identical in purpose and effect to quo warranto, was established in 1872. CCP §§803-811. Under CCP §803, the statutory action may be brought against "any person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise, or against any corporation, either de jure or de facto, which usurps, intrudes into, or unlawfully holds or exercises any franchise, within this state."

PRACTICE TIP: Courts continue to refer to the remedy provided by the statutory action as "quo warranto." (The official chapter title of the statute is "Actions for Usurpation of an Office or a Franchise," which, as B. E. Witkin points out, is rather unwieldy. See 8 Witkin, California Procedure, *Extraordinary Writs* §7).

For examples of recent uses of proceedings in the nature of quo warranto, see:

- Quo warranto proceeding proper method to challenge consolidation of county's correctional and peace officers. *People ex rel Deputy Sheriffs' Ass'n v County of Santa Clara* (1996) 49 CA4th 1471, 1476, 57 CR2d 322.
- Quo warranto proceeding proper method to challenge validity of a judicial assignment. *People v Kwolek* (1995) 40 CA4th 1521, 1531, 48 CR2d 325.
- Quo warranto the exclusive remedy to challenge a city charter amendment that unilaterally altered wages and working conditions in violation of the Meyers-Milias-Brown Act (Govt C §§3500-3508.5). *International Ass'n of Fire Fighters v City of Oakland* (1985) 174 CA3d 687, 698, 220 CR 256.

On the overlap between quo warranto and mandate proceedings, see 8 Witkin, California Procedure, *Extraordinary Writs* §27.

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§4.28 VI. ENFORCEMENT OF ORDERS IN AGRICULTURAL LABOR RELATIONS BOARD PROCEEDINGS

If no timely petition for review of an Agricultural Labor Relations Board (ALRB) order is filed in the court of appeal, or if review is denied, the ALRB may petition the superior court for enforcement of its order. Lab C §1160.8. On writ review of ALRB interim and final orders in the court of appeal, see §§16.18-16.21.

In an enforcement proceeding, the superior court may not review the merits of the administrative decision. The court must enforce the decision by writ of injunction or other process if, after the hearing, the court determines that (1) the order was issued under procedures established by the ALRB and (2) the person to whom the order is directed refuses to comply. *ALRB v Tex-Cal Land Mgmt., Inc.* (1987) 43 C3d 696, 701, 238 CR 780.

A superior court judgment enforcing a final ALRB order is appealable. 43 C3d at 705. The points that can be raised on appeal are limited to procedural irregularity and refusal to comply with the order. 43 C3d at 706.

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VII. OTHER SUPERIOR COURT WRITS

§4.29 A. Attachment

A writ of attachment permits a plaintiff in a civil action to have a defendant's property levied as security for the satisfaction of any judgment the plaintiff may recover, unless the defendant gives other security to cover the judgment. See CCP §§481.010-492.090.

Under CCP §483.010(a), attachment is available only if all of the following exist:

- There is an action on a claim or claims for money;
- That action is based on an express or implied contract; and
- The total amount of the claim(s) is a fixed or readily ascertainable amount of at least $500, exclusive of costs, interest, and attorney fees.

PRACTICE TIP: A party must strictly follow the statutory provisions on attachment.

On attachment, including forms, see Debt Collection Practice in California, chap 6 (2d ed Cal CEB 1999).

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B. Execution, Possession, and Sale

§4.30 1. Writ of Execution

A writ of execution authorizes seizure and appropriation of a defendant's property to satisfy an existing money judgment against the defendant. See generally the Enforcement of Judgments Act (CCP §§680.010-724.260). On property subject to execution, see CCP §§695.010-695.070. Procedures for obtaining a writ of execution and levying on property subject to execution are set out in CCP §§699.010-701.830.

On writs of execution, including forms, see Debt Collection Practice in California §§9.2-9.36 (2d ed Cal CEB 1999).

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§4.31 2. Writ of Possession

A writ of possession is used to enforce a judgment for possession of real or personal property. CCP §§712.010-712.070, 714.010-714.030, 715.010-715.050.

On writs of possession, including forms, see Debt Collection Practice in California §§6.111-6.166 (2d ed Cal CEB 1999).

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§4.32 3. Writ of Sale

A writ of sale is used to enforce a judgment for sale of real or personal property. CCP §§712.010-712.070, 716.010-716.030.

On writs of sale, including forms, see Debt Collection Practice in California §§9.37-9.49G (2d ed Cal CEB 1999).

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§4.33 C. Injunction

An injunction is a "writ or order requiring a person to refrain from a particular act." CCP §525. Injunctive relief, which may be temporary or permanent, is governed by CCP §§525-534. Normally, a party must seek injunctive relief in the superior court. CCP §86(a)(8).

There are three forms of injunctive relief (see CCP §§526-527):

- A temporary restraining order, which may be issued ex parte for a limited time, usually pending the court's ruling on the complainant's application for a preliminary injunction;
- A preliminary injunction, which binds a party during the pendency of an action; and
- A permanent injunction, which issues on final judgment.

A stay is a form of injunctive relief. On stays, see chap 6.

On injunctions, see California Civil Procedure Before Trial, chap 32 (4th ed Cal CEB 2004). See also 5 Witkin, California Procedure, *Pleading* §§822-832 (5th ed 2008); 6 Witkin, Procedure, *Provisional Remedies* §§363-418.

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5

Initiating a Superior Court Writ Proceeding

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I. SCOPE OF CHAPTER §5.1

II. OVERVIEW OF SUPERIOR COURT WRIT PROCEDURES §5.2
- A. Applicable Statutory Authorities
  - 1. Statutes Pertaining Specifically to Writs §5.3
  - 2. Other Statutes Made Applicable to Writ Proceedings §5.4
  - 3. Rules of Court §5.5
- B. Local Rules and Procedures §5.6
  - 1. Local Rules §5.7
  - 2. Unwritten Procedures §5.8
- C. Procedural Options: Noticed Motion or Alternative Writ §5.9
  - 1. Noticed Motion Procedure
    - a. Chronology of Noticed Motion Procedure §5.10
    - b. Advantages and Disadvantages of Noticed Motion Procedure
      - (1) No Need for Ex Parte Appearance §5.11
      - (2) Time Savings for Court §5.12
      - (3) Hearing on Merits Likely §5.13
      - (4) Control Over Timing of Hearing on Merits §5.14
  - 2. Alternative Writ Procedure
    - a. Chronology of Alternative Writ Procedure §5.15
    - b. Advantages and Disadvantages of Alternative Writ Procedure
      - (1) Immediate Relief Possible §5.16
      - (2) Early Hearing §5.17
      - (3) Court Can Deny Alternative Writ and Dismiss Petition §5.18
  - 3. Issuance of Peremptory Writ in First Instance Unusual §5.19

III. DRAFTING THE WRIT PETITION §5.20
- A. Format Requirements §5.21
  - 1. In General
    - a. Typewritten or Printed §5.22
    - b. Type and Size of Paper §5.23
    - c. Margins §5.24
    - d. Line Numbers §5.25
    - e. Page Numbers §5.26
    - f. Binding §5.27
    - g. Hole Punching §5.28
    - h. Exhibits §5.29
    - i. Footer §5.30
  - 2. First (Caption) Page §5.31
- B. Designation of Parties
  - 1. Petitioner §5.32
  - 2. Respondent §5.33
  - 3. Real Party in Interest
    - a. Determining Existence §5.34
    - b. Right to Notice and Hearing §5.35
- C. Requesting Alternative Forms of Writ Relief
  - 1. Selecting Wrong Writ Usually Not Fatal §5.36
  - 2. Pleading and Praying for Different Forms of Writ Relief §5.37
- D. Contents of Petition
  - 1. Opening Paragraph §5.38
  - 2. Request for Stay §5.39

3. Enumerated Allegations §5.40
a. Identity of Parties
(1) Form: Petitioner §5.41
(2) Form: Respondent §5.42
(3) Form: Real Party in Interest §5.43
(4) Particular Contexts
(a) Form: When Petition Challenges Nonjudicial Action §5.44
(b) Form: When Petitioner Is Party to Ongoing Administrative Proceeding §5.45
b. Describing Challenged Action and Factual Background
(1) Style for Statement of Facts §5.46
(2) Using Supporting Citations §5.47
(3) Relating to Legal Basis for Relief §5.48
c. Describing Basis for Challenging Action §5.49
(1) Specific Allegations Required for Mandate §5.50
(2) Specific Allegations Required for Prohibition §5.51
(3) Specific Allegations Required for Review (Certiorari) §5.52
d. Absence of Adequate Legal Remedy
(1) Requirement for Mandate and Prohibition §5.53
(2) Form: Absence or Inadequacy of Other Remedies §5.54
e. Exhaustion of Administrative Remedies
(1) Aspect of No-Adequate-Legal-Remedy Requirement §5.55
(2) Form: Exhaustion of Administrative Remedies §5.56
f. Alleging Damages if Appropriate §5.57
g. Alleging Basis for Stay if Requested §5.58
h. Prayer for Relief §5.59
(1) Form: Types of Relief §5.60
(2) Form: Costs and Attorney Fees §5.61
(3) Form: Other Appropriate Relief §5.62
4. Form: Signature Block §5.63
5. Verification Required §5.64
a. Public Entities Exempt §5.65
b. Verification Must Be Based on Personal Knowledge §5.66
c. Petitioner Must Verify Petition §5.67
d. Defects in Verification May Be Challenged §5.68
e. Form: Verification §5.69
6. Exhibits §5.70

IV. FILING AND SERVING THE PETITION §5.71
A. Time for Filing
1. When Special Statutory Deadline §5.72
2. When No Special Statutory Deadline §5.73
3. Laches §5.74
B. Venue §5.75
C. When Using Noticed Motion Procedure
1. Filing and Serving Writ Petition Only at Outset of Proceeding §5.76
a. Filing Procedures
(1) Place of Filing §5.77
(2) Civil Case Cover Sheet §5.78
(3) Filing Fee §5.79
(4) Copies §5.80
b. Serving Procedures
(1) When to Serve §5.81
(2) Whom to Serve §5.82
(3) Manner of Service §5.83
(4) Proof of Service
(a) Time of Filing §5.84
(b) Format §5.85
2. Bringing Petition on for Hearing
a. Preparing Motion for Issuance of Requested Writ §5.86
b. Format of Motion §5.87
c. Required Papers §5.88
(1) Notice of Motion §5.89
(2) Motion §5.90
(3) Combining Notice of Motion and Motion §5.91
(4) Supporting Memorandum

(a) Purpose of Supporting Memorandum §5.92
(b) Required Contents of Supporting Memorandum §5.93
(c) Format of Supporting Memorandum §5.94
(d) Page Limits §5.95
(e) Style of Supporting Memorandum §5.96
(i) Supporting Memorandum Should Be Persuasive §5.97
(ii) Supporting Memorandum Should Clearly State Basis for Issuance of Writ §5.98
(iii) Citations to Evidence §5.99
(iv) Use of Quotations §5.100
d. Additional Papers
(1) Declarations §5.101
(2) Administrative Record §5.102
(3) Proposed Order/Judgment §5.103
e. Service and Filing of Motion and Supporting Documents §5.104
(1) Whom to Serve §5.105
(2) When to Serve §5.106
(3) Where and When to File Papers §5.107
D. When Using Alternative Writ Procedure §5.108
1. Preparing the Papers
a. Writ Petition §5.109
b. Supporting Memorandum §5.110
c. Exhibits/Declarations §5.111
d. Proposed Alternative Writ §5.112
2. Filing and Service Procedures
a. Use of Ex Parte Application §5.113
(1) Contents of Ex Parte Application §5.114
(2) Service of Ex Parte Application §5.115
(3) Personal Appearance §5.116
(4) Following Local Procedures §5.117
b. Court Action on Ex Parte Application §5.118

V. COMBINING WRIT PETITION AND COMPLAINT §5.119

VI. CONSIDERING RESTRICTIONS OF TRIAL COURT DELAY REDUCTION ACT §5.120

VII. COSTS AND ATTORNEY FEES
A. Recovery of Costs
1. By Prevailing Party §5.121
2. Costs Allowed §5.122
3. Procedure for Claiming Costs §5.123
B. Award of Attorney Fees
1. When Fees Are Recoverable §5.124
2. Procedure for Recovering Attorney Fees
a. When to File §5.125
b. What to File §5.126
C. Interplay Between Motion for Fees and Costs Bill §5.127

VIII. CHECKLIST: PITFALLS TO AVOID §5.128

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§5.1 I. SCOPE OF CHAPTER

This chapter discusses how to initiate a writ proceeding in the superior court. It begins with an overview of superior court writ procedures, including discussions of the statutes and court rules governing writ proceedings (see §§5.2-5.5), the significance of local rules and unwritten procedures (see §§5.6-5.8), and the procedural options available to the petitioner in initiating a writ proceeding (see §§5.9-5.19). The chapter next discusses the particulars of drafting a writ petition (see §§5.20-5.70), including filing and serving procedures (see §§5.71-5.118) and when a writ petition should be combined with a complaint (see §5.119). The chapter discusses the impact of the Trial Court Delay Reduction Act on writ proceedings. See §5.120. It also discusses the recovery of costs and attorney fees. See §§5.121-5.127. The chapter concludes with a checklist of pitfalls that the petitioner should avoid. See §5.128.

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§5.2 II. OVERVIEW OF SUPERIOR COURT WRIT PROCEDURES

Handling a writ proceeding in the superior court can be bewildering. The applicable statutes are not models of clarity, and they include anachronistic terms such as "alternative writ" and "return." Some rules of court apply but do not provide much illumination as to the manner in which writ proceedings unfold. To fill the void and provide better direction, a number of superior courts have adopted local rules providing specific procedures for writ proceedings. A petitioner should always check for these rules before going forward.

Unlike ordinary civil actions, writ proceedings often do not involve discovery. Usually, extensive memoranda are filed in advance of the "trial," which in most cases is more akin to a law and motion hearing. The judge reviews the memoranda and any permissible documentary evidence, hears argument at a hearing that may last as little as 30 minutes, and then enters a judgment granting or denying the writ petition.

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A. Applicable Statutory Authorities

§5.3 1. Statutes Pertaining Specifically to Writs

Only a few statutes deal specifically with writ proceedings:

- Traditional mandate is addressed by CCP §§1084-1097 (except for CCP §1094.5, which deals with administrative mandamus, a statutorily created species of mandamus used to review most administrative adjudicatory decisions. For discussion of administrative mandamus, see chap 3 and California Administrative Mandamus (3d ed Cal CEB 2003)).
- Prohibition is addressed by CCP §§1102-1105.
- Review (certiorari) is addressed by CCP §§1067-1077.
- Preliminary provisions appear in CCP §§1063-1064.
- General rules pertaining to mandate, prohibition, and review appear in CCP §§1107-1110b.

NOTE: Writs of prohibition and review challenge judicial action, which generally only courts can take. Thus, these writs are rarely sought in the superior court. On the use of prohibition and review in superior court proceedings, see §§4.5-4.8 (prohibition), 4.13-4.15 (review).

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§5.4 2. Other Statutes Made Applicable to Writ Proceedings

Code of Civil Procedure §1109 makes the provisions of part two of the Code of Civil Procedure applicable to mandate, prohibition, and review (certiorari) proceedings. Accordingly, the code sections governing pleading and practice in ordinary civil cases (see CCP §§307-1062.20) apply to mandate, prohibition, and review proceedings except as otherwise provided in CCP §§1067-1110b. For example, although CCP §412.20 allows a defendant 30 days to file a responsive pleading in an ordinary civil case, CCP §1089.5 provides specific time periods for filing a responsive pleading in a mandate proceeding when no alternative writ has issued. See also CCP §§23, 363 (construing "action" as used in Title 2 of Code of Civil Procedure as including special proceedings of civil nature (*e.g.,* writ proceedings)).

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§5.5 3. Rules of Court

Some California Rules of Court apply to writ proceedings:

- Rule 2.2 provides that the trial court rules (Cal Rules of Ct 2.1-2.1100) "apply to all cases in the superior courts unless otherwise specified by a rule or statute."
- Rules 3.1100 and 3.1103(a)(2) expressly make the general law and motion rules (Cal Rules of Ct 3.1100-3.1370) applicable to superior court writ proceedings.

See also Cal Rules of Ct 1.6 (defining "action" to include "special proceedings" (*e.g.,* writ proceedings); and defining "civil case" to mean any case prosecuted "for the declaration, enforcement, or protection of a right or the redress or prevention of a wrong" and including "all cases except criminal cases and petitions for habeas corpus").

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§5.6 B. Local Rules and Procedures

Given the relatively few statutes and rules of court that specifically address writ proceedings, and the resulting lack of clear procedural directions, a number of superior courts have adopted local rules governing writ proceedings. Even when a superior court has not adopted local rules, there may be local practices that the court expects parties to follow. Thus, before initiating a writ proceeding, a petitioner must check for applicable local rules and contact the court clerk to determine whether the court has specific or preferred procedural practices for writ proceedings.

PRACTICE TIP: When contacting a court clerk, parties must remember that clerks cannot provide substantive legal advice.

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§5.7 1. Local Rules

Some superior courts have adopted local court rules or published guidelines for writ proceedings. See Amador Ct R 11.18 (noticed motion procedure should be used for bringing petition on for hearing "whenever possible"); Contra Costa Ct R 7(G)(1)(a) (specifying procedure for setting hearing on petition for writ of mandate); Imperial Ct R 3.4.0(a) (noticed motion procedure should be used "whenever possible"); Los Angeles Ct R 9.5(d)(1) (noticed motion procedure preferred); Sacramento County Superior Court Guide to the Procedures for Prosecuting Petitions for Prerogative Writs, p. 7 (same) (see copy in App B); San Diego Ct R 2.4.8(A) (same); San Francisco Ct R 8.1(A)(3)(a) (writs heard in civil law and motion department).

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§5.8 2. Unwritten Procedures

Even when a court has not adopted local rules or published guidelines on writ proceedings, it still may have established or preferred practices. For example, in some counties, the presiding judge determines the procedures applicable to writ proceedings. In other counties, designated writ departments may have their own unwritten procedural conventions. As a result, these unwritten procedures may change as judges rotate in and out of assignments. In still other counties, unwritten procedures may have remained constant for a number of years. Thus, if there are no published local rules or guidelines, parties to a writ proceeding should contact the court clerk (or research attorney, if appropriate) to determine whether the court has preferred procedures for handling writ petitions. Court clerks and research attorneys, however, can provide information only as to general court procedures; they cannot provide any substantive legal advice.

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§5.9 C. Procedural Options: Noticed Motion or Alternative Writ

Over the years, two procedural options have become the standard methods for prosecuting writ proceedings in the superior courts: (1) the noticed motion procedure and (2) the alternative writ procedure (order to show cause procedure in the context of writs of review (certiorari)). A writ petition will make its way through the court in a slightly different way depending on which procedure is used, and each procedure has its particular advantages and disadvantages. But ultimately, these procedures are simply two different routes to the same goal—obtaining a hearing on the merits of the writ petition.

Some superior courts have an expressed preference as to which procedure should be used. See Amador Ct R 11.18 (noticed motion procedure should be used "whenever possible"); Imperial Ct R 3.4.0(a) (same); Los Angeles Ct R 9.5(d)(1) (same); Sacramento County Superior Court Guide to the Procedures for Prosecuting Petitions for Prerogative Writs, p. 7 (same) (see copy in App B); San Diego Ct R 2.4.8(A) (same). Local rules also may set out a wholly unique procedure for handling writ petitions. See Contra Costa Ct R 7(G)(1)(a) (in mandate proceedings, petitioner appears ex parte to schedule status conference at which hearing date and briefing schedule will be set). If there are no local rules, the court may have unwritten practices as to how it handles writ proceedings.

PRACTICE TIP: The noticed motion procedure is the more common method used to prosecute superior court writ petitions, particularly in larger jurisdictions, although there may be times when the alternative writ procedure is preferable. See §§5.16-5.18.

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1. Noticed Motion Procedure

§5.10 a. Chronology of Noticed Motion Procedure

If the petitioner uses the noticed motion procedure:

- The petitioner files the writ petition and obtains a summons. The petition is the operative pleading that initiates the proceeding, just as a complaint initiates a civil action. See §§5.20-5.70.
- The petitioner serves the petition and summons but does not make any application for or serve any motion seeking issuance of a peremptory writ at that time. See §§5.76-5.85.
- If necessary to prevent irreparable injury pending disposition of the petition, the petitioner may seek a stay. See chap 6.
- The respondent or real party in interest files a responsive pleading or motion, *e.g.,* a demurrer or answer. See §§8.6-8.15.
- If permissible in the particular writ proceeding, the parties may conduct discovery, or, if the writ proceeding is based on an administrative record and the record has not already been requested or prepared and lodged with the court, the parties will request or prepare the record. See chap 7.
- When ready to proceed with the hearing on the merits of the petition, the petitioner files and serves a motion for issuance of the requested writ. See §§5.86-5.107.
- The respondent or real party in interest files opposition to the motion. See §§8.16-8.20.
- The petitioner may, and should, file a reply. See §§8.62-8.63.
- The court holds a hearing on the motion and either grants or denies the writ petition. See §§9.25-9.48.

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b. Advantages and Disadvantages of Noticed Motion Procedure

§5.11 (1) No Need for Ex Parte Appearance

At the time the writ petition is filed, a petitioner does not need to appear ex parte to obtain issuance of an alternative writ or file any other documentation in support of the petition (*e.g.,* supporting memorandum, declarations).

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§5.12 (2) Time Savings for Court

The use of the noticed motion procedure means that the superior court usually spends no time on the writ proceeding until shortly before the noticed hearing on the merits. In courts with a high number of writ proceedings or a dedicated writ department, not having to review and act on alternative writ applications can add up to a significant savings of time and judicial resources.

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§5.13 (3) Hearing on Merits Likely

The court can deny an application for an alternative writ and dismiss the writ petition. See §§9.17-9.19. If the petitioner uses the noticed motion procedure, however, the first time the court considers the matter is usually at the hearing on the merits of the petition, unless the respondent or real party in interest files a demurrer or other motion aimed at dismissing the petition. See §§8.40-8.44, 8.50-8.56. The noticed motion procedure often ensures a hearing on the merits. See §§5.86-5.107.

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§5.14 (4) Control Over Timing of Hearing on Merits

The noticed motion procedure allows the petitioner to control the timing of the hearing on the merits, which may be important if the writ proceeding is complex or involves a large record, or if counsel for the petitioner has special time constraints. The petitioner wants to ensure ample time to brief the merits of the petition.

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2. Alternative Writ Procedure

§5.15 a. Chronology of Alternative Writ Procedure

If the petitioner uses the alternative writ procedure:

- The petitioner prepares the writ petition, an application for an alternative writ, a supporting memorandum, and any supporting declarations and exhibits, and submits these to the court on an ex parte basis. See §§5.108-5.118. On the notice and service required for an ex parte hearing on an application for an alternative writ, see §5.115.
- The respondent or real party in interest may, but is not required to, oppose an ex parte application for an alternative writ. Many superior courts view alternative writs simply as a means of giving notice of the date of the hearing on the merits of the writ petition and therefore routinely issue them, absent some glaring deficiency in the petition. Even so, the respondent or real party in interest still may want to appear at the ex parte hearing to weigh in on the return date, briefing schedule, and hearing date. See §§8.21-8.31.
- If the court issues the alternative writ, the writ will set forth the date for the return (*i.e.,* the date by which the respondent or real party in interest must file a responsive pleading) and also a date for the hearing on the merits of the writ petition, which may be (but usually is not) the same as the return date. See §§9.6-9.10.
- If the court denies the application for an alternative writ, the court might also dismiss the petition if it is procedurally defective or meritless on its face. See §§9.17-9.19. If the court merely denies the application for an alternative writ but leaves the writ petition pending (an unlikely, but possible scenario), the petitioner can proceed by way of the noticed motion procedure to obtain a hearing on the merits. See §9.19.
- After the court issues an alternative writ and if it is permissible in the particular writ proceeding, the parties may conduct discovery, or, if the writ proceeding is based on an administrative record and the record has not already been requested or prepared and lodged with the court, the parties request or prepare the record. See chap 7.
- The respondent and any real party in interest may (and should) file a return supported by a memorandum opposing issuance of a writ. See §§8.35-8.38.
- The petitioner may (and should) file a reply. See §§8.57-8.63.
- The court holds a hearing and either grants or denies the writ petition. See §§9.25-9.48.

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b. Advantages and Disadvantages of Alternative Writ Procedure

§5.16 (1) Immediate Relief Possible

If the court issues an alternative writ, the respondent may comply (*e.g.,* by setting aside its decision or changing its action) rather than show cause why it should not be compelled to do so, thus sparing the petitioner further time and expense in proceeding with challenging the decision or action. (If the respondent does comply with the alternative writ, the petitioner should notify the court immediately.) On compliance, see §§10.3-10.10.

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§5.17 (2) Early Hearing

If the court issues an alternative writ, the writ will set dates for the return and the hearing on the merits of the writ petition, which may be sooner than if the noticed motion procedure were used. For example, an alternative writ might impose a shorter deadline for filing a responsive pleading than the 30 days that the respondent or real party in interest would otherwise have if the noticed motion procedure were used. Compare CCP §1089 (responsive pleading when alternative writ issued) and §1089.5 (responsive pleading when no alternative writ sought). On responsive pleadings, see §§8.35-8.56. Similarly, an alternative writ might set a tight briefing schedule and a hearing date soon after the date for the return. Although a compressed timetable will not be feasible or appropriate in many cases, shorter time periods might be appropriate if there is a small record and the petition raises a straightforward legal question.

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§5.18 (3) Court Can Deny Alternative Writ and Dismiss Petition

Unlike the noticed motion procedure, in which the petitioner largely controls the timing of the hearing on the merits, there is a risk that the court might deny the application for an alternative writ and dismiss the writ petition (*e.g.,* if the court determines that the petition is procedurally defective or meritless on its face). See §§9.17-9.19.

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§5.19 3. Issuance of Peremptory Writ in First Instance Unusual

The writ statutes permit a superior court to grant a peremptory writ in the first instance if the petitioner gives 10 days' notice of the application for a writ. See CCP §1088. However, this is not a procedure commonly used in the superior courts, no doubt because it does not provide a reasonable time for the respondent or real party in interest to respond or for busy courts to review the merits of the petition. If immediate action is required, the courts prefer to consider a stay request. See chap 6. On the issuance of a preemptory writ in the first instance in appellate court writ proceedings, see §§22.18-22.22.

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§5.20 III. DRAFTING THE WRIT PETITION

Regardless of whether the petitioner proceeds by way of the noticed motion procedure (see §§5.10-5.14) or the alternative writ procedure (see §§5.15-5.18), the initiating document is the writ petition.

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§5.21 A. Format Requirements

All papers filed in a superior court writ proceeding must comply with the rules of court generally governing the format of papers presented for filing (see Cal Rules of Ct 2.100-2.119) as well as the rules specifically governing the format of motion papers (see Cal Rules of Ct 3.1110-3.1370).

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1. In General

§5.22 a. Typewritten or Printed

Papers must be typewritten, printed, or prepared by a photocopying process that produces clear and permanent copies equally as legible as printing in type not smaller than 12 points. Cal Rules of Ct 2.104. The type face must be the equivalent of Courier, Times New Roman, or Arial, and the print color must be blue-black or black. Cal Rules of Ct 2.105-2.106. Lines must be 1½-spaced or double-spaced, on consecutively numbered lines. Cal Rules of Ct 2.108(1). The paper should be printed on one side only. Cal Rules of Ct 2.102.

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Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/§5.23 b. Type and Size of Paper

§5.23 b. Type and Size of Paper

The paper must be (Cal Rules of Ct 2.103):

- White or unbleached;
- Opaque;
- Unglazed;
- Of standard quality not less than 20-pound weight; and
- 8½ by 11 inches.

In addition, the paper used in all original papers filed with the court and in all copies, documents, and exhibits, whether filed or served on other parties, must be recycled. Cal Rules of Ct 2.101(a).

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§5.24 c. Margins

The left margin must be at least 1 inch wide and the right margin at least ½ inch wide. Cal Rules of Ct 2.107.

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§5.25 d. Line Numbers

Lines on each page must be consecutively numbered starting with the number 1, placed at the left margin, and separated from the text by a vertical column of space at least one-fifth (1/5) inch wide or a single or double vertical line. Each line number must be aligned with a line of type, or the line numbers must be evenly spaced vertically on the page. There must be at least three line numbers for every vertical inch on the page. Cal Rules of Ct 2.108(4).

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§5.26 e. Page Numbers

Unless a rule provides otherwise for a particular type of document, each page must be numbered consecutively at the bottom. Cal Rules of Ct 2.109, 3.1110(c).

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§5.27 f. Binding

The pages must be firmly bound together at the top and consist entirely of original pages without riders. Cal Rules of Ct 2.113, 3.1110(e). If the circumstances warrant it, the petition can be bound with a supporting memorandum and paginated consecutively. Cal Rules of Ct 3.1112(c).

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§5.28 g. Hole Punching

Each paper presented for filing must be prepunched with two holes centered 2½ inches apart and ⅝ inches from the top of the paper. Cal Rules of Ct 2.115.

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§5.29 h. Exhibits

Exhibits may be fastened to 8½ by 11-inch pages, but must be as legible and permanent as typewritten material. Cal Rules of Ct 2.114. In addition, each exhibit must be separated by a hard 8½ by 11-inch sheet with hard paper or plastic tabs extending below the bottom of the page, bearing the exhibit designation. There must be an exhibit index. Pages from a single deposition and associated exhibits must be designated as a single exhibit. Exhibits written in a foreign language must be accompanied by an English translation certified under oath by a qualified interpreter. Cal Rules of Ct 3.1110(f)-(g). On exhibits generally, see chap 7.

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§5.30 i. Footer

All papers filed with the court must have a footer in the bottom margin of each page that contains the title of the document or some clear, concise abbreviation of the title. The footer must be in at least 10-point type. This requirement does not apply to exhibits (Cal Rules of Ct 2.110) or to an administrative record lodged with the court (see §7.21).

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§5.31 2. First (Caption) Page

The first page of a writ petition filed in the superior court (sometimes called the caption page) must set forth (CCP §422.30; Cal Rules of Ct 2.111):

- The name, State Bar membership number, address, telephone number, fax number, and e-mail address (if available) of the attorney or unrepresented party who is filing the petition.
- The title of the court and county in which the action is brought, and a space for the number of the case, which will be stamped by the clerk when the petition is filed.
- The title of the case, which should include the names of all the parties, including every real party in interest. See CCP §422.40. Omitting a necessary party could render a writ ineffective by failing to bring that party before the court.
- The title of the document, indicating the nature of the proceeding (*e.g.*, "PETITION FOR WRIT OF MANDATE (CCP §1085)"). The given title is not determinative of the nature of the proceeding and does not limit the relief that can be granted; the petition's allegations control. *Jaffe v Carroll* (1973) 35 CA3d 53, 57, 110 CR 435; *Coffelt v Coffelt* (1964) 229 CA2d 659, 665, 40 CR 513. See *Lee v Blue Shield* (2007) 154 CA4th 1369, 1378, 65 CR3d 612 (court should have treated complaint for declaratory relief as petition for writ of mandate).
- In a limited jurisdiction civil case, the phrase "Limited Civil Case." On writ petitions in limited jurisdiction civil cases, see chap 12.

For a sample caption page, see form in §13.1.

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B. Designation of Parties

§5.32 1. Petitioner

The party instituting a civil writ proceeding typically is called the petitioner. The writ statutes allow use of the terms "plaintiff" and "defendant." CCP §1063. However, that terminology is not commonly used in writ proceedings.

PRACTICE TIP: Occasionally, a clerk's office will improperly refuse to file documents that use a nonstandard term for the parties. The safer approach, therefore, is to use the more common terms "petitioner," "respondent," and "real party in interest."

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§5.33 2. Respondent

The entity (*e.g.,* a governmental body or agency, or private corporation or association), official, or employee whose action or decision is being challenged in the writ proceeding is the respondent. See *Sustainability of Parks, Recycling & Wildlife Legal Defense Fund v County of Solano Dep't of Resource Mgmt.* (2008) 167 CA4th 1350, 1358, 84 CR3d 889 (holding landfill operator was not "indispensable party" to writ proceeding because petition sought to enforce ministerial duty of county department).

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3. Real Party in Interest

§5.34 a. Determining Existence

A real party in interest is any entity or person whose interest will be directly affected by the outcome of the writ proceeding. See *Tracy Press, Inc. v Superior Court* (2008) 164 CA4th 1290, 1297-1302, 80 CR3d 464 (writ petition filed in superior court properly named real party in interest, but writ petition filed in court of appeal did not and therefore was dismissed). Usually the real party in interest has been a participant in the underlying proceedings giving rise to the writ proceeding. *Sonoma County Nuclear Free Zone '86 v Superior Court* (1987) 189 CA3d 167, 173, 234 CR 357. In cases challenging or reviewing the actions of the state, a county, city, agency, board, school district, corporation, or charitable organization, or of an official of any of these entities, there often is no real party in interest. This is often the case in superior court writ proceedings. The petitioner and respondent (*e.g.*, a local school district) are the only parties. See *Vasquez v Happy Valley Union Sch. Dist.* (2008) 159 CA4th 969, 978, 72 CR3d 15 (only parties were petitioner (terminated teacher) and respondent (school district)); *Building Material & Constr. Teamsters Union, Local 216 v Farrell* (1986) 41 C3d 651, 656, 224 CR 688 (only parties were petitioner (union) and respondent (city agency)).

However, this is not always the case. See *California Correctional Peace Officers Ass'n v State Personnel Bd.* (1995) 10 C4th 1133, 1140, 43 CR2d 693 (parties were petitioner (union), respondents (State Personnel Board), and real parties in interest (Department of Corrections and Department of Youth Authority)); *Imagistics Int'l, Inc. v Department of Gen. Servs.* (2007) 150 CA4th 581, 585, 59 CR3d 18 (parties were petitioner (Imagistics International), respondent (Department of General Services), and real party in interest (Sharp Electronics)); *Savient Pharms., Inc. v Department of Health Servs.* (2007) 146 CA4th 1457, 1461, 53 CR3d 689 (parties were petitioner (Savient Pharmaceuticals), respondent (Department of Health Services), and real party in interest (Ramsell Corporation)). See also *Fonseca v Fong* (2008) 167 CA4th 922, 927 n6, 84 CR3d 567 (sheriff, not police department, administered jail; real party in interest problem "solved" by assuming sheriff had "self interest" in complying with court's ruling).

PRACTICE TIP: In determining whether a real party in interest exists, it may be helpful to consider the concept of indispensable parties in ordinary civil actions. A person is an indispensable party if the party's absence will prevent the court from granting a complete determination of the matter, or will seriously prejudice any party before the court, or if a judgment rendered will inequitably affect or jeopardize the party's interest. See CCP §389; *Hebbard v Colgrove* (1972) 28 CA3d 1017, 1026, 105 CR 172. See also California Civil Procedure Before Trial §§14.8-14.12 (4th ed Cal CEB 2004).

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§5.35 b. Right to Notice and Hearing

Any real party in interest *must* be named in the petition, is entitled to notice, and has a right to be heard. CCP §389; *Sonoma County Nuclear Free Zone '86 v Superior Court* (1987) 189 CA3d 167, 173, 234 CR 357; 8 Witkin, California Procedure, *Extraordinary Writs* §§166-168 (5th ed 2008). This requirement flows from due process principles and the fact that issuance of a peremptory writ will overturn a decision favoring the real party in interest, thus directly affecting a party who would presumably want the action or decision upheld.

PRACTICE TIP: The petitioner must make every effort to identify and name all real parties in interest. Failure to do so may result in delay or dismissal of the petition. See *Tracy Press, Inc. v Superior Court* (2008) 164 CA4th 1290, 1297-1302, 80 CR3d 464 (writ petition filed in superior court properly named real party in interest, but writ petition filed in court of appeal did not and therefore was dismissed); *Inland Counties Reg'l Ctr. v Office of Admin. Hearings* (1987) 193 CA3d 700, 704, 238 CR 422 (affirming trial court's order setting aside judgment granting writ of mandate because petition failed to name minor as real party in interest).

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C. Requesting Alternative Forms of Writ Relief

§5.36 1. Selecting Wrong Writ Usually Not Fatal

Most courts will not refuse relief just because the petitioner has asked for the wrong type of writ as long as the petition adequately alleges, and the petitioner proves, entitlement to writ relief. See *Coelho v State Personnel Bd.* (1989) 209 CA3d 968, 971, 257 CR 557 (petitioner incorrectly requested administrative mandamus but alleged an abuse of discretion; court should have considered petition as one for traditional mandate); *Eureka Teachers Ass'n v Board of Educ. of the Eureka City Schs.* (1988) 199 CA3d 353, 366, 244 CR 240 (when parties seek wrong writ, superior court must review petition under standard of review of proper writ). See also *Lee v Blue Shield* (2007) 154 CA4th 1369, 1378, 65 CR3d 612 (court should have treated complaint for declaratory relief as petition for writ of mandate); Chernoff & Watson, *Writ Lore*, 56 Cal SBJ 12 (1981).

PRACTICE TIP: Although courts may not deny relief because the petitioner asks for the wrong writ, a sloppy and inartful pleading does not make a favorable first impression, particularly if review is sought under a statute specifying a particular writ. For examples of writs authorized by statute, see chaps 2-4; §§16.2-16.85.

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§5.37 2. Pleading and Praying for Different Forms of Writ Relief

The requirements for various writs are not jurisdictional straitjackets limiting the petitioner's choice of relief, and it may be unclear in some cases which writ is appropriate. Thus, it is not uncommon to seek alternative forms of relief —*e.g.*, a peremptory writ of mandate under CCP §1085 or §1094.5, or a peremptory writ of mandate or prohibition. See *Eder v California Dep't of Fish & Game* (2009) 170 CA4th 216, 87 CR3d 788 (seeking relief under §1085 and §1094.5); *Young v Gannon* (2002) 97 CA4th 209, 219, 118 CR2d 187 (same). See also *Neighbors in Support of Appropriate Land Use v County of Tuolumne* (2007) 157 CA4th 997, 1004, 68 CR3d 882 (considering issue under both §1085 and §1094.5, with same result). The petition can be entitled as follows: "PETITION FOR WRIT OF MANDATE (CCP §1085) OR ADMINISTRATIVE MANDAMUS (CCP §1094.5)." Another option would be: "PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER EXTRAORDINARY RELIEF."

JUDICIAL PERSPECTIVE: If there is a wrong to be corrected, many judges will fashion an appropriate remedy despite a writ petition that asks for the incorrect type of relief.

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D. Contents of Petition

§5.38 1. Opening Paragraph

The opening paragraph of the petition should succinctly state the type of writ being sought and why writ relief is proper (*e.g.,* no other adequate legal remedy) and necessary (*e.g.,* the respondent has failed to perform an act required by law).

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§5.39 2. Request for Stay

Any stay request should be noted in the opening paragraph, *e.g.,* "In addition to a writ of mandate, the petitioner also seeks issuance of an immediate stay." In addition, the facts supporting a stay must be alleged in the subsequent enumerated paragraphs of the petition, and the prayer for relief should include a request for a stay. The request should also appear on the caption page of the petition.

PRACTICE TIP: A petitioner should not rely on a stay request in the petition to bring the request to the attention of the court. Rather, the petitioner should prepare a separate stay application or seek preliminary injunctive relief. On requesting a stay or preliminary injunctive relief, see chap 6.

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§5.40 3. Enumerated Allegations

The heart of the petition consists of a series of enumerated factual allegations that tell the court all the information it needs to make a decision in the case, *e.g.*, who the parties are, the factual background and procedural history, the challenged action or decision, and the basis for challenging it.

PRACTICE TIP: The allegations in the following section are only examples. Their language and the order in which they appear should not be slavishly followed. The allegations must be case specific. On the proper style for the statement of facts, see §5.46.

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a. Identity of Parties

§5.41 (1) Form: Petitioner

To download **Word** version, right click and choose *Save Target As*

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5.41-1 Allegation concerning petitioner

[1.] Petitioner(s) _ _[*specify name(s)*]_ _ _ _[*is/are*]_ _ **now and at all times mentioned in this petition** _ _[*explain role and beneficial interest of petitioner(s) in the proceeding, e.g., individual who was denied building permit, agency entitled to retroactive payment of taxes*]_ _**.**

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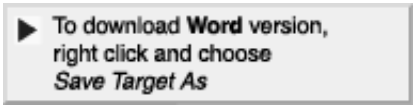
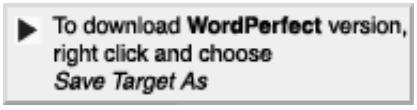
Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/§5.42 (2) Form: Respondent

§5.42 (2) Form: Respondent





5.42-1 Allegation concerning respondent

[2.] Respondent(s) _ _[*specify name(s)*]_ _ _ _[*is/are*]_ _ **now and at all times mentioned in this petition** _ _[*has/have*]_ _ **been** _ _[*a/an/the*]_ _ _ _[*designate type of inferior tribunal or officer, e.g., board, agency, or commissioner*]_ _**, responsible for administering the** _ _[*statute/ordinance/regulation*]_ _ **and** _ _[*obligated to perform the ministerial duty of* _ _[*specify duty*]_ _*/exercising adjudicatory functions in connection with* _ _[*specify proceeding*]_ _]_ _**.**

5.42-2 Optional addition to 5.42-1: Individual respondent

[3.] Respondent _ _[*name of public official or other individual respondent*]_ _ **is now, and at all times mentioned in this petition has been,** _ _[*a/an*]_ _ _ _[*specify position, e.g., Director of the Department of General Services*]_ _**, and in that capacity at all times relevant to these proceedings has** _ _[*failed to perform the ministerial duty of*_ _[*specify duty and manner in which respondent has failed to perform*]_ _*/abused* _ _[*his/her*]_ _*discretion by* _ _[*specify manner in which respondent has abused discretion*]_ _*/exercised powers in excess of* _ _[*his/her*]_ _*jurisdiction in that*_ _[*specify in what manner respondent has acted in excess of jurisdiction*]_ _]**.**

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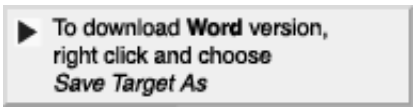
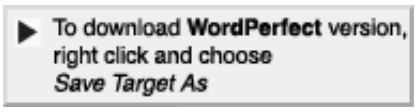
Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/§5.43 (3) Form: Real Party in Interest

§5.43 (3) Form: Real Party in Interest





5.43-1 Allegation concerning real party in interest

[3.] Real Party(ies) in Interest _ _[*specify name(s)*]_ _ _ _[*is/are*]_ _ **now and at all times mentioned in this petition** _ _[*specify role in the proceeding*]_ _**.**

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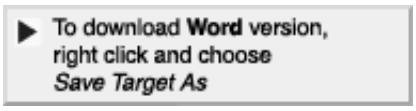
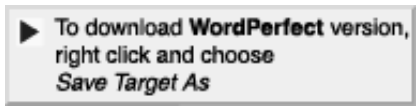
(4) Particular Contexts

§5.44 (a) Form: When Petition Challenges Nonjudicial Action





5.44-1 Allegations when nonjudicial action involved

[*Example 1: Petitioner seeks to compel action by California State Labor Commissioner*]

[1.] Petitioner(s), _ _[*name(s)*]_ _, _ _[*is/are*]_ _ _ _[*give status, e.g., an employee who seeks unpaid wages in three consolidated claims filed with the Labor Commissioner, entitled Able, Baker, and Cooper v William P. Bennett and Alicia Lopez, dba The Open Door, No. 12-12345 (1, 2, 3)*]_ _**.**

[2.] Respondent(s), _ _[*name(s)*]_ _,_ _[*specify connection to matter, e.g., is charged by California State Labor Code §98 with investigating employee complaints and with adjudicating them according to Labor Code guidelines*]_ _**.**

[3.] Real _ _[*party/parties*]_ _ **in Interest** _ _[*is/are*]_ _ _ _[*name(s)*]_ _**.** _ _[*Specify interest in the outcome, e.g.: The order sought by this petition directly affects real parties because they would be obliged to pay all unpaid wages that the California State Labor Commissioner found owing to petitioner employees*.]_ _

[*Example 2: Petitioner seeks to compel county controller to issue retirement check*]

[1.] Petitioner(s) _ _[*is/are*]_ _ **former employee(s) of the County of** _ __ __ _**, having been employed by the County from** _ _[*date*]_ _**, to** _ _[*date*]_ _**, and having retired from such service on** _ _[*date*]_ _**.**

[2.] Respondent(s), _ _[*name(s)*]_ _**,** _ _[*specify connection to matter*]_ _**.**

[*Example 3: Petitioner seeks to compel registrar of voters to delete from ballot the name of an ineligible incumbent, and to add that of petitioner-candidate*]

[1.] Petitioner is, and at all times mentioned in this petition was, a citizen and taxpayer and the candidate receiving the _ _[*e.g., second highest number of votes in the primary election held November 7, 2007, for the office of Judge of the Superior Court for the County of Buena Vista*]_ _**.**

[2.] Respondent(s), _ _[*name(s)*]_ _**,** _ _[*specify connection to matter*]_ _**.**

[*Example 4: Petitioner seeks to compel action by a corporation or association, e.g., when director or stockholder seeks inspection of corporate records*]

[1.] Petitioner(s) _ _[*is/are*]_ _**, and at all times mentioned in this petition** _ _[*was/were*]_ _**,** _ _[*director(s)/stockholder(s) and owner(s) of* _ _[*number*]_ _ *shares of the capital stock*]_ _ **of XYZ Company, Inc., a corporation organized and existing under the laws of**

[*Option 1: Domestic corporation*]

the State of California.

[*Option 2: Foreign corporation*]

the State of _ _[*name*]_ _ **and authorized to do business in California.**

[*Continue*]

[2.] Respondent(s), _ _[*name(s)*]_ _, _ _[*specify connection to matter*]_ _.

Comment: These are examples of challenges to nonadjudicatory action.

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Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/§5.45 (b) Form: When Petitioner Is Party to Ongoing Administrative Proceeding

§5.45 (b) Form: When Petitioner Is Party to Ongoing Administrative Proceeding

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5.45-1 Allegation when petitioner is party to ongoing administrative proceeding

[1.] Petitioner(s), _ _[*name(s)*]_ _**,** _ _[*is/are*]_ _ _ _[*one of*]_ _ **the** _ _[*plaintiff(s)/defendant(s)*]_ _ **in a proceeding** _ _[*now pending/ commenced*]_ _ **in** _ _[*name of, e.g., administrative agency's forum*]_ _**, entitled** _ _[*title of action*]_ _**, No.** _ _**. The** _ _[*plaintiff(s)/defendant(s)*]_ _ **in that proceeding** _ _[*is/are*]_ _ **named in this petition as real** _ _[*party/parties*]_ _ **in interest.**

Comment: This allegation covers the situation in which the petitioner is a party to an ongoing proceeding and wishes to challenge an action that has occurred in that proceeding. The use of this type of allegation in a superior court writ proceeding is rare, however, because the petitioner is usually challenging the *final* decision or action of a governmental or private entity. The petitioner may want to add a more specific allegation concerning the agency, *e.g.,* when a challenge to the hearing officer is involved.

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b. Describing Challenged Action and Factual Background

§5.46 (1) Style for Statement of Facts

The factual story should be told simply and directly, in whatever sequence provides the maximum force and continuity. The petitioner should avoid excessive formalism and try to be clear and straightforward. The factual allegations in the petition should be made in the ultimate-fact style characteristic of a complaint. For an example, see form in §13.1.

JUDICIAL PERSPECTIVE: Unless there is good reason not to, it usually is best to tell the court the factual story in chronological order. The petitioner should keep in mind that the judge will not be familiar with the case. If the factual allegations are lengthy, they can be separated into different sections under descriptive headings.

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§5.47 (2) Using Supporting Citations

If the writ proceeding arises from a proceeding that generated a record and that record will be part of the evidentiary basis for the writ proceeding, all factual allegations should cite to the record (if already prepared). Alternatively, if declarations or affidavits have been prepared and will be submitted to the court when the writ petition is filed, the factual allegations should refer to those documents. If the noticed motion procedure is used, supporting declarations and exhibits may be filed later in support of the motion for issuance of a peremptory writ. On the noticed motion procedure, see §§5.10-5.14, 5.76-5.107. On citing to the record, see §7.23.

PRACTICE TIP: It is important for the petitioner to be candid with the court in the factual recitation. Failure to tell the whole story, or to tell it fairly, can be extremely prejudicial to the petitioner's case both because the judge may form a negative opinion of the petitioner's case and because of the risk of creating an unclean hands defense.

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§5.48 (3) Relating to Legal Basis for Relief

The factual allegations must set forth all facts necessary to support the ground urged for issuance of the writ, *e.g.,* acting contrary to the law or an abuse of discretion. On the legal bases for writ relief, see chaps 2-4.

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Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/§5.49 c. Describing Basis for Challenging Action

§5.49 c. Describing Basis for Challenging Action

The allegations identifying the basis for relief are the crux of the writ petition. These allegations cannot be reduced to a formula; rather, they depend on the facts of the particular case. If the allegations in the petition flow chronologically, as recommended (see Judicial Perspective in §5.46), the allegations setting forth the basis for relief will follow the factual and procedural recitation. For an example, see form in §13.1.

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§5.50 (1) Specific Allegations Required for Mandate

To obtain a writ of mandate, the petition must allege, in addition to or in conjunction with the allegations discussed above, the following:

- The petitioner's beneficial interest in the outcome of the proceedings.
- The petitioner's clear, present, and legal right to the respondent's performance.
- The respondent's present legal duty and present ability to perform.
- The respondent's failure and refusal to perform, or the respondent's abuse of discretion.
- The lack of any plain, speedy, and adequate legal remedy.

On mandate generally, see chap 2.

PRACTICE TIP: An alternative writ of mandate, in and of itself, does not stay the challenged action or decision. To obtain temporary relief, the writ petition can include a request for and allegations supporting a stay. See §§5.39, 5.58. On stays in the superior court, see chap 6.

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§5.51 (2) Specific Allegations Required for Prohibition

To obtain prohibitory relief restraining a quasi-judicial tribunal or officer from acting without or in excess of jurisdiction (rarely applicable in superior court writ proceedings), the petition must allege, in addition to or in conjunction with the allegations discussed above, the following:

- Pendency of the action or proceeding over which the respondent exercises or is threatening to exercise judicial functions.
- The respondent's exercise of judicial functions.
- The respondent's intent, unless prohibited, to act or to continue to act without or in excess of jurisdiction (*e.g.*, to proceed to hear and determine the action or proceeding or to make or render a certain invalid order, judgment, or decision).
- The lack of any plain, speedy, and adequate legal remedy.

On prohibition generally, see §§4.2-4.9.

PRACTICE TIP: Although an alternative writ of prohibition in theory effects a stay by its own terms (see CCP §1104), to ensure immediate temporary relief, the writ petition can include a request for and allegations supporting a stay. See §§5.39, 5.58. On stays in the superior court, see chap 6.

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§5.52 (3) Specific Allegations Required for Review (Certiorari)

To obtain a writ of review (certiorari) of completed quasi-judicial action (rarely applicable in superior court writ proceedings), the petition must allege, in addition to or in conjunction with the allegations discussed above, the following:

- The respondent's exercise of judicial functions.
- A description of the completed judicial act sought to be reviewed for excess of jurisdiction.
- The reason or reasons for the invalidity of the respondent's action.
- The lack of a right of appeal, and the lack of any plain, speedy, and adequate legal remedy.

On writs of review generally, see §§4.10-4.16.

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d. Absence of Adequate Legal Remedy

§5.53 (1) Requirement for Mandate and Prohibition

Mandate and prohibition will issue only when the petitioner has no plain, speedy, and adequate remedy at law. CCP §§1086, 1103(a). For discussion, see §§2.15-2.16, 4.9.

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§5.54 (2) Form: Absence or Inadequacy of Other Remedies

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5.54-1 Allegation concerning absence or inadequacy of other remedies

[11.] Petitioner(s) _ _[*has/have*]_ _ **no plain, speedy, or adequate remedy** _ _[*at law*]_ _ **to challenge respondent's(s')** _ _[*order/judgment/decision of* _ _[*date*]_ _]_ _ **(Exhibit** _ _**) other than the relief sought in this petition.** _ _[*Detail factual basis supporting why petitioner(s) has/have no plain, speedy, and adequate remedy and what specific harm will result if writ relief is denied*.]_ _

Comment: This allegation is usually one of the last allegations in the petition and is numbered sequentially. Petitioners must be specific in explaining why there is no adequate remedy at law and what specific harm will result if writ relief is denied. *Phelan v Superior Court* (1950) 35 C2d 363, 370, 217 P2d 951. In a writ of review (certiorari) proceeding, the petitioner must allege not only the absence or inadequacy of other remedies but also that there is no right of appeal. CCP §1068(a). For discussion, see §4.16.

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e. Exhaustion of Administrative Remedies

§5.55 (1) Aspect of No-Adequate-Legal-Remedy Requirement

An aspect of the requirement that the petitioner have no adequate legal remedy is that the petitioner must exhaust all available administrative remedies before an administrative decision can be challenged through a writ proceeding. For further discussion, see §2.34.

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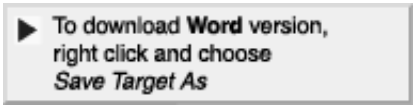
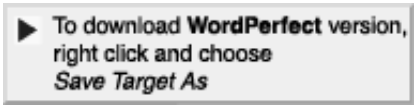
Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/§5.56 (2) Form: Exhaustion of Administrative Remedies

§5.56 (2) Form: Exhaustion of Administrative Remedies





5.56-1 Alternative: Allegation concerning exhaustion of all available remedies (administrative or other nonjudicial remedies)

[10.] Petitioner(s) _ _[*has/have*]_ _ **exhausted all available** _ _[*administrative*]_ _ **remedies required to be pursued by** _ _[*him/her/it/them*]_ _**,** _ _[*as set forth in Paragraph* _ _ *above/as follows:*]_ _ _ _[*Specify*]_ _**.**

5.56-2 Alternative: Allegation concerning failure to exhaust remedies (administrative or other nonjudicial remedies)

[10.] Petitioner(s) _ _[*has/have*]_ _ **not exhausted all available** _ _[*administrative*]_ _ _ _[*remedy/remedies*]_ _ **provided by** _ _[*e.g., statute/bylaws/contract*]_ _ **because** _ _[*e.g., the remedy is inadequate/to do so would cause irreparable injury*]_ _ **in that** _ _[*state in sufficient detail why available remedies have not been exhausted*]_ _**.**

Comment: When using this allegation, the petitioner should state clearly and concisely the steps taken, if any, otherwise required by law, administrative regulations, organizational rules, or contract provisions, and the specific reasons why any additional steps were not taken.

5.56-3 Alternative: Allegation concerning futility of exhausting administrative or other nonjudicial remedies

[10.] Petitioner(s) _ _[*has/have*]_ _ **not exhausted all available** _ _[*administrative*]_ _ _ _[*remedy/remedies*]_ _ **provided by** _ _[*e.g., statute/bylaws/contract*]_ _ **because it would be futile to do so in that** _ _[*state in sufficient detail why it would be futile to exhaust administrative remedies*]**.**

Comment: Futility is a narrow exception and will not suffice unless the petitioner "can positively state that [the respondent] has declared what its ruling will be in a particular case." *Sea & Sage Audubon Soc'y v Planning Comm'n* (1983) 34 C3d 412, 418, 194 CR 357. For further discussion of the futility exception, see California Administrative Mandamus §3.43 (3d ed Cal CEB 2003).

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§5.57 f. Alleging Damages if Appropriate

In mandate and prohibition proceedings, the petitioner can recover damages resulting from the challenged action or decision. CCP §1095. Damages may be enforced in the manner provided for money judgments generally. CCP §1095. In cases in which the respondent is an officer or employee of a public entity, any damages are recoverable against the entity, not the official or employee, provided the court finds that the official or employee appeared and defended in good faith. CCP §1095.

PRACTICE TIP: Claim filing requirements and various governmental immunities may affect the petitioner's ability to recover damages against a public entity. See California Government Tort Liability Practice, chaps 5, 10 (4th ed Cal CEB 1999).

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§5.58 g. Alleging Basis for Stay if Requested

If a stay is requested by application or request for temporary restraining order, the allegations must detail the facts and circumstances establishing that a stay is appropriate. On requesting a stay, see chap 6. If the stay would cause some apparent harm to the respondent or real party in interest, the petitioner may offer, if possible, to alleviate or diminish the harm in some way or provide clear evidence that the relative harm to the petitioner if the court denies the stay is greater.

PRACTICE TIP: A petitioner who intends to seek a stay of the challenged action or decision should do so at the earliest opportunity. Delay undercuts any alleged need for a stay and may result in the court denying a stay request.

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§5.59 h. Prayer for Relief

The prayer for relief follows the allegations and precedes the verification. The prayer should specify all types of relief sought by the petitioner, including any damages. When a stay is requested (see chap 6), it should be mentioned first. In addition, many courts will accept a request for both an alternative writ followed by issuance of a peremptory writ and a request for peremptory writ issued pursuant to noticed motion.

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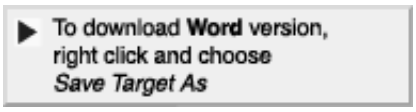

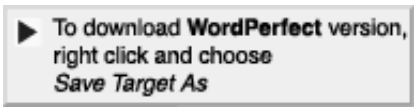

5.60-1 Opening language of prayer

WHEREFORE, petitioner respectfully prays that:

5.60-2 Optional: Stay

[1.] This Court immediately stay _ _[*specify what is to be stayed and, if administrative action is involved, give case number*]_ _**.**

5.60-3 Alternative: Petitioner seeks alternative writ of mandate

[2.] An alternative writ of mandate issue under seal of this Court commanding _ _[*respondent(s)/real* _ _[*party/parties*]_ _ *in interest*]_ _ _ _[*specify names of those to whom order is directed*]_ _ **to** _ _[*set out acts or duties required to be performed*]_ _**, or to show cause before this Court, at a time and place then or thereafter specified by Court order, why** _ _[*it/they*]_ _ _ _[*has/have*]_ _ **not done so and why a peremptory writ should not issue.**

[3.] On the return of the alternative writ and hearing on the order to show cause, a peremptory writ of mandate issue under seal of this Court compelling respondent(s) to _ _[*set out acts or duties to be performed*]_ _**.**

5.60-4 Alternative: Petitioner seeks alternative writ of prohibition

[2.] An alternative writ of prohibition issue under seal of this Court commanding _ _[*respondent(s)/real* _ _[*party/parties*]_ _ *in interest*]_ _ _ _[*specify names of those to whom order is directed*]_ _ **to desist and refrain from taking any further action or proceedings** _ _[*including, e.g., trial/continuance/enforcement of earlier proceedings*]_ _ **in the above described** _ _[*action/matter*]_ _ **until further order of this Court, and directing and requiring respondent(s)** _ _[*and real* _ _[*party/parties*]_ _ *in interest*]_ _ **to show cause before this Court, at a time and place then or thereafter specified by Court order, why it should not be absolutely and forever restrained from any further proceedings in the** _ _[*action/matter*]_ _**; or to show cause before this Court, at a time and place then or thereafter specified by Court order, why** _ _[*it/they*]_ _ _ _[*has/have*]_ _ **not done so and why a peremptory writ should not issue.**

[3.] On the return of the alternative writ and hearing on the order to show cause, a peremptory writ of prohibition issue under seal of this Court restraining respondent(s) absolutely and forever from taking any further proceedings in this _ _[*action/matter*]_ _**.**

5.60-5 Alternative: Petitioner seeks peremptory writ after briefing and a hearing

[2.] A peremptory writ of _ _[*prohibition/mandate*]_ _ **issue under seal of this Court commanding** _ _[*respondent(s)/real* _ _[*party/parties*]_ _ *in interest*]_ _ _ _[*specify names of those to whom order is directed*]_ _ _ _[*to desist and refrain from taking any further action or proceedings* _ _[*including, e.g., trial/continuance/enforcement of earlier proceedings*]_ _ **to** _ _[*set out acts or duties required to be performed*]_ _]_ _**.**

5.60-6 Alternative: Petitioner seeks writ of review (certiorari)

[2.] A writ of review (certiorari) issue under seal of this Court commanding respondent _ _[*state name of court or agency*]_ _ **to certify to this Court, at a time and place specified by Court order, a transcript of the record and proceedings of the above described** _ _[*action/cause/matter/hearing*]_ _**.**

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§5.61 (2) Form: Costs and Attorney Fees

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5.61-1 Request costs and attorney fees (when appropriate)

[4.] This Court award petitioner(s) the costs of this action.

[5.] This Court award petitioner(s) reasonable attorney fees under _ _[*cite applicable authority*]**_ _.**

Comment: On the recovery of costs and attorney fees, see §§5.121-5.127.

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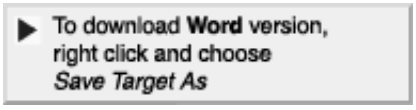
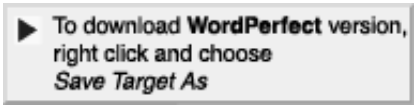
§5.62 (3) Form: Other Appropriate Relief





5.62-1 Request other appropriate relief

[6.] This Court grant such other relief as may be just and proper.

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§5.63 4. Form: Signature Block

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5.63-1 Signature block

Date: _ _ _ _ _ _

Respectfully submitted,
__[*Signature of attorney(s)*]__
_ _[*Typed name(s)*]_ _
Attorney(s) for Petitioner(s)

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§5.64 5. Verification Required

A petition for extraordinary relief must be verified (CCP §§1069, 1086, 1103(a)) in the same manner in which an ordinary civil complaint is verified (CCP §§446, 1109). Either a declaration under penalty of perjury or an affidavit may be used. CCP §§2009, 2015.5. Courts will decline to consider a petition on the merits for lack of, or for an inadequate, verification. See *Krueger v Superior Court* (1979) 89 CA3d 934, 939, 152 CR 870 (appellate court writ petition fatally defective because verification was dated December 3, but body of petition was dated December 22). For a form of verification, see §5.69.

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§5.65 a. Public Entities Exempt

In general, when the petitioner is a governmental body or public officer acting in his or her official capacity, the petition need not be verified. CCP §446(a); see, *e.g.*, *Fremont Union High Sch. Dist. v Santa Clara County Bd. of Educ.* (1991) 235 CA3d 1182, 1188, 286 CR 915 (petitioner school district exempt from verification requirement); *Murrieta Valley Unified Sch. Dist. v County of Riverside* (1991) 228 CA3d 1212, 1223, 279 CR 421 (same); *Elliott v Contractors' State License Bd.* (1990) 224 CA3d 1048, 1054, 274 CR 286 (answer of Contractors' State License Board exempt from verification requirement). But see *People v Superior Court (Alvarado)* (1989) 207 CA3d 464, 469, 255 CR 46 (People's petition must be verified when used as evidence of facts); *Municipal Court v Superior Court* (1988) 199 CA3d 19, 25 n1, 244 CR 591 (writ provisions requiring verification of petitions prevail over §446). The better practice is for the governmental body or official to verify the petition because it is often used as evidence of the facts alleged.

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§5.66 b. Verification Must Be Based on Personal Knowledge

To the extent the petition alleges facts that are intended to be relied on as evidence, the verification must be based on personal knowledge, not information and belief. *Star Motor Imports, Inc. v Superior Court* (1979) 88 CA3d 201, 204, 151 CR 721. When there are no disputed facts, the petition may be based on information and belief. *League of Women Voters v Eu* (1992) 7 CA4th 649, 9 CR2d 416. See also *Soltani-Rastegar v Superior Court* (1989) 208 CA3d 424, 428, 256 CR 255.

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§5.67 c. Petitioner Must Verify Petition

The petitioner must verify the writ petition. CCP §§1069, 1086, 1103(a). Under CCP §446, only in extenuating circumstances may a pleading be verified by the attorney rather than the party litigant. *Perlman v Municipal Court* (1979) 99 CA3d 568, 573, 160 CR 567 (verification by attorney merely for sake of convenience invalid). Extenuating circumstances might include the party's absence from the county in which the attorney's office is located, the party litigant's inability to verify, or the existence of facts that are within the exclusive knowledge of the attorney (*e.g.,* proceedings that occurred in court). See *Suzanne J. v Superior Court* (1996) 46 CA4th 785, 788, 54 CR2d 25 (court dismissed petition in dependency proceeding because mother's attorney had verified petition without explaining why mother had failed to do so or to execute declaration indicating her consent to attorney's doing so).

PRACTICE TIP: Every effort should be made to have the petitioner verify the petition. An attorney who verifies the petition must be careful not to verify facts that constitute a waiver of the attorney-client privilege, thus subjecting the attorney to deposition inquiries concerning the factual basis for the verification. See *Alpha Beta Co. v Superior Court* (1984) 157 CA3d 818, 825, 203 CR 752.

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§5.68 d. Defects in Verification May Be Challenged

The respondent or real party in interest must be sure to challenge improper verification or lack of verification because these errors are not jurisdictional and even minor defects may be sufficient to defeat a petition. If the respondent fails to object to the absence of verification, he or she waives the defect, and the court may allow the verification to be added by amendment even though the limitation period has expired since the date the petition was filed. See *Ware v Stafford* (1962) 206 CA2d 232, 237, 24 CR 153.

For further discussion of verifications, see §§18.42-18.48.

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Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/§5.69 e. Form: Verification

§5.69 e. Form: Verification

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5.69-1 Alternative: Affidavit with notary acknowledgment

State of _ _ _ _ _ _, County of _ _ _ _ _ _:

I, the undersigned, being sworn, say:

I am _ _[_ _[*one of***]_ _*/the attorney(s) for*]_ _ the petitioner(s) in this action. _ _[***All facts alleged in the above document are true of my own personal knowledge/I have read the above Petition for Writ of _ _[***Mandate/Prohibition/Review (Certiorari)***]_ _ and know its contents. All facts alleged in the petition are true of my own personal knowledge***.]_ _**

I declare under penalty of perjury that the foregoing is true and correct and that this affidavit was executed on _ _[*date***]_ _, at _ _[***city***]_ _, California.**

__[*Signature of petitioner/petitioner's attorney*]__
_ _[*Typed name*]_ _
_ _[*Petitioner/Attorney for petitioner*]_ _

State of California

County of _ _[*name of county***]_ _**

On _ _[*date***]_ _, before me, _ _[***name and title of notary***]_ _, personally appeared _ _[***name of affiant***]_ _, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) _ _[***is/are***]_ _ subscribed to the within instrument and acknowledged to me that _ _[***he/she/they***]_ _ executed the same in _ _[***his/her/their***]_ _ authorized capacity(ies), and that by _ _[***his/her/their***]_ _ signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.**

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____ (Seal)

5.69-2 Alternative: Declaration

I, the undersigned, declare:

I am _ _[_ _[*one of***]_ _*/the attorney(s) for*]_ _ the petitioner(s) in this action. _ _[***All facts alleged in the above document are true of my own personal knowledge/I have read the above Petition for Writ of _ _[***Mandate/Prohibition/Review (Certiorari)***]_ _ and know its contents. All facts alleged in the petition are true of my own personal knowledge***.]_ _**

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on _ _[*date***]_ _, at _ _[***city***]_ _, California.**

__[*Signature of petitioner/petitioner's attorney*]__
_ _[*Typed name*]_ _
_ _[*Petitioner/Petitioner's attorney*]_ _

Comment: The verification can be in the form of an affidavit or a declaration under penalty of perjury. CCP §2015.5. Verifications signed outside California must add the language "under the laws of the State of California" but need not recite the place of verification. CCP §2015.5.

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§5.70 6. Exhibits

If the record supporting the writ petition is only a few pages in length, it may be attached to the writ petition as an exhibit. In most cases, however, an administrative record (if there is one) will be lodged separately, as will any supporting declarations and exhibits. On the record in a superior court writ proceeding, see §§7.24-7.25.

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§5.71 IV. FILING AND SERVING THE PETITION

Some of the procedures for filing and serving a writ petition differ depending on whether the petitioner prosecutes the writ petition using the noticed motion procedure or the alternative writ procedure. For a description and comparison of these two procedures, see §§5.9-5.19. The procedures for filing and serving the petition when using the noticed motion procedure are discussed in §§5.76-5.85. The procedures for filing and serving when using the alternative writ procedure are discussed in §§5.108-5.118.

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A. Time for Filing

§5.72 1. When Special Statutory Deadline

A writ petition must be filed before any statutory deadline applicable to the specific context. For example:

- A proceeding challenging the adoption and application of an ordinance that restricts property development would be governed by the 90-day limitation periods of either Govt C §66499.37 (applied challenges) or Govt C §65009(c) (facial challenges).
- A mandate petition brought under the California Environmental Quality Act (CEQA) (Pub Res C §§21000-21177) must be brought within the time periods set forth in Pub Res C §21167.

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§5.73 2. When No Special Statutory Deadline

In the absence of a special statutory deadline (see §5.72), the statute of limitations applicable to the right or obligation sought to be enforced fixes the outside time limit for filing a writ petition. CCP §1109. For example, CCP §338(a), the 3-year statute of limitations, applies to enforce a statutory liability, and CCP §337(1), the 4-year statute of limitations, applies to enforce rights under a written contract or other instrument. See *Peralta Fed'n of Teachers v Peralta Community College Dist.* (1979) 24 C3d 369, 386, 155 CR 679 (3-year statute of limitations of CCP §338 applied to mandate proceeding in which teachers sought proper classification and salary); 8 Witkin, California Procedure, *Extraordinary Writs* §179 (5th ed 2008).

PRACTICE TIP: In appellate court writ proceedings, the courts of appeal have adopted the view that writ petitions should be filed within the 60-day time period applicable to filing a notice of appeal. See *Cal W. Nurseries, Inc. v Superior Court* (2005) 129 CA4th 1170, 1173, 29 CR3d 170. This view is grounded in the fact that appellate court writ petitions usually seek immediate interlocutory appellate review of a trial court ruling in an ongoing proceeding. See §§18.66-18.68. By contrast, many superior court writ proceedings are not in the nature of an appeal (*e.g.,* a challenge to the validity of a statute or regulation, or an action to compel the adoption or implementation of regulations or the performance of a ministerial duty). Thus, while it is good practice to file a superior court writ proceeding within 60 days of the challenged action or decision, this is by no means a jurisdictional deadline.

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§5.74 3. Laches

Because writ proceedings are equitable in nature, the doctrine of laches may be invoked against a dilatory petitioner. *El Dorado Palm Springs, Ltd. v Rent Review Comm'n* (1991) 230 CA3d 335, 346, 281 CR 327 ("mandamus is a type of action in which equitable principles, such as the doctrine of laches, apply"). See, *e.g., Schellinger Bros. v City of Sebastopol* (2009) 179 CA4th 1245, 102 CR3d 394 (finding "abundant support" for determination that petitioner unreasonably delayed and acquiesced in city taking over 1 year to certify environmental impact report).

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§5.75 B. Venue

The rules governing ordinary civil actions govern the selection of the proper venue in writ proceedings. See CCP §1109; *Harris v Alcoholic Beverage Control Appeals Bd.* (1961) 197 CA2d 759, 761, 18 CR 151. For example, in actions against a public officer or board, CCP §393(b) has been held to apply, *i.e.,* the petition must be filed in the county in which the cause arose. *Sutter Union High Sch. Dist. v Superior Court* (1983) 140 CA3d 795, 798, 190 CR 182.

See also California Administrative Mandamus §10.20 (3d ed Cal CEB 2003), which discusses venue in both traditional mandate and administrative mandamus. On venue generally, see California Civil Procedure Before Trial, chap 8 (4th ed Cal CEB 2004); 3 Witkin, California Procedure, *Actions* §§779-958 (5th ed 2008).

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C. When Using Noticed Motion Procedure

§5.76 1. Filing and Serving Writ Petition Only at Outset of Proceeding

When the petitioner prosecutes a writ proceeding using the noticed motion procedure, the case proceeds in much the same way as a regular civil action. Accordingly, no additional action need be taken at the outset other than filing and serving the writ petition. See §5.10 for a chronology.

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a. Filing Procedures

§5.77 (1) Place of Filing

Because practice varies from county to county, counsel must check local court rules or with the clerk's office to find out where to file the petition. Some courts consider writ petitions to be specialized proceedings and require that they be filed and heard in a specific department or branch of the court.

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§5.78 (2) Civil Case Cover Sheet

California Rule of Court 3.220 requires that the first paper filed in an "action or proceeding" be accompanied by a case cover sheet. See CCP §363 (construing "action" to include special proceedings of civil nature (*e.g.,* writ proceedings)); Cal Rules of Ct 1.6 (defining "action" to include "special proceedings"). The Judicial Council has mandated the use of Civil Case Cover Sheet (Form CM-010). Cal Rules of Ct 3.220(b).

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§5.79 (3) Filing Fee

The filing fee for a writ petition is the same as for any other civil action (*i.e.*, $355). Govt C §70611 (filing fee for first paper in civil action or proceeding in superior court).

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§5.80 (4) Copies

Usually only the original writ petition and any attachments must be filed. However, counsel should check local rules to see whether the court requires additional copies. Counsel should prepare and have file-stamped sufficient copies for his or her own records.

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b. Serving Procedures

§5.81 (1) When to Serve

When no alternative writ is sought (*i.e.*, the noticed motion procedure is used), the petition can be served on the respondent and real party in interest either before or after the petition is filed, although the court cannot issue a peremptory writ until it is served. CCP §§1088, 1088.5, 1105, 1107.

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§5.82 (2) Whom to Serve

Each respondent and real party in interest named in the petition must be served with a copy of the petition and all accompanying documents. CCP §§1088, 1088.5, 1105, 1107. When the respondent or real party in interest is a board or a commission, service is made on the presiding officer, the secretary, or a majority of the members of the board or commission. CCP §1107. See also Los Angeles Ct R 9.5(c).

For a detailed discussion of service, see California Civil Procedure Before Trial, chaps 17-18 (4th ed Cal CEB 2004).

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Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/§5.83 (3) Manner of Service

§5.83 (3) Manner of Service

The writ statutes are somewhat ambiguous on the issue of the manner of service of the petition. See CCP §1107. However, because the petition is the initiating pleading, due process demands that it be served in the same manner as a regular civil summons and complaint. See CCP §§413.10-417.40.

For further discussion of service of summons, see California Civil Procedure Before Trial §§17.14-17.46 (4th ed Cal CEB 2004).

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(4) Proof of Service

§5.84 (a) Time of Filing

When a writ of mandate is sought under CCP §1088.5 (*i.e.*, no alternative writ is requested and the noticed motion procedure is used), the petition need not be accompanied by a proof of service at the time of filing, although one must be filed before any court hearing or action on the petition. CCP §§1088.5, 1107.

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§5.85 (b) Format

Proof of service should be made on a Judicial Council form whenever possible. CCP §417.10(f). It should include all of the information required by CCP §417.10(a). See the sample proof of service forms in California Civil Litigation Forms Manual §9.2 (Cal CEB 1980) and in California Civil Procedure Before Trial §§18.21-18.23 (4th ed Cal CEB 2004).

PRACTICE TIP: Although adverse parties may be referred to and served as defendants (see CCP §1063), this is not done in practice and it is preferable to designate the parties being served as respondents or real parties in interest.

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Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/ 2. Bringing Petition on for Hearing/§5.86 a. Preparing Motion for Issuance of Requested Writ

2. Bringing Petition on for Hearing

§5.86 a. Preparing Motion for Issuance of Requested Writ

After the petitioner has filed and served the writ petition and when ready to proceed on the merits, the petitioner must file and serve a notice of motion and motion for issuance of the requested writ.

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§5.87 b. Format of Motion

A motion for issuance of a writ must comply with the general rules of court governing the format of papers presented for filing (see Cal Rules of Ct 2.100-2.119) as well as with the civil law and motion rules (see Cal Rules of Ct 3.1110-3.1370). Cal Rules of Ct 2.2, 2.100, 3.1100, 3.1103(a)(2). On the general rules governing the format of papers presented for filing, see §5.21. In addition to the specific formatting requirements described below for the moving papers, the first page of each document must specify the following information immediately below the case number (Cal Rules of Ct 3.1110(b)):

- The date, time, and location of the scheduled hearing, and the judge, if ascertainable;
- The date of filing of the writ proceeding; and
- The nature of any attached paper other than an exhibit (*e.g.,* a declaration).

PRACTICE TIP: Rather than file several separate documents, many petitioners file the petition and any accompanying declarations and documents bound together, unless doing so would make the filing too unwieldy to be presented as a single filing.

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Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/§5.88 c. Required Papers

§5.88 c. Required Papers

A motion for issuance of a writ must be supported by at least the following documents (Cal Rules of Ct 3.1112(a)):

- A notice of hearing on the motion;
- The motion; and
- A supporting memorandum.

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§5.89 (1) Notice of Motion

The notice of motion is a very short formal statement that identifies the time, date, and place of the hearing, the nature of the order being sought, the grounds for the motion, and the documents and other items that support the motion. See Cal Rules of Ct 3.1110(a). See also the standard notice of motion form in California Civil Procedure Before Trial §12.140 (4th ed Cal CEB 2004).

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§5.90 (2) Motion

The motion must identify the party making the motion, name the parties to whom it is addressed, briefly state the basis for the motion and the relief sought, and if a pleading is being challenged, identify the portion being challenged. Cal Rules of Ct 3.1112(d).

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§5.91 (3) Combining Notice of Motion and Motion

Under Cal Rules of Ct 3.1112, a "motion" that is largely duplicative of the notice of motion must be filed in addition to the notice of motion, even though CCP §1005.5 provides that a motion is deemed made on serving and filing of the notice of motion. Accordingly, the usual practice is to combine the notice of motion and the motion into a single document entitled "Notice of Motion and Motion."

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(4) Supporting Memorandum

§5.92 (a) Purpose of Supporting Memorandum

The supporting memorandum is of critical importance. It identifies and focuses the legal issues presented, makes the petitioner's case for relief, and anticipates and rebuts arguments or defenses likely to be raised by the respondent or real party in interest. Thus, the memorandum must be as complete and persuasive as possible. On the similar memorandum supporting writ petitions filed in the appellate courts, see §§18.49-18.56.

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Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/§5.93 (b) Required Contents of Supporting Memorandum

§5.93 (b) Required Contents of Supporting Memorandum

A memorandum must contain (Cal Rules of Ct 3.1113):

- A statement of facts supported by references to the supporting evidence, *e.g.,* verified allegations of the petition or other evidentiary documents, such as exhibits attached to the petition, declarations and their attachments, or an administrative record.
- A concise statement of the standard of review to be applied by the superior court, supported by statutory or case authority or both.
- Arguments supporting issuance of a writ, referencing the pertinent facts and supported by statutory or case authority.
- A table of contents and table of authorities if the memorandum is longer than ten pages, and an opening summary of argument if it is longer than 15 pages.
- Copies of any non-California authority tabbed in accordance with Cal Rules of Ct 3.1110(f). Alternatively, a separate compendium of non-California authorities, tabbed as required by the rules, can be submitted as part of the moving papers.

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§5.94 (c) Format of Supporting Memorandum

It is good practice to use the basic structure of a memorandum filed in an appellate writ proceeding, *i.e.,* separate sections for the introduction, facts and procedural history, argument, and conclusion. In the argument section, each point should be made separately under an appropriate heading, which should be a concise description of the point being made. See Cal Rules of Ct 8.204(a)(1)(B) (appellate rules on headings). If absolutely necessary, a point heading may be as long as three to four lines. It should be a specific application of a rule of law to the facts of the case and not a bare legal conclusion or statement of an abstract principle.

The caption page of the memorandum should not be numbered, but the pages of the tables must be numbered consecutively, using lowercase Roman numerals starting on the first page of the tables. The pages of the text must be numbered consecutively using Arabic numerals starting on the first page of the text. Cal Rules of Ct 3.1113(h).

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§5.95 (d) Page Limits

A supporting memorandum may not exceed 15 pages, excluding exhibits, declarations, attachments, the tables of contents and authorities (if required), and the proof of service. Cal Rules of Ct 3.1113(d). A party may apply to the court for permission to file a longer memorandum. See Cal Rules of Ct 3.1113(e).

PRACTICE TIP: Counsel should not expect courts to be very generous in granting such requests, although a stipulation signed by all parties may be helpful in securing permission for additional pages.

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Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/§5.96 (e) Style of Supporting Memorandum

§5.96 (e) Style of Supporting Memorandum

Some attorneys rely primarily on the petition to convey the facts and persuade the court; others feel that the judge may go directly to the supporting memorandum. Although the facts in the petition should be alleged in the ultimate-fact style characteristic of a complaint, they should be restated in the memorandum in a more persuasive manner, with citation to the operative allegations in the writ petition or to other supporting evidence (*e.g.,* the administrative record or declarations and attached exhibits).

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§5.97 (i) Supporting Memorandum Should Be Persuasive

The point of the supporting memorandum is to persuade the court to issue a writ. Often, the most persuasive elements are the factual story and the reasons why writ relief is proper. A formalistic approach can be a handicap in telling the story. One effective approach is a simple narrative style, in which the facts are told in chronological order. Other approaches include trying to capture the reader's attention by using a dramatic arrangement of the facts or organizing the facts around one or two major points of argument, if that is interesting and does not confuse the reader.

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Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/§5.98 (ii) Supporting Memorandum Should Clearly State Basis for Issuance of Writ

§5.98 (ii) Supporting Memorandum Should Clearly State Basis for Issuance of Writ

Merely stating the alleged basis for a writ with citations to legal authorities is meaningless. In the memorandum, the petitioner must explain why the applicable law applies to the facts at hand and requires relief.

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§5.99 (iii) Citations to Evidence

All factual assertions in the memorandum should be supported by a citation to evidence, such as the verified writ petition (*e.g.,* Pet. p. 10, ¶20), an administrative record (*e.g.,* Rec. at 5), hearing transcript (*e.g.,* 9-1-07 Hrg. Tr. at 5:3-10), or a supporting declaration (*e.g.,* Smith Decl., p. 7, ¶5; Smith Decl., Exh. A at 5). If support exists in multiple places in the record, then citations should be made to all pieces of supporting evidence.

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Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/§5.100 (iv) Use of Quotations

§5.100 (iv) Use of Quotations

Quotations can be appropriate on crucial points and, if carefully used, may be preferable to summarization. Lengthy quotations should be avoided, however, and quoted material must be supported by a specific citation to the source document and any supporting evidence.

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d. Additional Papers

§5.101 (1) Declarations

Depending on the nature of the writ proceeding, the petitioner may submit evidence in support of the petition by way of declaration and exhibits. Any such declaration must be based on personal knowledge and meet other evidentiary rules. See *Star Motor Imports, Inc. v Superior Court* (1979) 88 CA3d 201, 204, 151 CR 721 (declaration made on information and belief is hearsay and does not establish evidentiary facts in petition). Exhibits should be authenticated.

On preparing the record in a superior court writ proceeding, see chap 7.

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§5.102 (2) Administrative Record

Many writ cases arise from proceedings that generate a record. The record may consist entirely of documents, or it also may include a transcript of an administrative hearing. See §§7.6-7.13. If there is such a record, it almost always must be lodged with the superior court before the hearing on the merits. See §7.25.

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Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/§5.103 (3) Proposed Order/Judgment

§5.103 (3) Proposed Order/Judgment

Court rules require the moving party to submit a proposed order and judgment. Cal Rules of Ct 3.1113(m).

PRACTICE TIP: The proposed order and judgment can aid the judge by showing exactly what the court is being asked to order and by requiring only a signature, without the need for further drafting time or delay. The judge also can sign the proposed order and judgment with confidence that adversaries served in advance had the chance to raise any arguments about form and content. The petitioner must make certain that there is no substantive variance between the relief requested in the petition and that in the proposed order and judgment. Preparing a proposed order and judgment at the outset also is useful for counsel as a means of focusing the motion papers on precisely what is being requested.

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Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/§5.104 e. Service and Filing of Motion and Supporting Documents

§5.104 e. Service and Filing of Motion and Supporting Documents

Because the writ petition has already been filed and served, and the respondent and any real party in interest have already appeared, the notice of motion and other moving papers are served and filed according to CCP §§1003-1020.

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Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/§5.105 (1) Whom to Serve

§5.105 (1) Whom to Serve

All parties to the action must be served with a copy of the moving papers. See CCP §§1010-1020.

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§5.106 (2) When to Serve

The petitioner must give at least 16 court days' notice of the motion for issuance of a writ, plus additional time if the notice is mailed, unless the time has been shortened for good cause by the court. CCP §1005(b). See California Civil Procedure Before Trial §12.65 (4th ed Cal CEB 2004) for the procedures for applying for an order shortening time. The parties may want, however, to agree on a briefing schedule that allows more time than otherwise is provided by the rules of court. This is frequently the case in writ proceedings of any complexity or in those involving a significant evidentiary showing or a sizeable record. The court likely will approve a stipulated briefing schedule, particularly if it allows ample time for the court to prepare for the hearing after the reply memorandum is filed.

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§5.107 (3) Where and When to File Papers

The originals of the motion papers, with appropriate proofs of service, are filed either in the court clerk's office (see Cal Rules of Ct 3.1302(a)) or in a particular department specified by the court's local rules. Counsel also should submit copies for file endorsement to ensure that the petitioner has an accurate record of the document filing dates.

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§5.108 D. When Using Alternative Writ Procedure

When the petitioner prosecutes a writ proceeding using the alternative writ procedure, the petitioner must, at the outset of the proceeding, file not only the writ petition but several other documents as well. For a chronology of a writ proceeding using the alternative writ procedure, see §5.15.

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1. Preparing the Papers

§5.109 a. Writ Petition

As with the noticed motion procedure (see §5.76), the writ proceeding begins with the filing of the writ petition. On drafting the writ petition, see §§5.20-5.70. When the alternative writ procedure is used, the petition must include allegations supporting and requesting issuance of an alternative writ.

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§5.110 b. Supporting Memorandum

In addition to filing the writ petition, a petitioner using the alternative writ procedure also should file a memorandum in support of the petition and application for an alternative writ. No statute or rule expressly requires a supporting memorandum. This is conventional practice, however, and it is expected by the courts, for good reason:

- In substance, the petition is a complaint and does not contain legal arguments and authorities. It therefore is important to include a supporting memorandum setting forth the legal arguments and authorities that support the requested writ relief.
- Frequently, the memorandum submitted in conjunction with the writ petition (when the petitioner uses the alternative writ procedure) is considered the opening brief on the merits of the petition. If, as is likely, the court issues an alternative writ and sets a hearing date, the court also may set a briefing schedule, with the respondent and any real party in interest filing both a return and an opposing memorandum and the petitioner closing with a reply memorandum. See §§9.6-9.10.
- Although there is no specific statutory requirement that the petition be accompanied by a supporting memorandum, there is a specific rule that a notice of motion *must* be accompanied by a memorandum. See Cal Rules of Ct 3.1113(a). Because petitions for writs are covered by the law and motion superior court rules (see Cal Rules of Ct 3.1103(a)(2)), the court will expect a supporting memorandum.
- A writ petition filed in the court of appeal or supreme court must be accompanied by a supporting memorandum (see Cal Rules of Ct 8.486(a)(5)), so by analogy a writ petition in superior court should be supported by a memorandum.
- Local rules may require a supporting memorandum.

For an example of a memorandum in support of an application for an alternative writ, see form in §13.3.

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§5.111 c. Exhibits/Declarations

Exhibits may be attached to the writ petition. However, in most cases, any supporting evidentiary material (*e.g.,* an administrative record or supporting declarations and exhibits) should be filed separately. See §§5.101-5.102.

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Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/§5.112 d. Proposed Alternative Writ

§5.112 d. Proposed Alternative Writ

The petitioner also should submit a proposed alternative writ compelling the respondent to do the act required to be performed (mandate) or ordering the respondent to desist or refrain from performing a specified act (prohibition) immediately or by a specified date, or to appear before the court on a specified date to show cause why the respondent should not be so ordered. CCP §§1087, 1104.

JUDICIAL PERSPECTIVE: Sometimes lawyers submit proposed alternative writs with the writ petition; other times they submit an order to show cause. The mandate and prohibition statutes specifically provide only for issuance of an alternative writ, although they do include order-to-show-cause language. Most judges will sign either one. If the respondent's or real party in interest's counsel is concerned that the petitioner will use an order to show cause to suggest to third persons or to the public that the court has made a preliminary determination against his or her client, counsel should consider asking the court to modify the language or to use an alternative writ.

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2. Filing and Service Procedures

§5.113 a. Use of Ex Parte Application

In nearly all instances in which the alternative writ procedure is used, the petitioner begins the writ proceeding by filing an ex parte application for issuance of an alternative writ. See CCP §1088 (application for writ may be made without notice, but in such case court can issue only alternative writ). In fact, many courts mandate compliance with ex parte procedures (see Cal Rules of Ct 3.1200-3.1207) before issuing an alternative writ. See, *e.g.*, Los Angeles Ct R 9.5(e)(2). On ex parte applications generally, see California Civil Procedure Before Trial, chap 13 (4th ed Cal CEB 2004).

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§5.114 (1) Contents of Ex Parte Application

An ex parte application for issuance of an alternative writ must (Cal Rules of Ct 3.1200-3.1207):

- Notify all parties of the application at least by 10 a.m. on the court day before the appearance, absent exceptional circumstances (Cal Rules of Ct 3.1203(a));
- Be in writing and include (Cal Rules of Ct 3.1201):
- The case caption;
- The relief requested;
- A declaration in support of the application making an affirmative factual showing by competent testimony based on personal knowledge of irreparable harm, immediate danger, or any other statutory basis for granting relief ex parte (see Cal Rules of Ct 3.1202(c));
- A declaration based on personal knowledge as to the giving of notice (see Cal Rules of Ct 3.1204);
- A supporting memorandum; and
- A proposed order;
- State (Cal Rules of Ct 3.1202):
- The name, address, and telephone number of each party or the party's attorney; and
- Whether a previous application has been made of the same character or for the same relief, and the court's disposition of that previous application.

PRACTICE TIP: The petitioner should check local rules to see whether the court has more specific requirements for ex parte applications.

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§5.115 (2) Service of Ex Parte Application

The petitioner must serve the ex parte application and any other papers (*e.g.*, the petition, the supporting memorandum, or the proposed alternative writ) on all opposing parties at the first reasonable opportunity, *i.e.,* before the hearing begins. Cal Rules of Ct 3.1206; see also CCP §1107. Absent exceptional circumstances, the hearing will not be held unless such service has been made. Cal Rules of Ct 3.1206. Check local rules to see whether the court has more specific notification and service requirements for ex parte applications.

NOTE: Because Cal Rules of Ct 3.1206 requires that, in most cases, the petitioner give reasonable notice, each county may impose its own definition of "reasonable." For example, in Los Angeles County, the petitioner must serve the application at least 5 days before the ex parte hearing, unless good cause is shown. Los Angeles Ct R 9.5(e)(1).

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Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/§5.116 (3) Personal Appearance

§5.116 (3) Personal Appearance

The petitioner, or counsel for the petitioner, must appear at the ex parte hearing except in the case of (Cal Rules of Ct 3.1207):

- Applications to file memorandum in excess of the page limit;
- Applications for extensions of time to serve pleadings;
- Setting hearing dates on alternative writs and orders to show cause; or
- Stipulations by the parties or other court orders.

The respondent and any real party in interest may want to appear, if only to urge the court to establish reasonable dates for the return, briefing schedule, and hearing on the merits of the petition.

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§5.117 (4) Following Local Procedures

Check local rules and policies concerning ex parte procedures, as they vary in each county. For example, a county might allow counsel to file the ex parte application with the clerk and then present it to the presiding judge in chambers with the proposed alternative writ. If the alternative writ issues, the petitioner serves a copy of the writ, along with the petition and any other supporting documents, on the respondent and any real party in interest. In some cases, the respondent and any real party in interest may appear at the ex parte hearing. They may oppose issuance of the alternative writ, or more likely, may urge the court to establish reasonable dates for the return and hearing on the merits as well as a briefing schedule.

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§5.118 b. Court Action on Ex Parte Application

When presented with an ex parte application for issuance of an alternative writ, the court has several options. It can:

- Issue the alternative writ;
- Deny the application; or
- Deny the application and also dismiss the petition, with or without leave to amend.

On the respondent's and any real party in interest's responsive pleadings and papers, see §§8.21-8.38. On the petitioner's reply papers, see §§8.57-8.63. On the hearing and the court's action on the merits of a petition, see §§9.21-9.48.

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§5.119 V. COMBINING WRIT PETITION AND COMPLAINT

In some situations, a writ may not provide full and complete relief. In such case, the petitioner can file a combined initial pleading—a petition *and* a complaint for damages, declaratory relief, or injunctive relief, as may be appropriate. See *Morehart v County of Santa Barbara* (1994) 7 C4th 725, 735, 29 CR2d 804; *California Sch. Bds. Ass'n v State* (2009) 171 CA4th 1183, 90 CR3d 501 (combined complaint for declaratory relief and writ petition); *County of San Diego v State* (2008) 164 CA4th 580, 79 CR3d 489 (same). The combined pleading can be entitled, *e.g.,* "PETITION FOR WRIT OF MANDATE (CCP §1085) AND COMPLAINT FOR DAMAGES." On declaratory and injunctive relief, see California Civil Procedure Before Trial, chaps 32 (injunctions), 35 (declaratory relief) (4th ed Cal CEB 2004).

PRACTICE TIP: Combining a writ petition with a complaint may have the effect of prolonging the proceedings, *e.g.,* because of additional discovery prompted by the claims in the complaint or because those claims take longer to resolve by summary judgment or trial.

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§5.120 VI. CONSIDERING RESTRICTIONS OF TRIAL COURT DELAY REDUCTION ACT

The Trial Court Delay Reduction Act (Govt C §§68600-68620) applies to all actions and proceedings in the superior courts filed on and after July 1, 1992, except for juvenile, probate, and domestic relations cases. Govt C §68605.5. The Judicial Council has established standards for timely disposition to reduce delay in the superior courts (Govt C §68603), and these standards generally require a case to be resolved within 1 year (see Cal Rules of Ct 3.710-3.715). As a practical matter, these provisions have few consequences for writ proceedings because writ petitions often seek immediate or expedited relief, and it would be an extremely rare case in which the merits of a petition were not considered within 1 year. In addition, some provisions appear to conflict with the writ statutes. Compare Govt C §68616(b) (delay reduction rules may not shorten 30-day time period in which to file responsive pleading) with CCP §1089 (court sets date for return to alternative writ of mandate). The more specific writ statutes should govern writ proceedings, particularly because the flexibility given the courts by these statutes reflects the often urgent nature of writ proceedings.

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VII. COSTS AND ATTORNEY FEES

A. Recovery of Costs

§5.121 1. By Prevailing Party

As in other civil actions, the prevailing party in a superior court writ proceeding is entitled to allowable costs. See CCP §§1095, 1105, 1109 (making CCP §§1032, 1033, and 1033.5 applicable to writ proceedings). See also Cal Rules of Ct 8.493 (prevailing party in appellate court writ proceeding may be awarded costs); *Vasquez v Happy Valley Union Sch. Dist.* (2008) 159 CA4th 969, 987, 72 CR3d 15 (awarding costs to prevailing respondent in petitioner's appeal from denial of writ petition); *Little v Los Angeles County Assessment Appeals Bds.* (2007) 155 CA4th 915, 928, 66 CR3d 401 (same).

On the prevailing party concept, see California Attorney Fee Awards, chap 2 (2d ed Cal CEB 1994). On the prevailing party's entitlement to costs, see California Trial Practice: Civil Procedure During Trial §§27.8-27.18 (3d ed Cal CEB 1995).

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§5.122 2. Costs Allowed

The items of recoverable costs are specified in CCP §1033.5. The most common costs in a writ proceeding are filing fees and fees paid to have documents served. Other allowable costs include copying costs, those incurred during the trial, *e.g.,* jury fees and expenses (if a jury is used), and witness fees (if any are called).

On allowable cost items, see California Trial Practice: Civil Procedure During Trial §§27.67-27.81 (3d ed Cal CEB 1995).

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§5.123 3. Procedure for Claiming Costs

A prevailing party who claims costs must serve and file a verified memorandum of costs within (Cal Rules of Ct 3.1700(a)(1)):

- 15 days after the date of mailing notice of entry of judgment or dismissal by the clerk under CCP §664.5;
- 15 days after the date of serving the written notice of entry of judgment or dismissal; or
- 180 days after entry of judgment, whichever occurs first.

If the cost memorandum is served by mail, the time period for the losing party to seek to strike or tax costs is extended as provided in CCP §1013 (5 calendar days if mailed to and from California, 10 calendar days if mailed to or from outside California, and 20 calendar days if mailed to or from outside United States).

NOTE: The time for filing a cost memorandum may be extended by the parties' agreement, which must be in writing, specify the extended date for service, and be filed with the clerk. In the absence of an agreement, the court may extend the time for serving the cost memorandum for no more than 30 days. Cal Rules of Ct 3.1700(b)(3).

If cost items are expressly authorized by CCP §1033.5 and appear proper on their face, a verified memorandum of costs is prima facie evidence that they were necessarily incurred. *Nelson v Anderson* (1999) 72 CA4th 111, 131, 84 CR2d 753.

For a sample memorandum of costs, see California Trial Practice: Civil Procedure During Trial §27.129 (3d ed Cal CEB 1995).

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B. Award of Attorney Fees

§5.124 1. When Fees Are Recoverable

Attorney fees may be recoverable in a writ proceeding under a statute or contractual attorney fees provision. See *Mejia v City of Los Angeles* (2007) 156 CA4th 151, 157, 67 CR3d 228 (fees awarded to successful petitioner under CEQA statutes); *Zuehlsdorf v Simi Valley Unified Sch. Dist.* (2007) 148 CA4th 249, 255, 55 CR3d 467 (fees awarded under Govt C §800 (authorizing fees for successful challenge to decision by administrative agency if agency acted in arbitrary and capricious manner)).

For further discussion of recoverable attorney fees, see California Trial Practice: Civil Procedure During Trial §§27.96-27.102 (3d ed Cal CEB 1995). On fees recoverable under the private attorney general statute, see California Attorney Fee Awards, chap 4 (2d ed Cal CEB 1994). On attorney fee awards based on contract, see Attorney Fee Awards, chap 6. On attorney fees awarded for administrative proceedings, see Attorney Fee Awards, chap 10.

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2. Procedure for Recovering Attorney Fees

§5.125 a. When to File

A notice of motion to claim attorney fees for services up to and including the rendition of judgment in the superior court must be served and filed within the time for filing a notice of appeal under Cal Rules of Ct 8.104 and 8.108. Cal Rules of Ct 3.1702(b)(1). The parties may extend the time for filing the motion by stipulation or by the court on good cause. Cal Rules of Ct 3.1702(b)(2), (d).

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§5.126 b. What to File

Motions for attorney fees follow the same procedure as other motions. See Cal Rules of Ct 3.1100-3.1370. The prevailing party generally files and serves the fee motion, and the opponent files and serves opposition, with an opportunity for the moving party to file and serve a reply. See Cal Rules of Ct 3.1300(a).

The fee motion should include:

- A notice of motion, including the date, time, place of motion, summary of the grounds for entitlement to fees, and the documents on which the claim is based (see California Attorney Fee Awards, Appendix C (2d ed Cal CEB 1994) for sample form);
- A supporting memorandum discussing the background of the litigation, the grounds for entitlement, and the justification for the amount requested (see Attorney Fee Awards, App D for sample form);
- Declarations from attorneys claiming the fees, including, if appropriate, declarations from other attorneys or experts supporting the fee application (see Attorney Fee Awards, App E for sample form);
- A declaration explaining why the fees claimed are reasonable (see Attorney Fee Awards, App F for sample form); and
- A proposed order awarding reasonable attorney fees, including specific findings on the fee calculation (see Attorney Fee Awards, App I for sample form).

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§5.127 C. Interplay Between Motion for Fees and Costs Bill

When attorney fees are awardable, the party normally will want to claim both attorney fees under the applicable statute, contract, or equitable doctrine, and statutory costs under CCP §1033.5. The prevailing party must file separate documents: (1) a memorandum of costs to claim recoverable costs (see §5.123) and (2) a motion to recover attorney fees (see §§5.125-5.126). The prevailing party must pay attention to the timing and requirements for each type of filing.

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§5.128 VIII. CHECKLIST: PITFALLS TO AVOID

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The petitioner should make sure to:

- Determine whether there is a statutory deadline for filing a petition. See §§5.71-5.74.
- Determine whether there is a real party in interest that must be named and served. See §§5.34-5.35.
- Determine whether there are local rules or unwritten practices governing writ proceedings. See §§5.6-5.8.
- Allege all the essential facts in the petition, including the petitioner's beneficial interest in the proceedings. See §§5.40-5.58.
- Allege why writ relief should be granted, *i.e.,* the legal ground on which writ relief is sought and can be granted. See §§5.49-5.52.
- Identify why there is no other adequate legal remedy. See §§5.53-5.54.
- Include a clear and complete prayer for relief. See §§5.59-5.62.
- Properly verify the writ petition. See §§5.64-5.69.
- Request preparation of an administrative record if the writ petition arises from a proceeding that generated a record. Failure to request the administrative record can be fatal to a petitioner's case. Even a delayed request for preparation of the record may have consequences because in some writ proceedings the respondent is not required to file an answer until 30 days after the record is prepared and served. See CCP §1089.5. On record preparation, see chap 7.
- Prepare an adequate supporting memorandum. See §§5.92-5.100.
- Properly cite to the verified writ petition, administrative record, or other documentary evidence in the supporting memorandum. When confronted with inadequate citations, the court probably will not sift through the evidentiary materials to determine whether support exists for the position asserted. See §5.99.
- Seek a stay if one is necessary. See chap 6.
- Factually justify a stay request. See §5.58; chap 6.

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6

Requesting a Stay in a Superior Court Writ Proceeding

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I. SCOPE OF CHAPTER §6.1

II. GENERAL CONSIDERATIONS
- A. Two Methods for Staying Challenged Action or Decision §6.2
- B. Determining When Stay or Injunction Is Necessary or Appropriate §6.3
  - 1. Type of Writ Relief Sought May Be Determinative of Need for Stay §6.4
  - 2. Court Makes Preliminary Decision on Merits of Petition §6.5
- C. Factors to Consider When Deciding Between Stay or Preliminary Injunction §6.6

III. STAY APPLICATION
- A. Applying for Stay
  - 1. Application Can Be Part of Writ Petition or Separate Document §6.7
  - 2. Length of Stay §6.8
  - 3. Preparation of Documents
    - a. When Stay Application Is Part of Writ Petition §6.9
    - b. When Stay Application Is Separate Document §6.10
      - (1) Application §6.11
      - (2) Supporting Memorandum
        - (a) Contents §6.12
        - (b) Standard of Review §6.13
      - (3) Record §6.14
      - (4) Supporting Declarations §6.15
      - (5) Proposed Order §6.16
  - 4. Filing Documents §6.17
- B. Opposing Stay Application
  - 1. Entering Stipulation if No Opposition §6.18
  - 2. Filing Written Opposition if Time Permits §6.19
  - 3. Requesting Undertaking
    - a. Court Has Discretion to Require Undertaking §6.20
    - b. Court Has Discretion to Set Amount of Undertaking §6.21
- C. Superior Court Action on Stay Application
  - 1. Stay Hearing
    - a. Noticed Motion Procedure §6.22
    - b. Ex Parte Procedure §6.23
  - 2. Grant or Denial of Stay Request
    - a. Decision Is Within Court's Discretion §6.24
    - b. When Stay Application Is Granted §6.25
    - c. When Stay Application Is Denied §6.26
- D. Appellate Relief §6.27
- E. Modifying or Dissolving a Stay §6.28

IV. TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION
- A. Seeking Stay Through Preliminary Injunctive Relief §6.29
- B. Required Showing §6.30
- C. Temporary Restraining Order
  - 1. Description and Purpose §6.31
  - 2. Motion Papers Must Include Copy of Verified Writ Petition §6.32
  - 3. Court Has Discretion to Require Bond or Undertaking §6.33
  - 4. If Temporary Restraining Order Application Is Denied §6.34
  - 5. If Temporary Restraining Order Application Is Granted §6.35
- D. Motion for Preliminary Injunction

1. Criteria for Issuance §6.36
2. Undertaking (Bond) Requirement
    a. When Required §6.37
    b. Amount of Undertaking (Bond) §6.38

V. CHECKLIST: OBTAINING STAY ORDER §6.39

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Source: Civil Litigation/California Civil Writ Practice/6 Requesting a Stay in a Superior Court Writ Proceeding/§6.1 I. SCOPE OF CHAPTER

§6.1 I. SCOPE OF CHAPTER

This chapter discusses staying a challenged action or decision while a writ petition is pending in the superior court.

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II. GENERAL CONSIDERATIONS

§6.2 A. Two Methods for Staying Challenged Action or Decision

Neither the writ statutes nor the rules of court address the procedures for staying a challenged action or decision during the pendency of a superior court writ proceeding. As a result, and like other areas of superior court writ practice, the courts vary in how they handle stay requests. There are generally two accepted ways to seek a stay, by:

- Filing an application for a stay (see §§6.7-6.17); or
- Seeking a temporary restraining order or preliminary injunction (see §§6.29-6.38).

NOTE: This chapter does not address stays in administrative mandamus proceedings under CCP §1094.5(g)-(h). On staying an administrative adjudicatory decision, see California Administrative Mandamus §§11.3-11.27 (3d ed Cal CEB 2003). On administrative mandamus, see chap 3.

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Source: Civil Litigation/California Civil Writ Practice/6 Requesting a Stay in a Superior Court Writ Proceeding/§6.3 B. Determining When Stay or Injunction Is Necessary or Appropriate

§6.3 B. Determining When Stay or Injunction Is Necessary or Appropriate

A petitioner should seek a stay (by application or injunctive procedures) whenever the petitioner's interests are likely to be adversely and irreparably affected before the superior court can act on the writ petition.

PRACTICE TIP: A petitioner may avoid having to seek a stay from the superior court by first discussing the issue with the respondent and/or real party in interest. The respondent or real party may voluntarily agree to refrain from acting or enforcing a decision before the superior court rules on the writ petition, particularly if the petitioner agrees to bring the writ petition on for hearing within a relatively short time period.

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§6.4 1. Type of Writ Relief Sought May Be Determinative of Need for Stay

The need for a stay will be determined in part by the type of writ sought:

- **Alternative writ of mandate.** An alternative writ of mandate by its nature does not act as a stay. Accordingly, a petitioner will need a stay to halt the challenged action or decision. CCP §§1085, 1087. On alternative writs, see §§5.15-5.18.
- **Alternative writ of prohibition.** An alternative writ of prohibition, in contrast, does act as a stay. CCP §1104; see §4.2. In rare cases, however, a petitioner may need to seek a stay to clarify the action the respondent or real party in interest must stop.
- **Peremptory writ.** When a petitioner seeks only a peremptory writ (which is usually done through the noticed motion procedure; see §5.19), the petitioner may need a stay until the court acts on the merits of the writ petition.
- **Writ of review (certiorari).** A writ of review (certiorari) ordinarily provides for a stay (CCP §1071), although the court has discretion to omit it (CCP §1072).

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§6.5 2. Court Makes Preliminary Decision on Merits of Petition

When a superior court considers a stay request, it makes a preliminary, albeit nonbinding, decision on the merits of the writ petition. Thus, before seeking a stay (by way of application or injunctive procedures), a petitioner must consider the likelihood of success and make certain the moving papers are well prepared and amply supported. The court's first take on the case will be based on these papers and that impression could affect the court's later view of the case when it rules on the merits of the writ petition.

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§6.6 C. Factors to Consider When Deciding Between Stay or Preliminary Injunction

The principal factor in deciding whether to seek a stay by way of application or injunctive procedures is the particular preference of the superior court. Compare, *e.g.*, Sacramento County Superior Court Guide to the Procedures for Prosecuting Petitions for Prerogative Writs, p. 5 (instructing petitioners to follow temporary restraining order (TRO)/preliminary injunction procedures when seeking stay in traditional mandate proceedings) (see copy in App B) and Los Angeles Superior Court Local Rules 9.5(d) (indicating "stay or other temporary order" in writ proceedings may be obtained by ex parte procedures). If the superior court in which the petition will be filed does not have any published rules or guidelines on seeking stays in writ proceedings, the petitioner should check with the court clerk to determine whether the court has a procedural preference or there is a conventional practice.

If there is no required or standard practice for seeking a stay in a writ proceeding, the urgency of the situation may weigh in favor of using injunctive procedures (TRO followed by preliminary injunction). However, if the superior court will entertain a stay application on its ex parte calendar, there is no difference in the utility of application or injunctive procedures.

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III. STAY APPLICATION

A. Applying for Stay

§6.7 1. Application Can Be Part of Writ Petition or Separate Document

In some courts, a petitioner can seek a stay of the challenged action or decision by way of application. A stay application can be made in the writ petition itself or separately. The petitioner should check local rules and with the court clerk to determine if the court has a preference. However, in the absence of either a separate stay application or an application for an alternative writ bringing the petition to the attention of the court, the courts will simply file the writ petition.

PRACTICE TIP: A separate stay application is also helpful to the court because it focuses specifically and succinctly on why a stay is appropriate and necessary in the particular case.

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§6.8 2. Length of Stay

The courts generally dislike granting extended stays, especially if there is a risk of harm to the respondent or real party in interest. Thus, when seeking a stay, the petitioner should also urge the court to set a briefing schedule and hearing date on the petition that is reasonable under the circumstances, taking into consideration the size of the record, the date it will be prepared, and the amount of time the parties will need to review it, and then prepare the briefing in support of and in opposition to the petition. In addition, once a stay is in place, the court may be reluctant to grant a continuance of the hearing date, particularly if the respondent or real party in interest objects.

PRACTICE TIP: Depending on the circumstances, the petitioner may be able to negotiate terms for a stay that protect the petitioner while permitting certain activities to occur in the intervening period before a decision on the writ. The respondent or real party in interest may stipulate to a stay in exchange for specific protections or accommodations from the petitioner.

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3. Preparation of Documents

§6.9 a. When Stay Application Is Part of Writ Petition

When a stay is requested in the petition, the petition should:

- So state on the caption page (*e.g.*, "Petition for Writ of Mandate and Application for Stay");
- Contain all the necessary factual allegations for a stay in the body of the petition (*i.e.*, allege why a stay is necessary and appropriate); and
- Include a stay request in the prayer for relief.

Simply including the stay request in the writ petition, however, will not bring it before the court unless the petitioner is making the request in conjunction with an application for issuance of an alternative writ. See §§5.15-5.18. The petitioner should file a supporting memorandum and any necessary declarations supporting a stay as part of the application for an alternative writ. See §§6.12, 6.15. The petitioner should also lodge two orders, one pertaining to the request for an alternative writ and the other pertaining to the request for a stay, because:

- The court may grant the alternative writ but deny the request for a stay; and
- Speed is of the essence in ruling on a stay application, and the court may grant the stay immediately but wait for preliminary opposition before deciding whether to issue an alternative writ (although in most cases an alternative writ is sought ex parte). On opposition to application for issuance of alternative writ, see §§8.21-8.31.

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§6.10 b. When Stay Application Is Separate Document

A stay application filed as a separate document is in essence a motion. See Cal Rules of Ct 3.1103(a)(1) (motion includes "application before trial for an order"). Thus, the California Rules of Court relating to law and motion proceedings (Cal Rules of Ct 3.1100-3.1370) apply to stay applications. Because stay requests are generally time sensitive, they are usually heard on the court's ex parte calendar. See §6.23. A petitioner that cannot establish the grounds necessary to justify an ex parte stay order may seek a stay as a regularly noticed motion. However, it is likely that if the petitioner cannot demonstrate the urgency necessary to place the matter on the court's ex parte calendar, the petitioner will be unable to make the showing necessary to support a stay.

PRACTICE TIP: A petitioner should file a stay request promptly because the passage of time weakens the argument that harm will result without a stay.

On applying for an order ex parte, see California Civil Procedure Before Trial, chap 13 (4th ed Cal CEB 2004).

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§6.11 (1) Application

The stay application should be entitled "Request [or Application] for Stay of [*e.g.*, Name of Respondent]'s Decision." The application is similar to a notice of motion and motion: It identifies the parties and the nature, extent, and duration of the relief requested; sets out the reasons for the stay; and concludes with a prayer asking for the stay.

If the petitioner requests the stay ex parte, then "Ex Parte" should appear in the title, and the application must explain the urgency for the stay. California Rules of Court 3.1200-3.1207 detail the documents and information that must be included in an ex parte application (*e.g.*, a declaration describing the notice given to the other party or the reason for the lack of notice). In most cases, the petitioner should seek an ex parte order shortening time to hear the stay request.

PRACTICE TIP: Before filing an ex parte stay application, counsel should be sure to check the court's local rules for any additional requirements.

On applying for an order ex parte, see California Civil Procedure Before Trial, chap 13 (4th ed Cal CEB 2004).

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(2) Supporting Memorandum

§6.12 (a) Contents

The memorandum supporting a stay application must establish the necessity for the stay. It should include discussion of the facts, the action or decision being challenged, why that action or decision is invalid or an abuse of discretion, and most importantly, why a stay should issue. See Cal Rules of Ct 3.1113 (requirements for memorandum). The memorandum should refer to specific portions of the record, if available.

On the preparation of a memorandum generally, see California Civil Procedure Before Trial §§12.30-12.42 (4th ed Cal CEB 2004).

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§6.13 (b) Standard of Review

The only specific criteria governing stays in writ proceedings are set out in CCP §1094.5(g)-(h), governing stays in administrative mandamus proceedings. Compare CCP §1072 (specifying stay is included in writ of review unless court in its sound discretion orders otherwise). See also CCP §1072 (if appeal is taken from judgment granting writ relief, superior court may order that judgment is not stayed on showing that petitioner will suffer irreparable injury in business or reputation if execution is stayed).

Some adjudicatory administrative decisions are reviewed by way of traditional mandamus under CCP §1085, rather than administrative mandamus under CCP §1094.5, *e.g.,* when a hearing is not "required by law" (even if a hearing was held). See §2.33. In such cases, there is a good argument that the superior courts should be guided by the stay criteria in CCP §1094.5(g)-(h), because that criteria was specifically designed to address adjudicatory, administrative decisions and the policy reasons underlying those criteria apply whether the adjudicatory administrative decision is challenged in a §1085 or §1094.5 writ proceeding.

In other contexts, the superior courts will, as a practical matter, apply the weighing approach employed in deciding whether to issue a temporary restraining order and preliminary injunction. Thus, the court will weigh the extent to which there has been a colorable showing on the merits of the petition and the claimed injury if a stay does not issue. See §6.30.

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§6.14 (3) Record

The verified allegations in the writ petition will be essential to apprising the superior court of the operative facts. In addition, the petitioner should submit critical portions of the record, such as the challenged decision, any findings, key portions of hearing transcripts, and any other significant documents as attachments to counsel's declaration. (If the writ proceeding is based on an administrative record, the record often will not yet be prepared when the writ petition is filed and a stay is sought).

PRACTICE TIP: The petitioner should keep in mind that the objective is to make at least a colorable showing that the writ petition has merit.

On preparing the record, see §§7.5-7.17.

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Source: Civil Litigation/California Civil Writ Practice/6 Requesting a Stay in a Superior Court Writ Proceeding/§6.15 (4) Supporting Declarations

§6.15 (4) Supporting Declarations

Because the superior court will weigh the likelihood and extent of harm in deciding whether to grant a stay request, the petitioner (or other appropriate individual) must submit a declaration explaining the necessity for a stay pending the court's decision on the merits of the writ petition. The declaration should be based on personal knowledge (as opposed to information and belief) and should include:

- Specific facts describing the situation and the need to maintain the status quo;
- The reason a stay is required to maintain that status quo; and
- The harm the petitioner will suffer if the court denies the stay request.

If the petitioner can offer any accommodations to minimize harm from the stay on the respondent or real party in interest, the declaration should include an explanation of these points as well.

PRACTICE TIP: If the application requests the stay ex parte, the declaration should show that the petitioner gave proper notice of an ex parte hearing as required by Cal Rules of Ct 3.1204(b).

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§6.16 (5) Proposed Order

The petitioner should submit a proposed order granting the stay request and staying the challenged decision or action either for a specific time or until the court disposes of the writ petition on the merits. It should describe the evidence considered by the court, the basis for issuance of the stay, the specific actions being stayed, who is subject to the stay, and its duration.

PRACTICE TIP: Some courts prefer that orders be prepared without the party's name in the upper left-hand corner. The petitioner should check with the clerk to determine the court's preference.

On preparing a proposed order, see California Civil Procedure Before Trial §12.107 (4th ed Cal CEB 2004).

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§6.17 4. Filing Documents

In most counties, the petitioner files the writ petition and stay application in the clerk's office and then takes them to the assigned department for a ruling on the stay application by the judge. In other counties, the petition is filed in the clerk's office, but ex parte papers (such as an ex parte application for a stay) are filed directly in the assigned department. Some counties require ex parte applications to be scheduled with the clerk (see San Francisco Ct R 9.0(B) (ex parte hearing must be scheduled with clerk at least 24 hours before proposed hearing date)) while others require ex parte applications to be submitted to the clerk before the hearing. Counsel should consult any applicable local rules and, if there are none, call the court clerk.

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B. Opposing Stay Application

§6.18 1. Entering Stipulation if No Opposition

In some cases, the respondent or real party in interest may not oppose a stay, particularly if the petitioner agrees to prosecute the writ petition expeditiously. In such cases, the parties can enter into a written stipulation, eliminating the need to seek a stay from the court. Such a stipulation should usually be filed with the court and transformed into an order of the court by including "IT IS SO ORDERED" at the end, with date and signature lines for the judge. Enforcement of the stipulated order is easier and quicker than enforcement of a simple stipulation, as the latter may be enforceable only in a separate action for breach of contract.

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§6.19 2. Filing Written Opposition if Time Permits

If the respondent or real party in interest opposes a stay of the challenged action or decision, the respondent or real party in interest should file written opposition, if time permits, and appear at the hearing on the stay request. The hearing on the stay request may take place in conjunction with an application for issuance of an alternative writ.

If the writ petition is plainly frivolous or suffers from an obvious procedural defect, the opposition should point that out to the court. Otherwise, the opposition should focus on why there is no compelling reason for a stay, *e.g.*, the petitioner will not suffer any irreparable harm in the absence of a stay.

PRACTICE TIP: Opposition to a stay request is not the vehicle for making a full-blown attack on the merits of the writ petition, although respondent or real party in interest should say enough about the merits to let the court know that there will be serious opposition to the petition.

The opposition should include a supporting memorandum, competent declarations establishing the prejudice that the respondent or real party in interest will suffer if the court grants a stay, and, if the record has not been prepared, copies of any relevant documents that the petitioner failed to include in the application.

On opposing motions, see California Civil Procedure Before Trial §§12.78-12.94 (motions in general), 32.57-32.58, 32.66-32.74 (requests for temporary restraining order or preliminary injunction) (4th ed Cal CEB 2004).

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3. Requesting Undertaking

§6.20 a. Court Has Discretion to Require Undertaking

In addition to opposing a stay request (see §6.19), a respondent or real party in interest can and typically should ask the superior court to require an undertaking if the stay is granted. The request should be accompanied by competent evidence of the degree of potential harm the stay may cause.

There is no statutory requirement for an undertaking (also called a bond; see CCP §995.210) as a condition for issuance of a stay, but the court may in its discretion apply the statutory provisions concerning bonds (CCP §§995.010-996.560) to writ proceedings. See CCP §1109 (applying Part 2 of Code of Civil Procedure (CCP §§307-1062.20) to writ proceedings).

NOTE: Specified public agencies and officers are exempt from any undertaking requirement. See CCP §995.220.

On the requirements for undertakings, see California Civil Appellate Practice §§6.21-6.62 (3d ed Cal CEB 1996).

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§6.21 b. Court Has Discretion to Set Amount of Undertaking

The court has discretion to set the amount of any undertaking, but the amount should be sufficient to protect the respondent or real party in interest from the economic consequences of a stay if the court upholds the challenged decision. For example, the court may stay a city's decision to approve a development project on the condition the petitioner post an undertaking sufficient to cover the costs of lost contracts, land carry, and any other costs caused by the stay in development activities. If the court ultimately upholds the decision, this undertaking is available to compensate the respondent or real party in interest for the costs incurred because of the stay.

PRACTICE TIP: When economically appropriate, a party opposing a stay application should ask that any stay be conditioned on the petitioner's posting an undertaking. Petitioner should support the request with a competent declaration specifying the likely costs of staying the decision. The anticipated costs should include attorney fees.

If the potential harm of the stay is great and the bond is commensurately high, the petitioner may be unable to post the bond. This reality should motivate the opponent to make a complete showing in support of a bond. The possibility that recovery may be limited to the amount of the bond, even if actual damages from the stay are higher, is another reason to seek to obtain as high a bond as possible.

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C. Superior Court Action on Stay Application

1. Stay Hearing

§6.22 a. Noticed Motion Procedure

Because stay requests are generally time sensitive, they do not usually proceed via the regular noticed motion procedure. See Cal Rules of Ct 3.1100-3.1370. However, if the noticed motion procedure is used, the parties must submit their moving, opposition, and reply papers in advance of the hearing, which will be held in open court, with an opportunity for oral argument and a court reporter present to transcribe the hearing.

On noticed motion hearing procedures, see California Civil Procedure Before Trial, chap 12 (4th ed Cal CEB 2004).

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§6.23 b. Ex Parte Procedure

Stay applications usually proceed via the court's ex parte procedures, either as a stand-alone application or in conjunction with an application for issuance of an alternative writ. See §5.39.

PRACTICE TIP: Courts set ex parte hours at different times and days, so counsel should check the local rules and with the court clerk. See, *e.g.*, Los Angeles Ct R 9.9(a) (8:30 a.m., Monday through Friday); San Francisco Ct R 9.0(A) (11 a.m., Monday through Friday). To appear telephonically, counsel must either place the phrase "Telephone Appearance" below the title of the moving or opposing papers or notify the court and all other parties of counsel's intent to appear telephonically at least 3 court days before the hearing. Cal Rules of Ct 3.670(g)(1). Note that local rules may require that counsel use a particular vendor for telephone appearances. Cal Rules of Ct 3.670(*l*). In addition, the vendor may require a minimum amount of notice to set up the conference call.

Superior courts differ in how they handle ex parte applications. Some judges consider and rule on ex parte applications in chambers without counsel present, in which case the clerk will advise the parties of the court's decision. Some judges hear argument from the parties and rule on the application in chambers. Still others review the ex parte papers in chambers and then hold a hearing in open court with or without a court reporter present. Counsel should consult any applicable local rules and, if there are none, call the court clerk to determine the court's practice.

PRACTICE TIP: If a party wants a record of the stay proceeding, counsel should notify the court clerk before the hearing to make certain that a court reporter is available. See, *e.g.*, San Luis Obispo Ct R 7.17(b) (party should request court reporter no earlier than 48 hours and no later than 24 hours before hearing; court reporting fees to be paid before hearing as well). If the court's practice is to rule in chambers, counsel can request that a court reporter be present or that the ruling be given from the bench so there is at least a record of the court's action. Counsel should think carefully before making this request because it is highly unusual for appellate courts to reverse a superior court's decision on a stay request. See §6.27.

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2. Grant or Denial of Stay Request

§6.24 a. Decision Is Within Court's Discretion

The grant or denial of a stay application is within the sound discretion of the court. See *Medical Bd. v Superior Court* (1991) 227 CA3d 1458, 1462, 278 CR 247; *Venice Canals Resident Home Owners Ass'n v Superior Court* (1977) 72 CA3d 675, 679, 140 CR 361; *Ciro's of San Francisco, Inc. v State Bd. of Equalization* (1956) 143 CA2d 99, 299 P2d 985. The court will weigh the extent to which there has been a colorable showing on the merits of the petition and the claimed injury if a stay does not issue. See §6.13.

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§6.25 b. When Stay Application Is Granted

When the court grants a stay application, the petitioner should personally serve the stay order on the respondent and any real party in interest. Some administrative agencies authorize their counsel to accept service on their behalf. In such case, the petitioner can serve the order on counsel at the proceeding. This is also true if the court issues the stay with an alternative writ. In conjunction with granting the stay application, some courts will also set a briefing schedule and a hearing date on the return to the writ (if an alternative writ is issued) or on the merits of the writ petition (if the petitioner intends to proceed by noticed motion for issuance of a peremptory writ).

On issuance of an alternative writ, see §§5.15-5.18. On use of the noticed motion procedure for issuance of a peremptory writ, see §§5.10-5.14.

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§6.26 c. When Stay Application Is Denied

When the court denies a stay application, the court will issue a minute order or ask the respondent to prepare an order. At the end of the stay hearing, many courts will set a briefing schedule and a hearing date on the merits of the writ petition. Sometimes the court will request that the parties confer and submit a stipulated briefing schedule. On issuance of an alternative writ setting return and hearing dates, see §5.15. On use of the noticed motion procedure for issuance of a peremptory writ, see §5.19.

PRACTICE TIP: The denial of a stay request is not a ruling on the merits of the writ petition, and the petitioner may still ultimately prevail.

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§6.27 D. Appellate Relief

The grant or denial of a stay is not an appealable order. CCP §904.1. Rather, appellate relief must be sought by filing a petition for a writ of mandate under CCP §1085 in the court of appeal. However, because the discretion accorded a superior court in granting or denying a stay application is very broad (see §6.24), a reviewing court only very rarely will overrule the lower court's ruling. *Medical Bd. v Superior Court* (1991) 227 CA3d 1458, 1462, 278 CR 247; *Board of Med. Quality Assur. v Superior Court* (1980) 114 CA3d 272, 275, 170 CR 468.

On filing a writ petition in the court of appeal, see chap 18.

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§6.28 E. Modifying or Dissolving a Stay

When a court has granted a stay, it may dissolve or modify the stay at any time on the motion of the respondent or real party in interest, or on its own motion. *Ciro's of San Francisco, Inc. v State Bd. of Equalization* (1956) 143 CA2d 99, 299 P2d 985; *Morton v Superior Court* (1953) 119 CA2d 665, 260 P2d 215. Possible grounds include the petitioner's failure to diligently prosecute the petition.

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IV. TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

§6.29 A. Seeking Stay Through Preliminary Injunctive Relief

Local rules may require or suggest that a petitioner seek a stay through injunctive procedures, *i.e.*, a temporary restraining order (TRO) and preliminary injunction, rather than through an application for a stay. See, *e.g.*, Sacramento County Superior Court Guide to the Procedures for Prosecuting Petitions for Prerogative Writs, p. 5 (instructing petitioners to follow TRO/preliminary injunction procedures when seeking stay in traditional mandate proceeding) (see copy in App B).

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§6.30 B. Required Showing

The superior court must balance two factors when considering a request for preliminary injunctive relief (either in the form of a temporary restraining order or a preliminary injunction): (1) the likelihood that the plaintiff will prevail on the petition; and (2) the interim harm that the petitioner will face if injunctive relief is denied as compared to the harm that the respondent or real party in interest will face if it is granted. *IT Corp. v County of Imperial* (1983) 35 C3d 63, 69, 196 CR 715. The court uses a sliding scale, so the greater the petitioner's showing on one factor, the less need be shown on the other. *Butt v State* (1992) 4 C4th 668, 678, 15 CR2d 480. Regardless of the balance of harm, however, there always must be some possibility that the petitioner will prevail on the petition to justify preliminary injunctive relief. *Butt v State, supra*.

On equitable considerations and injunctive relief, see California Civil Procedure Before Trial §§32.29-32.35 (4th ed Cal CEB 2004).

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C. Temporary Restraining Order

§6.31 1. Description and Purpose

A temporary restraining order (TRO) is an interim order issued to preserve the status quo pending a hearing on a motion for a preliminary injunction. See CCP §527. A TRO is technically not an injunction, although it has the same force and effect, because it may issue ex parte (see CCP §527(c)-(d)) without requiring a bond or undertaking (except in an action for a claim and delivery of personal property; see CCP §515.010(a)). Generally, a TRO:

- Expires automatically at the end of 15 days or, if good cause is shown, 22 days after its issuance (see CCP §527(d)(1));
- Terminates if the court denies a motion for a preliminary injunction (*International Union of Operating Eng'rs v Superior Court* (1989) 207 CA3d 340, 355, 254 CR 782); or
- Is superseded by issuance of a preliminary injunction (*International Union of Operating Eng'rs v Superior Court, supra*; *Houser v Superior Court* (1932) 121 CA 31, 33, 8 P2d 483).

Whether an order is a TRO or a preliminary injunction is determined by its effect, not its title. *Yellen v Fidelity & Cas. Co.* (1931) 115 CA 434, 436, 1 P2d 1019. If the order states that it is effective "until further order of the court" or "until final judgment on the merits," it is a preliminary injunction and a bond is required regardless of what the order is called. *San Diego Water Co. v Pacific Coast S.S. Co.* (1894) 101 C 216, 218, 35 P 651; *McManus v KPAL Broad. Corp.* (1960) 182 CA2d 558, 562, 6 CR 441.

On the procedures for moving for a temporary restraining order, see California Civil Procedure Before Trial §§32.36-32.59 (4th ed Cal CEB 2004).

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§6.32 2. Motion Papers Must Include Copy of Verified Writ Petition

The judge who will hear the application for a temporary restraining order (TRO) must have a copy of the verified writ petition. If the petitioner files the petition on the same day as the TRO application, he or she must file the petition first, and then present the judge with a file-stamped copy. If the petitioner seeks the TRO in an existing case, the applicant must request that the court make its file available to the judge. See Cal Rules of Ct 3.1150(b).

On the documents that must accompany a motion for a temporary restraining order, see California Civil Procedure Before Trial §§32.37-32.46 (4th ed Cal CEB 2004).

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§6.33 3. Court Has Discretion to Require Bond or Undertaking

Whether to require a bond or undertaking when issuing a temporary restraining order (TRO) is discretionary with the court. *Biasca v Superior Court* (1924) 194 C 366, 367, 228 P 861; *Allen v Pitchess* (1973) 36 CA3d 321, 329, 111 CR 658. If the court orders a bond or undertaking, the TRO does not become effective until the bond or undertaking is given. *Heyman & Co. v Landers* (1859) 12 C 107; *Armstrong v Superior Court* (1916) 173 C 341, 343, 159 P 1176.

NOTE: Courts often do not require a bond or undertaking in connection with the issuance of a TRO, because of its relatively short duration. If a judge orders a bond or undertaking, the judge will look to the amount of damages that may result from issuance of the TRO to determine the amount of the bond or undertaking.

On the bond or undertaking, see California Civil Procedure Before Trial §32.56 (4th ed Cal CEB 2004).

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§6.34 4. If Temporary Restraining Order Application Is Denied

If the court denies the application for a temporary restraining order (TRO), the moving party may still schedule a hearing for a preliminary injunction. In addition, even if it denies the TRO application, the court still may issue an order to show cause why a preliminary injunction should not issue, returnable within 15 days, or 22 days if there is good cause, of the date of the order.

On moving for a preliminary injunction, see §§6.36-6.38.

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§6.35 5. If Temporary Restraining Order Application Is Granted

If the court grants an application for a temporary restraining order (TRO), it must set the hearing on the preliminary injunction within 15 days, or 22 days if there is good cause, of the issuance of the TRO. CCP §527(d)(1). Additionally, within the earlier of 5 days after the court issues the TRO or 2 days before the date of the preliminary injunction hearing, the applicant must serve the opposing party with: a copy of the petition, if it has not previously done so; the order to show cause stating the date, time, and place of the hearing; and all supporting papers. CCP §527(d)(2). If the applicant does not serve these materials in a timely manner, the court must dissolve the TRO. CCP §527(d)(3).

On moving for a preliminary injunction, see §§6.36-6.38.

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D. Motion for Preliminary Injunction

§6.36 1. Criteria for Issuance

A petitioner seeking a preliminary injunction must establish that (1) the petitioner has a reasonable likelihood of success on the merits of the underlying controversy, and (2) the petitioner will suffer harm without preliminary injunctive relief as compared to the harm that the respondent or real party in interest will face if relief is granted. *Cohen v Board of Supervisors* (1985) 40 C3d 277, 286, 219 CR 467; *IT Corp. v County of Imperial* (1983) 35 C3d 63, 69, 196 CR 715. The greater the chance of petitioner's success on the merits, the less severe the harm must be for the injunction to issue, particularly when the requested injunction maintains the status quo. *Butt v State* (1992) 4 C4th 668, 678, 15 CR2d 480; *King v Meese* (1987) 43 C3d 1217, 1228, 240 CR 829. When a governmental agency is the respondent, the petitioner must make a "significant" showing of irreparable harm because "[t]here is a general rule against enjoining public officers or agencies from performing their duties." *Tahoe Keys Prop. Owners' Ass'n v State Water Resources Control Bd.* (1994) 23 CA4th 1459, 1471, 28 CR2d 734.

PRACTICE TIP: The petitioner can use the declarations and supporting memorandum prepared for a temporary restraining order (TRO) application in support of the preliminary injunction, as appropriate. The petitioner should consider, however, supplemental declarations addressing newly discovered facts and background information unavailable at the TRO hearing. A petitioner who wishes to file such supplemental declarations should request permission to do so at the TRO hearing so that the court can set the briefing schedule and hearing date accordingly.

On procedures for obtaining a preliminary injunction, see California Civil Procedure Before Trial §§32.19-32.35, 32.60-32.91 (4th ed Cal CEB 2004).

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2. Undertaking (Bond) Requirement

§6.37 a. When Required

If the court decides that a preliminary injunction should issue, it must require the moving party to file a written undertaking (or bond) to ensure that the applicant will pay any damages that the wrongfully enjoined party sustains because of the injunction, unless excused by CCP §529(b). CCP §529(a). Under certain circumstances, the court may exercise discretion whether it will require an undertaking, *e.g.*, when the moving party is indigent (CCP §995.240), in domestic violence cases (CCP §529(b)(2)), or when the moving party is a public entity or officer described in CCP §995.220 (CCP §529(b)(3)).

On undertaking requirements, see California Civil Procedure Before Trial §§32.92-32.94 (4th ed Cal CEB 2004).

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§6.38 b. Amount of Undertaking (Bond)

The undertaking (or bond) must be sufficient to secure any costs and damages that the respondent or real party in interest may incur as a result of the preliminary injunction if that injunction is later found to have been wrongfully imposed. CCP §529(a). The court may require that the undertaking cover the enjoined party's attorney fees. *Satinover v Dean* (1988) 202 CA3d 1298, 1300, 249 CR 277.

On amount of undertaking, see California Civil Procedure Before Trial §32.96 (4th ed Cal CEB 2004).

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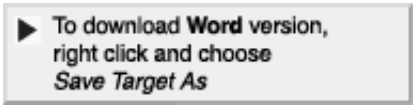
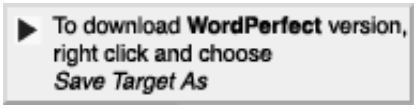
Source: Civil Litigation/California Civil Writ Practice/6 Requesting a Stay in a Superior Court Writ Proceeding/§6.39 V. CHECKLIST: OBTAINING STAY ORDER

§6.39 V. CHECKLIST: OBTAINING STAY ORDER





The following are tasks the petitioner should perform when seeking a stay of the challenged action or decision pending writ review in the superior court:

- Request preparation of the record; obtain estimated date of delivery. It might be necessary to seek a stay before the record can be compiled. If so, counsel should be sure to lodge copies of relevant documents with the stay application or motion for a temporary restraining order (TRO). See §6.14.
- Decide whether to prosecute writ proceeding by noticed motion procedure or alternative writ procedure (see §5.9); check local rules or call the court clerk to determine the court's preference.
- Decide whether to seek a stay by application (see §§6.7-6.17), or preliminary injunction procedures (see §§6.31-6.33 (TRO), §§6.36-6.38 (preliminary injunction)), by first checking local rules or guidelines, calling court clerk to determine any procedural preference or local practice, and then considering timing and other factors.
- Prepare application or request for TRO or preliminary injunction, supporting brief, necessary declarations, and proposed order.
- Check with court regarding filing practices and notice requirements.
- Give notice as required; prepare declaration of notice.
- Prepare copies of writ petition and, if filed separately, stay application; file original and required number of copies with court.
- If disqualification of the judge is desired, consider filing a CCP §170.6 challenge. See California Trial Practice: Civil Procedure During Trial §§6.26-6.78 (3d ed Cal CEB 1995).
- Be prepared to post bond or undertaking if required as a condition of stay or injunction.
- If court grants a stay, TRO, or preliminary injunction, serve order.

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7

The Record in Superior Court Writ Proceedings

David de Jesus

I. SCOPE OF CHAPTER §7.1

II. PURPOSE OF THE RECORD §7.2
- A. Necessity of Sufficient Record §7.3
- B. Statutory Guidance Limited §7.4

III. PREPARING THE RECORD FOR A SUPERIOR COURT WRIT PROCEEDING
- A. Who Prepares the Record §7.5
- B. What Record Includes
  - 1. Record Depends on Type of Petition and Nature of Underlying Proceeding §7.6
  - 2. Include All Relevant Evidence Presented During the Underlying Proceeding §7.7
  - 3. Include Opposing Party's Evidence Presented During Underlying Proceeding §7.8
  - 4. Evidence Not Presented During Underlying Proceeding (Extra-Record Evidence) §7.9
    - a. If Challenging Ministerial or Informal Actions §7.10
    - b. If Challenging Quasi-Legislative Actions §7.11
    - c. If Challenging Adjudicatory Decisions §7.12
  - 5. Record in Pre-Merits Hearings §7.13
- C. Obtaining Record From Decision-Making Body in Underlying Proceeding §7.14
  - 1. When to Request Underlying Record §7.15
  - 2. How to Request Underlying Record §7.16
  - 3. Paying for Preparation of Underlying Record §7.17

IV. FORMAT OF THE RECORD PRESENTED TO THE SUPERIOR COURT
- A. Administrative Record" Versus Documentation Submitted by Way of Exhibits §7.18
  - 1. Appending Supporting Documentation to Petition §7.19
  - 2. Separate Supporting Documentation §7.20
- B. Indexing, Pagination, and Order of Supporting Documentation §7.21
- C. Visual Quality of Documents §7.22
- D. Citation to the Record §7.23

V. SERVING AND LODGING/FILING THE RECORD DOCUMENTATION
- A. Serving the Record §7.24
- B. Lodging/Filing the Record §7.25

VI. PROTECTING CONFIDENTIAL DOCUMENTS §7.26
- A. Criteria for Sealing Documents §7.27
- B. Procedure for Sealing Documents §7.28
  - 1. Moving for Sealing Order §7.29
  - 2. Lodging Document (Record) With Court §7.30
    - a. Conditionally Sealing Document (Record) §7.31
    - b. Court's Handling of Conditionally Sealed Document (Record) §7.32
- C. Inserting Slip Pages for Sealed Documents §7.33

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§7.1 I. SCOPE OF CHAPTER

This chapter discusses the documentation submitted in support of a writ petition filed in the superior court (other than a petition for a writ of administrative mandamus under CCP §1094.5). The chapter begins with a discussion of the purpose of the supporting documentation, which can be in the form of:

- A true administrative record generated during an administrative adjudicatory proceeding;
- A record generated during underlying governmental or private proceedings that is both extensive and akin to (and often called) an administrative record; or
- Declarations and exhibits submitted in support of the petition.

Collectively and generally, this documentation is referred to in this chapter as the "record." See §§7.2-7.3.

The chapter next discusses how to compile the record (see §§7.5-7.17) and general formatting. See §§7.18-7.23. The chapter then discusses serving and lodging an administrative record, and serving and filing supporting declarations and exhibits. See §§7.24-7.25. The chapter concludes with a discussion of how to protect confidential documents by sealing portions of the record. See §§7.26-7.33.

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§7.2 II. PURPOSE OF THE RECORD

Many superior court writ actions arise from proceedings before a governmental or private body, in which the participants presented documents and/or testimony to the decision-maker. All administrative mandamus actions under CCP §1094.5 arise from such proceedings, as do many traditional mandamus actions under CCP §1085. See §§7.9-7.12. In such actions, the record generated during the underlying proceedings often provides the factual universe that the superior court considers in deciding the merits of the writ petition. Even when there is no underlying record, a petitioner usually must support a writ petition with sworn declarations setting out relevant facts and/or authenticating relevant exhibits. In any event, the petitioner has the burden of submitting all the information necessary for the superior court to decide the issues presented by the writ petition.

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§7.3 A. Necessity of Sufficient Record

The lack of an adequate record (*i.e.*, the documentation necessary for the superior court to fully consider the issues presented) is grounds to deny a writ petition. See *Darley v Ward* (1980) 28 C3d 257, 260, 168 CR 481 (superior court denied writ petition on ground petitioner failed to carry burden to provide adequate record; supreme court reversed, holding that superior court should have granted continuance to allow petitioner to obtain written transcription of hearing); *Pomona Valley Hosp. Med. Ctr. v Superior Court* (1997) 55 CA4th 93, 108 n8, 63 CR2d 743 (noting that superior court in administrative mandamus proceeding did not err in refusing to allow petitioner to file "statement of facts" and selective portions of record as substitute for complete administrative record). See also *Sherwood v Superior Court* (1979) 24 C3d 183, 186, 154 CR 917 (in appellate court writ proceeding, absence of transcripts of grand jury proceeding and trial court hearing rendered record insufficient and petition was denied); *Tyler v Superior Court* (1980) 102 CA3d 82, 86, 162 CR 82 (in appellate court writ proceeding, failure to include transcript of superior court hearing and superior court's order denying pretrial motion rendered record insufficient and petition was denied).

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§7.4 B. Statutory Guidance Limited

The writ statutes make limited reference to the record and primarily in the context of administrative adjudicatory decisions challenged under CCP §1094.5. See CCP §§1089.5 (timing of answer affected if administrative record has been requested and filed), 1094.5(a) (all or part of administrative record may be filed with petition, opposing memorandum, or otherwise as ordered by court), 1094.6(c) (respondent must prepare complete record when requested by petitioner), 1094.8(d)(1) (in First Amendment permit or entitlement decisions, record to be prepared within 5 court days of petitioner's request). However, a record can be generated in many kinds of governmental and private proceedings, and thus may be a necessary component of other kinds of writ proceedings as well. See §§7.2, 7.9, 7.11-7.12. Absent an underlying record, a petitioner will often need to support a petition for a writ of traditional mandate or other writ with declarations and/or exhibits. See §7.18.

The rules of court, in turn, expressly address the lodging of an administrative record in an administrative mandamus proceeding under CCP §1094.5. Cal Rules of Ct 3.1140. They also expressly address the preparation and filing of declarations and exhibits in the superior court (see Cal Rules of Ct 3.1110(c)-(g), 3.1113(k) (made applicable to writ proceedings by Cal Rules of Ct 3.1103(a)(2)) and the record in an appellate court writ proceeding (see Cal Rules of Ct 8.486(b)-(c); chap 20).

Thus, as with other aspects of superior court writ practice, the statutes and rules do not fully address the handling of records in traditional mandate and other kinds of writ actions. For example, there may be an extensive underlying record in a traditional mandate case that the parties will call and treat as an "administrative" record, but is not specifically covered by any statute or rule of court. The courts generally have no objection to the parties treating such an underlying record as an administrative record and lodging it with the court. See §7.18.

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III. PREPARING THE RECORD FOR A SUPERIOR COURT WRIT PROCEEDING

§7.5 A. Who Prepares the Record

It is the petitioner's responsibility to provide the superior court with the documentation necessary for the court to decide the issues presented by the writ petition. See §7.3. In some cases, the petitioner can fulfill its responsibility by giving notice to the entity whose action or decision is being challenged to prepare the record of the underlying proceedings. See Govt C §11523 (specifying that agency shall prepare record of adjudicatory proceedings).

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B. What Record Includes

§7.6 1. Record Depends on Type of Petition and Nature of Underlying Proceeding

The documentation submitted in support of a superior court writ petition depends on:

- The type of writ sought;
- The nature of the challenged action or decision;
- The character of the underlying proceeding; and
- The issues raised in the writ petition.

For example, if the statutory requirements for administrative mandamus (CCP §1094.5) are not all met, a petitioner may challenge an administrative adjudicatory decision by way of traditional mandamus (CCP §1085). See §§2.3-2.6, 3.3-3.6. In such a case, there will be a full administrative record. Similarly, the petitioner may challenge a land use decision reviewable under CCP §1085 in which a substantial record was generated during the underlying proceedings. See, *e.g., Bright Dev. v City of Tracy* (1993) 20 CA4th 783, 790, 24 CR2d 618.

On the other hand, a petitioner may challenge the validity of local legislative action by way of traditional mandate, in which case there will be a smaller record, which might include some history of the local enactment (*e.g.,* reports, analyses, testimony). In addition, the petitioner might rely on supporting declarations, or even a set of stipulated facts. See, *e.g., Friends of Bay Meadows v City of San Mateo* (2007) 157 CA4th 1175, 1181, 68 CR3d 916.

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§7.7 2. Include All Relevant Evidence Presented During the Underlying Proceeding

At a minimum, the documentation submitted to the superior court should include all documents and testimony presented to the decision-maker or decision-making body that are relevant to the petitioner's challenge to the underlying action or decision. The extent of this documentation will vary depending on the nature of the underlying proceedings and the issues presented in the writ petition. See §7.6. For example, an administrative hearing with multiple witnesses and numerous documents might generate a large record, but a license or permit denial might generate a relatively small one. In any case, the touchstone is relevance: The petitioner must ensure that the superior court has all documentation and testimony (if any) relevant to assessing the merits of the challenged action or decision. If the underlying proceeding did not involve documents (*e.g.,* if a party asked a governmental entity to perform a ministerial duty and no hearing was held), the supporting documentation will be in the form of declarations from individuals with personal knowledge of the underlying proceeding.

PRACTICE TIP: Statutes pertaining to administrative mandamus provide some guidance on the types of items that may be important to submit in a traditional mandamus action. See, *e.g.,* CCP §1094.6(c) (describing contents of record in administrative mandamus proceedings involving local agencies other than school districts); Govt C §11523 (describing contents of record in cases to be decided under administrative adjudication provisions of Administrative Procedure Act). On administrative mandamus, see chap 3. See also Cal Rules of Ct 8.486(b) (governing record in appellate court writ proceedings); §20.6.

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§7.8 3. Include Opposing Party's Evidence Presented During Underlying Proceeding

The record presented to the superior court must be complete, which means that the petitioner must include all relevant documents and testimony presented in the underlying proceedings by the respondent or any real party in interest as well by the petitioner. See, *e.g.,* CCP §1094.6(c) (in administrative mandamus proceedings, record includes "all pleadings" as well as all admitted exhibits and rejected exhibits in possession of local agency or its commission, board, officer, or agent); Govt C §11523 (in proceedings under Administrative Procedure Act, record includes "the pleadings" and "the exhibits admitted or rejected"). See also Cal Rules of Ct 8.486(b)(1)(B), (D) (in appellate court writ proceedings, record must include all documents submitted to trial court supporting and opposing challenged ruling and any other documents submitted to trial court necessary for complete understanding of case).

PRACTICE TIP: This does not mean that every document and all testimony presented (if any) during the underlying proceeding must be submitted to the superior court. Some of it may be irrelevant to the issues raised in the writ petition, and the court should not be burdened with such extraneous material. See CCP §1094.5(a) (in administrative mandamus proceeding, petitioner may submit all or part of administrative record).

A complete record is not simply a matter of the petitioner carrying its burden of proof (see §7.3), but also a matter of fundamental candor with the superior court. A petitioner will suffer a serious blow to credibility if the court discovers that the proffered "record" of the challenged action or decision is one-sided. Moreover, a party that prevails in the superior court based on an incomplete record (*i.e.*, one that does not support relief) risks later reversal on appeal.

PRACTICE TIP: "Unclean hands" can be interposed as a defense to a writ petition, and actions constituting unclean hands can occur before or during a superior court writ proceeding, including in connection with preparing a record. See generally *Allen v Los Angeles County Dist. Council of Carpenters* (1959) 51 C2d 805, 812, 337 P2d 457 (trial court did not abuse its discretion in denying writ of mandate given petitioner's unclean hands). On the unclean hands defense, see 5 Witkin, California Procedure, *Pleading* §1126 (5th ed 2008).

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§7.9 4. Evidence Not Presented During Underlying Proceeding (Extra-Record Evidence)

Extra-record evidence is evidence that was not presented during the underlying governmental or private proceedings. This evidence can include matters that are judicially noticeable, although judicial notice is most frequently requested in support of a legal argument (*e.g.*, the legislative history of a statute for a statutory construction argument), rather than to establish the operative facts. See, *e.g.*, *Preserve Shorecliff Homeowners v City of San Clemente* (2008) 158 CA4th 1427, 1444 n14, 71 CR3d 332 (judicial notice of legislative history); *Fiscal v City & County of San Francisco* (2008) 158 CA4th 895, 913, 70 CR3d 324 (same). See also *Tuolumne County Citizens for Responsible Growth, Inc. v City of Sonora* (2007) 155 CA4th 1214, 1220, 66 CR3d 645 (judicial notice of numerous items in CEQA writ proceeding).

PRACTICE TIP: If judicial notice is permissible, a petitioner must proceed in accordance with Cal Rules of Ct 3.1113(*l*) (made applicable to writ proceedings by Cal Rules of Ct 3.1103(a)(2)). On judicial notice requests in appellate court writ proceedings, see §§20.17-20.22.

The propriety of submitting extra-record evidence to the superior court in traditional mandamus proceedings under CCP §1085 depends on the type of action or decision being challenged. See §§7.10-7.11. See also *SN Sands Corp. v City & County of San Francisco* (2008) 167 CA4th 185, 195 n5, 83 CR3d 885. In contrast, in administrative mandamus proceedings under CCP §1094.5, the court can consider extra-record evidence only if (CCP §1094.5(e)):

- In the exercise of reasonable diligence the parties could not have produced it during the underlying proceedings; or
- The evidence was improperly excluded during the administrative proceedings.

This standard is also likely to be applied in a traditional mandate action challenging an administrative adjudicatory decision (*e.g.,* where the statutory requirements of CCP §1094.5 are not all met (see §§2.3-2.6, 3.3-3.6). See §7.12. On extra-record evidence in an administrative mandamus proceeding, see §3.7.

PRACTICE TIP: Under extremely limited circumstances, discovery is permissible in mandamus proceedings. In such circumstances, the superior court may necessarily be considering extra-record evidence. Any such review, however, still must be limited to relevant evidence. On discovery in superior court writ proceedings, see §§5.10, 5.16.

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§7.10 a. If Challenging Ministerial or Informal Actions

Extra-record evidence may be appropriate in traditional mandamus actions challenging or seeking to compel ministerial actions, particularly if the facts are in dispute. See *Western States Petroleum Ass'n v Superior Court* (1995) 9 C4th 559, 575, 38 CR2d 139 (extra-record evidence "is usually necessary only when the courts are asked to review ministerial or informal administrative actions, because there is often little or no record in such cases"). See also *SN Sands Corp. v City & County of San Francisco* (2008) 167 CA4th 185, 195 n5, 83 CR3d 885 (discussing *Western States*). See also CCP §1090 (allowing court to permit jury trial of disputed essential facts). For example, the petitioner may need to seek judicial notice of relevant rules, regulations, policies, charter provisions, ordinances, or other procedures with which the respondent allegedly is required to comply. See §7.9.

In addition, the petitioner will need to present to the superior court through exhibits—either attached to the petition or to an authenticating declaration—whatever documentation may have been generated in connection with the performance of or refusal to perform the action at issue. Although this is usually referred to as "extra-record" evidence, it is actually the documentary record, albeit minimal, of the underlying action or decision. See §7.18-7.20.

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§7.11 b. If Challenging Quasi-Legislative Actions

Extra-record evidence is generally not admissible in traditional mandamus proceedings challenging quasi-legislative actions if the issues presented are legal ones. See *Western States Petroleum Ass'n v Superior Court* (1995) 9 C4th 559, 575, 38 CR2d 139 (administrative record developed during quasi-legislative process is usually adequate for courts to review decision without recourse to extra-record evidence); *SN Sands Corp. v City & County of San Francisco* (2008) 167 CA4th 185, 195 n5, 83 CR3d 885 (extra-record declarations disregarded); *San Joaquin County Local Agency Formation Comm'n v Superior Court* (2008) 162 CA4th 159, 163, 76 CR3d 93 (trial court erred in ordering depositions of commissioners to learn what extra-record information they had when making decision on agency formation application because such extra-record evidence is inadmissible); *Shapell Indus., Inc. v Governing Bd.* (1991) 1 CA4th 218, 233, 1 CR2d 818 (court is not required to consider new evidence in mandamus proceeding presenting only legal question of whether agency acting in its quasi-legislative capacity has exceeded its authority). Limiting review to the administrative record is generally appropriate because of the limited scope of review applicable to quasi-legislative actions. *San Joaquin County Local Agency Formation Comm'n,* 162 CA4th at 167.

NOTE: There may be exceptional circumstances warranting consideration of extra-record evidence, such as issues concerning standing or capacity to sue, affirmative defenses, accuracy of the administrative record, procedural unfairness, or agency misconduct. *Western States Petroleum Ass'n v Superior Court* (1995) 9 C4th 559, 575 n5, 38 CR2d 139; *San Joaquin County Local Agency Formation Comm'n,* 162 CA4th at 167. However, extra-record evidence "can never be admitted merely to contradict the evidence the administrative agency relied on in making a quasi-legislative decision or to raise a question regarding the wisdom of that decision." *San Joaquin County Local Agency Formation Comm'n,* 162 CA4th at 169, quoting *Western States Petroleum Ass'n*, 9 C4th at 579.

When there are disputes as to essential facts, however, the superior courts may entertain extra-record evidence. See CCP §1090 (allowing court to permit jury trial of disputed essential facts); *Dare v Board of Med. Exam'rs* (1943) 21 C2d 790, 797, 136 P2d 304 (if there are disputed issues of fact, "any competent evidence may be introduced and received and the ordinary procedural rules apply"); *Shapell Indus., Inc. v Governing Bd., supra* (court may consider new evidence in mandamus proceeding in which factual questions are raised); *Bright Dev. v City of Tracy* (1993) 20 CA4th 783, 795, 24 CR2d 618 (in traditional mandamus proceeding, parties may present evidence outside administrative record).

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§7.12 c. If Challenging Adjudicatory Decisions

Extra-record evidence is generally not admissible in traditional mandamus actions challenging adjudicatory decisions. See *Bunnett v Regents of Univ. of Cal.* (1995) 35 CA4th 843, 853, 41 CR2d 567 (superior court cannot "accept evidence in addition to the administrative record in a mandate proceeding concerning an adjudicatory decision"), citing *Fascination, Inc. v Hoover* (1952) 39 C2d 260, 264, 246 P2d 656 (in mandamus proceeding challenging adjudicatory decision, trial court is limited to examination of matters that lower tribunal considered). See also *Golden Drugs Co. v Maxwell-Jolly* (2009) 179 CA4th 1455, 102 CR3d 446 (Department of Health Care Services reached adjudicatory decision that depended on particular facts of case, and petitioner failed to show why it should have been allowed to add extra-record evidence in trial court).

NOTE: Most administrative adjudicatory decisions are reviewed by way of administrative mandamus under CCP §1094.5, but if any of the three statutory requirements for administrative mandamus is not met (see §§3.3-3.7), an administrative adjudicatory decision is reviewed by way of traditional mandamus under CCP §1085. On traditional mandamus, see chap 2.

Extra-record evidence may be permissible, however, if the issue is whether the petitioner received a "fair" administrative hearing. See *Nasha v City of Los Angeles* (2004) 125 CA4th 470, 485, 22 CR3d 772 (in administrative mandamus proceeding, extra-record evidence permissible if petitioner claims that he or she was denied due process or fair hearing).

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§7.13 5. Record in Pre-Merits Hearings

There may be proceedings in a writ action before the superior court hears the petition on the merits (*e.g.*, on an application for alternative writ or application for stay or temporary restraining order). A party seeking preliminary relief must provide the court with sufficient information to decide the preliminary matter, generally by way of declaration and attached and authenticated exhibits.

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§7.14 C. Obtaining Record From Decision-Making Body in Underlying Proceeding

Because proceedings before a governmental or private body are often less formal than court proceedings, a petitioner may not have ready access to a copy of the full record generated during the underlying proceeding. The statutes may entitle the petitioner to request the record, in writing, from the lower agency or tribunal. See *e.g.,* Pub Res C §21167.6(a). This is most likely to be the case in connection with an administrative adjudicatory proceeding subject to review by way of administrative mandamus under CCP §1094.5.

If the decision-making body is not under any obligation to prepare a record of the underlying proceedings, the petitioner will need to assemble all relevant documents and hearing transcripts (if any).

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§7.15 1. When to Request Underlying Record

If applicable, a petitioner should promptly request the governmental or private body to prepare the record of the underlying proceedings.

PRACTICE TIP: A petitioner should not rely on a request for preparation of a record to stay the deadline for filing a writ petition. The best practice is to timely file the writ petition and include in the verified allegations when the record was requested, what was requested, and any known information as to when the record will be prepared.

The administrative mandamus statute requires a local agency to prepare a record within 190 days of the petitioner's request. CCP §1094.6(c). But see CCP §1094.8(d)(1) (administrative agency has only 5 court days to prepare record in cases involving denial, revocation, or suspension of permit for constitutionally protected expressive conduct). There is no similar deadline in the traditional mandamus statutes. A petitioner preparing a record in a traditional mandamus case is strongly recommended to comply with the administrative mandamus deadlines, particularly if it is unclear whether the traditional mandate or administrative mandate statutes apply. Indeed, the record preparation request is often made before the petitioner even files the petition and thus there will have not yet been a specific designation of the writ action as one for traditional or administrative mandamus, or both. On traditional mandamus, see chap 2. On administrative mandamus, see chap 3.

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§7.16 2. How to Request Underlying Record

There is no prescribed written form for requesting preparation of a record generated in an underlying governmental or private proceeding. Thus, a petitioner should inquire whether the body or agency has any special requirements for the written request. A letter is usually sufficient if it states the necessary information. If a state agency is the respondent, the petitioner should mail the request to the agency. See Govt C §11523 (specifying that agency shall prepare record). The request should identify (by number and title, if available) the following:

- The proceeding at issue;
- The parties to the proceeding and the parties to the pending or anticipated writ proceeding; and
- All desired items, including exhibits.

When requesting preparation of a record, the petitioner also should request a cost estimate for preparation. Once the estimated costs are ascertained, a check in that amount should be sent immediately, so as not to delay preparation of the record. Another option is to provide a "not to exceed" check when a rough estimate is available. The petitioner should not delay requesting the record while waiting for a cost estimate, however. On paying for the preparation of the record, see §7.17.

PRACTICE TIP: Although not required, petitioner should mail a courtesy copy of a request for a record to counsel for each party to the underlying proceeding and to the pending writ proceeding (if known). Petitioner may invite counsel for the other parties to supplement the request with additional material. This practice helps ensure that the record will be complete, thus avoiding delays in prosecuting the writ petition. It also encourages the parties to act with civility and professionalism.

On requesting the record in an administrative adjudicatory proceeding, see California Administrative Mandamus §§10.8-10.10 (3d ed Cal CEB 2003).

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§7.17 3. Paying for Preparation of Underlying Record

The governmental or private body preparing a record generally may recover its initial costs of doing so from the petitioner. See CCP §1094.5(a); Govt C §11523. A petitioner proceeding in forma pauperis, however, is not required to pay for the agency's record preparation costs. CCP §1094.5(a).

The prevailing party in a writ proceeding is entitled to recover costs for record preparation, compilation, and certification. See CCP §§1033.5, 1094.5(a); Govt C §11523. Accordingly, a petitioner that ultimately prevails in a writ proceeding may recover the costs it paid for record preparation.

On the cost of an administrative record, see California Administrative Mandamus §§10.14-10.16 (3d ed Cal CEB 2003).

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IV. FORMAT OF THE RECORD PRESENTED TO THE SUPERIOR COURT

§7.18 A. "Administrative Record" Versus Documentation Submitted by Way of Exhibits

Administrative record. In cases in which the petitioner requests that a governmental or private body prepare an underlying record (either a true administrative record generated during an administrative adjudicatory proceeding or an extensive record developed during other governmental or private proceedings), the governmental or private body will likely deliver the record to the petitioner as a bound document in one or more volumes. The petitioner need not reformat or recompile the record, but must ensure that it is timely lodged with the superior court. See Cal Rules of Ct 3.1140 (requiring administrative record in administrative mandamus action be lodged with court at least 5 days before hearing on writ petition); §7.25. As a result, the superior courts receive records of underlying proceedings in a variety of formats, *e.g.*, in three-ring binders, in vela-bound volumes, in tape-bound volumes, in boxes, and even in rubber-banded batches (not recommended).

Similarly, if the petitioner compiles the administrative record, it may be assembled in volumes, with an index and pages consecutively numbered.

PRACTICE TIP: The petitioner should check local rules or with the court clerk to determine whether the superior court has a specific preference on how to assemble the record in a writ proceeding.

Record in form of declarations and exhibits. In many traditional mandamus cases under CCP §1085, and in other types of writ cases, the record presented to the superior court is not the equivalent of an "administrative record," and instead will be in the form of declarations with attached and authenticated exhibits. See §§7.2, 7.6-7.7, 7.10, 7.19-7.20. The rules specify the format for exhibits. See Cal Rules of Ct 3.1110(c)-(g), 3.1113(j) (made applicable to writ proceedings by Cal Rules of Ct 3.1103(a)(2)).

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§7.19 1. Appending Supporting Documentation to Petition

If the supporting documentation consists of only a few pages (*i.e.,* it is not an administrative record or treated as such (see §7.18)), it can be attached as one or more exhibits to the writ petition with an index preceding the exhibits. See Cal Rules of Ct 3.1110(e)-(f), 3.1113(j) (made applicable to writ proceedings by Cal Rules of Ct 3.1103(a)(2)). See also Cal Rules of Ct 8.486(c)(1)(A) (specifying form of supporting documents for appellate court writ petitions). Exhibits can be authenticated by way of either a verified allegation in the petition or an authenticating declaration.

PRACTICE TIP: It is hard to quantify what constitutes a "few" pages. If the writ petition seems at all unwieldy, it is best to file supporting declarations and exhibits separately. See §7.20.

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§7.20 2. Separate Supporting Documentation

If the supporting documentation consists of more than a few pages, petitioner should submit it separately by attachment to sworn and authenticating declarations, or as an appendix of exhibits in support of the petition (the exhibits may be authenticated by verified allegation in the writ petition or an accompanying sworn declaration). See Cal Rules of Ct 3.1110(e)-(f), 3.1113(j) (made applicable to writ proceedings by Cal Rules of Ct 3.1103(a)(2)).

Any compendium of supporting exhibits exceeding 300 pages in length should be separated into volumes of no more than 300 pages each (with the caption page title noting, *e.g.,* Volume 1 of 3). For ease of reference, counsel should attach a complete index to the beginning of each volume. See Cal Rules of Ct 3.1110(f) (made applicable to writ proceedings by Cal Rules of Ct 3.1103(a)(2)). If the supporting documentation is of this length, however, it is likely to be the administrative record or its equivalent and, if so, the petitioner should treat it accordingly. See §7.18.

PRACTICE TIP: If a record or supporting exhibits include multiple copies of a document or if an irrelevant document is an exhibit to an otherwise relevant document, the petitioner can substitute a single page in place of the duplicate or irrelevant document that identifies the document and explains its omission or where its duplicate is located. The courts will appreciate efforts to minimize the size of a record or documentation submitted in support of a writ petition.

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§7.21 B. Indexing, Pagination, and Order of Supporting Documentation

Regardless of whether supporting documentation is appended to the writ petition (see §7.19) or submitted separately in the form of declarations and exhibits (see §7.20), it must conform with the following format requirements:

- **Index tab the documents.** Each exhibit must be separated by a hard 8½ × 11-inch sheet with tabs extending below the bottom of the page, bearing the exhibit designation. Counsel must designate pages from a single deposition and associated exhibits as a single exhibit. Cal Rules of Ct 3.1110(f) (made applicable to writ proceedings by Cal Rules of Ct 3.1103(a)(2)).

PRACTICE TIP: This requirement can lead to an unwieldy and confusing compendium if the exhibits themselves contain separately tabbed items, creating multiple layers of identification. One solution is to follow appellate court practice and, in a compendium of exhibits, in addition to the required tabs, use consecutive pagination for all exhibit pages. See Cal Rules of Ct 8.486(c)(1)(A); *Great Oaks Water Co. v Santa Clara Valley Water Dist.* (2009) 170 CA4th 956, 965 n7, 88 CR3d 506 (court complained that record was tabbed, but not consecutively or consistently numbered, and explained that "[e]ach page of the administrative record should be numbered so that reference can easily be made to specific pages within a specific document"). This allows for much more succinct citation to the record in the briefing (*e.g.,* "Vol. 1 of Exhs., Exh. 25 at 157") and helps the court turn quickly to referenced record material. See Cal Rules of Ct 3.1113(k) (made applicable to writ proceedings by Cal Rules of Ct 3.1103(a)(2)). On citation to the record, see §7.23.

- **Provide an index**. Counsel must provide an index to the exhibits. Cal Rules of Ct 3.1110(f) (made applicable to writ proceedings by Cal Rules of Ct 3.1103(a)(2)).

Additionally, counsel should:

- **Chronologically order the documents.** Place supporting documents in chronological order by date, with the earliest filed document appearing first.
- **Check local rules.** Check the court's local rules for any additional requirements.

PRACTICE TIP: The goal in preparing the supporting documentation is to provide the superior court with a user-friendly, easily understood, and manageable compendium that lends itself to a straightforward citation format in the writ petition and in the supporting and opposing memoranda.

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§7.22 C. Visual Quality of Documents

All copies of supporting documents should be readable and unmarked. If a copy of a document contains handwritten notations that counsel cannot "white out" to produce a clean copy, the petitioner should obtain a clean copy from the respondent or real party in interest. If available duplicating equipment will not produce a high-quality copy, counsel should use a professional copy service.

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§7.23 D. Citation to the Record

Citations should be short and easily understood. Citation to a record lodged with the court (see §7.18) can be very concise, *e.g*., "Rec. at 25," "Vol. 1 of Rec. at 5," "Rec., Vol. 1 at 5." Citation to declarations and exhibits should also be concise, *e.g.*, "Smith Dec., Exh. A at 5" or "Exhs., Exh. A at 5." See Cal Rules of Ct 3.1113(k) (made applicable to writ proceedings by Cal Rules of Ct 3.1103(a)(2)). See also Cal Rules of Ct 8.486(c).

Counsel should avoid cumbersome citations that recite the title of the document; not only are they difficult to decipher, they also add unnecessary length to documents and create problems with page limits.

PRACTICE TIP: To ensure that the court understands the citation format, the petitioner should drop a footnote immediately after the first record citation explaining the format, *e.g.,* "'Exh. 5' refers to page 5 of exhibit A attached to this writ petition" or "'Exh. 5' refers to page 5 of the compendium of exhibits submitted in conjunction with this petition" or "'Exh. 5' refers to page 5 of the record that will be lodged with the court within the time period provided by [*cite statute or rule*]."

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V. SERVING AND LODGING/FILING THE RECORD DOCUMENTATION

§7.24 A. Serving the Record

If a record of the underlying proceedings is prepared by a governmental or private body (see §7.18), the petitioner should serve a copy of the record shortly after receiving it, or at least when filing a notice of motion and motion for issuance of a writ. Similarly, if the petitioner prepares the administrative (or equivalent) record (see §7.18), it should be served when it is compiled, or at least when filing a notice of motion and motion for issuance of a writ.

PRACTICE TIP: Promptly serving a copy of the record allows the opposing party to work with the record in its final format, and ensures that record citations by all of the parties will follow a consistent format.

If the writ petition is supported by declarations and exhibits (see §§7.18-7.21), the time for service depends on whether the petitioner chooses to proceed by way of the noticed motion or alternative writ procedure, and also depends on any procedures specified by local rule of court. On noticed motion procedures, see §§5.76-5.107; on alternative writ procedure, see §§5.108-5.118.

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§7.25 B. Lodging/Filing the Record

Lodging an "administrative record." If a record of the underlying proceedings is prepared by a governmental or private body (see §7.18), or if the petitioner assembles such a record, the record should be lodged with the superior court at least 5 days before the hearing. See Cal Rules of Ct 3.1140.

PRACTICE TIP: Although Rule 3.1140 expressly applies to administrative mandamus proceedings, given its purpose and intent, it should also guide lodging of a record in a traditional mandamus proceeding.

If a writ action is an administrative mandamus action under CCP §1094.5, or a combined action under both CCP §1094.5 and §1085, there will be no uncertainty as to the procedures for assembling and lodging a record generated during the underlying proceedings. An administrative record must be "lodged" with the court, not filed. Cal Rules of Ct 3.1140. After the administrative mandamus action is over (*i.e.*, after the time to appeal has expired or, if there is an appeal, after the remittitur issues), the "lodged" record will probably be returned to the petitioner, thereby freeing up valuable shelf space at the court.

If the writ proceeding is solely one for traditional mandamus under CCP §1085, the court or its clerk may be uncertain about how to handle a proffered record of underlying governmental or private proceedings, because the rules only refer to a "record" in a traditional mandamus action. See §7.4. The cases make clear, however, that a record of underlying governmental or private proceedings (equivalent to an "administrative record" in an administrative adjudicatory proceeding) may exist in traditional mandamus actions. See §§7.11-7.12. Thus, if the clerk refuses such a proffered record, the petitioner may need to submit an application to the court (preferably accompanied by a stipulation signed by all parties) explaining that there is a record of the underlying proceedings, describing the record in some detail (*i.e.*, showing that it is the equivalent of an "administrative record"), and asking to lodge the record under Cal Rules of Ct 3.1140. The court should be receptive to lodging such a record because that allows the court to return the record to the petitioner (and thus recover shelf space) at the end of the writ action.

PRACTICE TIP: Counsel should view the 5-day deadline for lodging a record under Cal Rules of Ct 3.1140 as the statutory minimum. In practice, the court may require that petitioner prepare and lodge a record long before that time. For instance, in a large case, the court will normally set a briefing schedule and a date for lodging the record. Likewise, in cases in which the petitioner uses the noticed motion procedure, it is good practice to lodge a record in conjunction with the notice of motion and motion for issuance of the writ and serve it on the respondent and any real party in interest. In any event, a petitioner should check with the trial court for its preference, as practice varies widely.

Filing supporting declarations and exhibits. Documentation in support of a writ petition submitted by way of declarations and exhibits, as is often the case in traditional mandamus proceedings (see §§7.18-7.21), will be filed with the court (not lodged). The timing of this filing depends on whether the petitioner proceeds by way of the noticed motion or alternative writ procedure. On noticed motion procedures, see §§5.76-5.107; on alternative writ procedure, see §§5.108-5.118. As with other aspects of superior court writ practice, the petitioner should check local rules to determine whether the court has any special filing requirements. Because these documents are filed with the superior court and become part of the court's public record, they are not returned to the petitioner after the writ action is over.

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§7.26 VI. PROTECTING CONFIDENTIAL DOCUMENTS

Unless confidentiality of records is required by law, court records are presumed to be open to the public. Cal Rules of Ct 2.550(c). Thus, if a party to a writ proceeding believes that documents in the record submitted in a writ action (either as part of a formal record lodged with the court or as an exhibit filed in the court) should not be made public, that party must move for an order from the superior court sealing those documents or portions of them. Cal Rules of Ct 2.550-2.551. On moving to seal record, see §7.29.

On sealing documents generally, see California Civil Procedure Before Trial §§12.122-12.139 (4th ed Cal CEB 2004); Judge Kleinberg, *To Seal or Not to Seal: Protecting Confidential Records Under the Rules of Court*, 29 CEB Civ Litigation Rep 131 (Aug. 2007).

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§7.27 A. Criteria for Sealing Documents

To seal documents, the court must expressly find that (Cal Rules of Ct 2.550(d)):

- There is an overriding interest that overcomes the public's right to access the documents;
- The overriding interest supports sealing the record;
- A substantial probability exists that *not* sealing the record will prejudice the overriding interest;
- The proposed sealing is narrowly tailored; and
- No less restrictive means are available to achieve the overriding interest.

The parties cannot stipulate to sealing a document. The court must conduct an independent review and make the required findings to place a document under seal.

PRACTICE TIP: Although the parties cannot stipulate to filing a document under seal, a motion to file under seal has a better chance of success if it is unopposed or brought as a joint motion. Thus, counsel for a party seeking to seal a document should try to reach agreement with opposing counsel about the scope of the sealing order and stipulate when possible, particularly on documents or information that are indisputably confidential or private, such as Social Security numbers.

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Source: Civil Litigation/California Civil Writ Practice/7 The Record in Superior Court Writ Proceedings/§7.28 B. Procedure for Sealing Documents

§7.28 B. Procedure for Sealing Documents

When a party seeks to have a document or a portion of a document sealed, it must simultaneously:

- Move for an order sealing document(s) (called a "record" in the rules pertaining to sealing) (see §7.29); and
- Lodge the document(s) with the court under temporary seal (see §7.30).

On the procedures for sealing documents, see California Civil Procedure Before Trial §§12.126-12.133 (4th ed Cal CEB 2004).

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§7.29 1. Moving for Sealing Order

A party requesting that the court file documents (called "records" in the rules pertaining to sealing) under seal must file a motion or an application for an order sealing the record. The moving party must accompany this motion or application with a supporting memorandum and a declaration with facts sufficient to justify the sealing. Cal Rules of Ct 2.551(b)(1).

JUDICIAL PERSPECTIVE: The motion should state facts supporting each of the criteria for sealing documents. It is not sufficient to merely recite the criteria. On criteria for sealing documents, see §7.27.

The moving party must serve the motion or application to seal on all parties that have appeared in the case. Cal Rules of Ct 2.551(b)(2).

If necessary to prevent disclosure, any motion or application, opposition, and supporting documents "must be filed in a public redacted version and lodged in a complete version conditionally under seal." Cal Rules of Ct 2.551(b)(5).

PRACTICE TIP: Counsel should limit a motion to seal only to those documents, or portions of documents, that can legally be filed under seal. If a document contains confidential and non-confidential information, counsel should ask only that the confidential information be filed under seal. The rest of the document can remain in the public file in redacted form.

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§7.30 2. Lodging Document (Record) With Court

The party requesting that a document or portions of a document (called a "record" in the rules pertaining to sealing) be filed under seal must lodge those documents with the court under Cal Rules of Ct 2.551(d) when the motion or application is made, unless good cause exists for not lodging it or the document was previously lodged under Cal Rules of Ct 2.551(b)(3)(A)(i). Pending the determination of the motion or application, the court holds the lodged document or portions of the document conditionally under seal. Cal Rules of Ct 2.551(b)(4).

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§7.31 a. Conditionally Sealing Document (Record)

When counsel requests an order that a document or portions of a document (called a "record" in the rules pertaining to sealing) be filed under seal, counsel must lodge the record with the court in a sealed envelope or other appropriate container, labeled "CONDITIONALLY UNDER SEAL." Cal Rules of Ct 2.551(d)(1)-(2). Counsel must affix to the envelope or container a cover sheet that (Cal Rules of Ct 2.551(d)(3)(A)-(B)):

- Contains all the information required on a caption page under Cal Rules of Ct 2.111; and
- States that the enclosed record is subject to a motion or an application to file the record under seal.

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§7.32 b. Court's Handling of Conditionally Sealed Document (Record)

When the clerk receives a document (called a "record" in the rules pertaining to sealing) lodged under Cal Rules of Ct 2.551(d), it endorses the affixed cover sheet with the date of receipt and retains, but does not file, the document unless the court orders it filed. Cal Rules of Ct 2.551(d)(4).

PRACTICE TIP: Some superior courts scan filed documents into a publicly available database. If the proper procedures are followed, conditionally sealed documents will not be scanned; however, mistakes can and do occur. Accordingly, after lodging the confidential documents with the court, counsel should check the court's website to make certain those documents have not been scanned. If there is a mistake, counsel should apply ex parte as quickly as possible to remedy the situation.

If the documents placed under seal are voluminous and within a public agency's custody, the superior court may order the sealed records to remain with the agency "in a secure fashion" rather than with the clerk. Cal Rules of Ct 2.551(g).

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§7.33 C. Inserting Slip Pages for Sealed Documents

If the superior court orders sealed some documents in a record to be lodged with the court (see §7.18), those documents are before the court by virtue of the sealing order and do not need to be resubmitted to the court when the complete record is lodged. The petitioner should include slip pages in the record where the sealed documents otherwise would appear, stating that the document was filed under seal and providing the date of the sealing order. The same procedure can be used if sealed documents are part of exhibits submitted in support of a writ petition. See §§7.18-7.21.

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8

Responsive Pleadings and Petitioner's Reply

Kelly J. Savage

I. INTRODUCTION
- A. Scope of Chapter §8.1
- B. Terminology §8.2

II. PROCEDURAL ASPECTS OF RESPONDING TO A WRIT PETITION
- A. Response Controlled by Manner in Which Petitioner Chooses to Proceed §8.3
- B. When Petitioner Seeks Stay of Challenged Action or Decision §8.4
- C. Consider Joint Response §8.5
- D. When Petitioner Uses Noticed Motion Procedure
  - 1. File Responsive Pleading or Motion §8.6
    - a. Time to File §8.7
      - (1) When Record Has Been Filed or Is Unnecessary §8.8
      - (2) When Record Has Been Requested But Not Filed §8.9
      - (3) Time May Be Extended by Stipulation or Application §8.10
    - b. Filing, Fee, and Service
      - (1) File in Same Court as Petition §8.11
      - (2) Fee §8.12
      - (3) Serve All Parties §8.13
      - (4) How to Serve §8.14
    - c. Consequences of Not Filing Responsive Pleading §8.15
  - 2. File Opposition to Motion for Issuance of Writ §8.16
    - a. Time to File §8.17
    - b. Contents of Opposition Memorandum §8.18
    - c. Format of Opposition §8.19
    - d. Evidence in Opposition §8.20
- E. Alternative Writ Procedure
  - 1. Opposition to Application for Issuance of Alternative Writ
    - a. Optional if Petitioner Seeks Ex Parte Issuance of Alternative Writ §8.21
    - b. Strongly Recommended if Petitioner Gives 10 Days' Notice of Application for "a" Writ or for "Peremptory" Writ §8.22
    - c. Time to File §8.23
      - (1) When Alternative Writ Is Sought Ex Parte §8.24
      - (2) When Petitioner Has Given 10 Days' Notice of Application for "a" Writ or for "Peremptory" Writ §8.25
    - d. Content of Opposition
      - (1) When Alternative Writ Is Sought Ex Parte §8.26
      - (2) When Petitioner Has Given 10 Days' Notice of Application for "a" Writ or for "Peremptory" Writ §8.27
    - e. Filing, Fee, and Service
      - (1) Opposition Filed in Same Court as Petition §8.28
      - (2) Fee §8.29
      - (3) Serve All Parties §8.30
      - (4) How to Serve §8.31
  - 2. If Superior Court Issues Alternative Writ
    - a. Effect of Alternative Writ §8.32
      - (1) If Respondent Chooses to Comply §8.33
      - (2) If Respondent Chooses Not to Comply §8.34
    - b. Return After Issuance of Alternative Writ
      - (1) File Responsive Pleading or Motion §8.35
      - (2) Time to File §8.36
      - (3) Consequences of Filing Defective Return or No Return §8.37
      - (4) Memorandum Addressing Merits of Writ Petition §8.38
  - 3. "*Palma"* Notices Not Used in Superior Court Writ Proceedings §8.39

III. TYPES OF RESPONSIVE PLEADINGS AND MOTIONS
- A. Demurrer
  - 1. Tests Sufficiency of Petition §8.40
  - 2. Basis for Demurrer §8.41
  - 3. General Guidelines for Demurrers
    - a. If Demurrer Sustained §8.42
    - b. If Demurrer Overruled §8.43
  - 4. Answer in Conjunction With Demurrer §8.44
- B. Answer
  - 1. Function of Answer §8.45
  - 2. Content of Answer §8.46
    - a. Allegations Deemed Admitted if Not Denied §8.47
    - b. Affirmative Defenses Must Be Raised in Answer §8.48
  - 3. Verification Required §8.49
- C. Responsive Motions §8.50
  - 1. Motion to Dismiss §8.51
  - 2. Motion to Quash §8.52
  - 3. Motion for Judgment on the Pleadings §8.53
  - 4. Motion for Summary Judgment §8.54
  - 5. Other Miscellaneous Motions §8.55
  - 6. File Answer in Conjunction With Motion §8.56

IV. PETITIONER'S REPLY
- A. Replication (Reply) §8.57
  - 1. Deadline for Filing Replication (Reply) §8.58
  - 2. Contents of Replication (Reply) §8.59
  - 3. Advance Notice Required if Replication (Reply) Made by Evidence Presented at Hearing §8.60
  - 4. Filing and Service §8.61
- B. Petitioner's Reply Memorandum
  - 1. When Noticed Motion Procedure Is Used §8.62
  - 2. When Alternative Writ Procedure Is Used §8.63

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I. INTRODUCTION

§8.1 A. Scope of Chapter

This chapter discusses the ways in which the respondent or real party in interest may respond to a writ petition. It also discusses the petitioner's options in reply.

- The first part of the chapter summarizes the procedural differences in responding to a writ petition, depending on whether the petitioner proceeds by way of (a) noticed motion to bring the writ petition on for a hearing on the merits (see §§8.6-8.20), or (b) alternative writ (see §§8.21-8.38). This discussion includes responding to a stay application or request for preliminary injunctive relief. See §8.4.
- The second part of the chapter discusses the different kinds of responsive pleadings and motions a respondent or real party in interest can file, *e.g.,* a demurrer, answer, or motion to strike. See §§8.40-8.56.
- The third part of the chapter discusses the petitioner's reply to the respondent's or real party in interest's responsive pleadings. See §§8.57-8.63.

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§8.2 B. Terminology

In superior court writ practice, there are various terms of art used by statutes, rules, courts, and counsel. The following terms refer to the kinds of documents that may be filed in a superior court writ proceeding:

"Opposition to application for alternative writ": An optional, but strongly recommended, preliminary memorandum that can be filed, if time permits, in opposition to an application for an alternative writ. See §§8.21-8.31.

"Return": This term has multiple meanings. Most commonly, it refers to the class of documents the respondent or real party in interest may file in response to an alternative writ (if the alternative writ procedure is used to prosecute the writ petition). A return can be an answer, a demurrer, or both, or a responsive motion (*e.g.,* motion to strike). See §8.35. This term also refers to the respondent's report back to the court, after the court has issued a peremptory writ, regarding whether the respondent has complied with the writ. This return is required only if the court issuing the writ orders it. See §§10.3-10.10.

"Answer": A verified response to a writ petition containing paragraph-by-paragraph admissions and denials of the facts alleged in the petition as well as affirmative defenses. See §§8.45-8.49. The time for filing an answer depends on whether the petitioner proceeds by way of the noticed motion procedure or by way of an alternative writ. See §§5.10-5.18.

"Opposition memorandum": A memorandum filed by the respondent or real party in interest presenting legal arguments in opposition to the writ petition. See §§8.16-8.20 (if noticed motion procedure used), §8.38 (if alternative writ procedure used).

"Replication": A pleading filed by the petitioner in response to new affirmative allegations in the respondent's or real party in interest's answer. It is also called a "reply" (and sometimes a "traverse"). See §§8.57-8.61.

"Reply memorandum": A memorandum filed by the petitioner presenting legal arguments in reply to the arguments made in the respondent's or real party in interest's opposition memorandum. See §§8.62-8.63.

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II. PROCEDURAL ASPECTS OF RESPONDING TO A WRIT PETITION

§8.3 A. Response Controlled by Manner in Which Petitioner Chooses to Proceed

The manner in which the respondent or real party in interest responds to a writ petition largely depends on how the petitioner chooses to bring the petition on for a hearing on the merits. The petitioner may do so either (1) by noticed motion for issuance of the requested writ (see §§5.10-5.14) or (2) by seeking an alternative writ (see §§5.15-5.18).

The possible responses when the petitioner uses the noticed motion procedure are discussed below in §8.6. The possible responses when the petitioner seeks an alternative writ are discussed below in §§8.21-8.22.

PRACTICE TIP: There are few statutes and rules of court governing superior court writ practice. See §§5.2-5.8. Some superior courts have adopted local rules specifying required or preferred procedures. See, *e.g.,* Amador Ct R 11.18; Calaveras Ct R 1.4; Imperial Ct R 3.4.0; Los Angeles Ct R 9.5; San Diego Ct R 2.4.8; Sacramento County Superior Court Guide to the Procedures for Prosecuting Petitions for Prerogative Writs, p. 7 (copy located in App B). In other superior courts, writ procedures are a matter of historical practice in that particular court. Accordingly, it is important for the respondent and any real party in interest to check local rules and consult with the court clerk for procedures that may affect the nature and timing of any response to a writ petition.

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§8.4 B. When Petitioner Seeks Stay of Challenged Action or Decision

In conjunction with filing the writ petition, the petitioner can seek a stay of the challenged action or decision by filing a stay application seeking preliminary injunctive relief (*i.e.,* a temporary restraining order, preliminary injunction, or both). See §6.2. A respondent or real party in interest who opposes issuance of a stay must do so by promptly filing written opposition (if sufficient notice has been given) and appearing at the hearing on the stay request. On receiving notice of an ex parte application for issuance of an immediate stay or temporary restraining order (or for an order shortening time to hear such a request), counsel for the respondent or real party in interest should let the court know whether the application will be opposed and, if so, whether and when written opposition will be filed.

PRACTICE TIP: Because superior court writ procedures vary from one county to the next, the parties must check local rules or call the court clerk to determine how and when to file opposition to a stay request.

For further discussion of opposing a stay request, see §§6.18-6.21.

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§8.5 C. Consider Joint Response

If a writ proceeding is brought against both a respondent and a real party in interest, and their interests in defending the challenged action or decision are the same, they should consider responding jointly when appropriate, *e.g.,* filing a joint memorandum in opposition to a motion for issuance of a writ.

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D. When Petitioner Uses Noticed Motion Procedure

§8.6 1. File Responsive Pleading or Motion

When the petitioner uses the noticed motion procedure, typically only the writ petition is filed and served at the outset of the writ proceedings. See §§5.76-5.85. In response, the respondent or real party in interest files a responsive pleading or motion, *e.g.,* a demurrer, answer, or motion to strike. CCP §§1089.5, 1109. Demurrers and answers are by far the most common responses to a writ petition. If a demurrer or motion to strike is filed, the respondent or real party must comply with the rules of court and any local rules in bringing the demurrer or motion on for hearing.

PRACTICE TIP: The petitioner may notice a hearing on a motion for issuance of the requested writ concurrently with filing the writ petition. In that situation, even though the respondent or real party in interest will file memorandum opposing the motion for issuance of a writ, filing an answer or demurrer is still essential. Without a responsive *pleading* on file, *e.g.,* an answer or demurrer, the court likely will deem all factual allegations in the petition admitted. See CCP §§1088, 1094. If it will avoid unnecessary duplication, it may be appropriate to file one memorandum, in opposition to the motion for issuance of a writ and in support of the demurrer. However, counsel should check with the court or apply for permission to file a combined memorandum to avoid any risk that the motion for issuance of a writ is deemed unopposed or the responsive demurrer or motion is deemed unsupported.

On demurrers, see §§8.40-8.44. On answers, see §§8.45-8.49. On other responsive motions, see §§8.50-8.56.

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§8.7 a. Time to File

The time in which the respondent or real party in interest must file a responsive pleading or motion depends on whether an administrative record is necessary and, if so, whether it has been requested and filed. CCP §1089.5. On the record, see chap 7.

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§8.8 (1) When Record Has Been Filed or Is Unnecessary

If the administrative record has been filed with the writ petition, or if no record of the underlying proceeding is required, the responsive pleading or motion must be filed 30 days after service of the writ petition. CCP §1089.5.

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§8.9 (2) When Record Has Been Requested But Not Filed

If the petitioner has requested preparation of a record under Govt Code §11523 or some other statute, and the record has not been filed with the writ petition, the respondent or real party in interest need not respond until 30 days after receipt of a copy of the record. CCP §1089.5.

PRACTICE TIP: In this situation, it is good practice to confirm with the petitioner in writing the timing of the responsive pleading. In addition, the respondent or real party in interest should calendar reminders to check periodically on the status of the record preparation in case it takes an extended period of time.

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§8.10 (3) Time May Be Extended by Stipulation or Application

As in other civil actions, the time to file a responsive pleading can be extended by stipulation of the parties (see Cal Rules of Ct 3.110(d) (parties may stipulate to one 15-day extension (made applicable to writ proceedings by Cal Rules of Ct 3.10; rules apply to all civil cases in the superior courts unless otherwise provided); Govt C §68616(b) (under Trial Court Delay Reduction Act, parties may stipulate to one 15-day extension) or by application to the court.

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b. Filing, Fee, and Service

§8.11 (1) File in Same Court as Petition

The responsive pleading or motion is filed in the same court as the writ petition. The respondent and any real party in interest should check the court's local rules for specific filing requirements (*e.g.,* number of copies).

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§8.12 (2) Fee

When filing a responsive pleading or motion, the respondent or real party in interest must pay the normal first appearance fee of $355. Govt C §70612(a).

PRACTICE TIP: There may be surcharges in Riverside, San Bernardino, and San Francisco Counties. Govt C §70603(a)(3)-(5). Accordingly, parties involved in writ proceedings in those counties should check the court's local rules before filing a responsive pleading or motion.

If the court has designated an action as complex, an additional complex case fee will be added. See Govt C §70616(b).

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§8.13 (3) Serve All Parties

The respondent or real party in interest must serve a copy of the responsive pleading or motion on the petitioner and any other parties named in the petition. CCP §465 (made applicable to writ proceedings by CCP §1109).

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§8.14 (4) How to Serve

The method of service is governed by CCP §§1010-1020. CCP §§1107, 1109. For further discussion of service, see California Civil Procedure Before Trial, chap 18 (4th ed Cal CEB 2004).

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§8.15 c. Consequences of Not Filing Responsive Pleading

The superior court cannot grant a peremptory writ by default. CCP §§1088, 1094, 1105. Thus, even if the respondent or real party in interest fails to file a responsive pleading, the court must still decide whether writ relief is permissible and warranted. However, if no responsive pleading is filed, the factual allegations in the writ petition likely will be deemed uncontroverted. See *Titmas v Superior Court* (2001) 87 CA4th 738, 741, 104 CR2d 803 (real parties in interest failed to file return in appellate court writ proceeding, so facts alleged in petition accepted as true); *Shaffer v Superior Court* (1995) 33 CA4th 993, 996 n2, 39 CR2d 506 (same).

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§8.16 2. File Opposition to Motion for Issuance of Writ

When the petitioner brings the writ petition on for a hearing on the merits by filing a noticed motion for issuance of the requested peremptory writ, the respondent or real party in interest must file a memorandum in opposition to the motion. On the contents of an opposition memorandum, see §§8.18-8.20.

On bringing a writ petition on for a hearing on the merits, see §§5.86-5.107.

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§8.17 a. Time to File

Unless the parties agree to (and the court permits) a different briefing schedule, opposition papers must be filed at least 9 court days before the time set for hearing the motion. CCP §1005(b) (made applicable to writ proceedings by CCP §1109).

PRACTICE TIP: In writ proceedings in which there is any kind of lengthy or complicated record (either an administrative record or extensive exhibits), the standard law and motion deadlines might not afford the parties enough time to prepare adequate briefing (*i.e.,* opposition by the respondent or real party in interest, and reply by the petitioner). If possible, the parties should stipulate to a reasonable briefing schedule and hearing date and submit the stipulation to the court for approval. The court will probably approve such a stipulation, particularly if the schedule allows the court adequate time to review the matter after the last brief is filed. Once the court has approved the stipulation, however, it may be reluctant to grant additional time. Thus, in agreeing to a briefing schedule, counsel should take into account all foreseeable time contingencies.

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§8.18 b. Contents of Opposition Memorandum

The memorandum in opposition to a motion for issuance of a peremptory writ should fully address the merits of the writ petition and should contain the following (Cal Rules of Ct 3.1113(b) (made applicable to writ proceedings by Cal Rules of Ct 3.1103(a)(2))):

- A short introduction summarizing the nature of the writ proceeding and why writ relief is not warranted;
- A concise statement of the facts (important to balance the petitioner's factual statement or to tell the other side of the story) supported by references to the administrative record (if there is one) or to other evidence (*e.g.,* declarations and exhibits; see §8.20);
- A concise statement of the standard of review to be applied by the superior court, supported by relevant case authorities if the respondent or real party in interest disputes the standard stated by the petitioner or the petitioner has failed to set forth the applicable standard (see §§5.92-5.100);
- Arguments responding to those made by the petitioner, supported by relevant legal citations and references to the administrative record or other evidence before the court;
- Arguments in support of affirmative defenses not previously raised by demurrer; and
- A succinct conclusion.

PRACTICE TIP: Copies of any non-California authorities must be submitted in the format prescribed by the rules of court. See Cal Rules of Ct 3.1110(f), 3.1113(i) (made applicable to writ proceedings by Cal Rules of Ct 3.1103(a)(2)). In addition, if there are citations to regulations or other authorities that might not be readily accessible, copies of these should be provided as well.

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§8.19 c. Format of Opposition

The rules of court govern the format of all writ papers filed in the superior courts. Cal Rules of Ct 2.2, 3.1100, 3.1103(a)(2) (made applicable to writ proceedings by Cal Rules of Ct 3.1103(a)(2)). This includes rules concerning typeface, spacing, pagination, and binding. See Cal Rules of Ct 2.100-2.119. For example:

- **Maximum page length.** The opposition may not exceed 15 pages, excluding exhibits, declarations, attachments, the tables of contents and authorities, and the proof of service. Cal Rules of Ct 3.1113(d). A party may apply for permission to file a longer memorandum. Cal Rules of Ct 3.1113(e).

PRACTICE TIP: The page limits set by the rules of court may not be sufficient in complex writ proceedings. Thus, in addition to stipulating to a briefing schedule (see §8.17), counsel should also agree to reasonable page limitations, bearing in mind that the superior courts do not look kindly on long memoranda. Although the court may allow additional pages, it may allow fewer pages than counsel request. Alternatively, because the page limits do not apply to the answer, the respondent or real party in interest can elect to include a full factual recitation in the answer by allegation and a shorter statement of facts in the opposition memorandum.

- **Requirements based on page length.** An opposition memorandum exceeding 10 pages must include a table of contents, a table of authorities, and an opening summary of argument. Cal Rules of Ct 3.1113(f).
- **Binding, page numbering, and hole punching.** The pages must be bound together at the top and numbered consecutively at the bottom. Each page must be prepunched with two holes centered 2½ inches apart and ⅝ inch from the top of the paper. Cal Rules of Ct 2.113, 2.115, 3.1110(c).
- **Local rules and practice.** Although the rules of court are meant to preempt local rules on the form and format of papers filed in the superior courts (Cal Rules of Ct 2.100(a)), counsel should check local rules for any special requirements for pleadings and papers in writ proceedings.

For a complete list of format requirements, see §§5.21-5.31.

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§8.20 d. Evidence in Opposition

The evidence considered depends on the nature of the writ proceeding. Sometimes, the evidence is contained in a formal administrative record, requested by the petitioner and prepared by the administrative agency whose action or decision is at issue. The administrative record will be lodged with the superior court and served on all parties before the hearing on the motion for issuance of a writ. See §7.18. In such cases, the opposition memorandum should include clear and concise citations to that record to support all factual assertions (*e.g.,* "Rec. 100" or "App. 100"). When the record permits, counsel should provide the line numbers or identify the relevant paragraph. On citing to the record, see §7.23.

In other contexts, the evidence will be presented through declarations and exhibits, just as it would in a regular civil case. See §7.2. (In very rare instances, oral testimony may be presented at the hearing with leave of court under Cal Rules of Ct 3.1306. See §9.30.) The rules of evidence apply, so only relevant and properly authenticated evidence can be introduced. When relevant to a particular point, clear and concise reference to the evidence should be made in the opposing memorandum (*e.g.,* Baker Decl. at 5, ¶3; App. Exh. 5 at 13).

NOTE: Evidence may also be presented in the form of exhibits to a verified answer. See §§8.45-8.46.

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E. Alternative Writ Procedure

1. Opposition to Application for Issuance of Alternative Writ

§8.21 a. Optional if Petitioner Seeks Ex Parte Issuance of Alternative Writ

A petitioner who uses the alternative writ procedure files a writ petition and also seeks, at the outset of the proceedings, issuance of an alternative writ. CCP §§1087-1088. See §5.15. This is usually done through ex parte procedures or on shortened time. See §§5.15-5.18, 9.2-9.20. In contrast to appellate court writ procedures (see Cal Rules of Ct 8.487(a)(1)), there is no rule expressly allowing the respondent or real party in interest to file a preliminary opposition to an application for an alternative writ in superior court writ proceedings. Nevertheless, if time permits, a respondent or real party in interest can file a written opposition and appear at the hearing to oppose the issuance of an alternative writ. On preliminary oppositions in appellate court writ proceedings, see chap 21.

PRACTICE TIP: Many superior courts will readily issue an alternative writ, viewing the application simply as a notification device for the hearing on the merits of the return or writ petition. See §§5.15, 9.5. These courts hardly expect opposition on the merits, unless the respondent or real party in interest can point out a patent defect in the petition or establish that it is frivolous. Thus, a respondent or real party in interest may choose not to spend the time and effort opposing the issuance of an alternative writ, but nonetheless appear at the ex parte hearing to obtain a briefing schedule and hearing date that allows sufficient time to respond to the petition on the merits.

As long as the petitioner gives less than 10 days' notice (which will always be the case when the ex parte procedure is used), the court is limited to issuing an alternative writ and cannot issue a peremptory writ in the first instance. CCP §1088.

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§8.22 b. Strongly Recommended if Petitioner Gives 10 Days' Notice of Application for "a" Writ or for "Peremptory" Writ

If, instead of using ex parte procedures, a petitioner gives at least 10 days' notice of an application for issuance of "a" writ (meaning an application not limited to issuance of an alternative writ, but embracing a request for issuance of a peremptory writ) or a peremptory writ, the respondent or real party in interest must take action. If such notice is given, statutes allow issuance of a peremptory writ in the first instance. CCP §1088. See *Palma v U.S. Indus. Fasteners, Inc.* (1984) 36 C3d 171, 178, 203 CR 626 (court's authority to issue peremptory writ in first instance is limited to cases in which opposing party has received "due notice" at least 10 days beforehand).

However, case law makes it clear that a peremptory writ can be issued in the first instance (*i.e.,* in the absence of issuance of an alternative writ) only in the following limited circumstances:

- The court has received or solicited opposition from the parties adversely affected;
- The petition and opposition adequately address the issues raised by the petition;
- No factual dispute exists; and
- Additional briefing following the issuance of an alternative writ is unnecessary to the disposition of the petition.

Lewis v Superior Court (1999) 19 C4th 1232, 1240, 82 CR2d 85; *Palma,* 36 C3d at 178. The accelerated *Palma* procedure is reserved for "extremely narrow circumstances," primarily those cases in which a "compelling temporal urgency requires an immediate decision." *Lewis*, 19 C4th at 1261, citing *Ng v Superior Court* (1992) 4 C4th 29, 35, 13 CR2d 856. Thus, even an application for a peremptory writ on at least 10 days' notice rarely meets the requirements for issuance of the writ in the first instance.

PRACTICE TIP: As a practical matter, the expedited "*Palma*" notice procedure is rarely, if ever, used in superior court writ practice. Rather, it has become established superior court writ practice that petitioners either seek an alternative writ ex parte (see §§5.108-5.118) or use the noticed motion procedure (see §§5.76-5.107). The truncated "*Palma"* notice procedure under CCP §1088 is, instead, a feature of appellate court writ practice. See §§22.18-22.22.

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§8.23 c. Time to File

The time for filing opposition is driven by the manner in which the petitioner chooses to proceed.

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§8.24 (1) When Alternative Writ Is Sought Ex Parte

If the petitioner seeks an alternative writ ex parte or on shortened time, the respondent or real party in interest will have very little time to prepare and file an opposition memorandum. If time permits, counsel should prepare a short opposition identifying any glaring procedural or substantive defects in the petition. Counsel also should notify the court clerk that written opposition will be filed. If there is not enough time to prepare written opposition, the respondent or real party in interest should appear at the hearing to oppose the issuance of the alternative writ. Again, counsel should notify the clerk of any planned appearance at the hearing to oppose issuance of an alternative writ.

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§8.25 (2) When Petitioner Has Given 10 Days' Notice of Application for "a" Writ or for "Peremptory" Writ

If the petitioner has given at least 10 days' notice of an application for issuance of "a" writ (meaning an application not limited to issuance of an alternative writ, but embracing a request for issuance of a peremptory writ) or a peremptory writ, opposition must be filed within 5 days "after service and filing" of the application for issuance of the writ. CCP §§1088, 1107. If the respondent or real party in interest does not have sufficient time to prepare opposition, it should either work with the petitioner to reschedule the hearing date and establish a briefing schedule, or apply to the court for an extension of time and a new hearing date. If the time sought is reasonable under the circumstances, and the petitioner will not be prejudiced, the court in all likelihood will grant the continuance. Application for a writ on 10-days notice is rarely, if ever, made in a superior court writ proceeding. See §8.22.

PRACTICE TIP: A respondent or real party in interest that needs additional time but faces a credible showing of prejudice by the petitioner should propose options minimizing or avoiding the claimed prejudice, *e.g.,* agreeing to postpone a planned action. This will decrease the likelihood of strong opposition by the petitioner and increase the chances that the court will grant the extension.

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d. Content of Opposition

§8.26 (1) When Alternative Writ Is Sought Ex Parte

Because many superior courts typically view a request for issuance of an alternative writ simply as a request for a hearing date on the merits of the return or petition, they do not invest significant time on the merits of the writ petition in deciding whether to issue an alternative writ. In such cases, therefore, any written opposition should be succinct and focus on any readily apparent procedural problems or substantive deficiencies in the petition. In addition, the opposition should note the limited purpose of an alternative writ and remind the court that full briefing on the merits will follow.

PRACTICE TIP: If there is an easily explained and compelling reason why the writ petition lacks merit, previewing that point in the opposition to the application for issuance of an alternative writ might convince the court to deny the writ petition outright. See *Patterson v Board of Supervisors* (1947) 79 CA2d 670, 675, 180 P2d 945 (superior court not required to issue alternative writ before denying writ petition when record substantiated board's decision).

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§8.27 (2) When Petitioner Has Given 10 Days' Notice of Application for "a" Writ or for "Peremptory" Writ

When the petitioner has given at least 10 days' notice of an application for issuance of a writ (meaning an application not limited to issuance of an alternative writ, but embracing a request for issuance of a peremptory writ) or for a peremptory writ, the respondent or real party in interest must take into account that the court, by statute, can issue a peremptory writ in the first instance. CCP §1088. There are, however, significant limitations on the court's ability to do so. See §8.22. Further, this truncated procedure is rarely, if ever, used in superior court writ proceedings. See §8.22. If a respondent or real party receives such notice, written opposition should (a) urge the court to deny the writ petition outright—*i.e.,* attack the merits of the petition as best as can be done within the short period of time available—and (b) alternatively urge the court to issue only an alternative writ and establish a reasonable briefing schedule and set a hearing date on the merits of the petition.

NOTE: The statutory 10-day notice provision in CCP §1088 (*e.g.*, "*Palma*" notice (*Palma v U.S. Indus. Fasteners, Inc.* (1984) 36 C3d 171, 178, 203 CR 626)) is rarely, if ever, used in superior court writ practice. See §8.22.

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e. Filing, Fee, and Service

§8.28 (1) Opposition Filed in Same Court as Petition

Opposition to issuance of an alternative writ is filed in the same court as the writ petition. The respondent and any real party in interest should check local rules for specific filing requirements (*e.g.,* number of copies).

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§8.29 (2) Fee

The respondent or real party in interest must pay the normal first appearance fee of $355. Govt C §70612(a).

PRACTICE TIP: There may be surcharges in Riverside, San Bernardino, and San Francisco Counties. Govt C §70603(a)(3)-(5). Accordingly, parties involved in writ proceedings in those counties should check the court's local rules before filing an opposition.

If the court has designated an action as complex, an additional complex case fee will be added. See Govt C §70616(b).

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§8.30 (3) Serve All Parties

The respondent or real party in interest must serve a copy of any written opposition on the petitioner and on any other parties named in the petition. CCP §465 (made applicable to writ proceedings by CCP §1109).

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§8.31 (4) How to Serve

The method of service is governed by CCP §§1010-1020. CCP §§1107, 1109. See California Civil Procedure Before Trial, chaps 17-18 (4th ed Cal CEB 2004).

JUDICIAL PERSPECTIVE: Given the short timeframes involved, personal service is preferred. It not only reflects positively on the respondent or real party in interest, but also avoids the court's having to possibly continue the hearing if the petitioner argues that it has not had adequate time to consider the opposition.

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2. If Superior Court Issues Alternative Writ

§8.32 a. Effect of Alternative Writ

An alternative writ commands the respondent either to perform or cease to perform an act (as sought in the writ petition's prayer for relief) or to show cause why it should not be compelled to do so. CCP §§1087 (traditional mandate), 1104 (prohibition).

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§8.33 (1) If Respondent Chooses to Comply

If the respondent chooses to comply with the alternative writ, the court will dismiss the petition as moot after the respondent shows proof of compliance to the court. *Bruce v Gregory* (1967) 65 C2d 666, 671, 56 CR 265.

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§8.34 (2) If Respondent Chooses Not to Comply

If the respondent chooses not to comply with the alternative writ, the respondent or real party in interest must show cause why a peremptory writ should not issue by making a "return" to the alternative writ, which consists of filing a responsive pleading or motion (*e.g.,* a demurrer, answer, or motion to strike). CCP §§1089, 1105. If a demurrer or motion to strike is filed, the respondent or real party must comply with the rules of court and any local rules in bringing the demurrer or motion on for hearing.

On specific responsive pleadings and motions, see §§8.40-8.56.

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b. Return After Issuance of Alternative Writ

§8.35 (1) File Responsive Pleading or Motion

A respondent or real party in interest "makes a return" to an alternative writ by filing a responsive pleading or motion (*e.g.,* a demurrer, answer, or motion to strike). CCP §§1089, 1105. If a demurrer or motion to strike is filed, the respondent or real party must comply with the rules of court and any local rules in bringing the demurrer or motion on for hearing.

NOTE: This is the same responsive pleading or motion the respondent or real party in interest would initially file if the petitioner used the noticed motion procedure. See §8.6.

On demurrers, see §§8.40-8.44. On answers, see §§8.45-8.49. On other responsive motions, see §§8.50-8.56.

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§8.36 (2) Time to File

The responsive pleading or motion must be filed on the "date for return of the alternative writ" (CCP §§1089, 1105), which is set forth in the alternative writ. If the respondent or real party in interest needs additional time, counsel should first try to obtain a stipulation with opposing counsel, which likely will be approved by the court if the extension is for a reasonable period of time. If opposing counsel will not stipulate, the respondent or real party in interest should apply for an extension from the court. If good cause is shown, and the petitioner will not be prejudiced, the court will likely grant the extension.

PRACTICE TIP: The respondent or real party will often want to attend the ex parte hearing on the application for issuance of an alternative writ if for no other reason than to weigh in on both the date the return is due and the date for the hearing on the return or writ petition. The objective is to ensure that the respondent or real party in interest has enough time to prepare an adequate responsive pleading as well as enough time to prepare a thorough and persuasive memorandum in opposition to the petition. The petitioner, in turn, wants to have a reasonable period of time to prepare and file a reply. Thus, if the respondent or real party in interest proposes a reasonable return, briefing, and hearing schedule, the court likely will include those dates in the alternative writ.

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§8.37 (3) Consequences of Filing Defective Return or No Return

The superior court cannot grant a peremptory writ by default. CCP §§1088, 1094, 1105. Thus, a defective return or no return at all does not guarantee that the petitioner will succeed. Nonetheless, if no return is filed, the factual allegations in the writ petition will be deemed uncontroverted, greatly enhancing the chances that the petitioner will prevail if the dispute turns on those factual issues. See *Titmas v Superior Court* (2001) 87 CA4th 738, 741, 104 CR2d 803 (respondent failed to file return in appellate court writ proceeding, so facts alleged in petition accepted as true); *Shaffer v Superior Court* (1995) 33 CA4th 993, 996 n2, 39 CR2d 506 (same).

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§8.38 (4) Memorandum Addressing Merits of Writ Petition

Just as the application for an alternative writ is accompanied by a supporting memorandum (see §5.110), a return also should include a memorandum in opposition to the petition. No statute or rule expressly requires an opposing memorandum. However, the formal return (*i.e.,* the demurrer or answer) is simply a pleading. The legal arguments in support of that pleading and in opposition to the writ petition must be presented to the court in a memorandum.

When this memorandum should be filed often is fixed by stipulation, by the order issuing the alternative writ, or in the alternative writ itself. The respondent or real party in interest should check local rules and, if there are none, call the court clerk. Absent any other provision for filing a memorandum in support of the return and in opposition to the issuance of a writ, it should be filed at the same time the return is made, *i.e.,* when the responsive pleading is filed.

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§8.39 3. "*Palma*" Notices Not Used in Superior Court Writ Proceedings

The *Palma* notice procedure, as employed by the courts of appeal, is not a feature of superior court writ practice. See §§8.22, 8.25, 8.27. Under *Palma v U.S. Indus. Fasteners, Inc.* (1984) 36 C3d 171, 180, 203 CR 626, the courts of appeal sometimes issue a notice shortly after a writ petition is filed advising the parties that the court may issue a peremptory writ in the first instance (*i.e.,* without issuing an alternative writ, awaiting a formal return, holding oral argument, or preparing an opinion) and inviting opposition to be filed within a specified time, usually 20 days. Indeed, this procedure makes no sense in superior court writ proceedings given the routine practice of hearing applications for alternative writs on the ex parte calendar, as well as superior courts' common view that an alternative writ is basically notification of the hearing on the merits of the return or writ petition. On the use of *Palma* notices in appellate court writ proceedings, see §§22.18-22.22.

CAUTION: It is conceivable that a petitioner could give 10 days' notice of an application for issuance of a writ (*i.e.*, an application not limited to issuance of an alternative writ) for issuance of a peremptory writ. In such case, the respondent and real party in interest should be vigilant about appearing and opposing the application. See §8.22. However, the 10-day notice procedure (*e.g.*, "*Palma*" notice) is rarely, if ever, used in superior court writ practice. Rather, the established procedures are the alternative writ and noticed motion procedures. See §§5.108-5.118 (alternative writ procedure), 5.76-5.107 (noticed motion procedure).

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III. TYPES OF RESPONSIVE PLEADINGS AND MOTIONS

A. Demurrer

§8.40 1. Tests Sufficiency of Petition

A demurrer tests the legal sufficiency of a writ petition. See, *e.g., Sustainability of Parks, Recycling & Wildlife Legal Defense Fund v County of Solano Dep't of Resource Mgmt.* (2008) 167 CA4th 1350, 1356, 84 CR3d 889 (in light of amendments, trial court overruled demurrer); *Fonseca v Fong* (2008) 167 CA4th 922, 926, 84 CR3d 567 (trial court agreed with respondents that statute was per se preempted and sustained demurrer without leave to amend). *Larson v City of Redondo Beach* (1972) 27 CA3d 332, 337, 103 CR 592. See generally CCP §§430.10-430.80 (governing demurrers) (made applicable to writ practice by CCP §1109, making rules of practice governing civil actions applicable to writ proceedings). See also Cal Rules of Ct 3.1103(a)(2) (making law and motion rules applicable to writ proceedings).

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§8.41 2. Basis for Demurrer

A demurrer can raise any legal defect apparent on the face of the petition. This could include the lack of any beneficial interest, the existence of an adequate remedy at law, or the failure to state a claim for relief. See, *e.g.*, *Fonseca v Fong* (2008) 167 CA4th 922, 926, 84 CR3d 567 (demurrer to writ petition on preemption grounds should have been overruled); *Larson v City of Redondo Beach* (1972) 27 CA3d 332, 337, 103 CR 592 (demurrer sustained; city officials not legally required to administer boat slip rental rates because city's duties were discretionary, not mandatory). Additional grounds include untimeliness, the failure to exhaust available administrative remedies, mootness, unclean hands, a missing or defective verification, and improper venue.

For an example of a demurrer, see forms in §§13.10-13.11. See also discussion of demurrers and example in California Civil Procedure Before Trial, chap 23 (4th ed Cal CEB 2004).

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3. General Guidelines for Demurrers

§8.42 a. If Demurrer Sustained

If the superior court sustains the demurrer without leave to amend, the court will enter an order of dismissal, which, when filed, constitutes a judgment of dismissal. CCP §§581(f)(1), 581d, 1109. If the court sustains the demurrer with leave to amend, the petitioner may file an amended petition to rectify the pleading problems. Unless the court orders otherwise, the petitioner has 10 days to file an amended petition. Cal Rules of Ct 3.1320(g).

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§8.43 b. If Demurrer Overruled

If the court overrules the demurrer, and the respondent or real party in interest did not also file an answer, the court "may allow an answer to be filed within such time as it may designate." CCP §1089, see also CCP §§1069.1, 1105. Unless the court orders otherwise, the respondent or real party in interest has 10 days to file an answer. Cal Rules of Ct 3.1320(g) (made applicable to writ proceedings by Cal Rules of Ct 3.10 (rules apply to all civil cases in the superior courts unless otherwise provided)).

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§8.44 4. Answer in Conjunction With Demurrer

Case law indicates that a court has discretion under CCP §1089 to deny a respondent and/or real party leave to file an answer to a writ petition after overruling a demurrer. See *Florence W. Med. Clinic v Bontá* (2000) 77 CA4th 493, 505, 91 CR2d 609, citing *Ryne v Municipal Court* (1980) 113 CA3d 807, 819, 170 CR 312. However, a court's exercise of this discretion under §1089, like any exercise of discretion by a court, must be reasonable rather than arbitrary and can be challenged in an appropriate case as an abuse of discretion. See *Harris v Alcoholic Beverage Control Appeals Bd.* (1965) 62 C2d 589, 594, 43 CR 633, citing *Bailey v Taaffe* (1866) 29 C 422, 424. For example, were a court to deny leave to file an answer and to grant a peremptory writ when overruling a demurrer that addressed issues other than those necessary to the court's determination of the merits of the writ petition (such as the statute of limitations and exhaustion of administrative remedies), the denial of leave to file an answer would arguably constitute an abuse of discretion. The denial of leave to file an answer in those circumstances would effectively place the respondent and/or real party in default, require the court to decide the merits and rule on the petition under CCP §§1088 ("writ cannot be granted by default") and 1094 ("If no return be made, the case may be heard on the papers of the applicant"), and deprive the respondent and/or real party of a full and fair opportunity to defend themselves on the merits. *Florence W. Med. Clinic, supra*. But see Cal Rules of Ct 8.933(b)(4) (in limited civil cases, if return is by demurrer alone and court overrules demurrer, court may issue peremptory writ without granting respondent or real party in interest leave to answer).

Filing an answer in conjunction with a demurrer avoids any risk that the court might overrule the demurrer but deny leave to file an answer. See CCP §1089, see also CCP §§1069.1, 1105. It also avoids any argument by the petitioner that the failure to file an answer amounts to a waiver of the respondent's or real party in interest's right to do so following the court's overruling of a demurrer. It is far and away the best practice to file an answer in conjunction with any demurrer.

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B. Answer

§8.45 1. Function of Answer

An answer responds to the allegations of the writ petition, alleges any additional relevant facts, attaches and authenticates additional exhibits, and asserts any available affirmative defenses. See CCP §§431.10-431.30 (made applicable to writ practice by CCP §1109), 1069.1, 1089, 1089.5, 1105.

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§8.46 2. Content of Answer

The answer may consist of admissions, denials, and affirmative defenses. CCP §431.30 (made applicable to writ proceedings by CCP §1109). Counsel must also allege any relevant facts not contained in the petition supporting the answer. See, *e.g.*, *Coy v Superior Court* (1962) 58 C2d 210, 221, 23 CR 393 (answer in appellate court writ proceeding failed to include any supporting facts; peremptory writ issued). Additional documents may be attached as exhibits and authenticated in the answer.

The answer may raise issues of fact and law, both in its denial of the petition's facts and legal conclusions and in its affirmative defenses. See, *e.g.*, *McMahan's of Santa Monica v City of Santa Monica* (1983) 146 CA3d 683, 689, 194 CR 582 (issue of law: city's statutory immunity); *Lowell v Mother's Cake & Cookie Co.* (1978) 79 CA3d 13, 19, 144 CR 664 (issue of fact: justification).

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§8.47 a. Allegations Deemed Admitted if Not Denied

The respondent or real party in interest must deny all allegations that it disputes; otherwise, the allegations are deemed admitted. See, *e.g., Dulaney v Municipal Court* (1974) 11 C3d 77, 81 n3, 112 CR 777 (allegations not expressly denied in answer to writ petition were deemed admitted); *Baumgardner v City of Hawthorne* (1951) 104 CA2d 512, 517, 231 P2d 864 (same).

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§8.48 b. Affirmative Defenses Must Be Raised in Answer

The respondent or real party in interest must raise all affirmative defenses (*e.g.,* lack of capacity to sue, failure to exhaust administrative remedies, and laches) in the answer. CCP §430.80 (made applicable to writ proceedings by CCP §1109). See, *e.g., Parker v Bowron* (1953) 40 C2d 344, 349, 254 P2d 6 (in response to writ to raise workers' wages, city's answer alleged city wages on par with private wages, and existing ordinance for increased wage); See *Resource Defense Fund v County of Santa Cruz* (1982) 133 CA3d 800, 804, 184 CR 371 (answer to petition raised affirmative defenses of mootness, laches, and statute of limitations). Defenses not asserted are deemed waived, except lack of subject matter jurisdiction and the failure to state facts sufficient to constitute a cause of action. See CCP §430.80(a) (made applicable to writ proceedings by CCP §1109).

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§8.49 3. Verification Required

An answer to a writ petition must be verified. CCP §1089; see also CCP §446(a) (made applicable to writ proceedings by CCP §1109). To the extent the answer alleges facts to be relied on as evidence, the verification must be based on personal knowledge, not information and belief. See *Star Motor Imports, Inc. v Superior Court* (1979) 88 CA3d 201, 204, 151 CR 721 (verification of writ petition "on information and belief" ineffective; petition dismissed).

NOTE: Certain public entities and officials acting in their public capacities are exempt from the verification requirement. See CCP §446(a); *Crowl v Commission on Prof. Competence of the Governing Bd. of the San Juan Unified Sch. Dist.* (1990) 225 CA3d 334, 342, 275 CR 86 (school district); *Elliott v Contractors' State License Bd.* (1990) 224 CA3d 1048, 1054, 274 CR 286 (Contractors' State License Board). But see *People v Superior Court (Alvarado)* (1989) 207 CA3d 464, 255 CR 46 (division of authority in criminal cases regarding verification requirement for public entities and officials).

On verifications, see §§5.64-5.69; California Civil Procedure Before Trial §§25.9, 25.15-25.21 (4th ed Cal CEB 2004).

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§8.50 C. Responsive Motions

Although answers and demurrers are by far the most common responses to a writ petition filed in superior court (and the only ones expressly authorized by the writ statutes), courts have recognized the propriety of other motions to test the sufficiency of a writ petition. These motions are noticed in the same manner as are motions in a regular civil case, unless otherwise directed by the court. See generally CCP §§1003-1020; Cal Rules of Ct 3.1100-3.1370. Counsel should also check the court's local rules or call the clerk for specific procedures on filing a motion in a writ proceeding. For a full discussion of noticed motions, see California Civil Procedure Before Trial, chap 12 (4th ed Cal CEB 2004).

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§8.51 1. Motion to Dismiss

A respondent or real party in interest may file a motion to dismiss the petition. See, *e.g.*, *Swars v Council of the City of Vallejo* (1944) 64 CA2d 858, 861, 149 P2d 397 (noting that sufficiency of petition for writ of review should be raised by demurrer or motion to dismiss). It can be used, for example, to dismiss an inappropriate party or to dismiss the petition for failure to join an indispensable party or based on forum non conveniens. As a matter of current practice, however, motions to "dismiss" are directed at lack of prosecution—failure to serve summons within 3 years (mandatory dismissal under CCP §§583.210-583.250), failure to bring to trial within 5 years (mandatory dismissal under CCP §§583.310-583.360), or delay in prosecution (discretionary dismissal under CCP §§583.410-583.430). These dismissal motions are applicable to prerogative writs in the superior court through CCP §1109.

On motions to dismiss, see California Civil Procedure Before Trial, chap 39 (4th ed Cal CEB 2004).

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§8.52 2. Motion to Quash

A respondent or real party in interest may file a motion to quash service of the petition to challenge the court's jurisdiction over any of the parties or actions challenged. See, *e.g.*, *Hammond Lumber Co. v Board of Supervisors* (1948) 85 CA2d 568, 570, 193 P2d 503 (demurrer and motion to quash petition for writ of review (certiorari) sustained because act of school district was not judicial in character). On motions to quash, see California Civil Procedure Before Trial, chap 19 (4th ed Cal CEB 2004).

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§8.53 3. Motion for Judgment on the Pleadings

A motion for judgment on the pleadings is the equivalent of a demurrer, but can be made after an answer has been filed and the matter is at issue. CCP §438. A petitioner could make this motion instead of a demurrer to the answer. A respondent or real party in interest might make this motion after the petitioner has filed a replication (reply) to the answer. See *California Water Impact Network v Newhall County Water Dist.* (2008) 161 CA4th 1464, 1491, 75 CR3d 393 (trial court properly granted respondent's motion for judgment on pleadings). On filing a replication, see §§8.57-8.61. On the various technical requirements for and restrictions on making a motion for judgment on the pleadings, see California Civil Procedure Before Trial, chap 27 (4th ed Cal CEB 2004).

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§8.54 4. Motion for Summary Judgment

A motion for summary judgment is rarely appropriate in a writ proceeding. If the noticed motion procedure is used, the parties have a full opportunity to address all issues pertinent to the merits of the petition. If the alternative writ procedure is used, the merits hearing following issuance of an alternative writ is much the same. Nevertheless, the statutes do not preclude a summary judgment motion. See, *e.g.*, *Stanton v Dumke* (1966) 64 C2d 199, 207, 49 CR 380 (demurrer sustained and summary judgment granted; grievance moot). A summary judgment motion might be appropriate, for example, if based on a dispositive affirmative defense peripheral to the substantive merits of the petition when the material facts of the defense do not appear on the face of the petition, are not judicially noticeable, and thus could not be raised by demurrer.

PRACTICE TIP: In writ proceedings, the usefulness of a motion for summary judgment or adjudication to economically dispose of an unmeritorious case or claim is slight. See CCP §437c(a) (notice of motion for summary judgment must be served at least 75 days before hearing). The parties should consider whether a hearing on the merits of the writ petition will achieve the same purpose as a motion for summary judgment or adjudication, but at less cost. See Guide to the Procedures for Prosecuting Petitions for Prerogative Writs, Sacramento Superior Court, p. 6 (see App B).

For discussion of summary judgment motions, see California Civil Procedure Before Trial, chap 36 (4th ed Cal CEB 2004).

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§8.55 5. Other Miscellaneous Motions

Other pretrial matters applicable to civil proceedings, including discovery motions, motions for a change of venue, and motions to strike, also may be (but rarely are) brought in writ proceedings. CCP §1109; see also Guide to the Procedures for Prosecuting Petitions for Prerogative Writs, Sacramento Superior Court, p. 6 (see App B).

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§8.56 6. File Answer in Conjunction With Motion

As with a demurrer (see §8.44), it is prudent to file an answer in conjunction with the filing of a responsive motion. Although it is unlikely that the court, following disposition of a responsive motion, would deny leave to answer and proceed to decide the merits of the petition based solely on the allegations therein, filing an answer in conjunction with a responsive motion eliminates any such risk. See CCP §418.10(e)(1) (filing answer in conjunction with motion to quash does not constitute general appearance until order denying motion is entered). On answers, see §§8.45-8.49.

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IV. PETITIONER'S REPLY

§8.57 A. Replication (Reply)

If the answer to a writ petition alleges affirmative matters, the petitioner *must* deny or rebut them, as appropriate, or they will be deemed admitted. This is usually done by:

- A replication (also called a reply) to the answer; or
- Proof presented by the petitioner at the time of the trial. See CCP §1091 (petitioner is not "precluded by the return from any valid objection to its sufficiency, and may countervail it by proof either in direct denial or by way of avoidance"); see also CCP §1105.

Factual allegations in the answer that are not rebutted by a replication (reply) or proof at trial are taken as true. See, *e.g.*, *Elliott v Contractors' State License Bd.* (1990) 224 CA3d 1048, 1054, 274 CR 286.

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§8.58 1. Deadline for Filing Replication (Reply)

The writ statutes do not specify when a replication (reply) to an answer should be filed. However, because CCP §1109 makes Part 2 of the Code of Civil Procedure (CCP §§307-1062.20) applicable to writ proceedings, the deadlines to respond to an answer should apply. See CCP §§430.40(b) (10 days to demur to answer to complaint), 435(b)(1) (motion to strike answer must be filed within time to respond to a pleading). In any event, the replication should be filed as soon as possible and far enough in advance of the hearing to allow the court adequate time to review it.

PRACTICE TIP: When the petitioner uses the alternative writ procedure, the respondent or real party in interest has until the return date to file a responsive pleading, and the hearing on the petition also may be scheduled for that day. In such cases, the petitioner has no time to file a replication and thus may want to seek a continuance of the hearing date. Alternatively, the petitioner must make sure to challenge the responsive pleading at the hearing. CCP §1091. On continuance motions and forms, see California Civil Procedure Before Trial §§12.66-12.68, 12.146, 12.151 (4th ed Cal CEB 2004).

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§8.59 2. Contents of Replication (Reply)

The replication (reply) should contain admissions and denials in a pleading format similar to the answer. CCP §1091. See, *e.g.*, *English v City of Long Beach* (1952) 114 CA2d 311, 314, 250 P2d 298 (petitioner filed "what is denominated a traverse" to respondent's answer with detailed factual denials and allegations; entitled to court's consideration "with like effect as if originally set forth in her petition"). If the answer raises an affirmative defense (*e.g.,* the petition is barred by a statute of limitations), the replication may allege facts showing that the defense is inapplicable (*e.g.,* the respondent or real party in interest is estopped from asserting the defense).

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§8.60 3. Advance Notice Required if Replication (Reply) Made by Evidence Presented at Hearing

If the petitioner intends to contradict or challenge allegations in the answer by presenting oral testimony at the hearing, court rules require an advance request to the court and notice to opposing parties. Cal Rules of Ct 3.1306(b) (made applicable to writ proceedings by Cal Rules of Ct 3.1103(a)(2)). The notice should describe the nature of the evidence and the time that is likely to be required for its presentation.

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§8.61 4. Filing and Service

The petitioner must file the replication (reply) with the court and serve it on the respondent and any real party in interest or their attorneys. The method of service is governed by CCP §§1010-1020. CCP §§465, 1109. See California Civil Procedure Before Trial, chaps 17-18 (4th ed Cal CEB 2004).

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B. Petitioner's Reply Memorandum

§8.62 1. When Noticed Motion Procedure Is Used

Under standard motion practice, the petitioner is entitled to file a reply memorandum and additional evidence in rebuttal (if permissible and relevant) to any opposition filed by the respondent or real party in interest. CCP §§1005(b), 1109.

PRACTICE TIP: Although a reply memorandum is optional under the law and motion rules, the petitioner should always file one, because it is his or her last chance to communicate with the court on paper before the hearing and may be what tips the balance for a favorable tentative ruling.

Unless the parties have agreed on and the court has approved a specific briefing schedule, the petitioner's reply memorandum must be filed 5 court days before the scheduled hearing date. CCP §§1005(b), 1109.

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§8.63 2. When Alternative Writ Procedure Is Used

When the petitioner uses the alternative writ procedure, the respondent or real party in interest almost always will want to obtain a briefing schedule and hearing date that allows adequate time for briefing. Such a briefing schedule should specify when the petitioner's reply brief is due.

Otherwise, when seeking an alternative writ, the petitioner should ask for a hearing date on the merits sufficiently after the return date to ensure that there is adequate time to file a reply.

PRACTICE TIP: Although a reply memorandum is considered an optional pleading, a petitioner should always file one, because it is the petitioner's last chance to communicate with the court on paper before the hearing and may tip the balance for a favorable tentative ruling.

Unless the parties have agreed on and the court has approved a specific briefing schedule, the petitioner's reply memorandum should be filed in accordance with the standard law and motion rules, *i.e.,* 5 court days before the scheduled hearing date. CCP §1005(b).

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9

Action by Superior Court

The Hon. Kathleen M. Banke
Maureen M. Home

I. SCOPE OF CHAPTER §9.1

II. ACTION ON APPLICATION FOR ALTERNATIVE WRIT OF MANDATE OR PROHIBITION §9.2
- A. Court Usually Hears Application Ex Parte §9.3
- B. Hearing on Application §9.4
- C. Alternative Writ Usually Issues §9.5
- D. Effect of Issuance of Alternative Writ §9.6
- E. Content of Alternative Writ
  - 1. Writ of Mandate §9.7
  - 2. Writ of Prohibition §9.8
  - 3. Dates for Return and Hearings
    - a. Date for Return to Writ Petition §9.9
    - b. Date for Hearing Merits of Return and Petition §9.10
- F. Service of Alternative Writ
  - 1. By Petitioner §9.11
  - 2. What to Serve
    - a. Petition and Alternative Writ §9.12
    - b. Order Directing Issuance of Alternative Writ §9.13
    - c. Stay Order §9.14
  - 3. Whom to Serve §9.15
  - 4. When to Serve §9.16
- G. Denial of Alternative Writ and Petition if Facially Defective or Patently Meritless §9.17
  - 1. Leave to Amend §9.18
  - 2. Proceed by Way of Noticed Motion §9.19
- H. Peremptory Writ of Mandate or Prohibition May Issue in Limited Circumstances §9.20

III. ACTION ON MERITS OF PETITION FOR WRIT OF MANDATE OR PROHIBITION
- A. Hearing Date
  - 1. When Noticed Motion Procedure Is Used §9.21
    - a. Standard Law and Motion Rules Apply §9.22
    - b. If Petitioner Gives 10 Days' Notice §9.23
  - 2. When Alternative Writ Procedure Is Used §9.24
- B. Nature of Hearing
  - 1. If No Return Filed §9.25
  - 2. If Return Raises Only Questions of Law §9.26
  - 3. If Return Raises Factual Dispute
    - a. Petitioner Has Burden to Establish Disputed Facts §9.27
    - b. Parties Entitled to Present Evidence §9.28
      - (1) Evidence Presented by Declaration or Judicial Notice §9.29
      - (2) Oral Testimony §9.30
      - (3) Jury Trial Discretionary §9.31
- C. Rulings and Judgments
  - 1. Tentative Ruling Before Hearing §9.32
  - 2. Ruling at Conclusion of Hearing or After Submission §9.33
  - 3. Statement of Decision
    - a. Considerations in Requesting Statement of Decision §9.34
    - b. When to Request Statement of Decision §9.35
    - c. Content of Statement of Decision §9.36
  - 4. When Petitioner Prevails
    - a. Petitioner Prepares Judgment §9.37
      - (1) Purpose of Judgment §9.38
      - (2) Content of Judgment §9.39

(3) Conformed Copies for Parties §9.40
b. Petitioner Prepares Peremptory Writ
(1) Proposed Peremptory Writ §9.41
(2) Respondent's Return Date §9.42
(3) When to Prepare Writ §9.43
(4) Content of Writ §9.44
(5) Service of Writ §9.45
(6) Laying Foundation for Future Sanctions §9.46
5. When Respondent Prevails
a. Respondent Prepares Judgment Denying Issuance of Writ §9.47
b. Content of Judgment §9.48

IV. ACTION ON PETITION FOR WRIT OF REVIEW (CERTIORARI)
A. Issuance of Order to Show Cause §9.49
B. Issuance of Writ of Review (Certiorari) §9.50
C. Hearing and Decision on Merits §9.51
D. Ruling and Judgment §9.52

V. RULING ON MISCELLANEOUS MOTIONS §9.53

VI. RES JUDICATA EFFECT OF SUPERIOR COURT JUDGMENT
A. Final Judgment in Writ Proceeding Has Preclusive Effect §9.54
B. Denial of Alternative Writ Has No Preclusive Effect §9.55

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§9.1 I. SCOPE OF CHAPTER

This chapter discusses the actions that a superior court can take in a proceeding for a writ of mandate, prohibition, or review (certiorari). For a general discussion of the uses of these writs, see chaps 2, 4. This chapter discusses:

- Actions the superior court may take when the petitioner applies for an alternative writ of mandate or prohibition. See §§9.2-9.20. On the procedures for seeking an alternative writ, see §§5.108-5.118.
- Actions the superior court may take in considering and deciding the merits of a petition for a writ of mandate or prohibition. See §§9.21-9.31.
- Procedures following a ruling on the merits, *e.g.,* who needs to prepare the judgment and, if applicable, the peremptory writ. See §§9.32-9.48.
- Actions the superior court may take on a petition for a writ of review (certiorari). See §§9.49-9.52.
- Various motions the superior court may have to hear and determine before hearing the merits of the writ petition (*e.g.,* demurrer, motion for a change of venue). See §9.53.
- Res judicata effect of judgments in superior court writ proceedings. See §§9.54-9.55.

This chapter does *not* address actions the superior court can take on a petition for a writ of administrative mandamus under CCP §1094.5. For discussion of superior court actions in administrative mandamus proceedings, see California Administrative Mandamus, chaps 11, 14 (3d ed Cal CEB 2003). On the differences between traditional and administrative mandamus, including how to decide when to seek which writ, see §§3.18-3.21.

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§9.2 II. ACTION ON APPLICATION FOR ALTERNATIVE WRIT OF MANDATE OR PROHIBITION

A petitioner may initiate an action for a writ of mandate or prohibition by filing a writ petition and an application for issuance of an alternative writ. CCP §§1087-1088 (alternative writ of mandate), 1104 (alternative writ of prohibition). On the procedures for seeking an alternative writ of mandate or prohibition, see §§5.108-5.118.

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§9.3 A. Court Usually Hears Application Ex Parte

In most cases, a petitioner seeks an alternative writ ex parte. Although the writ statutes permit a court to issue an alternative writ of mandate or prohibition ex parte (*i.e.,* without notice or service of the petition; see CCP §§1088, 1105, 1107), the rules of court (and many local rules) require an ex parte applicant to provide at least some minimal notice to opposing parties of an ex parte appearance. See Cal Rules of Ct 3.1203(a) (absent exceptional circumstances, party seeking ex parte order must notify opposing parties no later than 10:00 a.m. one court day before appearance); Los Angeles Ct R 9.5(e)(1) (petitioner must serve application for alternative writ at least 5 days before ex parte hearing).

On the procedures for seeking an alternative writ, see §§5.108-5.118.

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Source: Civil Litigation/California Civil Writ Practice/9 Action by Superior Court/§9.4 B. Hearing on Application

§9.4 B. Hearing on Application

When a petitioner seeks an alternative writ ex parte, local rules and practice will govern the extent to which there is any hearing or argument by counsel. Often, the judge hearing the ex parte application will decide the matter in chambers based on the verified petition, the application for an alternative writ, and any opposition filed by the respondent or real party in interest. See CCP §166(a)(1) (superior court judge may grant ex parte application for alternative writ in chambers).

PRACTICE TIP: Because the superior court's decision on an ex parte application is often made solely on the papers filed, the form and quality of those papers is of the utmost importance. Even when the judge decides the application in chambers, counsel may get an opportunity to present argument to the judge's research attorney.

On rare occasions, the judge may hold a formal hearing (*i.e.,* both sides appear and present argument) before ruling on the application for an alternative writ of mandate or prohibition. See, *e.g.*, *Patterson v Board of Supervisors* (1947) 79 CA2d 670, 672, 180 P2d 945.

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§9.5 C. Alternative Writ Usually Issues

Many superior courts view an ex parte application for an alternative writ of mandate or prohibition as little more than a request for dates for (1) the return to the alternative writ; (2) a hearing on the return (if the respondent or real party in interest files a demurrer or other responsive motion); and (3) a hearing on the merits of the writ petition. See CCP §§1089 (mandate), 1105 (prohibition). On the return, see §§8.35-8.38. In such courts, absent a glaring deficiency in the writ petition (see §§9.17-9.19), the ex parte application is granted and the alternative writ issued.

JUDICIAL PERSPECTIVE: In some cases, the court will deny the application for an alternative writ and instead set a briefing schedule and hearing date on the merits of the petition.

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§9.6 D. Effect of Issuance of Alternative Writ

Once an alternative writ is issued, the superior court must hear the merits of the return, *i.e.,* rule on any demurrer or other responsive motion (*e.g.,* motion to strike) filed by the respondent or real party in interest. See CCP §§1090, 1105 (return may be by demurrer, answer, or both). See also §§8.40-8.44, 8.50-8.56. If the petition withstands a demurrer or other motion, then the respondent or real party in interest files an answer (or will already have filed an answer) (see §§8.45-8.49), and the court will hear the petition on the merits, including ruling on any affirmative defenses. See CCP §§1090 (discretionary jury trial of disputed facts), 1094 (court hears petition if return raises only questions of law or puts in issue only immaterial facts not affecting substantial rights of the parties), 1105 (mandate procedures also applicable to prohibition). See §§9.25-9.31.

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E. Content of Alternative Writ

§9.7 1. Writ of Mandate

If the superior court issues an alternative writ of mandate, it will "command" the respondent or real party in interest immediately or at some other specified time "to do the act required to be performed, or to show cause before the court at a time then or thereafter specified by court order why he has not done so." CCP §1087. For an example of an alternative writ of mandate, see form in §13.6.

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§9.8 2. Writ of Prohibition

If the superior court issues an alternative writ of prohibition, it will "command the party to whom it is directed to desist or refrain from further proceedings" until further order of the court and "to show cause before the court at a time and place then or thereafter specified by court order why such party should not be absolutely restrained from any further proceedings." CCP §1104.

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Source: Civil Litigation/California Civil Writ Practice/9 Action by Superior Court/ 3. Dates for Return and Hearings/§9.9 a. Date for Return to Writ Petition

3. Dates for Return and Hearings

§9.9 a. Date for Return to Writ Petition

The alternative writ will specify a date by which the respondent or real party in interest must make a return, *i.e.,* file a demurrer, verified answer, or other responsive motion. CCP §§1089, 1105. On preparing and filing a return, see §§8.35-8.56.

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§9.10 b. Date for Hearing Merits of Return and Petition

The alternative writ may specify either the return date or a later date as the date for the hearing on the merits of the return (when the respondent or real party in interest has filed a demurrer or other responsive motion). This date may also be the date for hearing the merits of the writ petition. See Los Angeles Ct R 9.5(e) ("Issuance of the alternative writ places the matter on the Court's calendar for hearing"); Sacramento County Superior Court Guide to the Procedures for Prosecuting Petitions for Prerogative Writs, p. 8 ("alternative writ is an order to show cause that calendars a writ petition for a hearing on the merits") (see App B).

Often the hearing date on the merits of the petition is later than the date for the return so the court has an opportunity to review the return and the petitioner has an opportunity to file a replication (reply). The court may also continue the hearing if, for example, the return raises a triable issue of fact and the court decides to exercise its discretion and hold a jury trial.

On replications (replies), see §§8.57-8.61. On jury trials, see §9.31.

PRACTICE TIP: To ensure adequate time for the petitioner to file a replication (reply) and for the court to adequately review the return and any replication, the parties should agree, whenever possible, on a briefing schedule and hearing date and ask the court to specify these dates in the alternative writ.

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F. Service of Alternative Writ

§9.11 1. By Petitioner

The petitioner is responsible for serving an alternative writ. An alternative writ must be served in the same manner as a summons in an ordinary civil action (see CCP §§417.10-417.40) unless waived by the respondent or otherwise ordered by the court. CCP §§1096 (mandate), 1105 (prohibition).

PRACTICE TIP: It is critical to ensure that the alternative writ is served properly. Improper service may mean the respondent is not required to comply with the writ or appear in court to justify noncompliance.

Any opposing party who is not served cannot be bound, because the court acquires jurisdiction over a party only when he or she is properly served or has made a general appearance. CCP §410.50(a).

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2. What to Serve

§9.12 a. Petition and Alternative Writ

Code of Civil Procedure §1088 requires that a copy of the petition be served with the alternative writ. If the respondent and any real party in interest were served with a copy of the petition in conjunction with the ex parte application for issuance of an alternative writ, it may not be necessary to serve them with another copy of the petition—but only if the respondent and real party in interest agree and confirm in writing that the petitioner need not serve them with a second copy of the petition.

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§9.13 b. Order Directing Issuance of Alternative Writ

The order directing the clerk to issue the alternative writ need not be served except when the order and alternative writ are a single document. The court can direct that any separate order be served. Moreover, it is always better practice to serve opposing parties with copies of any order made by the court.

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Source: Civil Litigation/California Civil Writ Practice/9 Action by Superior Court/§9.14 c. Stay Order

§9.14 c. Stay Order

If the superior court also issues a stay order, which is tantamount to a preliminary injunction, the stay order must be served in conjunction with the alternative writ. To ensure the ability to enforce compliance, the stay order should be personally served by a registered process server.

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§9.15 3. Whom to Serve

Service must be made on each respondent and real party in interest. Code of Civil Procedure §1096 states explicitly that service of the alternative writ on a board or a body may be made by serving a majority of its members, "whether at the time of the service the board or body was in session or not." Legal counsel for a particular respondent agency or officer is not generally the statutorily authorized person on whom service may be made. See CCP §§416.10-416.80. When time is of the essence, the petitioner might be able to effect service expeditiously by requesting the respondent agency to authorize its legal counsel to accept service, although it is doubtful an agency facing litigation would do so. See CCP §416.90.

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§9.16 4. When to Serve

The court may direct a minimum time within which the alternative writ must be served. If not, service must be made within a reasonable time before the return date. At a minimum, reasonable time is at least 10 calendar days before the return date (see CCP §1088), and it may well be longer depending on the nature and complexity of the case. The petitioner must bear in mind that an unclean hands objection might lie if it appears that the petitioner is trying to prevent the respondent and any real party in interest from having sufficient time to respond.

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§9.17 G. Denial of Alternative Writ and Petition if Facially Defective or Patently Meritless

Although many superior courts will routinely grant an application for an alternative writ (see §9.5), a petitioner is not entitled to its issuance. If the writ petition is procedurally defective or patently meritless, the court may deny the application and dismiss the petition. See, *e.g.*, *Dare v Board of Med. Exam'rs* (1943) 21 C2d 790, 797, 136 P2d 304 (courts may deny application for alternative writ "out of hand" when petition fails to allege prima facie case); *Kingston v Department of Motor Vehicles* (1969) 271 CA2d 549, 552, 76 CR 614 (courts may deny application for alternative writ when "it appears from the face of the petition that a peremptory writ will not be issued").

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§9.18 1. Leave to Amend

If it appears that the defects in the petition could be cured through amendment, the court may grant the petitioner leave to amend. CCP §472a(c) (made applicable to writ proceedings by CCP §1109). Unless otherwise ordered, the petitioner has 10 days to file and serve an amended petition. Cal Rules of Ct 3.1100, 3.1103(a)(2), 3.1320(g). If the petitioner fails to amend the petition, the matter ends with the denial of the application for an alternative writ and, if the court also orders it, dismissal of the petition.

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§9.19 2. Proceed by Way of Noticed Motion

If the superior court denies an application for an alternative writ and does not also dismiss the petition, the petitioner may file a noticed motion seeking issuance of a peremptory writ. See §§5.86-5.107. Whether it is worth the time to do so depends on the court's reason for denying the application for an alternative writ. If the court concluded that the petitioner's showing was insufficient to issue even an alternative writ, it is difficult to imagine that the court would conclude that the petition is meritorious and issue a peremptory writ. However, if the court denied the application on a nonsubstantive ground (*e.g.,* defective notice), proceeding by way of a noticed motion may be justified.

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Source: Civil Litigation/California Civil Writ Practice/9 Action by Superior Court/§9.20 H. Peremptory Writ of Mandate or Prohibition May Issue in Limited Circumstances

§9.20 H. Peremptory Writ of Mandate or Prohibition May Issue in Limited Circumstances

If the petitioner gives the respondent and real party in interest at least 10 days' notice of the application for issuance of "a writ" (meaning the request is not limited to an alternative writ), the superior court is empowered to issue a peremptory writ in the first instance. CCP §§1088, 1105. However, case law makes it clear that a peremptory writ can be issued in the first instance (*i.e.,* in the absence of issuance of an alternative writ) only in the following limited circumstances:

- The court has received or solicited opposition from the parties adversely affected;
- The petition and opposition adequately address the issues raised by the petition;
- No factual dispute exists; and
- Additional briefing following the issuance of an alternative writ is unnecessary to the disposition of the petition.

Lewis v Superior Court (1999) 19 C4th 1232, 1240, 82 CR2d 85; *Palma,* 36 C3d at 178. The accelerated *Palma* procedure is reserved for "extremely narrow circumstances," primarily those cases in which a "compelling temporal urgency requires an immediate decision." *Lewis*, 19 C4th at 1261, citing *Ng v Superior Court* (1992) 4 C4th 29, 35, 13 CR2d 856. Thus, even an application for a peremptory writ on at least 10 days' notice rarely meets the requirements for issuance of the writ in the first instance. See §8.22. Moreover, this procedure is virtually never followed in the superior courts (except, *e.g.,* in the unusual circumstance in which the respondent or real party in interest agrees to issuance of the peremptory writ). Petitioners either seek ex parte issuance of an alternative writ or proceed by way of noticed motion for issuance of a peremptory writ. See §§5.76-5.118.

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III. ACTION ON MERITS OF PETITION FOR WRIT OF MANDATE OR PROHIBITION

A. Hearing Date

§9.21 1. When Noticed Motion Procedure Is Used

When the petitioner proceeds by way of noticed motion (*i.e.,* moves for issuance of a peremptory writ of mandate or prohibition after the respondent or real party in interest has filed an answer; see §§5.86-5.107), the hearing date is set either (a) in the same manner as with other motions (see, *e.g.,* Los Angeles Ct R 9.5(d)(1) (hearing on petition "may be set by noticed motion in the manner generally governing motions")) or (b) according to local rules specifically governing writ proceedings (see, *e.g.,* Sacramento Ct R 2.01(E) (referring parties to court's guide for prosecuting writ petitions)).

PRACTICE TIP: The superior court's local rules may not only provide guidance on how to notice a hearing on a writ petition, but also indicate whether the court actually prefers the noticed motion procedure rather than the alternative writ procedure. See, *e.g.*, Los Angeles Ct R 9.5(d)(1) (motion procedure preferred); San Diego Ct R 2.4.8(A) (motion procedure should be used whenever possible).

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§9.22 a. Standard Law and Motion Rules Apply

When the noticed motion procedure is used, the standard law and motion rules apply (see Cal Rules of Ct 3.1100-3.1370), unless a writ statute or local rules specify a different procedure. CCP §1109; Cal Rules of Ct 3.1100, 3.1103(a)(2). See §9.21.

For a general discussion of motion and hearing procedures, see California Civil Procedure Before Trial, chap 12 (4th ed Cal CEB 2004).

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§9.23 b. If Petitioner Gives 10 Days' Notice

The writ statutes require a minimum of 10 days' notice before the superior court can issue a peremptory writ in the first instance. CCP §§1088, 1105. In such cases, the respondent or real party in interest may file a memorandum in opposition within 5 days of service of the application. CCP §1107. However, this procedure is rarely, if ever, used in superior court writ proceedings. See §8.22. The superior courts use either the standard noticed motion or alternative writ procedures, or a variation thereof set forth in the court's local rules. See §§5.9-5.19.

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§9.24 2. When Alternative Writ Procedure Is Used

If the superior court issues an alternative writ of mandate or prohibition, the alternative writ will set dates for hearings both on the merits of the return (if the return is by way of demurrer or other responsive motion) and on the writ petition (after the respondent or real party in interest has filed an answer). CCP §§1089-1090, 1094, 1105. See §§9.9-9.10.

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B. Nature of Hearing

§9.25 1. If No Return Filed

If the respondent or real party in interest does not file a responsive pleading (*i.e.*, does not file a return), the superior court assumes the truth of the petitioner's factual allegations. See, *e.g.*, *Block v Superior Court* (1998) 62 CA4th 363, 368 n2, 72 CR2d 610. Although the court cannot issue a writ by default (CCP §§1088, 1105), it can hear and decide the matter solely on the basis of the petitioner's papers. CCP §§1094, 1105; see, *e.g.*, *Rodriguez v Municipal Court* (1972) 25 CA3d 521, 526, 102 CR 45 (CCP §1088 requires court to hold hearing on remaining questions of law even though respondent failed to answer petition and factual allegations are deemed true); *Weisman v Board of Bldg. & Safety Comm'rs* (1927) 85 CA 493, 494, 259 P 768 (writ was not granted by default when superior court reviewed petition and heard and considered evidence).

JUDICIAL PERSPECTIVE: Even if the writ petition is unopposed and the factual allegations are deemed true, the court is always under an obligation to determine whether the petitioner is legally entitled to writ relief.

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§9.26 2. If Return Raises Only Questions of Law

If the return (*e.g.*, the answer) raises only questions of law, or puts in issue only immaterial factual allegations not affecting the substantial rights of the parties, the court must hold a hearing. CCP §§1094, 1105; see, *e.g.*, *California Standardbred Sires Stakes Comm., Inc. v California Horse Racing Bd.* (1991) 231 CA3d 751, 762, 282 CR 656; *English v City of Long Beach* (1952) 114 CA2d 311, 316, 250 P2d 298.

JUDICIAL PERSPECTIVE: Although the court determines whether the return raises only questions of law or puts in issue only immaterial allegations not affecting the substantial rights of the parties, the respondent or real party in interest should weigh in not only on that issue but also on whether writ relief legally can and should be granted.

Similarly, if a writ petition is based solely on an administrative record, the merits are heard by the court. CCP §1094.

PRACTICE TIP: Whether extra-record evidence is admissible depends on the nature of the challenged action or decision, and the nature of the writ sought. See §§7.9-7.12.

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3. If Return Raises Factual Dispute

§9.27 a. Petitioner Has Burden to Establish Disputed Facts

The petitioner has the burden of establishing those facts alleged in the petition that the respondent does not admit. See, *e.g.*, *California Standardbred Sires Stakes Comm., Inc. v California Horse Racing Bd.* (1991) 231 CA3d 751, 762, 282 CR 656.

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§9.28 b. Parties Entitled to Present Evidence

When the return raises a factual dispute essential to the determination of the petition and affecting the substantial rights of the parties, the superior court must hold a factual hearing at which the parties are entitled to present evidence on the merits of the petition. CCP §§1090-1091, 1105; see, *e.g.*, *Dare v Board of Med. Exam'rs* (1943) 21 C2d 790, 797, 136 P2d 304 (if there are disputed issues of fact, "any competent evidence may be introduced and received and the ordinary procedural rules apply"); *Bright Dev. v City of Tracy* (1993) 20 CA4th 783, 795, 24 CR2d 618 (in traditional mandamus proceeding, parties may present evidence outside administrative record); *English v City of Long Beach* (1952) 114 CA2d 311, 316, 250 P2d 298 ("[T]he pleadings having tendered a factual issue…, [petitioner] was entitled as of right to a trial thereon"). However, the type of writ sought, the nature of the challenged action or decision, and the issues raised most likely will limit the kind of evidence that may be presented to the trial court. See §§7.7-7.12.

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§9.29 (1) Evidence Presented by Declaration or Judicial Notice

Unless the superior court orders otherwise for good cause shown, the evidence presented at the hearing on a writ petition must be by declaration or judicial notice. See Cal Rules of Ct 3.1103(a)(2), 3.1306(a); *American Fed'n of State, County & Mun. Employees v Metropolitan Water Dist.* (2005) 126 CA4th 247, 263, 24 CR3d 285 (in writ of mandate hearing, trial court has broad discretion to decide case on basis of declarations and other documents rather than live, oral testimony).

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§9.30 (2) Oral Testimony

To present oral testimony, a party must seek permission from the court and comply with Cal Rules of Ct 3.1306(b). See also Los Angeles Ct R 9.5(g) ("evidence is presented by way of declarations, deposition testimony, etc., and not by oral testimony unless the court, in its discretion, permits it"); Sacramento County Superior Court Guide to the Procedures for Prosecuting Petitions for Prerogative Writs, p. 10 (directing parties who wish to present oral testimony to follow procedures in Cal Rules of Ct 3.1306) (copy located in App B). Counsel should also check the court's local rules for any additional procedures.

JUDICIAL PERSPECTIVE: The burden of justifying oral testimony at the hearing on the merits of a writ petition is a heavy one (*e.g.,* when there is extremely lengthy or technical testimony, a claim of bias by a decisionmaker, or the credibility of a party is in issue).

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§9.31 (3) Jury Trial Discretionary

The superior court may exercise its discretion and order factual disputes tried before a jury, postponing argument on the merits of the writ petition until after the trial and the verdict has been certified to the court. CCP §§1090, 1105; see, *e.g.*, *English v City of Long Beach* (1952) 114 CA2d 311, 316, 250 P2d 298. The court may also direct the jury to assess damages if it finds for the petitioner. CCP §1090.

JUDICIAL PERSPECTIVE: As a practical matter, juries are seldom used in writ proceedings because factual disputes are usually limited and most courts prefer to decide them without the aid of a jury. In addition, when the writ petition is combined with a complaint for damages, the court will try the writ petition first.

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C. Rulings and Judgments

§9.32 1. Tentative Ruling Before Hearing

Many superior courts (or certain departments within a particular superior court) offer a tentative ruling procedure that allows the court, before the hearing, to inform the parties of a tentative decision based on its review of the submitted papers. Cal Rules of Ct 3.1308 (made applicable to writ proceedings by Cal Rules of Ct 3.1103(a)(2)).

PRACTICE TIP: Counsel should be sure to check the court's local rules to determine not only whether the court has a tentative ruling procedure, but also the procedures by which counsel must contest the ruling (*e.g.*, through the court's website or by leaving a voicemail message with the department in which the hearing will take place after notice to all parties). Cal Rules of Ct 3.1308(c).

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Source: Civil Litigation/California Civil Writ Practice/9 Action by Superior Court/§9.33 2. Ruling at Conclusion of Hearing or After Submission

§9.33 2. Ruling at Conclusion of Hearing or After Submission

The court may announce its decision on the writ petition in open court at the end of the hearing, sometimes simply by adopting its previously announced tentative ruling as the statement of decision. However, in many cases, especially ones involving complicated factual or legal issues, the court will take the case under submission and notify the parties later of its decision. Cal Rules of Ct 3.1109 (made applicable to writ proceedings by Cal Rules of Ct 3.1103(a)(2)).

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3. Statement of Decision

§9.34 a. Considerations in Requesting Statement of Decision

If there are material factual disputes that the superior court must decide, counsel can request that the court prepare a statement of decision explaining the factual and legal bases for the court's decision on each material issue. CCP §632; Cal Rules of Ct 3.1590. A statement of decision provides a clear record of the court's findings and rulings if there is an appeal. In addition, a statement of decision occasionally reveals that the court has misunderstood a party's contentions or facts in the record, potentially justifying a motion for reconsideration. However, many writ petitions present only legal issues, in which case the parties are not entitled to a statement of decision. Nevertheless, some courts, if asked, will prepare a statement of decision that sets forth its analysis of the legal issues.

PRACTICE TIP: If no party requests a statement of decision, the court may issue a simple order stating that the petition is either granted or denied, without elaborating on the reasons. Accordingly, counsel should always request a statement of decision if there is any chance of appeal.

JUDICIAL PERSPECTIVE: Even if no party requests a statement of decision, many courts will nevertheless issue an order explaining the rationale for the decision.

For a general discussion of statements of decision, see California Trial Practice: Civil Procedure During Trial §§24.34-24.50 (3d ed Cal CEB 1995).

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§9.35 b. When to Request Statement of Decision

If the hearing will last less than 1 day, or less than 8 hours over more than 1 day, a request for a statement of decision must be made before the matter is submitted for decision. Otherwise, a request can be made within 10 days after the court announces its tentative decision. A request must specify the controverted issues counsel wishes the court to address in the statement. After a request is made, any party may make proposals concerning the statement's content. CCP §632.

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§9.36 c. Content of Statement of Decision

The statement of decision should discuss the contentions of the parties and the factual findings and legal conclusions needed to support the judgment. The procedures for preparing a proposed statement of decision and for making objections to one are set forth in Cal Rules of Ct 3.1590. On statements of decision, see California Trial Practice: Civil Procedure During Trial §§24.34-24.50 (3d ed Cal CEB 1995).

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4. When Petitioner Prevails

§9.37 a. Petitioner Prepares Judgment

When the superior court grants a writ petition, it will usually direct the petitioner to prepare the judgment, submit a proposed statement of decision (if the case involved disputed factual issues and a statement was timely requested under CCP §632 and Cal Rules of Ct 3.1590), and prepare the proposed peremptory writ of mandate or prohibition. See Cal Rules of Ct 3.1312.

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§9.38 (1) Purpose of Judgment

The principal function of the judgment in a mandate or prohibition proceeding is to order issuance of the peremptory writ. CCP §§1095 (mandate), 1104 (prohibition). The judgment will also address damages (if requested), interest (if any), costs, and attorney fees (if applicable).

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§9.39 (2) Content of Judgment

In mandate and prohibition, the judgment serves as the superior court's confirmation that the petition has been granted and as a directive to the court clerk to issue the writ, *e.g.,* "Let a peremptory writ of mandate issue, commanding…." The judgment should also contain reference to any award of costs and, when applicable, attorney fees.

JUDICIAL PERSPECTIVE: The petitioner should leave blank spaces for insertion of the amounts of any costs and attorney fees, because these will be determined in postjudgment proceedings. See §§5.121-5.127; California Trial Practice: Civil Procedure During Trial, chaps 26-27 (3d ed Cal CEB 1995).

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Source: Civil Litigation/California Civil Writ Practice/9 Action by Superior Court/§9.40 (3) Conformed Copies for Parties

§9.40 (3) Conformed Copies for Parties

To facilitate giving notice of entry of the judgment, counsel should submit to the superior court clerk an original and one copy for each party of the judgment so the clerk may send conformed copies. In some counties, the petitioner submits the judgment to the superior court clerk rather than to the clerk of the department that made the decision. Counsel should contact the court clerk for local practice.

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b. Petitioner Prepares Peremptory Writ

§9.41 (1) Proposed Peremptory Writ

When the petitioner prevails in a mandate or prohibition proceeding, the superior court will order the issuance of the peremptory writ. The petitioner must then prepare and submit a proposed peremptory writ (and a $25 fee; see Govt C §70626(a)(1)) and see that it is approved, issued, and served. The petitioner may, but is not required to, submit a proposed peremptory writ when filing the petition. This gives notice of the precise relief being sought. The writ is issued by the clerk, not the judge, and thus should be prepared for the clerk's signature. For an example of a peremptory writ, see form in §28.15.

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§9.42 (2) Respondent's Return Date

If requested in the petition and ordered by the superior court, the petitioner must include a return date in the peremptory writ. This is a different kind of "return" than that made after issuance of an alternative writ. See §9.6. In this context, the return date is the deadline for the respondent to report to the court that it has complied with the writ (or what it has done to comply). On respondent's compliance, see §§10.3-10.10.

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Source: Civil Litigation/California Civil Writ Practice/9 Action by Superior Court/§9.43 (3) When to Prepare Writ

§9.43 (3) When to Prepare Writ

The petitioner should submit a proposed peremptory writ concurrently with the proposed judgment and proposed statement of decision (if applicable).

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Source: Civil Litigation/California Civil Writ Practice/9 Action by Superior Court/§9.44 (4) Content of Writ

§9.44 (4) Content of Writ

In all cases, the peremptory writ must track the judgment granting the writ. It also must follow substantially the language set out in the appropriate code section. See CCP §§1087 (mandate), 1104 (prohibition). The peremptory writ is similar in form to the alternative writ except that the words requiring the party to show cause are omitted and a return date need not be included unless the judgment provided for one. For an example of a peremptory writ, see form in §28.15.

JUDICIAL PERSPECTIVE: The petitioner should pay careful attention to the wording of the writ, making sure that it is precise, easy to understand, and contains no extraneous matters.

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§9.45 (5) Service of Writ

A peremptory writ must be served in the same manner as the summons in an ordinary civil action unless the court expressly orders some other method of service. CCP §§1096, 1105.

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§9.46 (6) Laying Foundation for Future Sanctions

To lay the foundation to enforce the peremptory writ, the petitioner should effect personal service on the respondent and any real party in interest, and file the required proof of service with the court. CCP §§1097, 1105. On enforcing the writ, see §§10.11-10.19.

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Source: Civil Litigation/California Civil Writ Practice/9 Action by Superior Court/ 5. When Respondent Prevails/§9.47 a. Respondent Prepares Judgment Denying Issuance of Writ

5. When Respondent Prevails

§9.47 a. Respondent Prepares Judgment Denying Issuance of Writ

If the superior court rules against the petitioner, the court usually will direct the respondent (or real party in interest, if appropriate) to prepare and submit a proposed judgment and, if applicable, a proposed statement of decision. See Cal Rules of Ct 3.1312. On statements of decision, see §§9.34-9.36.

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§9.48 b. Content of Judgment

When the superior court rules in favor of the respondent, the judgment should not only state that the petition is denied, but also order any alternative writ discharged and, if a stay is in force, that the stay is dissolved. The judgment should also dispose of the matter of costs. CCP §1095. In mandate and prohibition, the judgment should state: "The petition for a peremptory writ is denied and the alternative writ is discharged."

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IV. ACTION ON PETITION FOR WRIT OF REVIEW (CERTIORARI)

§9.49 A. Issuance of Order to Show Cause

A petitioner may initiate a proceeding for a writ of review (certiorari) by filing a writ petition. The superior court may require that notice of this filing be given to the adverse party, or it may issue an order to show cause (OSC) why the writ should not be allowed. CCP §1069. If the petitioner seeks an OSC ex parte, the rules of court and any local ex parte rules will apply. See §9.3. The OSC will set out the date for the return by demurrer or answer (CCP §1069.1) and for hearing on the return and request for issuance of a writ. Theoretically, the petitioner could use the noticed motion procedure to obtain a writ of review, rather than obtaining an OSC. However, given the nature of the writ (*i.e.*, it simply commands the clerk of a lower tribunal to transmit the record of the lower proceedings to the superior court), the OSC procedure can be more efficient and result in a writ ordering transmission of the record to the court for review more speedily.

On the uses and requirements for a writ of review, see §§4.10-4.16, 15.27-15.38.

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Source: Civil Litigation/California Civil Writ Practice/9 Action by Superior Court/§9.50 B. Issuance of Writ of Review (Certiorari)

§9.50 B. Issuance of Writ of Review (Certiorari)

After the respondent and any real party files a return by way of demurrer or answer (CCP §1069.1), the superior court decides whether to issue a writ of review (certiorari). If the court refuses to issue a writ, that is the end of the action.

If the superior court orders issuance of a writ of review, the writ orders the party to whom it is directed to certify or return to the superior court the record of the judicial proceedings below and to desist from further proceedings in the matter under review. CCP §1071. The writ specifies the date for this return (different from the return specified in CCP §1069.1) and also usually provides the date for the hearing on the merits of the petition. CCP §1071; see also CCP §1074.

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§9.51 C. Hearing and Decision on Merits

After the respondent files the return to the writ of review (certiorari)—*i.e.,* after the respondent certifies the record below to the court issuing the writ—the superior court hears the case on the merits and issues a decision and judgment either affirming, annulling, or modifying the proceedings below. CCP §§1074-1075. If the return is defective (*e.g.,* improper service or incomplete record), the court may order that a further return be made. CCP §1075.

The superior court's review is based on the record of the proceedings below transmitted by the clerk of the lower tribunal (*e.g.,* any pleadings, transcripts of hearings, and briefs and evidence submitted by the parties). CCP §1074. Thus, the hearing in the superior court is usually confined to oral argument by counsel concerning the legal and factual issues raised by that record. The court's review cannot extend further than to determine whether the inferior tribunal, board, or officer has regularly pursued the authority of such tribunal, board, or officer, *i.e.,* acted beyond or in excess of its jurisdiction. CCP §1074. For discussion of the uses and requirements for a writ of review, see §§4.10-4.16.

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§9.52 D. Ruling and Judgment

In a writ of review (certiorari) proceeding, a prevailing petitioner only needs to prepare a proposed judgment and a proposed statement of decision (if the court decided material factual issues and a statement was timely requested). See CCP §1076.

If the petitioner prevails, the court either annuls or modifies the proceedings below and disposes of the writ, *e.g.,* "The order is annulled and the writ discharged." CCP §1075. If costs and attorney fees are awarded, the judgment should contain that information as well. If the respondent prevails, the judgment affirms the challenged proceeding, and because the writ of review has already issued, the judgment disposes of the writ, *e.g.,* "The order is affirmed and the writ discharged." CCP §1075.

A copy of the judgment signed by the clerk must be transmitted to the inferior tribunal, board, or officer having custody of the record or proceeding certified up. CCP §1076.

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Source: Civil Litigation/California Civil Writ Practice/9 Action by Superior Court/§9.53 V. RULING ON MISCELLANEOUS MOTIONS

§9.53 V. RULING ON MISCELLANEOUS MOTIONS

Because the ordinary rules of civil practice apply to writ proceedings (see CCP §1109), the superior court has authority to hear and decide the following motions:

- Motion to dismiss (see §8.51);
- Motion to quash (see §8.52);
- Motion for judgment on the pleadings (see §8.53);
- Motion for summary judgment (see §8.54);
- Motion for change of venue (see §8.55);
- Motion to strike (see §8.55); and
- Discovery motions (see §8.55).

These motions should be raised, briefed, and decided as any other motion in a civil action. For discussion of motions in civil actions, see California Civil Procedure Before Trial, chap 12 (4th ed Cal CEB 2004).

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VI. RES JUDICATA EFFECT OF SUPERIOR COURT JUDGMENT

§9.54 A. Final Judgment in Writ Proceeding Has Preclusive Effect

The superior court's judgment granting or denying issuance of a peremptory writ of mandate or prohibition has preclusive effect because it is a final determination of the rights of the litigants and therefore constitutes a final judgment within the meaning of CCP §1064. See, *e.g.*, *Overstreet v County of Butte* (1962) 57 C2d 504, 506, 20 CR 631; *Hollywood Circle, Inc. v Department of Alcoholic Beverage Control* (1961) 55 C2d 728, 733, 13 CR 104.

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§9.55 B. Denial of Alternative Writ Has No Preclusive Effect

Because an alternative writ may be denied for reasons that do not go to the ultimate merits of the petition (*e.g.,* a procedural defect in the petition), a denial of an application for an alternative writ generally has no preclusive effect in future proceedings. See *Kowis v Howard* (1992) 3 C4th 888, 893, 12 CR2d 728; *Palma v U.S. Indus. Fasteners, Inc.* (1984) 36 C3d 171, 182, 203 CR 626; *Bigbee v Pacific Tel. & Tel. Co.* (1983) 34 C3d 49, 57 n11, 192 CR 857.

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10

Enforcing Writs Issued by Superior Court

Judy L. McKelvey

I. SCOPE OF CHAPTER §10.1

II. OBLIGATION TO COMPLY WITH PEREMPTORY WRIT OF MANDATE OR PROHIBITION §10.2

III. PEREMPTORY WRIT COMPLIANCE
- A. Respondent or Real Party in Interest May File Return Regarding Compliance §10.3
  - 1. Contents of Return §10.4
    - a. Writ Satisfied in Full §10.5
    - b. Writ Satisfied in Part §10.6
    - c. Writ Not Satisfied §10.7
  - 2. Acceptable Reasons for Noncompliance With Writ §10.8
  - 3. Financial Burden Not Acceptable Reason for Noncompliance With Writ §10.9
- B. Challenging Return §10.10

IV. PEREMPTORY WRIT ENFORCEMENT
- A. Court Retains Jurisdiction to Enforce Writ §10.11
- B. Writ Must Be Personally Served §10.12
- C. Enforcement Methods
  - 1. Motion to Enforce Compliance §10.13
  - 2. Order to Show Cause re Contempt §10.14
  - 3. New or Supplemental Writ Petition §10.15
- D. Penalties for Noncompliance §10.16
  - 1. Enforcement Order §10.17
  - 2. Fine §10.18
  - 3. Imprisonment §10.19

V. ENFORCING WRITS OF REVIEW (CERTIORARI)
- A. Remedies for Failure to Comply With Writ of Review (Certiorari) §10.20
- B. New Writ Petition Necessary to Enforce Judgment in Writ of Review (Certiorari) Proceeding §10.21

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§10.1 I. SCOPE OF CHAPTER

This chapter discusses enforcing writs of mandate or prohibition, including:

- The obligation to comply with a writ of mandate or prohibition (see §10.2);
- The contents of a "return" showing the superior court the respondent or real party in interest has complied with the writ (see §§10.3-10.9);
- Challenging the return (see §10.10); and
- Enforcing the writ (see §§10.11-10.19).

This chapter also discusses enforcing writs of review (certiorari) (see §§10.20-10.21).

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§10.2 II. OBLIGATION TO COMPLY WITH PEREMPTORY WRIT OF MANDATE OR PROHIBITION

Once a final judgment has been entered and a peremptory writ of mandate or prohibition issued, the respondent (or real party in interest, depending on the terms of the peremptory writ) is legally obliged to comply with the writ. See CCP §1097.

NOTE: An appeal from the final judgment may affect the legal obligation to comply with a peremptory writ. On appeal staying compliance with a writ, see §10.8. On appellate review of a superior court's judgment in a writ action, see chap 11.

In addition to entering final judgment and issuing a writ, the superior court may order the respondent or real party in interest to file a "return," advising the court of all actions taken in response to the writ. CCP §1108. On filing a return, see §§10.3-10.9.

If the respondent or real party does not comply with the peremptory writ, the court may take enforcement action. On court enforcement, see §§10.11-10.15. The court may also order penalties for noncompliance with the writ. On penalties for noncompliance, see §§10.16-10.19.

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III. PEREMPTORY WRIT COMPLIANCE

§10.3 A. Respondent or Real Party in Interest May File Return Regarding Compliance

A superior court issuing a peremptory writ of mandate or prohibition may order the respondent or real party in interest to file a "return" within a specified period of time after entry of final judgment or issuance of the writ. By its return, the respondent or real party in interest advises the court of all actions it has taken in response to the peremptory writ. CCP §1108. On contents of return, see §10.4.

NOTE: The "return" filed after issuance of a peremptory writ is not the same as the "return" filed by a respondent and any real party after issuance of an alternative writ or order to show cause. The latter is a responsive pleading challenging the merits of the petition, *e.g.,* an answer, demurrer, or both. CCP §§1089, 1105. See §§8.35-8.38.

Filing a return after entry of final judgment is not mandatory unless the court issuing the peremptory writ specifically requires it. CCP §1108.

PRACTICE TIP: Even if the court does not expressly require a return, a respondent or real party in interest may want to file one. If a respondent or real party in interest has complied with all terms of the writ, filing a return will alert the court to the actions taken and may head off an enforcement action by the petitioner. If there are any unsatisfied terms of the writ, however, filing a return may alert an inattentive petitioner to grounds for an enforcement action.

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§10.4 1. Contents of Return

It is recommended practice that the return advise the court whether the respondent or real party in interest has satisfied the writ either in full or in part, or has not satisfied the writ.

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Source: Civil Litigation/California Civil Writ Practice/10 Enforcing Writs Issued by Superior Court/§10.5 a. Writ Satisfied in Full

§10.5 a. Writ Satisfied in Full

If the respondent or real party in interest has fully complied with the terms of the writ, the return should:

- State that the writ has been satisfied in full compliance with the final judgment and writ; and
- Set out the actions taken in compliance with the writ.

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§10.6 b. Writ Satisfied in Part

If the respondent or real party in interest has only partially complied with the writ, the return should:

- State that the writ has been partially satisfied;
- Set out the actions taken in compliance with the writ; and
- State why the filing party has been unable to satisfy fully the terms of the writ.

On acceptable reasons for noncompliance with a writ, see §10.8.

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§10.7 c. Writ Not Satisfied

If the respondent or real party in interest has not complied with the writ, the return should state the reasons why the writ has not been satisfied. On acceptable and unacceptable reasons for noncompliance, see §§10.8-10.9.

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§10.8 2. Acceptable Reasons for Noncompliance With Writ

An appeal may be an acceptable reason for not complying with a writ. If the writ requires affirmative conduct on the part of the respondent, as writs of mandate typically do, an appeal automatically stays the judgment and thus the operative force of the writ. See CCP §1110b. On appeal staying writ of mandate, see §11.24. However, the superior court may, on a showing by the petitioner that it will suffer irreparable damage in its business or profession, order that appeal does not stay the judgment and writ. CCP §1110b. An appeal does not automatically stay the judgment and operative effect of a writ of prohibition. On appeal not staying writ of prohibition, see §11.25.

Other acceptable reasons for not complying with a writ include:

- Change in the law rendering the writ moot;
- Object of writ has been lost, damaged, or destroyed;
- Death of the respondent or real party in interest;
- Action by another court with an inconsistent order; or
- Impossible, incomprehensible, or ambiguous writ.

The respondent or real party in interest may simply need more time to comply with a writ. In such instances, a return showing due diligence and good cause will probably stave off enforcement proceedings.

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§10.9 3. Financial Burden Not Acceptable Reason for Noncompliance With Writ

A respondent or real party in interest may not refuse to comply with a peremptory writ simply because compliance will impose a substantial financial burden. Although a showing of fiscal impossibility or practical difficulty in a particular case has sometimes been held to excuse nonperformance of an official duty (see, *e.g., Sutro Heights Land Co. v Merced Irrigation Dist.* (1931) 211 C 670, 704, 296 P 1088 (court found respondent discharged duty to extent that could be reasonably required with available money)), there is no generally applicable excuse from performance of a mandatory official duty due to fiscal difficulty. See *King v Martin* (1971) 21 CA3d 791, 796, 98 CR 711 (*Sutro Heights* does not establish generally applicable excuse for financial burden). See also *King v Woods* (1983) 144 CA3d 571, 579, 192 CR 724 (court recognized enormity of task required by writ, but did not find it to be impossible).

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§10.10 B. Challenging Return

If the petitioner believes the respondent's or real party in interest's return to the peremptory writ is invalid because of (a) failure to comply with some or all terms of the writ or (b) inaccurately reporting the basis for noncompliance, the petitioner can challenge the return by filing:

- An enforcement motion requesting a finding that the respondent has not in fact complied with the writ. See §10.13. See, *e.g.*, *City of Carmel-By-The-Sea v Board of Supervisors* (1982) 137 CA3d 964, 970, 187 CR 379 (petitioner successfully moved for order finding respondent had not complied with writ);
- A motion for and order to show cause re contempt (see §10.14); or
- A supplemental writ petition under the original action's case number or a new writ petition (see §10.15).

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IV. PEREMPTORY WRIT ENFORCEMENT

§10.11 A. Court Retains Jurisdiction to Enforce Writ

The court issuing a peremptory writ of mandate or prohibition retains complete jurisdiction and may take all steps necessary to enforce the writ until it is completely satisfied. CCP §§1097, 1105; *California Labor Fed'n AFL-CIO v Occupational Safety & Health Standards Bd.* (1992) 5 CA4th 985, 989 n1, 7 CR2d 399. Accordingly, if the respondent or real party in interest fails to comply with the peremptory writ, the issuing court may enforce it and impose penalties as appropriate. On compliance with writ, see §§10.3-10.9.

NOTE: All orders issued by the court to enforce compliance with the writ must be consistent with the terms of the original judgment. See, *e.g.*, *Carroll v Civil Serv. Comm'n* (1970) 11 CA3d 727, 734, 90 CR 128 (first order must be obeyed and second order must be reversed, because second order went far beyond first order and constituted major modification of that order).

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§10.12 B. Writ Must Be Personally Served

The court can enforce a peremptory writ of mandate or prohibition only if the petitioner has filed proof of personal service of the writ on the respondent or real party in interest. CCP §1096 (unless court orders otherwise, petitioner must serve peremptory writ in same manner as summons in civil action). See also CCP §§1097, 1105. On service requirements, see §§5.81-5.85.

PRACTICE TIP: The petitioner should effect personal service of the peremptory writ and file a proof of service with the issuing court as soon as possible. The service and filing will facilitate petitioner's efforts to enforce the writ if the respondent or real party in interest fails to comply with the terms and requirements set out in the peremptory writ. See CCP §§1097, 1105.

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C. Enforcement Methods

§10.13 1. Motion to Enforce Compliance

If the respondent or real party in interest fails to comply with the terms of the peremptory writ, the petitioner should file a motion for an order compelling compliance with the writ. CCP §§1097, 1105. Petitioner must support the motion with evidence (through declarations, affidavits, and documents, as appropriate) showing that:

- The petitioner personally served the responding party with the writ (see §10.12);
- The petitioner filed a proof of service; and
- The responding party failed to comply with all or part of the peremptory writ.

The court should grant the motion if it appears that the responding party has, without good cause, refused or neglected to comply with the writ. CCP §§1097, 1105.

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§10.14 2. Order to Show Cause re Contempt

Courts may treat a motion to compel enforcement brought under CCP §1097 as being "in the nature of sanctions for contempt." *Carroll v Civil Serv. Comm'n* (1970) 11 CA3d 727, 733, 90 CR 128. Thus, a respondent's or real party in interest's noncompliance with a peremptory writ can be brought before the court by means of a sworn declaration and an order to show cause re contempt. The petitioner may include an affidavit regarding the facts constituting the failure to comply with the writ (the "contempt"). CCP §1211(a). On contempt procedures, see California Trial Objections, chap 57 (Cal CEB Annual); California Trial Practice: Civil Procedure During Trial §§16.99-16.129 (3d ed Cal CEB 1995); California Criminal Law Procedure and Practice, chap 58 (Cal CEB Annual).

The court may elect to treat a contempt motion as a supplemental writ proceeding to issue a writ of enforcement. See, *e.g.*, *Professional Eng'rs in Cal. Gov't v State Personnel Bd.* (1980) 114 CA3d 101, 109, 170 CR 547 (superior court's characterization of action as "supplemental writ" indicated it was continuing to exercise its jurisdiction in attempting to enforce original writ). On supplemental writ petitions, see §10.15.

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§10.15 3. New or Supplemental Writ Petition

A petitioner may request enforcement of a peremptory writ by filing either a supplemental writ petition under the same case number as the original petition for peremptory writ, or by filing an entirely new writ petition under a new case number. *City of Carmel-By-The-Sea v Board of Supervisors* (1982) 137 CA3d 964, 971, 187 CR 379 (indicating that when return states that court's mandate has been carried out, petitioner may challenge validity of that claim by new petition or by supplemental petition). See also *Bakkebo v Municipal Court* (1981) 124 CA3d 229, 234, 177 CR 239 (when respondent court refused to comply with decision of appellate department, writ was proper remedy).

On contents and format of writ petition, see §§5.20-5.70.

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Source: Civil Litigation/California Civil Writ Practice/10 Enforcing Writs Issued by Superior Court/§10.16 D. Penalties for Noncompliance

§10.16 D. Penalties for Noncompliance

The superior court may order the following penalties for noncompliance with a peremptory writ (CCP §1097):

- Enforcement;
- A fine not exceeding $1000, if the court finds no good cause for the failure to comply; or
- Imprisonment, if the court finds persistent refusal to comply with the writ.

The court's determination of which of the three available penalties is appropriate depends on the severity of the circumstances. *King v Woods* (1983) 144 CA3d 571, 578, 192 CR 724.

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§10.17 1. Enforcement Order

The superior court may issue whatever orders are necessary and proper to enforce a writ of mandate or prohibition. CCP §§1097, 1105. The court's power to order compliance with a writ is inherent and the court may use it when there is any inadequacy in compliance; there is no requirement of a showing of willfulness or persistent refusal. *King v Woods* (1983) 144 CA3d 571, 578, 192 CR 724. To justify the issuance of an enforcement order, the petitioner need only show that it personally served the responding party or real party in interest and that party has not adequately complied with the peremptory writ. CCP §§1097, 1105.

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§10.18 2. Fine

The court may impose a fine of up to $1000 for noncompliance with a peremptory writ if (*King v Woods* (1983) 144 CA3d 571, 578, 192 CR 724):

- The party was personally served with the writ;
- The party refused or neglected to obey the writ; and
- The party's refusal or neglect was without just excuse.

On just excuses for a party's refusal or neglect to comply with a peremptory writ, see §10.8.

The court may impose a fine after finding that the respondent refused or neglected to obey the writ. CCP §§1097, 1105. The court need not find that the respondent deliberately intended to refuse to comply with the writ. 144 CA3d at 579 (fine valid given respondent's refusal or neglect to comply with writ).

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§10.19 3. Imprisonment

The court may order the respondent or real party in interest imprisoned for failure to comply with a peremptory writ if (*King v Woods* (1983) 144 CA3d 571, 578, 192 CR 724):

- The party was personally served with the writ;
- The party refused or neglected to obey the writ;
- The party's refusal or neglect was without just excuse; and
- The party's refusal to comply is persistent.

For the court to order imprisonment, it must find more than mere indifference. The court must find intentional refusal to obey the writ. 114 CA3d at 579. When appropriate, the court can order a willfully disobedient respondent jailed until the writ is fully satisfied. CCP §§1097, 1105.

JUDICIAL PERSPECTIVE: In practice, courts are (and should be) reluctant to order imprisonment. It is harsh and dangerous. Instead, courts try to fashion other ways of enforcing the writ. See §§10.17-10.18.

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V. ENFORCING WRITS OF REVIEW (CERTIORARI)

§10.20 A. Remedies for Failure to Comply With Writ of Review (Certiorari)

In contrast to the statutes applicable to mandamus and prohibition (CCP §§1097, 1105), the statutes dealing specifically with writs of review (certiorari) (CCP §§1067-1077) provide no express remedy or penalty for a respondent's failure to comply with the writ (which directs the clerk of the lower tribunal to certify the record of the proceedings therein to the court issuing the writ). On nature of writs of review, see §§4.10-4.16. On initiating a writ of review proceeding, see chap 5.

A court issuing a writ of review, however, has inherent power to enforce its orders through sanctions proceedings or the contempt process. On contempt procedures, see California Trial Objections, chap 57 (Cal CEB Annual); California Trial Practice: Civil Procedure During Trial §§16.99-16.129 (3d ed Cal CEB 1995); California Criminal Law Procedure and Practice, chap 58 (Cal CEB Annual).

If a return is made to a writ of review (certiorari) but it is defective, the superior court can order that a further return be made. CCP §§1076.

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§10.21 B. New Writ Petition Necessary to Enforce Judgment in Writ of Review (Certiorari) Proceeding

A petitioner seeking enforcement of the judgment on the merits entered after issuance of writ of review (certiorari) and the return thereto (see §§10.3-10.7) must file a new writ action, either for a peremptory writ of mandate or prohibition. On filing a writ petition, see §§5.71-5.75.

To compel a lower tribunal to comply with a reviewing court's judgment, the petitioner should file a petition for a writ of mandate. To prevent the tribunal from acting in excess of its authority, it is recommended practice that the petitioner file a petition for a writ of prohibition. Given the technicalities of these writs, the best practice may be to seek alternative relief. On initiating a writ proceeding, see chap 5. On seeking alternative writ relief, see §§5.36-5.37.

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11

Challenging the Superior Court's Decision

The Hon. Margaret M. Grignon (Ret.)
Judith E. Posner

I. SCOPE OF CHAPTER §11.1

II. SEEKING RELIEF IN SUPERIOR COURT §11.2
- A. Motion for New Trial §11.3
- B. Motion to Vacate §11.4
- C. Motion for Reconsideration
  - 1. Probably Not Permissible if Ruling on Petition Disposes of All Issues §11.5
  - 2. When Order Does Not Finally Determine All Issues §11.6

III. SEEKING RELIEF IN COURT OF APPEAL
- A. Filing Appeal Is Usual Remedy §11.7
  - 1. No Formal Judgment Necessary §11.8
  - 2. Decision Must Finally Determine Parties' Rights §11.9
    - a. Denial Without Prejudice §11.10
    - b. Multi-Party Cases §11.11
  - 3. Decision Final Despite Noncompliance With Writ §11.12
  - 4. Postjudgment Orders Appealable §11.13
  - 5. Interlocutory Rulings Not Appealable §11.14
- B. Deciding Whether to Appeal
  - 1. Factors to Consider §11.15
    - a. Standard of Review on Appeal §11.16
    - b. Time and Financial Costs §11.17
    - c. Gravity of Adverse Consequences of Judgment §11.18
  - 2. Prospect of Settlement on Appeal §11.19
- C. Summary Overview of Appellate Process
  - 1. Rules Applicable in Writ Proceedings §11.20
  - 2. Notice of Appeal §11.21
    - a. Time to File §11.22
    - b. Timely Filing Is Jurisdictional §11.23
  - 3. Stay on Appeal
    - a. Appeal Automatically Stays Execution of Writ of Mandate, But Not of Writ of Prohibition §11.24
    - b. Exceptions to Automatic-Stay Rule §11.25
  - 4. Record on Appeal §11.26
  - 5. Briefing on Appeal §11.27
    - a. Appellant's Opening Brief §11.28
    - b. Respondent's Brief §11.29
    - c. Appellant's Reply Brief §11.30
  - 6. Oral Argument §11.31
  - 7. Opinion of Court of Appeal §11.32
  - 8. Costs on Appeal §11.33
- D. Challenging Court of Appeal's Decision
  - 1. Rehearing in Court of Appeal §11.34
  - 2. Review by Supreme Court §11.35
- E. Requesting Depublication of Published Court of Appeal Opinion §11.36

IV. SEEKING WRIT RELIEF IN APPELLATE COURTS
- A. Petition Filed in Court of Appeal §11.37
- B. Petition Filed in Supreme Court §11.38

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§11.1 I. SCOPE OF CHAPTER

A party aggrieved by a superior court's final decision on a writ petition can challenge that decision by:

- Moving for relief in the superior court;
- Appealing to the court of appeal; or
- In very rare situations, filing a writ petition in the court of appeal instead of, or in addition to, an appeal.

This chapter first discusses the possibility of seeking relief in the superior court by way of a motion for a new trial, a motion to vacate, or a motion for reconsideration. See §§11.2-11.6. The chapter next discusses appealing from an adverse decision and provides a summary description of the appellate process. See §§11.7-11.36. The chapter concludes with a discussion of the rare circumstances in which an aggrieved party should consider filing a writ petition in the court of appeal instead of, or in conjunction with, an appeal. See §§11.37-11.38.

For a general discussion of appeals from superior court judgments, including from superior court writ proceedings, see California Civil Appellate Practice (3d ed Cal CEB 1996).

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§11.2 II. SEEKING RELIEF IN SUPERIOR COURT

The superior courts have only limited authority to revisit decisions in writ proceedings, as discussed below. On postjudgment motions in civil cases, see California Civil Appellate Practice, chap 2 (3d ed Cal CEB 1996).

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§11.3 A. Motion for New Trial

Any aggrieved party in a writ proceeding may file a motion for a new trial under CCP §§656-662.5. CCP §§1092, 1105, 1109-1110 (making post-trial statutes applicable to writ proceedings). See *Lippman v City of Los Angeles* (1991) 234 CA3d 1630, 1633, 286 CR 406 (new trial denied in mandate proceeding seeking to compel city to consult with citizens' committee in implementing redevelopment project); *City of Poway v City of San Diego* (1991) 229 CA3d 847, 855, 280 CR 368 (new trial denied in mandate proceeding challenging city's decision on roadway closure).

PRACTICE TIP: An aggrieved party must challenge the superior court's factual findings by filing a motion for a new trial, not a new or supplemental writ petition. *Pollak v State Personnel Bd.* (2001) 88 CA4th 1394, 1405, 107 CR2d 39 (petitioner improperly used supplemental petition to seek readjudication of factual issues instead of seeking new trial).

On the grounds and procedures for motions for a new trial, see California Civil Appellate Practice §§2.3-2.38 (3d ed Cal CEB 1996); California Trial Practice: Civil Procedure During Trial §§25.22-25.71 (3d ed Cal CEB 1995).

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§11.4 B. Motion to Vacate

An aggrieved party in a writ proceeding may move to vacate the judgment under CCP §663 when (1) there is an incorrect or erroneous legal basis for the decision or (2) the decision is not consistent with or not supported by the facts. CCP §§1109-1110 (making post-trial statutes applicable to writ proceedings). See *Hernandez v County of Los Angeles* (2008) 167 CA4th 12, 18, 84 CR3d 10 (petitioners moved to vacate judgment denying writ petition and then appealed from judgment and order denying motion to vacate); *Lippman v City of Los Angeles* (1991) 234 CA3d 1630, 1633, 286 CR 406 (parties seeking to intervene in mandate proceeding filed notice of intent to move for new trial and to vacate judgment); *Simac Design, Inc. v Alciati* (1979) 92 CA3d 146, 152, 154 CR 676 (motion to vacate properly made in mandate proceeding in which superior court rendered erroneous judgment based on uncontroverted findings of fact).

On the procedures for motions to vacate, see California Civil Appellate Practice §§2.52-2.60 (3d ed Cal CEB 1996); California Trial Practice: Civil Procedure During Trial §§25.72-25.77 (3d ed Cal CEB 1995).

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C. Motion for Reconsideration

§11.5 1. Probably Not Permissible if Ruling on Petition Disposes of All Issues

A party may move for reconsideration of an appealable *order* under CCP §1008, but not of a final *judgment*. See *Ramon v Aerospace Corp.* (1996) 50 CA4th 1233, 1237, 58 CR2d 217.

Code of Civil Procedure §1064 defines "judgment" for purposes of writ proceedings as the "final determination of the rights of the parties." CCP §1064. Section 1064 also states the definitions of a "motion" and an "order" in a civil action are applicable to "similar acts in a special proceeding." CCP §1064. Nevertheless, the courts have repeatedly held that an order granting or denying a writ petition that finally determines the rights of the parties is deemed a final judgment from which an appeal can be taken. See, *e.g.*, *Steen v Board of Civil Serv. Comm'rs* (1945) 26 C2d 716, 727, 160 P2d 816 (minute order denying petition for writ of mandate appealable when no further ruling contemplated); *Public Defenders' Org. v County of Riverside* (2003) 106 CA4th 1403, 1409, 132 CR2d 81 (order granting or denying writ petition constitutes final judgment for purposes of appeal); *Townsel v San Diego Metro. Transit Dev. Bd.* (1998) 65 CA4th 940, 944 n1, 77 CR2d 231 (order denying petition for writ of mandate treated as appealable judgment); *Manhattan Sepulveda, Ltd. v City of Manhattan Beach* (1994) 22 CA4th 865, 869 n6, 27 CR2d 565 (party properly appealed from minute order denying writ petition). See also §§11.8-11.9. Thus, these cases treating an order disposing of all issues in a writ proceeding as an appealable final judgment appear to foreclose a motion for reconsideration.

NOTE: In *Arnold v California Exposition & State Fair* (2004) 125 CA4th 498, 502 n1, 22 CR3d 790, the court of appeal noted that the petitioner had moved for reconsideration of the denial of his petition for a writ of mandate. The court simply observed that an order denying a motion for reconsideration is not appealable and did not discuss whether a motion for reconsideration may properly be made following the denial or grant of a writ petition. A case is not authority for a proposition it does not specifically address. *Zurich Am. Ins. Co. v Superior Court* (2007) 155 CA4th 1485, 1503, 66 CR3d 833.

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§11.6 2. When Order Does Not Finally Determine All Issues

An order that does not finally determine all of the issues between the parties is not a final judgment. Thus, if the petitioner has filed a combined writ petition and complaint (see §5.119), and the superior court has ruled only on the writ petition, the court's order does not dispose of all issues between the parties and is not a final judgment for purposes of appeal. *Griset v Fair Political Practices Comm'n* (2001) 25 C4th 688, 697, 107 CR2d 149 (order denying petition for writ of administrative mandamus not appealable because it did not resolve remaining three causes of action); *Nerhan v Stinson Beach County Water Dist.* (1994) 27 CA4th 536, 540, 33 CR2d 10 (denial of writ petition to compel action on variance not appealable because complaint for damages remained pending). In such cases, a motion for reconsideration under CCP §1008 may be appropriate.

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III. SEEKING RELIEF IN COURT OF APPEAL

§11.7 A. Filing Appeal Is Usual Remedy

Because a superior court's final decision on a writ petition disposing of all the issues between the parties is deemed a final judgment (see CCP §1064), an aggrieved party must seek review of the decision in the court of appeal by filing an appeal, *not* by filing a writ proceeding. CCP §904.1(a)(1) (appeal may be taken from "judgment"). See, *e.g.*, *Palos Verdes Faculty Ass'n v Palos Verdes Peninsula Unified Sch. Dist.* (1978) 21 C3d 650, 655, 147 CR 359 (appeal from ruling granting writ of mandate); *Mission Hosp. Reg'l Med. Ctr. v Shewry* (2008) 168 CA4th 460, 469, 85 CR3d 639 (both petitioners and respondent appealed from adverse portions of trial court's judgment in mandamus action); *Sustainability of Parks, Recycling & Wildlife Legal Defense Fund v County of Solano Dep't of Resource Mgmt.* (2008) 167 CA4th 1350, 84 CR3d 889 (appeal from order denying writ of mandate); *SN Sands Corp. v City & County of San Francisco* (2008) 167 CA4th 185, 191, 83 CR3d 885 (respondent appealed from grant of writ of mandate); *Vasquez v Happy Valley Union Sch. Dist.* (2008) 159 CA4th 969, 980, 72 CR3d 15 (appeal from ruling denying writ of mandate); *Capo for Better Representation v Kelley* (2008) 158 CA4th 1455, 1459, 71 CR3d 354 (appeal from ruling denying writ of mandate); *Little v Los Angeles County Assessment Appeals Bds.* (2007) 155 CA4th 915, 917, 66 CR3d 401 (appeal from ruling denying writ of mandate); *Sacramento County Alliance of Law Enforcement v County of Sacramento* (2007) 151 CA4th 1012, 1021, 60 CR3d 202 (appeal from ruling denying writ of mandate).

PRACTICE TIP: In exceedingly rare circumstances, an aggrieved party may want to seek appellate review by filing a writ petition, either alone or in addition to an appeal. See §§11.37-11.38.

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§11.8 1. No Formal Judgment Necessary

An order granting or denying a petition for a writ of mandate, prohibition, or review (certiorari) that finally determines the rights of the parties is a judgment under the writ statutes and thus reviewable on appeal even if it is in the form of a minute order instead of a formal judgment. CCP §1064; see, *e.g.*, *Steen v Board of Civil Serv. Comm'rs* (1945) 26 C2d 716, 727, 160 P2d 816 (minute order denying petition for writ of mandate appealable when no further order contemplated); *State Bldg. & Constr. Trades Council v Duncan* (2008) 162 CA4th 289, 301 n6, 76 CR3d 507 (appeals from order granting writ petition were proper, appeals from actual issuance of writ were not); *JKH Enters., Inc. v Department of Indus. Relations* (2006) 142 CA4th 1046, 1056, 48 CR3d 563 (order denying writ petition appealable despite lack of formal judgment because order appeared to have terminated case in superior court); *Public Defenders' Org. v County of Riverside* (2003) 106 CA4th 1403, 1409, 132 CR2d 81 (order granting or denying writ petition is final judgment for purposes of appeal even if there is no separate formal judgment); *Townsel v San Diego Metro. Transit Dev. Bd.* (1998) 65 CA4th 940, 944 n1, 77 CR2d 231 (order denying petition for writ of mandate treated as appealable judgment); *Manhattan Sepulveda, Ltd. v City of Manhattan Beach* (1994) 22 CA4th 865, 869 n6, 27 CR2d 565 (appeal from court's minute order denying writ petition proper despite court's failure to enter formal judgment). However, in *Hadley v Superior Court* (1972) 29 CA3d 389, 394, 105 CR 500, the court held that a minute order, entered after an alternative writ issued and an evidentiary hearing was held, was *not* appealable because entry of judgment was contemplated. This case has not been followed and seems to be an anomaly based on the court of appeal's determination that formal entry of judgment was contemplated.

CAUTION: Because no formal judgment is necessary to make an order granting or denying a writ petition appealable, an aggrieved party should appeal from both the order and any subsequent judgment to ensure that, if the order is appealable, he or she has timely appealed. See *MCM Constr. Inc. v City & County of San Francisco* (1998) 66 CA4th 359, 367 n3, 78 CR2d 44 (two appeals were filed "in an abundance of caution"—one from order denying petition for writ of mandate and one from subsequent judgment). On time to file appeal, see §11.22.

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§11.9 2. Decision Must Finally Determine Parties' Rights

To be appealable, a superior court's order on a writ petition must be final—*i.e.,* the order must completely dispose of all issues and causes of action between the parties. See, *e.g.*, *Griset v Fair Political Practices Comm'n* (2001) 25 C4th 688, 697, 107 CR2d 149 (order denying petition for writ of administrative mandamus not appealable because it did not resolve remaining three causes of action); *Morehart v County of Santa Barbara* (1994) 7 C4th 725, 743, 29 CR2d 804 (no appeal permitted from judgment that does not dispose of all causes of action even when causes of action disposed of are tried separately or can be characterized as "separate and independent" from those remaining); *Canandaigua Wine Co. v County of Madera* (2009) 177 CA4th 298, 302, 99 CR3d 264 (when only one of three causes of action in writ petition was disposed of, leaving two others pending, order granting summary adjudication was not appealable); *Haight v City of San Diego* (1991) 228 CA3d 413, 416, 278 CR 334 (petitioner able to appeal order denying petition for writ of mandate because he dismissed other claims).

NOTE: In *Griset*, the supreme court explicitly disapproved earlier cases holding that a superior court's decision on a writ petition was appealable even if other issues remained pending. 25 C4th at 698.

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§11.10 a. Denial Without Prejudice

An order denying a writ petition without prejudice (*i.e.,* the petitioner could initiate a new proceeding) is appealable unless the superior court's order states that the petition is not dismissed, thus neither terminating the proceeding nor finally determining the parties' rights. Compare *Unified Teachers—Los Angeles v Los Angeles Unified Sch. Dist.* (1994) 24 CA4th 1510, 1514 n3, 29 CR2d 897 (order denying writ petition without prejudice appealable because no further action or order on petition was necessary) with *Gibson v Savings & Loan Comm'r* (1970) 6 CA3d 269, 272, 85 CR 799 (order denying writ not appealable because superior court made it "quite clear" that it was not dismissing petition).

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§11.11 b. Multi-Party Cases

In multi-party cases, an order resolving all issues as to one party is final and appealable as to that party, and that "party need not wait [to appeal] until final judgment has been entered against the other parties." *Consumers Union, Inc. v California Milk Producers Advisory Bd.* (1978) 82 CA3d 433, 436, 147 CR 265. Indeed, that party cannot wait to appeal, because the time periods to file a notice of appeal begin when the order is entered and served on that party. Cal Rules of Ct 8.104.

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§11.12 3. Decision Final Despite Noncompliance With Writ

Whether there has been compliance with a writ issued by the superior court is irrelevant to whether the court's decision on the petition is appealable as a final judgment. *Public Defenders' Org. v County of Riverside* (2003) 106 CA4th 1403, 1410, 132 CR2d 81 (county's alleged failure to comply with writ irrelevant to appealability of court's decision). However, if subsequent events render the dispute moot, the court of appeal generally will not consider the matter. See generally *MHC Operating Ltd. Partnership v City of San Jose* (2003) 106 CA4th 204, 215, 130 CR2d 564.

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§11.13 4. Postjudgment Orders Appealable

An order made after a final decision granting or denying a writ petition is appealable. CCP §904.1(a)(2). See, *e.g.*, *Arnold v California Exposition & State Fair* (2004) 125 CA4th 498, 509, 22 CR3d 790 (appeal from order denying motion for attorney fees under CCP §1021.5 made after decision denying petition for writ of mandate).

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§11.14 5. Interlocutory Rulings Not Appealable

An interlocutory ruling in a superior court writ action, by definition, is not a final decision resolving all issues and claims between the parties. Accordingly, such rulings are not generally appealable. See, *e.g.*, *Sunseri v Board of Med. Exam'rs* (1964) 224 CA2d 309, 319, 36 CR 553 (order denying motion to amend writ petition not appealable and purported appeal dismissed); *McPheeters v Board of Med. Exam'rs* (1946) 74 CA2d 46, 47, 168 P2d 65 (order denying a motion to strike petition for writ of mandate not appealable).

PRACTICE TIP: By statute, a limited number of interlocutory rulings are appealable, *e.g.*, an order on a motion to disqualify opposing counsel. In fact, if a party fails to exercise a statutory right of appeal, he or she forfeits appellate review. See California Civil Appellate Practice §§3.25-3.47 (3d ed Cal CEB 1996).

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B. Deciding Whether to Appeal

§11.15 1. Factors to Consider

Deciding whether to appeal a superior court's decision in a writ proceeding is often difficult. The decision to appeal should be made only after a thorough evaluation of the record, the potential issues for appeal, the standard of review for each of those issues, whether any superior court error was prejudicial, and the overall equities of the case. Counsel should keep in mind that most appeals are not successful. See Cal Const art VI, §13 (reversal of superior court judgment permissible only if appellate court finds miscarriage of justice); CCP §475 (reversal permissible only if error was prejudicial); *Mathew Zaheri Corp. v New Motor Vehicle Bd.* (1997) 55 CA4th 1305, 1313, 64 CR2d 705 (all intendments are construed in favor of judgment, which is presumed correct). On these and other factors to consider in deciding whether to appeal, see California Civil Appellate Practice §§1.49-1.61 (3d ed Cal CEB 1996).

PRACTICE TIP: Because it may be difficult for the client and trial counsel to make a dispassionate assessment of the merits of an appeal, it may be helpful to hire or consult with an appellate lawyer, who will be thoroughly conversant with the standards of review and other issues bearing on the outcome of an appeal.

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§11.16 a. Standard of Review on Appeal

The standard of review on appeal—*i.e.,* how the court of appeal will review the action taken by the superior court—is one of the most important indicators of the chances of success on appeal. In a traditional mandate proceeding under CCP §1085, the appellate standard of review will vary depending on the nature of the writ proceeding and the issues presented on appeal. See, *e.g.*, *Mednik v State Dep't. of Health Care Servs.* (2009) 175 CA4th 631, 639, 96 CR3d 112 (substantial evidence review of foundational factual findings, but legal questions, including ultimate determination of whether administrative proceedings were fundamentally fair, reviewed de novo); *Munroe v Los Angeles County Civil Serv. Comm'n* (2009) 173 CA4th 1295, 1301, 93 CR3d 716 (in ordinary mandamus proceeding, appellate court applies substantial evidence test to review trial court's factual findings, but applies de novo standard to questions of law); *Sustainability of Parks, Recycling & Wildlife Legal Defense Fund v County of Solano Dep't of Resource Mgmt.* (2008) 167 CA4th 1350, 1357, 84 CR3d 889 (de novo review of purely legal question); *Fonseca v Fong* (2008) 167 CA4th 922, 929, 84 CR3d 567 (de novo review of dismissal following order sustaining demurrer); *Hernandez v County of Los Angeles* (2008) 167 CA4th 12, 18, 84 CR3d 10 (legal issues reviewed de novo); *SN Sands Corp. v City & County of San Francisco* (2008) 167 CA4th 185, 191, 83 CR3d 885 (appellate court applied same standard as trial court in reviewing agency's decision). See also *Committee for Responsible Sch. Expansion v Hermosa Beach City Sch. Dist.* (2006) 142 CA4th 1178, 1184, 48 CR3d 705 (de novo review of interpretation of California Constitution); *Branciforte Heights, LLC v City of Santa Cruz* (2006) 138 CA4th 914, 933, 42 CR3d 96 (de novo review of applicable statute). An appellant's chances of success are enhanced when the standard of review is de novo and no deference is given to the superior court. On these standards of review, see California Civil Appellate Practice §§1.50, 1.53 (3d ed Cal CEB 1996).

In a prohibition action under CCP §1102, the standard of review will generally be de novo since the writ is "jurisdictional," that is, it examines whether the respondent is engaged in judicial action without or in excess of its jurisdiction—generally questions of law. See, *e.g.*, *Jensen v Superior Court* (2008) 160 CA4th 266, 271, 72 CR3d 594 (legal analysis of whether trial court could proceed); *Good v Superior Court* (2008) 158 CA4th 1494, 1505, 71 CR3d 125 (same).

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§11.17 b. Time and Financial Costs

The appellate process is time-consuming and expensive, and these factors must be carefully weighed in light of the (usually small) chances of success on appeal. An appeal can be less stressful for clients than the superior court proceedings because the appellate process, until oral argument, takes place on a paper record. However, the appellate process is lengthy, and the ongoing uncertainty about the matter can be stressful.

PRACTICE TIP: In addition to the financial costs of the appellate process, an aggrieved party, and particularly public entity clients, should consider any long-term costs resulting from a published, adverse decision.

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§11.18 c. Gravity of Adverse Consequences of Judgment

In some cases, the consequences of an adverse judgment may be so great that filing an appeal is warranted regardless of limited chances of success. For example, if a professional license is involved, an adverse judgment may mean the irreversible loss of a professional career. In such cases, the time and costs associated with an appeal become reasonable, even if the chances of success are relatively low. The same could be true in a case involving the destruction of the environment or a law that impacts many people. Additionally, in cases in which the issues of law and equity are close, counsel may obtain a stay of the challenged action while the appeal is pending. This in itself may benefit the client, even if the appeal is not successful in the long run. On obtaining a stay in the court of appeal, see chap 19.

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§11.19 2. Prospect of Settlement on Appeal

Some courts of appeal have formal settlement and mediation programs, many of which have been remarkably successful. See, *e.g.,* 1st App Dist Local R 2(d) (requiring parties to submit Case Screening Form to mediation program administrator); 4th App Dist (Div 2) Local R 4 (parties must submit Settlement Conference Information Form after filing notice of appeal). A writ proceeding, like any civil proceeding, may be amenable to settlement on appeal.

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C. Summary Overview of Appellate Process

§11.20 1. Rules Applicable in Writ Proceedings

The rules governing appeals from ordinary civil judgments apply to writ proceedings unless inconsistent with the provisions specifically governing writs. CCP §1110.

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§11.21 2. Notice of Appeal

Filing a notice of appeal initiates the appellate process. The appellant must do all of the following:

- File with the clerk of the superior court that rendered the judgment the original, signed notice of appeal and the required filing fee. Cal Rules of Ct 8.100(a)(1), (b)(1).
- Identify in the notice of appeal the particular judgment or order being appealed. Cal Rules of Ct 8.100(a)(2).
- Serve and file the notice of appeal on all parties and file proof of service with the clerk of the superior court. Cal Rules of Ct 8.25(a), 8.100(a)(1).

On the requirements for filing of a notice of appeal, including a form Notice of Appeal, see California Civil Appellate Practice §§7.8-7.24 (3d ed Cal CEB 1996).

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§11.22 a. Time to File

The basic time for filing a notice of appeal from an appealable order or judgment is the earliest of the following (Cal Rules of Ct 8.104(a)):

- 60 days after the clerk serves the party filing the notice of appeal with a document entitled "Notice of Entry" of judgment or a file-stamped copy of the judgment (NOTE: The 60-day period is not extended under CCP §1013(a) when service is by mail);
- 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled "Notice of Entry" of judgment or a file-stamped copy of the judgment, accompanied by proof of service (NOTE: The 60-day period is not extended under CCP §1013(a) when service is by mail); or
- 180 days after entry of judgment.

CAUTION: The deadlines to file a notice of appeal are jurisdictional and cannot be extended by the court. See §11.23. However, timely filed postjudgment motions may extend the time to appeal as specified in Cal Rules of Ct 8.108.

NOTE: The "prison-delivery rule," which provides that a self-represented inmate's notice of appeal in a criminal case is deemed timely filed if, within the relevant time period, the notice is delivered to prison authorities, applies to civil cases. *Silverbrand v County of Los Angeles* (2009) 46 C4th 106, 92 CR3d 595.

On the time for filing a notice of appeal generally, see California Civil Appellate Practice §§7.25-7.43 (3d ed Cal CEB 1996). On extensions of the time for filing a notice of appeal, see Civ App Prac §§7.44-7.77.

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§11.23 b. Timely Filing Is Jurisdictional

Filing a timely notice of appeal is critical. If the notice is not timely filed with the superior court, the appellate court lacks jurisdiction and the appeal must be dismissed. *Silverbrand v County of Los Angeles* (2009) 46 C4th 106, 92 CR3d 595 (filing of timely notice of appeal is jurisdictional prerequisite); *Hollister Convalescent Hosp., Inc. v Rico* (1975) 15 C3d 660, 668, 125 CR 757 (untimely appeal dismissed because time to file is "mandatory and jurisdictional"). Courts may not extend the time to file a notice of appeal, except as provided in Cal Rules of Ct 8.104(b) (for public emergency).

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3. Stay on Appeal

§11.24 a. Appeal Automatically Stays Execution of Writ of Mandate, But Not of Writ of Prohibition

An order or judgment granting a writ of mandate is stayed on appeal unless the superior court or the court of appeal orders otherwise. CCP §1110b; see also CCP §916(a). This is consistent with the general rule that a mandatory injunction (*i.e.,* one that changes the status quo) is automatically stayed on appeal, but a prohibitory injunction is not. See, *e.g.*, *Union Pac. R.R. v State Bd. of Equalization* (1989) 49 C3d 138, 158, 260 CR 565 (party required to comply with writ of prohibition during appeal). Thus, a writ of mandate is automatically stayed on appeal, but a writ of prohibition is not. On writs of prohibition, see §§15.14-15.26.

PRACTICE TIP: If the superior court refuses to recognize or enforce a stay arising by virtue of the filing of an appeal, the appellant can seek a writ of supersedeas from the court of appeal directing the issuance of a stay. CCP §923. On petitions for writs of supersedeas, see chap 26; California Civil Appellate Practice §§6.68-6.85 (3d ed Cal CEB 1996).

In contrast, an order or judgment granting a writ of prohibition or review (certiorari) is not stayed by the filing of a notice of appeal. See, *e.g., Union Pac. R.R. Co. v State Bd. of Equalization* (1989) 49 C3d 138, 158, 260 CR 565 (party required to comply with writ of prohibition during appeal). This is consistent with the general rule that an appeal does not stay a prohibitory injunction. If the circumstances are unusual and a stay is warranted, the respondent or real party in interest should first seek a stay in the superior court and, if not successful, petition the court of appeal for a writ of supersedeas.

On stays on appeal, see chap 19; Civ App Prac, chap 6. On petition for writ of supersedeas, see chap 26.

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§11.25 b. Exceptions to Automatic-Stay Rule

If the petitioner shows that a stay of a writ of mandate will result in irreparable damage to his or her business or profession, the superior court or court of appeal can order that the filing of an appeal does not stay execution of a writ of mandate. CCP §1110b. There also is no stay on appeal from an order or judgment directing issuance of a writ of mandate involving delivery of water for irrigation. CCP §1110a.

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§11.26 4. Record on Appeal

In addition to filing a timely notice of appeal, an appellant must timely file a designation of the record on appeal. Cal Rules of Ct 8.121(a). Although the time to file a record designation is not jurisdictional, the failure to timely procure the record may, and likely will, result in dismissal of the appeal.

The record on appeal generally consists of:

- The reporter's transcript of the superior court proceedings (Cal Rules of Ct 8.120(b), 8.130); and
- The superior court pleadings in the form of (Cal Rules of Ct 8.120(a)):
- A clerk's transcript (Cal Rules of Ct 8.122);
- An appendix prepared by a party on appeal (Cal Rules of Ct 8.124);
- The original superior court file (Cal Rules of Ct 8.128);
- An agreed statement (Cal Rules of Ct 8.134(a)(2)); or
- A settled statement (Cal Rules of Ct 8.137).

On designating the record on appeal, see chap 20; California Civil Appellate Practice, chap 9 (3d ed Cal CEB 1996).

In a writ proceeding in which there is an administrative record, that record also is part of the record on appeal. See *Crawford v City of Los Angeles* (2009) 175 CA4th 249, 254, 95 CR3d 550 (discussing administrative record on appeal and importance of adequate record, but noting that failure to properly designate administrative record as part of appellate record—"a technical defalcation" in this case—is not "the equivalent of failing to provide [the] court with a complete record"). On the administrative record, see §§7.14-7.18; California Administrative Mandamus, chap 4 (3d ed Cal CEB 2003).

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Source: Civil Litigation/California Civil Writ Practice/11 Challenging the Superior Court's Decision/§11.27 5. Briefing on Appeal

§11.27 5. Briefing on Appeal

The most important part of an appeal is the briefing. Before oral argument, the courts of appeal fully work up a case along with a draft opinion.

JUDICIAL PERSPECTIVE: Courts rarely change a draft opinion as a result of oral argument. Accordingly, the parties must make every effort to win on the briefing.

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§11.28 a. Appellant's Opening Brief

The opening brief is generally the appellate court's first view of the case and thus should clearly, concisely, and persuasively present the appellant's case. An opening brief should include (Cal Rules of Ct 8.204):

- An introduction summarizing the case and identifying the issues on appeal;
- A statement of the facts and procedural background;
- An argument section broken down into subsections addressing the relevant legal issues and including a statement of the standard of review applicable to each issue; and
- A conclusion.

Briefing should be scrupulously faithful to the record. All factual statements should be supported by a citation to the record. Overstating or misstating the facts will hurt the party's credibility. Similarly, briefing should fairly and accurately cite legal authorities. Misciting cases or other legal authority also will seriously damage the party's credibility.

PRACTICE TIP: Although a brief can be as long as 14,000 words (Cal Rules of Ct 8.204(c)(1)), shorter, well-edited briefs often are much more effective.

On the format and content of opening briefs, see California Civil Appellate Practice §§12.1-12.52 (3d ed Cal CEB 1996). On the time for filing and the consequences of the failure to file, see Cal Rules of Ct 8.212, 8.220; Civ App Prac §§12.59-12.66.

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§11.29 b. Respondent's Brief

The respondent's brief should be complete and self-contained, enabling the court of appeal to fully understand the respondent's position without referring to the appellant's opening brief. The basic components of the respondent's brief are the same as those of an appellant's opening brief, *i.e.,* an introduction, a statement of the facts and procedural history, an argument section, and a conclusion. Cal Rules of Ct 8.204. See §11.28.

PRACTICE TIP: The legal discussion should not only refute the issues raised by the appellant, but should also affirmatively demonstrate the merits of the respondent's case and the correctness of the superior court's decision.

On the format and content of respondent's briefs, see California Civil Appellate Practice §§13.1-13.26 (3d ed Cal CEB 1996). On the time for filing, see Civ App Prac §13.27.

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§11.30 c. Appellant's Reply Brief

Unlike an opening brief, a reply brief is optional. Cal Rules of Ct 8.200(a)(3). Nevertheless, an appellant should file a reply brief, because it allows the appellant to:

- Refocus the court on the legal and factual issues supporting reversal of the superior court's decision; and
- Directly respond to the respondent's legal arguments.

CAUTION: Do not raise new issues for the first time in the reply brief. The courts of appeal almost always deem belatedly raised issues forfeited, absent compelling justification for not raising the issue in the opening brief. See *Save the Sunset Strip Coalition v City of W. Hollywood* (2001) 87 CA4th 1172, 1181 n3, 105 CR2d 172 (refusing to consider issue raised for first time in reply brief).

On the format and content of reply briefs, see California Civil Appellate Practice §§12.67-12.77 (3d ed Cal CEB 1996). On the time for filing, see Civ App Prac §12.78.

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§11.31 6. Oral Argument

Parties have a right to oral argument on appeal and to the presence at oral argument of each justice who will participate in deciding the appeal. *Moles v Regents of Univ. of Cal.* (1982) 32 C3d 867, 871, 187 CR 557. See also Cal Rules of Ct 8.256 (notice and conduct of oral argument). Although parties may waive oral argument, it is the one opportunity for counsel to determine whether the court understands the party's arguments as presented in the brief(s), and it is the only opportunity that a client has to observe the court that will be deciding his or her case.

The following are some practical tips for counsel in making their oral argument:

- **Make oral argument short, concise, and to the point.** The main purpose of oral argument is to answer questions posed by the court, and counsel should be prepared to take questions and answer them directly. Sometimes, however, the panel is silent, in which case counsel should also have prepared remarks.
- **Prepare for oral argument knowing that the justices have reviewed a draft opinion.** The justice assigned to author the opinion in the case circulates a draft opinion to the other two justices on the panel before oral argument. In many courts, the justices also conference before oral argument to discuss their tentative views on the case. Thus, simply repeating the arguments made in the briefs often is not helpful to the court. Instead, counsel should focus on one or two major points or recap the party's position in a different light.
- **Do not focus on any one justice.** The court notifies the parties as to which justices will hear the case shortly before or at oral argument. The court, however, does not identify which justice has been assigned to write the opinion. It might become clear at oral argument based on the questions asked which justice "has the case." But the writing assignment could change, and the justice who is most active at argument may be in the minority trying to persuade the panel majority to change their view. Therefore, counsel should pay attention to each justice on the panel.

The appellate court submits the case for decision when a waiver of oral argument has been noted on the record, at the conclusion of oral argument, or upon submission of any supplemental briefing requested by the court. Cal Rules of Ct 8.256(d)(1).

On oral argument, see California Civil Appellate Practice, chap 16 (3d ed Cal CEB 1996).

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§11.32 7. Opinion of Court of Appeal

The court of appeal generally issues its opinion within 90 calendar days of the submission date. Although not formally prescribed by statute, court of appeal justices respect the 90-day deadline because receipt of their salaries is contingent on having no cause undetermined for 90 days after submission. Cal Const art VI, §19; Govt C §68210 (to receive salary, justice must file affidavit stating that no cause remains undetermined for 90 days after submission for decision). On determining submission date, see §24.16.

NOTE: As a practical matter, because the justices file the affidavits only once a month, the court often has slightly more than 90 days (to the end of the month in which the 90th day falls) to issue an opinion.

Appellate courts publish their opinions only if a majority of the court certifies the opinion for publication before the decision is final. Cal Rules of Ct 8.1105(b). An opinion may be published if it (Cal Rules of Ct 8.1105(c)):

- Establishes a new rule of law;
- Applies an existing rule of law to a set of facts significantly different from those stated in published opinions;
- Modifies, explains, or criticizes with reasons given, an existing rule of law;
- Advances a new interpretation, clarification, criticism, or construction of a provision of a constitution, statute, ordinance, or court rule;
- Addresses or creates an apparent conflict in the law;
- Involves a legal issue of continuing public interest;
- Makes a significant contribution to the legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law;
- Invokes a previously overlooked rule of law or reaffirms a legal principle not applied in a recently reported decision; or
- Is accompanied by a separate concurring or dissenting opinion, and publication of the majority and separate opinions would significantly contribute to the development of the law.

On requesting depublication of a published court of appeal opinion, see §11.36. On publication of opinions, see California Civil Appellate Practice §§21.5-21.18 (3d ed Cal CEB 1996).

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§11.33 8. Costs on Appeal

The party prevailing in the court of appeal in a civil case is generally entitled to costs on appeal. See, *e.g., Vasquez v Happy Valley Union Sch. Dist.* (2008) 159 CA4th 969, 987, 72 CR3d 15 (costs awarded to respondent prevailing in petitioner's appeal from writ judgment); *Fiscal v City & County of San Francisco* (2008) 158 CA4th 895, 920, 70 CR3d 324 (costs awarded to petitioner prevailing in respondents' appeal from writ judgment). If the court of appeal affirms the superior court's decision, the respondent is the prevailing party; if the court reverses the superior court's decision in its entirety, the appellant is the prevailing party. Cal Rules of Ct 8.278(a)(1)-(2). If the court reverses the superior court's decision in part or modifies it, or if there is more than one notice of appeal, the opinion must specify the award or denial of costs. Cal Rules of Ct 8.278(a)(3). In the interests of justice, the court may award or deny costs as it deems proper. Cal Rules of Ct 8.278(a)(5). See, *e.g., Capo for Better Representation v Kelley* (2008) 158 CA4th 1455, 1466, 71 CR3d 354 (in "interest of justice" each side to bear costs on appeal from writ judgment).

The clerk of the court will indicate in the remittitur whether costs are awarded. Cal Rules of Ct 8.278(b)(1).

NOTE: The remittitur is a document issued by the clerk of the court of appeal to the superior court, notifying the superior court that the judgment of the appellate court is final and that the superior court has regained jurisdiction over the matter. See Cal Rules of Ct 8.272; *Schwartz v Schwartz* (1969) 268 CA2d 685, 690, 74 CR 192.

A party awarded costs must file a memorandum of costs in the superior court within 40 days after the appellate court clerk mails notice of the issuance of remittitur. Cal Rules of Ct 8.278(c)(1). Costs on appeal are usually relatively small. See Cal Rules of Ct 8.278(d)(1) (listing recoverable costs).

Unless the court of appeal orders otherwise, its award of costs neither includes attorney fees on appeal nor precludes a party from seeking them. Cal Rules of Ct 8.278(d)(2).

On costs on appeal, see California Civil Appellate Practice §§20.1-20.12 (3d ed Cal CEB 1996).

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D. Challenging Court of Appeal's Decision

§11.34 1. Rehearing in Court of Appeal

On petition of a party, or on its own motion, the court of appeal may order rehearing of any decision that is "not final in that court on filing." Cal Rules of Ct 8.268(a)(1). See also Cal Rules of Ct 8.264(b) (on finality of decision).

Petitions for rehearing are rarely granted. The vast majority of appeals are correctly decided, and, even when reasonable minds may differ on the correct outcome, it is difficult to persuade the court that its opinion is incorrect and should be revisited. Nevertheless, a petition for rehearing may be appropriate, and indeed necessary, in the following instances:

- If the court of appeal decided the case on an issue neither party raised or had opportunity to brief. Govt C §68081. See *People v Alice* (2007) 41 C4th 668, 674, 61 CR3d 648 (providing guidance on use of petition for rehearing based on new issue under §68081).
- If the aggrieved party intends to seek review by the California Supreme Court and believes that the court of appeal's opinion omits or misstates facts. Cal Rules of Ct 8.500(c)(2) (supreme court normally accepts court of appeal opinion's statement of issues and facts unless party has raised any alleged omission or misstatement of issue or fact in petition for rehearing).
- If the case is one of the exceedingly rare instances in which the appellate court determines that it wrongly decided the case. See, *e.g., Kaplan v Coldwell Banker Residential Affiliates, Inc.* (1997) 59 CA4th 741, 69 CR2d 640 (decision on rehearing reversing summary judgment vacates previously published opinion affirming summary judgment).
- If a party believes that the court of appeal needs to limit, modify, or clarify its decision to enable the superior court or parties to comply with it in the case at hand or in future cases.

On the filing deadline for petitions for rehearing and the timing for the court of appeal to act on the petition, see Cal Rules of Ct 8.264, 8.268. For further discussion of petitions for rehearing in the court of appeal, see §§25.16-25.25; California Civil Appellate Practice, chap 19 (3d ed Cal CEB 1996).

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§11.35 2. Review by Supreme Court

In almost all cases, an aggrieved party's last resort is to seek review by the California Supreme Court. Cal Rules of Ct 8.500(a)(1). A party does not appeal from an adverse decision by a court of appeal, but rather files a petition for review asking the supreme court to exercise its discretionary review authority. Cal Const art VI, §12(b). See, *e.g.*, *Ste. Marie v Riverside County Reg'l Park & Open-Space Dist.* (2009) 46 C4th 282, 93 CR3d 369 (granting review and reversing court of appeal's judgment, which had affirmed trial court judgment issuing writ to prevent sale of park district property); *Spielbauer v County of Santa Clara* (2009) 45 C4th 704, 88 CR3d 590 (granting review and reversing court of appeal's judgment, which had reversed trial court's judgment in mandate action challenging dismissal from public employment).

The California Supreme Court is not a court of error. Rather, its mission is to establish and clarify the law of the state. The supreme court grants review only in limited circumstances (*e.g.,* to decide important public issues or to resolve conflicts among the courts of appeal), and thus only a small fraction of petitions for review are granted.

On the grounds and procedures for petitioning for review and what occurs once review has been granted, see §§27.12-27.33; California Civil Appellate Practice, chap 22 (3d ed Cal CEB 1996).

PRACTICE TIP: A petition for review challenging a court of appeal's opinion is entirely different from a petition invoking the supreme court's original jurisdiction and seeking issuance of a prerogative writ of mandate, prohibition, or review (certiorari). Although the supreme court is empowered to issue prerogative writs, original proceedings in the high court are extremely rare. See §§27.2-27.11.

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§11.36 E. Requesting Depublication of Published Court of Appeal Opinion

In addition to, or in lieu of, a petition for review, a party or other interested person may request the supreme court to order that an opinion certified for publication not be published. This request cannot be part of a petition for review; rather, it must be made by a separate letter to the supreme court. See Cal Rules of Ct 8.1125(a) (rules on content and service of request). An order by the supreme court depublishing a court of appeal's opinion is not a statement as to the correctness of the decision or any of its legal analysis. Cal Rules of Ct 8.1125(d).

On requesting depublication, including practical considerations and procedure, see California Civil Appellate Practice §§21.15-21.18 (3d ed Cal CEB 1996).

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IV. SEEKING WRIT RELIEF IN APPELLATE COURTS

§11.37 A. Petition Filed in Court of Appeal

In exceedingly rare cases, a party aggrieved by a superior court's decision in a writ proceeding may file a writ petition in the court of appeal instead of, or in addition to, an appeal. Writ review is appropriate when an appeal does not provide an adequate remedy, *i.e.,* when time is of the essence. For example:

- When the superior court issued a writ of mandate invalidating the certification of a referendum petition and striking the referendum from the ballot, the court of appeal allowed the writ petition on the ground that an appeal was an inadequate remedy because it could not be heard before the election occurred. *Hayward Area Planning Ass'n v Superior Court* (1990) 218 CA3d 53, 55, 266 CR 745.
- The court of appeal acted on a petition for a writ of mandate filed as an original proceeding, instead of an appeal, because of the need for a speedy resolution of issues that were in the public interest. *San Gabriel Tribune v Superior Court* (1983) 143 CA3d 762, 770, 192 CR 415.

CAUTION: The filing of a writ petition in the court of appeal does not toll or extend the time to file a notice of appeal. If the court of appeal concludes that an appeal is an adequate remedy but the time to appeal has lapsed while the writ petition was pending, the party will have forfeited the right to appeal. Thus, it is always advisable to file both a notice of appeal *and* a writ petition to ensure that the right to appeal is not lost in the event the appellate court denies the writ petition.

On choosing between a direct appeal and an extraordinary writ, see California Civil Appellate Practice, chap 3A (3d ed Cal CEB 1996).

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§11.38 B. Petition Filed in Supreme Court

On even rarer occasions, a petitioner may file a writ petition in the California Supreme Court, skipping the court of appeal altogether. See *Brown v Superior Court* (1971) 5 C3d 509, 514, 96 CR 584 (original mandate proceeding filed in supreme court because public interest in constitutionality of finance disclosure laws required more rapid determination of issue than was possible in course of normal appeal); *Farley v Healey* (1967) 67 C2d 325, 326, 62 CR 26 (original mandate proceeding filed in supreme court because timing of issue made appeal from superior court order inadequate remedy). This procedure is strongly disfavored unless the petitioner feels that time constraints and the overriding public importance compel attention by the supreme court. On original writ petitions in the supreme court, see §§27.2-27.11.

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12

Writ Petitions in Limited Civil and Small Claims Cases

Efrat M. Cogan

I. SCOPE OF CHAPTER §12.1

II. LIMITED JURISDICTION CIVIL CASES
- A. Definition of Limited Jurisdiction Civil Case §12.2
- B. Writ Review of Superior Court's Interlocutory Action in Limited Jurisdiction Civil Case §12.3
- C. Initiating Writ Proceeding in Appellate Division
  - 1. Format and Contents of Petition §12.4
  - 2. Supporting Memorandum §12.5
  - 3. Supporting Record
    - a. Contents of Record §12.6
    - b. Format of Record §12.7
    - c. Inadequate or Nonconforming Record §12.8
  - 4. Requesting a Stay §12.9
  - 5. Filing and Service §12.10
- D. Initial Action by Appellate Division §12.11
- E. Opposition to Writ Petition
  - 1. Preliminary Opposition
    - a. Format and Contents of Preliminary Opposition §12.12
    - b. Time for Filing Preliminary Opposition §12.13
  - 2. Opposition When Appellate Division Considers Issuing Peremptory Writ in First Instance §12.14
  - 3. Opposition and Return When Appellate Division Issues Alternative Writ §12.15
- F. Petitioner's Reply
  - 1. Reply to Preliminary Opposition §12.16
  - 2. Reply to Opposition and Return §12.17
- G. Review of Appellate Division's Decision on Writ Petition
  - 1. Mandate and Prohibition
    - a. Filing New Petition in Court of Appeal §12.18
    - b. Court of Appeal May Treat Erroneous Appeal as Writ Petition §12.19
  - 2. Filing Appeal in Writ of Review (Certiorari) Cases §12.20
  - 3. Writ Petition to California Supreme Court May Be Appropriate in Rare Cases §12.21
- H. Review of Appellate Division's Judgment on Appeal
  - 1. By Writ Petition to Court of Appeal §12.22
  - 2. By Certification or Transfer to Court of Appeal
    - a. Certification to Court of Appeal §12.23
    - b. Transfer to Court of Appeal §12.24
- I. Costs §12.25

III. SMALL CLAIMS COURT CASES
- A. Writ Review Unavailable to Challenge Small Claims Court Judgment §12.26
- B. Writ Review May Be Available to Challenge Superior Court Judgment After Appeal §12.27

IV. WRITS OF SUPERSEDEAS §12.28

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§12.1 I. SCOPE OF CHAPTER

This chapter discusses writ proceedings in limited jurisdiction civil and small claims court cases.

- **Limited jurisdiction civil cases.** In a limited jurisdiction civil case, a party aggrieved by an interlocutory order or ruling can seek immediate appellate review by filing a writ petition in the appellate division of the superior court. See §12.3. This is analogous to a party in a general civil action seeking immediate appellate review of an interlocutory order or ruling by filing a writ petition in the court of appeal. The procedures for prosecuting writs in limited jurisdiction civil cases are discussed in §§12.4-12.17. A party aggrieved by the appellate division's decision on a petition for a writ of mandate or prohibition can seek further appellate review by filing a new writ petition in the court of appeal (which likely will be denied). See §§12.18-12.19. A party aggrieved by the appellate division's decision granting or denying a petition for a writ of review (also called a writ of certiorari) can seek review by way of appeal to the court of appeal. See §12.20. A party aggrieved by the judgment in a limited civil case must appeal to the appellate division. A party aggrieved by the appellate division's decision on appeal can seek writ review by the court of appeal or, more commonly, seek certification and transfer to the court of appeal. See §12.22-12.24.
- **Small claims court cases.** Writ review is generally unavailable to challenge a small claims court judgment. See §12.26. However, the superior court's appellate division may review a judgment rendered by the superior court in a small claims court appeal if there is a need to settle a significant issue of small claims law or procedure. See §§12.27-12.28.

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II. LIMITED JURISDICTION CIVIL CASES

§12.2 A. Definition of Limited Jurisdiction Civil Case

Limited jurisdiction civil cases consist of those actions or special proceedings in which (1) the amount in controversy, exclusive of attorney fees, interest, and costs, does not exceed $25,000, and (2) the relief sought is solely of the type that can be granted in limited civil cases. CCP §85. In addition, some proceedings have been designated by statute as limited civil cases. See CCP §86. For further discussion, see California Civil Procedure Before Trial §§6.15-6.17 (4th ed Cal CEB 2004).

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§12.3 B. Writ Review of Superior Court's Interlocutory Action in Limited Jurisdiction Civil Case

The superior court's appellate division has jurisdiction to grant writs of mandate, prohibition, or review (certiorari) directed to the superior court in limited jurisdiction civil cases. CCP §§1068(b), 1085(b), 1103(b); see *General Elec. Capital Auto Fin. Servs. v Appellate Div.* (2001) 88 CA4th 136, 144, 105 CR2d 552. Accordingly, a party aggrieved by an interlocutory order or ruling in a limited civil case can seek immediate appellate review by filing a writ petition in the appellate division of the superior court.

NOTE: For the purposes of CCP §§1068, 1085, and 1103, when the superior court acts in its limited jurisdiction capacity, it is an "inferior tribunal" to the superior court's appellate division. CCP §§1068(b), 1085(b), 1103(b).

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C. Initiating Writ Proceeding in Appellate Division

§12.4 1. Format and Contents of Petition

The superior court appellate division is the appellate tribunal for limited jurisdiction matters and therefore entertains, hears, and decides matters as an appellate body. See §12.2. A writ petition filed in the appellate division of the superior court should be prepared in accordance with the rules set out in Cal Rules of Ct 8.931, 8.932. See Cal Rules of Ct 8.930. Rule 8.931 governs petitions filed by parties unrepresented by counsel. Writ petitions filed by attorneys must follow Rule 8.931 unless otherwise required by Rule 8.932. As to matters not expressly addressed by the new rules on writs in limited jurisdiction matters, the rules addressing writs filed in the courts of appeal (Cal Rules of Ct 8.485-8.493) provide some guidance.

NOTE: The rules on the format and content of a writ petition filed in the appellate division mirror those for petitions filed in the courts of appeal, discussed in §§18.5-18.48. Given the often simpler nature of limited jurisdiction matters, writ petitions filed in the appellate division generally will be simpler and shorter than their counterparts filed in the court of appeal. On writ petitions in the court of appeal, see chap 18. On the possible bases for appellate writ relief, see chaps 15-17, App A. On the basic requirements a petitioner must meet for appellate writ relief, see chaps 15, 17. On the showing a petitioner must make for appellate writ relief, see chaps 15-17.

Appellate division writ petitions filed by counsel must comply with the form and content requirements of Cal Rules of Ct 8.932(b). These writ petitions must include supporting documents as provided for in Rule 8.931(b). Unrepresented parties must use an approved form—Petition for Writ (Misdemeanor, Infraction, or Limited Civil Case) (Judicial Council form APP-151)—to seek writ review (Cal Rules of Ct 8.931(a)), but are required to provide an adequate record to support their petition (Cal Rules of Ct 8.931(b)). See §13.16.

PRACTICE TIP: A petitioner initiating a writ petition in a limited jurisdiction civil case should consult the Judicial Council's pamphlet Information on Writ Proceedings in Misdemeanor, Infraction, and Limited Civil Cases (form APP-150-INFO). See §13.17. This pamphlet contains step-by-step instructions on filing writ petitions in the appellate division of the superior court.

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Source: Civil Litigation/California Civil Writ Practice/12 Writ Petitions in Limited Civil and Small Claims Cases/§12.5 2. Supporting Memorandum

§12.5 2. Supporting Memorandum

Every appellate division writ petition filed by counsel must include a supporting memorandum setting forth the legal arguments explaining why the superior court's order or ruling was in error and why the appellate division should grant writ relief. See Cal Rules of Ct 8.932(b)(5) (petition filed by counsel must be accompanied by memorandum, which need not repeat facts alleged in petition).

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3. Supporting Record

§12.6 a. Contents of Record

In addition to the writ petition, the petitioner must file supporting exhibits (the record), which should include all of the following (see Cal Rules of Ct 8.931(b)(1)):

- The order or ruling from which the petition seeks relief;
- All documents and exhibits submitted to the superior court that support and oppose the petitioner's position;
- Any other relevant documents necessary for a complete understanding of the issues under review; and
- A reporter's transcript or electronic recording of the oral proceedings that resulted in the order or ruling that is the subject of the petition, or if a transcript or recording is unavailable, a declaration by counsel (or, if the petitioner is unrepresented by counsel, by the petitioner) (1) explaining why it is unavailable and summarizing the proceedings or (2) stating that the transcript or recording has been ordered and the date it is expected to be filed.

PRACTICE TIP: If any of the above documents are unavailable, the petitioner should file a declaration explaining why the documents are unavailable and fairly summarizing their contents. Cal Rules of Ct 8.931(b)(2).

See Cal Rules of Ct 8.931(b) (requirements for contents of record for writ petitions filed by unrepresented petitioners in limited civil cases).

A petitioner seeking to have the appellate division consider original exhibits that were neither copied in the clerk's transcript nor included in the original file must serve and file a notice in the trial court designating such exhibits with a copy to the appellate division. Cal Rules of Ct 8.843(a). On transmittal of such exhibits, see Cal Rules of Ct 8.843(d).

For further discussion of the contents of the supporting record in the context of writ petitions filed in the courts of appeal, see §§20.6-20.9.

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§12.7 b. Format of Record

The documents that constitute the record should (see Cal Rules of Ct 8.931(c)(1) (applicable to both unrepresented and represented parties)):

- Be bound together at the end of the petition or in separate volumes not exceeding 300 pages each and consecutively numbered.
- Be index-tabbed by number or letter.
- 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.

For further discussion of the format of the record in the context of writ petitions filed in the courts of appeal, see §§20.11-20.14.

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§12.8 c. Inadequate or Nonconforming Record

If the petitioner does not provide an adequate record, or does not explain why an adequate record is not available, the court may summarily deny the writ petition. See, *e.g.*, *Lantz v Superior Court* (1994) 28 CA4th 1839, 1847 n8, 34 CR2d 358. The clerk must file any documents supporting a petition (or a petition itself) that do not comply with these requirements. However, the court may notify the petitioner that it will strike or summarily deny the petition unless petitioner brings the documents into compliance within a stated period of time of at least 5 days. See Cal Rules of Ct 8.931(c)(2).

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§12.9 4. Requesting a Stay

There is no automatic stay of superior court proceedings pending the disposition of writ proceedings in the appellate division of the superior court. However, issuance of an alternative writ of prohibition or a writ of review (certiorari) effectively acts as a stay unless the court orders otherwise. See §19.5. A petitioner is not first required to ask the superior court for a stay. However, it is expected as a matter of practice. See CCP §128(a)(3) ("Every court shall have the power… [t]o provide for the orderly conduct of proceedings before it, or its officers"). If the superior court refuses to stay the limited jurisdiction proceedings, the petitioner may seek a stay from the appellate division.

PRACTICE TIP: If a stay is requested from the appellate division, the front cover of the writ petition should conspicuously state that a stay is requested, and the petition itself should include a section that explains why there is good cause and urgency for the stay. See Cal Rules of Ct 8.932(b)(7). See also Cal Rules of Ct 8.116 (rule on cover information for petitions filed in court of appeal, discussed in §§18.19, 18.58, 18.60).

On stays during appellate writ review generally, see chap 19.

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Source: Civil Litigation/California Civil Writ Practice/12 Writ Petitions in Limited Civil and Small Claims Cases/§12.10 5. Filing and Service

§12.10 5. Filing and Service

Under Cal Rules of Ct 8.931(d)):

- The petition and one set of supporting documents must be served on any named real party in interest (*i.e.,* the opposing parties in the action), but only the petition need be served on the respondent (*i.e.,* the lower court that issued the challenged opinion);
- The proof of service must give the telephone number of each attorney or unrepresented party served;
- The petition must be served on a public officer or agency when required by statute or Cal Rules of Ct 8.29;
- The clerk must file the petition even if the proof of service is defective, but if the petitioner fails to correct the deficiency within 5 days after the clerk gives notice of the defect, the court may strike the petition or impose some other sanction; and
- The court may allow the petition to be filed without proof of service.

PRACTICE TIP: A writ petition should be filed as soon as possible and in any event no later than 30 days after the decision or action being challenged.

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§12.11 D. Initial Action by Appellate Division

The appellate division can take the following initial actions on a writ petition:

- Summarily deny it;
- Issue an alternative writ or order to show cause;
- Issue notice that the court may grant a peremptory writ in the first instance.

The most likely action is a summary denial. On the likelihood of and on the bases for appellate writ relief, see chaps 15, 17.

The appellate division may take any of these actions without waiting for opposition by the real party in interest (usually the opposing party in the underlying limited jurisdiction case). On real parties in interest, see §23.21. On the types of actions that an appellate court may take on the filing of a writ petition, see §§22.9-22.29; Cal Rules of Ct 8.933(a)(4); see also Information on Writ Proceedings in Misdemeanor, Infraction, and Limited Civil Cases (Form APP-150-INFO). See §13.17.

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E. Opposition to Writ Petition

1. Preliminary Opposition

§12.12 a. Format and Contents of Preliminary Opposition

When served with a writ petition, either the real party in interest or the respondent may file a preliminary opposition. Cal Rules of Ct 8.933(a). The purpose of preliminary opposition is to help the appellate division weed out writ petitions that are procedurally infirm or clearly without merit, thus summarily ending the proceedings without further expenditure of judicial resources and additional expense to the parties.

NOTE: Rule 8.933(a)(2) provides that the preliminary opposition must include a memorandum and any statement of material fact not included in the petition. In other words, it should alert the court to any patent procedural or substantive defect in the petition so the court can dispense with the petition summarily if that is appropriate. The format and contents of a preliminary opposition should resemble (albeit in shorter form) the format and contents of a preliminary opposition filed in a writ proceeding in the court of appeal. See Cal Rules of Ct 8.204, 8.487(a)(2), discussed in §§21.8-21.13.

In addition, the court may, without requesting preliminary opposition or waiting for a reply, grant or deny a request for a 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. Cal Rules of Ct 8.933(a)(4). On the similar types of actions the courts of appeal may take on a writ petition, see §§22.9-22.29.

PRACTICE TIP: The preliminary opposition can be used to point out any factual inaccuracies or omissions in the record filed by the petitioner. It also can be used to point out that there is neither irreparable harm to the petitioner nor any need for writ review. On the showing a petitioner must make for appellate court writ relief, see chaps 15, 17.

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Source: Civil Litigation/California Civil Writ Practice/12 Writ Petitions in Limited Civil and Small Claims Cases/§12.13 b. Time for Filing Preliminary Opposition

§12.13 b. Time for Filing Preliminary Opposition

Preliminary oppositions must be filed within 10 days after filing, not service, of a writ petition. Cal Rules of Ct 8.933(a)(1). It is not clear whether additional time is added to the 10 days to take into account the mailing of a writ petition. It likely is not since the "mail extension" provisions of CCP §1013(a) apply where action is triggered by "service," not by "filing" as specified in writ and appellate rules.

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§12.14 2. Opposition When Appellate Division Considers Issuing Peremptory Writ in First Instance

If the appellate division notifies the parties that it is considering issuing a peremptory writ in the first instance (*i.e.,* a *Palma* notice; see §§22.18-22.22), the respondent or real party in interest may, within 30 days after the court's notification, serve and file an opposition. See Cal Rules of Ct 8.933(b)(1)-(2).

The format and contents of the opposition should resemble the format and contents of an opposition filed in a writ proceeding in the court of appeal. See *e.g.,* Cal Rules of Ct 8.40, 8.204, 8.485-8.493, discussed in §§23.3-23.10.

A respondent or real party in interest cannot raise new issues for interlocutory appellate review in an opposition to a writ petition. See *Campbell v Superior Court* (2005) 132 CA4th 904, 922, 34 CR3d 68.

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§12.15 3. Opposition and Return When Appellate Division Issues Alternative Writ

If the appellate division issues an alternative writ or order to show cause (see §§22.23-22.29), the respondent or real party in interest may, within 30 days after the court issues the alternative writ or order to show cause, serve and file a return by demurrer, verified answer, or both. See Cal Rules of Ct 8.933(b)(1)-(2).

The format and contents of a demurrer or verified answer should resemble the format and contents of a demurrer or answer filed in a writ proceeding in the court of appeal. See Cal Rules of Ct 8.40, 8.204, 8.485-8.493, discussed in §§23.19-23.38.

CAUTION: If the return is by demurrer alone and the demurrer is not sustained, the court may issue a peremptory writ without granting the respondent or real party in interest leave to answer. Cal Rules of Ct 8.933(b)(4). Thus, a respondent or real party in interest should accompany a demurrer with an answer. See §23.34.

Just as the petition must be accompanied by a supporting memorandum (Cal Rules of Ct 8.932(b)(5)), a return also should include a memorandum making the legal arguments in support of the return and in opposition to the petition. On returns filed in the courts of appeal, see §23.37.

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F. Petitioner's Reply

§12.16 1. Reply to Preliminary Opposition

Within 10 days after a preliminary opposition is filed, the petitioner may file and serve a reply. See Cal Rules of Ct 8.933(a)(3).

PRACTICE TIP: A petitioner generally should take advantage of the opportunity to have the "last word" on the matter and respond to points made in the opposition.

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§12.17 2. Reply to Opposition and Return

Within 15 days after the filing of a return or opposition to the court's notification that it is considering issuing a peremptory writ in the first instance, the petitioner may serve and file a reply. See Cal Rules of Ct 8.933(b)(3). On the similar rules and practice for replies filed in the courts of appeal, see §§23.17-23.18, 23.48-23.50.

PRACTICE TIP: A petitioner generally should take advantage of the opportunity to have the "last word" on the matter and respond to points made in the opposition. This is especially true when the court has indicated enough interest in the petition to issue an alternative writ or notice indicating it may issue a peremptory writ in the first instance.

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G. Review of Appellate Division's Decision on Writ Petition

1. Mandate and Prohibition

§12.18 a. Filing New Petition in Court of Appeal

A decision (judgment) of the appellate division of the superior court granting or denying a petition for a writ of mandate or prohibition does not constitute an appealable order. CCP §904.3. The aggrieved party may, however, file a new writ petition in the court of appeal. In such cases, the appellate court may exercise its discretion to grant review. CCP §904.3. See *Chavez v Superior Court* (1984) 153 CA3d 130, 132, 200 CR 75 (court of appeal exercised its discretion to review superior court judgment in municipal court case); *Strand Prop. Corp. v Municipal Court* (1983) 148 CA3d 882, 886 n4, 200 CR 47 (noting that no appeal lies from order denying petition for writ of prohibition in pending municipal court case), disapproved on other grounds in *People v Superior Court* (1989) 49 C3d 14, 28 n10, 259 CR 740.

NOTE: Some statutes and many older cases refer to the municipal court, which used to hear limited jurisdiction civil cases. However, the municipal and superior courts in all counties are now "unified" as superior courts (see *General Elec. Capital Auto Fin. Servs. v Appellate Div.* (2001) 88 CA4th 136, 145, 105 CR2d 552).

On determining whether to file appellate court writ proceedings, see chap 17. On initiating a writ proceeding in the court of appeal, see chap 18.

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§12.19 b. Court of Appeal May Treat Erroneous Appeal as Writ Petition

If a party erroneously files an appeal from a nonappealable decision from the superior court's appellate division, the court of appeal may, in its discretion, treat the impermissible "appeal" as a petition for writ of mandate or prohibition (see CCP §904.3 (appellate division decision on writ petition not appealable)) or as a writ petition. See *Morehart v County of Santa Barbara* (1994) 7 C4th 725, 744, 29 CR2d 804; *Stonewall Ins. Co. v City of Palos Verdes Estates* (1996) 46 CA4th 1810, 1831, 54 CR2d 176. However, an aggrieved party should not rely on the court of appeal to "save" an invalid appeal by deeming it a writ petition. An appellate court will treat an invalid appeal as a writ only in unusual circumstances, *e.g.*:

- California Supreme Court treated an improper appeal as a petition for a writ of mandate because (1) the briefs and the record contained "all the [necessary] elements… for an original mandate proceeding"; (2) the case presented "unusual circumstances making it appropriate to ascertain from the record whether there are substantive errors that the Court of Appeal should, by writ, order the trial court to correct"; and (3) judicial economy would be served by resolving the issue that was the subject of the appeal, rather than waiting until final judgment on all of the plaintiff's claims. *Morehart*, 7 C4th at 745.
- Court of appeal treated improper appeal as a petition for extraordinary relief because case involved a novel interpretation of the dismissal statutes and there was no objection by the other party. *Nassif v Municipal Court* (1989) 214 CA3d 1294, 1297, 263 CR 195.
- Court of appeal treated improper appeal as writ petition because the issue presented was one of first impression, was fully briefed, and presented a pure question of law. *Rogers v Municipal Court* (1988) 197 CA3d 1314, 1317, 243 CR 530.
- Court of appeal treated improper appeal as writ petition because case "involve[d] a question of public importance appropriate for resolution," action was fully briefed, and the respondent did not object. *Heldt v Municipal Court* (1985) 163 CA3d 532, 534 n1, 209 CR 579.

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§12.20 2. Filing Appeal in Writ of Review (Certiorari) Cases

A decision (judgment) of the appellate division granting or denying a petition for a writ of review (certiorari) can be appealed to the court of appeal. CCP §904.3; see *Bermudez v Municipal Court* (1992) 1 C4th 855, 860, 4 CR2d 609 (amendments to CCP §904.1 only limited right of appeal for writs of mandate and prohibition, not certiorari).

NOTE: The right of appeal includes decisions on petitions for writs of review (certiorari) arising from contempt rulings, even though a contempt order is not appealable. See CCP §904.1(a); Bermudez, at 1 C4th 864. The legislative scheme thus effectively allows appeal in limited civil case contempt matters but not in superior court contempt matters. 1 C4th at 860.

On prosecuting an appeal, see California Civil Appellate Practice (3d ed Cal CEB 1996).

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§12.21 3. Writ Petition to California Supreme Court May Be Appropriate in Rare Cases

In extraordinary cases, a party may want to seek review of a superior court appellate division writ decision (judgment) by filing a new writ petition directly in the California Supreme Court. See *Serna v Superior Court* (1985) 40 C3d 239, 245, 219 CR 420 (supreme court granted alternative writ after superior court denied petition for writ of mandate to "review two novel and important questions of statewide application"). Such petitions, however, are very rarely granted. On original writ proceedings filed in the California Supreme Court, see chap 27.

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H. Review of Appellate Division's Judgment on Appeal

§12.22 1. By Writ Petition to Court of Appeal

A party aggrieved by the superior court's judgment in a limited jurisdiction civil matter must appeal to the appellate division. CCP §904.2.

A party aggrieved by the appellate division's decision (judgment) on appeal may seek writ review of that decision by the court of appeal. However, the court of appeal will grant writ relief only in exceptional circumstances. See, *e.g., Auto Equity Sales, Inc. v Superior Court* (1962) 57 C2d 450, 453-62, 20 CR 321 (review of appellate division's reversal of a new trial order by way of petition for writ of prohibition; petition granted and appellate division's judgment annulled); *Mahdavi v Superior Court* (2008) 166 CA4th 32, 82 CR3d 121 (review of appellate division's dismissal of notice of appeal from judgment in unlawful detainer case); *Greene v Municipal Court* (1975) 51 CA3d 446, 448, 124 CR 139 (review of appellate division's affirmance of unlawful detainer judgment and denial of motion to vacate by way of petition for writ of review (certiorari); petition granted and appellate division directed to reverse unlawful detainer judgment).

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2. By Certification or Transfer to Court of Appeal

§12.23 a. Certification to Court of Appeal

Rather than seeking writ relief from the court of appeal, parties more commonly request certification or transfer of the case to the court of appeal. See CCP §911 (authorizing transfer to court of appeal); Cal Rules of Ct 8.1000-1018 (setting forth procedures for certification and transfer). The requirements for certification and transfer are stringent, and limited jurisdiction cases are rarely certified or transferred to the court of appeal.

The appellate division may on its own motion certify a case for transfer to the court of appeal. Cal Rules of Ct 8.1005(a). Alternatively, a party may file an application for certification by the appellate division within 15 days after the appellate division pronounces its judgment (affirming or reversing the superior court's judgment in the limited jurisdiction matter). Cal Rules of Ct 8.1005(b). The application for certification can be included in a petition for rehearing by the appellate division. Cal Rules of Ct 8.1005(b)(1). The application must explain why a transfer is necessary either to secure uniformity of the law or to settle an important question of law. Cal Rules of Ct 8.1005(b)(2). Opposition must be filed within 5 days of the filing of the certification application. Cal Rules of Ct 8.1005(b)(3).

A case may be certified for transfer any time after the record on appeal has been filed in the appellate division until the appellate division's decision on the appeal (judgment) is final. Cal Rules of Ct 8.1005(d). Finality is determined by Rule 8.888. Cal Rules of Ct 8.1005(c). A certification order must: (1) briefly describe any conflict in the applicable law or any important question of law to be settled and (2) state whether there was a judgment on appeal from the appellate division and, if so, its date and disposition. Cal Rules of Ct 8.1005(e). Upon certification, further proceedings in the appellate division, except to prepare and transfer the record (Cal Rules of Ct 8.1010), are stayed. Cal Rules of Ct 8.1014.

If the appellate division orders certification, the clerk must promptly send a copy of the order to the parties, the court of appeal, and, in a criminal case, the Attorney General. Cal Rules of Ct 8.1005(f)(1). If the appellate division denies a certification request, the clerk must promptly send a copy to the parties. Cal Rules of Ct 8.1005(f)(2).

It is entirely within the court of appeal's discretion whether to accept a case certified to it by the appellate division. Cal Rules of Ct 8.1002. If the court of appeal accepts the certification, the case is transferred to the court and proceeds in accordance with the rules on transfer. See §12.24.

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§12.24 b. Transfer to Court of Appeal

The court of appeal may, on its own motion or on a party's petition, transfer to itself a case that is on appeal to the appellate division. Cal Rules of Ct 8.1008(a).

A party may petition for transfer if the appellate division declines to certify the case to the court of appeal. Cal Rules of Ct 8.1008(b). A petition for transfer must be filed and served (including on the appellate division) within 15 days of when the appellate division's decision on appeal is final. Cal Rules of Ct 8.1008(b)(2). The petition must explain why transfer is necessary either to secure uniformity of the law or to settle an important question of law. Cal Rules of Ct 8.1008(b)(3). No party may file an answer to the petition for transfer unless the court of appeal requests an answer. Cal Rules of Ct 8.1008(b)(4). Any answer must be filed within 10 days after the order asking for opposition is filed, unless the court of appeal orders otherwise. Cal Rules of Ct 8.1008(b)(4). The petition and any answer must comply as nearly as possible with Rule 8.504 (governing petitions for review by the supreme court). Cal Rules of Ct 8.1008(b)(5).

The court of appeal may order a transfer: (1) after certification by the appellate division or on its own motion within 20 days after the record on transfer is filed with the court of appeal; or (2) on petition for transfer within 20 days after the petition if filed (which time the court of appeal can extend by another 20 days). Cal Rules of Ct 8.1008(c)(1)-(2). If the court of appeal does not timely order a transfer the petition is deemed denied. Cal Rules of Ct 8.1008(c)(3). The court of appeal may limit the issues to be considered by the court. Cal Rules of Ct 8.1008(e).

The record on transfer is governed by Cal Rules of Ct 8.1010. Briefing by the parties is governed by Cal Rules of Ct 8.1012. The court of appeal may vacate the transfer order and retransfer to the appellate division (Cal Rules of Ct 8.1016(b)(1)), or decide fewer than all the issues raised by the parties (Cal Rules of Ct 8.1016(a)). The issuance of remittiturs by the appeal court and the appellate division is governed by Cal Rules of Ct 8.1018. On petitions for rehearing by the court of appeal, see §§25.16-25.25. On petitions for review by the supreme court, see §§27.12-27.33.

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§12.25 I. Costs

Unless the interests of justice dictate otherwise, the prevailing party in a writ proceeding in the appellate division of the superior court is entitled to costs if the court resolves the proceeding after issuing an alternative writ, an order to show cause, or a peremptory writ in the first instance. Cal Rules of Ct 8.936(a). On the procedure for claiming costs, see Cal Rules of Ct 8.891(c).

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III. SMALL CLAIMS COURT CASES

§12.26 A. Writ Review Unavailable to Challenge Small Claims Court Judgment

A party cannot challenge a small claims court judgment by filing a writ petition in the superior court. Other rules apply to the availability of further review in a small claims case:

- **Plaintiff.** A plaintiff is bound by the judgment in a small claims action and may not challenge it by filing an appeal in the superior court. CCP §116.710(a). The plaintiff cannot get around this statutory prohibition by filing a writ petition in the superior court. See *Parada v Small Claims Court* (1977) 70 CA3d 766, 769, 139 CR 87 (allowing plaintiff to challenge adverse judgment by filing writ petition "would emasculate the prohibition against appeals by plaintiffs from judgments rendered by a small claims court").
- **Defendant.** The defendant in a small claims court action may appeal an adverse judgment to the superior court in the county in which the action was heard. CCP §116.710(b). Thus, because there is an adequate remedy at law, writ relief is unavailable to the defendant to challenge an adverse small claims court judgment. See CCP §§1068(a), 1086, 1103(a). On the adequate remedy at law limitation, see §§15.56-15.60.

NOTE: In small claims court cases in which a defendant files a cross-complaint against the plaintiff, the parties' positions become reversed with respect to challenging the judgment on the cross-complaint. CCP §116.710(b); see *Upson Metal Fabricators v Superior Court* (1988) 203 CA3d 67, 69, 251 CR 304 ("as plaintiff has not selected the forum in which to litigate defendant's claim against him, he may not be deprived of his right to appeal an unfavorable decision"); *Davis v Superior Court* (1980) 102 CA3d 164, 170, 162 CR 167 (noting that defendant filing cross-complaint in small claims action "gives up his right to appeal on the cross-complaint").

On the jurisdiction of the small claims court, see California Civil Procedure Before Trial §6.19 (4th ed Cal CEB 2004). On the procedures for appealing from small claims court judgments, see California Civil Appellate Practice §§10.103-10.131 (3d ed Cal CEB 1996).

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§12.27 B. Writ Review May Be Available to Challenge Superior Court Judgment After Appeal

The decision (judgment) of the superior court in an appeal from a small claims court judgment is final and not appealable. CCP §116.780(a). However, in an unusual case, the superior court's judgment on appeal may be reviewed by means of a writ petition filed in the court of appeal. See *Houghtaling v Superior Court* (1993) 17 CA4th 1128, 1131, 21 CR2d 855 (due to informal nature of small claims court proceedings, precedential decisions cannot be made; thus, appellate courts must have jurisdiction to grant writ petitions to settle significant issues of small claims law or procedure); *Davis v Superior Court* (1980) 102 CA3d 164, 168, 162 CR 167 (writ review available in small claims cases to "secure uniformity in the operations of the small claims courts and uniform interpretation of the statutes governing them").

NOTE: The superior court appellate division has jurisdiction to issue writ relief regarding *postjudgment* enforcement orders of the small claims court. See *General Elec. Capital Auto Fin. Servs. v Appellate Div*. (2001) 88 CA4th 136, 144, 105 CR2d 552.

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§12.28 IV. WRITS OF SUPERSEDEAS

In some cases, filing a notice of appeal automatically stays enforcement of the challenged ruling. CCP §916. See §§26.5-26.9. If the superior court nevertheless allows further proceedings in a limited jurisdiction civil matter, a surprisingly common event often driven by a misunderstanding of the automatic-stay rule, the appealing party should petition the appellate division for a writ of supersedeas. On the format and contents of a petition for a writ of supersedeas filed in the court of appeal, see §§26.22-26.26.

California Rules of Court 8.824 governs petitions for writs of supersedeas filed in the appellate division. Under that rule, writ of supersedeas petitions must bear the same title as the appeal, explain the necessity for the writ, include a supporting memorandum, and be verified. Cal Rules of Ct 8.824(a). The petition may request a temporary stay pending the appellate division's ruling, although a separate application for a temporary stay must be filed and served on the respondent. Cal Rules of Ct 8.824(c).

If the record has not yet been filed in the appellate division, the petition must include a statement of the case showing that the petitioner will raise a substantial issue on appeal (*i.e.,* a summary of the material facts, the issues that are likely to be raised on appeal, and any oral statement by the court supporting its ruling related to these issues) as well as (Cal Rules of Ct 8.824(a)(4)):

- The judgment or order, showing its date of entry;
- The notice of appeal, showing its date of filing;
- Any application for a stay filed in the superior court and any opposition; and
- Any other document from the superior court proceeding that is necessary for consideration of the petition.

For the format of these documents, see Cal Rules of Ct 8.824(a)(4)(C).

Opposition must be served and filed within 15 days after the petition is filed. Cal Rules of Ct 8.824(b)(1). It must state any material facts not included in the petition and contain a memorandum. Cal Rules of Ct 8.824(b)(2). For discussion of the format and contents of an opposition filed in the court of appeal, see §§26.28-26.29.

The court may issue a writ of supersedeas in a limited civil case "on any conditions it deems just." Cal Rules of Ct 8.824(d)(1).

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13

Superior Court Forms

I. FORM: VERIFIED PETITION FOR ALTERNATIVE WRIT OF MANDATE AND VERIFIED COMPLAINT FOR DECLARATORY RELIEF §13.1

II. EX PARTE APPLICATION FOR ALTERNATIVE WRIT OF MANDATE AND ORDER TO SHOW CAUSE
- A. Form: Ex Parte Application for Alternative Writ of Mandate and Order to Show Cause §13.2
- B. Form: Memorandum in Support of Ex Parte Application for Alternative Writ of Mandate and Order to Show Cause §13.3
- C. Form: Declaration of Notice in Support of Ex Parte Application for Alternative Writ of Mandate and Order to Show Cause §13.4
- D. Form: Proposed Order Directing Issuance of Alternative Writ of Mandate §13.5
- E. Form: Alternative Writ of Mandate §13.6
- F. Form: Notice of Hearing on Petition for Writ of Mandate §13.7

III. APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE
- A. Form: Ex Parte Application for Temporary Restraining Order and Order to Show Cause §13.8
- B. Form: Proposed Temporary Restraining Order and Order to Show Cause §13.9

IV. DEMURRER TO PETITION FOR WRIT OF MANDATE
- A. Form: Demurrer to Petition for Writ of Mandate §13.10
- B. Form: Memorandum in Support of Demurrer to Petition for Writ of Mandate §13.11

V. OPPOSITION TO PETITION FOR WRIT OF MANDATE
- A. Form: Opposition to Petition for Writ of Mandate §13.12
- B. Form: Request for Judicial Notice in Opposition to Petition for Writ of Mandate §13.13
- C. Form: Declaration in Opposition to Petition for Writ of Mandate §13.14
- D. Form: Proposed Order Denying Petition for Writ of Mandate §13.15

VI. LIMITED CIVIL CASES
- A. Form: Information on Writ Proceedings in Misdemeanor, Infraction, and Limited Civil Cases (Judicial Council Form APP-150-INFO) §13.16
- B. Form: Petition for Writ (Misdemeanor, Infraction, or Limited Civil Case) (Judicial Council Form APP-151) §13.17

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Source: Civil Litigation/California Civil Writ Practice/13 Superior Court Forms/§13.1 I. FORM: VERIFIED PETITION FOR ALTERNATIVE WRIT OF MANDATE AND VERIFIED COMPLAINT FOR DECLARATORY RELIEF

NOTE: The following forms are illustrative only. When drafting papers in writ proceedings, counsel should use their own independent legal and professional judgment in light of the particular client and factual situation. As always, counsel should consult all applicable statutes, rules of court, and local rules before filing any papers with the court.

§13.1 I. FORM: VERIFIED PETITION FOR ALTERNATIVE WRIT OF MANDATE AND VERIFIED COMPLAINT FOR DECLARATORY RELIEF

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ABC CORPORATION

SUPERIOR COURT OF THE STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO—
UNLIMITED JURISDICTION

ABC CORPORATION, Plaintiff and Petitioner, vs. THE CITY & COUNTY OF SAN FRANCISCO, and DOES 1-30, Defendants and Respondents.	**CASE NO. _ _ _ _ _ _** **VERIFIED PETITION FOR WRIT OF MANDATE (CCP §1085); EX PARTE APPLICATION FOR ALTERNATIVE WRIT; AND VERIFIED COMPLAINT FOR DECLARATORY RELIEF (CCP §526(a))** **_____** **Date: February 7, 2008** **Time: 11:00 a.m.** **Dept.: 301 or 302** **Judge:** **Date of first filing: February 7, 2008** **Trial date:**

Plaintiff and Petitioner ABC Corporation ("ABC") hereby petitions this court for an alternative writ of mandate and a peremptory writ of mandate under Code of Civil Procedure section 1085, directed to Respondents and Defendants the City & County of San Francisco ("the City") and Does 1-30, and hereby complains against Respondents and Defendants as follows:

THE PARTIES

1. Plaintiff and Petitioner ABC is a California corporation with its principal places of business in San Francisco and Oakland, California. It is in the business of construction trucking and materials and is authorized, qualified, and licensed to perform this business in California.

2. Defendant and Respondent the City is a charter city, within the state of California, subject to the court's power to compel compliance with a legal duty under Code of Civil Procedure section 1085.

3. ABC is ignorant of the true names and capacities of Defendants and Respondents sued herein as Does 1-30, inclusive, and therefore sues these Defendants and Respondents by such fictitious names. ABC will amend this Complaint and Petition to allege their true capacities when ascertained. ABC is informed and believes and thereon alleges that each of the fictitiously named Defendants and Respondents is responsible in some manner for the occurrences herein alleged.

STATEMENT OF FACTS

4. The City has contracted for biosolids and grit hauling services with one contractor—We-Haul Company—under a sole source contract since the 1950s. In the past year, the City decided to end this practice and put these services out for competitive bidding for the first time in 50 years.

5. In February 2007, the City, by and through the San Francisco Office of Contract Administration ("SFOCA"), issued an Invitation For Bids ("IFB") for the San Francisco Public Utilities Commission ("SFPUC") for a contract to perform biosolids and grit hauling services for the SFPUC ("the Contract"). A true and correct copy of relevant excerpts from the IFB is attached as Exhibit A.

6. The IFB provided, among other things, that the Contract term would be 5 years. (Exhibit A, General Conditions, ¶28, Contract Term.) Bidders were required to provide a fixed price for that period. The IFB also provided that the parties could, by mutual agreement, extend the contract twice for up to 2 years for each extension. Any such extension would be on terms agreed to by the parties at the time. (*Id.,* ¶29.)

7. The IFB also provided that SFPUC would award the Contract to the low responsive and responsible bidder. (*Id.,* Special Conditions, ¶79.)

8. ABC timely submitted a bid in response to the IFB. See Exhibit B, which is a true and correct copy of the City's Budget Analyst recommendation that the Budget and Finance Committee approve the Contract, at p. 35.

9. ABC bid to perform the 5-year Contract for $3.32 per mile for biosolids hauling, and $3.14 for grit hauling, which equated to an estimated $8,577,092 for the 5-year term of the Contract. (*Id.*, p. 33.)

10. Under the existing sole source contract for the same services, the incumbent provider, We-Haul, was performing at an estimated cost to the City approximately 26 percent higher than ABC's bid price. (*Id.*, p. 37.)

11. Four bidders other than ABC, including We-Haul, submitted bids in response to the IFB. (*Id.*, p. 35.)

12. In May 2007, SFPUC held a bid opening. (*Id.*)

13. SFPUC determined that ABC was responsible and the second lowest priced bidder and that its bid was fully responsive to the IFB. (*Id.*)

14. SFPUC determined that the bids submitted by the other four bidders were materially nonresponsive to the IFB. (*Id.*)

15. Based on its determination that ABC was the lowest responsive and responsible bidder, SFOCA (SFPUC Purchasing Division) issued a Notice of Intent to Award the Contract to ABC on October 5, 2007. A true and correct copy of the Notice is attached as Exhibit C.

16. Two of the other bidders, We-Haul and American Hauling, protested SFPUC's intended award to ABC. American Hauling was the low bidder, but its bid was nonresponsive. We-Haul, the incumbent provider, not only submitted the highest-priced bid (at $4.74 per mile for biosolids hauling and $4.69 per mile for grit hauling) but also one that was nonresponsive. The City Attorney's office reviewed and denied both protests. (Exhibit B (City Budget Analyst Report), pp. 35-36.)

17. SFOCA (SFPUC Purchasing Division) issued a conditional award of the Contract to ABC and, on November 7, 2007, sent to ABC a Notice of Conditional Award, stating that the award was conditioned on ABC's timely submission of a performance bond, insurance certificates, and additional insured endorsements and on its confirmation that it would comply with applicable prevailing wage requirements. The Notice also stated that SFPUC would issue a Notice to Proceed to ABC upon SFPUC's receipt of the documents and confirmation required by SFPUC in its conditional award. A true and correct copy of the Notice is attached as Exhibit D.

18. ABC bought and paid for the performance bond and insurance coverage required by SFPUC in its conditional award, and it timely provided to SFPUC the documents and confirmation required by the conditional award. A true and correct copy of SFPUC and ABC e-mails confirming ABC's satisfaction of the conditions is attached as Exhibit E.

19. SFPUC did not then execute the Contract or issue a Notice to Proceed to ABC, and, to date, it still has done neither.

20. SFPUC informed ABC that the Contract term would begin on April 1, 2008, and ABC is prepared to begin service on that date.

21. On December 20, 2007, SFOCA submitted a proposed resolution to the City Board of Supervisors ("the Board") for approval of the Contract. A true and correct copy of the SFOCA submission is attached as Exhibit F.

22. On January 9, 2008, the City's Budget Analyst recommended to the Board's Budget & Finance Committee that the SFOCA's proposed resolution be approved. (Exhibit B.)

23. On January 16, 2008, the Board's Budget & Finance Committee heard arguments from the San Francisco Labor Council, Teamsters Union, and We-Haul's representatives. No ABC representatives were present at that meeting. The Committee recommended against Board approval of the Contract.

24. On January 28, 2008, the Board disapproved the Contract.

25. Based on the Board's disapproval of the Contract, SFPUC has refused to execute the Contract and to issue a Notice to Proceed to ABC.

26. SFPUC has informed ABC that SFPUC intends to extend its existing contract with We-Haul to perform the same work that ABC would perform under the Contract. The We-Haul contract is set to expire on February 29, 2008.

FIRST CAUSE OF ACTION
(WRIT OF MANDATE—Code Civ. Proc. §1085)

27. ABC refers to and realleges all of the above paragraphs and by this reference incorporates those paragraphs as though fully set forth at length.

28. Having properly awarded the Contract to ABC, the City, by and through SFPUC, had a legal ministerial duty to execute the Contract, to timely issue a Notice to Proceed allowing ABC to begin performance under the Contract, and not to interfere with ABC's rights and obligations under the Contract.

29. The City, by and through the Board, also had a legal duty not to interfere with SFPUC's award, execution, and procession of the Contract.

30. The City violated its legal duties in that the City, by and through SFPUC, has refused to execute the Contract and timely issue a Notice to Proceed allowing ABC to begin performance under the Contract. The City also intends to violate its legal duties further by extending its contract with We-Haul.

31. The City, by and through the Board, has interfered with SFPUC's award, execution, and procession of the Contract. The Board is not authorized, under the City Charter, to approve or disapprove SFPUC contracts having a term of 10 years or less and requiring anticipated expenditures of less than $10 million. Since the Contract term is 5 years and the anticipated expenditures under the Contract are less than $8.6 million, the Board's disapproval of the Contract was unauthorized interference with SFPUC's ability to contract.

32. ABC has a beneficial pecuniary interest in the issuance of a writ of mandate, apart from that of the public at large, in that if this petition is granted, ABC will be allowed to perform under the Contract and to enjoy the rights granted to it under the Contract, including the right to payments for services it will perform under the Contract.

33. ABC does not have a plain, speedy, and adequate remedy at law. ABC is informed and believes that there are no available legal procedures to redress the harm that ABC will suffer if its requested relief is denied.

34. If the Court allows the Board's disapproval of the Contract to stand and allows SFPUC to continue in its refusal to execute and proceed with the Contract and to extend its contract with We-Haul, ABC will be irreparably harmed because ABC will be denied the opportunity to perform any work completed by the incumbent contractor, We-Haul, before this matter can be tried, and there is no legal remedy that would allow ABC to recover damages from the City to compensate it for this loss.

SECOND CAUSE OF ACTION
(DECLARATORY RELIEF—Code Civ. Proc. §526(a))

35. ABC refers to and realleges all of the above paragraphs and by this reference incorporates those paragraphs as though fully set forth at length.

36. An actual controversy exists between ABC and the City as to whether the City, by and through the SFOCA and SFPUC, has awarded an enforceable contract to ABC and whether the City, by and through the Board, was authorized to disapprove the Contract.

37. ABC contends that SFOCA awarded the Contract to ABC, that the Contract became enforceable upon award, and that the Board had no authority to disapprove the Contract, because the Contract has a term of less than 10 years and requires anticipated expenditures of less than $10 million. ABC is informed and believes that the City disputes this contention.

38. ABC requests a judicial determination that SFOCA and SFPUC awarded an enforceable contract to ABC and that the Board lacked authority to disapprove the Contract and, as a result, the Board's resolution disapproving the Contract is null and void.

39. This determination is necessary and proper because the City, by and through SFPUC, is refusing to execute and proceed with the Contract based on its contention that SFOCA and SFPUC did not award an enforceable contract to ABC and based on the Board's unauthorized disapproval of the Contract.

PRAYER FOR RELIEF

WHEREFORE, ABC respectfully prays that the court enter judgment against Defendants and Respondents as follows:

1. For an Alternative Writ of Mandate to be issued under Code of Civil Procedure section 1085, ex parte under the seal of this court, ordering:

a. The City, by and through SFPUC, to execute and proceed with the Contract immediately and not to extend the City's contract with We-Haul for the same services or, if it has already extended that contract, to terminate that extension; and

b. The City, by and through the Board, to vacate immediately its resolution disapproving the Contract; or

c. The City to show cause before this court, by February 21, 2008, or as soon thereafter as possible, at a time and place specified by court order, why the City has not done so and why a peremptory writ should not issue;

2. On return of the alternative writ and hearing on the order to show cause, for a peremptory writ of mandate to be issued under the seal of this court ordering:

a. The City, by and through SFPUC, to execute and proceed with the Contract and not to extend the City's contract with We-Haul for the same services or, if it has already extended that contract, to terminate that extension; and

b.; The City, by and through the Board, to vacate its resolution disapproving the Contract;

5. For a declaration, under Code of Civil Procedure section 526(a), that the Board was not authorized to disapprove the Contract and that its resolution purporting to disapprove the Contract is null and void;

6. For ABC's cost in this action; and

7. For such other relief as the court considers just and proper.

Dated: February 7, 2008 **JONES & PETERS LLP**

By: _____
ROBERTA JONES

Attorneys for Plaintiff and Petitioner
ABC CORPORATION

VERIFICATION

I, John Doe, the undersigned, say:

I am the General Manager of Plaintiff and Petitioner ABC Corporation. I have read the above VERIFIED PETITION FOR WRIT OF MANDAMUS (Code Civ. Proc. §1085); EX PARTE APPLICATION FOR ALTERNATIVE WRIT; and VERIFIED COMPLAINT FOR DECLARATORY RELIEF (Code Civ. Proc. §526(a)), and I am familiar with its contents. I am informed and believe that the matters stated therein are true and on that basis verify that the matters stated therein are true.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this verification is executed on February 6, 2008, in Oakland, California.

_____

JOHN DOE

Note: This sample brief has not been updated for substantive legal accuracy. It is presented as an example of form, not content, and should not be presumed accurate with regard to the state of the law. The names of the parties and attorneys have been changed for publication.

Comment: The format of attorney-drafted court papers is generally governed by Cal Rules of Ct 2.100-2.119. See also Cal Rules of Ct 3.1110-3.1116 (format requirements for civil law and motion papers, made applicable to writ petitions by Cal Rules of Ct 3.1100 and 3.1103(a)(2)).

On drafting writ petitions, see §§5.20-5.70. On the procedures for bringing a petition for an alternative writ on hearing, see §§5.108-5.118.

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II. EX PARTE APPLICATION FOR ALTERNATIVE WRIT OF MANDATE AND ORDER TO SHOW CAUSE

§13.2 A. Form: Ex Parte Application for Alternative Writ of Mandate and Order to Show Cause

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Attorneys for Plaintiff and Petitioner

ABC CORPORATION

SUPERIOR COURT OF THE STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO—
UNLIMITED JURISDICTION

ABC CORPORATION, Plaintiff and Petitioner,	**CASE NO. _ _ _ _ _ _**
vs.	**PLAINTIFF AND PETITIONER ABC CORPORATION'S EX PARTE APPLICATION FOR ALTERNATIVE WRIT OF MANDATE AND ORDER TO SHOW CAUSE WHY PEREMPTORY WRIT SHOULD NOT ISSUE**
THE CITY & COUNTY OF SAN FRANCISCO, and DOES 1-30, Defendants and Respondents.	**Date: February 7, 2008** **Time: 11:00 a.m.** **Dept.: 301 or 302** **Judge:** **Date of first filing: February 7, 2008** **Trial date:**

Plaintiff and Petitioner ABC Corporation ("ABC") hereby applies ex parte for an alternative writ of mandate under the seal of this court and an order to show cause why a peremptory writ should not issue. Specifically, ABC seeks an alternative writ compelling Defendant and Respondent the City & County of San Francisco ("the City") either to execute the contract awarded by the San Francisco Office of Contract Administration to ABC under the Invitation For Bids for the San Francisco Public Utilities Commission ("SFPUC") for a contract to perform biosolids and grit hauling services for the SFPUC ("the Contract"), issue to ABC a Notice to Proceed under the Contract, and vacate the resolution by the Board of Supervisors disapproving the Contract, immediately after receipt of alternative writ of mandate or, in the alternative, to show cause before this court at a specified time and place why it has not done so.

This application will be based on ABC's verified petition and complaint, supporting memorandum, alternative writ, notice of writ hearing, proposed order, and the Declaration of Robert Jones, all filed herewith, and such oral argument as the court allows ABC to present to the court.

Dated: February 7, 2008 **JONES & PETERS LLP**

By: _____

ROBERTA JONES

Attorneys for Plaintiff and Petitioner ABC CORPORATION

Note: This sample application is presented as an example of form, not content. The names of the parties and attorneys have been changed for publication.

Comment: The format of attorney-drafted court papers is generally governed by Cal Rules of Ct 2.100-2.119. See also Cal Rules of Ct 3.1110-3.1116 (format requirements for civil law and motion papers, made applicable to writ petitions by Cal Rules of Ct 3.1100 and 3.1103(a)(2)); Cal Rules of Ct 3.1200-3.1207 (requirements for ex parte applications).

On drafting an ex parte application for an alternative writ, see §§5.113-5.117.

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§13.3 B. Form: Memorandum in Support of Ex Parte Application for Alternative Writ of Mandate and Order to Show Cause

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Attorneys for Plaintiff and Petitioner

ABC CORPORATION

SUPERIOR COURT OF THE STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO—
UNLIMITED JURISDICTION

ABC CORPORATION, Plaintiff and Petitioner, vs. THE CITY & COUNTY OF SAN FRANCISCO, and DOES 1-30, Defendants and Respondents.	**CASE NO. _ _ _ _ _ _** **MEMORANDUM IN SUPPORT OF PLAINTIFF AND PETITIONER ABC CORPORATION'S EX PARTE APPLICATION FOR ALTERNATIVE WRIT OF MANDATE AND ORDER TO SHOW CAUSE WHY PEREMPTORY WRIT SHOULD NOT ISSUE** **Date: February 7, 2008** **Time: 11:00 a.m.** **Dept.: 301 or 302** **Judge:** **Date of first filing: February 7, 2008** **Trial date:**

I. INTRODUCTION

ABC Corporation ("ABC") requires immediate court action to prevent the irreparable injury that it will suffer if the City & County of San Francisco ("the City") continues its refusal to execute and proceed with the contract it awarded to ABC for hauling services ("the Contract") and extends its existing contract with We-Haul Company ("We-Haul") to perform the same work.

In February 2007, the City determined that the contract for hauling biosolids and grit from the City's wastewater treatment facilities, performed sole source by We-Haul since the 1950s, should be put out to competitive bid. In its solicitation for the work, the City stated that it would award the Contract to the lowest responsive and responsible bidder.

After the City received bids and correctly determined that ABC was the lowest (and the only) responsive and responsible bidder, it conditionally awarded the Contract to ABC. ABC satisfied all of the conditions stated in the conditional award (by submitting the required documents and confirmation), the award became final, and the Contract became effective and enforceable. All that remained to be done was for the City to execute the Contract—a ministerial act.

Rather than executing the Contract as it was legally obligated to do, the City submitted the Contract to the City's Board of Supervisors for approval. The Board disapproved the award, and, based on that disapproval, the City has refused to execute the Contract and issue a Notice to Proceed allowing ABC to start performance and intends to extend its contract with We-Haul, set to expire February 29, 2008. The City's actions are illegal because the Board had no authority to disapprove the Contract. Under the City Charter, the Board's contract approval authority applies only to contracts for more than $10 million or longer than 10 years. The Contract between ABC and the City is neither.

Under these circumstances, the court should order the City to execute and proceed with the Contract. *Transdyn/Cresci JV v City & County of San Francisco* (1999) 72 CA4th 746, and the California Supreme Court cases on which it relies, are directly on point. Unless the court takes immediate action, the City will cause ABC irreparable harm by preventing ABC from performing under the Contract. Instead the City will have We-Haul continue to perform for an indefinite period under its existing, higher-priced contract, even though We-Haul submitted a non-responsive and higher-priced bid in this competition, and even though ABC was awarded the new Contract. As a result, the court should issue an alternative writ compelling the City to execute and proceed with the Contract with ABC and an order to show cause by February 21, 2008, or as soon thereafter as possible, why a peremptory writ of mandamus should not issue.

II. STATEMENT OF FACTS

The City has contracted for biosolids and grit hauling services with one contractor—We-Haul—under a sole source contract since the 1950s. (Verified Petition, Exh. B (City Budget Analyst Report).) In the past year, the City decided to end this practice and put these services out for competitive bidding for the first time in 50 years.

In February 2007, the City, by and through the San Francisco Office of Contract Administration ("SFOCA"), issued an Invitation For Bids ("IFB") for the San Francisco Public Utilities Commission ("SFPUC") for a contract to perform biosolids and grit hauling services for the SFPUC ("the Contract"). (Verified Petition, Exh. A (IFB).) The IFB provided, among other things, that the Contract term would be 5 years. (*Id.,* Exh. A, General Conditions, ¶28 (Contract Term).) Bidders were required to provide a fixed price for that period. The IFB also provided that the parties could, by mutual agreement, extend the contract twice for up to 2 years for each extension. Any such extension would be on terms agreed to by the parties at the time. (*Id.,* Exh. A, General Conditions, ¶29.) The IFB also stated that SFPUC would award the Contract to the low responsive and responsible bidder. (*Id.,* Exh. A, Special Conditions, ¶79.)

ABC timely submitted a bid in response to the IFE. ABC bid to perform the 5-year Contract for $3.32 per mile for biosolids hauling, and $3.14 for grit hauling, which equated to an estimated $8,577,092 for the 5-year term of the Contract. (Verified Petition, Exh. B (City Budget Analyst Report, pp. 33, 35).)

Under the existing sole source contract for the same services, the incumbent provider, We-Haul, was performing at an estimated cost to the City that was approximately 26 percent higher than ABC's bid price. (Verified Petition, Exh. B (City Budget Analyst Report, p. 37).)

[*Remainder of text of Statement of Facts omitted.*]

III. ARGUMENT

A. The Court Should Grant ABC's Ex Parte Application for an Alternative Writ.

1. This Court Is Responsible for Determining Whether the City's Actions Are Illegal or Prejudicial Abuses of Discretion.

A court may issue a writ of mandate "to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust or station." (Code Civ. Proc. §1085.) Mandate lies when (1) the respondent has a clear, present duty to act, and (2) the petitioner has a beneficial right to performance of that duty. *People ex. rel. Younger v County of El Dorado* (1971) 5 C3d 480, 491; *TransdynlCresci JV v City & County of San Francisco* (1999) 72 CA4th 746, 752. Code of Civil Procedure section 1086 provides that when a verified petition is submitted by a party "beneficially interested," a writ "must issue where there is not a plain, adequate speedy remedy in the ordinary course of law."

In this proceeding, the court must "determine whether [the City's] actions have been arbitrary or capricious, entirely lacking in evidentiary support, or whether it failed to follow the proper procedures." *Boydston v Napa Sanitation Dist.* (1990) 222 CA3d 1362, 1369. The refusal of a California public entity to execute a contract that it had already properly awarded based on competitive bidding is an abuse of discretion, properly remedied by issuance of a writ of mandate. (*Transdyn/Cresci JV v. City & County of San Francisco, supra,* 72 CA4th at p. 758.)

Here, the City, by and through SFPUC, abused its discretion and failed to follow its announced procedures by refusing to execute and proceed with the Contract after the City awarded it to ABC. In addition, the City, by and through the Board, acted illegally by disapproving the Contract even though both the amount and term of the Contract were below the minimums stated in the City Charter provision that authorizes Board review of SFPUC contracts. This proceeding is ABC's only recourse.

As explained below, SFPUC had a clear and present duty to execute and proceed with the Contract with ABC, and the Board had a clear and present duty not to interfere with the Contract. Enforcement of these criteria would benefit ABC because it would allow it to start performing the Contract and enjoying the benefit of its bargain with the City. Accordingly, the court should order the City to execute the Contract and to issue a Notice to Proceed to ABC or to show cause why a peremptory writ should not issue.

[*Remainder of text of Section 1 omitted.*]

2. ABC Is a Beneficially Interested Party and Has No Adequate Remedy at Law.

As the low responsive and responsible bidder for the Contract, ABC is clearly a "party beneficially interested" with standing to seek a writ. (See, *e.g., Transdyn/Cresci JV v City & County of San Francisco, supra,* 72 CA4th 746.) Because the Contract has been awarded to ABC but the City has allowed performance by We-Haul to continue, ABC has no adequate remedy at law. (*Id.*; see also *Pozar v Department of Transp. (*1983) 145 CA3d 269, 271 [pending contract award and performance established that losing bidder had no adequate remedy at law other than issuance of a writ of mandate].)

An illegal extension of the City's contract with We-Haul will cause ABC to suffer loss of potential profits. ABC will also lose the prestige, publicity, good will, and other potential business opportunities that might arise by virtue of performing the Contract. Moreover, even if ABC could establish its monetary damages with reasonable certainty, lost profits are not recoverable against the City. (*Kajima/Ray Wilson v L.A. County Metro.* (2000) 23 C4th 305, 315-21; *Swinerton & Walberg Co. v City of Inglewood-L.A. County Civic Ctr. Auth.* (1974) 40 CA3d 98, 103)

Therefore, as a matter of law, ABC will suffer irreparable injury because it will not be able to recover damages for the City's blatant violation of law. The City's refusal to execute the Contract and its threatened extension of the contract with We-Haul irreparably harm both ABC and the public. Unless restrained by the court, the City will undermine public confidence in the accountability of government and the integrity of its laws, and a nonresponsive higher-priced incumbent will have been allowed to continue hauling biosolids and grit for the City instead of ABC as the lowest responsible and responsive bidder.

IV. CONCLUSION

For the foregoing reasons, ABC respectfully requests that this court issue an alternative writ and an order to show cause why a peremptory writ should not issue. Because the City's contract with We-Haul will expire (unless extended) on February 29, 2008, and ABC will start incurring irreparable harm immediately thereafter, ABC requests that the court set the hearing on the order to show cause by February 21, 2008.

Dated: February 7, 2008 **JONES & PETERS LLP**

By:_____
ROBERTA JONES

Attorneys for Plaintiff and Petitioner
ABC CORPORATION

Note: This sample brief has not been updated for substantive legal accuracy. It is presented as an example of form, not content, and should not be presumed accurate with regard to the state of the law. The names of the parties and attorneys have been changed for publication.

Comment: The format of attorney-drafted court papers is generally governed by Cal Rules of Ct 2.100-2.119. See also Cal Rules of Ct 3.1110-3.1116 (format requirements for civil law and motion papers, made applicable to writ petitions by Cal Rules of Ct 3.1100 and 3.1103(a)(2)); Cal Rules of Ct 3.1200-3.1207 (requirements for ex parte applications).

On drafting an ex parte application for an alternative writ, see §§5.113-5.117.

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§13.4 C. Form: Declaration of Notice in Support of Ex Parte Application for Alternative Writ of Mandate and Order to Show Cause

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Attorneys for Plaintiff and Petitioner

ABC CORPORATION

SUPERIOR COURT OF THE STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO—
UNLIMITED JURISDICTION

ABC CORPORATION, Plaintiff and Petitioner,	**CASE NO. _ _ _ _ _ _**
vs.	**DECLARATION OF ROBERTA JONES IN SUPPORT OF PLAINTIFF AND PETITIONER'S EX PARTE APPLICATION FOR AN ALTERNATIVE WRIT OF MANDATE AND ORDER TO SHOW CAUSE WHY PEREMPORY WRIT SHOULD NOT ISSUE**
THE CITY & COUNTY OF SAN FRANCISCO, and DOES 1-30, Defendants and Respondents.	**Date: February 7, 2008** **Time: 11:00 a.m.** **Dept.: 301 or 302** **Judge:** **Date of first filing: February 7, 2008** **Trial date:**

I, ROBERTA JONES, declare:

1. I am an attorney at law duly licensed to practice before all courts of the State of California and am a shareholder in the law firm of Jones & Peters LLP, counsel of record for Plaintiff and Petitioner ABC Corporation ("ABC"). I make this declaration in support of ABC's ex parte application for an alternative writ of mandate. I have personal knowledge of the facts set forth herein, and if called as a witness, could and would testify competently hereto.

2. At approximately 9:20 a.m. on Wednesday, February 6, 2008, I notified the City Attorney's Office for the City & County of San Francisco that ABC would be appearing ex parte at 11:00 a.m. on February 7, 2008, in Department 301 or 302 of this court, as assigned, to apply for an alternative writ of mandate and an order to show cause why a peremptory writ of mandate should not issue. Specifically, I spoke to Rachel Smythe, whom I understand to be the City Attorney responsible for the contract awarded to ABC and the subject of ABC's application and petition.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge.

Executed this 6th day of February 2008, at San Francisco, California.

_____
ROBERTA JONES

Note: This sample declaration is presented as an example of form, not content. The names of the parties and attorneys have been changed for publication.

Comment: The format of attorney-drafted court papers is generally governed by Cal Rules of Ct 2.100-2.119. See also Cal Rules of Ct 3.1110-3.1116 (format requirements for civil law and motion papers, made applicable to writ petitions by Cal Rules of Ct 3.1100 and 3.1103(a)(2)); Cal Rules of Ct 3.1200-3.1207 (requirements for ex parte applications).

On drafting an ex parte application for an alternative writ, see §§5.113-5.117.

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§13.5 D. Form: Proposed Order Directing Issuance of Alternative Writ of Mandate

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Attorneys for Plaintiff and Petitioner

ABC CORPORATION

SUPERIOR COURT OF THE STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO—
UNLIMITED JURISDICTION

ABC CORPORATION, Plaintiff and Petitioner,	**CASE NO. _ _ _ _ _ _**
vs.	**[PROPOSED] ORDER DIRECTING ISSUANCE OF ALTERNATIVE WRIT OF MANDATE**
THE CITY & COUNTY OF SAN FRANCISCO, and DOES 1-30, Defendants and Respondents.	**_____ Date: February 7, 2008 Time: 11:00 a.m. Dept.: 301 or 302 Judge: Date of first filing: February 7, 2008 Trial date:**

Good cause appearing, the ex parte application for an alternative writ of mandate of Plaintiff and Petitioner ABC Corporation ("ABC") on file in this proceeding is GRANTED.

IT IS ORDERED that an alternative writ of mandate issue under the seal of this court compelling Defendant and Respondent the City & County of San Francisco ("the City") either to execute the contract awarded by the San Francisco Office of Contract Administration to ABC under the Invitation For Bids for the San Francisco Public Utilities Commission ("SFPUC") for a contract to perform biosolids and grit hauling services for the SFPUC ("the Contract"), issue to ABC a Notice to Proceed under the Contract, and vacate the resolution by the Board of Supervisors disapproving the Contract, immediately after receipt of alternative writ of mandate or, in the alternative, to show cause before this court in Department ____ on _____ at _____ o'clock why it has not done so.

IT IS SO ORDERED.

Dated: February 7, 2008 **By: _____**
Superior Court Judge

Note: This sample order is presented as an example of form, not content. The names of the parties and attorneys have been changed for publication.

Comment: The format of attorney-drafted court papers is generally governed by Cal Rules of Ct 2.100-2.119. See also Cal Rules of Ct 3.1110-3.1116 (format requirements for civil law and motion papers, made applicable to writ petitions by Cal Rules of Ct 3.1100 and 3.1103(a)(2)); Cal Rules of Ct 3.1200-3.1207 (requirements for ex parte applications).

In addition to the date for the return, counsel can include a proposed briefing schedule and date for the hearing on the merits of the petition. Counsel may also wish to confer beforehand on possible briefing schedules and hearing dates and propose them to the court.

On drafting an ex parte application for an alternative writ, see §§5.113-5.117.

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§13.6 E. Form: Alternative Writ of Mandate

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Attorneys for Plaintiff and Petitioner

ABC CORPORATION

SUPERIOR COURT OF THE STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO—
UNLIMITED JURISDICTION

ABC CORPORATION, Plaintiff and Petitioner, vs. THE CITY & COUNTY OF SAN FRANCISCO, and DOES 1-30, Defendants and Respondents.	**CASE NO. _ _ _ _ _ _** **ALTERNATIVE WRIT OF MANDATE** **_____** **Date: February 7, 2008** **Time: 11:00 a.m.** **Dept.: 301 or 302** **Judge:** **Date of first filing: February 7, 2008** **Trial date:**

TO THE CITY & COUNTY OF SAN FRANCISCO ("THE CITY"), RESPONDENTS:

Good cause appearing, the ex parte application of Plaintiff and Petitioner ABC Corporation ("ABC") for an alternative writ of mandate on file in this proceeding is GRANTED.

THE CITY IS HEREBY COMPELLED by order of this court made on February 8, 2008, either to execute the contract awarded by the San Francisco Office of Contract Administration to ABC under the Invitation For Bids for the San Francisco Public Utilities Commission ("SFPUC") for a contract to perform biosolids and grit hauling services for the SFPUC ("the Contract"), issue to ABC a Notice to Proceed under the Contract, and vacate the resolution by the Board of Supervisors disapproving the Contract, immediately after receipt of alternative writ of mandate or, in the alternative, to show cause before this court in Department ____ on _____ at _____ o'clock why it has not done so.

Dated: February 7, 2008 **By:_____**
Deputy Clerk

Note: This sample alternative writ is presented as an example of form, not content. The names of the parties and attorneys have been changed for publication.

Comment: The format of attorney-drafted court papers is generally governed by Cal Rules of Ct 2.100-2.119. See also Cal Rules of Ct 3.1110-3.1116 (format requirements for civil law and motion papers, made applicable to writ petitions by Cal Rules of Ct 3.1100 and 3.1103(a)(2)); Cal Rules of Ct 3.1200-3.1207 (requirements for ex parte applications).

In addition to the date for the return, the court may include a briefing schedule and date for the hearing on the

merits of the petition.

On drafting an ex parte application for an alternative writ, see §§5.113-5.117.

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§13.7 F. Form: Notice of Hearing on Petition for Writ of Mandate

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JONES & PETERS LLP
ROBERTA JONES (State Bar No. 00000)
DANIEL PETERS (State Bar No. 12222)
10 Main Street, 2nd Floor
San Francisco, California 94111
Telephone: 415-123-4567
Facsimile: 415-456-7891

Attorneys for Plaintiff and Petitioner ABC CORPORATION

SUPERIOR COURT OF THE STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO—
UNLIMITED JURISDICTION

ABC CORPORATION, Plaintiff and Petitioner,	**CASE NO. _ _ _ _ _ _**
vs.	**NOTICE OF HEARING ON PLAINTIFF AND PETITIONER ABC CORPORATION'S PETITION FOR WRIT OF MANDATE (Code Civ. Proc. §1085)**
THE CITY & COUNTY OF SAN FRANCISCO, and DOES 1-30, Defendants and Respondents.	**_____**
	Date:
	Time:
	Dept.:
	Date of first filing: February 7, 2008
	Trial date:

TO ALL PARTIES AND THE COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on _____, at _____, in Department ____ of the above-named court located at 400 McAllister Street, San Francisco, CA 94102, Plaintiff and Petitioner ABC Corporation's petition for a writ of mandate under Code of Civil Procedure section 1085 will be heard by the Honorable Superior Court Judge _____.

Dated: February 7, 2008 **JONES & PETERS LLP**

By:_____
ROBERTA JONES

Attorneys for Plaintiff and Petitioner
ABC CORPORATION

Note: This sample notice is presented as an example of form, not content. The names of the parties and attorneys have been changed for publication.

Comment: The format of attorney-drafted court papers is generally governed by Cal Rules of Ct 2.100-2.119. See also Cal Rules of Ct 3.1110-3.1116 (format requirements for civil law and motion papers, made applicable to writ petitions by Cal Rules of Ct 3.1100 and 3.1103(a)(2)); Cal Rules of Ct 3.1200-3.1207 (requirements for ex parte applications).

Counsel can use this form following the issuance of an alternative writ to give notice to the opposing party of the hearing date on the merits of the petition. It can be completed when the court issues the alternative writ and served with it or served at a later date.

On drafting an ex parte application for an alternative writ, see §§5.113-5.117.

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III. APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE

§13.8 A. Form: Ex Parte Application for Temporary Restraining Order and Order to Show Cause

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JONES & PETERS LLP
ROBERTA JONES (State Bar No. 00000)
DANIEL PETERS (State Bar No. 12222)
10 Main Street, 2nd floor
San Diego, California 92101
Telephone: 619-123-4567
Facsimile: 619-456-7891

Attorneys for Petitioner JANE DOE

SUPERIOR COURT OF THE STATE OF CALIFORNIA
CITY AND COUNTY OF SAN DIEGO, NORTH COUNTY DIVISION

JANE DOE,	)	**CASE NO. 123456**
	)	
Petitioner,	)	**PETITIONER'S EX PARTE**
	)	**APPLICATION FOR**
vs.	)	**TEMPORARY RESTRAINING**
	)	**ORDER AND ORDER TO**
CITY OF SAN DIEGO,	)	**SHOW CAUSE;**
	)	**MEMORANDUM IN SUPPORT**
Respondent;	)	**THEREOF**
	)	_____
	)	**Date: April 25, 2008**
	)	**Time: 8:30 a.m.**
	)	**Dept.: 00**
_____	)	**Judge: Honorable Robert Smith**
ABC Corporation,		
		Action filed: April 18, 2008
Real Party in Interest.		**Trial date: Not set**

Petitioner Jane Doe does hereby move ex parte for a temporary restraining order to rescind project approval and stop construction on the project at issue in this proceeding pending this Court's consideration of petitioner's motion for a preliminary injunction.

Petitioner has provided Respondent City of San Diego and Real Party in Interest ABC Corporation with notice of her intention to seek ex parte relief. (Declaration of Roberta Jones in Support of Petitioner's Ex Parte Application for Temporary Restraining Order and Order to Show Cause, ¶1.) Petitioner is informed and believes that respondent is represented by:

Brian Thomas, City Attorney
City of San Diego
15 Circle Drive, Suite 100
San Diego, CA 92101
619-123-4567
619-456-7891 (fax)

Real Party in Interest is represented by:

Lucy Adams
100 University Avenue
San Diego, CA 92101

619-987-6543
619-654-3219 (fax)

MEMORANDUM

This action challenges the failure of Respondent City of San Diego to comply with its own municipal code and building requirements by allowing Real Party in Interest ABC Corporation to build homes several feet higher than allowed. Respondent approved a Design Review and Coastal Development Permit for ABC that allows construction of nine single-family residences within the Coastal Zone on a 2.3-acre site at 100 Main Street in the City of San Diego ("the Project"). The Project approvals allow the homes to be built several feet higher than allowed by code—specifically, the pads for the homes are to be raised by several feet and the height of the homes will be measured from that raised elevation, in direct violation of code requirements.

Although the site remained inactive for many months, just 2 days after this proceeding was filed, substantial grading, surveying, and other construction work began occurring at the site. Petitioner seeks a temporary restraining order to halt the Project approvals and ensure that construction does not proceed in direct violation of City requirements.

STATEMENT OF FACTS

On October 22, 2007, the City's Planning Commission approved a tentative map, major use permit, and coastal development permit for development of nine homes on the approximately 2.3-acre site (Resolution No. 2007-00). (Jones Decl., Exh. 1.) The findings for this approval indicated, among other things, that "[f]uture construction of single-family residences must comply with all applicable development standards, including but not limited to *building height*." (Jones Decl., Exh. 1, p. 5 [emphasis added].) The approved Tentative Map did not establish the elevation from which the heights of the buildings would be measured. (Jones Decl., Exh. 2.)

[*Remainder of text of Statement of Facts omitted.*]

ARGUMENT

I. Legal Standards

This Court has "inherent power" to "exercise reasonable control over litigation before it." (*Venice Canals Resident Home Owners Ass'n v Superior Court* (1977) 72 CA3d 675, 679.) A court may issue a temporary restraining order when the relief consists of restraining the commission or continuance of an act; when money damage would be inadequate; or when it is extremely difficult to measure the full extent of damages suffered by the plaintiff. (Code Civ. Proc. §526(a)(1), (4)-(5).)

The granting of such relief involves the evaluation of two interrelated factors. First, the Court must evaluate the likelihood that the plaintiff will prevail on the merits at trial. Second, the Court must evaluate the interim harm that the plaintiff is likely to suffer if the injunction is denied, as compared to the harm that the defendant is likely to suffer if the injunction is issued. (*Butt v State of California* (1992) 4 C4th 668, 678.) In weighing the relative hardships, the Court must also balance the respective equities of the parties. (*Robbins v Superior Court* (1985) 38 C3d 199, 206.)

II. Petitioner Is Likely to Prevail on the Merits

San Diego Municipal Code section 30.04 defines the term "building height" to mean: "[t]he vertical distance of the *lower* of the natural or finished exterior grade adjacent to the structure, to the highest point of the structure immediately above." (Jones Decl., Exh. 6 [emphasis added].) Respondent approved the Project allowing for raised pad heights from which the 26-foot building heights would be measured. The pads will be raised by four or five feet (and possibly more), in effect resulting in even taller homes in the community. (Jones Decl., Exh. 4, pp. 1-4.) Respondent did not require ABC to measure the building heights from the natural grade, even though the natural grade is five feet or more below the planned finished grade. (Jones Decl, Exh. 5, p. A-2.)

[*Remainder of text of Section II omitted.*]

III. The Balance of Equities Tips Sharply in Favor of Granting a Restraining Order

A restraining order will ensure that work is not performed at the site that precludes an appropriate remedy. The building pads should not be raised and finished now, and construction begun, such that a remedy after a hearing on the merits would require the tearing down of buildings and removal of other structures to ensure compliance with the City's height limitations. Allowing the Project to proceed would jeopardize the ability of petitioner to obtain adequate relief after a hearing on the merits.

Allowing the Project would also impact the existing community by allowing homes that are substantially greater in height than the homes currently there. The area is known for its eclectic, even "funky," community character. (Declaration of John Doe in Support of Ex Parte Application for Temporary Restraining Order, ¶2-5; Jones Decl., Exh. 15, pp. 1-3 [October 2004 staff report stating: "The surrounding neighborhood maintains an eclectic mix of residential types and lot sizes, and a variety of old and new residences"].) Allowing large homes to be built several feet above the existing ground level would substantially impact the community's character. (Doe Decl., ¶5.) It would also impact views. (Doe Decl., ¶6.)

Furthermore, allowing the Project to proceed would reward illegal behavior by allowing the City to violate its own municipal code. Respondent and real party in interest have no good argument against a brief delay until petitioner's motion for a preliminary injunction can be heard. There is nothing a brief delay would prevent that needs to be accomplished in the short term.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the Court grant a temporary restraining order withdrawing the Project's approval and prohibiting respondent and real party in interest from taking any steps to further the Project.

Dated: April 24, 2008 **JONES & PETERS LLP**

By:_____
ROBERTA JONES

Attorneys for Petitioner
JANE DOE

Note: This sample application has not been updated for substantive legal accuracy. It is presented as an example of form, not content, and should not be presumed accurate with regard to the state of the law. The names of the parties and attorneys have been changed for publication.

Comment: The format of attorney-drafted court papers is generally governed by Cal Rules of Ct 2.100-2.119. See also Cal Rules of Ct 3.1110-3.1116 (format requirements for civil law and motion papers, made applicable to writ petitions by Cal Rules of Ct 3.1100 and 3.1103(a)(2)); Cal Rules of Ct 3.1200-3.1207 (requirements for ex parte applications).

On drafting an application for a temporary restraining order and order to show cause, see §§6.31-6.32.

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Source: Civil Litigation/California Civil Writ Practice/13 Superior Court Forms/§13.9 B. Form: Proposed Temporary Restraining Order and Order to Show Cause

§13.9 B. Form: Proposed Temporary Restraining Order and Order to Show Cause

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DANIEL PETERS (State Bar No. 12222)
10 Main Street, 2nd Floor
San Diego, California 92101
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Facsimile: 619-456-7891

Attorneys for Petitioner JANE DOE

SUPERIOR COURT OF THE STATE OF CALIFORNIA
CITY AND COUNTY OF SAN DIEGO, NORTH COUNTY DIVISION

JANE DOE,	)	**CASE NO. 123456**
	)	
Petitioner,	)	**[PROPOSED] TEMPORARY**
	)	**RESTRAINING ORDER AND**
vs.	)	**ORDER TO SHOW CAUSE**
	)	_____
CITY OF SAN DIEGO,	)	**Date: April 25, 2008**
	)	**Time: 8:30 a.m.**
Respondent;	)	**Dept.: 00**
_____	)	**Judge: Honorable Robert Smith**
ABC Corporation,		**Action filed: April 18, 2008**
		Trial date: Not set
Real Party in Interest.		

RESPONDENT CITY OF SAN DIEGO AND REAL PARTY IN INTEREST ABC CORPORATION ARE HEREBY ORDERED TO SHOW CAUSE on _____, 2008, or as soon thereafter as counsel may be heard in Department 00 of this Court, why you, your agents, servants, assigns, and all those acting in concert with you should not be restrained and enjoined pending a hearing on the merits of the petition from issuing any permits, authorizations, or any other action to authorize any grading or soil disturbing or any construction of building pads or homes on the site and are further ordered to revoke the Design Review and Coastal Development Permit issued to real party in interest ABC Corporation, and any other steps that have been taken to date to allow grading or soil disturbing or any construction of building pads or homes on the site at 100 Main Street in San Diego, California.

PENDING HEARING on the above Order to Show Cause, RESPONDENT CITY OF SAN DIEGO AND REAL PARTY IN INTEREST ABC CORPORATION, any agents, servants, assigns, and anyone acting in concert with you, ARE HEREBY RESTRAINED AND ENJOINED from taking any action, including grading, demolition, or construction activities, that would disturb, destroy, or remove any existing feature on the site at 100 Main Street in San Diego, California, developing any building pads or homes on the site, or otherwise altering the status quo, except site maintenance for the control of stormwater runoff.

The following briefing schedule shall apply: Any opposition papers to the Order to Show Cause shall be filed and served on petitioner no later than _____. Any reply papers shall be filed and served on respondent and real party in interest no later than _____.

IT IS SO ORDERED.

Dated: _____ By: _____ Superior Court Judge

Note: This sample temporary restraining order and order to show cause is presented as an example of form, not content. The names of the parties and attorneys have been changed for publication.

Comment: The format of attorney-drafted court papers is generally governed by Cal Rules of Ct 2.100-2.119. See also Cal Rules of Ct 3.1110-3.1116 (format requirements for civil law and motion papers, made applicable to writ petitions by Cal Rules of Ct 3.1100 and 3.1103(a)(2)); Cal Rules of Ct 3.1200-3.1207 (requirements for ex parte applications).

On drafting an application for a temporary restraining order and order to show cause, see §§6.31-6.32.

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IV. DEMURRER TO PETITION FOR WRIT OF MANDATE

§13.10 A. Form: Demurrer to Petition for Writ of Mandate

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GINGER FRANKLIN
STATE LABOR COMMISSIONER
BY: OLIVER DENNIS, Senior Counsel [State Bar No. 8000000]
525 Golden Gate Avenue
San Francisco, California 94102
Telephone: 123-678-9012
Attorney for Respondent

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR SAN FRANCISCO COUNTY

Mary Jones, Frank Fuentes, and Angela Goetz, Petitioners,	**CASE NO. 123456**
vs.	**DEMURRER TO PETITION FOR WRIT OF MANDATE**
California State Labor Commissioner, Respondent.	**Date:** **Time:** **Dept:**
Hank Duval and Nancy Brower, Center Restaurant Association; Hotel and Restaurant Employees and Bartenders' Union, Local A, Real Parties in Interest.	

Ginger Franklin, Labor Commissioner and Chief, Division of Labor Standards Enforcement, Department of Industrial Relations, demurs to the Petition for a Writ of Mandate herein on the following grounds:

1. This Court is without jurisdiction to hear this matter because this Petition fails to state facts showing entitlement to relief in that the petitioners have failed to show that a writ of mandate is necessary to protect a substantial right.

2. This Court is without jurisdiction to hear this matter because this Petition fails to state facts showing entitlement to relief in that the petitioners have a plain, speedy, and adequate remedy in the ordinary course of law.

3. The Petition does not state facts sufficient to constitute a cause of action in that the order the petitioners seek cannot be granted because it would be contrary to law.

WHEREFORE, respondent prays that this demurrer be sustained without leave to amend, that the petition be dismissed, and that the Court grant all the relief it considers proper.

DIVISION OF LABOR STANDARDS ENFORCEMENT

Dated: _ _ _ _ _ _

_____
OLIVER DENNIS
Attorney for Respondent

Note: This sample demurrer is presented as an example of form, not content, and should not be presumed accurate with regard to the state of the law. The names of the parties and attorneys have been changed for publication.

Comment: The format of attorney-drafted court papers is generally governed by Cal Rules of Ct 2.100-2.119. See also Cal Rules of Ct 3.1110-3.1116 (format requirements for civil law and motion papers, made applicable to writ petitions and demurrers by Cal Rules of Ct 3.1100 and 3.1103(a)(2), (c)).

On drafting a demurrer to a writ petition, see §§8.40-8.44.

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§13.11 B. Form: Memorandum in Support of Demurrer to Petition for Writ of Mandate

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GINGER FRANKLIN
STATE LABOR COMMISSIONER
BY: OLIVER DENNIS, Senior Counsel, State Bar No. 80000
525 Golden Gate Avenue
San Francisco, California 94102
Telephone: 123-678-9012
Attorney for Respondent

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR SAN FRANCISCO COUNTY

Mary Jones, Frank Fuentes, and Angela Goetz, Petitioners,	**CASE NO. 123456**
vs.	**MEMORANDUM IN SUPPORT OF DEMURRER TO PETITION FOR WRIT OF MANDATE**
California State Labor Commissioner, Respondent.	**Date:** **Time:** **Dept:**
Hank Duval and Nancy Brower, Center Restaurant Association; Hotel and Restaurant Employees and Bartenders' Union, Local A, Real Parties in Interest.	

MANDATE WILL NOT LIE WHERE THERE IS A PLAIN, SPEEDY, AND ADEQUATE ALTERNATIVE REMEDY

Generally, a writ of mandate will lie only when there is no plain, speedy, and adequate alternative remedy, when the Respondent has a clearly defined duty to perform, and when the Petitioner has a clear and beneficial right to performance. (*Payne v Superior Court* (1976) 17 C3d 908, 925.)

It is the Petitioner's burden to establish the inadequacy of other relief. (*Phelan v Superior Court* (1950) 35 C2d 363, 366.) A remedy is not inadequate merely because more time would be consumed by pursuing it through the ordinary channels.

[*Text omitted.*]

A writ must be issued in all cases where there is no plain, speedy, and adequate remedy in the ordinary course of law. It must be issued upon the verified petition of the party beneficially interested.

The verification of the Petition herein is signed by an attorney who also represented one of the real parties in this matter.

The verification purports to be based upon the attorney's personal knowledge. The verification does not explain how the facts contained in paragraph 6 of the Petition can be based on the personal knowledge of the attorney. Nor does it explain how it can be within the personal knowledge of the attorney that petitioners first learned of the underpayment of the collectively bargained rate of pay in December of 1983 as alleged in paragraph 8 of the Petition.

The verification fails to comply with Code of Civil Procedure section 446 in that it does not explain why the attorney and not the beneficially interested Petitioners signed the verification.

CONCLUSION

For all the reasons outlined above, the demurrer of Respondent should be sustained without leave to amend.

Dated: _ _ _ _ _ _ **Respectfully submitted,**

_____
OLIVER DENNIS
Senior Counsel

Note: This sample memorandum has not been updated for substantive legal accuracy. It is presented as an example of form, not content, and should not be presumed accurate with regard to the state of the law. The names of the parties and attorneys have been changed for publication.

Comment: The format of attorney-drafted court papers is generally governed by Cal Rules of Ct 2.100-2.119. See also Cal Rules of Ct 3.1110-3.1116 (format requirements for civil law and motion papers, made applicable to writ petitions and demurrers by Cal Rules of Ct 3.1100 and 3.1103(a)(2), (c)).

On drafting a demurrer to a writ petition, see §§8.40-8.44.

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V. OPPOSITION TO PETITION FOR WRIT OF MANDATE

§13.12 A. Form: Opposition to Petition for Writ of Mandate

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City Attorney
LUCY ADAMS, State Bar #11111
Deputy City Attorney
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102
Telephone: 415-123-4567
Facsimile: 415-456-7891
Attorneys for Defendant and Respondent

CITY AND COUNTY OF SAN FRANCISCO

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO—
UNLIMITED JURISDICTION

ABC CORPORATION, Plaintiff and Petitioner, vs. THE CITY & COUNTY OF SAN FRANCISCO, and DOES 1-30, Defendants and Respondents.	**CASE NO. 123-456** **CITY AND COUNTY OF SAN FRANCISCO'S OPPOSITION TO PETITION FOR WRIT OF MANDATE** **Hearing date: March 10, 2008** **Time: 9:30 a.m.** **Place: 302** **Action filed: February 7, 2008** **Trial date: N/A**

INTRODUCTION

San Francisco Charter Section 9.118 requires City departments to submit for Board of Supervisors approval any contract involving anticipated expenditures of more than $10 million. Of course, in the real world, it is sometimes difficult to estimate precisely how much a contract will require the City to spend. The question presented by this case is as follows: When a City department cannot definitively predict the City's total expenditures under the contract, but believes there is a significant possibility that they will exceed $10 million, may the department submit that contract to the Board of Supervisors for approval?

The only sensible answer to this question is "yes." The San Francisco voters enacted Charter Section 9.118 with the singular purpose of imposing a measure of oversight and fiscal accountability in City contracting. They sought to ensure that if a contract requires the City to spend such a large amount of taxpayer dollars, the final decision would rest with the elected body responsible for the City's budget, not with an unelected departmental employee. A rule preventing departments from submitting contracts to the Board for approval unless those contracts are certain to exceed $10 million would run contrary to the voters' intent.

The contract at issue here was not readily subject to a cost projection. The bid submitted by ABC Corporation ("ABC") was based not on a specific dollar figure but rather on an amount to be charged per mile traveled over the next 5 years hauling biosolids and grit from the City's wastewater treatment plants to sites outside San Francisco. Although the Public Utilities Commission ("PUC") assigned a rough dollar value to the bid ($8.32 million), it made clear from the start that this estimate was unreliable, that the true amount that the City would ultimately be required to pay under the contract was likely to deviate greatly from the estimate, and that there was a significant possibility that the cost of the contract would exceed $10 million over the 5-year term. That is because, among other things, the number of miles to be traveled under the hauling contract was

subject to numerous variables. While the estimate provided a useful tool for the policymakers to compare one bid against the other, it was not very useful for projecting the total cost of the contract.

Having been made aware of the uncertainty of the estimate by the PUC, and having been made aware from the start that there was a significant possibility the contract would exceed $10 million, the Office of Contract Administration ("OCA") decided from the start of the process to submit the contract for Board approval. Moreover, OCA informed ABC of the need for Board approval months before the vote, and ABC never questioned the Board's jurisdiction to consider the contract until it became dissatisfied with the Board's decision. Now, ABC appears to seek a ruling that would effectively prevent a department from submitting a contract to the Board for approval if the department is not certain that the contract will exceed $10 million. Because this would be contrary to the purposes of Charter Section 9.118, the Court should deny the petition for a writ of mandate.

BACKGROUND

In this Section, the City will address three key misimpressions left by ABC's opening papers: (A) the misimpression that the Board of Supervisors jumped in at the eleventh hour to disapprove the contract, thereby "interfering" with the ability of OCA to make the award; (B) the misimpression that ABC was somehow blindsided by OCA's submission of the contract to the Board; and, most importantly (C) the misimpression that the 5-year contract could not require expenditures of more than $10 million by the City.

[*Remainder of text of Background omitted.*]

LEGAL STANDARD

The legal standard cited by ABC is accurate, and it is very important given the facts of this case. The Court must "determine whether [the City's] actions have been arbitrary or capricious, *entirely lacking in evidentiary support,* or whether it failed to follow the proper procedures." (*Boydston v Napa Sanitation Dist.* (1990) 222 CA3d 1362, 1369 [emphasis added].)

DISCUSSION

I. THE PURPOSE OF CHARTER SECTION 9.118(b) IS TO PREVENT DEPARTMENTS FROM COMMITTING THE CITY TO SPENDING LARGE SUMS OF CITY DOLLARS WITHOUT FISCAL OVERSIGHT FROM ACCOUNTABLE POLICYMAKERS.

In 1988, the San Francisco voters imposed on City departments a measure of fiscal accountability. Previously, departments could enter into contracts with private companies involving payment of unlimited amounts of taxpayer dollars, for unlimited periods of time, without any oversight from the City's elected policymakers. Indeed, the San Francisco Charter had completely excluded the Board from involvement in contracting decisions by stating: "Neither the Board of Supervisors, its committees, nor any of its members, shall have any power or authority, nor shall they dictate, suggest or interfere with respect to any… contract or requisition for purchase or other administrative actions or recommendations of the City Administrator or of department heads under the City Administrator…." (San Francisco Charter, at §2.114.)

[*Remainder of text of Section I omitted.*]

II. WHEN THERE IS A SIGNIFICANT POSSIBILITY THAT A CONTRACT WILL FALL WITHIN THE TERMS OF CHARTER SECTION 9.118, CITY DEPARTMENTS MAY SUBMIT THE CONTRACT TO THE BOARD OF SUPERVISORS FOR APPROVAL.

Although it is understandable that the voters wished to draw a line at contracts requiring the expenditure of $10 million, in the real world it is not always easy to draw such lines. In some cases, it may be clear from the outset that the City will spend more than $10 million (such as, for example, when a contract explicitly states that the City is required to pay the contractor an amount greater than $10 million). In other cases—indeed, in the great majority of cases—it will be equally clear that the City has no chance to spend such a large amount. But in some cases, as here, the amount the City will end up spending under the terms of a contract is not subject to precise measurement. This case presents the question of how the Charter should be applied in those situations.

[*Remainder of text of Section II omitted.*]

III. BECAUSE THE CONTRACT WAS SUBJECT TO BOARD APPROVAL, THE CITY WAS NOT UNDER A MINISTERIAL DUTY TO EXECUTE AND PROCEED WITH THE CONTRACT.

Under Code of Civil Procedure section 1085, a writ may issue to require the government to fulfill its ministerial duty. *American Fed. of State, County & Municipal Employees v Metropolitan Water Dist. of So. Cal.*

(2005) 126 CA4th 247, 261. It is true that once a contract has been awarded, "a public official's duty to execute such a contract is ministerial." *TransdynlCresci JV v City and County of San Francisco* (1999) 72 CA4th 746, 758. But ABC's argument that the City has a ministerial duty to execute the proposed contract is based entirely on the assumption that the Board lacked the jurisdiction to reject it. As discussed above, this assumption is incorrect as a matter of law—DCA properly submitted the contract to the Board for exercise of its authority under the Charter. Thus, there simply could be no contract until the Board approved it. Once the Board rejected the contract, the City was under no duty—ministerial or otherwise—to proceed. To the contrary, it would have been illegal for the City to proceed with a contract that was not formed in accordance with the Charter. (See, *e.g., San Francisco Int'l Yachting Ctr. Devel. Group v City & County of San Francisco* (1992) 9 CA4th 672, 693-94; *Dynamic Indus. Co. v City of Long Beach* (1958) 159 CA2d 294, 298-99.)

CONCLUSION

The Court should deny the petition for a writ of mandate.

Dated: February 29, 2008

BRIAN THOMAS
City Attorney
LUCY ADAMS
Deputy City Attorney

By_____
LUCY ADAMS

Attorneys for Defendant and Respondent
CITY AND COUNTY OF SAN FRANCISCO

Note: This sample brief has not been updated for substantive legal accuracy. It is presented as an example of form, not content, and should not be presumed accurate with regard to the state of the law. The names of the parties and attorneys have been changed for publication.

Comment: The format of attorney-drafted court papers is generally governed by Cal Rules of Ct 2.100-2.119. See also Cal Rules of Ct 3.1110-3.1116 (format requirements for civil law and motion papers, made applicable to writ petitions and demurrers by Cal Rules of Ct 3.1100 and 3.1103(a)(2), (c)).

On drafting an opposition to a writ petition, see §§8.16-8.20.

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§13.13 B. Form: Request for Judicial Notice in Opposition to Petition for Writ of Mandate

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City Attorney
LUCY ADAMS, State Bar #11111
Deputy City Attorney
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102
Telephone: 415-123-4567
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Attorneys for Defendant and Respondent

CITY AND COUNTY OF SAN FRANCISCO

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO—
UNLIMITED JURISDICTION

ABC CORPORATION, Plaintiffs and Petitioner,	**CASE NO. 123-456**
vs.	**REQUEST FOR JUDICIAL NOTICE IN OPPOSITION TO PETITION FOR WRIT OF MANDATE**
THE CITY & COUNTY OF SAN FRANCISCO, and DOES 1-30, Defendants and Respondents.	**Hearing date: March 10, 2008** **Time: 9:30 a.m.** **Place: 302** **Action filed: February 7, 2008** **Trial date: N/A** **Attached documents: Exhibits A-D**

Pursuant to California Evidence Code sections 451 and 452, Defendant City and County of San Francisco respectfully requests that the Court take judicial notice of the following materials:

Exhibit A: Letter to the San Francisco Board of Supervisors from ABC Corporation, dated November 12, 2007 (taken from San Francisco Board of Supervisors Legislative File No. 00000).

Exhibit B: Appendix B and Appendix B-1 to the proposed Contract for Biosolids and Grit Hauling Services (taken from San Francisco Board of Supervisors Legislative File No. 01111).

Exhibit C: Budget Analyst Memorandum to the Budget and Finance Committee of the San Francisco Board of Supervisors (taken from San Francisco Board of Supervisors Legislative File No. 01111).

Exhibit D: Excerpts of Ballot Pamphlet from November 1998 election (downloaded from the San Francisco Department of Elections website at http://www.sfp14.sfpl.orgllibrarylocations/mainlgic/voterpamp/votepamp.htm).

Dated: February 29, 2008

BRIAN THOMAS
City Attorney
LUCY ADAMS
Deputy City Attorney

By_____

LUCY ADAMS

Attorneys for Defendant and Respondent
CITY AND COUNTY OF SAN FRANCISCO

Note: This sample request for judicial notice is presented as an example of form, not content. The names of the parties and attorneys have been changed for publication.

Comment: The format of attorney-drafted court papers is generally governed by Cal Rules of Ct 2.100-2.119. See also Cal Rules of Ct 3.1110-3.1116 (format requirements for civil law and motion papers, made applicable to writ petitions and demurrers by Cal Rules of Ct 3.1100 and 3.1103(a)(2), (c)).

On drafting an opposition to a writ petition, see §§8.16-8.20.

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§13.14 C. Form: Declaration in Opposition to Petition for Writ of Mandate

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Attorneys for Defendant and Respondent

CITY AND COUNTY OF SAN FRANCISCO

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO—
UNLIMITED JURISDICTION

ABC CORPORATION,	**CASE NO. 123-456**
Plaintiffs and Petitioner,	**DECLARATION OF JOHN SMITH IN OPPOSITION TO PETITION FOR WRIT OF MANDATE**
vs.	**_____**
THE CITY & COUNTY OF SAN FRANCISCO, and DOES 1-30, Defendants and Respondents.	**Hearing date: March 10, 2008** **Time: 9:30 a.m.** **Place: 302** **Action filed: February 7, 2008** **Trial date: N/A** **Attached documents: Exhibits A-B**

I, John Smith, declare as follows:

1. I have personal knowledge of the matters stated herein, except for those matters set forth on information and belief, which I believe to be true, and if called to testify, I can and will testify competently as to all matters set forth herein.

2. I am employed as a Supervising Purchaser in the Office of Contract Administration ("OCA") for the City & County of San Francisco. I have served in this capacity for 5 years. Overall, I have been employed with OCA since 1985.

3. During 2007, I was responsible for implementing and overseeing the bid process for the grit and biosolids hauling contract that is the subject of this litigation.

4. It has always been my understanding and assumption that OCA, before finally awarding the contract, would submit it to the Board of Supervisors for approval, because of the significant possibility that the contract would require the City to expend in excess of $10 million during the 5-year term.

5. Even after OCA conditionally awarded the contract to ABC Corporation, it was my understanding and assumption that the contract would require Board approval. Although Jane Doe of the Public Utilities Commission estimated that the price of the potential contract with ABC over the 5-year term to be $8.32 million, she made clear to me that this estimate was extremely rough and subject to so many variables as to make it an unreliable predictor of whether the cost would actually exceed $10 million. Accordingly, Ms. Doe's estimate did not change our belief that there was a significant possibility the contract would exceed $10 million over the 5-year term, and for this reason it did not change my belief that the contract required Board approval.

6. My understanding about the need for Board approval was in no way influenced by any interference by members of the Board of Supervisors or its staff. At no time did any member of the Board of Supervisors or its staff contact me to urge that DCA submit the contract to the Board. Nor am I aware of any member of the Board or its staff having contacted anyone at OCA or PUC in an attempt to ensure that the Board would have the opportunity to consider the contract.

7. Although I do not specifically recall the first time I told bidders that the contract was subject to Board approval, I do recall that I informed them of that fact.

8. Attached hereto as Exhibit A is a true and correct copy of an e-mail exchange between me and Joe Barnes of ABC, which I retrieved from my computer and printed on December 4, 2007. This e-mail reflects that I informed Mr. Barnes on August 10, 2007, of the need for Board approval. Mr. Barnes responded to this e-mail but did not question the need for Board approval. Nor did anyone at ABC ever inform me that it believed Board approval was not required.

9. I believe that I informed ABC and the other bidders of the need for Board approval before this date, but this is the earliest documentary evidence I can find that demonstrates that they were made aware of this requirement.

10. Attached hereto as Exhibit B is a true and correct copy of an e-mail I sent to Joe Barnes of ABC as well as to the subcontractors to ABC, which I retrieved from my computer and printed on December 4, 2007. This e-mail reflects my continued understanding that the contract required Board approval because of the significant possibility that it would involve expenditures of more than $10 million.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed in San Francisco, California on February 28, 2008.

By:_____
JOHN SMITH

INDEX TO EXHIBITS

Exhibit	Description
A	8/10/07 e-mail between John Smith and Joe Barnes
B	10/25/07 e-mail from John Smith to ABC Corporation

Note: This sample declaration is presented as an example of form, not content. The names of the parties and attorneys have been changed for publication.

Comment: The format of attorney-drafted court papers is generally governed by Cal Rules of Ct 2.100-2.119. See also Cal Rules of Ct 3.1110-3.1116 (format requirements for civil law and motion papers, made applicable to writ petitions and demurrers by Cal Rules of Ct 3.1100 and 3.1103(a)(2), (c)).

On drafting an opposition to a writ petition, see §§8.16-8.20.

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§13.15 D. Form: Proposed Order Denying Petition for Writ of Mandate

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Attorneys for Defendant and Respondent

CITY AND COUNTY OF SAN FRANCISCO

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO—
UNLIMITED JURISDICTION

ABC CORPORATION,	**CASE NO. 123-456**
Plaintiffs and Petitioner,	**[PROPOSED] ORDER DENYING PETITION FOR WRIT OF MANDATE**
vs.	_____
THE CITY & COUNTY OF SAN FRANCISCO, and DOES 1-30, Defendants and Respondents.	**Hearing date: March 10, 2008** **Time: 9:30 a.m.** **Place: 302** **Action filed: February 7, 2008** **Trial date: N/A**

The Petition for a Writ of Mandate in the above-captioned matter came on for hearing at 9:30 a.m. on March 10, 2008, in Department 302 of this Court, located at 400 McAllister Street, San Francisco, before the Honorable Jane Doe. Roberta Jones appeared on behalf of Petitioner ABC CORPORATION. Lucy Adams appeared on behalf of Respondent CITY AND COUNTY OF SAN FRANCISCO.

Having considered the memorandum and supporting documents, and having heard oral argument of counsel, the Court orders that the Petition is DENIED. As a matter of law, a City department may submit a proposed contract to the Board of Supervisors for approval under San Francisco Charter Section 9.118 if there is a significant possibility that the cost of the contract will exceed $10 million. Because that possibility existed with respect to the contract at issue in this case, the Board acted within its jurisdiction in rejecting the contract, and the City was under no ministerial duty to proceed with it.

IT IS SO ORDERED.

Dated: _____

_____
JANE DOE
Judge of the Superior Court

Note: This sample order is presented as an example of form, not content. The names of the parties and attorneys have been changed for publication.

Comment: The format of attorney-drafted court papers is generally governed by Cal Rules of Ct 2.100-2.119. See also Cal Rules of Ct 3.1110-3.1116 (format requirements for civil law and motion papers, made applicable to writ petitions and demurrers by Cal Rules of Ct 3.1100 and 3.1103(a)(2), (c)).

On drafting an opposition to a writ petition, see §§8.16-8.20.

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Source: Civil Litigation/California Civil Writ Practice/13 Superior Court Forms/ VI. LIMITED CIVIL CASES/§13.16 A. Form: Information on Writ Proceedings in Misdemeanor, Infraction, and Limited Civil Cases (Judicial Council Form APP-150-INFO)

VI. LIMITED CIVIL CASES

§13.16 A. Form: Information on Writ Proceedings in Misdemeanor, Infraction, and Limited Civil Cases (Judicial Council Form APP-150-INFO)

APP-150-INFO Information on Writ Proceedings in Misdemeanor, Infraction, and Limited Civil Cases

GENERAL INFORMATION

1 What does this information sheet cover?

This information sheet tells you about **writ proceedings**—proceedings in which a person is asking for a writ of mandate, prohibition, or review—in misdemeanor, infraction, and limited civil cases. Please read this information sheet before you fill out *Petition for Writ (Misdemeanor, Infraction, or Limited Civil Case)* (form APP-151). This information sheet does not cover everything you may need to know about writ proceedings. It is only meant to give you a general idea of the writ process. To learn more, you should read rules 8.930–8.936 of the California Rules of Court, which set out the procedures for writ proceedings in the appellate division. You can get these rules at any courthouse or county law library or online at *www.courtinfo.ca.gov/rules*.

This information sheet does NOT provide information about appeals or proceedings for writs of supersedeas or habeas corpus.

- For information about appeals, please see the box on the top of this page.
- For information about writs of habeas corpus, please see rules 4.550–4.552 of the California Rules of Court and *Petition for Writ of Habeas Corpus* (form MC-275).
- For information about writs of supersedeas, please see rule 8.824 of the California Rules of Court.

You can get these rules and forms at any courthouse or county law library or online at *www.courtinfo.ca.gov/rules* for the rules or *www.courtinfo.ca.gov/forms* for the forms.

2 What is a writ?

A writ is an order from a higher court telling a lower court to do something the law says the lower court must do or not to do something the law says the lower court does not have the power to do. In writ proceedings in the appellate division, the lower court is the superior court that took the action or issued the order being challenged.

For information about appeal procedures, see:

- *Information on Appeal Procedures for Misdemeanors* (form CR-131-INFO)
- *Information on Appeal Procedures for Infractions* (form CR-141-INFO)
- *Information on Appeal Procedures for Limited Civil Cases* (form APP-101-INFO)

You can get these forms at any courthouse or county law library or online at *www.courtinfo.ca.gov/forms*.

In this information sheet, we call the lower court the "trial court."

3 Are there different kinds of writs?

Yes. There are three main kinds of writs:

- Writs of mandate (sometimes called "mandamus"), which are orders telling the trial court to do something.
- Writs of prohibition, which are orders telling the trial court not to do something.
- Writs of review (sometimes called "certiorari"), which are orders telling the trial court that the appellate division will review certain kinds of actions already taken by the trial court.

There are laws (statutes) that you should read concerning each type of writ: see California Code of Civil Procedure sections 1084–1097 about writs of mandate, sections 1102–1105 about writs of prohibition, and sections 1067–1077 about writs of review. You can get copies of these statutes at any county law library or online at *www.leginfo.ca.gov/calaw.html*.

4 Is a writ proceeding the same as an appeal?

No. In an **appeal,** the appellate division *must* consider the parties' arguments and decide whether the trial court made the legal error claimed by the appealing party and whether the trial court's decision should be overturned

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based on that error (this is called a "decision on the merits"). In a **writ proceeding,** the appellate division is *not* required to make a decision on the merits; even if the trial court made a legal error, the appellate division can decide not to consider that error now, but to wait and consider the error as part of any appeal from the final judgment. Most requests for writs are denied without a decision on the merits (this is called a "summary denial"). Because of this, appeals are the ordinary way that decisions made by a trial court are reviewed and writ proceedings are often called proceedings for "extraordinary" relief.

Appeals and writ proceedings are also used to review different kinds of decisions by the trial court. Appeals can be used only to review a trial court's final judgment and a few kinds of orders. Most rulings made by a trial court before it issues its final judgment cannot be appealed right away; they can only be appealed after the trial court case is over, as part of an appeal of the final judgment. Unlike appeals, writ proceedings can be used to ask for review of certain kinds of important rulings made by a trial court before it issues its final judgment.

5 Is a writ proceeding a new trial?

No. **A writ proceeding is NOT a new trial.** The appellate division will not consider new evidence, such as the testimony of new witnesses. Instead, if it does not summarily deny the request for a writ, the appellate division reviews a record of what happened in the trial court and the trial court's ruling to see if the trial court made the legal error claimed by the person asking for the writ. When it conducts its review, the appellate division presumes that the trial court's ruling is correct; the person who requests the writ must show the appellate division that the trial court made the legal error the person is claiming.

6 Can a writ be used to address *any* errors made by a trial court?

No.

Writs can only address certain legal errors: Writs can only address the following types of legal errors made by a trial court:

- The trial court has a legal duty to act but:
  - Refuses to act
  - Has not done what the law says it must do
  - Has acted in a way the law says it does not have the power to act
- The trial court has performed or says it is going to perform a judicial function (like deciding a person's rights under law in a particular case) in a way that the court does not have the legal power to do.

There must be no other adequate remedy: The trial court's error must also be something that can be fixed only with a writ. The person asking for the writ must show the appellate division that there is no adequate way to address the trial court's error other than with the writ (this is called having "no adequate remedy at law"). As mentioned above, appeals are the ordinary way that trial court decisions are reviewed. If the trial court's ruling can be appealed, the appellate division will generally consider an appeal to be good enough (an "adequate remedy") unless the person asking for the writ can show the appellate division that he or she will be harmed in a way that cannot be fixed by the appeal if the appellate division does not issue the writ (this is called "irreparable" injury or harm).

Statutory writs: There are laws (statutes) that provide that certain kinds of rulings can or must be challenged using a writ proceeding. These are called "statutory writs." Here is a list of some of the most common rulings that a statute says can or must be challenged using a writ:

- A ruling on a motion to disqualify a judge (see California Code of Civil Procedure section 170.3(d))
- Denial of a motion for summary judgment (see California Code of Civil Procedure section 437c(m)(l))
- A ruling on a motion for summary adjudication of issues (see California Code of Civil Procedure section 437c(m)(l))
- Denial of a stay in an unlawful detainer matter (see California Code of Civil Procedure section 1176)
- An order disqualifying the prosecuting attorney (see California Penal Code section 1424)

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You can get copies of these statutes at any county law library or online at *www.leginfo.ca.gov/calaw.html.* You will need to check whether there is a statute providing that the specific ruling you want to challenge can or must be reviewed using a writ proceeding. (Note that just because there is a statute requiring or allowing you to ask for a writ to challenge a ruling does not mean that the court must grant your request; the appellate division can still deny a request for a statutory writ.)

Common law writs: Even if there is not a statute specifically providing for a writ proceeding to challenge a particular ruling, most trial court rulings other than the final judgment can potentially be challenged using a writ proceeding if the trial court made the type of legal error described above and the petitioner has no other adequate remedy at law. These writs are called "common law" writs.

(7) Can the appellate division consider a request for a writ in *any* case?

No. Different courts have the power (called "jurisdiction") to consider requests for writs in different types of cases. The appellate division can only consider requests for writs in limited civil, misdemeanor, and infraction cases. A limited civil case is a civil case in which the amount claimed is $25,000 or less (see California Code of Civil Procedure sections 85 and 88). Misdemeanor cases are cases in which a person has been charged with or convicted of a crime for which the punishment can include jail time of up to one year but not time in state prison (see California Penal Code sections 17 and 19.2). (If the person was also charged with or convicted of a felony in the same case, it is considered a felony case, not a misdemeanor case.) Infraction cases are cases in which a person has been charged with or convicted of a crime for which the punishment can be a fine, traffic school, or some form of community service but cannot include any time in jail or prison (see California Penal Code sections 17 and 19.8). Examples of infractions include traffic tickets or citations for violations of some city or county ordinances. (If a person was also charged with or convicted of a misdemeanor in the same case, it is considered a misdemeanor case, not an infraction case.) You can get copies of these statutes at any county law library or online at *www.leginfo.ca.gov/calaw.html.*

The appellate division does NOT have jurisdiction to consider requests for writs in either unlimited civil cases (civil cases in which the amount claimed is more than $25,000) or felony cases (cases in which a person has been charged with or convicted of a crime for which the punishment can include time in state prison). Requests for writs in these cases can be made in the Court of Appeal. The appellate division also does NOT have the jurisdiction to consider requests for writs of habeas corpus; requests for these writs can be made in the superior court.

(8) Who are the parties in a writ proceeding?

If you are asking for the writ, you are called the PETITIONER. You should read "Information for the Petitioner," beginning on page 4.

The court the petitioner is asking to be ordered to do or not to do something is called the RESPONDENT. In appellate division writ proceedings, the trial court is the respondent.

Any other party in the trial court case who would be affected by a ruling regarding the request for a writ is a REAL PARTY IN INTEREST. If you are a real party in interest, you should read "Information for a Real Party in Interest," beginning on page 9.

(9) Do I need a lawyer to represent me in a writ proceeding?

You do not *have* to have a lawyer; you are allowed to represent yourself in a writ proceeding in the appellate division. But writ proceedings can be very complicated and you will have to follow the same rules that lawyers have to follow. If you have any questions about the writ procedures, you should talk to a lawyer. In limited civil cases and infraction cases, you must hire a lawyer at your own expense if you want one (the court cannot provide one). You can get information about finding a lawyer on the California Courts Online Self-Help Center at *www.courtinfo.ca.gov/selfhelp/lowcost.*

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INFORMATION FOR THE PETITIONER

This part of the information sheet is written for the petitioner—the party asking for the writ. It explains some of the rules and procedures relating to asking for a writ. The information may also be helpful to a real party in interest. There is more information for a real party in interest starting on page 9 of this information sheet.

(10) Who can ask for a writ?

Only a party in the trial court proceeding—the plaintiff or defendant in a civil case or the defendant or prosecuting agency in a misdemeanor or infraction case—can ask for a writ challenging a ruling on a motion to disqualify a judge (see California Code of Civil Procedure section 170.3(d)). Parties are also usually the only ones that ask for writs challenging other kinds of trial court rulings. However, in most cases, a person who was not a party does have the legal right to ask for a writ if that person has a "beneficial interest" in the trial court's ruling. A "beneficial interest" means that the person has a specific right or interest affected by the ruling that goes beyond the general rights or interests the public may have in the ruling.

(11) How do I ask for a writ?

To ask for a writ you must serve and file a petition for a writ (see below for an explanation of how to "serve and file" a petition). A petition is a formal request that the appellate division issue a writ. A petition for a writ explains to the appellate division what happened in the trial court, what legal error you (the petitioner) believe the trial court made, why you have no other adequate remedy at law, and what order you are requesting the appellate division to make.

(12) How do I prepare a writ petition?

If you are represented by a lawyer, your lawyer will prepare your petition for a writ. If you are not represented by a lawyer, you must use *Petition for Writ (Misdemeanor, Infraction, or Limited Civil Case)* (form APP-151) to prepare your petition. You can get form APP-151 at any courthouse or county law library or online at *www.courtinfo.ca.gov/forms*. This form asks you to fill in the information that needs to be in a writ petition.

a. Description of your interest in the trial court's ruling

Your petition needs to tell the appellate division why you have a right to ask for a writ in the case. As discussed above, usually only a person who was a party in the trial court case—the plaintiff or defendant in a civil case or the defendant or prosecuting agency in a misdemeanor or infraction case—asks for a writ challenging a ruling in that case. If you were a party in the trial court case, say that in your petition. If you were not a party, you will need to describe what "beneficial interest" you have in the trial court's ruling. A "beneficial interest" means that you have a specific right or interest affected by the ruling that goes beyond the general rights or interests the public may have in the ruling. To show the appellate division that you have a beneficial interest in the ruling you want to challenge, you must describe how the ruling will affect you in a direct and negative way.

b. Description of the legal error you believe the trial court made

Your petition will need to tell the appellate division what legal error you believe the trial court made. Not every mistake a trial court might make can be addressed by a writ. You must show that the trial court made one of the following types of legal errors:

- The trial court has a legal duty to act but:
  - Refuses to act
  - Has not done what the law says it must do
  - Has acted in a way the law says it does not have the power to act
- The trial court has performed or says it is going to perform a judicial function (like deciding a person's rights under law in a particular case) in a way that the court does not have the legal power to do.

To show the appellate division that the trial court made one of these legal errors, you will need to:

- Show that the trial court has the legal duty or the power to act or not act in a particular way. You will need to tell the appellate division what legal

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authority—what constitutional provision, statute, rule, or published court decision—establishes the trial court's legal duty or power to act or not act in that way.

- Show the appellate division that the trial court has not acted in the way that this legal authority says the court is required to act. You will need to tell the appellate division exactly where in the record of what happened in the trial court it shows that the trial court did not act in the way it was required to.

c. Description of why you need the writ

One of the most important parts of your petition is explaining to the appellate division why you need the writ you have requested. Remember, the appellate division does not have to grant your petition just because the trial court made an error. You must convince the appellate division that it is important for it to issue the writ.

Your petition needs to show that a writ is the only way to fix the trial court's error. To convince the court you need the writ, you will need to show the appellate division that you have no way to fix the trial court's error other than through a writ (this is called having "no adequate remedy at law").

This will be hard if the trial court's ruling can be appealed. If the ruling you are challenging can be appealed, either immediately or as part of an appeal of the final judgment in your case, the appellate division will generally consider this appeal to be a good enough way to fix the trial court's ruling (an "adequate remedy"). To be able to explain to the appellate division why you do not have an adequate remedy at law, you will need to find out if the ruling you want to challenge can be appealed, either immediately or as part of an appeal of the final judgment.

Here are some trial court rulings that can be appealed. There are laws (statutes) that say that certain kinds of trial court rulings ("orders") can be appealed immediately. In limited civil cases, California Code of Civil Procedure section 904.2 lists orders that can be appealed immediately, including orders:

- Changing or refusing to change the place of trial (venue)
- Granting a motion to quash service of summons
- Granting a motion to stay or dismiss the action on the ground of inconvenient forum
- Granting a new trial
- Denying a motion for judgment notwithstanding the verdict
- Granting or dissolving an injunction or refusing to grant or dissolve an injunction
- Appointing a receiver
- Made after final judgment in the case

In misdemeanor and infraction cases, orders made after the final judgment that affect the substantial rights of the defendant can be appealed immediately (California Penal Code section 1466).

In misdemeanor cases, orders granting or denying a motion to suppress evidence can also be appealed immediately (California Penal Code section 1538.5(j)).

You can get copies of these statutes at any county law library or online at *www.leginfo.ca.gov/calaw.html.* You should also check to see if there are published court decisions that indicate whether you can or must use an appeal or a writ petition to challenge the type of ruling you want to challenge in your case.

If the ruling can be appealed, you will need to show that an appeal will not fix the trial court's error. If the trial court ruling you want to challenge can be appealed, you will need to show the appellate division why that appeal is not good enough to fix the trial court's error. To do that, you will need to show the appellate division how you will be harmed by the trial court's error in a way that cannot be fixed by the appeal if the appellate division does not issue the writ (this is called "irreparable" injury or harm). For example, because of the time it takes for an appeal, the harm you want to prevent may happen before an appeal can be finished.

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d. Description of the order you want the appellate division to make

Your petition needs to describe what you are asking the appellate division to order the trial court to do or not do. Writ petitions usually ask that the trial court be ordered to cancel ("vacate") its ruling, issue a new ruling, or not take any steps to enforce its ruling.

If you want the appellate division to order the trial court not to do anything more until the appellate division decides whether to grant the writ you are requesting, you must ask for a "stay." If you want a stay, you should first ask the trial court for a stay. You should tell the appellate division whether you asked the trial court for a stay. If you did not ask the trial court for a stay, you should tell the appellate division why you did not do this.

If you ask the appellate division for a stay, make sure you also fill out the "Stay requested" box on the first page of the *Petition for Writ (Misdemeanor, Infraction, or Limited Civil Case)* (form APP-151).

e. Verifying the petition

Petitions for writs must be "verified." This means that either the petitioner or the petitioner's attorney must declare under penalty of perjury that the facts stated in the petition are true and correct, must sign the petition, and must indicate the date that the petition was signed. On the last page of the *Petition for Writ (Misdemeanor, Infraction, or Limited Civil Case)* (form APP-151), there is a place for you to verify your petition.

(13) Is there anything else that I need to serve and file with my petition?

Yes. Along with the petition, you must serve and file a record of what happened in the trial court (see below for an explanation of how to serve and file the petition). Since the appellate division judges were not there in the trial court, a record of what happened must be sent to the appellate division for its review. The materials that make up this record are called "supporting documents."

What needs to be in the supporting documents: The supporting documents must include:

- A record of what was said in the trial court about the ruling that you are challenging (this is called the "oral proceedings") and
- Copies of certain important documents from the trial court.

Read below for more information about these two parts of the supporting documents.

Record of the oral proceedings: There are several ways a record of what was said in the trial court may be provided to the appellate division:

- **A transcript**—A transcript is a written record (often called the "verbatim" record) of the oral proceedings in the trial court. If a court reporter was in the trial court and made a record of the oral proceedings, you can have the court reporter prepare a transcript of those oral proceedings, called a "reporter's transcript," for the appellate division. If a reporter was not there, but the oral proceedings were officially recorded on approved electronic recording equipment, you can have a transcript prepared for the appellate division from the official electronic recording of these proceedings. You (the petitioner) must pay for preparing a transcript, unless the court orders otherwise.
- **A copy of an electronic recording**—If the oral proceedings were officially recorded on approved electronic recording equipment, the court has a local rule for the appellate division permitting this recording to be used as the record of the oral proceedings, and all the parties agree ("stipulate"), a copy of the official electronic recording itself can be used as the record of the oral proceedings instead of a transcript. You (the petitioner) must pay for preparing a copy of the official electronic recording, unless the court orders otherwise.
- **A summary**—If a transcript or official electronic recording of what was said in the trial court is not available, your petition must include a declaration (a statement signed by the petitioner under penalty of perjury) either:
  - Explaining why the transcript or official electronic recording is not available and providing a fair summary of the proceedings,

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including the petitioner's arguments and any statement by the court supporting its ruling or
- Stating that the transcript or electronic recording has been ordered, the date it was ordered, and the date it is expected to be filed.

Copies of documents from the trial court: Copies of the following documents from the trial court must also be included in the supporting documents:

- The trial court ruling being challenged in the petition
- All documents and exhibits submitted to the trial court supporting and opposing the petitioner's position
- Any other documents or portions of documents submitted to the trial court that are necessary for a complete understanding of the case and of the ruling being challenged

What if I cannot get copies of the documents from the trial court because of an emergency? Rule 8.931 of the California Rules of Court provides that in extraordinary circumstances the petition may be filed without copies of the documents from the trial court. If the petition is filed without these documents, you must explain in your petition the urgency and the circumstances making the documents available.

Format of the supporting documents: Supporting documents must be put in the format required by rule 8.931 of the California Rules of Court. Among other things, there must be a tab for each document and an index listing the documents that are included. You should carefully read rule 8.931. You can get a copy of rule 8.931 at any courthouse or county law library or online at *www.courtinfo.ca.gov/rules*.

(14) Is there a deadline to ask for a writ?

Yes. For statutory writs, the statute usually sets the deadline for serving and filing the petition. Here is a list of the deadlines for filing petitions for some of the most common statutory writs (you can get copies of these statutes at any county law library or online at *www.leginfo.ca.gov/calaw.html*).

Statutory Writ	Filing Deadline
Writ challenging a ruling on a motion to disqualify a judge (see California Code of Civil Procedure section 170.3(d))	10 days after notice to the parties of the decision
Writ challenging the denial of a motion for summary judgment (see California Code of Civil Procedure section 437c(m)(l))	20 days after service of written notice of entry of the order
Writ challenging a ruling on a motion for summary adjudication of issues (see California Code of Civil Procedure section 437c(m)(l))	20 days after service of written notice of entry of the order

For common law writs or statutory writs where the statute does not set a deadline, you should file the petition as soon as possible and not later than 30 days after the court makes the ruling that you are challenging in the petition. While there is no absolute deadline for filing these petitions, writ petitions are usually used when it is urgent that the trial court's error be fixed. Remember, the court is not required to grant your petition even if the trial court made an error. If you delay in filing your petition, it may make the appellate division think that it is not really urgent that the trial court's error be fixed and the appellate division may deny your petition. If there are extraordinary circumstances that delayed the filing of your petition, you should explain these circumstances to the appellate division in your petition.

(15) How do I "serve" my petition?

Rule 8.931(d) requires that the petition and one set of supporting documents be served on any named real party in interest and that just the petition be served on the respondent trial court. "Serving" a petition on a party means that you must:

- Have somebody over 18 years old who is not a party to the case—so not you—mail or deliver ("serve") the petition to the real party in interest and the respondent court in the way required by law.

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- Make a record that the petition has been served. This record is called a "proof of service." *Proof of Service (Appellate Division)* (form APP-109) can be used to make this record. The proof of service must show who served the petition, who was served with the petition, how the petition was served (by mail or in person), and the date the petition was served.

You can get more information about how to serve court documents and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California Courts Online Self-Help Center at *www.courtinfo.ca.gov /selfhelp/lowcost/getready.htm#serving.*

(16) How do I file my petition?

To file a petition for a writ in the appellate division, you must bring or mail the original petition, including the supporting documents, and the proof of service to the clerk for the appellate division of the superior court that made the ruling you are challenging. If the superior court has more than one courthouse location, you should call the clerk at the courthouse where the ruling you are challenging was made to ask where to file your petition. You should make a copy of all the documents you are planning to file for your own records before you file them with the court. It is a good idea to bring or mail an extra copy of the petition to the clerk when you file your original and ask the clerk to stamp this copy to show that the original has been filed.

(17) Do I have to pay to file a petition?

There is no fee to file a petition for a writ in a misdemeanor or infraction case, but there is a fee to file a petition for a writ in a limited civil case. You should ask the clerk for the appellate division where you are filing the petition what this fee is. If you cannot afford to pay this filing fee, you can ask the court to waive this fee. To do this, you must fill out an *Application for Waiver of Court Fees and Costs* (form FW-001). You can get form FW-001 at any courthouse or county law library or online at *www.courtinfo.ca.gov/forms.* You can file this application either before you file your petition or with your petition. The court will review this application and decide whether to waive the filing fee.

(18) What happens after I file my petition?

Within 10 days after you serve and file your petition, the respondent or any real party in interest can serve and file preliminary opposition to the petition. Within 10 days after an opposition is filed, you may serve and file a reply to that opposition.

The appellate division does not have to wait for an opposition or reply before it can act on a petition for a writ, however. Without waiting, the appellate division can:

a. Issue a stay

b. Summarily deny the petition

c. Issue an alternative writ or order to show cause

d. Notify the parties that it is considering issuing a preemptory writ in the first instance

Read below for more information about these options.

a. Stay of trial court proceedings

A stay is an order from the appellate division telling the trial court not to do anything more until the appellate division decides whether to grant your petition. A stay puts the trial court proceedings on temporary hold.

b. Summary denial

A "summary denial" means that the appellate division denies the petition without deciding whether the trial court made the legal error claimed by the petitioner or whether the writ requested by the petitioner should be issued based on that error. Remember, even if the trial court made a legal error, the appellate division can decide not to consider that error now but to wait and consider the error as part of any appeal from the final judgment. No reasons need to be given for a summary denial. Most petitions for writs are denied in this way.

c. Alternative writ or order to show cause

An "alternative writ" is an order telling the trial court either to do what the petitioner has requested in the petition (or some modified form of what the petitioner

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requested) or to show the appellate division why the trial court should not be ordered to do what the petitioner requested. An "order to show cause" is similar; it is an order telling the trial court to show the appellate division why the trial court should not be ordered to do what the petitioner requested in the petition (or some modified form of what the petitioner requested). The appellate division will issue an alternative writ or an order to show cause only if the petitioner has shown that he or she has no adequate remedy at law and the appellate division has decided that the petitioner may have shown that the trial court made a legal error that needs to be fixed.

If the appellate division issues an alternative writ and the trial court does what the petitioner requested (or a modified form of what the petitioner requested as ordered by the appellate division), then no further action by the appellate division is needed and the appellate division may dismiss the petition.

If the trial court does not comply with an alternative writ, however, or if the appellate division issues an order to show cause, then the respondent court or a real party in interest can file a response to the appellate division's order (called a "return") that explains why the trial court should not be ordered to do what the petitioner requested. The return must be served and filed within the time specified by the appellate division or, if no time is specified, within 30 days from the date the alternative writ or order to show cause was issued. The petitioner will then have an opportunity to serve and file a reply within 15 days after the return is filed. The appellate division may set the matter for oral argument. When all the papers have been served and filed (or the time to serve and file them has passed) and oral argument is completed, the appellate division will decide the case.

d. Peremptory writ in the first instance

A "peremptory writ in the first instance" is an order telling the trial court to do what the petitioner has requested (or some modified form of what the petitioner requested) that is issued without the appellate division first issuing an alternative writ or order to show cause. It is very rare for the appellate division to issue a peremptory writ in the first instance, and it will not do so without first notifying the parties and giving the respondent court and any real party in interest a chance to file an opposition.

The respondent court or a real party in interest can file a response to the appellate division's notice (called an "opposition") that explains why the trial court should not be ordered to do what the petitioner has requested. The opposition must be served and filed within the time specified by the appellate division or, if no time is specified, within 30 days from the date the notice was issued. The petitioner will then have a chance to serve and file a reply within 15 days after the opposition is filed. The appellate division may then set the matter for oral argument. When all the papers have been served and filed (or the time to serve and file them has passed) and oral argument is completed, the appellate division will decide the case.

(19) What should I do if the court denies my petition?

If the court denies your petition, it may be helpful to talk to a lawyer. In a limited civil or infraction case, you must hire a lawyer at your own expense if you want one (the court cannot provide one). You can get information about finding an attorney on the California Courts Online Self-Help Center at *www.courtinfo.ca.gov /selfhelp/lowcost.*

INFORMATION FOR A REAL PARTY IN INTEREST

This part of the information sheet is written for a real party in interest—a party from the trial court case other than the petitioner who will be affected by a ruling on a petition for a writ. It explains some of the rules and procedures relating to responding to a petition for a writ. The information may also be helpful to the petitioner.

(20) I have received a copy of a petition for a writ in a case in which I am a party. Do I need to do anything?

You do not *have* to do anything. The California Rules of Court give you the right to file a preliminary opposition to a petition for a writ within 10 days after the petition is served and filed, but you are not required to do this. The appellate division can take certain actions without waiting for any opposition, including:

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- Summarily denying the petition
- Issuing an alternative writ or order to show cause
- Notifying the parties that it is considering issuing a peremptory writ in the first instance

Read the response to question (18) for more information about these options.

Most petitions for writs are summarily denied, often within a few days after they are filed. If you have not already received something from the appellate division saying what action it is taking on the petition, it is a good idea to call the appellate division to see if the petition has been denied before you decide whether and how to respond.

This would also be a good time to talk to a lawyer. You do not *have* to have a lawyer; you are allowed to represent yourself in a writ proceeding in the appellate division. But writ proceedings can be very complicated and you will have to follow the same rules that lawyers have to follow. If you have any questions about writ proceedings or about whether and how you should respond to a writ petition, you should talk to a lawyer. In a limited civil case or infraction case, you must hire a lawyer at your own expense if you want one (the court cannot provide one). You can get information about finding an attorney on the California Courts Online Self-Help Center at *www.courtinfo.ca.gov/selfhelp/lowcost.*

If the petition has not already been summarily denied, you may, but are not required to, serve and file a preliminary opposition to the petition within 10 days after the petition was served and filed. In general, it is a good idea to consider filing a preliminary opposition if the petition misstates the facts or if you think the petition shows that the trial court made a legal error that may need to be fixed. However, the appellate division will not grant a writ without first issuing an alternative writ, an order to show cause, or a notice that it is considering issuing a peremptory writ. In all these circumstances, you will get notice from the court and have a chance to file a response. A preliminary opposition is therefore typically used to explain to the appellate division why you believe it should not grant an alternative writ or order to show cause.

If you decide to file a preliminary opposition, you must serve that preliminary opposition on all the other parties to the writ proceeding. "Serving and filing" an opposition means that you must:

- Have somebody over 18 years old who is not a party to the case—so not you—mail or deliver ("serve") the preliminary opposition to the other parties in the way required by law.
- Make a record that the preliminary opposition has been served. This record is called a "proof of service." *Proof of Service (Appellate Division)* (form APP-109) can be used to make this record. The proof of service must show who served the preliminary opposition, who was served with the preliminary opposition, how the preliminary opposition was served (by mail or in person), and the date the preliminary opposition was served.
- File the original preliminary opposition and the proof of service with the appellate division. You should make a copy of the preliminary opposition you are planning to file for your own records before you file it with the court. It is a good idea to bring or mail an extra copy of the preliminary opposition to the clerk when you file your original and ask the clerk to stamp this copy to show that the original has been filed.

You can get more information about how to serve court documents and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California Courts Online Self-Help Center at *www.courtinfo.ca.gov /selfhelp/lowcost/getready.htm#serving.*

(21) I have received a copy of an alternative writ or an order to show cause issued by the appellate division. Do I need to do anything?

Yes. Unless the trial court has already done what the alternative writ told it to do, you should serve and file a response called a "return."

As explained above, the appellate division will issue an alternative writ or an order to show cause only if the appellate division has decided that the petitioner may have shown that the trial court made a legal error that

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needs to be fixed. An "alternative writ" is an order telling the trial court either to do what the petitioner has requested in the petition (or some modified form of what the petitioner requested) or to show the appellate division why the trial court should not be ordered to do what the petitioner requested. An "order to show cause" is similar; it is an order telling the trial court to show the appellate division why the trial court should not be ordered to do what the petitioner requested in the petition (or some modified form of what the petitioner requested).

If the appellate division issues an alternative writ and the trial court does what the petitioner requested (or a modified form of what the petitioner requested as ordered by the appellate division), then no further action by the appellate division is needed and the appellate division may dismiss the petition. If the trial court does not comply with an alternative writ, however, or if the appellate division issues an order to show cause, then the respondent court or the real party in interest may serve and file a response to the appellate division's order, called a "return."

A return is your argument to the appellate division about why the trial court should not be ordered to do what the petitioner has requested. If you are represented by a lawyer in the writ proceeding, your lawyer will prepare your return. If you are not represented by a lawyer, you will need to prepare your own return. A return is usually a legal response called an "answer." An answer is used to admit or deny the facts alleged in the petition, to add to or correct the facts, and to explain any legal defenses to the legal arguments made by the petitioner. You should read California Code of Civil Procedure sections 430.10–430.80 for more information about answers. You can get copies of these statutes at any county law library or online at *www.leginfo.ca.gov/calaw.html*. A return can also include additional supporting documents not already filed by the petitioner.

If you do not file a return when the appellate division issues an alternative writ or order to show cause, it does not mean that the appellate division is required to issue the writ requested by the petitioner. However, the appellate division will treat the facts stated by the petitioner in the petition as true, which makes it more likely the appellate division will issue the requested writ.

Unless the appellate division sets a different filing deadline in its alternative writ or order to show cause, you must serve and file your return within 30 days after the appellate division issues the alternative writ or order to show cause. The return must be served on all the other parties to the writ proceeding. "Serving and filing" the return means that you must:

- Have somebody over 18 years old who is not a party to the case—so not you—mail or deliver ("serve") the return to the other parties in the way required by law.
- Make a record that the return has been served. This record is called a "proof of service." *Proof of Service (Appellate Division)* (form APP-109) can be used to make this record. The proof of service must show who served the return, who was served with the return, how the return was served (by mail or in person), and the date the return was served.
- File the original return and the proof of service with the appellate division. You should make a copy of the return you are planning to file for your own records before you file it with the court. It is a good idea to bring or mail an extra copy of the return to the clerk when you file your original and ask the clerk to stamp this copy to show that the original has been filed.

You can get more information about how to serve court documents and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California Courts Online Self-Help Center at *www.courtinfo.ca.gov /selfhelp/lowcost/getready.htm#serving*.

(22) I have received a copy of a notice from the appellate division indicating it is considering issuing a peremptory writ in the first instance. Do I need to do anything?

Yes. You should serve and file a response called an "opposition."

As explained in the answer to question (18), a "peremptory writ in the first instance" is an order telling the trial court to do what the petitioner has requested (or

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some modified form of what the petitioner requested as ordered by the appellate division) that is issued without the appellate division first issuing an alternative writ or order to show cause. The appellate division will not issue a peremptory writ in the first instance without first giving the parties notice and a chance to file an opposition. However, when the appellate division issues such a notice, it means that the appellate division is strongly considering granting the writ requested by the petitioner.

An opposition is your argument to the appellate division about why the trial court should not be ordered to do what the petitioner has requested. If you are represented by a lawyer in the writ proceeding, your lawyer will prepare your opposition. If you are not represented by a lawyer, you will need to prepare your own opposition. Like a return discussed above, an opposition is usually a legal response called an "answer." An answer is used to admit or deny the facts alleged in the petition, to add to or correct the facts, and to explain any legal defenses to the legal arguments made by the petitioner. You should read California Code of Civil Procedure sections 430.10–430.80 for more information about answers. You can get copies of these statutes at any county law library or online at *www.leginfo.ca.gov/calaw.html.*

Unless the appellate division sets a different deadline in its notice that it is considering issuing a peremptory writ, you must serve and file your opposition within 30 days after the appellate division issues the notice. The opposition must be served on all the other parties to the writ proceeding. "Serving and filing" the opposition means that you must:

- Have somebody over 18 years old who is not a party to the case—so not you—mail or deliver ("serve") the opposition to the other parties in the way required by law.
- Make a record that the opposition has been served. This record is called a "proof of service." *Proof of Service (Appellate Division)* (form APP-109) can be used to make this record. The proof of service must show who served the opposition, who was served with the opposition, how the opposition was served (by mail or in person), and the date the opposition was served.
- File the original opposition and the proof of service with the appellate division. You should make a copy of the opposition you are planning to file for your own records before you file it with the court. It is a good idea to bring or mail an extra copy of the opposition to the clerk when you file your original, and ask the clerk to stamp this copy to show that the original has been filed.

You can get more information about how to serve court documents and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California Courts Online Self-Help Center at *www.courtinfo.ca.gov /selfhelp/lowcost/getready.htm#serving.*

(23) What happens after I serve and file my return or opposition?

After you file a return or opposition, the petitioner has 15 days to serve and file a reply. The appellate division may also set the matter for oral argument. When all the papers have been filed (or the time to file them has passed) and oral argument is completed, the appellate division will decide the case.

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Source: Civil Litigation/California Civil Writ Practice/13 Superior Court Forms/§13.17 B. Form: Petition for Writ (Misdemeanor, Infraction, or Limited Civil Case) (Judicial Council Form APP-151)

§13.17 B. Form: Petition for Writ (Misdemeanor, Infraction, or Limited Civil Case) (Judicial Council Form APP-151)

APP-151 Petition for Writ (Misdemeanor, Infraction, or Limited Civil Case)

_____
Petitioner
(fill in the name of the person asking for the writ)

v.

Superior Court of California, County of _____

_____
Respondent
(fill in the name of the court whose action or ruling you are challenging)

_____
Real Party in Interest
(fill in the name of any other parties in the trial court case)

Clerk stamps date here when form is filed.

Clerk will fill in the number below:

Appellate Division Case Number:

☐ **Stay requested**
(see item (12) c. on page 6)

Instructions

- This form is only for requesting a **writ** in a misdemeanor, infraction, or limited civil case. You can get forms for other writs and for appeals at any courthouse or county law library or online at *www.courtinfo.ca.gov/forms.*
- Before you fill out this form, read *Information on Writ Proceedings in Misdemeanor, Infraction, and Limited Civil Cases* (form APP-150-INFO) to know your rights and responsibilities. You can get form APP-150-INFO at any courthouse or county law library or online at *www.courtinfo.ca.gov/forms*.
- Unless a special statute sets an earlier deadline, you should file this form no later than **30 days** after the date the superior court took the action or issued the ruling you are challenging in this petition (see form APP-150-INFO, page 7, for more information about the deadline for filing a writ petition). It is your responsibility to find out if a special statute sets an earlier deadline. If your petition is filed late, the appellate division may deny it.
- Fill out this form and make a copy of the completed form for your records and for the respondent (the trial court whose action or ruling you are challenging) and each of the real parties in interest (the other party or parties in the trial court case).
- Serve a copy of the completed form on the respondent and on each real party in interest and keep proof of this service. *Proof of Service (Appellate Division)* (form APP-109) can be used to make this record. You can get information about how to serve court papers and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California Courts Online Self-Help Center at *www.courtinfo.ca.gov/selfhelp/lowcost/getready.htm#serving*.
- Take or mail the completed form and your proof of service on the respondent and each real party in interest to the clerk's office for the appellate division of the superior court that took the action or issued the ruling you are challenging.

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Appellate Division Case Name: _____

Appellate Division Case Number:

1 Your Information

a. Petitioner (the party who is asking for the writ):

Name: _____

Street address: _____
Street *City* *State* *Zip*

Mailing address *(if different)*: _____
Street *City* *State* *Zip*

Phone: ( ) _____ E-mail *(optional)*: _____

b. Petitioner's lawyer *(skip this if the petitioner does not have a lawyer for this petition)*:

Name: _____ State Bar number: _____

Street address: _____
Street *City* *State* *Zip*

Mailing address *(if different)*: _____
Street *City* *State* *Zip*

Phone: ( ) _____ E-mail *(optional)*: _____

Fax *(optional)*: ( ) _____

The Trial Court Action or Ruling You Are Challenging

2 I am/My client is filing this petition to challenge an action taken or ruling made by the trial court in the following case:

a. Case name *(fill in the trial court case name)*: _____

b. Case number *(fill in the trial court case number)*: _____

3 The trial court action or ruling I am/my client is challenging is *(describe the action taken or ruling made by the trial court)*: _____

4 The trial court took this action or made this ruling on the following date *(fill in the date)*: _____

5 *If you are filing this petition more than 60 days after the date that you listed in 4, explain the extraordinary circumstances that caused the delay in filing this petition:*

Print

Appellate Division Case Name:_____

Appellate Division Case Number:

The Parties in the Trial Court Case

6 I/My client *(check and fill in a or b):*

a. ☐ was a party in the case identified in 2.

b. ☐ was not a party in the case identified in 2 but will be directly and negatively affected in the following way by the action taken or ruling made by the trial court *(describe how you/your client will be directly and negatively affected by the trial court's action or ruling):*

_____

_____

_____

7 The other party or parties in the case identified in 2 was/were *(fill in the names of the parties):*

_____

Appeals or Other Petitions for Writs in This Case

8 Did you or anyone else file an appeal about the same trial court action or ruling you are challenging in this petition? *(Check and fill in a or b):*

a. ☐ No

b. ☐ Yes *(fill in the appellate division case number of the appeal):*_____

9 Have you filed a previous petition for a writ challenging this trial court action or ruling? *(Check and fill in a or b):*

a. ☐ No

b. ☐ Yes *(Please provide the following information about this previous petition).*

(1) Petition title *(fill in the title of the petition):*_____

(2) Date petition filed *(fill in the date you filed this petition):* _____

(3) Case number *(fill in the case number of the petition):* _____

If you/your client filed more than one previous petition, attach another page providing this information for each additional petition. At the top of each page, write "APP-151, item 9.")

Reasons for This Petition

10 The trial court made the following legal error or errors when it took the action or made the ruling described in 3 *(check and fill in at least one):*

a. ☐ The trial court has not done or has refused to do something that the law says it *must* do.

(1) *Describe what you believe the law says the trial court must do:*_____

_____

_____

_____

(2) *Identify the law (the section of the Constitution or statute, published court decision, or other legal authority) that says the trial court must do this:*_____

_____

_____

_____

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10 (continued)

(3) *Identify where in the supporting documents (the record of what was said in the trial court and the documents from the trial court) it shows that the court did not do or refused to do this:*

_____

_____

_____

☐ *Check here if you need more space to describe the reason for your petition and attach a separate page or pages describing it. At the top of each page, write "APP-151, item 10a."*

b. ☐ The trial court has done something that the law says the court *cannot or must not* do.

(1) *Describe what the trial court did:*_____

_____

_____

_____

(2) *Identify where in the supporting documents (the record of what was said in the trial court and the documents from the trial court) it shows that the court did this:* _____

_____

_____

_____

(3) *Identify the law (the section of the Constitution or statute, published court decision, or other legal authority) that says the trial court cannot or must not do this:* _____

_____

_____

_____

☐ *Check here if you need more space to describe the reason for your petition and attach a separate page or pages describing it. At the top of each page, write "APP-151, item 10b."*

c. ☐ The trial court has performed or said it is going to perform a judicial function (like deciding a person's rights under law in a particular situation) in a way the court does not have the legal power to do.

(1) *Describe what the trial court did or said it is going to do:* _____

_____

_____

_____

(2) *Identify where in the supporting documents (the record of what was said in the trial court and the documents from the trial court) it shows that the court did or said it was going to do this:*

_____

_____

_____

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10 (continued)

(3) *Identify the law (the section of the Constitution or statute, published court decision, or other legal authority) that says the trial court does not have the power to do this:*

_____

_____

_____

☐ *Check here if you need more space to describe this reason for your petition and attach a separate page or pages describing it. At the top of each page, write "APP-151, item 10c."*

☐ *Check here if there are more reasons for this petition and attach an additional page or pages describing these reasons. At the top of each page, write "APP-151, item 10d."*

11 This petition will be granted only if there is no other adequate way to address the trial court's action or ruling other than by issuing the requested writ.

a. *Explain why there is no way other than through this petition for a writ—through an appeal, for example—for your arguments to be adequately presented to the appellate division:*

_____

_____

_____

_____

b. *Explain how you/your client will be irreparably harmed if the appellate division does not issue the writ you are requesting:* _____

_____

_____

_____

_____

Order You Are Asking the Appellate Division to Make

12 I request that this court *(check and fill in all that apply):*

a. ☐ order the trial court to do the following *(describe what, if anything, you want the trial court to be ordered to do):* _____

_____

_____

_____

b. ☐ order the trial court not to do the following *(describe what, if anything, you want the trial court to be ordered NOT to do)*: _____

_____

_____

_____

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12 (continued)

c. ☐ issue a stay ordering the trial court not to take any further action in this case until this court decides whether to grant or deny this petition *(describe below why it is urgent that the trial court not take any further action and check the Stay requested box on page 1 of this form):*

_____

_____

_____

_____

I/My client:

(1) ☐ asked the trial court to stay these proceedings, but the trial court denied this request *(include in your supporting documents a copy of the trial court's order denying your request for a stay).*

(2) ☐ did not ask the trial court to stay these proceedings for the following reasons *(describe below why you did not ask the trial court to stay these proceedings):*

_____

_____

_____

_____

d. ☐ take other action *(describe):* _____

_____

_____

_____

_____

e. ☐ grant any additional relief that the appellate division decides is fair and appropriate.

Supporting Documents

13 Is a record of what was said in the trial court about the action or ruling you are challenging attached as required by rule 8.931(b)(1)(D) of the California Rules of Court?

a. ☐ Yes, a transcript or an official electronic recording of what was said in the trial court is attached.

b. ☐ No, a transcript or official electronic recording is not attached, but I have attached a declaration (a statement signed under penalty of perjury) *(Check (1) or (2):*

(1) ☐ stating the transcript or electronic recording has been ordered, the date it was ordered, and the date it is expected to be filed

(2) ☐ explaining why the transcript or official electronic recording is not available and providing a fair summary of what was said in the trial court, including the petitioner's arguments and any statement by the trial court supporting its ruling.

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14 Are the following documents attached as required by rule 8.931(b)(1)(A)–(C):

- The trial court ruling being challenged in this petition
- All documents and exhibits submitted to the trial court supporting and opposing the petitioner's position
- 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 being challenged? *(Check a or b):*

a. ☐ Yes, these documents are attached.

b. ☐ No, these documents are not attached for the following reasons *(explain why these documents are not attached and give a fair summary of the substance of these documents. Note that rule 8.931 provides that, in extraordinary circumstances, the petition may be filed without these documents, but the petitioner must explain the urgency and the circumstances making the documents unavailable):*

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

Verification

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _____

_____ ▶ _____

Type or print your name *Signature of petitioner or attorney*

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14

Overview of Appellate Court Writ Practice

The Hon. Kathleen M. Banke

I. INTRODUCTION §14.1

II. PROCEDURES FOR PROSECUTING APPELLATE COURT WRITS §14.2

III. COVERAGE OF APPELLATE COURT WRIT PRACTICE §14.3

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§14.1 I. INTRODUCTION

The courts of appeal and the California Supreme Court can issue the same kinds of civil writs as the superior courts. However, writ practice in the appellate courts is very different from writ practice in the superior courts. In contrast with superior court writ proceedings, which generally challenge actions by nonjudicial bodies or officials, most appellate court writ proceedings challenge *judicial* action taken by a superior court in an underlying civil lawsuit. Thus, writ review by the appellate courts is almost always in the nature of immediate interlocutory appellate review, bypassing the usual requirement that there be only one appeal at the end of a case following entry of final judgment.

Accordingly, writ review by the courts of appeal is almost always highly discretionary, and that discretion is rarely exercised. The vast majority of appellate court writ petitions are summarily denied in one- or two-sentence orders without any reasons stated. See chaps 15, 17. In the superior courts, in contrast, writ petitions generally are treated as another species of operative pleading and almost always heard on the merits, with the court issuing a final judgment (granting or denying the petition) that can be appealed to the court of appeal.

The staggering denial rate of appellate court writ petitions is not surprising. As the appellate courts see it, the petitioning party wants to cut in line ahead of hundreds of other parties who duly filed notices of appeal after entry of final judgment and are patiently waiting for the court to hear their cases. The appellate courts therefore agree to hear the merits of a writ petition only in exceptional circumstances, *e.g.*, if a writ proceeding is the designated and exclusive means of appellate review, if the petitioner is threatened with immediate and irreparable injury, or if the trial court plainly erred and further trial court proceedings would be a needless waste of the court's and parties' resources. See chaps 15, 17.

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§14.2 II. PROCEDURES FOR PROSECUTING APPELLATE COURT WRITS

As one would expect given the fundamentally different ways in which superior and appellate courts treat writ petitions, the writ procedures in these courts also differ significantly. The writ statutes provide little guidance as to procedures in the appellate courts. The rules of court, however, do provide considerable guidance, making writ practice in the courts of appeal much more uniform than writ practice in the superior courts. See chap 18.

An appellate court writ petition consists of a single bound document, the format of which is governed by the appellate rules of court. This document includes the formal petition (which can, and often does, include a request for an immediate stay of the lower court proceedings), verification, and a supporting memorandum. See chap 18. The petition must be supported by all relevant superior court documents and the reporter's transcript of the superior court hearing. This supporting documentation usually is bound in a separate volume of exhibits, the format of which is also governed by the rules of court. See chap 20.

The appellate courts also generally control the timing of writ proceedings. When an immediate stay is requested, the court usually acts on the request within a day or two and may grant or deny it, or issue an emergency stay and ask for opposition before granting or denying a stay pending the outcome of the writ proceeding. See chap 19. As for the writ petition, the rules of court allow, but do not require, a respondent or real party in interest to file preliminary opposition within 10 days. See chap 21. However, the appellate courts can deny a writ petition before any opposition is filed. Alternatively, either before or after preliminary opposition is filed, the appellate court can issue what is known as a *Palma* notice, asking for opposition and giving notice that the court may issue a peremptory writ without further briefing and without oral argument. See chap 22. Or, either before or after preliminary opposition is filed, the court can issue an alternative writ or order to show cause, setting a date for the "return" by the respondent and the real party in interest and a briefing schedule. If the court issues an alternative writ or order to show cause, this means the court has made the writ proceeding a full-fledged "cause" that it likely will decide on the merits after oral argument (the court might later decide that the alternative writ or order to show cause was improvidently granted and summarily dismiss the petition). See chap 24. Thus, in contrast to superior court writ proceedings, the vast majority of appellate court writ proceedings are handled and disposed of entirely on the papers and without oral argument.

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§14.3 III. COVERAGE OF APPELLATE COURT WRIT PRACTICE

Part II provides a practical guide to appellate court writ practice. The initial chapters of Part II discuss when a trial court ruling must be challenged by way of a writ proceeding either as the exclusive means of appellate review or as a prerequisite to seeking post-judgment appellate review, when discretionary writ review is authorized by statute, and other instances in which the appellate courts have exercised their discretion to grant writ review. See chaps 15-17. Subsequent chapters provide a detailed nuts-and-bolts discussion of appellate court writ procedures, including the content and format of papers filed by petitioners (see chaps 18-19), respondents, and real parties in interest (see chaps 21, 23), the timing and nature of actions that may be taken by the courts of appeal, and seeking further appellate review of a court of appeal's action on a writ petition (see chaps 22, 24-25).

Several chapters focus on specialized appellate writ proceedings, including petitions for writs of review challenging certain administrative actions (see chap 16), petitions for writs of supersedeas seeking to stay a superior court's judgment pending appeal (see chap 26), and petitions for review by the California Supreme Court (see chap 27).

Part II concludes with a collection of exemplar appellate court writ forms. See chap 28.

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15

Common Writs and Basic Requirements

Grace K. Won
David K. Ismay

I. SCOPE OF CHAPTER §15.1

II. WRIT OF MANDATE §15.2
- A. Description and Purpose §15.3
- B. Issuance Within Appellate Court's Discretion §15.4
- C. Substantive Requirements §15.5
- D. Function of Mandate
  - 1. To Compel Performance of Ministerial Duty §15.6
    - a. "Ministerial Duty" Defined §15.7
    - b. Examples of Ministerial Trial Court Actions §15.8
    - c. Examples of Nonjudicial Court Officer's Ministerial Duties §15.9
  - 2. To Compel Exercise of Discretion §15.10
  - 3. To Correct Abuse of Discretion §15.11
    - a. When Facts Dictate Particular Result §15.12
    - b. When Trial Court Has Made Error of Law §15.13

III. WRIT OF PROHIBITION
- A. Description and Purpose §15.14
- B. Substantive Requirements
  - 1. Challenged Action Must Be Judicial §15.15
    - a. Most Court Action Is Judicial §15.16
    - b. Ministerial Court Actions Do Not Qualify §15.17
  - 2. Challenged Action Must Be Threatened But Not Completed §15.18
    - a. Prohibition Does Not Restrain Merely Possible Action §15.19
    - b. Prohibition Can Restrain Continuing or Incomplete Judicial Action §15.20
    - c. When Trial Court Completes Act Before Appellate Court Rules on Petition §15.21
  - 3. Jurisdictional Defect Must Exist §15.22
    - a. Test for Determining Existence of Jurisdictional Defect §15.23
    - b. When Only Portion of Threatened Judicial Action Exceeds Court's Jurisdiction §15.24
- C. Seek Relief in Trial Court First §15.25
- D. Examples of Threatened Judicial Acts in Excess of Jurisdiction §15.26

IV. WRIT OF REVIEW (CERTIORARI)
- A. Description and Purpose §15.27
- B. Writ Brings Up Record From Lower Court §15.28
- C. Substantive Requirements for Writ of Review (Certiorari)
  - 1. Act to Be Reviewed Must Be Judicial §15.29
  - 2. Judicial Act Must Be Completed §15.30
  - 3. Act Must Be in Excess of Court's Jurisdiction §15.31
  - 4. No Right of Appeal §15.32
    - a. Requirement Strictly Applied §15.33
    - b. Requirement Applies Even if Appeal Is Not Speedy or Adequate Remedy §15.34
    - c. Remote Appeal May Justify Writ §15.35
    - d. Exception When Right to Appeal Lost Through No Fault of Petitioner §15.36
- D. Examples of Completed Judicial Action Subject to Writ of Review (Certiorari)
  - 1. Rulings in Contempt Proceedings §15.37
  - 2. Other Judicial Actions §15.38

V. OTHER WRITS
- A. Habeas Corpus
  - 1. Description and Purpose
    - a. Inquires Into Cause of Imprisonment or Restraint §15.39

b. Used Mostly in Criminal Context §15.40
2. Uses in Civil Proceedings
a. Civil Contempt §15.41
b. Child Custody §15.42
c. Civil Commitment §15.43
B. Coram Nobis and Coram Vobis
1. Description and Purpose
a. Correct Errors of Fact §15.44
b. Case Law Governs §15.45
c. Used Mostly in Criminal Cases §15.46
2. Requirements for Issuance §15.47
3. Availability in Civil Cases §15.48
C. Writ of Supersedeas §15.49
D. Quo Warranto §15.50

VI. BASIC REQUIREMENTS FOR WRIT RELIEF
A. Petitioner Must Have Beneficial Interest
1. "Beneficial Interest" Defined §15.51
2. Party Aggrieved by Trial Court Ruling Has Beneficial Interest §15.52
3. Petitioner Need Not Be Party to Underlying Action §15.53
4. When Petitioner Challenges Nonjudicial Action in Court of Appeal §15.54
5. Trial Court Usually Not Beneficially Interested §15.55
B. Petitioner Must Have No Other Adequate Remedy
1. Appeal Is Usually Adequate Remedy §15.56
a. Appealable Interlocutory Orders and Judgments §15.57
b. Appeal From Final Judgment §15.58
c. If Writ Proceeding Is Exclusive Means of Appellate Review §15.59
2. Petitioner's Burden to Show Inadequacy of Other Remedies §15.60
C. Petitioner Must Face Irreparable Injury §15.61
1. Specific and Immediate Harm §15.62
a. When Ruling Deprives Petitioner of Opportunity to Present Case §15.63
b. When Ruling Is Clearly Erroneous and Substantially Prejudicial §15.64
2. Petitioner's Burden to Show Irreparable Injury §15.65
D. Issue Must Not Be Moot
1. Writ Generally Will Not Issue When Case Is Moot §15.66
2. Public Interest May Override Mootness §15.67
E. Issue Usually Must Have Been Raised in Trial Court §15.68
F. Other Factors §15.69
1. Issue of Widespread Public Importance or First Impression §15.70
2. Trial Courts in Conflict §15.71

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§15.1 I. SCOPE OF CHAPTER

This chapter begins with an overview of the writs most frequently sought in the appellate courts: traditional mandate (see §§15.2-15.13), prohibition (see §§15.14-15.26), and review (certiorari) (see §§15.27-15.38). This is a general discussion of the basic character and uses of these writs. On specific contexts in which the appellate courts issue mandate, prohibition, and review, see chap 16 and App A. The chapter also discusses other writs that may be sought from the appellate courts, including habeas corpus (see §§15.39-15.43) and coram nobis and coram vobis (see §§15.44-15.48). Again, this is a general overview of the nature and general uses of these writs. On specific contexts in which the appellate courts issue these writs, see chap 16 and App A. On writs of supersedeas to obtain a stay during the pendency of an appeal, see chap 26.

The chapter next addresses the basic requirements for writ relief in the appellate courts, *i.e.*:

- The petitioner must have a beneficial interest in the outcome of the proceedings (see §§15.51-15.55);
- The petitioner must have no other adequate legal remedy (see §§15.56-15.60);
- The petitioner will sustain irreparable injury if writ relief is not granted (see §§15.61-15.65);
- The issue generally must not be moot (see §§15.66-15.67); and
- The issue usually must have been raised in the trial court (see §15.68).

This discussion also includes other factors that appellate courts consider in determining whether to hear a writ petition on the merits. See §§15.69-15.71. On drafting an appellate court writ petition and alleging the requirements for writ relief, see §§18.5-18.60.

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§15.2 II. WRIT OF MANDATE

A writ of mandate issued by an appellate court under CCP §1085 orders the respondent to take some specified action within a specified period of time. The vast majority of writ petitions filed in the appellate courts seek to compel action by a trial court in an ongoing civil action. In exceedingly rare circumstances, a party aggrieved by nonjudicial action (*e.g.,* by a governmental or private body) may file a mandate proceeding in an appellate court in the first instance, bypassing the superior court. In such cases, the nature of the appellate court writ proceeding is largely the same as a superior court writ proceeding, although the procedures for prosecuting a writ proceeding in the appellate court differ significantly from those applicable to prosecuting a writ proceeding in the superior court. Compare chap 5 (initiating superior court writ proceeding) with chap 18 (initiating appellate court writ proceeding).

NOTE: The terms "mandate" and "mandamus" are used interchangeably. CCP §1084. Mandate under CCP §1085 is sometimes referred to as traditional mandate to distinguish it from administrative mandamus under CCP §1094.5. Administrative mandamus is a statutorily created type of mandate used to review most administrative adjudicatory decisions. Accordingly, most administrative mandamus actions are commenced in the superior courts, and the courts of appeal usually consider such writ actions only on appeal from a superior court judgment. See chap 3; California Administrative Mandamus §§1.5-1.12 (3d ed Cal CEB 2003).

For discussion of superior court mandate proceedings challenging nonjudicial action, see chaps 2 (traditional mandate under CCP §1085) and 3 (administrative mandamus under CCP §1094.5).

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§15.3 A. Description and Purpose

The writ of mandate is "the principal extraordinary writ surviving under California law." *City of King City v Community Bank* (2005) 131 CA4th 913, 925, 32 CR3d 384. See Comment, *Appellate Review in California with the Extraordinary Writs*, 36 Cal L Rev 75, 79 (March 1948) (reviewing history of writ of mandate). A writ of mandate is a prerogative writ that (a) compels the performance of a mandatory ministerial duty on the part of a subordinate court, corporation, board, agency, or officer (see §§15.6-15.9), (b) compels a subordinate court, corporation, board, agency, or officer to exercise its discretion (see §15.10), or (c) corrects a clear abuse of discretion by a subordinate court, corporation, board, agency, or officer (see §§15.11-15.13). See CCP §1085(a).

On specific contexts in which the appellate courts have issued writs of mandate, see chap 16 and App A. On seeking a writ of mandate from the superior courts, see chap 2.

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§15.4 B. Issuance Within Appellate Court's Discretion

True to its historical roots as a prerogative of the English royal courts, there is no right to issuance of a writ of mandate. *Fisherman's Wharf Bay Cruise Corp. v Superior Court* (2003) 114 CA4th 309, 319, 7 CR3d 628. In appellate court writ practice in particular, the issuance of writs of mandate is highly discretionary, and in the vast majority of cases—about 90 percent—the appellate courts decline to exercise their original jurisdiction. See Judicial Council of California, Court Statistics Report, Courts of Appeal, Table 5 (2007), available at http://www.courtinfo.ca.gov/reference/documents/csr2007.pdf. On factors appellate courts consider in deciding whether to exercise their discretion to grant writ review, see §§15.51-15.71. On specific contexts in which appellate courts have issued writs of mandate, see chap 16 and App A.

In the rare instance in which a writ proceeding is the exclusive means of obtaining appellate review of an order or judgment (see §§16.2-16.48), the appellate court's discretion with respect to writ relief is limited. In such cases, the court may not deny a meritorious writ petition merely because it presents no important public issue or because the court considers the case less worthy of its attention than other pending cases. See *Powers v City of Richmond* (1995) 10 C4th 85, 114, 40 CR2d 839 (because writ relief is exclusive means of appellate review under Public Records Act, appellate court's refusal to entertain otherwise meritorious writ petition would likely constitute abuse of discretion).

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Source: Civil Litigation/California Civil Writ Practice/15 Common Writs and Basic Requirements/§15.5 C. Substantive Requirements

§15.5 C. Substantive Requirements

The substantive requirements for issuance of a writ of mandate are (CCP §1085(a)):

- A clear and present ministerial duty of the respondent to do an act that the law specially enjoins; and
- A clear, present, and beneficial right of the petitioner to the performance of that duty.

See *Moran v Department of Motor Vehicles* (2006) 139 CA4th 688, 691, 43 CR3d 116; *Fisherman's Wharf Bay Cruise Corp. v Superior Court* (2003) 114 CA4th 309, 319, 7 CR3d 628.

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D. Function of Mandate

§15.6 1. To Compel Performance of Ministerial Duty

The primary purpose of a writ of mandate issued by an appellate court is to compel the performance of a ministerial legal duty, whether before, during, or after trial, by a subordinate court. See CCP §1085(a) (mandate issues "to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station"); *Fisherman's Wharf Bay Cruise Corp. v Superior Court* (2003) 114 CA4th 309, 319, 7 CR3d 628 ("mandate will lie if the trial court has a clear, present and usually ministerial duty and the petitioner has a clear, present and beneficial right to performance of that duty").

NOTE: In writ proceedings challenging trial court actions, the courts of appeal rarely specifically discuss the concept of ministerial duty. Compare *Henry v Superior Court* (2008) 160 CA4th 440, 72 CR3d 808 (no discussion), *California Pub. Employees' Retirement Sys. v Superior Court* (2008) 160 CA4th 174, 72 CR3d 561 (same), *Zevnik v Superior Court* (2008) 159 CA4th 76, 70 CR3d 817 (same), and *Snyder v Superior Court* (2007) 157 CA4th 1530, 69 CR3d 600 (same), with *Fisherman's Wharf Bay Cruise Corp. v Superior Court* (2003) 114 CA4th 309, 319, 7 CR3d 628 (discussing requirements for writ relief). Rather, the appellate courts generally focus on whether the factors warranting immediate appellate review are present (*e.g.,* irreparable harm, issue of first impression or of widespread public importance; see §§15.51-15.71) and then decide whether the trial court erred as a matter of law or clearly abused its discretion.

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§15.7 a. "Ministerial Duty" Defined

A ministerial duty is one that does not require the exercise of judgment and discretion. *Jenkins v Knight* (1956) 46 C2d 220, 223, 293 P2d 6. See *Kavanaugh v West Sonoma County Union High Sch. Dist.* (2003) 29 C4th 911, 916, 129 CR2d 811 ("[A] ministerial act is an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning such act's propriety or impropriety, when a given state of facts exists"). See also §§2.5-2.7.

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§15.8 b. Examples of Ministerial Trial Court Actions

Mandate has issued to compel trial courts to:

- Give an unlawful detainer action pretrial calendar preference, as required by statute. *Cohen v Superior Court* (1967) 248 CA2d 551, 554, 56 CR 813.
- Grant a motion for preference according to mandatory statutory language. *Peters v Superior Court* (1989) 212 CA3d 218, 227, 260 CR 426.
- Permit an indigent plaintiff to proceed without prepayment of jury fees (*Isrin v Superior Court* (1965) 63 C2d 153, 154, 45 CR 320) or to hold a required evidentiary hearing before denying an in forma pauperis application (*Cruz v Superior Court* (2004) 120 CA4th 175, 180, 14 CR3d 917).
- Accept for filing a substitution-of-attorney document. *Hock v Superior Court* (1990) 221 CA3d 670, 671, 270 CR 579.
- Hear and determine a motion to bifurcate a trial. *Trickey v Superior Court* (1967) 252 CA2d 650, 655, 60 CR 761.

For further discussion of specific contexts in which appellate courts have issued writs of mandate, see chap 16 and App A.

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§15.9 c. Examples of Nonjudicial Court Officer's Ministerial Duties

In rare instances, a party to a trial court proceeding may be aggrieved by the action (or inaction) of a nonjudicial court officer. Mandate has issued to compel:

- The clerk and the court reporter to prepare, certify, and transmit transcripts. *Sullivan v Superior Court* (1954) 128 CA2d 476, 477, 275 P2d 595.
- The clerk to enter a default judgment. *W. A. Rose Co. v Municipal Court* (1959) 176 CA2d 67, 74, 1 CR 49.
- The clerk to issue subpoenas compelling witnesses to attend and testify. *Patterson v Sharp* (1967) 253 CA2d 838, 841, 61 CR 517.

For discussion of specific contexts in which appellate courts have issued writs of mandate, see chap 16 and App A.

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§15.10 2. To Compel Exercise of Discretion

Mandate can issue to compel a trial court to exercise its discretion if the court is required, but has refused, to do so. See, *e.g., Payne v Superior Court* (1976) 17 C3d 908, 925, 132 CR 405 (trial court erroneously refused to consider whether incarcerated defendant was indigent and entitled to counsel; writ issued to compel trial court to vacate default judgment and to exercise its discretion to ensure meaningful opportunity to be heard); *Thurmond v Superior Court* (1967) 66 C2d 836, 840, 59 CR 273 (trial court erroneously viewed continuance statute as mandatory; writ issued to compel trial court to reconsider motion to continue and to exercise its discretion in connection therewith).

The corollary to the rule that mandate issues to compel the performance of a ministerial duty (see §15.6) is that mandate generally will not issue to compel a trial court to exercise its discretion in a particular way. See, *e.g., Fisherman's Wharf Bay Cruise Corp. v Superior Court* (2003) 114 CA4th 309, 319, 7 CR3d 628.

For discussion of specific contexts in which appellate courts have issued writs of mandate, see chap 16 and App A.

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§15.11 3. To Correct Abuse of Discretion

Mandate also will issue to correct an abuse of discretion. See, *e.g., Bell v Superior Court* (2007) 158 CA4th 147, 164, 69 CR3d 328 (trial court abused its discretion in denying class certification; writ issued); *Biosense Webster, Inc. v Superior Court* (2006) 135 CA4th 827, 834, 37 CR3d 759 (trial court abused its discretion in issuing temporary restraining order; writ issued).

In writ proceedings, the appellate courts often use the phrase "abuse of discretion" to mean more than simply whether the trial court "exceeded the bounds of reason," which is the traditional formulation of the abuse of discretion standard on appeal. See, *e.g., Bell v Superior Court, supra* (review of class certification ruling for abuse of discretion included whether trial court used improper criteria or made erroneous legal assumptions); *Biosense Webster, Inc. v Superior Court, supra* (review of temporary restraining order included whether trial court "exceeded the bounds of reason" as well as whether under facts discretion could be exercised "in only one way"); *Fisherman's Wharf Bay Cruise Corp. v Superior Court* (2003) 114 CA4th 309, 319, 7 CR3d 628 (review of order granting summary adjudication included whether trial court made error of law, which "automatically" would constitute abuse of discretion).

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§15.12 a. When Facts Dictate Particular Result

If the issue in question is committed to the trial court's sound discretion but the facts are such that that discretion can be exercised in only one way and the trial court has ruled otherwise, the trial court has committed an abuse of discretion that may be corrected by writ. See, *e.g.*, *Robbins v Superior Court* (1985) 38 C3d 199, 205, 211 CR 398 ("If, on the basis of undisputed facts, it is clear that the trial court abused its discretion in failing to issue the preliminary injunction, a writ of mandamus to compel issuance of the injunction is appropriate"); *Ombudsman Servs. of N. Cal. v Superior Court* (2007) 154 CA4th 1233, 1239, 65 CR3d 456 (trial court abused discretion in ordering disclosure of confidential records); *TSI Seismic Tenant Space, Inc. v. Superior Court* (2007) 149 CA4th 159, 165, 56 CR3d 751 ("where the exercise of discretion on the basis of established criteria may yield but one conclusion, an abuse of discretion may be found"); *Pacific Indem. Co. v Superior Court* (1966) 246 CA2d 63, 72, 54 CR 470 ("[S]ince under the circumstances the discretion of the trial court could be legally exercised in only one way, it was an abuse of discretion for the court to deny a preliminary injunction").

For discussion of specific contexts in which appellate courts have issued writs of mandate, see chap 16 and App A.

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§15.13 b. When Trial Court Has Made Error of Law

The courts of appeal also sometimes characterize legal error by the trial court as an abuse of discretion. See, *e.g., Bell v Superior Court* (2007) 158 CA4th 147, 164, 69 CR3d 328 (review of class certification ruling for abuse of discretion included whether trial court used improper criteria or made erroneous legal assumptions); *Fisherman's Wharf Bay Cruise Corp. v Superior Court* (2003) 114 CA4th 309, 319, 7 CR3d 628 (on motion for summary adjudication, "the trial court has no discretion to exercise," *i.e.,* there either is or is not a triable issue of material fact; if trial court errs in ruling on motion, "it has made an error of law, which automatically constitutes an abuse of discretion"); *Mason v Superior Court* (1985) 163 CA3d 989, 993, 210 CR 63 (trial court abused its discretion because "the only proper way the trial court could exercise its discretion was to deny both the motion for summary judgment and the motion to expunge the lis pendens"). See also CCP §1094.5(b) (defining abuse of discretion for purposes of administrative mandamus to include not proceeding in manner required by law).

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III. WRIT OF PROHIBITION

§15.14 A. Description and Purpose

Prohibition is used to prevent or restrain an inferior tribunal from erroneously assuming jurisdiction or acting in excess of its jurisdiction. CCP §1102; *C. S. Smith Metro. Mkt. Co. v Superior Court* (1940) 16 C2d 226, 228, 105 P2d 587 (prohibition "provide[s] a remedy when rigidity of the ordinary procedure fails to protect a litigant from the wrongful exercise of jurisdiction by a court"). Because prohibition restrains only judicial action (see §§15.14-15.17), the writ has more vitality in the appellate courts than it does in the superior courts.

On the rare use of prohibition in the superior courts to restrain judicial action by a body other than a court, see §§4.5-4.8. For discussion of specific contexts in which appellate courts have issued writs of mandate and prohibition, see chap 16 and App A.

NOTE: The writ of prohibition is a preventive remedy, rather than a corrective or remedial one. *Evans v Superior Court* (1939) 14 C2d 563, 580, 96 P2d 107; *Schoenfeldt v Municipal Court* (1960) 187 CA2d 748, 750, 9 CR 912. Thus, it can only be used to challenge threatened, but not completed, judicial actions. See §§15.18-15.21. Completed judicial actions in excess of jurisdiction can be challenged by a writ of review (certiorari). See §§15.27-15.38.

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B. Substantive Requirements

§15.15 1. Challenged Action Must Be Judicial

A writ of prohibition will lie only as to judicial acts. CCP §1102 (prohibition "arrests the proceedings of any tribunal… exercising judicial functions").

PRACTICE TIP: Because the definition of judicial action is the same for writs of prohibition and writs of review (certiorari), prohibition and review cases can be cited interchangeably on this point. See *Auto Equity Sales, Inc. v Superior Court* (1962) 57 C2d 450, 454, 20 CR 321; 8 Witkin, California Procedure, *Extraordinary Writs* §52 (5th ed 2008). To show that such citations are purposeful and knowledgeable, and not the result of carelessness, a petition should make clear that review cases are being cited in a prohibition proceeding because the issue of judicial action is the same in both contexts.

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§15.16 a. Most Court Action Is Judicial

Most court action is judicial. Therefore, the trial courts and courts of appeal are generally subject to prohibition. See, *e.g., Housing Auth. of the City of Eureka v Superior Court* (1950) 35 C2d 550, 556, 219 P2d 457, superseded by statute on other grounds (trial court's issuance of alternative writ of mandate and order to show cause were judicial acts subject to prohibition).

On the rare use of prohibition in the superior courts to restrain judicial action by a body other than a court, see §§4.5-4.8.

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§15.17 b. Ministerial Court Actions Do Not Qualify

Ministerial acts performed by a court or its officers do not qualify as judicial acts for purposes of prohibition. *Duke v Justice's Court* (1940) 42 CA2d 178, 179, 108 P2d 707. The character of the act, not of the actor, determines whether the challenged act is judicial. For example, hearing and deciding a motion or rendering a decision on the merits of a case, are judicial actions. However, issuing a writ of execution after entry of judgment is a ministerial act that prohibition cannot reach. *Duke v Justice's Court, supra*. Court clerks usually perform ministerial functions and therefore are not subject to prohibition. Mandate, rather than prohibition, is the proper vehicle for challenging or enforcing a ministerial act. See §§15.6-15.9.

PRACTICE TIP: If there is any doubt whether a threatened act is judicial or ministerial, the petitioner should alternatively pray for both prohibition and mandate. See §18.3.

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§15.18 2. Challenged Action Must Be Threatened But Not Completed

A writ of prohibition "arrests the proceedings." CCP §1102. Accordingly, it issues to enjoin only a threatened, but not completed, exercise of judicial power. *Aronoff v Franchise Tax Bd.* (1963) 60 C2d 177, 181, 32 CR 1; see *Melancon v Superior Court* (1954) 42 C2d 698, 704, 268 P2d 1050 (prohibition not available to challenge trial court's order granting plaintiff's motion to furnish security); *City of Santa Barbara v Superior Court* (1966) 240 CA2d 612, 614, 49 CR 798 (prohibition issued to prevent new trial when motion for new trial was invalid and order directing new trial was void).

PRACTICE TIP: Completed judicial actions must be challenged by way of a petition for a writ of review (certiorari). See *Duke v Justice's Court* (1940) 42 CA2d 178, 179, 108 P2d 707 (writ of review, not prohibition, was proper vehicle to challenge order granting motion to enforce judgment); *Chase v Superior Court* (1962) 210 CA2d 872, 878, 27 CR 383 (petition for writ of prohibition deemed one for review because trial court had already issued challenged order); *Lambert v Municipal Court* (1960) 179 CA2d 682, 3 CR 894 (prohibition not available to annul trial court's entry of judgment). On writs of review challenging completed judicial actions, see §§15.27-15.38.

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§15.19 a. Prohibition Does Not Restrain Merely Possible Action

Prohibition will not restrain judicial action that is merely possible. The petitioner must affirmatively show that the lower court has actually decided or ruled that it will take the challenged action. Compare *Lee v Superior Court* (1961) 196 CA2d 161, 163, 16 CR 268 (prohibition issued to restrain trial court from proceeding with new trial after court gave notice of pretrial procedures for retrial), and *Blache v Superior Court* (1939) 35 CA2d 740, 741, 96 P2d 970 (prohibition issued to arrest proceedings to hold petitioner in contempt for refusal to give deposition because, during oral argument, respondents indicated that they contemplated further action), with *Chodos v Superior Court* (1964) 226 CA2d 703, 714, 38 CR 301 (prohibition not available because trial court had not threatened to act to reset case for new trial).

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§15.20 b. Prohibition Can Restrain Continuing or Incomplete Judicial Action

If the challenged judicial action is continuing, such as when the court has granted an injunction whose effect continues into the future, the court's act is viewed as incomplete and prohibition may issue. For example, prohibition issued to:

- Restrain the trial court from further proceedings after the court sanctioned nonparty attorneys for their refusal to make discovery, except to recall a writ of execution. *Lund v Superior Court* (1964) 61 C2d 698, 715, 39 CR 891.
- Restrain the trial court from further proceedings after the court issued a temporary restraining order that was in excess of its jurisdiction. *City & County of San Francisco v Superior Court* (1959) 53 C2d 236, 244, 1 CR 158.
- Restrain the trial court from enforcing a preliminary injunction. *Evans v Superior Court* (1939) 14 C2d 563, 581, 96 P2d 107.

For further discussion of specific contexts in which appellate courts have issued writs of prohibition, see chap 16 and App A.

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§15.21 c. When Trial Court Completes Act Before Appellate Court Rules on Petition

If prohibition is an appropriate remedy when the writ is sought, but the lower court completes the challenged act before the appellate court rules on the petition, the appellate court may treat the proceeding as one for a writ of review (certiorari). *Chase v Superior Court* (1962) 210 CA2d 872, 878, 27 CR 383; *Wallace v Superior Court* (1956) 141 CA2d 771, 298 P2d 69, disapproved on other grounds in *Knoll v Davidson* (1974) 12 C3d 335, 343, 116 CR 97. On writs of review, see §§15.27-15.38. The appellate court may also treat the petition as one for a writ of mandate. *Miller v Superior Court* (1968) 69 C2d 14, 17, 69 CR 583 (parties stipulated to changing requested relief from prohibition to mandate in vacated opinion; trial court had signed and filed challenged order by time oral argument occurred).

PRACTICE TIP: If there is any doubt as to the appropriate remedy, counsel should request more than one type of writ. *Dresser v Superior Court* (1964) 231 CA2d 68, 74, 41 CR 473 (either mandate to compel dismissal or prohibition to prevent further proceedings was appropriate). See §18.3.

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§15.22 3. Jurisdictional Defect Must Exist

Prohibition is called a "jurisdictional" writ because it is not available to correct mere error or abuse of discretion, but is limited to restraining proceedings that are "without or in excess of" the jurisdiction of an inferior tribunal when no other adequate remedy is available. CCP §§1102-1103; *Running Fence Corp. v Superior Court* (1975) 51 CA3d 400, 432, 124 CR 339. Although most jurisdictional errors and defects are reviewable on appeal, thus generally precluding writ relief (see §§15.56-15.60), a writ of prohibition may still issue if the petitioner can show that an appeal is not an adequate remedy. See §15.61.

PRACTICE TIP: Because the substantive basis for a writ of prohibition—action in excess of jurisdiction—is the same as that for a writ of review (certiorari), cases involving prohibition and review may be cited interchangeably on this point. See *Auto Equity Sales, Inc. v Superior Court* (1962) 57 C2d 450, 454, 20 CR 321; 8 Witkin, California Procedure, *Extraordinary Writs* §52 (5th ed 2008). To show that such citations are purposeful and knowledgeable, and not the result of carelessness, a petition should make clear that review cases are being cited in a prohibition proceeding because the jurisdictional principles are the same.

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§15.23 a. Test for Determining Existence of Jurisdictional Defect

In a series of cases starting with *Abelleira v District Court of Appeal* (1941) 17 C2d 280, 109 P2d 942, the California Supreme Court established that the phrase "without or in excess of jurisdiction," as used in the context of a petition for a writ of prohibition, includes any act exceeding the power or competency of a court, board, or tribunal as defined by constitutional provisions, statutes, or judicially developed rules under the doctrine of stare decisis (17 C2d at 288):

> For the purpose of determining the right to… restraint by prohibition,… a much broader meaning [of jurisdiction] is recognized. Here it may be applied to a case where, though the court has jurisdiction over the subject matter and the parties in the fundamental sense, it has no "jurisdiction" (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites.

See also *Corona Unified Hosp. Dist. v Superior Court* (1964) 61 C2d 846, 852, 40 CR 745; *Auto Equity Sales, Inc. v Superior Court* (1962) 57 C2d 450, 454, 20 CR 321; *City & County of San Francisco v Superior Court* (1959) 53 C2d 236, 243, 1 CR 158; *The Rescue Army v Municipal Court* (1946) 28 C2d 460, 464, 171 P2d 8; *Redlands High Sch. Dist. v Superior Court* (1942) 20 C2d 348, 358, 125 P2d 490.

PRACTICE TIP: If there is any doubt whether the challenged trial court action is an erroneous exercise of the court's discretion (subject to mandate) or an act in excess of its jurisdiction (subject to prohibition), counsel should request issuance of a writ of mandate or prohibition. *Dresser v Superior Court* (1964) 231 CA2d 68, 74, 41 CR 473 (either mandate to compel dismissal or prohibition to prevent further proceedings was appropriate). See §18.3.

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§15.24 b. When Only Portion of Threatened Judicial Action Exceeds Court's Jurisdiction

When only a portion of a threatened judicial act exceeds the court's jurisdiction, prohibition is the appropriate remedy to restrain that portion. See *Wong v Superior Court* (1966) 246 CA2d 541, 550, 54 CR 782 (in divorce proceeding, writ of prohibition issued to restrain enforcement of portion of judgment requiring payment of attorney fees from community property); *American Radio Ass'n v Superior Court* (1965) 237 CA2d 891, 898, 47 CR 419 (writ of prohibition issued solely against injunction banning picketing, not against all further proceedings).

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§15.25 C. Seek Relief in Trial Court First

An appellate court will not presume that a lower court would erroneously overrule a valid objection to its jurisdiction. Therefore, a party challenging a trial court's action as beyond its jurisdiction should always raise a jurisdictional challenge in the trial court before seeking writ relief from the court of appeal. See *Huson v Superior Court* (1963) 220 CA2d 140, 142, 33 CR 568 (prohibition not available because record did not show that trial court arbitrarily refused to comply with mandatory dismissal statute); *MacFarland v Superior Court* (1934) 3 CA2d 173, 176, 38 P2d 800 (prohibition not available because petitioner failed to first attempt to intervene in trial court action and object to lower court's jurisdiction).

On the general requirement that a petitioner seeking writ relief from an appellate court first raise the issue in the trial court, see §15.68.

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§15.26 D. Examples of Threatened Judicial Acts in Excess of Jurisdiction

A court may exceed its jurisdiction for purposes of a writ of prohibition (or a writ of review (certiorari); see §§15.27-15.38) if it attempts to:

- Proceed after the defendant fails to answer or demur and the plaintiff has requested a default judgment. *W. A. Rose Co. v Municipal Court* (1959) 176 CA2d 67, 73, 1 CR 49.
- Deny a trial by jury if a jury has been timely requested. *Turlock Golf & Country Club v Superior Court* (1966) 240 CA2d 693, 695, 50 CR 70.
- Enforce a judgment or order that is void (*De Luca v Superior Court* (1968) 262 CA2d 254, 255, 68 CR 535; *Maben v Superior Court* (1967) 255 CA2d 708, 712, 63 CR 439; *Cubalevic v Superior Court* (1966) 240 CA2d 557, 563, 49 CR 698) or partially void (*Wong v Superior Court* (1966) 246 CA2d 541, 550, 54 CR 782).
- Try an action or make an order that is barred by a jurisdictional time limit, such as an order for new trial (see CCP §660; *City of Santa Barbara v Superior Court* (1966) 240 CA2d 612, 615, 49 CR 798 (motion premature; thus, order granting new trial void)) or a mandatory dismissal statute (see CCP §§583.110-583.160; *Dresser v Superior Court* (1964) 231 CA2d 68, 74, 41 CR 473 (either mandate to compel dismissal or prohibition to prevent further proceedings appropriate); *Mass v Superior Court* (1961) 197 CA2d 430, 433, 17 CR 549)). But see *General Motors Corp. v Superior Court* (1966) 65 C2d 88, 96, 52 CR 460 (if judicially implied exception to time period exists, prohibition will be denied).
- Award costs not provided by statute, entertain an action without requiring the posting of security for costs when such security is prescribed by statute, or dismiss an action for failure to comply with a statutory security provision when the provision does not apply. *Hagan v Superior Court* (1960) 53 C2d 498, 502, 2 CR 288.
- Enjoin the enactment or enforcement of a valid public statute or ordinance (*Crittenden v Superior Court* (1964) 61 C2d 565, 567, 39 CR 380; *City of Los Angeles v Superior Court* (1959) 51 C2d 423, 430, 333 P2d 745; *City of Santa Monica v Superior Court* (1964) 231 CA2d 223, 227, 41 CR 824) or enjoin the functioning of another branch of government (*Santa Clara County v Superior Court* (1949) 33 C2d 552, 559, 203 P2d 1; *Alden v Superior Court* (1963) 212 CA2d 764, 768, 28 CR 387).
- Obviate court-developed law and the doctrine of stare decisis. *Auto Equity Sales, Inc. v Superior Court* (1962) 57 C2d 450, 455, 20 CR 321; *Abelleira v District Court of Appeal* (1941) 17 C2d 280, 288, 109 P2d 942.

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IV. WRIT OF REVIEW (CERTIORARI)

§15.27 A. Description and Purpose

A writ of review (also called a writ of certiorari; see CCP §1067) issues to review a completed judicial action allegedly taken without or in excess of jurisdiction, when there is no right of appeal and no other adequate remedy. CCP §§1068(a), 1074; *Auto Equity Sales, Inc. v Superior Court* (1962) 57 C2d 450, 454, 20 CR 321. On the rare use of writs of review in the superior courts to restrain judicial action by a body other than a court, see §§4.13-4.15.

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§15.28 B. Writ Brings Up Record From Lower Court

Unlike a writ of mandate or prohibition, a writ of review (certiorari) merely orders the tribunal to which the writ is directed (*e.g.,* the trial court) to certify or return to the reviewing court a record of the proceedings below and to desist from further proceedings in the matter under review. CCP §§1070-1071; *Rondon v Alcoholic Beverage Control Appeals Bd.* (2007) 151 CA4th 1274, 1286, 60 CR3d 295.

NOTE: When the superior court appellate division grants a writ of review in a limited civil case directed to the superior court, the superior court is an inferior tribunal for the purposes of review. CCP §1068(b). On writ petitions in limited civil cases, see chap 12.

After issuing the writ, the appellate court reviews the record and enters a judgment affirming, annulling, or modifying the proceedings below. CCP §1075. That judgment, rather than the writ, is the ultimate relief sought.

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C. Substantive Requirements for Writ of Review (Certiorari)

§15.29 1. Act to Be Reviewed Must Be Judicial

Like a writ of prohibition, a writ of review (certiorari) lies only as to judicial action. Whether an action is judicial depends on the "character of the act or determination sought to be reviewed, rather than of the tribunal or officer by which the act or determination is made." *Quinchard v Board of Trustees of Alameda* (1896) 113 C 664, 668, 45 P 856.

PRACTICE TIP: Because the definition of judicial action is the same for writs of review and prohibition, review and prohibition cases can be cited interchangeably on this point. See *Auto Equity Sales, Inc. v Superior Court* (1962) 57 C2d 450, 454, 20 CR 321; 8 Witkin, California Procedure, *Extraordinary Writs* §52 (5th ed 2008). To show that such citations are purposeful and knowledgeable, and not the result of carelessness, a petition should make clear that prohibition cases are being cited in a review case because the issue of judicial action is the same in both contexts.

For further discussion of what constitutes judicial action, see §§15.15-15.17.

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§15.30 2. Judicial Act Must Be Completed

Only completed judicial acts are subject to a writ of review (certiorari). See CCP §§1067-1068; Comment, *Appellate Review in California with the Extraordinary Writs*, 36 Cal L Rev 75, 79 (March 1948) (writ of review is historical predecessor to general appellate review, surviving with only limited function of jurisdictional review). This contrasts with writs of prohibition, which reach threatened judicial action. See 8 Witkin, California Procedure, *Extraordinary Writs* §40 (5th ed 2008). See also §§15.18-15.21.

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§15.31 3. Act Must Be in Excess of Court's Jurisdiction

Like a writ of prohibition, a writ of review (certiorari) is a "jurisdictional" writ and issues to restrain or correct completed judicial action in excess of the lower court's jurisdiction. CCP §§1068(a), 1074; see *Howard v Superior Court* (1944) 25 C2d 784, 788, 154 P2d 849 (writ of review was unavailable to challenge trial court's order vacating fee award; even if trial court acted without sufficient grounds, that was error in exercise of its jurisdiction, not action in excess of its jurisdiction); *Redlands High Sch. Dist. v Superior Court* (1942) 20 C2d 348, 360, 125 P2d 490 (writ of review was unavailable to challenge trial court's allowance of case to proceed when plaintiffs failed to file verified claim; action was legal error, but not in excess of court's jurisdiction).

The test for determining whether a lower court exceeded its jurisdiction for purposes of a writ of review is the same as the test for determining whether a lower court has threatened to act in excess of its jurisdiction for purposes of a writ of prohibition (CCP §1102). See §§15.22-15.24.

PRACTICE TIP: Because the basis for a writ of review—action in excess of jurisdiction—is the same as that for a writ of prohibition, cases involving review and prohibition may be cited interchangeably on this point. See *Auto Equity Sales, Inc. v Superior Court* (1962) 57 C2d 450, 454, 20 CR 321; 8 Witkin, California Procedure, *Extraordinary Writs* §52 (5th ed 2008). To show that such citations are purposeful and knowledgeable, and not the result of carelessness, a petition should make clear that prohibition cases are being cited in a review case because the jurisdictional principles are the same.

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§15.32 4. No Right of Appeal

A writ of review (certiorari) will issue only when there is no right of appeal from the challenged action of the lower tribunal, board, or officer. CCP §1068(a); *Ivory v Superior Court* (1938) 12 C2d 455, 459, 85 P2d 894; *Stoner v Superior Court* (1945) 67 CA2d 760, 762, 155 P2d 697.

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§15.33 a. Requirement Strictly Applied

The requirement that there be no right of appeal from the challenged action is not limited to a right of immediate appeal. If the complained-of judicial action can be challenged on appeal from a final judgment, a writ of review (certiorari) will not issue. See *Howard v Superior Court* (1944) 25 C2d 784, 787, 154 P2d 849 (writ of review would not issue to review trial court order vacating allowance of attorney fees because "the matter will be reviewable upon an appeal from a subsequent order"); *Bank of Am. Nat'l Trust & Sav. Ass'n v Superior Court* (1942) 20 C2d 697, 703, 128 P2d 357 (writ of review would not issue because order allowing plaintiffs to amend complaint was reviewable on appeal from the final judgment; review will not lie "if the effect of the order sought to be annulled can be reviewed and nullified on an appeal from the final judgment even though the order itself is not appealable").

Nor is a writ of review available when a right to appeal existed but was lost through the aggrieved party's neglect. *Simmons v Superior Court* (1959) 52 C2d 373, 375, 341 P2d 13; *Goble v Municipal Court* (1956) 138 CA2d 725, 726, 292 P2d 585.

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§15.34 b. Requirement Applies Even if Appeal Is Not Speedy or Adequate Remedy

If a right of appeal exists, a writ of review (certiorari) is not available even if an appeal fails to provide a plain, speedy, or adequate remedy. See *State Bd. of Equalization v Superior Court* (1937) 9 C2d 252, 255, 70 P2d 482; *Monterey Club v Superior Court* (1941) 44 CA2d 351, 355, 112 P2d 321; *Hughson v Superior Court* (1932) 120 CA 658, 659, 8 P2d 227.

NOTE: This is in contrast with writs of mandate and prohibition, both of which are available when an appeal is available but is not an adequate remedy. See CCP §§1086, 1103(a).

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§15.35 c. Remote Appeal May Justify Writ

That there is a right of appeal from a related ruling or order may not foreclose issuance of a writ of review (certiorari). In *Estate of Bodger* (1954) 128 CA2d 710, 276 P2d 83, the court of appeal held that the trial court exceeded its jurisdiction in appointing an unwanted attorney for the petitioner. The respondent argued that a writ of review was unavailable because the petitioner could appeal from the court's later order granting attorney fees. Dismissing this proposed remedy as "obscure" and "tenuous," the court of appeal annulled the appointment order. 128 CA2d at 715; see also *Howard v Superior Court* (1944) 25 C2d 784, 787, 154 P2d 849 ("there may be situations in which an appeal from a subsequent order or from the final judgment may not be an adequate remedy").

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§15.36 d. Exception When Right to Appeal Lost Through No Fault of Petitioner

The courts have created a very limited exception to the no-right-to-appeal requirement when the opportunity to appeal is lost through no fault of the aggrieved party because of lack of knowledge or notice of the proceedings or of the entry of judgment. See *Grinbaum v Superior Court* (1923) 192 C 528, 556, 221 P 635 (court of appeal annulled trial court order adjudging nonresident petitioner incompetent and appointing guardian of her estate on ground that she had no notice of proceedings).

PRACTICE TIP: This is an extremely limited exception and not one on which parties should rely. In *Simmons v Superior Court* (1959) 52 C2d 373, 377, 341 P2d 13, the petitioner sought to have an order dismissing his action annulled because he failed to file an amended complaint after the defendant's demurrer was sustained and the time to appeal from the subsequent dismissal had expired. The petitioner was present at the hearing, but did not receive notice of the court's ruling. The supreme court denied relief because the petitioner could easily have learned of the ruling; his lack of knowledge resulted solely from his failure to stay informed as to the status of the case. See also *Arens v Superior Court* (1955) 45 C2d 623, 625, 290 P2d 257 (relief denied to petitioner who claimed lack of notice of probate order because statute did not require actual notice).

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D. Examples of Completed Judicial Action Subject to Writ of Review (Certiorari)

§15.37 1. Rulings in Contempt Proceedings

Because most judgments are appealable and most orders can be challenged on appeal after entry of a final judgment, the major use of the writ of review (certiorari) in California today is to review contempt proceedings, because judgments and orders in those proceedings are not appealable. CCP §§904.1(a)(1)(B), 1222; *Moffat v Moffat* (1980) 27 C3d 645, 656, 165 CR 877; see also 8 Witkin, California Procedure, *Extraordinary Writs* §35 (5th ed 2008). For a detailed discussion of contempt, see California Trial Objections, chap 57 (Cal CEB Annual); California Trial Practice: Civil Procedure During Trial §§16.99-16.129 (3d ed Cal CEB 1995); California Criminal Law Procedure and Practice, chap 58 (Cal CEB Annual). See also §§16.130-16.142.

If the petitioner has been incarcerated for contempt, the proper procedure is a petition for writ of habeas corpus. See *In re Buckley* (1973) 10 C3d 237, 240 n1, 110 CR 121; see also *Fine v Superior Court* (2002) 97 CA4th 651, 661 n4, 119 CR2d 376 (because jail sentence for contempt was stayed pending writ review, court treated writ "as one for certiorari").

PRACTICE TIP: It is permissible to alternatively request review or habeas relief. "A writ of habeas corpus or in the alternative a writ of certiorari is properly invoked where… a petitioner seeks to annul an order adjudging him in direct contempt of court." *Fine*, 97 CA4th at 661 n4; *Davidson v Superior Court* (1999) 70 CA4th 514, 522, 82 CR2d 739.

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§15.38 2. Other Judicial Actions

There are very few judicial actions (besides rulings in contempt proceedings; see §15.37) subject to review by writ of review (certiorari):

- Certain nonappealable probate and guardianship orders. See §§16.143-16.144.
- Public Utility Commission (PUC) rulings. See *Hillsboro Props. v Public Utils. Comm'n* (2003) 108 CA4th 246, 254, 133 CR2d 343 (discussing scope of review); *Pacific Bell v Public Utils. Comm'n* (2000) 79 CA4th 269, 280, 93 CR2d 910. See §§16.33-16.45.
- Certain orders for immediate possession of disputed premises in a condemnation proceeding. *County of Marin v Superior Court* (1960) 53 C2d 633, 636, 2 CR 758.
- Orders extending time to plead beyond the period authorized by CCP §1054. *Thelander v Superior Court* (1962) 58 C2d 811, 813 n3, 26 CR 643; *Baker v Superior Court* (1887) 71 C 583, 12 P 685.
- Orders denying exceptions to a court reporter's charge for preparing a transcript on appeal. *Summers v Superior Court* (1959) 53 C2d 295, 297, 1 CR 324.

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V. OTHER WRITS

A. Habeas Corpus

1. Description and Purpose

§15.39 a. Inquires Into Cause of Imprisonment or Restraint

The writ of habeas corpus permits a person who is unlawfully imprisoned or restrained to challenge the lawfulness of the imprisonment or restraint. Pen C §1473(a). Habeas corpus is also available to challenge aspects of constructive restraint such as bail, parole, probation, and release on recognizance, because such restraints can lead to incarceration. *People v Villa* (2009) 45 C4th 1063, 1069, 90 CR3d 344; *In re Catalano* (1981) 29 C3d 1, 8, 171 CR 667; *In re Paul W.* (2007) 151 CA4th 37, 53, 60 CR3d 329.

For a comprehensive discussion of the procedures in habeas corpus proceedings in trial and reviewing courts, see Appeals and Writs in Criminal Cases, chap 10 (3d ed Cal CEB 2007).

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§15.40 b. Used Mostly in Criminal Context

Although habeas corpus is not itself a criminal proceeding (Part II, Title XII of the Penal Code classifies habeas corpus as a "special proceeding of a criminal nature"), it is most commonly used by those charged with, or convicted of, criminal offenses. If a person "is not in prison or on probation or parole or otherwise in constructive custody, the remedy of habeas corpus is not available to him—and it is immaterial that lingering noncustodial collateral consequences are still attached to his conviction." *Mendez v Superior Court* (2001) 87 CA4th 791, 796, 104 CR2d 839. See *In re Stier* (2007) 152 CA4th 63, 82, 61 CR3d 181 (habeas corpus not available to litigate requirement that petitioner register as sex offender, even though registration could lead to loss of medical license and failure to register could lead to imprisonment).

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2. Uses in Civil Proceedings

§15.41 a. Civil Contempt

A person wrongfully imprisoned for contempt may seek review of the contempt judgment or order by a writ of review (certiorari) or a writ of habeas corpus. *In re Buckley* (1973) 10 C3d 237, 240 n1, 110 CR 121. See *Fine v Superior Court* (2002) 97 CA4th 651, 661 n4, 119 CR2d 376 (writ of habeas corpus or, alternatively, writ of review (certiorari) "is properly invoked where… a petitioner seeks to annul an order adjudging him in direct contempt of court"). For further discussion of writ proceedings challenging contempt orders, see §§16.130-16.142.

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§15.42 b. Child Custody

Habeas corpus is available in certain child custody matters. *In re Paul W.* (2007) 151 CA4th 37, 53, 60 CR3d 329. For a detailed discussion, see §§4.18-4.20.

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§15.43 c. Civil Commitment

Habeas corpus can be used to challenge commitment to a psychiatric facility. *In re Lois M.* (1989) 214 CA3d 1036, 1038, 263 CR 100; *In re Azzarella* (1989) 207 CA3d 1240, 1244, 254 CR 922. For a detailed discussion, see §§4.21-4.25.

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B. Coram Nobis and Coram Vobis

1. Description and Purpose

§15.44 a. Correct Errors of Fact

Coram nobis and coram vobis are writs of error used to obtain relief from errors of fact that are unrecognized before final disposition of the action—*i.e.*, the errors are not reflected in the trial record and could not have been considered at trial or during appeal—but which point unerringly to the conclusion the judgment should be reversed. *People v Kim* (2009) 45 C4th 1078, 1091, 90 CR3d 355; *In re Derek W.* (1999) 73 CA4th 828, 831, 86 CR2d 742. These writs are not a means of revising or reversing findings based on known facts, or facts that should have been known by the exercise of ordinary and reasonable diligence. *In re Derek W., supra*.

The writs are essentially identical, except that a petition for writ of coram nobis is addressed to the trial court and a petition for writ of coram vobis is addressed to the appellate court. *Betz v Pankow* (1993) 16 CA4th 931, 941, 20 CR2d 841 (when evidence of extrinsic fraud is discovered during pendency of appeal, "an appellate court can issue a writ of error *coram vobis* commanding the trial court to reconsider its decision in light of the newly discovered evidence"). Once a notice of appeal has been filed, the superior court loses jurisdiction and an application for a writ of error (in the form of a petition for a writ of coram vobis) must be made to the appellate court. See *People v Brady* (1973) 30 CA3d 81, 83, 105 CR 280.

For a comprehensive discussion of coram nobis, see Prickett, *The Writ of Error Coram Nobis in California*, 30 Santa Clara L Rev 1 (1990). On coram nobis and coram vobis in criminal cases, see Appeals and Writs in Criminal Cases, chap 11 (3d ed Cal CEB 2007).

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§15.45 b. Case Law Governs

The only statutory recognition of these writs is a brief reference to the writ of error coram nobis in Pen C §1265, which provides that, once a judgment has been affirmed on appeal, a party can bring a petition for a writ of error coram nobis to vacate the judgment only in the court that affirmed it. Thus, case law governs most aspects of these writs.

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§15.46 c. Used Mostly in Criminal Cases

The writs of coram nobis and coram vobis are very rare in civil matters and are used almost exclusively in criminal cases. One civil use of coram vobis might be to obtain relief in a marital dissolution case in which a spouse concealed assets and effectively obtained a judgment by fraud. On the use of coram nobis and coram vobis in civil cases, see §15.48. On the use of coram nobis and coram vobis in criminal cases, see Appeals and Writs in Criminal Cases, chap 11 (3d ed Cal CEB 2007).

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§15.47 2. Requirements for Issuance

The court will issue a writ of error coram nobis or coram vobis only when the petitioner shows that (*Los Angeles Airways, Inc. v Hughes Tool Co.* (1979) 95 CA3d 1, 8, 156 CR 805):

- Some fact existed that, not owing to any fault or negligence by the petitioner, was not presented to the court at the trial on the merits, and that if the fact had been presented, it would have prevented rendition of the judgment;
- The newly discovered evidence does not go to the merits of the issues tried; and
- The newly discovered evidence was unknown to him or her and could not in the exercise of reasonable diligence have been discovered at any time substantially earlier than the time of making the writ petition.

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§15.48 3. Availability in Civil Cases

Even though coram nobis or coram vobis are available to vacate a judgment based on newly discovered evidence after the time to move for a new trial has expired, a court is unlikely to grant the writ unless the petitioner can make an exceptionally strong showing of injustice. See *People v Gallardo* (2000) 77 CA4th 971, 982, 92 CR2d 161 (noting that terms "motion to vacate" and "petition for writ of error coram nobis" are often used interchangeably, but courts have applied more precise rules to appeals from denials of coram nobis petitions). Some courts hold that the writ is available only if the omissions from the trial record were attributable to extrinsic fraud. See *Philippine Export & Foreign Loan Guarantee Corp. v Chuidian* (1990) 218 CA3d 1058, 1090, 267 CR 457; *Los Angeles Airways, Inc. v Hughes Tool Co.* (1979) 95 CA3d 1, 9, 156 CR 805.

The court considered coram nobis and coram vobis in the following civil cases:

- The court of appeal refused to treat as a petition for a writ of error coram vobis defendant's motion under CCP §909 to take new evidence of attorney fraud; under CCP §1008(b), defendant could renew, based on new facts, his earlier CCP §473 motion. *Monsan Homes, Inc. v Pogrebneak* (1989) 210 CA3d 826, 831, 258 CR 676.
- After entry of judgment for defendant, the trial court denied plaintiff's motion for a new trial; while plaintiff's appeal was pending, plaintiff discovered documents that had not been produced during discovery and asked the appellate court for an order directing the trial court to reconsider its denial of a new trial; the court of appeal denied the request, holding that an aggrieved party can obtain relief by coram vobis only if there has been extrinsic fraud, *i.e.,* if the party has been entirely prevented from obtaining hearing. *Los Angeles Airways, Inc. v Hughes Tool Co.* (1979) 95 CA3d 1, 8, 156 CR 805. But see *Rollins v City & County of San Francisco* (1974) 37 CA3d 145, 149, 112 CR 168 (court allowed introduction of addendum to autopsy report that had not been produced with decedent's medical records without requiring showing of extrinsic fraud because justice demanded relief; court treated motion as petition for writ of error coram vobis).
- The trial court granted respondent's petition for a writ of error coram nobis and vacated its judgment dismissing respondent's cause of action; the court of appeal reversed on the grounds that respondent had not exercised due diligence in discovering his new evidence and that he could not state a cause of action even with the new evidence. *Page v Insurance Co. of N. Am.* (1969) 3 CA3d 121, 128, 83 CR 44.
- The court of appeal stated that a writ of error coram nobis could be used following judgment in a civil proceeding, but affirmed the trial court's denial of relief in this case. *In re Dyer* (1948) 85 CA2d 394, 400, 193 P2d 69.

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§15.49 C. Writ of Supersedeas

A writ of supersedeas is a procedural tool that may be used to secure a stay on appeal. Thus, it is unlike the other writs discussed in this chapter, which are original proceedings. By its nature, supersedeas is always ancillary to a pending appeal and suspends the trial court's power to act on an appealed order or judgment until the appeal has run its course. CCP §923; Cal Rules of Ct 8.112(a)(1); *People ex rel San Francisco Bay Conserv. & Dev. Comm'n v Town of Emeryville* (1968) 69 C2d 533, 538, 72 CR 790 (courts have inherent power to preserve their own jurisdiction by issuing writs of supersedeas). For a detailed discussion of supersedeas, see chap 26; California Civil Appellate Practice §§6.68-6.85 (3d ed Cal CEB 1996).

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§15.50 D. Quo Warranto

In California, the writ of quo warranto no longer exists, although a statutory action, identical in purpose and effect to quo warranto, was established in 1872. CCP §§803-811. For a detailed discussion, see §4.27.

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VI. BASIC REQUIREMENTS FOR WRIT RELIEF

A. Petitioner Must Have Beneficial Interest

§15.51 1. "Beneficial Interest" Defined

A party seeking writ relief in an appellate court must have a beneficial interest in the outcome of the proceeding. CCP §§1069, 1086, 1103(a). The beneficial interest requirement is essentially a standing requirement—only a person who is affected both practically and legally by the challenged order or ruling has standing to seek extraordinary relief by way of prerogative writ. See *Sonoma County Nuclear Free Zone '86 v Superior Court* (1987) 189 CA3d 167, 175, 234 CR 357 (beneficially interested party is one who "has some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large").

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§15.52 2. Party Aggrieved by Trial Court Ruling Has Beneficial Interest

Most appellate court writ proceedings challenge trial court rulings in ongoing proceedings. Thus, the beneficial interest requirement is usually readily met because the party seeking writ relief is a party to the trial court proceedings and directly affected by the lower court's ruling. See *Ra v Superior Court* (2007) 154 CA4th 142, 147 n4, 64 CR3d 539 (ruling on one plaintiff's cause of action affected cause of action asserted by other plaintiff, so latter had beneficial interest in outcome and could seek writ relief); *Daro v Superior Court* (2007) 151 CA4th 1079, 1092, 61 CR3d 716 (ruling directed to co-defendant's property affected other defendants, so latter had beneficial interest in outcome and could seek writ relief).

NOTE: Because the beneficial interest requirement is so easily met, many courts of appeal never even mention the requirement in denying or granting a writ petition challenging an order or ruling by a trial court. See, *e.g.*, *Henry v Superior Court* (2008) 160 CA4th 440, 72 CR3d 808 (no discussion); *California Pub. Employees' Retirement Sys. v Superior Court* (2008) 160 CA4th 174, 72 CR3d 561 (same); *Zevnik v Superior Court* (2008) 159 CA4th 76, 70 CR3d 817 (same); *Snyder v Superior Court* (2007) 157 CA4th 1530, 69 CR3d 600 (same). This does not mean that the petition need not allege a beneficial interest in the challenged ruling; on the contrary, a petition must include this allegation. See §18.28.

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§15.53 3. Petitioner Need Not Be Party to Underlying Action

An individual or entity who is not a party to the trial court proceedings can have a beneficial interest in the outcome of those proceedings and seek writ relief in the court of appeal. A nonparty may seek writ relief if he or she is "directly and prejudicially affected" by the trial court's challenged order or ruling. *Burlingame v Justice's Court of the City of Berkeley* (1934) 1 C2d 71, 75, 33 P2d 669; see *Ombudsman Servs. of N. Cal. v Superior Court* (2007) 154 CA4th 1233, 1239, 65 CR3d 456 (nonparty successfully petitioned for writ of mandate compelling trial court to vacate order requiring production of records); *Seven Up Bottling Co. v Superior Court* (1951) 107 CA2d 75, 76, 236 P2d 623 (nonparty sought writ of prohibition following trial court's denial of nonparty's motion to quash service of subpoena and subpoena duces tecum); *Monterey Club v Superior Court* (1941) 48 CA2d 131, 143, 119 P2d 349 (nonparty obtained writ to prohibit trial court from enjoining alleged gambling operations; petitioner was private club where alleged gambling occurred, but was not party to trial court proceeding).

JUDICIAL PERSPECTIVE: A nonparty petitioner should explain in the petition why it did not first seek relief from the trial court.

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§15.54 4. When Petitioner Challenges Nonjudicial Action in Court of Appeal

In rare instances, an original writ proceeding challenging nonjudicial action (*e.g.,* action taken by a governmental body or private entity) may be filed in the court of appeal in the first instance, bypassing the superior court. See §§16.18-16.48. In such cases, whether the petitioner has a beneficial interest in the proceedings may be a more nuanced inquiry, analogous to the inquiry that would be made if the proceeding had been brought in the superior court. On the beneficial interest of a petitioner in a superior court writ proceeding, see §§2.12-2.14.

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§15.55 5. Trial Court Usually Not Beneficially Interested

The trial court, although named as the respondent, is usually a neutral party with no beneficial interest in the outcome of the case, even though its ruling is being challenged in the writ proceeding. *Solberg v Superior Court* (1977) 19 C3d 182, 189, 137 CR 460; see also *Curle v Superior Court* (2001) 24 C4th 1057, 1064, 103 CR2d 751 (trial judge does not have standing to initiate writ proceeding to challenge disqualification order). "This is true even where the subject matter of the [writ] proceeding is a ruling which significantly affects the operations of the petitioning court." *Municipal Court v Superior Court* (1993) 5 C4th 1126, 1129, 22 CR2d 504. See also *Municipal Court v Superior Court* (1988) 202 CA3d 957, 961, 249 CR 182 (municipal court could not seek writ challenging procedures employed for peremptory challenges). On the designation of parties, see §18.18.

NOTE: An individual trial judge might be a beneficially interested party if he or she was personally named as a party in the proceedings below.

JUDICIAL PERSPECTIVE: Whether or not deemed beneficially interested, the trial court can have county counsel file opposition if the petition attacks the court's procedure or if the court is otherwise interested in the outcome. See *People v Superior Court (Williams)* (1992) 8 CA4th 688, 695, 10 CR2d 873 (in writ proceeding challenging denial of peremptory challenge, court filed opposition to writ and response to supplemental briefing). But see *Ng v Superior Court* (1997) 52 CA4th 1010, 1019, 61 CR2d 49 (striking trial judge's return to writ petition; trial judge had no standing to defend ruling on criminal defendant's substitution of counsel because issue did not affect court's operating procedures or budget), overruled on other grounds in *Curle v Superior Court* (2001) 24 C4th 1057, 1069 n6, 103 CR2d 751.

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B. Petitioner Must Have No Other Adequate Remedy

§15.56 1. Appeal Is Usually Adequate Remedy

"To obtain writ review, a petitioner generally must show his or her remedy in the ordinary course of law is inadequate or that petitioner would suffer irreparable injury were the writ not granted." *Interinsurance Exch. of the Automobile Club v Superior Court* (2007) 148 CA4th 1218, 1225, 56 CR3d 421. See *County of Sonoma v Superior Court* (2009) 173 CA4th 322, 336 n6, 93 CR3d 39 (case involved novel, significant constitutional question that generated conflicting trial court decisions, and petitioner lacked adequate remedy at law and would suffer irreparable harm absent writ review). Generally the right of appeal is considered an adequate remedy. *Kawasaki Motors Corp. v Superior Court* (2000) 85 CA4th 200, 205, 101 CR2d 863. However, even when there is a right of appeal, there are considerations that may weigh in favor of immediate appellate review. See, *e.g.*, *CashCall, Inc. v Superior Court* (2008) 159 CA4th 273, 285 n6, 71 CR3d 441 (rejecting adequate remedy on appeal argument "because the petition raises a question of first impression"). On specific contexts in which the appellate courts have issued writs of mandate, see chap 16 and App A.

NOTE: When the other factors justifying writ review are present (see §§15.51-15.55, 15.61-15.71), the courts of appeal often do not specifically discuss whether the petitioner lacks an adequate legal remedy. See, *e.g.*, *Henry v Superior Court* (2008) 160 CA4th 440, 72 CR3d 808 (no discussion); *California Pub. Employees' Retirement Sys. v Superior Court* (2008) 160 CA4th 174, 72 CR3d 561 (same); *Zevnik v Superior Court* (2008) 159 CA4th 76, 70 CR3d 817 (same); *Heritage Provider Network, Inc. v Superior Court* (2008) 158 CA4th 1146, 70 CR3d 645 (same); *Bell v Superior Court* (2007) 158 CA4th 147, 69 CR3d 328 (same); *Snyder v Superior Court* (2007) 157 CA4th 1530, 69 CR3d 600 (same). This does not mean that the petition need not allege lack of an adequate legal remedy; on the contrary, this is a required allegation. See §18.34.

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§15.57 a. Appealable Interlocutory Orders and Judgments

Some interlocutory orders and judgments are immediately appealable. See CCP §§904.1-904.2. The right of immediate appeal will generally be deemed an adequate remedy, foreclosing mandate and prohibition absent extraordinary circumstances. See CCP §§1086, 1103(a); *Marriage of Skelley* (1976) 18 C3d 365, 369, 134 CR 197 (interlocutory order reducing temporary spousal support was immediately appealable, thus foreclosing writ review). There may be cases, however, in which even an immediate appeal from an interlocutory order may not be an adequate remedy. For example, although an order granting or denying a motion to disqualify an adversary's attorney is appealable, the reviewing court may deem an appeal to be an inadequate remedy, because it is not as expeditious as a writ proceeding and because the right to counsel is involved. See §16.102.

In the case of writs of review (certiorari), the existence of a right to appeal wholly forecloses writ relief because the absence of a right of appeal is a substantive requirement for issuance of the writ. CCP §1068(a). For discussion, see §§15.32-15.36.

On determining whether an interlocutory order or judgment is appealable, see California Civil Appellate Practice, chap 3 (3d ed Cal CEB 1996).

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§15.58 b. Appeal From Final Judgment

Most rulings made during trial court proceedings can be reviewed on appeal after entry of final judgment. See CCP §§904.1-904.2. Accordingly, this right of appeal will usually be deemed an adequate remedy, foreclosing mandamus and prohibition. See *Omaha Indem. Co. v Superior Court* (1989) 209 CA3d 1266, 1273, 258 CR 66.

In the case of writs of review (certiorari), the existence of a right to appeal wholly forecloses writ relief because the absence of a right of appeal is a substantive requirement for issuance of the writ. CCP §1068(a); see §§15.32-15.36.

CAUTION: Appeal does not become an inadequate remedy merely because a party fails to file a timely notice of appeal. *Phelan v Superior Court* (1950) 35 C2d 363, 370, 217 P2d 951; see *Annette F. v Sharon S.* (2005) 130 CA4th 1448, 1459, 30 CR3d 914 (untimely appeal not construed as petition for writ relief). Courts have permitted a party to seek relief by way of writ petition after the time to appeal has expired only in extremely limited circumstances, such as when the trial court has acted in excess of its jurisdiction or when fundamental constitutional rights have been violated. See *Mauro B. v Superior Court* (1991) 230 CA3d 949, 954, 281 CR 507 (listing cases in which exceptions have been permitted). But see *In re Meranda P.* (1997) 56 CA4th 1143, 1164, 65 CR2d 913 (disagreeing with *Mauro B.*'s approval of allowing party to seek writ relief after time to appeal has expired).

On determining when a judgment is final and appealable, see California Civil Appellate Practice, chap 3 (3d ed Cal CEB 1996).

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§15.59 c. If Writ Proceeding Is Exclusive Means of Appellate Review

In extremely limited circumstances, a writ proceeding is the exclusive means of obtaining appellate review of an order or judgment. See §§16.2-16.48. In such cases, the appellate court may not deny an apparently meritorious writ petition merely because the petition presents no important issue or because the reviewing court considers the case less worthy of its attention than other pending matters. *Powers v City of Richmond* (1995) 10 C4th 85, 114, 40 CR2d 839 (because writ relief is exclusive means of appellate review under Public Records Act, appellate court's refusal to entertain otherwise meritorious writ petition would likely constitute abuse of discretion); *PG&E Corp. v PUC* (2004) 118 CA4th 1174, 1193, 13 CR3d 630 (when petition for review "apparently" had merit, court could not summarily deny it merely because it presented no "important" issues).

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§15.60 2. Petitioner's Burden to Show Inadequacy of Other Remedies

The petitioner must allege and explain why no other remedy is available or, if another remedy is available, why it is inadequate. See *Phelan v Superior Court* (1950) 35 C2d 363, 366, 217 P2d 951; *Hogya v Superior Court* (1977) 75 CA3d 122, 128, 142 CR 325. On drafting the no-other-remedy allegations of an appellate court writ petition, see §18.34.

NOTE: Even though a petitioner must include these allegations in the writ petition, the courts of appeal often do not specifically address the no-other-adequate-relief requirement. See, *e.g.*, *Henry v Superior Court* (2008) 160 CA4th 440, 72 CR3d 808 (no discussion); *California Pub. Employees' Retirement Sys. v Superior Court* (2008) 160 CA4th 174, 72 CR3d 561 (same); *Snyder v Superior Court* (2007) 157 CA4th 1530, 69 CR3d 600 (same).

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§15.61 C. Petitioner Must Face Irreparable Injury

A petitioner must show that he or she will suffer irreparable injury if the appellate court fails to immediately intervene. See *County of Sonoma v Superior Court* (2009) 173 CA4th 322, 336 n6, 93 CR3d 39 (under circumstances of case, petitioner "lacks an adequate remedy at law and would suffer irreparable harm absent writ review"); *Interinsurance Exch. of the Automobile Club v Superior Court* (2007) 148 CA4th 1218, 1225, 56 CR3d 421 (to obtain writ review, "a petitioner generally must show his or her remedy in the ordinary course of law is inadequate or that petitioner would suffer irreparable injury were the writ not granted"). Irreparable injury can take a variety of forms, *e.g.,* the disclosure of privileged information, the loss of the ability to present substantial portions of a case, or the unnecessary expenditure of significant resources. See §§15.62-15.64. On specific contexts in which the appellate courts have issued writs of mandate, see chap 16 and App A.

NOTE: Like the no-adequate-remedy-at-law requirement (see §§15.56-15.60), the courts of appeal often do not specifically address the irreparable injury requirement. Instead, irreparable injury is merely implicit from the circumstances. See, *e.g.*, *Henry v Superior Court* (2008) 160 CA4th 440, 72 CR3d 808 (no discussion; injury implicit from potentially needless expenditure of significant time and resources); *California Pub. Employees' Retirement Sys. v Superior Court* (2008) 160 CA4th 174, 72 CR3d 561 (same from overruling demurrer); *Zevnik v Superior Court* (2008) 159 CA4th 76, 70 CR3d 817 (same from order denying motion to disqualify counsel); *Heritage Provider Network, Inc. v Superior Court* (2008) 158 CA4th 1146, 70 CR3d 645 (same from denial of statutory stay of trial court proceedings pending completion of arbitration); *Bell v Superior Court* (2007) 158 CA4th 147, 69 CR3d 328 (same from partial denial of class certification motion); *Snyder v Superior Court* (2007) 157 CA4th 1530, 69 CR3d 600 (same from dismissal without prejudice); *CenterPoint Energy, Inc. v Superior Court* (2007) 157 CA4th 1101, 69 CR3d 202 (same from order denying motion to quash service of summons).

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§15.62 1. Specific and Immediate Harm

The prospect of imminent, irreparable injury is one of the most common bases on which the appellate courts grant writ relief. See *Science Applications Int'l Corp. v Superior Court* (1995) 39 CA4th 1095, 1100, 46 CR2d 332 (writ relief available when "lower court's determination imposes unusually harsh and unfair results for which ordinary appellate review is inadequate").

Irreparable injury is often found, for example, in discovery cases when an order granting discovery allegedly violates a privilege of the party against whom discovery is granted. *Costco Wholesale Corp. v Superior Court* (2009) 47 C4th 725, 101 CR3d 758 (appellate court should have granted writ of mandate vacating order compelling discovery because it violated attorney-client privilege; petitioner not required to establish that its case would be harmed by disclosure of evidence), citing *Roberts v Superior Court* (1973) 9 C3d 330, 336, 107 CR 309.

For representative cases, see, *e.g.*:

- *Ombudsman Servs. of N. Cal. v Superior Court* (2007) 154 CA4th 1233, 1239, 65 CR3d 456 (writ review of order compelling nonparty to produce confidential records);
- *People ex rel Lockyer v Superior Court* (2004) 122 CA4th 1060, 1071, 19 CR3d 324 (writ review of order compelling production of potentially privileged documents); and
- *Davis v Superior Court* (1992) 7 CA4th 1008, 9 CR2d 331 (writ review of order denying motion to quash a subpoena requesting 10 years' worth of plaintiff's medical records "[t]o avoid the possibility of irreparable injury").

On specific contexts in which the appellate courts have issued writs of mandate, see chap 16 and App A.

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§15.63 a. When Ruling Deprives Petitioner of Opportunity to Present Case

An appellate court may grant writ relief when a trial court's ruling has deprived the petitioner of the opportunity to present a significant portion of its case. Immediate appellate review may save the trial court and parties substantial time and resources. See, *e.g.*, *Henry v Superior Court* (2008) 160 CA4th 440, 448, 72 CR3d 808 (pretrial evidentiary ruling precluded defendants from presenting evidence of contributory negligence); *Bell v Superior Court* (2007) 158 CA4th 147, 159, 69 CR3d 328 (partial denial of class certification motion); *Snyder v Superior Court* (2007) 157 CA4th 1530, 1535, 69 CR3d 600 (dismissal of complaint without prejudice); *Johnson v Superior Court* (2006) 143 CA4th 297, 304, 49 CR3d 52 (writ review of order granting summary judgment for some, but not all, defendants appropriate because immediate review preferable to obviating possible multiple trials). On specific contexts in which the appellate courts have issued writs of mandate, see chap 16 and App A.

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§15.64 b. When Ruling Is Clearly Erroneous and Substantially Prejudicial

An appellate court may grant writ relief when a trial court's ruling is clearly erroneous and substantially prejudices the petitioner's case. Immediate appellate review may save the trial court and parties substantial time and resources. See, *e.g., California Pub. Employees' Retirement Sys. v Superior Court* (2008) 160 CA4th 174, 187, 72 CR3d 561 (writ review of order overruling demurrer); *Wells Fargo Bank v Superior Court* (2008) 159 CA4th 381, 385, 71 CR3d 506 (writ review of order overruling demurrer); *CenterPoint Energy, Inc. v Superior Court* (2007) 157 CA4th 1101, 1106, 69 CR3d 202 (writ review of order denying motion to quash service of summons); *Fair Employment & Hous. Comm'n v Superior Court* (2004) 115 CA4th 629, 633, 9 CR3d 409 (writ review of order overruling demurrer). On specific contexts in which the appellate courts have issued writs of mandate, see chap 16 and App A.

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§15.65 2. Petitioner's Burden to Show Irreparable Injury

The petitioner must allege and explain why it faces irreparable injury if the court of appeal fails to immediately intervene and review the challenged trial court order or ruling. See *Phelan v Superior Court* (1950) 35 C2d 363, 370, 217 P2d 951. On drafting the irreparable injury allegations of an appellate court writ petition, see §18.34.

PRACTICE TIP: Counsel cannot assume that the court of appeal understands the ramifications of permitting an erroneous ruling to stand.

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D. Issue Must Not Be Moot

§15.66 1. Writ Generally Will Not Issue When Case Is Moot

A writ will not issue "to enforce an abstract or moot right …, and certainly the writ never should issue to compel an act which will tend to an unlawful purpose." *Slater v City Council of City of Los Angeles* (1965) 238 CA2d 864, 868, 47 CR 837. See, *e.g., Gridley v Gridley* (2008) 166 CA4th 1562, 83 CR3d 715 (writ relief denied because challenge to means by which petition was transferred to judge was moot); *Cooke v Superior Court* (1989) 213 CA3d 401, 417, 261 CR 706 (writ relief denied after county passed resolution making changes sought by writ petition), disapproved on other grounds by *County of San Diego v State* (1997) 15 C4th 68, 106 n30, 61 CR2d 134.

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§15.67 2. Public Interest May Override Mootness

If the petition raises an issue of public interest, particularly one likely to recur in future cases, an appellate court may decide the case, even though the issue is otherwise moot. See, *e.g.*, *Independent Energy Producers Ass'n v McPherson* (2006) 38 C4th 1020, 1024, 44 CR3d 644 (although challenge to initiative was rendered moot when the initiative was defeated, case raised important legal issues regarding preelection review of initiatives); *NBC Subsidiary (KNBC-TV), Inc. v Superior Court* (1999) 20 C4th 1178, 1190 n6, 86 CR2d 778 (although case technically moot, it presented important question affecting public's interest in access to courtroom proceedings); *Green v Superior Court* (1974) 10 C3d 616, 622 n6, 111 CR 704 (although case was moot, it presented important issues regarding the warranty of habitability that would frequently arise); *Jonathan L. v Superior Court* (2008) 165 CA4th 1074, 1088 n15, 81 CR3d 571 (even if dependency issues were moot, home schooling issues were of public interest and in need of clarification); *Ombudsman Servs. of N. Cal. v Superior Court* (2007) 154 CA4th 1233, 1239, 65 CR3d 456 (even if conditional settlement had made case moot, court would have decided petition because issue was important and of continuing public interest); *Corrales v Bradstreet* (2007) 153 CA4th 33, 46, 62 CR3d 440 (although supreme court opinion rendered case moot, case still presented important issues concerning agency practice of designating decisions as precedent); *TSI Seismic Tenant Space, Inc. v Superior Court* (2007) 149 CA4th 159, 168 n4, 56 CR3d 751 (despite stipulation to withdraw writ petitions, court decided issue "to resolve a matter of continuing public interest"); *Oaks Mgmt. Corp. v Superior Court* (2006) 145 CA4th 453, 458 n1, 51 CR3d 561 (although parties reached settlement, issue of the attorneys' disqualification was of general public interest and there was "dearth of published opinions" on issue); *Black Diamond Asphalt, Inc. v Superior Court* (2003) 114 CA4th 109, 115, 7 CR3d 466 (despite parties' settlement and request for dismissal, court decided issue in the interest of public policy and clarification of the law).

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§15.68 E. Issue Usually Must Have Been Raised in Trial Court

An appellate court will not issue a writ of mandate, prohibition, or review (certiorari) unless the petitioner has asked the trial court to act on the issue in question and the lower court has either refused to do so or ruled against the petitioner. *Phelan v Superior Court* (1950) 35 C2d 363, 372, 217 P2d 951; see also *Citizens Utils. Co. of Cal. v Superior Court* (1963) 59 C2d 805, 814, 31 CR 316 (requirement that petitioner raise issue in trial court is judicially created rule of practice adopted to prevent unnecessary litigation and as courtesy to trial courts); *Howell v Superior Court* (1962) 211 CA2d 487, 490, 27 CR 149 (prohibition denied for failure to seek relief in second of two superior courts having concurrent jurisdiction).

Typically, the issue in dispute is raised in the trial court in the moving or opposing papers. See also *Los Angeles Times v Superior Court* (2003) 114 CA4th 247, 254, 7 CR3d 524 (informal letters to superior court referee treated as motion sufficient to warrant writ consideration).

In rare circumstances, an appellate court may entertain a writ petition raising a new issue. See *Vannier v Superior Court* (1982) 32 C3d 163, 175, 185 CR 427 (court ruled on electronic surveillance issue despite lack of ruling by trial court; because trial judge had ruled on ultimate issue of petitioners' mandatory appearance as witnesses in Florida, petitioners were not required to demand separate ruling on what reviewing court viewed as evidentiary matter); *Civil Serv. Employees Ins. Co. v Superior Court* (1978) 22 C3d 362, 374 n6, 149 CR 360 (important constitutional issue); *Sheller v Superior Court* (2008) 158 CA4th 1697, 1709, 71 CR3d 207 (to avoid miscarriage of justice, appellate court reached "purely legal issue" of trial court's authority to formally reprimand attorney and order him to pay attorney fees, despite petitioner's failure to raise issue in trial court); *Monterey Club v Superior Court* (1941) 48 CA2d 131, 143, 119 P2d 349 (petitioner had no timely and appropriate opportunity to make the objection in the trial court).

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§15.69 F. Other Factors

In addition to the basic requirements discussed above (see §§15.51-15.68), the supreme court and courts of appeal have identified several other factors that they consider in determining whether to hear the merits of a writ petition. See *Omaha Indem. Co. v Superior Court* (1989) 209 CA3d 1266, 1270, 258 CR 66 (surveying decisions and listing factors, including basic requirements, that appellate courts weigh in deciding whether to consider merits of writ petition). The appellate courts and appellate practitioners sometimes collectively refer to the basic requirements and the other factors as the "*Omaha* factors." See, *e.g., Nguyen v Superior Court* (2007) 150 CA4th 1006, 1009, 58 CR3d 802; *Smith v Superior Court* (1996) 41 CA4th 1014, 1020, 49 CR2d 20.

The extent to which these factors apply depends on the facts and circumstances of the particular case. See, *e.g., Nguyen v Superior Court, supra* (noting that most *Omaha* factors were not applicable to case); *Roden v AmerisourceBergen Corp.* (2005) 130 CA4th 211, 218, 29 CR3d 810 (discussing applicable *Omaha* factors). On specific contexts in which the appellate courts have issued writs of mandate, see chap 16 and App A. Two of the most important of these factors are discussed below.

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§15.70 1. Issue of Widespread Public Importance or First Impression

In deciding whether to hear the merits of a writ petition, the appellate courts often give considerable weight to whether the petitioner raises an issue of public importance that should be resolved promptly. See, *e.g.*, *Yamaha Motor Co. v Superior Court* (2009) 174 CA4th 264, 94 CR3d 494 (court issued order to show cause because writ petition presented "an issue of some public importance that has not yet been squarely faced by a California state court); *County of Sonoma v Superior Court* (2009) 173 CA4th 322, 336 n6, 93 CR3d 39 (case "involves a novel and significant constitutional question which has generated conflicting trial court decisions"); *Southern Cal. Reg'l Rail Auth. v Superior Court* (2008) 163 CA4th 712, 717, 77 CR3d 765 (trial court certified pretrial preemption issue under CCP §166.1 as involving controlling question of law on which there were substantial grounds for difference of opinion and appellate resolution would materially advance conclusion of litigation); *Henry v Superior Court* (2008) 160 CA4th 440, 448, 72 CR3d 808 (interpreting Proposition 51's impact on evidence of nonparty's contributory negligence); *County of Los Angeles v Superior Court* (2008) 159 CA4th 353, 358, 71 CR3d 485 (deciding writ petition challenging class certification order "in order to decide the important legal question presented"); *Snyder v Superior Court* (2007) 157 CA4th 1530, 1533, 69 CR3d 600 (holding Los Angeles Superior Court General Order invalid); *CenterPoint Energy, Inc. v Superior Court* (2007) 157 CA4th 1101, 1120, 69 CR3d 202 (discussing jurisdiction on successor liability theory); *Interinsurance Exch. of the Automobile Club v Superior Court* (2007) 148 CA4th 1218, 1225, 56 CR3d 421 (meaning of statutory term "premium" was issue affecting all Californians).

Similarly, the appellate courts give weight to whether the petition raises an issue of first impression that should be decided immediately rather than after entry of a final judgment. See, *e.g., CashCall, Inc. v Superior Court* (2008) 159 CA4th 273, 285 n6, 71 CR3d 441 (precertification discovery issue was one of first impression); *Interinsurance Exch. of the Automobile Club,* 148 CA4th at 1226 (meaning of statutory term "premium" was issue of first impression); *California Highway Patrol v Superior Court* (2006) 135 CA4th 488, 496, 38 CR3d 16 (interlocutory writ review of summary adjudication order appropriate because issue was one of first impression); *Anderson v Superior Court* (1989) 213 CA3d 1321, 1328, 262 CR 405 (writ review appropriate because issue was one of first impression, and review was necessary to prevent multiplicity of appeals raising same issue). On specific contexts in which the appellate courts have issued writs of mandate, see chap 16 and App A.

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§15.71 2. Trial Courts in Conflict

In deciding whether to hear a writ petition, the appellate courts also give considerable weight to whether the petition raises an issue on which the trial courts have reached conflicting results, particularly if the trial courts are within the same appellate district. *Omaha Indem. Co. v Superior Court* (1989) 209 CA3d 1266, 1273, 258 CR 66. Immediate appellate review could result in a significant savings of time and judicial resources. See, *e.g., County of Sonoma v Superior Court* (2009) 173 CA4th 322, 336 n6, 93 CR3d 39 (case "involves a novel and significant constitutional question which has generated conflicting trial court decisions"); *Corbett v Superior Court* (2002) 101 CA4th 649, 657, 125 CR2d 46 (trial courts were in conflict on whether class actions could be brought under unfair competition law); *Smith v Superior Court* (1996) 41 CA4th 1014, 1020, 49 CR2d 20 (trial courts had issued conflicting rulings on effect of injunction entered in out-of-state wrongful termination case). On specific contexts in which the appellate courts have issued writs of mandate, see chap 16 and App A.

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16

Availability of Writ Relief

Paul D. Fogel

I. SCOPE OF CHAPTER §16.1

II. STATUTES SPECIFYING USE OF WRIT PETITION TO OBTAIN APPELLATE REVIEW
A. Writ Petition as Exclusive Means of Obtaining Appellate Review §16.2
1. CCP §170.3: Grant or Denial of Judicial Disqualification or Challenge
a. Writ Proceeding Exclusive Means of Obtaining Appellate Review §16.3
(1) Only Parties May File Writ Petition §16.4
(2) Request Mandate §16.5
b. Deadline to File Writ Petition Under CCP §170.3(d) §16.6
c. Standard of Review if Writ Petition Accepted §16.7
2. CCP §404.6: Order Concerning Coordination of Actions
a. Writ Proceeding Exclusive Means of Obtaining Appellate Review §16.8
b. Deadline to File Writ Petition §16.9
c. Standard on Review if Writ Petition Accepted §16.10
3. CCP §405.39: Grant or Denial of Motion to Expunge Lis Pendens
a. Writ Proceeding Exclusive Means of Obtaining Appellate Review §16.11
b. Deadline to File Writ Petition §16.12
c. Standard of Review if Writ Petition Accepted §16.13
4. Govt C §6259(c): Public Records Act
a. Writ Proceeding Exclusive Means of Obtaining Appellate Review §16.14
b. Court Has Limited Discretion to Deny Writ Petition §16.15
c. Deadline to File Writ Petition and Trial Court Stay §16.16
d. Standard of Review if Writ Petition Accepted §16.17
5. Special Provisions for Writ Review of Certain Administrative Proceedings
a. Petition for Review of Final Order of Agricultural Labor Relations Board
(1) Writ Proceeding Exclusive Means of Obtaining Appellate Review §16.18
(2) Deadline to File Writ Petition §16.19
(3) Discretion to Deny Petition §16.20
(4) Standard of Review if Writ Petition Accepted §16.21
b. Decisions of Alcoholic Beverage Control Appeals Board
(1) Petition for Writ of Review of Adjudicatory Order of Alcoholic Beverage Control Appeals Board §16.22
(2) Deadline to File Writ Petition §16.23
(3) Standard of Review if Writ Petition Accepted §16.24
(4) Petition for Writ of Mandate Challenging Nonadjudicatory Action §16.25
c. Petition for Writ of Review of Decisions of Energy Resources Conservation and Development Commission §16.26
(1) Deadline to File Writ Petition §16.27
(2) Standard on Review if Writ Petition Accepted §16.28
d. Petition for Writ of Review of Decisions of Public Employment Relations Board §16.29
(1) Deadline to File Writ Petition §16.30
(2) Standard of Review if Writ Petition Accepted §16.31
(3) Compare Board Petition to Enforce Decision §16.32
e. Petition for Writ of Review of Decisions of Public Utilities Commission
(1) Petition for Writ of Review §16.33
(a) Application for Rehearing Prerequisite to Judicial Review §16.34
(b) No Petition for Rehearing Required After Decision on Rehearing §16.35
(c) Application for Rehearing Deemed Denied §16.36
(2) Deadline to File Petition for Writ of Review §16.37
(3) Parties and Venue §16.38
(4) Standard of Review if Writ Petition Accepted §16.39
(a) In Complaint, Enforcement, Ratemaking, or Licensing Proceedings Under Pub Util C §1757 §16.40

(b) In Cases in Which Pub Util C §1757 Does Not Apply §16.41
(c) In Cases Pertaining to Water Corporations §16.42
(d) No New Evidence in Writ Proceeding §16.43
(e) In Cases Involving Constitutional Questions §16.43A
(5) Summary Denial of Writ Is on Merits §16.44
(6) PUC's Exercise of Legislative Power Not Res Judicata §16.45
f. Decisions of Workers' Compensation Appeals Board
(1) Writ of Review Exclusive Means of Obtaining Appellate Review §16.46
(2) Deadline to File Petition for Writ of Review §16.47
(3) Standard of Review if Writ Petition Accepted §16.48
B. Writ Petition as Prerequisite to Appeal
1. CCP §877.6(e): Grant or Denial of Motion for "Good Faith Settlement" Determination
a. Writ Proceeding May Be Prerequisite to Obtaining Appellate Review §16.49
b. Deadline to File Writ Petition §16.50
c. Standard of Review if Writ Petition Accepted §16.51
2. Challenge to Setting Termination Hearing Under Welf & I C §366.26(*l*) or Post-Termination Placement Order Under Welf & I C §366.28(b) §16.52

III. OTHER STATUTES AUTHORIZING WRIT REVIEW
A. Overview §16.53
B. CCP §418.10(c): Denial of Motion to Quash Service; to Stay or Dismiss for Inconvenient Forum; to Dismiss for Delay in Prosecution
1. Overview §16.54
2. Deadline to File Writ Petition Under CCP §418.10(c) §16.55
3. Standard of Review if Writ Petition Accepted §16.56
4. Filing Writ Petition Extends Time to File Responsive Pleading in Superior Court §16.57
C. CCP §403.080: Grant or Denial of Superior Court Motion to Reclassify Action or Proceeding
1. Overview §16.58
2. Deadline to File Writ Petition Under CCP §403.080 §16.59
3. Filing Requirements and Possible Stay §16.60
4. Standard of Review if Writ Petition Accepted §16.61
D. CCP §400: Grant or Denial of Superior Court Motion to Change Venue
1. Overview §16.62
2. Exception: Venue Order in Limited Civil Cases Directly Appealable §16.63
3. Deadline to File Writ Petition Under CCP §400 §16.64
4. Standard of Review if Writ Petition Accepted §16.65
E. CCP §437c: Denial of Motion for Summary Judgment; Violation of Summary Judgment Motion Procedures; Grant or Denial of Motion for Summary Adjudication
1. Overview §16.66
2. Denial of Motion for Summary Judgment §16.67
3. Grant or Denial of Summary Adjudication §16.68
4. Basis for Writ Petition
a. Court Erred in Denying Motion §16.69
b. Court Failed to Specify Issues and Evidence Relied on §16.70
c. Court Erred in Taking Motion Off Calendar §16.71
d. Court Erred by Shortening Notice Period §16.72
e. Court Erred by Depriving Party of Right to File Motion §16.73
f. Court Erred by Denying Oral Argument §16.74
g. Court Erred by Refusing to Consider Summary Adjudication in Alternative §16.75
5. Deadline to File Writ Petition §16.76
6. Standard of Review if Writ Petition Accepted §16.77
F. CCP §1176: Denial of Stay in Unlawful Detainer Action
1. Overview §16.78
2. Deadline to File Writ Petition §16.79
3. Standard of Review if Writ Petition Accepted §16.80
G. CCP §904.1(a)(11)-(12): Monetary Sanction Judgment or Order of $5000 or Less
1. Overview §16.81
2. Request Writ of Mandate or Prohibition in Alternative §16.82
3. No Statutory Deadline for Petition §16.83
4. Standard of Review if Writ Petition Accepted §16.84
5. Discovery Sanctions §16.85

IV. OTHER CONTEXTS IN WHICH WRIT RELIEF HAS BEEN GRANTED
A. Overview §16.86
B. Time to File Nonstatutory Writ Petition §16.87

C. To Challenge Jurisdiction of Superior Court on Basis of Invalidity of Statute or Ordinance
1. Overview §16.88
2. Use of Prohibition to Test Validity of Law §16.89
3. Use of Mandate to Test Validity of Law §16.90
4. Standard of Review if Writ Petition Accepted §16.91
D. In Cases of Exclusive, Conflicting, or Concurrent Jurisdiction
1. Exclusive Jurisdiction §16.92
2. Conflicting or Concurrent Jurisdiction
a. Trial Courts With Conflicting or Concurrent Jurisdiction §16.93
b. Determining Which Trial Court Has Jurisdiction §16.94
c. Determining Choice of Law §16.95
d. Other Tribunals With Conflicting or Concurrent Jurisdiction §16.96
3. Objecting Before Seeking Writ §16.97
4. Standard of Review if Writ Petition Accepted §16.98
E. To Review Arbitration Issues
1. Questions of First Impression §16.99
2. Orders Compelling Arbitration §16.100
3. Standard of Review if Writ Petition Accepted §16.101
F. To Remedy Orders Concerning Counsel
1. Disqualification Motions §16.102
2. Other Issues Involving Counsel §16.103
3. Standard of Review if Writ Petition Accepted §16.104
G. To Review Orders on Pleadings
1. When Issue Is Substantial or Resolution Would Result in Final Disposition of Case as to Party §16.105
2. When Ruling on Pleading Would Dramatically Affect Scope or Nature of Action §16.106
3. Standard of Review if Writ Petition Accepted §16.107
H. To Review Rulings on Demurrer
1. When Demurrer Is Overruled in Its Entirety §16.108
2. When Demurrer Is Partially Sustained §16.109
3. When Court Sustains Demurrer §16.110
4. Standard of Review if Writ Petition Accepted §16.111
I. When Court Denies Motion to Dismiss
1. Overview §16.112
2. Writ of Prohibition to Prevent Trial §16.113
3. Standard of Review if Writ Petition Accepted §16.114
J. To Correct Discovery Order
1. Overview §16.115
2. Significant Issues of First Impression Arising During Discovery §16.116
3. Constitutional Issues Arising During Discovery
a. Overview §16.117
b. Right to Privacy §16.118
4. Recurring Procedural Issues §16.119
5. Issues of Privilege
a. Overview §16.120
b. Examples of Writ Review of Privilege Issues §16.121
c. Attorney-Client Privilege and Work Product Doctrine §16.122
6. Issues Involving Denial of Discovery §16.123
7. Issues Involving Grant of Discovery §16.124
8. Issues Involving Orders Imposing Discovery Sanctions §16.125
a. Review of Discovery Sanctions of $5000 or Less §16.126
b. Review of Discovery Sanctions of More Than $5000 §16.127
9. Time to File Writ Petition §16.128
10. Standard of Review if Writ Petition Accepted §16.129
K. To Review Class Certification Orders §16.129A
1. Class Notification Issues §16.129B
2. Time to File Writ Petition §16.129C
3. Standard of Review if Writ Petition Accepted §16.129D
L. To Review Judgments and Orders in Contempt Cases §16.130
1. Review of Order Before Contempt Adjudication
a. Writ of Prohibition Before Contempt Adjudication §16.131
b. State Newspersons' Shield Law Does Not Provide Relief Before Contempt Adjudication §16.132
2. Writ Review of Contempt Judgment or Order
a. Overview §16.133
b. Scope of Review §16.134

c. Review by Writ of Review (Certiorari) §16.135
d. Review by Writ of Habeas Corpus §16.136
e. Review by Writ of Prohibition
(1) Writ of Prohibition Not Available After Fine Has Been Paid or Jail Sentence Has Been Served §16.137
(2) Writ of Prohibition Restrains Court That Failed to Comply With Prescribed Contempt Procedures §16.138
(3) Using Writ of Prohibition to Challenge Defective Affidavits §16.139
f. Review by Writ of Mandate §16.140
3. Time to File Writ Petition §16.141
4. Standard of Review if Writ Petition Accepted §16.142
M. To Review Probate Proceedings §16.143
N. To Review Family Law and Dependency Matters §16.143A
O. To Review Guardianship and Conservatorship Proceedings §16.144
P. To Review Orders on Motions in Limine §16.145
1. Time to File Writ Petition §16.146
2. Standard of Review if Writ Petition Accepted §16.147
Q. To Review Order Requiring Jury Trial
1. Overview §16.148
2. Standard of Review if Writ Petition Accepted §16.149
R. To Review Injunctions
1. Overview §16.150
2. Standard of Review if Writ Petition Accepted §16.151

V. EXTRAORDINARY CIRCUMSTANCES THAT REQUIRE FILING BOTH WRIT AND APPEAL §16.152

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§16.1 I. SCOPE OF CHAPTER

Most appellate court writ proceedings challenge trial court rulings in ongoing civil actions. See chap 15. This chapter discusses the kinds of interlocutory rulings that appellate courts have reviewed through writ proceedings. It also discusses the limited instances in which appellate courts have reviewed, in the first instance, decisions of certain state agencies by way of original writ proceedings.

In some contexts, a writ proceeding is the only means of obtaining appellate review of a superior court ruling (see §§16.3-16.48) or is a prerequisite to seeking postjudgment appellate review (see §§16.49-16.52). In other contexts, statutes authorize discretionary writ review. See §§16.54-16.86. In still other contexts, appellate courts exercise their discretion to issue a common law writ (*e.g.,* mandate, prohibition, or review (also called certiorari)). See §§16.87-16.152. The chapter concludes with a discussion of the rare instances in which a party aggrieved by an appealable order or final judgment should file both a writ petition and a notice of appeal. See §16.152.

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II. STATUTES SPECIFYING USE OF WRIT PETITION TO OBTAIN APPELLATE REVIEW

§16.2 A. Writ Petition as Exclusive Means of Obtaining Appellate Review

A number of statutes authorize writ review. These statutes often specify which type of writ the petitioner should seek (usually a writ of mandate). Some of these statutes specify that writ review is the sole means of obtaining appellate review. See §§16.2-16.48. Others make seeking writ review a prerequisite to later raising the issue on appeal from a final judgment. See §§16.49-16.52. Still other statutes provide for, but do not mandate, writ review. See §§16.53-16.85. On the requirements of the most common writs (*i.e.,* mandate, prohibition, and review (certiorari)), and how to select the proper writ, see chap 15.

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1. CCP §170.3: Grant or Denial of Judicial Disqualification or Challenge

§16.3 a. Writ Proceeding Exclusive Means of Obtaining Appellate Review

A party aggrieved by the grant or denial of a disqualification motion for cause (CCP §§170.1-170.5) or of a peremptory challenge to a judge (CCP §170.6) must seek appellate review by way of a petition for a writ of mandate under CCP §170.3(d). See, *e.g.*, *People v Hull* (1991) 1 C4th 266, 269, 2 CR2d 526 (CCP §170.3(d) applies equally to challenges for cause and peremptory challenges); *In re Sheila B.* (1993) 19 CA4th 187, 193, 23 CR2d 482 (CCP §170.3(d) is exclusive remedy for party aggrieved by grant of disqualification request). Such orders are not appealable. CCP §170.3(d); *Sheila B.*, *supra*. Even a party's waiver of a nonwaivable disqualification under CCP §170.3(b)(2)(B) can only be reviewed by writ. *People v Barrera* (1999) 70 CA4th 541, 551, 82 CR2d 755.

Review by writ promotes (1) judicial economy by eliminating the waste of time and money that would result if the matter proceeded to final judgment only to be reversed because proceedings after a wrongfully denied disqualification motion were void, and (2) fairness by preventing a party from obtaining a windfall by waiting until after there is an unfavorable outcome of the litigation before challenging a disqualification. See *Tri Counties Bank v Superior Court* (2008) 167 CA4th 1332, 1338, 84 CR3d 835 (objection under CCP §170.3(c) was untimely and properly stricken); *Sears, Roebuck & Co. v Nat'l Union Fire Ins. Co.* (2005) 131 CA4th 1342, 1348, 32 CR3d 717 (CCP §170.3 writ review is exclusive avenue of appellate review for rulings regarding disqualification of discovery referee).

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§16.4 (1) Only Parties May File Writ Petition

Only a party to the trial court proceeding, not the judge, may file a writ petition under CCP §170.3(d). In *Curle v Superior Court* (2001) 24 C4th 1057, 1067, 103 CR2d 751, the supreme court held that the court of appeal has authority to hear a petition under CCP §170.3(d) only if a party has filed the petition; because a superior court judge disqualified under former CCP §170.1(a)(6)(C) (now CCP §170.1(a)(6)(A)(iii)) is not a party to the proceeding under CCP §170.3(d), he or she cannot challenge the disqualification order by writ petition.

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§16.5 (2) Request Mandate

Because CCP §170.3(d) provides that a disqualification order may be reviewed "only by a writ of mandate," the petitioner must seek mandate rather than prohibition. See *People v Hull* (1991) 1 C4th 266, 269, 2 CR2d 526. Although a few courts have indicated that a writ of prohibition will lie to review an order denying a peremptory judicial challenge, most of these cases predate CCP §170.3(d) as well as the supreme court's decision in *Hull*. See, *e.g.*, *Calhoun v Superior Court* (1958) 51 C2d 257, 331 P2d 648; *Kohn v Superior Court* (1966) 239 CA2d 428, 48 CR 832. For cases illustrating the availability of mandate to review judicial challenge orders, see:

- *Swift v Superior Court* (2009) 172 CA4th 878, 91 CR3d 504 (writ of mandate compelling trial court to vacate order striking CCP §170.6 peremptory challenge);
- *C.C. v Superior Court* (2008) 166 CA4th 1019, 1023, 83 CR3d 225 (writ of mandate compelling trial court to vacate order accepting CCP §170.6 challenge);
- *Guardado v Superior Court* (2008) 163 CA4th 91, 77 CR3d 149 (petition challenging trial court's acceptance of CCP §170.6 challenge denied on merits);
- *First Fed. Bank. v Superior Court* (2006) 143 CA4th 310, 49 CR3d 296 (writ of mandate compelling trial court to honor CCP §170.6 challenge on remanded motion for attorney fees);
- *Jonathon M. v Superior Court* (2006) 141 CA4th 1093, 46 CR3d 798 (writ of mandate compelling trial court to accept peremptory challenge; juvenile court judge's refusal to follow earlier court of appeal decision on same issue and accept timely peremptory challenge was error);
- *Pfeiffer Venice Props. v Superior Court* (2003) 107 CA4th 761, 132 CR2d 400 (writ of mandate compelling trial court to honor challenge after remand to determine entitlement to attorney fees);
- *Pandazos v Superior Court* (1997) 60 CA4th 324, 70 CR2d 669 (writ of mandate compelling trial court to honor CCP §170.6 challenge to trial judge made after reversal of judgment on jury verdict);
- *La Seigneurie U.S. Holdings, Inc. v Superior Court* (1994) 29 CA4th 1500, 35 CR2d 175 (writ of mandate compelling trial court to grant peremptory challenge made more than 15 days after petitioner had made special appearance);
- *Farmers Ins. Exch. v Superior Court* (1992) 10 CA4th 1509, 13 CR2d 449 (writ of mandate compelling trial court to accept CCP §170.6 challenge to coordination judge that was properly made under former Cal Rules of Ct 1515 (now Cal Rules of Ct 3.516);
- *Stegs Invs. v Superior Court* (1991) 233 CA3d 572, 284 CR 495 (writ of mandate compelling trial court to accept post-appeal CCP §170.6 challenge on remand for partial trial).

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§16.6 b. Deadline to File Writ Petition Under CCP §170.3(d)

A party must file and serve a writ petition "within 10 days after service of written notice of entry of the court's order determining the question of disqualification." CCP §170.3(d); *Carl v Superior Court* (2007) 157 CA4th 73, 75, 68 CR3d 566 (summarily denying petition for writ of mandate filed almost 2 months after service of written notice of entry of order striking statement of disqualification). Section 170.3(d) does not provide for any extension of this deadline. Although CCP §170.3(d) is part of a code section concerning challenges for cause, the supreme court has held that it applies to peremptory challenges as well. See *People v Hull* (1991) 1 C4th 266, 270, 2 CR2d 526. On who qualifies as a party under CCP §170.3(d), see §16.4.

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§16.7 c. Standard of Review if Writ Petition Accepted

An appellate court reviews an order granting or denying a motion for judicial disqualification for abuse of discretion. See, *e.g.*, *Daniel V. v Superior Court* (2006) 139 CA4th 28, 39, 42 CR3d 471; *Hemingway v Superior Court* (2004) 122 CA4th 1148, 1153, 19 CR3d 363.

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2. CCP §404.6: Order Concerning Coordination of Actions

§16.8 a. Writ Proceeding Exclusive Means of Obtaining Appellate Review

A petition for a writ of mandate is the exclusive means of obtaining appellate review of an order concerning the coordination of previously unrelated actions. CCP §404.6; Cal Rules of Ct 3.505(b). Such orders are not appealable. *Lautrup, Inc. v Trans-West Discount Corp.* (1976) 64 CA3d 316, 134 CR 348.

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§16.9 b. Deadline to File Writ Petition

A party must file a writ petition within 20 days after service of a written notice of entry of the trial court's order. CCP §404.6. Before the 20-day period expires, the trial court may for "good cause" grant the petitioner up to 10 additional days within which to file the petition. CCP §404.6.

Subject to the rules concerning transfer of causes among the courts of appeal, a writ petition relating to an order granting or denying coordination may be filed in any reviewing court having jurisdiction under the rules applicable to civil actions generally. Cal Rules of Ct 3.505(b), 10.1000. If the actions to be coordinated are within the jurisdiction of more than one reviewing court, the order granting the petition for coordination must specify the court in which any petition for a writ relating to any subsequent order in the coordination proceeding must be filed. CCP §404.2; Cal Rules of Ct 3.505(a).

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§16.10 c. Standard on Review if Writ Petition Accepted

The standard of review of an order granting or denying coordination of previously unrelated actions depends on the nature of the determination under review. The trial court's application of law to undisputed facts is subject to de novo review. When the trial court's ruling is a mixed question of fact and law, the appellate court gives deference to the trial court's factual findings and reviews de novo the trial court's application of law to facts. See *McGhan Med. Corp. v Superior Court* (1992) 11 CA4th 804, 809, 14 CR2d 264.

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3. CCP §405.39: Grant or Denial of Motion to Expunge Lis Pendens

§16.11 a. Writ Proceeding Exclusive Means of Obtaining Appellate Review

A petition for a writ of mandate is the exclusive means of obtaining appellate review of an order granting or denying expungement of a lis pendens; such orders are not appealable. CCP §405.39. A writ petition is also the vehicle by which a party challenges an attorney fee order made under CCP §405.38. *Castro v Superior Court* (2004) 116 CA4th 1010, 1016 n10, 10 CR3d 865, citing CCP §405.39. See also *Shah v McMahon* (2007) 148 CA4th 526, 529, 55 CR3d 792 (dismissing purported appeal because challenge to fee order following order expunging lis pendens could be reviewed only by petition for writ of mandate).

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§16.12 b. Deadline to File Writ Petition

A writ petition must be filed and served within 20 days after service of written notice of the trial court's order by the court or any party. CCP §405.39. A petitioner may seek up to 10 additional days in which to file the petition if the extension is sought within the original 20-day period. CCP §405.39.

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§16.13 c. Standard of Review if Writ Petition Accepted

The standard of review is much like the abuse of discretion standard applicable to the review of an order granting or denying a preliminary injunction. *Howard S. Wright Constr. Co. v Superior Court* (2003) 106 CA4th 314, 320, 130 CR2d 641.

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4. Govt C §6259(c): Public Records Act

§16.14 a. Writ Proceeding Exclusive Means of Obtaining Appellate Review

A petition for an extraordinary writ, including a writ of mandate, is the exclusive means of obtaining appellate review of a trial court order under the California Public Records Act (Govt C §§6250-6276.48), either directing disclosure of a public record or supporting the decision of a public official refusing disclosure. Govt C §6259(c); *Filarsky v Superior Court* (2002) 28 C4th 419, 426, 121 CR2d 844; *Powers v City of Richmond* (1995) 10 C4th 85, 89, 40 CR2d 839; *County of Santa Clara v Superior Court* (2009) 170 CA4th 1301, 1311 n2, 89 CR3d 374; *Los Angeles Unified Sch. Dist. v Superior Court* (2007) 151 CA4th 759, 764 n2, 60 CR3d 445.

The limitation of judicial review in Govt C §6259(c) to review by extraordinary writ rather than by appeal does not violate the appellate jurisdiction clause of the California Constitution, Cal Const art VI, §11. *Powers*, 10 C4th at 93. The appellate jurisdiction vested in the courts by Cal Const art VI, §11, encompasses review by extraordinary writ as well as review by direct appeal. *Leone v Medical Bd.* (2000) 22 C4th 660, 667, 94 CR2d 61; *Powers v City of Richmond, supra*.

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§16.15 b. Court Has Limited Discretion to Deny Writ Petition

Because a writ petition under Govt C §6259(c) is the sole method of obtaining appellate review of a trial court order under the Public Records Act, a reviewing court does not have unfettered discretion to deny such a petition. A court "may not deny an apparently meritorious writ petition, timely presented in a formally and procedurally sufficient manner, merely because, for example, the petition presents no important issue of law or because the court considers the case less worthy of its attention than other matters." *Powers v City of Richmond* (1995) 10 C4th 85, 114, 40 CR2d 839. See, *e.g., Los Angeles Unified Sch. Dist. v Superior Court* (2007) 151 CA4th 759, 764, 60 CR3d 445 (writ denied on merits). This is in contrast to most other contexts in which appellate courts can, and usually do, summarily deny writ petitions for any number of reasons. See §§22.14-22.17.

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§16.16 c. Deadline to File Writ Petition and Trial Court Stay

A party must file a writ petition within 20 days after service of written notice of entry of an order under Govt C §6259. Govt C §6259(c). If the notice is served by mail, the period within which to file the petition is increased by 5 days. Govt C §6259(c). The trial court may, for good cause, grant the petitioner up to an additional 20 days within which to file the petition as long as the petitioner makes the request within 20 days after service of written notice of the entry of order. Govt C §6259(c).

A court will not stay an order under the Public Records Act unless the petitioner "demonstrates it will otherwise sustain irreparable damage and probable success on the merits." Govt C §6259(c). On requesting a stay in an appellate court writ proceeding, see chap 19.

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§16.17 d. Standard of Review if Writ Petition Accepted

The standard of review of an order under Govt C §6259 is "independent review." A trial court's interpretation of the Public Records Act and its application to undisputed facts present questions of law subject to de novo review, whereas a reviewing court will uphold the trial court's factual findings if based on substantial evidence. *County of Santa Clara v Superior Court* (2009) 170 CA4th 1301, 1311 n2, 89 CR3d 374 ("scope of review is the same as for direct appeals"); *Los Angeles Unified Sch. Dist. v Superior Court* (2007) 151 CA4th 759, 764, 60 CR3d 445.

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5. Special Provisions for Writ Review of Certain Administrative Proceedings

a. Petition for Review of Final Order of Agricultural Labor Relations Board

§16.18 (1) Writ Proceeding Exclusive Means of Obtaining Appellate Review

The court of appeal may review a final order of the Agricultural Labor Relations Board (ALRB) by way of a petition asking that the order be modified or set aside. *Artesia Dairy v ALRB* (2008) 168 CA4th 598, 86 CR3d 91 (because employer could not challenge union certification, it engaged in "technical" unfair labor practice to generate unfair labor practice decision reviewable under Lab C §1160.8). The petition must be filed in the court of appeal that has jurisdiction over the county in which the unfair labor practice allegedly occurred or in which the petitioner resides or transacts business. Lab C §1160.8. A writ petition is the exclusive means of appellate review of an ALRB final order. Lab C §1160.9.

On enforcement of ALRB orders in superior court, see §4.28.

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§16.19 (2) Deadline to File Writ Petition

A petition under Lab C §1160.8 must be filed within 30 days from the date of the issuance of the Agricultural Labor Relations Board's (ALRB) order. Lab C §1160.8. This time limit is jurisdictional. *United Farm Workers v Agricultural Labor Relations Bd.* (1977) 74 CA3d 347, 350, 141 CR 437. Code of Civil Procedure §1013(a) does not apply to extend the time within which to file a petition under Lab C §1160.8. *Mario Saikhon, Inc. v ALRB* (1983) 140 CA3d 581, 584, 189 CR 632.

The ALRB must file the certified record of the proceeding in the court of appeal within 10 days after it receives notice that the petition has been filed. Lab C §1160.8. Procedures are set forth in Cal Rules of Ct 8.498.

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§16.20 (3) Discretion to Deny Petition

The court of appeal has discretion to summarily deny the petition. *Tex-Cal Land Mgmt., Inc. v ALRB* (1979) 24 C3d 335, 350, 156 CR 1. However, the court will likely allow the petitioner a reasonable time to file points and authorities based on the record of the proceeding filed with the court by the Agricultural Labor Relations Board (ALRB). By placing the burden to furnish a sufficient record on the ALRB, Lab C §1160.8 "impliedly assures the petitioner an opportunity to present written arguments based on the board-certified record." 24 C3d at 351. See also *Powers v City of Richmond* (1995) 10 C4th 85, 113, 40 CR2d 839 ("reviewing court's discretion is quite restricted" when writ review is exclusive avenue of appellate review).

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§16.21 (4) Standard of Review if Writ Petition Accepted

On writ review, the ALRB's findings with respect to questions of fact are conclusive if supported by substantial evidence in the record. Lab C §1160.8. See *Tex-Cal Land Mgmt., Inc. v ALRB* (1979) 24 C3d 335, 342, 156 CR 1 (upholding constitutionality of substantial evidence standard prescribed by Lab C §1160.8); *Artesia Dairy v ALRB* (2008) 168 CA4th 598, 604, 86 CR3d 91 (as to ALRB's findings of fact, court applies substantial evidence standard and does not reweigh evidence, although evidence must be of "ponderable legal significance"; however, ALRB decisions that "rest on erroneous legal foundations will be set aside").

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b. Decisions of Alcoholic Beverage Control Appeals Board

§16.22 (1) Petition for Writ of Review of Adjudicatory Order of Alcoholic Beverage Control Appeals Board

The Alcoholic Beverage Control Appeals Board is an appellate agency within the Department of Alcoholic Beverage Control. Bus & P C §23077. The board reviews, among other things, the department's findings to determine whether they are supported by substantial evidence. See Bus & P C §23084.

The exclusive method of obtaining review of the board's adjudicatory orders is by a writ of review. The procedures are set forth in Bus & P C §§23090-23090.7. Bus & P C §§23089, 23090.5.

An aggrieved party may apply to the court of appeal for a writ of review of a final order of the board. Bus & P C §23090. Although Bus & P C §23090 also provides for application to the supreme court, applications filed there are routinely transferred to the courts of appeal without consideration of the merits. See, *e.g., Rondon v Alcoholic Beverage Control Appeals Bd.* (2007) 151 CA4th 1274, 1280, 60 CR3d 295. The procedures for seeking this statutory writ of review are those prescribed for a petition for a writ of review (certiorari) in CCP §§1067-1077. Bus & P C §23090.4. Procedures in the courts of appeal and the supreme court are discussed in chaps 18, 27.

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§16.23 (2) Deadline to File Writ Petition

The application for a writ of review must be filed and served "within 30 days after the filing of the final order of the board." Bus & P C §23090.

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§16.24 (3) Standard of Review if Writ Petition Accepted

The scope of review of the board's order is similar to review under CCP §1094.5. See Bus & P C §23090.2. Therefore, counsel can use the administrative mandamus format for the petition and responsive pleadings. The title of the petition, however, should be "Petition for Writ of Review." See the forms in California Administrative Mandamus (3d ed Cal CEB 2003). When reviewing the board's order, courts apply the same substantial evidence test that the board applies to the department's findings. Bus & P C §23090.2(d); *Kirby v Alcoholic Beverage Control Appeals Bd.* (1968) 261 CA2d 119, 121, 67 CR 628. See also *Rondon v Alcoholic Beverage Control Appeals Bd.* (2007) 151 CA4th 1274, 1283, 60 CR3d 295 (in absence of clear abuse of discretion, court will uphold decision to suspend license for violation of liquor laws; however, some situations call for de novo review, including whether administrative proceeding was fundamentally fair, which is question of law).

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§16.25 (4) Petition for Writ of Mandate Challenging Nonadjudicatory Action

A writ of mandate is available to review the Department of Alcoholic Beverage Control's nonadjudicatory actions; this writ also must be sought in the court of appeal or the supreme court. Bus & P C §23090.5; *Schenley Affiliated Brands Corp. v Kirby* (1971) 21 CA3d 177, 195, 98 CR 609 (review of department rule making); *Samson Mkt. Co. v Kirby* (1968) 261 CA2d 577, 580, 68 CR 130 (review of department order denying extension of time before cancellation of liquor license became effective). On writs of mandate, see §§15.2-15.13.

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§16.26 c. Petition for Writ of Review of Decisions of Energy Resources Conservation and Development Commission

Decisions of the Energy Resources Conservation and Development Commission on applications for the certification of sites and related facilities can be reviewed only through a petition for a writ of review in the California Supreme Court. Pub Res C §25531(a). See *County of Sonoma v State Energy Resources Conserv. & Dev. Comm'n* (1985) 40 C3d 361, 363, 220 CR 114 (upholding constitutionality of statutory restriction on method of review); *Santa Teresa Citizen Action Group v State Energy Resources Conserv. & Dev. Comm'n* (2003) 105 CA4th 1441, 1450, 130 CR2d 392 (supreme court had exclusive jurisdiction regarding judicial review of Energy Commission's decision on power plant).

Review is limited to whether the Commission acted under its statutory authority and in conformity with constitutional safeguards. The Commission's findings of fact are final and not subject to review. Pub Res C §25531(b).

For further discussion of the review of State Energy Resources Conservation and Development Commission decisions and for a sample form, see 20 California Forms of Pleading and Practice §247.279 (2007).

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§16.27 (1) Deadline to File Writ Petition

No statutory deadline exists for filing the petition for a writ of review.

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§16.28 (2) Standard on Review if Writ Petition Accepted

The supreme court may determine whether the commission acted under its statutory authority and in conformity with constitutional safeguards, but the commission's findings of fact are final and not subject to review, except as provided in Pub Res C §§25500-25543. Pub Res C §25531(b).

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§16.29 d. Petition for Writ of Review of Decisions of Public Employment Relations Board

Review of decisions by the Public Employment Relations Board (PERB) is through a "petition for a writ of extraordinary relief." Govt C §3542(b). The writ has also been referred to as a "writ of review." *Regents of Univ. of Cal. v PERB* (1986) 41 C3d 601, 606, 224 CR 631; *California Faculty Ass'n v PERB* (2008) 160 CA4th 609, 615, 72 CR3d 654. Procedures are set out in Cal Rules of Ct 8.498.

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§16.30 (1) Deadline to File Writ Petition

The petition must "be filed within 30 days after issuance of the board's final order, order denying reconsideration, or order joining in the request for judicial review, as applicable." Govt C §3542(c). The time limit for seeking judicial review prescribed by Govt C §3542(c) is jurisdictional and is not extended by CCP §1013(a) when the board's decision is served by mail. *San Mateo Fed'n of Teachers v Public Employment Relations Bd.* (1994) 28 CA4th 150, 155, 33 CR2d 387.

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§16.31 (2) Standard of Review if Writ Petition Accepted

The board's findings on "questions of fact, including ultimate facts, if supported by substantial evidence on the record considered as a whole, are conclusive." Govt C §3542(c). See *California Faculty Ass'n v PERB* (2008) 160 CA4th 609, 616, 72 CR3d 654 (appellate court defers to board's determination of whether matter is within scope of representation unless clearly erroneous).

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§16.32 (3) Compare Board Petition to Enforce Decision

If the time to petition for extraordinary relief has expired, the board may seek enforcement of its final decision or order, by writ of mandamus, in the court of appeal or the superior court. Govt C §3542(d).

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e. Petition for Writ of Review of Decisions of Public Utilities Commission

§16.33 (1) Petition for Writ of Review

The method for seeking judicial review of a decision of the Public Utilities Commission (PUC), an agency of state constitutional origin, is a petition for a writ of review filed in the court of appeal or the supreme court. Pub Util C §1756. In rare circumstances, however, a writ of mandate directed at the PUC may issue in the supreme court or the court of appeal as prescribed in CCP §1085. Pub Util C §1759(b).

No court, except the court of appeal or supreme court in review proceedings, may review, reverse, correct, or annul PUC orders or decisions. The superior court may not interfere with the PUC's regulation of public utilities. Pub Util C §1759(a); *Hartwell Corp. v Superior Court* (2002) 27 C4th 256, 275, 115 CR2d 874; *San Diego Gas & Elec. Co. v Superior Court* (1996) 13 C4th 893, 916, 55 CR2d 724; but see *People ex rel Orloff v Pacific Bell* (2003) 31 C4th 1132, 1138, 7 CR3d 315 (PUC does not have exclusive jurisdiction over all actions against public utilities; Pub Util C §1759(a) does not insulate public utilities from all civil actions brought in superior court).

A petition for a writ of review pertaining solely to water corporations may be filed only in the supreme court, which must grant expedited consideration to any petition alleging that the court of appeal has assumed jurisdiction over such a proceeding. Pub Util C §§1756(f), 1758(d). The supreme court may review decisions of the court of appeal on a petition for a writ of review in the manner provided for other civil actions. Pub Util C §1758(c).

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§16.34 (a) Application for Rehearing Prerequisite to Judicial Review

Filing an application for rehearing within 30 calendar days of the effective date of a PUC decision is a jurisdictional prerequisite to filing a petition for a writ of review. Pub Util C §1731; *Albin v Railroad Comm'n* (1932) 216 C 655, 15 P2d 860. The application for rehearing must set forth with specificity the grounds on which the applicant believes the PUC decision is unlawful; no ground may be urged in any court unless set forth in the application for rehearing. Pub Util C §1732. If an application for rehearing is filed 10 days or more before the effective date of the challenged order, the application must be granted or denied before the effective date, or the order will stand suspended until the application is granted or denied, up to a period of 60 days from the date the application is filed. Pub Util C §1733(a).

PRACTICE TIP: Except in very rare circumstances, the PUC makes its decisions effective on the date of issuance, mooting Pub Util C §1733(a).

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§16.35 (b) No Petition for Rehearing Required After Decision on Rehearing

An aggrieved party desiring judicial review is not obliged to seek rehearing of a decision on rehearing before petitioning for a writ of review. *Toward Util. Rate Normalization v PUC* (1978) 22 C3d 529, 536, 149 CR 692.

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Source: Civil Litigation/California Civil Writ Practice/16 Availability of Writ Relief/§16.36 (c) Application for Rehearing Deemed Denied

§16.36 (c) Application for Rehearing Deemed Denied

An application for rehearing not granted within 60 days may be deemed denied by the applicant, unless the PUC extends the effective date of the order for the period of the pendency of the application. Pub Util C §1733.

PRACTICE TIP: It is generally unwise to deem the application for rehearing denied and file a petition for a writ of review, because the PUC can simply inform the court that an order on the application for rehearing is imminent and include in its order a discussion addressing the points made in the petition for review.

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§16.37 (2) Deadline to File Petition for Writ of Review

A petition for a writ of review must be filed within 30 calendar days after the PUC issues its decision denying the application for rehearing or, if the application is granted, within 30 calendar days after issuance of the decision on rehearing. Pub Util C §1756(a). For decisions for which the rehearing application is granted but no decision on rehearing has been issued, the petition for a writ of review must be filed at least 120 days after the application for rehearing was granted. Pub Util C §1756(a).

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§16.38 (3) Parties and Venue

A petitioner seeking a writ of review must be "a party that is aggrieved" by the PUC's decision and must have filed a timely application for rehearing. Pub Util C §§1731(b), 1756(a). See §§16.33-16.37. The PUC is the respondent in the review proceeding and generally appears as a party. Pub Util C §§1756.2, 1758(a). Other parties to the PUC proceeding may appear and are often designated real parties in interest. Venue for a petition for a writ of review is in the judicial district in which the petitioner resides or, if the petitioner is a business, the judicial district in which the petitioner has its principal place of business in California. Pub Util C §1756(d).

PRACTICE TIP: When the petitioner has its principal place of business outside California, the petition should allege that fact and the reasons the particular venue was chosen, *e.g.,* the petitioner has business connections to the judicial district, counsel makes its office in the district, or the PUC's decision or the underlying transaction occurred in the district.

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§16.39 (4) Standard of Review if Writ Petition Accepted

As a general matter, the PUC's interpretation of the Public Utilities Code "should not be disturbed unless it fails to bear a reasonable relation to statutory purposes and language." *Greyhound Lines, Inc. v PUC* (1968) 68 C2d 406, 410, 67 CR 97. However, the PUC does not receive such deference on questions relating to the scope of its own jurisdiction.

To the extent not inconsistent with the Public Utilities Code, the provisions of the Code of Civil Procedure relating to writs of review (certiorari) (CCP §§1067-1077) apply to the review proceeding. Pub Util C §1758(b).

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Source: Civil Litigation/California Civil Writ Practice/16 Availability of Writ Relief/§16.40 (a) In Complaint, Enforcement, Ratemaking, or Licensing Proceedings Under Pub Util C §1757

§16.40 (a) In Complaint, Enforcement, Ratemaking, or Licensing Proceedings Under Pub Util C §1757

In complaint or enforcement proceedings, and in ratemaking or licensing proceedings addressed to particular parties, judicial review, based on the entire record certified by the PUC, is limited to whether any of the following occurred (Pub Util C §1757(a)):

- The PUC acted without, or in excess of, its powers or jurisdiction;
- The PUC did not proceed in the manner required by law;
- The PUC's decision was not supported by the findings;
- The findings in the decision were not supported by substantial evidence in light of the whole record;
- The order or decision of the PUC was procured by fraud or was an abuse of discretion; or
- The order or decision of the PUC violated any federal or state constitutional right of the petitioner.

See *Utility Reform Network v PUC* (2008) 166 CA4th 522, 533, 82 CR3d 791 (setting out court's standard of review of PUC decisions).

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Source: Civil Litigation/California Civil Writ Practice/16 Availability of Writ Relief/§16.41 (b) In Cases in Which Pub Util C §1757 Does Not Apply

§16.41 (b) In Cases in Which Pub Util C §1757 Does Not Apply

In cases in which Pub Util C §1757 does not apply, such as rulemaking cases or industrywide investigations, judicial review, based on the entire record certified by the PUC, is limited to whether any of the following occurred (Pub Util C §1757.1(a)):

- The order or decision of the PUC was an abuse of discretion;
- The PUC did not proceed in the manner required by law;
- The PUC acted without, or in excess of, its powers or jurisdiction;
- The decision of the PUC was not supported by the findings;
- The order or decision of the PUC was procured by fraud; or
- The order or decision of the PUC violated a federal or state constitutional right of the petitioner.

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Source: Civil Litigation/California Civil Writ Practice/16 Availability of Writ Relief/§16.42 (c) In Cases Pertaining to Water Corporations

§16.42 (c) In Cases Pertaining to Water Corporations

Review of PUC decisions pertaining solely to water corporations is limited to determining whether the PUC regularly pursued its authority, including whether the order or decision violates any state or federal constitutional right of the petitioner. Pub Util C §1757.1(b).

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§16.43 (d) No New Evidence in Writ Proceeding

No new or additional evidence may be presented in the writ proceeding. Apart from constitutional questions, the findings of the PUC, including its findings of ultimate fact and its findings and conclusions on reasonableness and discrimination, are final. Pub Util C §1757.1(c).

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§16.43A (e) In Cases Involving Constitutional Questions

When a PUC order or decision is challenged on the ground that it violates any state or federal constitutional right of the petitioner, the reviewing court exercises "independent judgment on the law and the facts, and the findings or conclusions of the [PUC] material to the determination of the constitutional question" are not final. Pub Util C §1760.

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§16.44 (5) Summary Denial of Writ Is on Merits

A summary denial of a petition for a writ of review is a decision on the merits as to the law and the facts presented in the review proceedings. *In re Rose* (2000) 22 C4th 430, 444, 93 CR2d 298, following the holding in *Consumers Lobby Against Monopolies v PUC* (1979) 25 C3d 891, 901, 160 CR 124. That is because a petition to the supreme court for a writ of review is the sole means provided by law for judicial review of a PUC decision and the petition serves the same function as an appeal. 25 C3d at 901. Thus, unlike a summary denial of a petition for mandate, prohibition, or other prerogative writ, the summary denial of a petition for a writ of review under Pub Util C §1756 is normally res judicata. 25 C3d at 901 n3. See chaps 22, 24 on summary denial and res judicata.

PRACTICE TIP: A summary denial of a petition for review by the court of appeal is immediately final. See Cal Rules of Ct 8.490(b)(1); *Pacific Bell v Public Utils. Comm'n* (2000) 79 CA4th 269, 284 n12, 93 CR2d 910. This gives the petitioner just 10 days to file a petition for review in the supreme court. Cal Rules of Ct 8.500(e)(1).

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§16.45 (6) PUC's Exercise of Legislative Power Not Res Judicata

In *Camp Meeker Water Sys. v PUC* (1990) 51 C3d 845, 274 CR 678, the PUC looked at the deeds of the parties to determine whether the petitioner, a private water system, was entitled to a rate increase. The supreme court ruled that the PUC did not attempt to adjudicate incidents of title or to enforce rights between parties. The PUC's rate increase decision was binding in all collateral actions or proceedings under Pub Util C §1709 but did not otherwise have res judicata effect. 51 C3d at 852 n3. It is well settled that when the PUC exercises its judicial power, its orders or decisions are res judicata as to the issues involved "in subsequent proceedings between the same parties." When the PUC fixes rates, however, it exercises its legislative, not its judicial, power. 21 C3d at 852 n3.

On review of PUC decisions and forms, see also 42 California Forms of Pleading and Practice, Public Utilities §§480.140-480.147, 480.200.

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f. Decisions of Workers' Compensation Appeals Board

§16.46 (1) Writ of Review Exclusive Means of Obtaining Appellate Review

The exclusive method for obtaining review of decisions of the Workers' Compensation Appeals Board (WCAB) is by a special statutory writ of review. Lab C §5950. See, *e.g., Gelson's Mkts., Inc. v WCAB* (2009) 179 CA4th 201, 208, 101 CR3d 548 (court of appeal granted writ of review and annulled WCAB's decision); *Bensen v WCAB* (2009) 170 CA4th 1535, 89 CR3d 166 (court of appeal granted writ of review and upheld WCAB's decision); *Department of Corrections & Rehabilitation v WCAB* (2008) 166 CA4th 911, 916, 82 CR3d 920 (treating petition for writ of mandate or prohibition as petition for writ of review). A petition for reconsideration by the WCAB is a necessary prerequisite for judicial review. Lab C §5901.

The petition for review should be filed in the court of appeal for the appellate district in which the petitioner resides. Lab C §5950. As with other writs, although the petition can be filed first in the supreme court (Lab C §5950), that court routinely transfers such petitions to the court of appeal without considering the merits.

The supreme court and the courts of appeal are also authorized by Lab C §5955 to issue mandate to the WCAB (*i.e.,* to compel a legal duty) in "all proper cases." *Loustalot v Superior Court* (1947) 30 C2d 905, 908, 186 P2d 673. Under Lab C §5955, mandate may be available to challenge the constitutionality of workers' compensation legislation if the petitioner can meet the criteria in CCP §1085. *Greener v WCAB* (1993) 6 C4th 1028, 1046, 25 CR2d 539 (trial court had personal jurisdiction over WCAB but lacked subject matter jurisdiction to declare Workers' Compensation Act provisions invalid and enjoin their enforcement; although challenge to validity of statute before its application in effect sought declaratory relief over which appellate courts do not have original jurisdiction, petitioner could petition appellate court for writ of mandate).

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§16.47 (2) Deadline to File Petition for Writ of Review

The petition must be filed within 45 calendar days after a petition for reconsideration is denied; or, if reconsideration is granted, within 45 calendar days after filing of the order, decision, or award following reconsideration. Lab C §5950. The prescribed time limit is jurisdictional. *Southwest Airlines v WCAB* (1991) 234 CA3d 1421, 1424, 286 CR 347 (when petition was not filed within time specified by Lab C §5950, appellate court lacked jurisdiction and petition was denied). Code of Civil Procedure §1013 does not extend the time within which a party must file a petition for a writ of review under Lab C §5950 if the Workers' Compensation Appeals Board's decision is served by mail. *Camper v WCAB* (1992) 3 C4th 679, 690, 12 CR2d 101, citing *Paneno v WCAB* (1992) 4 CA4th 136, 148, 5 CR2d 461.

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§16.48 (3) Standard of Review if Writ Petition Accepted

An appellate court reviews interpretation of governing statutes or application of the law to undisputed facts de novo, although "the WCAB's interpretation is entitled to great weight unless clearly erroneous." *Zenith Ins. Co. v WCAB* (2008) 159 CA4th 483, 490, 71 CR3d 724. See *Bensen v WCAB* (2009) 170 CA4th 1535, 1543, 89 CR3d 166; *Brodie v WCAB* (2007) 40 C4th 1313, 1331, 57 CR3d 644; *Medrano v WCAB* (2008) 167 CA4th 56, 64, 83 CR3d 802; *Tomlin v WCAB* (2008) 162 CA4th 1423, 1427, 76 CR3d 672. The WCAB's findings on questions of fact are conclusive when supported by substantial evidence, based on review of the entire record. Lab C §§5952-5953; *Braewood Convalescent Hosp. v WCAB* (1983) 34 C3d 159, 164, 193 CR 157; *Verga v WCAB* (2008) 159 CA4th 174, 183, 70 CR3d 871. See *Gelson's Mkts., Inc. v WCAB* (2009) 179 CA4th 201, 208, 101 CR3d 548 (court "defer[s] to the Board's determination of facts if supported by substantial evidence").

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B. Writ Petition as Prerequisite to Appeal

1. CCP §877.6(e): Grant or Denial of Motion for "Good Faith Settlement" Determination

§16.49 a. Writ Proceeding May Be Prerequisite to Obtaining Appellate Review

At least two courts have held that a petition for a writ of mandate is the proper method to seek *prejudgment* review of a trial court's determination that settlement by one of several joint tortfeasors or co-obligors on a contract was or was not in good faith. A party seeking *postjudgment* review of a good faith settlement determination may do so on appeal, at least if it has already unsuccessfully sought a writ prejudgment. See CCP §877.6(e); *Maryland Cas. Co. v Andreini & Co.* (2000) 81 CA4th 1413, 1425, 97 CR2d 752. See also *Wilshire Ins. Co. v Tuff Boy Holding, Inc.* (2001) 86 CA4th 627, 636, 103 CR2d 480.

In *Maryland Cas.*, an insured brought an action against his insurer and his broker. The insured settled with the broker, and the trial court found that the settlement was made in good faith. The insured's prejudgment petition for a writ of mandate was summarily denied, and the insurer again sought review, postjudgment, on appeal as a matter of right. The court of appeal held that mandate is the exclusive procedure for obtaining immediate review of a good faith determination, and any party wishing to challenge the merits of such an order must do so within the time prescribed in CCP §877.6(e). However, a summary denial of such a petition does not foreclose postjudgment review of the determination on appeal. *Wilshire Ins. Co. v Tuff Boy Holding, Inc, supra,* is to the same effect, except that the writ petition was brought by an insurer whose indemnity claim against the manufacturer was extinguished by the good faith settlement. The insurer later appealed from a stipulated judgment but was unable to change the outcome.

PRACTICE TIP: Counsel should seek the writ immediately, so as not to foreclose the ability to raise the issue on appeal from a final judgment.

The failure to seek immediate writ review of a good faith settlement determination possibly forecloses a party from later challenging the determination on appeal. In *Maryland Cas.*, for example, the court noted that the appellant had timely petitioned the court for writ review, which was summarily denied. *Maryland Cas. Co. v Andreini & Co.* (2000) 81 CA4th 1413, 1425 n13, 97 CR2d 752. The court thus did not decide whether an aggrieved party may choose to forgo writ review of a good faith settlement determination and raise the issue for the first time on appeal. In *Main Fiber Prods., Inc. v Morgan & Franz Ins. Agency* (1999) 73 CA4th 1130, 1135, 87 CR2d 108, the applicant did not seek writ review, and the appellate court held that the good faith settlement determination could not be challenged on appeal. See also *O'Hearn v Hillcrest Gym & Fitness Ctr., Inc.* (2004) 115 CA4th 491, 499, 9 CR3d 342 (same result due to strong policy of encouraging early finality).

NOTE: On the other hand, *Rohr Indus., Inc. v First State Ins. Co.* (1997) 59 CA4th 1480, 69 CR2d 872, considered the applicability of CCP §§877-877.6 to a third party (in *Rohr*, an insurer), concluding that the appropriate remedy in that case was an appeal: "[W]hen a party wishes to challenge the legality or appropriateness of extending the applicability of sections 877 and 877.6 to settlements not involving 'joint tortfeasors' or 'co-obligors on a contract debt,' as the terms are used in these statutes, they may do so by way of appeal." 59 CA4th at 1486.

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§16.50 b. Deadline to File Writ Petition

The writ petition must be filed within 20 days of service after written notice of the determination on the good faith hearing. CCP §877.6(e). The notice may be served by one of the parties or the clerk of the court. The trial court may grant up to an additional 20 days for filing the petition. CCP §877.6(e).

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§16.51 c. Standard of Review if Writ Petition Accepted

Ordinarily, the determination of whether a settlement is in good faith is reviewed for abuse of discretion. *Tech-Bilt, Inc. v Woodward-Clyde & Assoc.* (1985) 38 C3d 488, 502, 213 CR 256. See *Long Beach Mem. Med. Ctr. v Superior Court* (2009) 172 CA4th 865, 872, 91 CR3d 494 (reviewing factors in making good faith settlement determination under CCP §877.6 and concluding court abused discretion in approving doctors' settlement; writ issued directing trial court to vacate order finding settlement was in good faith); *TSI Seismic Tenant Space, Inc. v Superior Court* (2007) 149 CA4th 159, 165, 56 CR3d 751 (when exercise of discretion on basis of established criteria can yield only one conclusion, abuse of discretion will be found). However, an issue of statutory interpretation and application of the statute to undisputed facts is a question of law subject to de novo review. *Be v Western Truck Exch.* (1997) 55 CA4th 1139, 1143, 64 CR2d 527.

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§16.52 2. Challenge to Setting Termination Hearing Under Welf & I C §366.26(*l*) or Post-Termination Placement Order Under Welf & I C §366.28(b)

In juvenile dependency proceedings, the trial court may set a hearing to terminate parental rights under Welf & I C §366.26 or order post-termination placement of the child under Welf & I C §366.28. Writ review under Cal Rules of Ct 8.450-8.452 or 8.454-8.456 is the exclusive means to challenge an order setting a hearing to terminate parental rights or a post-termination placement order. Cal Rules of Ct 8.450(a), 8.454(a). See *Jennifer T. v Superior Court* (2007) 159 CA4th 254, 255 n2, 71 CR3d 293 (purported appeal of juvenile court order terminating family reunification services and setting permanent planning hearing treated as writ petition); *Wayne F. v Superior Court* (2006) 145 CA4th 1331, 1334, 1345, 52 CR3d 519 (petition for extraordinary relief granted to caretakers who qualified as prospective adoptive parents, affirming that they had standing to participate in removal hearing). These juvenile court orders are not appealable unless a petition for a writ of extraordinary relief, substantively addressing the specific issues and supported by the record, is timely filed but not resolved on the merits by the appellate court. Welf & I C §§366.26(*l*)(1)(A)-(C), 366.28(b)(1); Cal Rules of Ct 8.450-8.452, 8.454-8.456.

On writ review to challenge an order setting a hearing to terminate parental rights or a post-termination placement order, see California Juvenile Dependency Practice §§10.92-10.108 (Cal CEB Annual).

On further review of writs in juvenile proceedings, see Cal Rules of Ct 8.406, 8.470 (courts of appeal), and 8.472 (supreme court).

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III. OTHER STATUTES AUTHORIZING WRIT REVIEW

§16.53 A. Overview

This section discusses the various statutes authorizing writ review (sometimes referred to as "statutory writs"). In spite of such authorization, the appellate courts retain discretion to hear the merits or summarily deny the petition. On factors the courts of appeal consider in deciding whether to grant writ review, see chaps 15, 17. If the court chooses to decide the matter on the merits, its disposition will turn on the substantive law applicable to the issue presented and the record before it.

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B. CCP §418.10(c): Denial of Motion to Quash Service; to Stay or Dismiss for Inconvenient Forum; to Dismiss for Delay in Prosecution

§16.54 1. Overview

A litigant may seek a writ of mandate to overturn an order denying a motion to: (1) quash the service of summons; (2) stay or dismiss an action on the ground of inconvenient forum; or (3) dismiss the action "pursuant to the applicable provisions of Chapter 1.5 (commencing with Section 583.110) of Title 8." CCP §418.10(a), (c). See, *e.g., Agua Caliente Band of Cahuilla Indians v Superior Court* (2006) 40 C4th 239, 52 CR3d 659 (motion to quash); *Kumar v Superior Court* (1982) 32 C3d 689, 186 CR 772 (same); *Ameriloan v Superior Court* (2008) 169 CA4th 81, 88, 86 CR3d 572 (same); *Anglo Irish Bank Corp. v Superior Court* (2008) 165 CA4th 969, 977, 81 CR3d 535 (same). Expeditious review makes sense; if a trial court has erroneously denied such a motion, the remaining proceedings as to the defendant who made the motion are for naught and would waste judicial resources. See, *e.g.*, *Reid v Balter* (1993) 14 CA4th 1186, 1196, 18 CR2d 287 ("counterproductive" for defendants to wait until after trial and judgment to request review of denial of motion to dismiss for delay in prosecution; on appeal, court refused to disturb plaintiffs' victory on merits by considering issue of delay; case predates addition to CCP §418.10(a) of motion to dismiss for delay in prosecution); see discussion in §16.55.

NOTE: It is not clear that every motion to dismiss for delay in prosecution is included within "the applicable provisions of Chapter 1.5 (commencing with Section 583.110) of Title 8," as provided in CCP §418.10(c). It may be that only a motion to dismiss for failure to timely serve the summons and complaint (see CCP §§583.210-583.250) comes within CCP §418.10(a), (c); only this motion is a likely substitute for the defendant's pleading at the beginning of the case.

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§16.55 2. Deadline to File Writ Petition Under CCP §418.10(c)

A defendant must file the writ petition *before* filing a responsive pleading (see §16.57) and within 10 days after service of a written notice of entry of the order denying the motion. CCP §418.10(c). Service by mail extends the period within which the petition must be filed by 5 days under CCP §1013(a). *Shearer v Superior Court* (1977) 70 CA3d 424, 426, 138 CR 824. The trial court may extend the period within which the petition must be filed by a maximum of 20 days for "good cause." CCP §418.10(c). *Cornell Univ. Med. College v Superior Court* (1974) 38 CA3d 311, 313, 113 CR 291.

The defendant must serve the notice of the petition for a writ of mandate on the adverse party and file it with trial court. CCP §418.10(c).

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§16.56 3. Standard of Review if Writ Petition Accepted

The standard of review turns in part on the showing the defendant made in the trial court. When a nonresident defendant challenges personal jurisdiction, the plaintiff must prove, by a preponderance of the evidence, the factual basis justifying the exercise of jurisdiction. See, *e.g.*, *Pavlovich v Superior Court* (2002) 29 C4th 262, 273, 127 CR2d 329; *Anglo Irish Bank Corp. v Superior Court* (2008) 165 CA4th 969, 980, 81 CR3d 535; *Dorel Indus., Inc. v Superior Court* (2005) 134 CA4th 1267, 1273, 36 CR3d 742. If the plaintiff meets this burden, the defendant must then show "that the exercise of jurisdiction would be unreasonable." *Vons Cos. v Seabest Foods, Inc.* (1996) 14 C4th 434, 449, 58 CR2d 899.

On review, the question of jurisdiction is one of law. When the jurisdictional facts are conflicting, the reviewing court reviews the trial court's factual determinations for substantial evidence and then independently reviews the trial court's conclusions as to the legal significance of the facts. See, *e.g.*, *Vons Cos.*, 14 C4th at 449; *Dorel Indus., Inc.*, 134 CA4th at 1273. When the jurisdictional facts are not in dispute, the question of personal jurisdiction is purely one of law that the appellate court reviews de novo. See, *e.g.*, *Pavlovich*, 29 C4th at 273; *Anglo Irish Bank*, 165 CA4th at 977; *CenterPoint Energy, Inc. v Superior Court* (2007) 157 CA4th 1101, 1116, 69 CR3d 202 (legal question turning on rules of successor liability); *Dorel Indus., Inc. v Superior Court, supra*; *Sonora Diamond Corp. v Superior Court* (2000) 83 CA4th 523, 540, 99 CR2d 824.

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§16.57 4. Filing Writ Petition Extends Time to File Responsive Pleading in Superior Court

Serving and filing a petition for a writ of mandate extends the defendant's time to file a responsive pleading until 10 days after service of written notice of the final judgment in the mandate proceeding. CCP §418.10(c). See also Cal Rules of Ct 8.491 (time for filing responsive pleading extended until 10 days after supreme court files its order denying writ of review after court of appeal denies writ of mandate). The trial court may extend the time to plead for an additional period, not exceeding 20 days, on a showing of good cause. CCP §418.10(c).

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C. CCP §403.080: Grant or Denial of Superior Court Motion to Reclassify Action or Proceeding

§16.58 1. Overview

A party aggrieved by an order granting or denying a motion to reclassify an action or proceeding may obtain review of that order by a petition for a writ of mandate filed in the court of appeal. CCP §403.080. These orders are not directly appealable. *Garau v Torrance Unified Sch. Dist.* (2006) 137 CA4th 192, 199, 40 CR3d 108.

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§16.59 2. Deadline to File Writ Petition Under CCP §403.080

The petitioner must file the petition in the court of appeal within 20 days after service of written notice of the order granting or denying the motion to reclassify the case. CCP §403.080. The trial court may extend this deadline for an additional 10 days for good cause, provided that the petitioner seeks the extension before the 20-day period expires. CCP §403.080.

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§16.60 3. Filing Requirements and Possible Stay

The petitioner must also file a copy of the writ petition in the trial court immediately after the petition is filed in the court of appeal. CCP §403.080. The court of appeal may stay all proceedings in the case pending the finality of its decision on the writ petition. CCP §403.080. Immediately after the decision on the petition becomes final, the clerk of the court of appeal must file a copy of the final order or judgment with the clerk of the trial court. CCP §403.080.

On requesting a stay in an appellate court writ proceeding, see chap 19.

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§16.61 4. Standard of Review if Writ Petition Accepted

The appellate court reviews an order granting or denying a motion to reclassify for abuse of discretion. See, *e.g.*, *Ytuarte v Superior Court* (2005) 129 CA4th 266, 276, 28 CR3d 474.

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D. CCP §400: Grant or Denial of Superior Court Motion to Change Venue

§16.62 1. Overview

A petition for a writ of mandate is the proper method to obtain review of a superior court order granting *or* denying a motion to change venue. CCP §400. See, *e.g.*, *San Francisco Found. v Superior Court* (1984) 37 C3d 285, 208 CR 31 (denying); *Alexander v Superior Court* (2003) 114 CA4th 723, 8 CR3d 111 (denying); *Hamilton v Superior Court* (1974) 37 CA3d 418, 112 CR 450 (granting). Such orders are not directly appealable. See, *e.g.*, *Calhoun v Vallejo City Unified Sch. Dist.* (1993) 20 CA4th 39, 41, 24 CR2d 337; *Hennigan v Boren* (1966) 243 CA2d 810, 815, 52 CR 748. It is unclear whether an order granting or denying a change of venue can be reviewed on appeal from a final judgment. Compare *Hennigan v Boren, supra* (denial of motion to change venue not subject to review on appeal from final judgment) to *Calhoun v Vallejo City Unified Sch. Dist., supra* (appeal of denial of motion to change venue can occur after rendition of final judgment). As a practical matter, the statutory writ is the most useful method of review because it is doubtful that on appeal, the aggrieved party could show prejudice resulted from trial in the wrong court.

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Source: Civil Litigation/California Civil Writ Practice/16 Availability of Writ Relief/§16.63 2. Exception: Venue Order in Limited Civil Cases Directly Appealable

§16.63 2. Exception: Venue Order in Limited Civil Cases Directly Appealable

An order granting or denying a motion to change venue in a limited civil case is an appealable order. CCP §904.2(c).

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§16.64 3. Deadline to File Writ Petition Under CCP §400

The petitioner must file the writ petition in the court of appeal within 20 days after service of written notice of the order granting or denying the change of venue motion. CCP §400. Before the 20-day period expires, the trial court, for good cause, may extend the time within which to file the writ petition for up to an additional 10 days. CCP §400. The petitioner must file a copy of the writ petition in the trial court "immediately after the petition is filed in the court of appeal." CCP §400.

The court of appeal may stay all proceedings in the case pending finality of its judgment on the writ petition. CCP §400. On requesting a stay in an appellate court writ proceeding, see chap 19.

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§16.65 4. Standard of Review if Writ Petition Accepted

If the petitioner sought a change of venue as a matter of right (*e.g.,* the action was pending in the wrong court), the reviewing court will uphold the trial court's determination even if there were conflicting affidavits or testimony unless that determination was arbitrary. See, *e.g.*, *Swartz v California Olive Growers' Packing Corp.* (1942) 56 CA2d 168, 170, 133 P2d 20. If the petitioner sought a change of venue as a matter of discretion (*e.g.,* convenience of witnesses, impartial trial), the reviewing court will uphold the order unless the trial court clearly abused its discretion. See, *e.g.*, *Garrett v Superior Court* (1967) 248 CA2d 263, 268, 56 CR 418 (court found abuse of discretion). See 3 Witkin, California Procedure, *Actions* §948 (5th ed 2008).

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E. CCP §437c: Denial of Motion for Summary Judgment; Violation of Summary Judgment Motion Procedures; Grant or Denial of Motion for Summary Adjudication

§16.66 1. Overview

A party may appeal a judgment entered after an order granting a motion for summary judgment under CCP §437c. CCP §437c(m)(1). All other orders entered under CCP §437c are reviewable by writ. See CCP §437c(m)(1), which states: "Upon entry of any order pursuant to this section, except the entry of summary judgment, a party may… petition an appropriate reviewing court for a peremptory writ." That is, if the trial court did anything other than grant summary judgment, CCP §437c(m)(1) authorizes a party to petition for a peremptory writ (in practice, usually mandate) to review the court's order. Thus, a party may seek a writ to review an order denying summary judgment, an order granting summary judgment of a complaint that leaves a cross-complaint pending, an order granting or denying summary adjudication, or an order that violates the procedural provisions of CCP §437c.

NOTE: Although the Consumers Legal Remedies Act (CLRA) precludes a motion for summary judgment or adjudication under CCP §437c, CCP §1781(c)(3) empowers a court to determine if a CLRA action "is without merit or there is no defense to the action." In ruling on a CLRA "no merit" motion, the courts "[i]n practice," have applied the "standards applicable to motions for summary judgment and summary adjudication." *Princess Cruise Lines, Ltd. v Superior Court* (2009) 179 CA4th 36, 101 CR3d 323 (issuing writ requiring trial court to vacate order denying summary judgment).

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§16.67 2. Denial of Motion for Summary Judgment

Although one decision suggests that a reviewing court usually considers the merits of the summary judgment motion when deciding whether to grant writ relief from an order denying the motion (see *Leyva v Superior Court* (1985) 164 CA3d 462, 468, 210 CR 545), in practice, writ review on the merits is not easy to obtain when summary judgment has been denied. See, *e.g., Lompoc Unified Sch. Dist. v Superior Court* (1993) 20 CA4th 1688, 1692, 26 CR2d 122 (courts "reluctant" to review denials of summary judgment by writ); *Whitney's at the Beach v Superior Court* (1970) 3 CA3d 258, 265, 83 CR 237. But see *State Dep't of Health Servs. v Superior Court* (2003) 31 C4th 1026, 1037, 6 CR3d 441 (reversing appellate court's denial of writ of mandate to overturn order denying summary judgment, allowing defendant to raise defense to action under Fair Employment and Housing Act); *Kentucky Fried Chicken v Superior Court* (1997) 14 C4th 814, 828, 59 CR2d 756 (reversing appellate court's denial of writ of mandate to overturn order denying summary judgment because defendant owed no duty to plaintiff); *Greenberg v Superior Court* (2009) 172 CA4th 1339, 92 CR3d 96 (same); *California Highway Patrol v Superior Court* (2008) 162 CA4th 1144, 76 CR3d 578 (ruling CHP owed no statutory duty to plaintiff and issuing writ of mandate directing trial court to enter summary judgment for CHP); *City of San Diego v Superior Court* (2006) 137 CA4th 21, 28, 40 CR3d 26 (peremptory writ of mandate issued directing trial court to enter summary judgment for defendant; question of fact "can be decided as a matter of law if reasonable minds can come to only one conclusion concerning" issue); *Balloon v Superior Court* (1995) 39 CA4th 1116, 1119, 46 CR2d 161 (peremptory writ of mandate issued directing trial court to grant defendants' summary judgment motion for failure to exhaust administrative remedies), superseded by statute on other grounds as stated in *McDonald v Antelope Valley Community College Dist.* (2008) 45 C4th 88, 110, 84 CR3d 734.

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§16.68 3. Grant or Denial of Summary Adjudication

Under CCP §437c, a party may move for summary adjudication on one or more causes of action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty. CCP §437c(f)(1). The trial court must grant summary adjudication "only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." CCP §437c(f)(1). See *DeCastro West Chodorow & Burns, Inc. v Superior Court* (1996) 47 CA4th 410, 422, 54 CR2d 792 (petition for writ of mandate denied because CCP §437c(f)(1) does not allow summary adjudication of single component of compensatory damages that does not dispose of entire cause of action). Because CCP §437c provides for writ review of *any order* other than an order granting summary judgment, orders granting or denying summary adjudication are reviewable by writ. See, *e.g., The MEGA Life & Health Ins. Co. v Superior Court* (2009) 172 CA4th 1522, 1534, 92 CA4th 399 (granting writ petition challenging denial of summary adjudication on fraud cause of action); *Ra v Superior Court* (2007) 154 CA4th 142, 147, 64 CR3d 539 (denying on merits writ petition challenging summary adjudication as to one of several causes of action).

In *Fisherman's Wharf Bay Cruise Corp. v Superior Court* (2003) 114 CA4th 309, 7 CR3d 628, the court of appeal explained the reasons for considering the merits of a writ petition contesting an order granting summary adjudication: (1) an erroneous ruling created a likelihood of the necessity of two trials rather than one, allowing some causes of action to go forward while omitting significant legal issues that arose out of the same facts and that quite likely should be tried together; and (2) the issues raised in the petition were questions of law, making their immediate resolution on writ review appropriate. 114 CA4th at 319. Although mandate does not lie to control the exercise of trial court discretion, on a motion for summary adjudication, a trial court has no discretion to exercise. "If the trial court errs, it has made an error of law, which automatically constitutes an abuse of discretion." 114 CA4th at 320. See also *Marron v Superior Court* (2003) 108 CA4th 1049, 1056, 134 CR2d 358 (finding irreparable injury if second trial were required).

In *City of Oakland v Superior Court* (1996) 45 CA4th 740, 53 CR2d 120, the court issued a writ of mandate directing the trial court to grant summary adjudication on two of six causes of action. The court issued the writ because the case presented significant legal questions of constitutional and statutory interpretation, public interest supported a speedy resolution of the issues, and the issues presented were questions of law. 45 CA4th at 750.

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4. Basis for Writ Petition

§16.69 a. Court Erred in Denying Motion

If both sides have moved for summary judgment and no facts are disputed, a writ petition lies to require the trial court to grant the motion of one of the parties. *Burke Concrete Accessories, Inc. v Superior Court* (1970) 8 CA3d 773, 775, 87 CR 619. That is because the trial court is *required* to grant the motion under CCP §437c if there is no triable issue and the moving party is entitled to judgment as a matter of law. *B & E Convalescent Ctr. v State Compensation Ins. Fund* (1992) 8 CA4th 78, 88, 9 CR2d 894.

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§16.70 b. Court Failed to Specify Issues and Evidence Relied on

A writ petition lies to compel the trial court to comply with summary judgment motion procedures, *e.g.,* to specify the issues and evidence it relied on in ruling on the motion. See CCP §437c(g); *Vineyard Springs Estates, LLC v Superior Court* (2004) 120 CA4th 633, 642, 15 CR3d 587 (court of appeal vacated denial of summary judgment, ordered trial court to reconsider motion after discharging its duty to rule on evidentiary objections); *Continental Ins. Co. v Superior Court* (1985) 165 CA3d 1069, 1072, 212 CR 140 (court of appeal vacated denial of summary judgment on ground that trial court had not identified material conflicts in evidence by reference to evidence in support of and in opposition to particular asserted facts); *Greater Irvine Credit Union v Superior Court* (1986) 186 CA3d 1189, 1192, 231 CR 296 (same effect). The requirement that the trial court specify the issues and evidence it relied on in ruling on the motion is a task the court often shifts to counsel. See, *e.g.*, *Tera Pharms., Inc. v Superior Court* (1985) 170 CA3d 530, 532, 215 CR 923.

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§16.71 c. Court Erred in Taking Motion Off Calendar

A writ petition lies to challenge an order taking a motion for summary judgment off calendar that fails to comply with the timing requirements of local court rules. See, *e.g., Wells Fargo Bank v Superior Court* (1988) 206 CA3d 918, 922, 254 CR 68 (summary judgment motion was timely under CCP §437c, but local rule required that motion be specially set, preventing hearing no later than 30 days before trial as specified in CCP §437c(a); appellate court issued writ directing trial court to vacate order taking motion off calendar and to hear motion before trial date).

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§16.72 d. Court Erred by Shortening Notice Period

A writ petition lies to vacate a trial court order shortening the notice period for a summary judgment motion. In *McMahon v Superior Court* (2003) 106 CA4th 112, 130 CR2d 407, the court of appeal issued a writ directing the trial court to vacate an order shortening such period on the ground that, in enacting CCP §437c, the Legislature did not give trial courts such authority. 106 CA4th at 118. The court recognized that a motion for summary judgment is potentially case-dispositive and usually requires considerable time and effort to prepare and oppose.

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§16.73 e. Court Erred by Depriving Party of Right to File Motion

A writ petition lies to ensure that a party can exercise the statutory right to bring a summary judgment motion. In *Polibrid Coatings, Inc. v Superior Court* (2003) 112 CA4th 920, 923, 6 CR3d 7, the trial court cited fast-track rules when it denied a trial continuance that would have allowed a cross-defendant brought into the case 14 months after the complaint was filed sufficient time to file a summary judgment motion. The court of appeal issued a writ, agreeing with the petitioner that the fast-track rules must yield to the statutory right to bring a summary judgment motion.

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§16.74 f. Court Erred by Denying Oral Argument

A writ petition lies to ensure that a party has a right to oral argument on a motion for summary judgment. In *Brannon v Superior Court* (2004) 114 CA4th 1203, 8 CR3d 491, the trial court issued a telephonic order denying summary judgment and stating that it would not entertain oral argument. The defendants filed a writ petition. After examining the statutory language and the Legislature's view of the importance of the summary judgment process, the court of appeal concluded that a trial court may not refuse to hear oral argument on a summary judgment motion, although it has substantial discretion to impose reasonable limitations. It therefore issued a writ directing the trial court to hear the matter. 114 CA4th at 1211.

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§16.75 g. Court Erred by Refusing to Consider Summary Adjudication in Alternative

A writ petition lies to direct the trial court to consider a party's alternative motion for summary adjudication. In *Hope Int'l Univ. v Superior Court* (2004) 119 CA4th 719, 14 CR3d 643, the trial court denied the plaintiff's motion for summary judgment or summary adjudication. Because the plaintiff's memorandum of points and authorities was not organized by cause of action, and despite the absence of any rule or decision requiring the trial court's preferred organization, the trial court refused to consider summary adjudication. Petitioner sought a writ of mandate. The court of appeal concluded that the trial court erred in not considering the summary adjudication motion but denied the petition because triable issues of fact existed. 119 CA4th at 744.

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§16.76 5. Deadline to File Writ Petition

A party seeking writ review of an order denying summary judgment, granting or denying summary adjudication, or violating summary judgment motion procedures must file the petition within 20 days after service of "written notice of entry of the order." CCP §437c(m)(1). The deadline runs from the service date of the writing that makes petitioner aware of the trial court's ruling; that is, "written notice of entry of the order." As used in CCP §437c(m)(1), this can mean the date on which the court clerk mailed a copy of the order rather than the date on which the prevailing party mailed notice of its entry. *Eldridge v Superior Court* (1989) 208 CA3d 1350, 1353, 256 CR 724; *Schmidt v Superior Court* (1989) 207 CA3d 56, 60, 254 CR 827 (because petitioner became aware of trial court's ruling through minute order mailed by court, that order, not later notice of order, triggered filing period).

The initial 20-day period is extended if the notice of entry of order is served by mail. CCP §437c(m)(1). If the notice is served by fax, express mail, or another method providing for overnight delivery, the initial period is extended by 2 court days. CCP §437c(m)(1). Code of Civil Procedure §§1005 and 1013 (extending times within which to act) do *not* apply to extend the time within which to file the writ petition. CCP §437c(b)(6).

PRACTICE TIP: Unless the petitioner is certain of the date of mailing, fax, or express mail, it is safest to calendar the date to file the writ petition from the date of the order.

Filing a motion for reconsideration does not extend the period for seeking writ review. *Bensimon v Superior Court* (2003) 113 CA4th 1257, 1259, 7 CR3d 151 (time limits to file writ petition to review denial of motion for summary judgment are strictly construed; motion for reconsideration does not extend time to file writ petition); *Schmidt*, 207 CA3d at 61.

Before the 20-day period within which to file the petition expires, the trial court may for good cause extend the time for one additional period not to exceed 10 days. CCP §437c(m)(1).

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§16.77 6. Standard of Review if Writ Petition Accepted

On writ review, the court of appeal reviews de novo the trial court's decision to grant summary adjudication or deny summary judgment or summary adjudication. It is not bound by the trial court's stated reasons or rationales. See, *e.g.*, *Travelers Cas. & Sur. Co. v Superior Court* (1998) 63 CA4th 1440, 1450, 75 CR2d 54 (denial of summary adjudication); *Scripps Clinic v Superior Court* (2003) 108 CA4th 917, 927, 134 CR2d 101 (same); *West Shield Investigations & Sec. Consultants v Superior Court* (2000) 82 CA4th 935, 946, 98 CR2d 612 (same). With respect to an order denying a defendant's motion for summary adjudication, the appellate court first reviews the motion to determine whether the defendant met its initial burden to establish that one or more causes of action in the complaint had no merit, by showing that one or more elements of the cause of action could not be established, or that there was a complete defense thereto. If the defendant met that burden, the court then examines whether the plaintiff showed, by setting forth specific facts, that a triable issue of fact existed as to that cause of action or defense. 82 CA4th at 946.

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F. CCP §1176: Denial of Stay in Unlawful Detainer Action

§16.78 1. Overview

Code of Civil Procedure §1176(a) authorizes a defendant in an unlawful detainer action whose petition for a stay of judgment pending appeal has been denied by the trial court to file a petition for an extraordinary writ with the appropriate court of appeal.

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§16.79 2. Deadline to File Writ Petition

A party seeking writ review of an order denying a petition for a stay of judgment in an unlawful detainer proceeding pending appeal must file the petition "forthwith." CCP §1176(a). The statute does not impose any more specific deadline for filing the petition.

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§16.80 3. Standard of Review if Writ Petition Accepted

On writ review, an order denying a stay of judgment pending appeal is reviewed under the abuse of discretion standard. See, *e.g.*, *Mehr v Superior Court* (1983) 139 CA3d 1044, 1050, 189 CR 138 (court abused discretion in denying tenants' motion for stay of execution of judgment pending appeal).

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G. CCP §904.1(a)(11)-(12): Monetary Sanction Judgment or Order of $5000 or Less

§16.81 1. Overview

In an unlimited jurisdiction civil case, an immediate appeal may be taken from an interlocutory judgment or order directing payment of sanctions of more than $5000. CCP §904.1(a)(11)-(12). A sanctions order or judgment of *$5000 or less* against a party or a party's attorney "may be reviewed on an appeal by that party after entry of final judgment in the main action, or, at the discretion of the court of appeal, may be reviewed upon petition for an extraordinary writ." CCP §904.1(b).

Because a sanction order or judgment of $5000 or less may be reviewed on appeal after final judgment or on petition for extraordinary writ, the failure to petition for writ relief from such an order or judgment should not affect the right to appeal after final judgment. Because CCP §904.1(a)(11)-(12) provides the right to appeal a sanctions order or judgment that exceeds $5000, a court may deny a writ petition that seeks review of an order or judgment of $5000 or less on the ground that appeal is an adequate remedy. For discussion of appeal as an adequate remedy, see §§15.56-15.60.

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§16.82 2. Request Writ of Mandate or Prohibition in Alternative

In requesting writ review of sanctions, the attorney should request issuance of a writ of mandate or prohibition in the alternative. A writ of mandate is an appropriate remedy to prevent or to obtain the imposition of sanctions. See, *e.g., Kirschenman v Superior Court* (1994) 30 CA4th 832, 835, 36 CR2d 166 (writ of mandate issued ordering trial court to vacate order imposing sanctions on attorney and client for failing to personally attend mediation session and ordering further mediation; trial court had no statutory authority to mandate mediation, and no enforceable agreement to mediate existed); *Yarnell & Assocs. v Superior Court* (1980) 106 CA3d 918, 923, 165 CR 421.

Prohibition is also appropriate to prevent an award of sanctions that exceeds the trial court's jurisdiction, even when execution on the order for sanctions has already issued. *Lund v Superior Court* (1964) 61 C2d 698, 709, 39 CR 891.

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Source: Civil Litigation/California Civil Writ Practice/16 Availability of Writ Relief/§16.83 3. No Statutory Deadline for Petition

§16.83 3. No Statutory Deadline for Petition

The statute does not specify a deadline within which to file the writ petition. CCP §904.1(b).

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§16.84 4. Standard of Review if Writ Petition Accepted

In general, an appellate court reviews a sanctions award for abuse of discretion. See, *e.g.*, *City & County of San Francisco v Ballard* (2006) 136 CA4th 381, 404, 39 CR3d 1.

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§16.85 5. Discovery Sanctions

There is a split of authority over the appealability of discovery sanctions. For discussion of special issues involving review of discovery sanctions, see §§16.125-16.127. See also California Civil Appellate Practice §§3.24, 3.41 (3d ed Cal CEB 1996).

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IV. OTHER CONTEXTS IN WHICH WRIT RELIEF HAS BEEN GRANTED

§16.86 A. Overview

This section discusses the various contexts in which appellate courts have granted writ relief despite the absence of a statute authorizing such relief. As with so-called statutory writs, the appellate courts retain the discretion to determine whether to entertain a writ petition on the merits. On factors the appellate courts consider in deciding whether to consider a petition on the merits, see chaps 15, 17. If the court entertains a writ petition on the merits, its decision turns on the applicable substantive law and the record.

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§16.87 B. Time to File Nonstatutory Writ Petition

When there is no statutory deadline for filing a writ petition, the appellate courts often apply an "unwritten" 60-day deadline from the date of the challenged order or ruling. See *People v Superior Court (Brent)* (1992) 2 CA4th 675, 682, 3 CR2d 375 (60 days is time limit within which petition "usually" must be filed). Many cases articulate this 60-day rule. See, *e.g.*, *Planned Parenthood Golden Gate v Superior Court* (2000) 83 CA4th 347, 356, 99 CR2d 627 ("[w]here there is otherwise no statutory time limit in filing a writ petition, it must usually be filed within 60 days"); *Popelka, Allard, McCowan & Jones v Superior Court* (1980) 107 CA3d 496, 499, 165 CR 748 ("[a]n appellate court *may* consider a petition for an extraordinary writ at any time [citation], but has discretion to deny a petition filed after the 60-day period applicable to appeals, and *should* do so absent 'extraordinary circumstances' justifying the delay"). But see *Good v Superior Court* (2008) 158 CA4th 1494, 1505 n9, 71 CR3d 125 (although 60-day rule is generally recognized, petition filed beyond 60-day deadline will not be denied unless respondent can show prejudice).

Some cases recognize exceptions to this "unwritten" rule. See, *e.g., Planned Parenthood Golden Gate v Superior Court*, *supra* (60-day rule relaxed because privacy rights of third parties implicated); *Irwin Mem. Blood Ctrs. v Superior Court* (1991) 229 CA3d 151, 156, 279 CR 911 (same).

A petition filed toward the end of the 60-day period is not necessarily timely if the petitioner has "slept on" his or her rights to the real party in interest's prejudice. In such cases, laches may apply and result in denial of the writ petition. See*, e.g.*, *H.D. Arnaiz, Ltd. v County of San Joaquin* (2002) 96 CA4th 1357, 1368, 118 CR2d 71 (laches principles govern timeliness of nonstatutory writ petition); *Wagner v Superior Court* (1993) 12 CA4th 1314, 1317, 16 CR2d 534 ("There is no absolute deadline for filing a petition for writ of mandamus, although the equitable doctrine of laches may bar relief when the petitioner has unreasonably delayed in filing the petition to the prejudice of the opposing party"; petition filed 4 months after challenged discovery order held timely); *People v Superior Court (Clements)* (1988) 200 CA3d 491, 496, 246 CR 122 ("the approach of the Supreme Court to the timeliness of a petition has been one of laches"), citing *Peterson v Superior Court* (1982) 31 C3d 147, 163, 181 CR 784.

The governing principle is reasonableness: if speedy appellate review of a trial court order is necessary, waiting until the 60th day to seek writ relief is risky.

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C. To Challenge Jurisdiction of Superior Court on Basis of Invalidity of Statute or Ordinance

§16.88 1. Overview

The appellate courts have entertained writ petitions by parties threatened with the enforcement of an unconstitutional or inapplicable statute or ordinance. A party may challenge the court's attempt to assume jurisdiction based on an unconstitutional law (see *Mendoza v Small Claims Court* (1958) 49 C2d 668, 321 P2d 9 (mandamus proceeding)), a law that has expired or been repealed without a savings clause (see *Charrot v Municipal Court* (1968) 260 CA2d 208, 66 CR 903), a law that is inapplicable to the petitioner's conduct (*In re Zerbe* (1964) 60 C2d 666, 668, 36 CR 286 (habeas corpus proceeding) (see §§4.17-4.26, 15.39-15.43 for discussion of habeas corpus), or a law that would be unconstitutional if applied in the manner contemplated (*Wetteland v Superior Court* (1967) 251 CA2d 607, 59 CR 605; *Patterson v Municipal Court* (1965) 232 CA2d 289, 293, 42 CR 769; see *In re Bevill* (1968) 68 C2d 854, 862, 69 CR 599 (habeas corpus proceeding)).

As these cases illustrate, the courts are somewhat flexible about the relief sought, and a petitioner may alternatively request either prohibition or mandate. Depending on the timing of the challenge, a writ of review (certiorari) also may be available. Depending on the circumstances, habeas relief may be appropriate. On the time for filing writ petition, see §16.87.

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§16.89 2. Use of Prohibition to Test Validity of Law

Prohibition has been used to test the constitutionality of a law on the ground that its invalidity deprives the trial court of jurisdiction to hear the case. See, *e.g.*, *Melancon v Superior Court* (1954) 42 C2d 698, 703, 268 P2d 1050 (civil statute; rule recognized but statute upheld), citing *Rescue Army v Municipal Court* (1946) 28 C2d 460, 171 P2d 8 (criminal ordinance). This rule applies to statutes (*Canon v Justice Court* (1964) 61 C2d 446, 39 CR 228), ordinances (*Lambert v Municipal Court* (1960) 53 C2d 690, 3 CR 168), and court rules (*Turlock Golf & Country Club v Superior Court* (1966) 240 CA2d 693, 50 CR 70).

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§16.90 3. Use of Mandate to Test Validity of Law

The appellate courts have also entertained challenges to the constitutionality of a statute by way of a petition for a writ of mandate. See, *e.g., Anderson v Superior Court* (1995) 11 C4th 1152, 1155, 48 CR2d 766 (original proceeding in court of appeal challenging local rule divesting county clerk of superior court clerk duties before expiration of elected term); *Zumwalt v Superior Court* (1989) 49 C3d 167, 170, 260 CR 545 (original proceeding in court of appeal challenging constitutionality of local court rule divesting county clerk of superior court clerk duties); *State Route 4 Bypass Auth. v Superior Court* (2007) 153 CA4th 1546, 1549, 64 CR3d 286 (authority filed mandate petition challenging trial court's pretrial ruling declaring right-of-way dedication requirement unconstitutional); *Hatch v Superior Court* (2000) 80 CA4th 170, 182, 94 CR2d 453 (writ petition challenging trial court's denial of motion to dismiss information on several grounds, including that statute was unconstitutional).

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§16.91 4. Standard of Review if Writ Petition Accepted

If the petition challenges the constitutionality of a statute, the appellate court will review the matter de novo because the issue presents a pure question of law. See, *e.g., Wells Fargo Bank v Superior Court* (2008) 159 CA4th 381, 385, 71 CR3d 506 (appellate courts "independently construe statutory law, as its interpretation is a question of law on which [the courts] are not bound by the trial court's analysis"); *County of Orange v Superior Court* (2007) 155 CA4th 1253, 1258, 66 CR3d 689 (on question of whether trial court correctly interpreted scope of its statutory authority, appellate court reviews issue de novo).

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D. In Cases of Exclusive, Conflicting, or Concurrent Jurisdiction

§16.92 1. Exclusive Jurisdiction

A trial court acts without or in excess of its jurisdiction if it attempts to act in a case over which another court or administrative tribunal has exclusive jurisdiction or over which another court first obtained jurisdiction. A writ of prohibition may issue to restrain that court from proceeding with the action. For examples of cases in which appellate courts have considered whether to issue a writ of prohibition under such circumstances, see:

- *Musicians Union, Local No. 6 v Superior Court* (1968) 69 C2d 695, 700, 73 CR 201 (prohibition issued restraining all further proceedings, including enforcement of any orders or injunctions previously issued; National Labor Relations Board and not superior court had jurisdiction because labor dispute affected interstate commerce);
- *People v Superior Court* (*Dyke Water Co.*) (1965) 62 C2d 515, 42 CR 849 (prohibition issued; trial court precluded from adjudicating same issues pending before Public Utilities Commission);
- *City & County of San Francisco v Small Claims Court* (1983) 141 CA3d 470, 190 CR 340 (prohibition unavailable to restrain small claims court from joining 183 claims against airport);
- *Commercial Ins. Co. v Superior Court* (1969) 272 CA2d 321, 77 CR 769 (prohibition issued; trial court had no jurisdiction when plaintiff insured employee was relegated exclusively to federal remedies under Defense Bases Act and Longshoremen's and Harbor Workers' Compensation Act);
- *Vick v Superior Court* (1965) 239 CA2d 105, 47 CR 840 (prohibition issued restraining trial court from hearing order to show cause why interlocutory judgment of divorce should not be modified to show husband was entitled to income tax deduction for minor's support; federal courts have exclusive jurisdiction to determine factual questions concerning deductions, exclusions, and exemptions).

On time to file writ petition, see §16.87.

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2. Conflicting or Concurrent Jurisdiction

§16.93 a. Trial Courts With Conflicting or Concurrent Jurisdiction

When two trial courts have concurrent jurisdiction over the same parties and the same subject matter in actions brought in different counties, the court in which jurisdiction of the defendant is first obtained is entitled to try the action. *Stearns v Los Angeles City School Dist.* (1966) 244 CA2d 696, 708, 53 CR 482. A writ of prohibition lies to restrain the second court from proceeding with the case until the first court renders a final decision. *People ex rel Garamendi v American Autoplan, Inc.* (1993) 20 CA4th 760, 771, 25 CR2d 192 ("rule of exclusive concurrent jurisdiction" requires second court to acquire jurisdiction to stay proceedings pending resolution of first action). For other examples, see:

- *Kresteller v Superior Court* (1967) 248 CA2d 545, 56 CR 771 (prohibition issued in action for child support; court with jurisdiction of dissolution action had concurrent and continuing primary jurisdiction);
- *Morrisette v Superior Court* (1965) 236 CA2d 597, 599, 46 CR 153 (prohibition issued to restrain trial court from proceeding in second adoption action filed by paternal grandparents pending finality of proceedings in first adoption action filed by maternal grandparents);
- *Adolph v Municipal Court* (1960) 181 CA2d 198, 5 CR 212 (because order overruling demurrer was not appealable, prohibition was proper to test municipal court's jurisdiction to try case on ground of prior action pending in superior court between same parties for same cause).

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§16.94 b. Determining Which Trial Court Has Jurisdiction

The preliminary question is often which trial court assumed jurisdiction first. The answer is found by determining in which action process was first served, not in which court the action was first filed. CCP §410.50; *Torrey Pines Inn, Inc. v Superior Court* (1964) 227 CA2d 265, 38 CR 565 (discussing former CCP §416, now CCP §410.50). See *People ex rel Garamendi v American Autoplan, Inc*. (1993) 20 CA4th 760, 770, 25 CR2d 192; *Figgs v Superior Court* (1962) 204 CA2d 231, 22 CR 199 (discussing former CCP §416, now CCP §410.50); *Cade v Superior Court* (1961) 191 CA2d 554, 12 CR 847.

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§16.95 c. Determining Choice of Law

A writ of mandate lies to determine the appropriate law among competing jurisdictions. In *State Farm Mut. Auto. Ins. Co. v Superior Court* (2003) 114 CA4th 434, 438, 8 CR3d 56, after certification of a nationwide class action, the court issued a writ of mandate determining that Illinois, not California, law governed.

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§16.96 d. Other Tribunals With Conflicting or Concurrent Jurisdiction

The rule of exclusive concurrent jurisdiction is not confined to trial courts, but applies to all tribunals exercising judicial functions. When two or more state tribunals have concurrent jurisdiction, the first to assume jurisdiction retains it to the exclusion of all others. *Scott v Industrial Acc. Comm'n* (1956) 46 C2d 76, 81, 293 P2d 18 (in conflict between California tribunals, prohibition, not mandate, is proper remedy). Note, however, that prohibition is available against *judicial* action only, and that most statewide administrative agencies are of legislative origin and do not exercise judicial functions. See discussion of judicial action in §§15.15-15.17.

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§16.97 3. Objecting Before Seeking Writ

Before seeking a writ of prohibition to restrain the second tribunal from proceeding, the petitioner must first object in the second tribunal, by motion or demurrer, to *that* tribunal's jurisdiction to hear and determine the action or proceeding. See, *e.g.*, *Howell v Superior Court* (1962) 211 CA2d 487, 27 CR 149 (priority rule recognized, but prohibition denied because petitioner failed to seek relief in second court before seeking writ relief). For discussion of the basic requirement that the petitioner perfect or exhaust other available remedies before seeking a writ, see §§2.15-2.16, 15.56-15.60.

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§16.98 4. Standard of Review if Writ Petition Accepted

Questions of jurisdiction and choice of law typically present pure questions of law that an appellate court reviews de novo. See, *e.g. State Farm Mut. Auto. Ins. Co. v Superior Court (2003) 114 CA4th 434, 439, 8 CR3d 56.*

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E. To Review Arbitration Issues

§16.99 1. Questions of First Impression

It is difficult to obtain writ review in an arbitration case. In Moncharsh v Heily & Blase (1992) 3 C4th 1, 12, 10 CR2d 183, the supreme court held that judicial review of private arbitration awards is limited to the grounds set out in CCP §§1286.2 (vacating awards) and 1286.6 (correcting awards). The supreme court specifically disapproved a line of cases permitting judicial review when an error appears on the face of the award and causes substantial injustice. 3 C4th at 28. But see Burlage v Superior Court (2009) 178 CA4th 524, 100 CR3d 531 (in denying writ petition, appellate court held that trial court properly vacated arbitrator's award based on arbitrator's wrongful refusal to consider material evidence; under Moncharsh, arbitrators have much, but not absolute, power). See also Cable Connection, Inc. v DIRECTV, Inc. (2008) 44 C4th 1334, 1340, 82 CR3d 229 (if parties limit arbitrators' authority by requiring dispute to be decided by rule of law, and make intention plain that award is reviewable for legal error, general rule of limited review is displaced by parties' agreement).

The Moncharsh court also held that claims of illegality of an arbitration provision are not sufficient to obtain judicial review, except in rare cases in which arbitration finality is incompatible with the protection of statutory rights. 3 C4th at 33. See, e.g., Board of Educ. v Round Valley Teachers Ass'n (1996) 13 C4th 269, 52 CR2d 115. See also Advanced Micro Devices, Inc. v Intel Corp. (1994) 9 C4th 362, 36 CR2d 581, in which a divided court upheld the arbitrator's remedy as rationally related to the underlying contract as interpreted by the arbitrator. But see California Faculty Ass'n v Superior Court (1998) 63 CA4th 935, 75 CR2d 1 (court denied petition for writ of mandate and upheld the trial court's vacation of an arbitrator's award when it determined that arbitrator had exceeded his authority under a collective bargaining agreement).

Many arbitration issues are reviewable by appeal (see CCP §§1294-1294.2) and thus not subject to writ review. For discussion of availability of appeal, see California Civil Appellate Practice §§3.23, 3.42 (3d ed Cal CEB 1996). See also §§15.57-15.61.

Successful petitions for writs involving arbitration issues are usually restricted to questions of first impression. See, e.g., Jevne v Superior Court (2005) 35 C4th 935, 28 CR3d 685 (on issue of first impression, affirming appellate court's denial of writ seeking to set aside trial court's denial of motion to set aside order compelling arbitration, supreme court held that Securities and Exchange Act preempts California Ethics Standards for Neutral Arbitrators in National Association of Securities Dealers arbitrations); Jakks Pac., Inc. v Superior Court (2008) 160 CA4th 596, 600, 72 CR3d 914 (challenging trial court's ruling as to when arbitrator's disclosures are required; affirming trial court and denying writ on merits); Blue Cross v Superior Court (1998) 67 CA4th 42, 78 CR2d 779 (application of California classwide arbitration rule not preempted by Federal Arbitration Act); Trump v Superior Court (1981) 118 CA3d 411, 173 CR 403 (trial de novo must include all issues); Depretto v Superior Court (1981) 116 CA3d 36, 171 CR 810 (writ issued because transfer order denied petitioner's right to establish that damages brought case within court's jurisdiction when initiated). But see Heritage Provider Network, Inc. v Superior Court (2008) 158 CA4th 1146, 1152, 70 CR3d 645 (writ issued to enforce stay of judicial proceedings pending arbitration).

On time to file writ petition, see §16.87.

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§16.100 2. Orders Compelling Arbitration

Orders compelling arbitration are not appealable (Wheeler v St. Joseph Hosp. (1976) 63 CA3d 345, 353, 133 CR 775), so writ review is the only mechanism for seeking review of such orders. Writ review of orders compelling arbitration "'is proper in at least two circumstances: (1) if the matters ordered arbitrated fall clearly outside the scope of the arbitration agreement or (2) if the arbitration would appear to be unduly time consuming or expensive.'" Parada v Superior Court (2009) 176 CA4th 1554, 1566, 98 CR3d 743, quoting Zembsch v Superior Court (2006) 146 CA4th 153, 160, 53 CR3d 69. For example, see:

- *Rodriquez v Superior Court (2009) 176 CA4th 1461, 98 CR3d 728 (writ of mandate issued directing trial court to vacate order compelling plaintiff to arbitrate wrongful death claim);*
- *County of Sonoma v Superior Court (2009) 173 CA4th 322, 329, 93 CR3d 39 (writ of mandate issued directing trial court to vacate order compelling county to arbitrate law enforcement union);*
- *Roman v Superior Court (2009) 172 CA4th 1462, 92 CR3d 153 (deciding writ petition on merits and upholding trial court's order compelling arbitration);*
- *Mercuro v Superior Court (2002) 96 CA4th 167, 173, 116 CR2d 671 (writ of mandate overturned trial court order compelling arbitration of employment-related tort claims based on finding that employee had been coerced into signing arbitration agreement);*
- *Rosenfield v Superior Court (1983) 143 CA3d 198, 191 CR 611 (writ of mandate directed trial court to vacate order staying action and requiring arbitration; arbitration agreement was unenforceable because it did not provide mandatory specific advisement of plaintiff patient's waiver of right to jury trial under CCP §1295).*

Mandate or prohibition may be invoked to reverse an order compelling arbitration if the matters ordered for arbitration fall clearly outside the scope of the arbitration agreement or if the arbitration would appear to be unduly time consuming or expensive. See Atlas Plastering, Inc. v Superior Court (1977) 72 CA3d 63, 68, 140 CR 59 (trial court had jurisdiction to order arbitration but exceeded its jurisdiction in joining parties not in privity). Mandate or prohibition is also appropriate to reverse an order compelling arbitration when enforcement of the arbitration provision would be unconscionable. In Discover Bank v Superior Court (2005) 36 C4th 148, 162, 30 CR3d 76, the supreme court reversed the court of appeal's issuance of a writ of mandate to compel arbitration of a consumers' class action claim. The court held that the waiver of class arbitration contained in a consumer contract of adhesion was unconscionable and thus unenforceable. See also Gentry v Superior Court (2007) 42 C4th 443, 467, 64 CR3d 773, in which the court of appeal denied a writ and found that a class action arbitration agreement provided to employees was not unconscionable; the employees were given an opportunity to opt out and the terms were clearly spelled out. The supreme court reversed, concluding that, despite the opt-out provision, the agreement was procedurally unconscionable because the employer's explanation of it was misleading. See also Trend Homes, Inc. v Superior Court (2005) 131 CA4th 950, 32 CR3d 411 (writ of mandate directed trial court to grant petitioner's motion to compel judicial reference; court of appeal found that clause in homebuyers' purchase contract requiring that disputes be submitted to judicial reference was not unconscionable).

Because arbitration reduces the judicial workload, a court might be more likely to issue a writ in support of arbitration. See, e.g., San Jose Fed'n of Adult Educ. Teachers v Superior Court (1982) 132 CA3d 861, 183 CR 410 (writ of mandate directed trial court to set aside order vacating arbitration award). See also Helzel v Superior Court (1981) 123 CA3d 652, 176 CR 740 (writ of mandate directed trial court to grant petition to compel arbitration); Dinong v Superior Court (1981) 120 CA3d 300, 174 CR 590 (writ of mandate directed trial court to vacate order disqualifying arbitrators).

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§16.101 3. Standard of Review if Writ Petition Accepted

The standard of review depends on the issue the writ petition presents. For example, the meaning and scope of an arbitration clause in a contract is generally a question of law reviewed de novo. See, e.g., Titolo v Cano (2007) 157 CA4th 310, 316, 68 CR3d 616. The same holds true for whether an arbitration clause is unenforceable due to unconscionability. Higgins v Superior Court (2006) 140 CA4th 1238, 1249, 45 CR3d 293 (whether arbitration agreement is unconscionable is a question of law; when facts are undisputed, appellate court reviews arbitration agreement de novo to determine unconscionability); see also Flores v Transamerica HomeFirst, Inc. (2001) 93 CA4th 846, 851, 113 CR2d 376 (same). The de novo standard also applies to whether the statute governing arbitration requires the disclosures that a party claimed. See Hayden v Robertson Stephens, Inc. (2007) 150 CA4th 360, 58 CR3d 333 (bank was not party to proceedings for arbitrator's disclosure purposes). See also Cardiff Equities, Inc. v Superior Court (2008) 166 CA4th 1541, 1548, 83 CR3d 699 (ordinarily trial court's decision to stay action pending arbitration is reviewed for abuse of discretion, but because underlying facts were undisputed and stay issue turned on legal question, court applied de novo standard of review).

On occasion, interpretation and enforceability issues present factual questions when the parties have introduced conflicting extrinsic evidence requiring resolution by the trier of fact. In such circumstances, the appellate court reviews the trial court's factual determinations under the substantial evidence standard. See, e.g., Baker v Osborne Dev. Corp. (2008) 159 CA4th 884, 892, 71 CR3d 854 (arbitration agreement reviewed de novo for enforceability; trial court's factual determinations bearing on unconscionability reviewed for substantial evidence).

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F. To Remedy Orders Concerning Counsel

§16.102 1. Disqualification Motions

An order granting or denying a motion to disqualify an adversary's attorney is appealable. See Jacuzzi v Jacuzzi Bros., Inc. (1963) 218 CA2d 24, 32 CR 188. However, the reviewing court may deem appeal to be an inadequate remedy because it is not as expeditious as a writ proceeding and because the right to counsel is involved. Thus, courts have issued writs to overturn orders concerning attorney disqualifications. See, e.g., Chambers v Superior Court (1981) 121 CA3d 893, 896, 175 CR 575 (state obtained disqualification of plaintiff's firm because one of its lawyers had previously worked for state; court issued writ of mandate vacating disqualification order based on plaintiff's right to counsel of her choice). Compare Shadow Traffic Network v Superior Court (1994) 24 CA4th 1067, 29 CR2d 693 (writ of mandate denied; trial court properly removed defense counsel for having retained experts who had received confidential information from plaintiff's counsel regarding lawsuit), to Western Digital Corp. v Superior Court (1998) 60 CA4th 1471, 71 CR2d 179 (writ of mandate issued directing trial court to vacate order disqualifying defense counsel and expert witness when plaintiff failed to establish that expert actually possessed attorney-client information, as opposed to merely having potential access to it). See also Baker Manock & Jensen v Superior Court (2009) 175 CA4th 1414, 96 CR3d 785 (writ of mandate issued directing trial court to vacate order disqualifying law firm; trial court erred in finding that case facts constituted conflict of interest); Gong v RFG Oil, Inc. (2008) 166 CA4th 209, 213, 82 CR3d 416 (party filed both notice of appeal and writ petition challenging order denying disqualification motion; court of appeal treated writ petition as petition for writ of supersedeas, stayed further proceedings in trial court, decided appeal, and reversed order); Cal W. Nurseries, Inc. v Superior Court (2005) 129 CA4th 1170, 29 CR3d 170 (writ of mandate issued directing trial court to disqualify law firm that continued to represent party adverse to another client in unrelated proceeding); Lyle v Superior Court (1981) 122 CA3d 470, 175 CR 918 (plaintiff's law firm disqualified because attorneys in firm were scheduled to testify for plaintiff; writ of mandate issued directing trial court to vacate disqualification order).

On time to file writ petition, see §16.87.

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§16.103 2. Other Issues Involving Counsel

Other issues involving attorney representation that have been resolved in writ proceedings include:

- *Propriety of appearing pro hac vice and trial court's authority to issue sanctions for misconduct. Sheller v Superior Court (2008) 158 CA4th 1697, 1701 n1, 71 CR3d 207 (writ of mandate issued).*
- *Discharged attorney's retention of files. Academy of Cal. Optometrists, Inc. v Superior Court (1975) 51 CA3d 999, 124 CR 668 (writ of mandate issued).*
- *Denial of representation by counsel of client's own choosing. See Meadow v Superior Court (1963) 59 C2d 610, 616, 30 CR 824 (writ of mandate issued); Golden State Glass Corp. v Superior Court (1939) 13 C2d 384, 90 P2d 75 (writ of mandate issued to compel recognition of attorney); Cloer v Superior Court (1969) 271 CA2d 143, 76 CR 217 (writ of mandate issued).*
- *Potential deprivation of counsel. Adams v Superior Court (1992) 2 CA4th 521, 532, 3 CR2d 49 (existence of malicious prosecution and abuse of process lawsuit would drive wedge between petitioner attorneys and their clients; writ issued to require trial court to sustain petitioners' demurrer to malicious prosecution and all other causes of action without leave to amend).*

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§16.104 3. Standard of Review if Writ Petition Accepted

The standard of review in these proceedings depends on the issue presented. Generally, an appellate court reviews an order on a disqualification motion for abuse of discretion. People ex rel Dep't of Corporations v SpeeDee Oil Change Sys., Inc. (1999) 20 C4th 1135, 1143, 86 CR2d 816. But when "there are no material disputed factual issues, the appellate court reviews the trial court's determination as a question of law." 20 C4th at 1144; see also Cal W. Nurseries, Inc. v Superior Court (2005) 129 CA4th 1170, 1174, 29 CR3d 170.

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G. To Review Orders on Pleadings

§16.105 1. When Issue Is Substantial or Resolution Would Result in Final Disposition of Case as to Party

Although appellate courts prefer to review cases on a full record and resolve the entire case at one time, in rare cases an appellate court may invoke mandate or prohibition to review rulings at the pleading stage. Courts may grant such review in instances of a serious nature, when the issue is of substantial legal importance, or when resolution of the issue would result in final disposition as to a party. For examples, see:

- *Covenant Care, Inc. v Superior Court (2004) 32 C4th 771, 776, 11 CR3d 222 (supreme court reviewed trial court ruling allowing fourth amended complaint to resolve conflict in courts of appeal regarding whether procedural prerequisites to seeking punitive damages against health care provider under CCP §425.13(a) applied to elder abuse actions);*
- *Brandt v Superior Court (1985) 37 C3d 813, 816, 210 CR 211 (court reviewed ruling at pleading stage because issue was of widespread interest, courts of appeal were in conflict, and trial court's ruling "effectively deprived petitioner of the opportunity to present a substantial portion of his cause of action");*
- *Coulter v Superior Court (1978) 21 C3d 144, 148, 145 CR 534, superseded by statute on other grounds ("mandamus will lie when it appears that the trial court has deprived a party of an opportunity to plead his cause of action or defense, and when that extraordinary relief may prevent a needless and expensive trial and reversal");*
- *Babb v Superior Court (1971) 3 C3d 841, 851, 92 CR 179 (court unwilling to endorse use of prerogative writ to review rulings on pleadings except in "instances of such grave nature or of such significant legal impact that we feel compelled to intervene through the issuance of an extraordinary writ");*
- *Los Angeles County Metro. Transp. Auth. v Superior Court (2004) 123 CA4th 261, 265, 20 CR3d 92 ("[d]ue to the novelty of the factual context in which this issue was raised," court issued order to show cause on petition for writ of mandate to reverse trial court order denying motion to strike allegations supporting claim for civil penalty under the Unruh Act, but then denied writ); and*
- *Campbell v Superior Court (1996) 44 CA4th 1308, 1315, 52 CR2d 385 (alternative writ issued to decide "novel and important question" in case in which demurrer was sustained without leave to amend with respect to less than all causes of action).*

On time to file writ petition, see §16.87.

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§16.106 2. When Ruling on Pleading Would Dramatically Affect Scope or Nature of Action

Appellate courts continue to exercise their discretion to hear writ petitions at the pleading stage in the interest of judicial economy, particularly when the trial court ruling may have a dramatic effect on the scope or the nature of the action. Some examples are:

- *Issuance of mandate to compel a trial court to permit an amendment or amended complaint. See, e.g., Peterson v Superior Court (1982) 31 C3d 147, 181 CR 784; Cuadros v Superior Court (1992) 6 CA4th 671, 8 CR2d 18 (allowing plaintiff to name correct defendant). See also 5 Witkin, California Procedure, Pleading §1197 (5th ed 2008).*
- *Issuance of mandate to compel a trial court to deny a motion to strike a pleading. See, e.g., Grafton Partners L.P. v Superior Court (2005) 36 C4th 944, 32 CR3d 5 (affirming writ of mandate issued to reverse trial court's order striking demand for jury trial on ground that predispute jury waivers by contract are unenforceable); Bruno v Superior Court (1981) 127 CA3d 120, 179 CR 342 (mandate issued to compel vacation of order striking certain requested remedies from complaint); Blegen v Superior Court (1981) 125 CA3d 959, 178 CR 470 (mandate issued to compel vacation of order striking claim for punitive damages).*
- *Issuance of mandate to compel trial court to vacate order allowing amendment to add punitive damages claim. See Freedman v Superior Court (2008) 166 CA4th 198, 201, 82 CR3d 563 (writ relief warranted to set aside trial court's ruling that excused plaintiff from statutory deadline for filing motion to amend complaint to add punitive damages claim).*
- *Issuance of mandate to compel trial court to vacate order denying motion to strike punitive damages claim for failure to make threshold showing on merits. Little Co. of Mary Hosp. v Superior Court (2008) 162 CA4th 261, 265, 75 CR3d 519 (trial court erred in concluding pretrial mechanism provided in CCP §425.14 does not apply in elder abuse cases seeking exemplary damages against religious organizations).*
- *Issuance of mandate to compel trial court to grant demurrer and motion to strike portions of class action complaint. TJX Cos. v Superior Court (2008) 163 CA4th 80, 83, 77 CR3d 114.*
- *Issuance of mandate to ensure a defendant's opportunity to defend the action. See Mediterranean Exports, Inc. v Superior Court (1981) 119 CA3d 605, 174 CR 169 (mandate issued to ensure corporation's opportunity to defend action; its answer and cross-complaint had been stricken in breach of lease action instituted against it).*
- *Issuance of mandate to compel trial court to partially vacate case management order. See Fire Ins. Exch. v Superior Court (2004) 116 CA4th 446, 10 CR3d 617 (construing case management order as denial of motion for judgment on the pleadings because order resolved disputed issues raised by the pleadings); Hernandez v Superior Court (2003) 112 CA4th 285, 303, 4 CR3d 883.*
- *Issuance of mandate to compel trial court to vacate order granting or denying motion for judgment on the pleadings. See Fire Ins. Exch. v Superior Court, supra; American Int'l Group, Inc. v Superior Court (1991) 234 CA3d 749, 755, 285 CR 765 (denial of motion for judgment on the pleadings may be reviewed by writ of mandate).*
- *Issuance of mandate in consolidation and severance matters. See State Farm Mut. Auto. Ins. Co. v Superior Court (1956) 47 C2d 428, 304 P2d 13 (mandate issued to compel severance; trial judge abused discretion in ordering consolidation); Omaha Indem. Co. v Superior Court (1989) 209 CA3d 1266, 1274, 258 CR 66 (mandate appropriate when severance motion denied with prejudice to bringing motion at later time).*
- *Issuance of order to show cause why mandate should not issue to determine collateral estoppel effect of prior court of appeal opinion. Zevnik v Superior Court (2008) 159 CA4th 76, 83, 70 CR3d 817 (important issue of law as to which there was uncertainty and which would significantly impact case).*

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§16.107 3. Standard of Review if Writ Petition Accepted

The standard of review of an order concerning a pleading issue depends on the particular issue that the writ petition presents. Generally, a court reviews an order denying or granting leave to amend for abuse of discretion. It reviews an order overruling or sustaining a demurrer, or an order granting or denying a motion for judgment on the pleadings, de novo, because the court assumes the truth of the allegations in the complaint. See, e.g., Poway Royal Mobilehome Owners Ass'n v City of Poway (2007) 149 CA4th 1460, 1470, 58 CR3d 153 (demurrer); Lazar v Hertz Corp. (1999) 69 CA4th 1494, 1501, 82 CR2d 368 (demurrer); see also Angelucci v Century Supper Club (2007) 41 C4th 160, 166, 59 CR3d 142 (judgment on the pleadings); Mendoza v. Continental Sales Co. (2006) 140 CA4th 1395, 1401, 45 CR3d 525 (same).

A court generally reviews other rulings on procedural matters (e.g., severance, consolidation, case management) for abuse of discretion. See Hernandez v Superior Court (2003) 112 CA4th 285, 294, 4 CR3d 883 (case management order); Omaha Indem. Co. v Superior Court (1989) 209 CA3d 1266, 1271, 258 CR 66 (severance); McLellan v McLellan (1972) 23 CA3d 343, 353, 100 CR 258 (severance); State Farm Mut. Auto. Ins. Co. v Superior Court (1956) 47 C2d 428, 304 P2d 13 (consolidation).

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H. To Review Rulings on Demurrer

§16.108 1. When Demurrer Is Overruled in Its Entirety

If a trial court erroneously overrules a demurrer there may be a needless and significant expenditure of resources absent immediate appellate review. Accordingly, in the interest of judicial economy, a writ may issue to review an order overruling a demurrer. For example:

- *State v Superior Court (2004) 32 C4th 1234, 1245, 13 CR3d 534 (in prison inmate's action against state, state agencies, and employees for inadequate medical treatment, supreme court granted review and held that failure to plead facts demonstrating or excusing compliance with claim presentation requirement of Government Claims Act (formerly known as the Tort Claims Act) (Govt C §§810-997.6) may be raised on general demurrer to complaint);*
- *Farb v Superior Court (2009) 174 CA4th 678, 682, 94 CR3d 586 (writ of mandate issued directing trial court to vacate order overruling demurrer on statute of limitations grounds and dismiss case);*
- *Wells Fargo Bank v Superior Court (2008) 159 CA4th 381, 385, 71 CR3d 506 (legal issue of preemption is "properly raised by demurrer and an order overruling a demurrer on that ground is properly reviewed by petition for a writ of mandate");*
- *Stavropoulos v Superior Court (2006) 141 CA4th 190, 193, 45 CR3d 705 (writ review appropriate on significant issue of first impression; court of appeal held malicious prosecution complaint was subject to 2-year limitations period of CCP §335.1, not 1-year period of CCP §340(c), and was timely filed);*
- *Big Valley Band of Pomo Indians v Superior Court (2005) 133 CA4th 1185, 1189, 35 CR3d 357 (writ review appropriate because tribe effectively would have lost sovereign immunity defense if required to proceed to trial on casino employees' breach of contract action);*
- *Mitsubishi Materials Corp. v Superior Court (2003) 113 CA4th 55, 60, 6 CR3d 159 (writ of mandate issued directing trial court to dismiss cases in which World War II prisoners of war asserted claims against Japanese companies for whom they were forced to do slave labor; case merited expeditious consideration because plaintiffs were World War II veterans and permitting lengthy trial only to reverse judgment years later would unfairly create false hope of monetary recovery).*

On time to file writ petition, see §16.87.

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§16.109 2. When Demurrer Is Partially Sustained

If a trial court sustains a demurrer to only part of a complaint or answer, writ relief may be available. See, e.g., Coulter v Superior Court (1978) 21 C3d 144, 148, 145 CR 534 (demurrer to portion of complaint); Alch v Superior Court (2004) 122 CA4th 339, 351, 19 CR3d 29 (in class action age discrimination case, plaintiffs appealed and petitioned for writs of mandate from trial court's grant of demurrer with leave to amend; court consolidated appeals and petitions and issued mandate to set aside trial court's rulings); Campbell v Superior Court (1996) 44 CA4th 1308, 1315, 52 CR2d 385 (demurrer sustained without leave to amend with respect to less than all causes of action; but writ issued to decide "novel and important question").

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§16.110 3. When Court Sustains Demurrer

If a trial court sustains a demurrer with leave to amend, appellate review in any form is usually premature. If a trial court sustains a demurrer to the entire complaint without leave to amend, appeal from the resulting judgment of dismissal is normally an adequate remedy, because appeal is immediately available. See, e.g., Babb v Superior Court (1971) 3 C3d 841, 850, 92 CR 179 (rule stated, but writ of mandate issued because issue presented could have significant impact on other cases).

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§16.111 4. Standard of Review if Writ Petition Accepted

Because a demurrer tests the complaint's legal sufficiency, an appellate court reviews an order on a demurrer de novo, exercising its independent judgment about whether the complaint states a cause of action. See, e.g., Zenith Ins. Co. v O'Connor (2007) 148 CA4th 998, 1006, 55 CR3d 911; Flying Dutchman Park, Inc. v City & County of San Francisco (2001) 93 CA4th 1129, 1134, 113 CR2d 690.

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I. When Court Denies Motion to Dismiss

§16.112 1. Overview

An order denying a motion to dismiss an action under the mandatory dismissal statutes (CCP §§583.210-583.250, 583.310-583.360) may be reviewable by petition for writ of mandate. For examples, see:

- *Moran v Superior Court (1983) 35 C3d 229, 240, 197 CR 546 (medical malpractice action was not brought to trial within 5-year period under former CCP §583(b), because clerk's office mistakenly sent case file to storage instead of resetting it for trial after arbitration; trial court denied motion to dismiss, and supreme court refused to issue writ of mandate because failure to meet statutory requirements was beyond plaintiff's control);*
- *Tunis v Superior Court (1963) 59 C2d 465, 466, 30 CR 135 (writ of mandate granted; failure to go to trial within 5 years);*
- *New W. Fed. Sav. & Loan Ass'n v Superior Court (1990) 223 CA3d 1145, 1152, 273 CR 37 (writ of mandate denied; 5-year statutory period in which to bring case to trial was tolled while writ petition challenging denial of summary judgment motion was pending);*
- *Kerr-McGee Chem. Corp. v Superior Court (1984) 160 CA3d 594, 597, 206 CR 654 (writ of mandate granted to quash service; defendant must be directly named or named and served as fictitious defendant within 3-year period of former CCP §581a);*
- *Lesko v Superior Court (1982) 127 CA3d 476, 485, 179 CR 595 (writ of mandate granted; failure to serve complaint within 3-year period of former CCP §581a).*

NOTE: *When reviewing older opinions involving motions to dismiss, counsel should be aware that the statute requiring service and filing of summons within 3 years, former CCP §581a, was in effect from 1982 until it was repealed and replaced by CCP §§583.210-583.250. Former CCP §581a excused compliance with the 3-year period only if there was a basis for estoppel or if the noncompliance was beyond the party's control. Counsel should also be aware that the statute requiring commencement of trial within 5 years, former CCP §583, was repealed in 1984 and replaced by CCP §§583.310-583.360.*

If the motion to dismiss is based on inconvenient forum or delay in prosecution and is made in lieu of the defendant's responsive pleading, writ review of denial of the motion may fall within CCP §418.10. See discussion in §§16.54-16.57.

On time to file writ petition, see §16.87.

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§16.113 2. Writ of Prohibition to Prevent Trial

Although mandate is available to compel a dismissal, prohibition may be used to prevent a trial. J. C. Penney Co. v Superior Court (1959) 52 C2d 666, 669, 343 P2d 919 (either writ of mandate to compel dismissal or writ of prohibition to prevent trial of action is appropriate remedy after expiration of time prescribed by former CCP §583). See also Rio Del Mar Country Club, Inc. v Superior Court (1948) 84 CA2d 214, 217, 190 P2d 295 (attempt to proceed with trial after meritorious motion to dismiss under mandatory dismissal statutes exceeds court's jurisdiction).

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§16.114 3. Standard of Review if Writ Petition Accepted

The standard of review for trial court orders denying a motion for mandatory dismissal is abuse of discretion. See New W. Fed. Sav. & Loan Ass'n v Superior Court (1990) 223 CA3d 1145, 1156, 273 CR 37 (writ of mandate denied; trial court did not abuse its discretion by denying motion to dismiss under CCP §583.310); Baccus v Superior Court (1989) 207 CA3d 1526, 1531, 255 CR 781 (writ of mandate issued; trial court denied motion to dismiss under CCP §583.310).

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J. To Correct Discovery Order

§16.115 1. Overview

As a general rule, appellate courts disfavor writ review of discovery orders because it is potentially disruptive of trial court proceedings and because routine review of such orders would overwhelm the appellate courts. This is so even though it is virtually impossible to obtain meaningful review of a discovery order on appeal after judgment. See, e.g., Sav-On Drugs, Inc. v Superior Court (1975) 15 C3d 1, 5, 123 CR 283; Pacific Tel. & Tel. Co. v Superior Court (1970) 2 C3d 161, 169, 84 CR 718; Catanese v Superior Court (1996) 46 CA4th 1159, 1163, 54 CR2d 280; Oceanside Union Sch. Dist. v Superior Court (1962) 58 C2d 180, 185 n4, 23 CR 375 (writ review of discovery orders should be limited to important matters of first impression and situations in which general guidelines can be established for future cases). In Roden v AmerisourceBergen Corp. (2005) 130 CA4th 211, 29 CR3d 810, the court denied a petition for a writ of mandate addressing a postjudgment discovery issue because the defendant had an adequate remedy at law. The court noted that "extraordinary relief is supposed to be extraordinary" and that writ relief "is not available as a matter of course just because a particular postjudgment order is nonappealable." 130 CA4th at 213.

Despite the general rule, courts sometimes grant writ review of a discovery order if it: (1) compels production of privileged information; (2) prevents a party from having a fair opportunity to litigate a case; or (3) involves unresolved issues of first impression and importance to the trial courts and bar. OXY Resources Cal. LLC v Superior Court (2004) 115 CA4th 874, 886, 9 CR3d 621. Often, the discovery order at issue in cases in which courts have granted review implicated several of these important considerations. See Paterno v Superior Court (2008) 163 CA4th 1342, 1357, 78 CR3d 244 (writ issued to reverse discovery order that delayed anti-SLAPP motion to enforce protections of anti-SLAPP statute (CCP §425.16) against harassing litigation and avoid irreparable injury); San Joaquin County Local Agency Formation Comm'n v Superior Court (2008) 162 CA4th 159, 166, 76 CR3d 93 (writ issued to prohibit discovery that would implicate privilege).

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§16.116 2. Significant Issues of First Impression Arising During Discovery

Courts may relax their general reluctance to review discovery orders (see §16.115) when an order presents a generally important question of first impression. See Oceanside Union Sch. Dist. v Superior Court (1962) 58 C2d 180, 185 n4, 23 CR 375; CashCall, Inc. v Superior Court (2008) 159 CA4th 273, 285 n6, 71 CR3d 441 (considering question of first impression regarding precertification discovery of identities of potential class members). For example, in Catanese v Superior Court (1996) 46 CA4th 1159, 54 CR2d 280, following 8 days of deposition, the plaintiff propounded a series of five interrogatories, asking the defendant whether he contended that any of the plaintiff's deposition answers were untruthful and what evidence supported those contentions. The defendant objected to the interrogatories as not being self-contained, and as violating the "Rule of 35" (CCP §2030.030), limiting the number of interrogatories without a declaration of good cause. The court of appeal issued a writ of mandate directing the trial court to vacate its order compelling further responses, noting that the discovery tactic tested the proper dividing line between protected work product and compelled contention interrogatories. Because such a tactic would have a major impact on litigation and litigation expenses and would likely achieve prevalence in practice, the issue merited review by writ. 46 CA4th at 1163. Additional examples include:

- *Urban Pac. Equities Corp. v Superior Court (1997) 59 CA4th 688, 693, 69 CR2d 635 (reviewing order quashing plaintiff's business records subpoena of court reporter to obtain copy of plaintiff's own deposition transcript; although intrigued by issue of first impression, court denied writ petition because transcript was "product," not "record," of court reporter's business);*
- *Palay v Superior Court (1993) 18 CA4th 919, 934, 22 CR2d 839 (writ of mandate denied regarding order compelling production of guardian ad litem's medical records; petition involved conflict between litigant's right to discovery and nonlitigant's right to invoke physician-patient privilege);*
- *Daly v Superior Court (1977) 19 C3d 132, 140, 137 CR 14 (writ review granted because power of trial court to grant prospective witness immunity to facilitate discovery by private party was important issue of first impression and general guidelines could be established).*

For other examples of issues of first impression, see discussion of procedural issues in §16.119.

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3. Constitutional Issues Arising During Discovery

§16.117 a. Overview

An appellate court may be persuaded to review the merits of a writ petition seeking review of a discovery order that presents a constitutional issue. Examples include:

- ***Immunity from criminal prosecution.*** *Compare Fremont Indem. Co. v Superior Court (1982) 137 CA3d 554, 187 CR 137 (writ of mandate issued directing trial court to order plaintiff to appear for deposition; plaintiff could not sue insurance company for bad faith settlement of claim for loss of restaurant by fire, then resist deposition on ground of self-incrimination after indictment for arson) to Gonzales v Superior Court (1980) 117 CA3d 57, 72, 178 CR 358 (writ of mandate issued to control interrogatories in civil paternity action to provide immunity to putative fathers whose answers to questions to establish paternity might also result in criminal prosecution for nonsupport).*
- ***Illegal search and seizure.*** *See Barnes v Molino (1980) 103 CA3d 46, 50, 162 CR 786 (writ of mandate issued to modify order regarding subpoena duces tecum alleged to interfere with freedom from unreasonable search and seizure). But see Tom v Schoolhouse Coins, Inc. (1987) 191 CA3d 827, 828 n1, 236 CR 541 (declining to treat appeal from order requiring compliance with subpoena duces tecum as petition for writ of mandate).*
- ***Freedom of speech.*** *See Maggi v Superior Court (2004) 119 CA4th 1218, 1226, 15 CR3d 161 (writ of mandate issued directing trial court to vacate restraining order; prohibiting petitioner and counsel from discussing lawsuit with third parties without court's permission, which was sought and denied, violated constitutional right to free speech and was not appropriate discovery sanction). See also Paterno v Superior Court (2008) 163 CA4th 1342, 1357, 78 CR3d 244 (writ of mandate issued to enforce protections of anti-SLAPP statute (CCP §425.16) against harassing litigation and reverse discovery order that delayed anti-SLAPP motion).*

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§16.118 b. Right to Privacy

In determining whether to grant writ review, courts continue to place emphasis on the right to privacy embodied in Cal Const art I, §1. For example, in Palay v Superior Court (1993) 18 CA4th 919, 22 CR2d 839, the court issued an alternative writ because the case involved an issue of first impression in the areas of privilege and constitutional privacy that was also "of general importance to the trial court and the profession." 18 CA4th at 925. The question presented was whether a nonlitigant mother may, in an action by her son for negligence against a hospital and doctors, assert her statutory privilege and constitutional right of privacy to prevent discovery of her prenatal records. See also Alch v Superior Court (2008) 165 CA4th 1412, 1422, 82 CR3d 470 (trial court denied discovery on privacy grounds; writ issued because trial court failed to properly weigh interests and should have allowed some discovery); Kahn v Superior Court (1987) 188 CA3d 752, 769, 233 CR 662 (trial court ordered university professor to be deposed about confidential faculty meeting concerning petitioner's possible permanent appointment to teaching position; mandate issued to set aside that order based on professor's right to privacy).

Courts have issued writs on a wide range of privacy issues, including:

- ***Financial privacy.*** *Courts have held that the right to privacy gives a litigant a presumptive right to a protective order restricting the use of discovered personal financial data. Moskowitz v Superior Court (1982) 137 CA3d 313, 317, 187 CR 4; Richards v Superior Court (1978) 86 CA3d 265, 272, 150 CR 77. But see GT, Inc. v Superior Court (1984) 151 CA3d 748, 754, 198 CR 892 (no presumption applied when corporate financial information sought concerning antitrust and unfair competition allegations).*
- ***Tax data.*** *A writ may issue to overturn an order requiring disclosure of data contained in sales tax returns. Sav-On Drugs, Inc. v Superior Court (1975) 15 C3d 1, 5, 123 CR 283 (writ of prohibition issued).*
- ***Sexual privacy.*** *A plaintiff does not surrender her right to privacy by bringing a sexual harassment suit. Vinson v Superior Court (1987) 43 C3d 833, 842, 239 CR 292 (writ of mandate issued limiting discovery of plaintiff's sexual history and setting standards for such inquiries in future cases). See also Fults v Superior Court (1979) 88 CA3d 899, 903, 152 CR 210 (writ of mandate issued limiting inquiry into mother's sexual history in paternity suit). In John B. v Superior Court (2006) 38 C4th 1177, 1181, 45 CR3d 316, a wife sought discovery of her husband's medical records and sexual history to confirm her allegations that he knowingly or negligently infected her with HIV. The husband filed a writ petition after the trial court permitted broad discovery into his sexual history and medical records. The supreme court limited discovery to protect the identities of the husband's previous sexual partners, denied requests for admissions concerning his lifestyle, and temporally limited discovery to the period of possible infection.*
- ***Marital privacy.*** *The marital relationship is a foundation for the right to privacy. Tylo v Superior Court (1997) 55 CA4th 1379, 1388, 64 CR2d 731 (in wrongful termination suit based on pregnancy discrimination, court of appeal issued writ of mandate; trial court erred in ordering plaintiff to answer deposition questions relating to possible emotional distress arising out of her marital relationship).*
- ***Associational privacy.*** *The right to associational privacy may also be protected by a writ. See Britt v Superior Court (1978) 20 C3d 844, 859, 143 CR 695 (writ of mandate issued to prevent forced disclosure of information on political affiliation, which violated freedom of association); Church of Hakeem, Inc. v Superior Court (1980) 110 CA3d 384, 387, 168 CR 13 (writ of prohibition issued nullifying contempt order and discovery order for refusal to disclose membership list in answer to interrogatories, on ground that disclosure order violated right of associational privacy of innocent nonlitigant church members). But see Bodenheimer v Superior Court (1980) 108 CA3d 885, 889, 167 CR 26 (writ petition denied; in defamation action, question concerning petitioner's membership in defendant organization did not violate right to associational privacy); Davies v Superior Court (1984) 36 C3d 291, 300, 204 CR 154 (petition for writ of mandate denied because trial court and real party in interest complied with alternative writ; nonetheless, in automobile accident case, court of appeal decided that information about other accidents at that location that did not disclose identifying material was not privileged, disapproving long line of contrary cases).*
- ***Medical privacy.*** *See Ombudsman Servs. of N. Cal. v Superior Court (2007) 154 CA4th 1233, 1239, 65 CR3d*

456 (mandate issued to prevent disclosure of records of long-term care facility not involving deceased plaintiff and his representatives); Doyle v Superior Court (1996) 50 CA4th 1878, 1887, 58 CR2d 476 (writ of mandate issued; plaintiff's allegation of past emotional distress did not place her mental condition in controversy and did not justify order for mental exam); Jones v Superior Court (1981) 119 CA3d 534, 544, 174 CR 148 (writs denied; right to privacy; physician-patient privilege). See also John B. v Superior Court, supra.

- ***Juvenile records.*** *See R.S. v Superior Court (2009) 172 CA4th 1049, 91 CR3d 546 (denying writ challenging order permitting disclosure of Child Abuse Services Team's tape of victim in juvenile's court file subject to protective order; trial court did not abuse its discretion in balancing competing interests).*
- ***Privileged communications or information.*** *On possible writ review of discovery orders impinging on privileged communications or information, see §§16.120-16.122.*

PRACTICE TIP: *It is essential to ask the appellate court to stay a discovery order requiring the disclosure of private or privileged information in connection with the filing of a writ petition. Without a stay, compliance with the discovery order may render the matter moot. On requesting a stay in appellate court writ proceedings, see chap 19.*

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§16.119 4. Recurring Procedural Issues

If the discovery order presents a recurring issue of discovery procedure, an appellate court may entertain the writ petition on the merits. Examples:

- *Sexton v Superior Court (1997) 58 CA4th 1403, 1406, 68 CR2d 708 (written opposition to motion to compel production of documents under former CCP §2031(l) (now CCP §2031.300) failed to raise timeliness; writ of mandate issued directing trial court to deny motion as untimely because time limit was mandatory and at least quasi-jurisdictional).*
- *Standon Co. v Superior Court (1990) 225 CA3d 898, 902, 275 CR 833 (writ review of order finding motion to compel further response to demand for inspection of documents under former CCP §2031(l) (now CCP §2031.300), filed more than 45 days after response date, untimely; 45-day period ran from service of written response, not from date set for production or inspection; petition denied, except to compel trial court to exercise its discretion on issue of sanctions).*
- *Roe v Superior Court (1990) 224 CA3d 642, 646, 273 CR 745 (writ of mandate issued directing trial court to require answers to interrogatories and production of documents; discovery automatically reopened when court-ordered arbitration proceedings were vacated by striking of at-issue memorandum; because question was one of first impression, trial court had discretion to deny sanctions).*
- *Carter v Superior Court (1990) 218 CA3d 994, 996, 267 CR 290 (writ of mandate issued directing trial court to vacate protective order and reconsider ruling on motion; party who missed deadline for compelling inspection of documents under former CCP §2031(l) (now CCP §2031.300) was not barred from requesting that same documents be brought to deposition under former CCP §2025 (now CCP §§2025.010-2025.620); failure of one procedure did not bar use of other procedure). See also Carpenter v Superior Court (2006) 141 CA4th 249, 252, 45 CR3d 821 (writ of mandate issued directing trial court to vacate order granting mental examination of plaintiff because order did not specify psychological tests to be administered, in violation of CCP §2032.320); Rancho Bernardo Dev. Co. v Superior Court (1992) 2 CA4th 358, 363, 2 CR2d 878 (writ review granted because petition concerning interpretation of former CCP §2034(i)(2) (now CCP §§2034.430-2034.450), limiting expert witness fees for depositions, raised issues of general concern that should receive early resolution).*

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5. Issues of Privilege

§16.120 a. Overview

Courts may grant writ review of discovery orders when privileged communications are at issue. See, e.g., Pacific Tel. & Tel. Co. v Superior Court (1970) 2 C3d 161, 170 n11, 84 CR 718; Marcus v Superior Court (1971) 18 CA3d 22, 23, 95 CR 545. In fact, interlocutory review of discovery orders by writ of mandate is the only adequate remedy when a court orders production of documents that may be subject to a privilege, because "once privileged matter has been disclosed there is no way to undo the harm which consists in the very disclosure." Crab Addison, Inc. v Superior Court (2008) 169 CA4th 958, 965, 87 CR3d 400, quoting People ex rel Lockyer v Superior Court (2004) 122 CA4th 1060, 1071, 19 CR 3d 324. See also Valley Bank v Superior Court (1975) 15 C3d 652, 657, 125 CR 553 (right to discover confidential bank records must be balanced against customer's right to privacy under Cal Const art I, §1).

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Source: *Civil Litigation/California Civil Writ Practice/16 Availability of Writ Relief/§16.121 b. Examples of Writ Review of Privilege Issues*

§16.121 b. Examples of Writ Review of Privilege Issues

Privileges that have been the subject of writ review of discovery orders include the following:

- ***Physician-patient privilege; psychotherapist-patient privilege.*** *Britt v Superior Court (1978) 20 C3d 844, 862, 143 CR 695 (although Evid C §§996 and 1016 provide exceptions to physician-patient and psychotherapist-patient privileges when patient puts medical condition at issue in lawsuit, mandate will issue to prevent discovery of unrelated past medical or psychotherapeutic treatment); Manela v Superior Court (2009) 177 CA4th 1139, 1143, 99 CR3d 736 (writ of mandate issued directing trial court to vacate order quashing subpoena for medical records on grounds father had waived privilege); Palay v Superior Court (1993) 18 CA4th 919, 925, 22 CR2d 839 (first impression issue of whether mother may assert physician-patient privilege to prevent disclosure of her prenatal medical records in child's negligence action against doctors and hospital); Rittenhouse v Superior Court (1991) 235 CA3d 1584, 1591, 1 CR2d 595 (writ of mandate issued directing trial court to quash deposition subpoenas for records protected by physician-patient and psychotherapist-patient privileges).*
- ***Law enforcement agency personnel records*** *(see Evid C §§1043, 1045). Shepherd v Superior Court (1976) 17 C3d 107, 116, 130 CR 257 (in police misconduct suit, supreme court discussed numerous privileges and statutory exemptions claimed by defendants resisting discovery; writ of mandate issued directing trial court to further consider petitioner's motion to compel), overruled on other grounds by People v Holloway (2004) 33 C4th 96, 131, 14 CR3d 212; County of Orange v Superior Court (2000) 79 CA4th 759, 763, 94 CR2d 261 (explaining analysis in Shepherd); Hackett v Superior Court (1993) 13 CA4th 96, 98, 16 CR2d 405 (writ of mandate issued directing trial court to deny motion to compel; privilege extends to answers to interrogatories seeking such information as officer's home address, telephone number, and driver's license number, even though information could be found outside officer's personnel file).*
- ***Official information.*** *City of Fresno v Superior Court (1988) 205 CA3d 1459, 1464, 253 CR 296 (writ review of document production order that might have caused police officers unnecessary annoyance, embarrassment, or oppression).*
- ***Deliberative process privilege.*** *San Joaquin County Local Agency Formation Comm'n v Superior Court (2008) 162 CA4th 159, 76 CR3d 93 (writ issued to prohibit discovery that would implicate legislative process).*
- ***Mediation privilege.*** *Rojas v Superior Court (2004) 33 C4th 407, 415, 15 CR3d 643 (tenants of apartment complex sought to compel production of photos and other raw data in possession of developers, who opposed motion on ground that items were exchanged in mediation in prior litigation and were protected by mediation privilege (Evid C §1119); supreme court held documents were protected); Doe 1 v Superior Court (2005) 132 CA4th 1160, 1173, 34 CR3d 248 (writ of mandate issued prohibiting church from publicly releasing written summaries of personnel files of priests accused of childhood sexual abuse that were prepared for submission in ongoing mediation because disclosure would violate mediation confidentiality privilege; disclosure of underlying information used in creating summaries, which existed before mediation proceeding, was not prohibited). But see Saeta v Superior Court (2004) 117 CA4th 261, 267, 11 CR3d 610 (petition for writ of mandate denied; mediation privilege did not apply to statements made during hearing conducted by employment termination review panel).*

NOTE: *As the current update to this publication was going to press, the California Supreme Court granted a petition for review in Cassel v Superior Court (review granted Feb. 3, 2010, B215215; superseded opinion at 179 CA4th 152, 101 CR3d 501). In a now-superseded opinion, the court of appeal granted a writ petition challenging an order excluding evidence, finding that the mediation privilege did not apply in an attorney malpractice case. On review, the supreme court will consider the following issues: (1) are the private conversations of an attorney and client for the purpose of mediation entitled to confidentiality under Evid C §§1115-1128, and (2) is an attorney a "participant" in a mediation such that communications between the attorney and his or her client for purposes of mediation must remain confidential under Evid C §§1119(c) and 1122(a)(2)? This publication will discuss the outcome of this case in a forthcoming update.*

- ***State newspersons' shield law.*** *KSDO v Superior Court (1982) 136 CA3d 375, 385, 186 CR 211 (writ of mandate issued nullifying trial court order requiring production of newsperson's notes in libel action; under qualified privilege of freedom of press, because newsperson was party to suit, information that went to "heart of the claim" was not discoverable, because it was available from other sources). On state newspersons' shield law (Cal Const art I, §2; Evid C §1070), see discussion of contempt in §16.132.*
- ***Confidential reporting required by law.*** *Union Bank of Cal. v Superior Court (2005) 130 CA4th 378, 385, 29 CR3d 894 (writ of mandate issued directing trial court to deny production of bank's internal suspicious activity forms used to file suspicious activity reports (SARs) required by federal law; under 12 CFR §21.11(k), bank was prohibited from producing SAR or providing any information that could disclose whether it prepared or filed SAR).*
- ***Miscellaneous matters.*** *County of Los Angeles v Superior Court (1975) 13 C3d 721, 732, 119 CR 631 (writ of prohibition issued restraining trial court from requiring members of board of supervisors to answer deposition questions concerning their motives for enacting legislation); American Airlines, Inc. v Superior Court (2003) 114 CA4th 881, 892, 8 CR3d 146 (writ of mandate issued directing trial court to compel deposition testimony of union representative; no privilege against disclosure of union representative's discussions with represented workers).*

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§16.122 c. Attorney-Client Privilege and Work Product Doctrine

If a discovery order presents an attorney-client privilege issue, an appellate court may grant writ review. For example:

- *Mitchell v Superior Court (1984) 37 C3d 591, 599, 208 CR 886 (writ of mandate issued; deposition questions about what plaintiff's attorneys told her concerning chemical alleged to have contaminated groundwater were clearly within purview of attorney-client privilege);*
- *Tritek Telecom, Inc. v Superior Court (2009) 169 CA4th 1385, 87 CR3d 455 (writ of mandate issued to protect corporate records generated in defense of suit brought by disgruntled director);*
- *Snyder v Superior Court (2007) 157 CA4th 1530, 1533, 69 CR3d 600 (writ of mandate issued; local general order requiring case discovery information in reports in asbestos cases infringed on work product doctrine);*
- *Best Prods., Inc. v Superior Court (2004) 119 CA4th 1181, 1190, 15 CR3d 154 (writ of mandate issued directing trial court to set aside order overruling defendant's boilerplate attorney-client privilege objections to document request; statutory law did not recognize failure to file privilege log as waiver of attorney-client privilege);*
- *OXY Resources Cal. v Superior Court (2004) 115 CA4th 874, 886, 9 CR3d 621 (writ of mandate issued when trial court erred by denying discovery based on common interest doctrine without first concluding that information was protected from disclosure by attorney-client privilege or work product doctrine, then determining whether disclosure was reasonably necessary to accomplish purpose for which attorneys were consulted);*
- *McKesson HBOC, Inc. v Superior Court (2004) 115 CA4th 1229, 1238, 9 CR3d 812 (petition for writ of mandate denied; despite written confidentiality agreement stating lack of intent to waive privileges, McKesson waived attorney-client and work product privileges by sharing documents with Securities and Exchange Commission for use in investigation of alleged securities fraud because McKesson and government were not aligned in litigation, did not share same stake, and did not have same goal); but see County of Los Angeles v Superior Court (2005) 130 CA4th 1099, 1107, 30 CR3d 708 (writ of mandate issued directing trial court to deny motion to compel production of documents; privilege not waived when legislative body disclosed closed session minutes to another governmental agency under confidentiality agreement, as provided by Govt C §6254.5(e));*
- *Shooker v Superior Court (2003) 111 CA4th 923, 929, 4 CR3d 334 (writ of mandate issued; plaintiff did not waive attorney-client privilege by designating himself as expert, then withdrawing before disclosing any confidential communications).*

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§16.123 6. Issues Involving Denial of Discovery

Mandate alone (rather than mandate and prohibition) usually will provide sufficient relief from an improper order denying discovery. In Burke v Superior Court (1969) 71 C2d 276, 78 CR 481, petitioners requested both mandate and prohibition to halt further trial court proceedings until they had received proper discovery responses, but the supreme court ultimately granted only mandate. The court reasoned that, because discovery ordinarily must be completed before trial, "it is implicit in a writ of mandate… that the trial should not proceed until discovery has been satisfactorily completed or appropriate sanctions have been imposed." 71 C2d at 277 n1. Selection of the appropriate writ or writs will depend on the circumstances of the case. On types of writs available, see chap 15.

The following cases illustrate situations in which courts issued writs of mandate to ensure proper discovery:

- *Emerson Elec. Co. v Superior Court (1997) 16 C4th 1101, 1111, 68 CR2d 883 (affirming mandate to compel personal injury plaintiff to demonstrate at videotaped deposition how injury occurred; "answer" in former CCP §2025 (now CCP §§2025.010-2025.620) includes nonverbal as well as verbal responses at videotaped deposition);*
- *Beesley v Superior Court (1962) 58 C2d 205, 208, 23 CR 390 (writ of mandate issued directing trial court to compel inspection of statements of independent witnesses taken by adjuster of defendant, an insurance company; trial court abused discretion in denying discovery when plaintiff presented facts showing good cause as a matter of law and defendant opposed only on ground that no good cause was shown);*
- *Wagner v Superior Court (1993) 12 CA4th 1314, 1316, 16 CR2d 534 (mandate issued directing trial court to vacate orders setting discovery cutoff date in "fast-track" case when no trial date had yet been set; trial court abused discretion as a matter of law by denying petitioner's statutory right under former CCP §2024(a) (now CCP §2024.020(a)) to conduct discovery up to 30 days before initial trial date);*
- *Abex Corp. v Superior Court (1989) 209 CA3d 755, 756, 257 CR 498 (writ of mandate issued; trial court clearly abused discretion by denying motion to compel physical exam of plaintiff in personal injury case).*

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§16.124 7. Issues Involving Grant of Discovery

Although writ review of orders granting discovery appears to be less favored than writ review of orders denying discovery, writs are available in egregious or important cases. For example:

- *City of Los Angeles v Superior Court (2002) 29 C4th 1, 10, 124 CR2d 202 (writ of mandate issued directing trial court not to disclose information in police officer's personnel records because material was more than 5 years old and, thus, not discoverable under Evid C §1045(b)(1));*
- *City of Santa Cruz v Municipal Court (1989) 49 C3d 74, 86, 260 CR 520 (writ of mandate issued upholding trial court order compelling discovery of prior incidents of police brutality under Evid C §1043(b) without affidavit based on personal knowledge);*
- *Pomona Valley Hosp. Med. Ctr. v Superior Court (1997) 55 CA4th 93, 100, 63 CR2d 743 (writ of mandate issued to set aside order permitting petitioner in administrative mandamus proceeding to depose witness and augment record because testimony sought was not reasonably calculated to produce evidence admissible under CCP §1094.5(e));*
- *Doyle v Superior Court (1996) 50 CA4th 1878, 1883, 58 CR2d 476 (writ of mandate issued vacating order compelling sexual harassment plaintiff to undergo mental exam for past emotional distress and to pay sanctions; writ review appropriate to resolve tension between defendant's right to discovery and plaintiff's constitutional right to privacy);*
- *Bridgestone/Firestone, Inc. v Superior Court (1992) 7 CA4th 1384, 1393, 9 CR2d 709 (writ of mandate issued to compel trial court to set aside order requiring defendant to provide tire rubber formula; opinion set stringent standards for trial courts that require disclosure of trade secrets);*
- *Olympic Club v Superior Court (1991) 229 CA3d 358, 362, 282 CR 1 (writ of mandate issued to vacate broad-based discovery order compelling private club to supply city with names and business addresses of applicants denied membership; although city's need for disclosure to prove prohibited discrimination outweighed rejected applicants' First Amendment right to associational privacy, trial court was required to establish notification procedures to give rejected applicants prior notice and opportunity to seek protective order).*

On writ review of orders granting discovery that involve issues of privilege, see §§16.120-16.122.

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§16.125 8. Issues Involving Orders Imposing Discovery Sanctions

Although trial courts are increasingly willing to impose sanctions to control the discovery process, appellate courts are unlikely to become involved in reviewing such orders by writ, because the trial court's ruling in discovery matters is often a matter within its discretion and many lawsuits produce a large number of discovery orders. The petitioner must show a serious abuse of discretion to obtain writ review. See, e.g., Newland v Superior Court (1995) 40 CA4th 608, 615, 47 CR2d 24 (terminating sanction issued solely because of failure to pay monetary discovery sanction was abuse of discretion). Nevertheless, courts have granted writ petitions from orders imposing sanctions, including discovery sanctions. See, e.g., Lund v Superior Court (1964) 61 C2d 698, 709, 39 CR 891; Maggi v Superior Court (2004) 119 CA4th 1218, 1226, 15 CR3d 161 (terminating restraining order prohibiting counsel from discussing lawsuit with third parties without court's permission as unconstitutional discovery sanction). See also Fairfield v Superior Court (1966) 246 CA2d 113, 121, 54 CR 721 (writ of mandate issued directing trial court to vacate order imposing sanctions; mandate and prohibition equally appropriate remedies to circumvent imposition of invalid sanctions).

In at least one instance, a court of appeal has issued a writ following an order denying discovery sanctions. In Do v Superior Court (2003) 109 CA4th 1210, 1218, 135 CR2d 855, pro bono counsel for an indigent defendant sought monetary sanctions for plaintiff's failure to appear at deposition. The trial court denied sanctions for the sole reason that counsel had taken the case pro bono. The appellate court granted defendant's petition for writ of mandate and ordered the trial court to award sanctions in an amount based on the reasonable value of counsel's services.

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§16.126 a. Review of Discovery Sanctions of $5000 or Less

If the sanctions imposed are $5000 or less, CCP §904.1(b) makes clear that the affected party may petition for writ review or wait until after a final judgment and appeal. See §§16.81-16.85.

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§16.127 b. Review of Discovery Sanctions of More Than $5000

In general, in an unlimited civil case, an order imposing sanctions over $5000 is immediately appealable. CCP §904.1(a)(11)-(12). A split of authority remains, however, about whether a party can immediately appeal from an interlocutory judgment or order directing payment of monetary discovery sanctions by a party or an attorney if the amount exceeds $5000.

Several cases hold that an order imposing discovery sanctions in excess of $5000 is appealable. Sears, Roebuck & Co. v Nat'l Union Fire Ins. Co. (2005) 131 CA4th 1342, 1352, 32 CR3d 717 (discovery sanctions in excess of $5000 appealable under CCP §904.1(a)(11)); Mileikowsky v Tenet Healthsystem (2005) 128 CA4th 262, 264, 26 CR3d 831 (monetary discovery sanctions in excess of $5000 immediately appealable under CCP §904.1(a)(12)); Rail-Transport Employees Ass'n v Union Pac. Motor Freight (1996) 46 CA4th 469, 475, 54 CR2d 713 (discovery sanctions in excess of $5000 directly appealable under CCP §904.1). See also California Civil Appellate Practice §3.41 (3d ed Cal CEB 1996).

There is also a line of cases, generally decided before the 1993 amendments to CCP §904.1, which holds that, although sanctions awards in excess of $5000 are appealable under CCP §904.1(11), discovery sanctions are not. See Ballard v Taylor (1993) 20 CA4th 1736, 25 CR2d 384; Hanna v Bankamerica Bus. Credit, Inc. (1993) 16 CA4th 913, 20 CR2d 430; Russell v General Motors Corp. (1992) 3 CA4th 1114, 4 CR2d 750; Ghanooni v Super Shuttle (1992) 2 CA4th 380, 3 CR2d 43; Rao v Campo (1991) 233 CA3d 1557, 285 CR 691; Imuta v Nakano (1991) 233 CA3d 1570, 285 CR 681.

PRACTICE TIP: *Although most recent authority holds that discovery sanctions in excess of $5000 are appealable, because of this split of authority, counsel seeking review should file both a notice of appeal and a writ petition, explaining in the papers that counsel has filed both in an abundance of caution to avoid loss of the right to immediate review. This will allow the court to determine the appropriate method of review.*

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§16.128 9. Time to File Writ Petition

Because a writ petition from a discovery order is not governed by statute, the "60-day rule" generally applies. See §16.87. However, if there is a looming deadline for production of discoverable evidence or if the need for expeditious discovery is compelling, counsel should file the petition well before the 60-day time period expires.

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§16.129 10. Standard of Review if Writ Petition Accepted

The standard of review that applies to a discovery order depends on the issues that the order presents. Courts review questions of privilege, privacy, and other pure questions of law de novo, while they review questions concerning motions to compel discovery, the burdensomeness of discovery, the timeliness of a discovery request, sanctions, and similar subjects for abuse of discretion. See, e.g., Britts v Superior Court (2006) 145 CA4th 1112, 1123, 52 CR3d 185.

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§16.129A K. To Review Class Certification Orders

Class certification rulings can dramatically affect the nature of a case. Accordingly, writ relief may be granted on a compelling showing that the trial court abused its discretion in granting or denying class certification. See, e.g., Sav-On Drug Stores, Inc. v Superior Court (2004) 34 C4th 319, 17 CR3d 906 (granting review and reversing court of appeal's decision granting writ relief as to class comprised of managerial employees in wage and hour case); Hewlett-Packard Co. v Superior Court (2008) 167 CA4th 87, 83 CR3d 836 (court of appeal issued order to show cause, stayed further trial court proceedings, reviewed class certification ruling on merits, and denied writ petition); County of Los Angeles v Superior Court (2008) 159 CA4th 353, 358, 71 CR3d 485 (same); Alch v Superior Court (2004) 122 CA4th 339, 19 CR3d 29 (issuing writ in 23 consolidated class action age discrimination cases to reverse three rulings: (1) dismissal of class claims under Govt C §12965(b) of Fair Employment and Housing Act when previous class action had been filed but dismissed in federal court, (2) dismissal of certain job applicants' claims as time-barred, and (3) requiring all individual claims to be pled with particularity); Corbett v Superior Court (2002) 101 CA4th 649, 654, 125 CR2d 46 (issuing writ directing trial court to vacate order refusing to consider class action under Unfair Competition Law); Stern v Superior Court (2003) 105 CA4th 223, 129 CR2d 275 (issuing writ directing trial court to vacate reclassification order entered without giving parties notice or opportunity to present facts and argument).

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§16.129B 1. Class Notification Issues

Writ relief may also be granted to correct rulings on class notice. See, e.g., Hypertouch, Inc. v Superior Court (2005) 128 CA4th 1527, 27 CR3d 839 (peremptory writ issued directing trial court to vacate order approving class notice requiring individual members of certified class to "opt in" to participate in action).

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§16.129C 2. Time to File Writ Petition

Because a writ petition from a class certification order is not governed by statute, the "60-day rule" generally applies. See §16.87.

PRACTICE TIP: *If there are pressing trial court matters that depend on the certification order, counsel should file the petition well before the 60-day time period expires.*

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§16.129D 3. Standard of Review if Writ Petition Accepted

An order on class certification generally is reviewed for abuse of discretion. See, e.g., County of Los Angeles v Superior Court (2008) 159 CA4th 353, 359, 71 CR3d 485; Capitol People First v State Dep't of Dev. Servs. (2007) 155 CA4th 676, 689, 66 CR3d 300; Reese v Wal-Mart Stores, Inc. (1999) 73 CA4th 1225, 1229, 87 CR2d 346. An abuse of discretion includes applying an incorrect legal standard.

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Source: *Civil Litigation/California Civil Writ Practice/16 Availability of Writ Relief/§16.130 L. To Review Judgments and Orders in Contempt Cases*

§16.130 L. To Review Judgments and Orders in Contempt Cases

When the court orders counsel or a party to do something that counsel or the party does not wish to do, there are two choices: (1) attack the order immediately by a petition for writ of prohibition or mandate; or (2) violate the order and mount a collateral attack on it by seeking review of the resulting contempt judgment or order, usually by petition for a writ of review (certiorari) (see §16.135) or habeas corpus (see §16.136). The latter course is obviously risky because, if the underlying order is correct, the contempt will stand. In some circumstances (usually counsel contempt), there may not be an underlying order to challenge.

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1. Review of Order Before Contempt Adjudication

§16.131 a. Writ of Prohibition Before Contempt Adjudication

When the court makes an invalid order, prohibition is appropriate to prevent the court from enforcing the order under penalty of contempt and from adjudging the person subject to the order to be in contempt for disobeying it. See, e.g.:

- *Lund v Superior Court (1964) 61 C2d 698, 708, 39 CR 891 (writ of prohibition issued; invalid contempt order based on nonattendance at deposition);*
- *Franchise Tax Bd. v Superior Court (1950) 36 C2d 538, 545, 225 P2d 905 (writ of prohibition issued to restrain enforcement of invalid orders for inspection of privileged information);*
- *Nelson v Superior Court (1937) 9 C2d 729, 731, 73 P2d 232 (writ of prohibition issued to prevent contempt proceedings for failure to comply with invalid deposition subpoena duces tecum);*
- *McMahon v Superior Court (1967) 255 CA2d 363, 62 CR 873 (writ of prohibition issued to prevent hearing on order to show cause why petitioner should not be committed for contempt);*
- *Farnham v Superior Court (1961) 188 CA2d 451, 455, 10 CR 615 (writ of prohibition issued to prevent contempt proceedings for disobedience of defective minute order in discovery proceedings);*
- *Hunter v Superior Court (1939) 36 CA2d 100, 110, 97 P2d 492 (writ of prohibition issued; violation of void injunction: "If the trial court is about to imprison or fine petitioner for contempt under a void judgment, prohibition is a proper remedy").*

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§16.132 b. State Newspersons' Shield Law Does Not Provide Relief Before Contempt Adjudication

A newsperson seeking extraordinary relief from an adverse trial court order under the state newspersons' shield law (Cal Const art I, §2(b) and Evid C §1070) must violate the adverse order and be adjudged guilty of contempt before he or she can claim the protection of the shield law. New York Times Co. v Superior Court (1990) 51 C3d 453, 273 CR 98. The shield law protects a newsperson who is not a party to civil litigation from contempt for failure to disclose unpublished information. It provides only immunity from contempt, not a privilege, and a petition for extraordinary relief under the shield law is premature until an order or judgment of contempt has been entered. 51 C3d at 458.

Although in New York Times the supreme court held that the appellate court's issuance of a writ of mandate was premature, it nonetheless ruled on the merits to avoid remanding the case merely to obtain a contempt judgment. The dissent noted that the decision makes possible precontempt and postcontempt writ review if the newsperson's resistance to disclosure is based on a qualified privilege under the First Amendment and on the shield law. 51 C3d at 469. On writ review of discovery orders involving issues of privilege and constitutional rights, see §§16.14-16.15, 16.120-16.122.

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2. Writ Review of Contempt Judgment or Order

§16.133 a. Overview

The judgments or orders in contempt cases that are made final and conclusive (CCP §1222) are not appealable (CCP §904.1(a)(1)(B)). They may be reviewed in a writ proceeding, however. See, e.g., McComb v Superior Court (1977) 68 CA3d 89, 93 n1, 137 CR 233. In In re Buckley (1973) 10 C3d 237, 259, 110 CR 121, the supreme court implied that the appellate courts should review all contempt orders challenged by writ petition, particularly if the person held in contempt is threatened with jail. This does not, however, appear to be the practice.

Writ review of contempt judgments and orders has been by way of petition for writ of review (certiorari) (see McComb v Superior Court, supra; Fontana v Superior Court (1977) 72 CA3d 159, 139 CR 851), writ of prohibition (see Lister v Superior Court (1979) 98 CA3d 64, 159 CR 280), writ of mandate (see Ramirez v Superior Court (1977) 72 CA3d 351, 140 CR 108), and writ of habeas corpus for individuals "in custody" (see In re Buckley, supra; see generally Appeals and Writs in Criminal Cases §9.21 (3d ed Cal CEB 2007)).

Writ petitions should include the allegations necessary to obtain the appropriate writ. On the requirements of mandate, prohibition, writ of review, and habeas corpus, see chap 15. On drafting the petition, see chaps 18, 27.

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§16.134 b. Scope of Review

Although the reviewing court is generally confined to determining whether substantial evidence supports the trial court's jurisdiction to adjudge the petitioner in contempt (see In re Buckley (1973) 10 C3d 237, 247, 110 CR 121; see also §16.142), the court may review the procedures by which the finding of contempt was made, the validity of the underlying order whose violation led to the contempt, or both. See, e.g., In re Berry (1968) 68 C2d 137, 150, 65 CR 273 (when contempt proceedings challenged, court reviews underlying order as well). See also 6 Witkin, California Procedure, Provisional Remedies §409 (5th ed 2008). A frequent basis for invalidating a judgment or order of contempt is the intrusion of that adjudication on constitutionally protected rights. See Church of Hakeem, Inc. v Superior Court (1980) 110 CA3d 384, 387, 168 CR 13 (writ of prohibition; court of appeal prohibited contempt for refusing to disclose membership list in answers to interrogatories on grounds that disclosure order violated right of associational privacy of innocent nonlitigant church members).

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§16.135 c. Review by Writ of Review (Certiorari)

When the contempt judgment or order imposes a fine, rather than custody or constructive custody, a writ of review (certiorari) may be used to challenge the contempt judgment. See In re Coleman (1974) 12 C3d 568, 572 n2, 116 CR 381; Anderson v Superior Court (1998) 68 CA4th 1240, 1245, 80 CR2d 891; Miller v Municipal Court (1967) 249 CA2d 531, 532, 57 CR 578. See also Moffat v Moffat (1980) 27 C3d 645, 656, 165 CR 877. On the definition, purpose, and requirements of a writ of review, see §§15.27-15.38. A writ of review is the writ most commonly used to review contempt judgments and orders.

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§16.136 d. Review by Writ of Habeas Corpus

If the petitioner is incarcerated or threatened with incarceration, rather than subject to a fine, he or she should seek a writ of habeas corpus. See Pen C §1473; In re Buckley (1973) 10 C3d 237, 259, 110 CR 121. On the definition, purposes, and requirements of habeas corpus, see §§15.39-15.43. The alleged contemner may apply for habeas corpus even though he or she is not in actual custody; habeas corpus relief is available to a person in constructive as well as in actual custody. See In re Berry (1968) 68 C2d 137, 146 n7, 65 CR 273.

If habeas corpus is unavailable, a writ of review (certiorari) may be appropriate. See Miller v Municipal Court (1967) 249 CA2d 531, 532, 57 CR 578 (petition for writ of habeas corpus had been changed to petition for writ of review because only fine was imposed). Because the scope of review on habeas corpus is "precisely the same" as that for writ of review (Wilde v Superior Court (1942) 53 CA2d 168, 176, 127 P2d 560), habeas corpus and writ of review cases are sometimes cited interchangeably. On scope of review in writ of review cases, see §§15.27-15.38.

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e. Review by Writ of Prohibition

§16.137 (1) Writ of Prohibition Not Available After Fine Has Been Paid or Jail Sentence Has Been Served

Prohibition usually issues to prevent enforcement of the contempt judgment or order after the adjudication of contempt, but before enforcement, at a time when a writ of review (certiorari) is also available. Because prohibition requires that the challenged action be threatened rather than completed, a prohibition petition must be filed before the fine has been paid or the jail sentence has been served. See §§15.18-15.21. Once punishment is more than threatened, only writ of review or habeas corpus is available.

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§16.138 (2) Writ of Prohibition Restrains Court That Failed to Comply With Prescribed Contempt Procedures

The procedures for imposing a contempt order under CCP §§1211-1218 are mandatory and jurisdictional. Thus, prohibition is appropriate when other remedies are inadequate to restrain a court that attempts to adjudge a person guilty of contempt when it lacks jurisdiction to do so because of failure to comply with the prescribed procedures. CCP §§1102-1103; Lund v Superior Court (1964) 61 C2d 698, 712, 39 CR 891 (writ of prohibition issued because trial court did not follow contempt procedures but instead imposed "sanctions"; supreme court held that under discovery statutes, trial court must proceed as contempt when proposed sanction is for refusal of nonparty witness to obey duly issued and served subpoena, or for failure of any person properly brought before court to obey order made to compel discovery).

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§16.139 (3) Using Writ of Prohibition to Challenge Defective Affidavits

If the contempt was not committed in the immediate presence of the court (indirect contempt), the facts constituting the contempt are presented to the court in an affidavit. CCP §1211(a). A petition for a writ of prohibition can be the appropriate means to challenge such affidavits on the ground that they are defective and cannot support an adjudication of contempt. See, e.g., McMahon v Superior Court (1967) 255 CA2d 363, 62 CR 873; Farnham v Superior Court (1961) 188 CA2d 451, 455, 10 CR 615. When challenging a defective affidavit, counsel should attach it as an exhibit to and incorporate it by reference in the writ petition. If the affidavit is not made a part of the record, the defect is not properly before the court and prohibition may be denied. See Morelli v Superior Court (1969) 1 C3d 328, 333, 82 CR 375.

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§16.140 f. Review by Writ of Mandate

Mandate is also available to review the contempt order. See, e.g., Ramirez v Superior Court (1977) 72 CA3d 351, 140 CR 108 (appellate court issued writ of mandate because trial court refused to consider evidence that petitioner did not have financial ability to comply with trial court's order). On definition, purpose, and requirements of mandate, see §§15.2-15.13. On requesting a stay in appellate court writ proceedings, see chap 19.

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§16.141 3. Time to File Writ Petition

Because a petition for a writ review of a contempt order is not governed by statute, the "60-day rule" generally applies (see §16.87), although it is inadvisable to wait until the 60th day if it is reasonable for the appellate court to expect more expeditious action.

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§16.142 4. Standard of Review if Writ Petition Accepted

The substantial evidence standard applies to an adjudication of contempt, although the ultimate question is whether the trial court had jurisdiction to render the contempt order. See, e.g., In re Marcus (2006) 138 CA4th 1009, 1015, 41 CR3d 861 ("In writ proceedings to review an adjudication of contempt, our inquiry is whether there was any substantial evidence before the trial court to prove the elements of the contempt. Absent such evidence, the order must be annulled"), citing Board of Supervisors v Superior Court (1995) 33 CA4th 1724, 1736, 39 CR2d 906 (review of contempt adjudication limited to determining whether substantial evidence sustained jurisdiction of trial court).

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§16.143 M. To Review Probate Proceedings

Probate Code §1300 (former Prob C §§7240, 1297, and 1240) sets out appealable probate proceeding orders. Orders that do not appear in Prob C §1300 may not be appealed (see McDonald v Structured Asset Sales, LLC (2007) 154 CA4th 1068, 1073, 65 CR3d 366), except for orders granting new trials, which case law has made appealable. See Estate of Wilhelm (1957) 152 CA2d 803, 805, 313 P2d 161, citing Estate of Noonan (1952) 113 CA2d 899, 249 P2d 306.

Some courts have held that a writ of review (certiorari) is the method for reviewing probate orders that are not appealable under Prob C §1300, if the other requirements for a writ of review are met (see §§15.27-15.38). See, e.g., Fredrickson v Superior Court (1952) 38 C2d 593, 597, 241 P2d 541; Kramer v Superior Court (1950) 36 C2d 159, 161, 222 P2d 874; Estate of Vai (1959) 168 CA2d 147, 335 P2d 501. For examples of nonappealable probate orders, see Estate of Vose (1970) 4 CA3d 454, 84 CR 347 (order allowing filing of an amended claim), disapproved on other grounds in Nathanson v Superior Court (1974) 12 C3d 355, 370, 115 CR 783; Estate of Cuneo (1963) 214 CA2d 381, 29 CR 497 (order denying petition to set aside prior allowance of claim); Estate of Windiate (1961) 197 CA2d 560, 17 CR 297 (order denying petition to revoke and annul letters of special administration); 9 Witkin, California Procedure, Appeal §205 (5th ed 2008).

On writ review of probate proceedings, see also 8 Witkin, California Procedure, Extraordinary Writs §36 (5th ed 2008).

On time to file writ petition, see §16.87.

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§16.143A N. To Review Family Law and Dependency Matters

Writ review may be sought in a variety of family law matters. For example:

- *Decision to dismiss dependency petition. Los Angeles County Dep't of Children & Family Servs. (2008) 162 CA4th 1408, 77 CR3d 52 (department challenged trial court order dismissing dependency petition; writ issued).*
- *Order denying reunification services and scheduling a permanent plan hearing. See S.T. v Superior Court (2009) 177 CA4th 1009, 99 CR3d 412 (parent challenged order terminating reunification services and setting permanency planning hearing; writ granted); Amanda H. v Superior Court (2008) 166 CA4th 1340, 83 CR3d 229 (same); David L. v Superior Court (2008) 166 CA4th 387, 83 CR3d 14 (father challenged order setting new permanent plan selection and implementation hearing; writ denied); Mardardo F. v Superior Court (2008) 164 CA4th 481, 78 CR3d 884 (father challenged order denying reunification services; writ denied).*
- *Order removing minors from parents' custody and denying reunification services. See Justin L. v Superior Court (2008) 165 CA4th 1406, 1411, 81 CR3d 884 (both parents challenged orders; writ issued "solely for purpose of ensuring compliance with [Indian Child Welfare Act]").*
- *Dependency ruling involving home schooling. See Jonathan L. v Superior Court (2008) 165 CA4th 1074, 81 CR3d 571 (children's counsel challenged trial court's refusal to order parents to send children to public or private school, instead of home schooling; writ granted).*
- *Order in Uniform Parentage Act (UPA) case. See Scott v Superior Court (2009) 171 CA4th 540, 89 CR3d 843 (woman who previously lived with children's father successfully petitioned to reopen and join UPA case seeking custody and visitation; writ granted overturning order allowing joinder).*

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§16.144 O. To Review Guardianship and Conservatorship Proceedings

Probate Code §§1300-1301 (former Prob C §1630) set out appealable guardianship or conservatorship orders. Those guardianship or conservatorship orders not appealable by the terms of §§1300-1301 may be subject to writ review. See, e.g., Greene v Superior Court (1951) 37 C2d 307, 310, 231 P2d 821 (writ of prohibition granted; decided under former Prob C §1630). See also 9 Witkin, California Procedure, Appeal §203 (5th ed 2008); California Conservatorship Practice §24.2 (Cal CEB 2005); and California Guardianship Practice §17.2 (Cal CEB Annual).

On time to file writ petition, see §16.87.

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§16.145 P. To Review Orders on Motions in Limine

A writ petition may be filed to challenge an in limine ruling. In Fatica v Superior Court (2002) 99 CA4th 350, 120 CR2d 904, for example, the court of appeal issued a writ of mandate directing the trial court to vacate its order granting a motion in limine which, if left standing, would have deprived petitioners of a fair and reasonable opportunity to present a substantial portion of their case. Plaintiffs filed the petition on the third day of trial; the court of appeal immediately ordered the trial stayed and issued the writ the following day.

In Cox v Superior Court (2002) 98 CA4th 670, 120 CR2d 45, by contrast, the court of appeal, citing judicial economy, intervened before the start of trial, directing the trial court to grant plaintiffs' motion in limine. See also Aguiar v Superior Court (2009) 170 CA4th 313, 87 CR3d 813 (petition challenging in limine ruling that regulation did not conflict with living wage ordinance; court issued order to show cause, stayed proceedings, determined regulation was invalid, and issued writ); State Farm Fire & Cas. Co. v Superior Court (2008) 164 CA4th 317, 320, 78 CR3d 828 (petition challenging order finding duty to defend after trial of that issue in "trifurcated" case); Southern Cal. Reg'l Rail Auth. v Superior Court (2008) 163 CA4th 712, 715, 77 CR3d 765 (petition challenging pre-trial ruling on preemption issue); Employers Reinsurance Co. v Superior Court (2008) 161 CA4th 906, 912, 74 CR3d 733 (petition challenging in limine ruling precluding evidence of 30 years of claims handling on issue of meaning of insurance policies; court issued order to show cause, stayed proceedings, and issued writ in part); Henry v Superior Court (2008) 160 CA4th 440, 449, 72 CR3d 808 (petition challenging pretrial ruling in premises liability case excluding evidence of medical malpractice in treating injuries; court stayed trial proceedings and subsequently issued writ); State Route 4 Bypass Auth. v Superior Court (2007) 153 CA4th 1546, 1549, 64 CR3d 286 (petition challenging trial court's determination as to dedication requirement in phase one of bifurcated condemnation cases; court stayed further trial proceedings and subsequently issued writ).

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§16.146 1. Time to File Writ Petition

As with other nonstatutory writs, there is no express deadline. See §16.87. However, because a motion in limine is usually heard and ruled on immediately before trial, if the ruling is erroneous and will inject reversible error into the case, the aggrieved party should ask the trial court for an immediate stay and seek writ review immediately, renewing the stay request if the trial court denies it.

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§16.147 2. Standard of Review if Writ Petition Accepted

The applicable standard of review depends on the nature of the in limine motion. In general, an appellate court reviews evidentiary rulings and orders on motions in limine for abuse of discretion. See, e.g., KB Home v Superior Court (2003) 112 CA4th 1076, 5 CR3d 587. However, when the facts are undisputed, pure questions of law are subject to independent review. See, e.g., Aas v Superior Court (2000) 24 C4th 627, 634, 101 CR2d 718.

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Q. To Review Order Requiring Jury Trial

§16.148 1. Overview

In Southern Pac. Transp. Co. v Superior Court (1976) 58 CA3d 433, 435, 129 CR 912, the court of appeal, without discussing why writ review was the appropriate remedy, issued a writ prohibiting the trial court from enforcing its order requiring a jury trial. The action was a suit for damages brought under CCP §871.1 by a good-faith improver of land that the petitioner owned. The petitioner contended that, because the good-faith improver action originated in equity, there was no right to a jury trial. Deciding an issue of first impression, the court of appeal determined that the legislature did not intend that a jury determine the issues under the statute and issued the writ.

In Hodge v Superior Court (2006) 145 CA4th 278, 282, 51 CR3d 519, the court, citing Southern Pac. Transp. Co. v Superior Court, supra, stated that a "petition for a writ of prohibition was a proper method" to challenge a trial court determination that a party was entitled to a jury trial. The court also noted that the case raised an important legal issue (the right to a jury trial in a suit alleging violation of the Unfair Competition Law (Bus & P C §§17200-17210)) and that an appeal would not provide plaintiffs with an adequate remedy if the trial court's determination was erroneous.

Conversely, in Jogani v Superior Court (2008) 165 CA4th 901, 81 CR3d 503, the court of appeal, without discussing why writ review was the appropriate remedy, issued a writ of mandate ordering the trial court to vacate its order denying the plaintiff a jury trial on a quantum meruit claim.

On time to file writ petition, see §16.87.

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§16.149 2. Standard of Review if Writ Petition Accepted

Whether a statute affords a party a jury trial is a pure question of law that an appellate court reviews de novo. See DiPirro v Bondo Corp. (2007) 153 CA4th 150, 179, 62 CR3d 722.

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R. To Review Injunctions

§16.150 1. Overview

Injunctive and preliminary injunctive orders, whether granting or denying relief, are appealable. CCP §§904.1(a)(6), 904.2(g); O'Connor v Superior Court (1979) 90 CA3d 107, 110, 153 CR 306 (preliminary injunction); District Election of Supervisors Comm. v O'Connor (1978) 78 CA3d 261, 264 n1, 144 CR 442 ("injunction" in former CCP §904.1(f) (now CCP §904.1(a)(6)) includes preliminary injunction).

In unusual situations, however, counsel may be able to obtain writ review rather than review on appeal. Some examples are:

- *United Farm Workers of Am. v Superior Court (1975) 14 C3d 902, 122 CR 877 (restraining order infringed on constitutionally protected free speech);*
- *O'Connell v Superior Court (2006) 141 CA4th 1452, 47 CR3d 147 (writ of mandate issued directing trial court to vacate preliminary injunction restraining Board of Education from denying diplomas to public high school students qualified to graduate but for their failure of high school exit exam);*
- *Biosense Webster, Inc. v Superior Court (2006) 135 CA4th 827, 37 CR3d 759 (writ of mandate issued directing trial court to vacate temporary restraining order enjoining employer from enforcing noncompetition agreement against former employees on ground that order improperly enjoined sister-state and federal actions outside California);*
- *American Booksellers Ass'n v Superior Court (1982) 129 CA3d 197, 205, 181 CR 33 (writ of mandate issued requiring entry of injunction because overbroad ordinance affected First Amendment right regarding display of explicit materials).*

Writs also can be used to direct a trial court to weigh the evidence and determine whether the facts warrant issuing an injunction (Kaplan's Fruit & Produce Co. v Superior Court (1979) 26 C3d 60, 80, 160 CR 745), or to direct the trial court to vacate its denial of a preliminary injunction and to grant the injunction (Robbins v Superior Court (1985) 38 C3d 199, 211 CR 398). If the trial court grants summary adjudication of issues and dismisses a count for injunctive relief, a petition for a writ of mandate, not an appeal, is the proper method of reviewing the order. Art Movers, Inc. v Ni W., Inc. (1992) 3 CA4th 640, 4 CR2d 689 (although an order granting a permanent injunction is appealable under former CCP §904.1(f) (now CCP §904.1(a)(6)), an interlocutory order dismissing a count for permanent injunctive relief is not). On writ relief from grant or denial of motions for summary adjudication, see §§16.66-16.77.

On time to file writ petition, see §16.87.

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§16.151 2. Standard of Review if Writ Petition Accepted

The abuse of discretion standard applies to the review of an injunction ruling. See, e.g., Robbins v Superior Court (1985) 38 C3d 199, 205, 211 CR 398. However, to the extent the trial court's assessment of probable success on the merits depends on legal rather than factual questions, review is de novo. See, e.g., O'Connell v Superior Court (2006) 141 CA4th 1452, 1463, 47 CR3d 147.

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§16.152 V. EXTRAORDINARY CIRCUMSTANCES THAT REQUIRE FILING BOTH WRIT AND APPEAL

In most cases, counsel will be able to determine whether a particular order is appealable. In rare cases, however, counsel may conclude that an appeal will not afford an adequate remedy, because of the more leisurely pace at which an appeal proceeds and the inability or difficulty of obtaining an interim stay that preserves the status quo. See, e.g., State Water Resources Control Bd. v Superior Court (2002) 97 CA4th 907, 913, 118 CR2d 784, quoting Reed v Superior Court (2001) 92 CA4th 448, 455, 111 CR2d 842 (petition for extraordinary relief on merits of attorney disqualification order is preferable to appeal because extraordinary writs are generally determined more speedily than appeals and "[t]he specter of [improper] disqualification of counsel should not be allowed to hover over the proceedings for an extended period of time for an appeal"). If this situation arises, counsel should file both a notice of appeal and a writ petition and advise the trial court of the filing of the notice of appeal so the court can determine whether it may continue to exercise jurisdiction.

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17

Determining Whether to File an Appellate Court Writ Petition

Robert H. Wright

I. SCOPE OF CHAPTER §17.1

II. EXPLORING ALTERNATIVES TO SEEKING WRIT RELIEF §17.2

III. HANDLING APPELLATE COURT WRIT PROCEEDING §17.3
- A. Ethical Considerations for Trial Counsel §17.4
- B. Ethical Considerations for Appellate Specialist
  - 1. Duty to Practice Competently §17.5
  - 2. Duty to Ensure That Client Is Aware of Appellate Counsel's Involvement in the Case §17.6
- C. Allocation of Responsibility Between Counsel §17.7

IV. CHECKING FOR CONFLICTS OF INTEREST §17.8
- A. Checking for Conflicts Before Discussing Case §17.9
- B. Potential Conflicts
  - 1. Conflict With the Interests of Another Current Client §17.10
  - 2. Conflict Arising From Receipt of Confidential Information From a Client or Former Client §17.11
  - 3. Conflict Arising From Attorney's Interests and Relationships §17.12
  - 4. Conflict Arising From Payment for Legal Services §17.13
  - 5. Conflict Arising From Legal Position Taken §17.14

V. GATHERING INFORMATION TO EVALUATE AND PREPARE WRIT PETITION
- A. Obtaining Copy of Order to Be Challenged §17.15
- B. Obtaining Register of Actions §17.16
- C. Obtaining All Potentially Relevant Pleadings and Trial Court Documents §17.17
- D. Obtaining Reporter's Transcript §17.18
- E. Preparing Declaration if Hearing Transcript Unavailable §17.19
- F. Obtaining Sample Writ Petition §17.20

VI. PRELIMINARY RESEARCH ON CHALLENGED ORDER OR RULING
- A. Determining if Challenged Order or Ruling Is Appealable
  - 1. Writ Relief Is Presumptively Unavailable if Order Is Appealable §17.21
  - 2. Exceptions to Presumption Against Writ Relief for Appealable Orders §17.22
- B. Determining Whether Statute Provides for Writ Review §17.23
  - 1. Is Order Reviewable Only by Writ Petition? §17.24
  - 2. Is Writ Petition Prerequisite for Postjudgment Review on Appeal? §17.25
- C. Calculating Deadline to File Writ Petition §17.26

VII. DETERMINING WHETHER APPELLATE COURT IS LIKELY TO GRANT EXTRAORDINARY RELIEF §17.27
- A. Most Writ Petitions Are Denied §17.28
- B. Is Writ Review on the Merits Required? §17.29
- C. Is There an Adequate Remedy at Law? §17.30
- D. Does Petitioner Face Irreparable Injury? §17.31
- E. Is Writ Relief Necessary to Decide Important Issue? §17.32
- F. What Is the Standard of Appellate Review? §17.33

VIII. POTENTIAL BENEFITS AND RISKS OF SEEKING WRIT
- A. Benefits of Seeking Writ §17.34
- B. Risks of Seeking Writ §17.35

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§17.1 I. SCOPE OF CHAPTER

This chapter provides a practitioner's "checklist" for determining whether to file an appellate court writ petition. It begins by discussing whether seeking further relief in the trial court is preferable to seeking writ relief in the court of appeal (see §17.2). The chapter next discusses ethical issues counsel should consider, including hiring an appellate specialist to handle the writ proceedings and allocating responsibility between trial counsel and appellate counsel (see §§17.3-17.7). It also covers potential conflicts of interest that may arise in handling an appellate court writ proceeding (see §§17.8-17.14). The chapter then turns to the information counsel must gather to evaluate and prosecute an appellate court writ proceeding (see §§17.15-17.20). This includes preliminary research to determine whether appellate review should be by appeal or writ petition (see §§17.21-17.26). The chapter next discusses factors to consider in evaluating the likelihood that the appellate court will grant extraordinary relief (see §§17.27-17.33), and concludes with a discussion of the potential risks and benefits of seeking immediate appellate review by way of a writ petition (see §§17.34-17.35).

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§17.2 II. EXPLORING ALTERNATIVES TO SEEKING WRIT RELIEF

The courts of appeal rarely grant writ relief; most claims of error or abuse of discretion will be decided on appeal from the final judgment unless immediate appellate action is required to prevent irreparable injury. See §§17.28, 22.15. Indeed, the courts of appeal summarily deny the vast majority of writ petitions in one- or two-sentence orders giving no reasons for the denial. See §§22.14-22.16. The appellate courts are not being uncharitable; they have a full docket of appeals and, absent extraordinary circumstances, do not have the resources to devote to interlocutory matters that can be reviewed on appeal. Accordingly, counsel should determine whether there are other means to obtain the relief sought before incurring the time and expense of preparing a writ petition.

For example, counsel might seek redress from an erroneous trial court ruling by a motion for reconsideration, although there are stringent statutory requirements for such motions. See CCP §1008, limiting motions for reconsideration to those based on new or different facts, circumstances, or law. On filing a motion for reconsideration, see California Civil Procedure Before Trial §§12.113-12.118 (4th ed Cal CEB 2004). Similarly, an issue raised on demurrer might be raised again in a summary judgment motion. Even if the motion is denied, the issue may be in a better procedural posture to interest the court of appeal, because there will be a more complete record. See §§16.66-16.77.

CAUTION: Certain statutory time limits for filing a writ petition (*e.g.,* review of the denial of a motion for summary judgment or summary adjudication) are strictly construed. Filing a motion for reconsideration does not change those limits. *Bensimon v Superior Court* (2003) 113 CA4th 1257, 1258, 7 CR3d 151 (motion for reconsideration does not extend jurisdictional time for writ petition when trial court has denied summary judgment motion).

JUDICIAL PERSPECTIVE: Petitions seeking relief from an order denying a motion for summary judgment or summary adjudication are rarely granted; when they are, it is usually because there is a case-dispositive legal issue that can be decided before the record is fully developed.

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§17.3 III. HANDLING APPELLATE COURT WRIT PROCEEDING

Appellate court writ proceedings differ significantly from any trial court proceeding. Trial counsel must candidly assess whether he or she has the time, expertise, and resources necessary to handle an appellate court writ proceeding.

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§17.4 A. Ethical Considerations for Trial Counsel

Trial counsel must consider:

- **The duty to practice competently.** Trial counsel must have the knowledge, time, and resources necessary to handle competently an appellate court writ proceeding. See Cal Rules of Prof Cond 3-110. On the duty to represent clients competently, see California Trial Practice: Civil Procedure During Trial §16.36 (3d ed Cal CEB 1995).

PRACTICE TIP: Regardless of how well qualified counsel may be to handle a trial, special concerns arise in the context of appellate court writ proceedings in which short deadlines and procedural requirements can become traps for the unwary. On appellate court writ practice, see chaps 18 (initiating writ proceeding in court of appeal), 21 (preliminary opposition), 22 (initial action by court of appeal), 23 (formal opposition and reply), 24 (action taken by court of appeal), 25 (review of court of appeal's decision).

- **The duty to bring in a specialist when necessary.** Trial counsel should consider whether an appellate lawyer would more fully and objectively advise the client about the merits of seeking writ relief, particularly if trial counsel may have committed error. Trial counsel is required to associate or consult with an appellate specialist when trial counsel lacks sufficient skill and experience to handle a writ petition. See Cal Rules of Prof Cond 3-110(C).

JUDICIAL PERSPECTIVE: Trial counsel should consult an appellate specialist early in any case of sufficient substance.

- **The duty to keep the client closely advised on the status of the matter.** Trial counsel should invite the client's input on whether the actual or potential costs of seeking writ review are justified by the chances (usually very low, see §17.28) of obtaining writ relief. See Cal Rules of Prof Cond 3-500. On the duty to communicate with the client and make the client part of the decision-making process, see A Litigator's Guide to Effective Use of ADR in California §§4.4-4.5 (Cal CEB 2005).

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B. Ethical Considerations for Appellate Specialist

§17.5 1. Duty to Practice Competently

Like trial counsel, appellate counsel has the obligation to provide competent representation. Cal Rules of Prof Cond 3-110(C). Although an appellate lawyer may have general expertise in appellate writ practice, he or she may not be familiar with a particular substantive area. In such cases, appellate counsel must work closely with the trial attorney or other counsel with expertise in the substantive area. Appellate counsel also must assess other time commitments, and candidly determine whether he or she can turn immediately to a writ petition. Finally, appellate counsel must ensure that he or she has all the information necessary to assess the merits and chances of success of a writ petition. On the duty to represent clients competently, see California Trial Practice: Civil Procedure During Trial §16.36 (3d ed Cal CEB 1995).

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§17.6 2. Duty to Ensure That Client Is Aware of Appellate Counsel's Involvement in the Case

Appellate counsel also has a duty to ensure that the client is aware of his or her involvement in the case. See Cal Rules of Prof Cond 3-500. An appellate specialist who is new to the case and was contacted by trial counsel rather than by the client should confirm with trial counsel that the client is aware of and has authorized the involvement of new counsel. Appellate counsel should participate in conversations with the client about seeking writ relief and, if relief is sought, about the status of the proceedings. On the duty to communicate with the client, see A Litigator's Guide to Effective Use of ADR in California §4.4 (Cal CEB 2005).

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Source: Civil Litigation/California Civil Writ Practice/17 Determining Whether to File an Appellate Court Writ Petition/ §17.7 C. Allocation of Responsibility Between Counsel

§17.7 C. Allocation of Responsibility Between Counsel

If the client retains an appellate specialist, trial counsel and appellate counsel must discuss and allocate the following tasks as soon as possible:

- Who will decide whether a writ petition is filed;
- Who will take the lead in drafting the petition;
- Who will obtain the necessary supporting documents; and
- Who will complete the final version of the petition and file it with the accompanying exhibits.

Practical considerations in making this allocation include the relative resources counsel can devote to the tasks and where the documents must be filed and served.

PRACTICE TIP: If an appellate specialist is retained, there should be from the outset frequent communication between trial and appellate counsel to ensure that all procedural minutiae are properly handled. For example, counsel should discuss the need to obtain verification from trial counsel or the client of the petition's allegations and, if a transcript of the hearing is unavailable, to prepare a declaration under Cal Rules of Ct 8.486(b)(3).

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§17.8 IV. CHECKING FOR CONFLICTS OF INTEREST

Trial and appellate counsel must ensure that there is no conflict of interest in representing the client in an appellate court writ proceeding. Cal Rules of Prof Cond 3-300.

JUDICIAL PERSPECTIVE: Losing a client is not the only concern for counsel with a conflict. Conflicts can fatally derail a case.

On avoiding conflicts of interest generally, see California Civil Procedure Before Trial, chap 2 (4th ed Cal CEB 2004).

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§17.9 A. Checking for Conflicts Before Discussing Case

To avoid conflicts of interest, counsel must identify all parties to the action and their counsel as soon as possible and, at the very least, before discussing the details of the case. Appellate counsel must be particularly vigilant because writ proceedings have relatively short deadlines. Trial counsel will want and need to communicate substantive information about the case very quickly. Despite time pressures, appellate counsel must obtain a complete list of *all* parties and their counsel and run a conflicts check before discussing any details about the case.

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B. Potential Conflicts

§17.10 1. Conflict With the Interests of Another Current Client

An attorney cannot represent more than one client in a matter in which the interests of the clients are actually or potentially in conflict without the informed written consent of each client. Cal Rules of Prof Cond 3-310(C)(1)-(2). Moreover, the attorney cannot represent a client in a matter and, at the same time in a separate matter, accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter. Cal Rules of Prof Cond 3-310(C)(3).

NOTE: In applying this rule, it is important to identify and evaluate the interests of *all* parties to the action, even if it appears that only one party has a direct interest in the order to be challenged in the writ proceeding.

On conflicting concurrent representation, see California Civil Procedure Before Trial §§2.25-2.34 (4th ed Cal CEB 2004).

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§17.11 2. Conflict Arising From Receipt of Confidential Information From a Client or Former Client

An attorney cannot, without the informed written consent of the client (or former client), accept employment adverse to the client if, as a result of representing the client, the attorney obtained confidential information material to the employment. Cal Rules of Prof Cond 3-310(E).

The receipt of confidential information will be presumed, and the attorney's disqualification is mandatory, if counsel represented the client or former client in any matter "substantially related" to the matter out of which the proposed writ proceedings arise. See *People ex rel Dept. of Corporations v SpeeDee Oil Change Sys., Inc.* (1999) 20 C4th 1135, 1146, 86 CR2d 816; *Flatt v Superior Court* (1994) 9 C4th 275, 283, 36 CR2d 537. See also, *e.g., Knight v Ferguson* (2007) 149 CA4th 1207, 1213, 57 CR3d 823 (substantial relationship between prior and current representation); *Fremont Indem. Co. v Fremont Gen. Corp.* (2006) 143 CA4th 50, 66, 49 CR3d 82 (substantial relationship not present); *Brand v 20th Century Ins. Co./21st Century Ins. Co.* (2004) 124 CA4th 594, 605, 21 CR3d 380 (substantial relationship between current and prior engagements mandates disqualification of attorney as expert witness against his former client); *Jessen v Hartford Cas. Ins. Co.* (2003) 111 CA4th 698, 712, 3 CR3d 877 (successive representations will be "substantially related" when information material to "evaluation, prosecution, settlement or accomplishment" of prior representation is also material to "evaluation, prosecution, settlement or accomplishment" of current representation).

On an attorney's use of confidential information against a present or former client, see California Civil Procedure Before Trial §§2.13-2.24 (4th ed Cal CEB 2004).

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§17.12 3. Conflict Arising From Attorney's Interests and Relationships

Conflicts of interest may arise from an attorney's interests in the subject matter of the representation or from an attorney's relationship with other parties or witnesses. All of these types of conflicts require written disclosure to the client. The Rules of Professional Responsibility define disclosure for these purposes as "informing the client… of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client." Cal Rules of Prof Cond 3-310(A).

An attorney cannot accept or continue representation of a client without written disclosure to the client if:

- The attorney has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter (Cal Rules of Prof Cond 3-310(B)(1));
- The attorney knows or reasonably should know that he or she (1) had a legal business, financial, professional, or personal relationship with a party or witness in the same matter, and (2) the previous relationship would substantially affect the attorney's representation (Cal Rules of Prof Cond 3-310(B)(2));
- The attorney has or had a legal, business, financial, professional, or personal relationship with another person or entity whose interest would be affected substantially by the matter (Cal Rules of Prof Cond 3-310(B)(3)); or
- The attorney has or had a legal, business, financial, or professional interest in the subject matter of the representation. Cal Rules of Prof Cond 3-310(B)(4).

Further, without written disclosure to the client, an attorney cannot represent a client in a matter in which another party's lawyer is a spouse, parent, child, or sibling of the attorney, lives with the attorney, is a client of the attorney, or has an intimate personal relationship with the attorney. Cal Rules of Prof Cond 3-320.

NOTE: This rule does not apply when an attorney fails to advise the client of a relationship with another lawyer who is merely a partner or associate in the same law firm as the adverse party's counsel, and who is not directly involved in the matter. Comment to Cal Rules of Prof Cond 3-320.

On conflicts arising from relationships with other persons, see California Civil Procedure Before Trial §§2.35-2.42 (4th ed Cal CEB 2004).

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Source: Civil Litigation/California Civil Writ Practice/17 Determining Whether to File an Appellate Court Writ Petition/ §17.13 4. Conflict Arising From Payment for Legal Services

§17.13 4. Conflict Arising From Payment for Legal Services

Generally, an attorney cannot accept payment for representing a client from anyone other than the client. Cal Rules of Prof Cond 3-310(F). This rule guards against possible conflicts of interest when the client and the party paying the attorney have adverse interests in the litigation.

NOTE: This rule may raise a particular concern for appellate specialists who are contacted by trial counsel to prepare a writ petition at trial counsel's expense. Appellate counsel should scrutinize any proposed fee arrangement with this rule in mind.

Payment can be accepted from someone other than the client only if (Rule 3-310(F)(1)-(3)):

- The payment does not interfere with the independence of the attorney's professional judgment or the attorney-client relationship;
- Information relating to the representation is protected under Bus & P C §6068(e) (requiring attorneys to maintain client confidences); and
- The client has given informed written consent.

On conflicts arising from payment for legal services, see California Civil Procedure Before Trial §2.21 (4th ed Cal CEB 2004).

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§17.14 5. Conflict Arising From Legal Position Taken

An attorney is not prohibited from representing in different cases parties with adverse positions on the same legal question. See Comment to Cal Rules of Prof Cond 3-310. As a practical matter, however, counsel should be wary of doing so, particularly when the legal issue in both cases is important, novel, and specific. Accepting clients with adverse positions on the same legal question and advancing dramatically different positions in these different actions can result in:

- Clients losing confidence in the attorney's commitment to their case; and
- Counsel losing credibility with the court.

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V. GATHERING INFORMATION TO EVALUATE AND PREPARE WRIT PETITION

§17.15 A. Obtaining Copy of Order to Be Challenged

Counsel should obtain and carefully review the trial court order or ruling that will be challenged in the anticipated writ proceeding. Trial counsel usually has a copy of the order or ruling in hand. If not, counsel can obtain a copy from the court or, if the court has an online register of actions, simply by pulling up and printing out the applicable document. If an appellate specialist is involved, trial counsel usually provides a copy of the pertinent order or ruling by fax or e-mail.

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§17.16 B. Obtaining Register of Actions

Counsel should also obtain a copy of the register of actions (also known as the docket sheet) if one is maintained by the superior court. This can be a useful document for newly retained appellate counsel because it should list every filing in the case. It can also be a handy document for trial counsel and acts as a double-check to ensure that trial counsel's files are complete. Many superior courts now provide online access to registers of actions, making it easy to pull up and print a copy.

PRACTICE TIP: Registers of actions are not infallible and may omit some documents filed in the case. If there is uncertainty about what has been filed, counsel should review the court file itself or send an attorney service to do so.

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§17.17 C. Obtaining All Potentially Relevant Pleadings and Trial Court Documents

Counsel must identify and review all documents relevant to seeking writ review. This includes the operative pleadings and all moving and opposing papers relevant to the order or ruling that may be challenged. Other documents may be relevant as well, providing background to or context for the challenged order or ruling. Trial counsel should have a complete file of these documents. If not, counsel must obtain copies from the court, or print them if the court has online access. Counsel must amass the relevant documents quickly, given the speed with which writ relief must be sought. See §§18.61-18.76.

PRACTICE TIP: Even if counsel is already familiar with these documents, it is best to assemble them chronologically as early as possible so that counsel can conveniently review them as a group. This will also facilitate preparation of the exhibits accompanying the writ petition. On preparation of exhibits to the petition, see chap 20.

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§17.18 D. Obtaining Reporter's Transcript

An appellate court writ petition must be accompanied by a transcript of the proceedings (if available) that led to the challenged order or ruling. See Cal Rules of Ct 8.486(b)(1)(D). Given the relatively short time period in which an appellate court writ petition should be filed, it is important to order any relevant hearing transcript as soon as possible. Hearings usually last only part of a day, and a transcript can be obtained relatively quickly at moderate cost. Early review of the transcript may reveal some nuance about the order or ruling undercutting a claim of error or prejudice, foreclosing any basis for writ relief.

On obtaining the reporter's transcript for the record in an appellate court writ proceeding, see §20.9.

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§17.19 E. Preparing Declaration if Hearing Transcript Unavailable

If a transcript of the proceedings that led to the ruling below is unavailable, the petition must be accompanied by a declaration from counsel including both (Cal Rules of Ct 8.486(b)(3)):

- An explanation of why a transcript is unavailable; and
- A fair summary of the proceedings, including oral arguments by both sides and any court statements on the basis for its ruling.

PRACTICE TIP: Take care of this housekeeping matter as soon as possible to avoid a last-minute scramble to obtain the materials necessary for the writ petition.

On preparing a declaration when the transcript is unavailable, see §20.9.

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§17.20 F. Obtaining Sample Writ Petition

If counsel has little experience in appellate court writ proceedings, it may be helpful to obtain an exemplar from another case to serve as a guide for format and style. For an example of a writ petition, see form in §28.1.

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VI. PRELIMINARY RESEARCH ON CHALLENGED ORDER OR RULING

A. Determining if Challenged Order or Ruling Is Appealable

§17.21 1. Writ Relief Is Presumptively Unavailable if Order Is Appealable

If the challenged order or ruling is appealable under CCP §904.1, a writ petition almost certainly will be denied because the court of appeal will conclude that the petitioner has an adequate remedy at law (*i.e.,* the right to immediate appeal). See also *Powers v City of Richmond* (1995) 10 C4th 85, 112, 40 CR2d 839 (remedy by direct appeal presumed adequate); *Marriage of Skelley* (1976) 18 C3d 365, 369, 134 CR 197 (right to immediate review by appeal is generally adequate remedy).

On determining whether an order is immediately appealable, see chaps 11, 15-16. On appealability of orders generally, see California Civil Appellate Practice, chap 3 (3d ed Cal CEB 1996). On the requirement that a petitioner have no adequate remedy at law, see §§15.56-15.60, 17.30.

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§17.22 2. Exceptions to Presumption Against Writ Relief for Appealable Orders

Writ review is sometimes available even when an order is immediately appealable. For example, courts have frequently reviewed attorney disqualification orders by writ even though such orders are appealable. Courts generally act more quickly on writ petitions, and the "specter of disqualification of counsel should not be allowed to hover over the proceedings for an extended period of time." *Apple Computer, Inc. v Superior Court* (2005) 126 CA4th 1253, 1263, 24 CR3d 818, quoting *Reed v Superior Court* (2001) 92 CA4th 448, 455, 111 CR2d 842. See *State Water Resources Control Bd. v Superior Court* (2002) 97 CA4th 907, 913, 118 CR2d 784 (order disqualifying counsel appropriate for extraordinary writ review).

Appellate courts may also grant writ review if an otherwise appealable order raises an important issue of first impression. See *Rodrigues v Superior Court* (2005) 127 CA4th 1027, 1032, 26 CR3d 194 (writ review of order vacating default judgment appropriate to promptly resolve issue of first impression and to establish guidelines for bench and bar). On writ review for issues of public or jurisprudential significance, see §17.32.

JUDICIAL PERSPECTIVE: If petitioner is seeking writ relief from an appealable order, the petition's introduction should say so and explain why an appeal will not provide an adequate remedy.

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§17.23 B. Determining Whether Statute Provides for Writ Review

In most cases, a party can challenge an interlocutory order on appeal either immediately or after entry of final judgment, without having sought writ relief. See *Premium Commercial Servs. Corp. v National Bank* (1999) 72 CA4th 1493, 1499, 86 CR2d 65 (trial court order setting aside CCP §998 settlement may be challenged on appeal even though plaintiff did not seek writ review of order). In some limited circumstances, however, there is no right of appeal, and by statute, writ review is the sole means of appellate review. See §17.24. In other limited circumstances, seeking writ review is a prerequisite to a subsequent challenge on appeal. See §17.25.

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§17.24 1. Is Order Reviewable Only by Writ Petition?

A statute may provide that the sole means of appellate review is by way of a writ proceeding. See, *e.g.*, Govt C §6259(c) (writ petition sole mode of appellate review in Public Record Act cases); CCP §170.3(d) (judicial disqualification ruling must be challenged by writ petition); *Curle v Superior Court* (2001) 24 C4th 1057, 1063, 103 CR2d 751 (noting that CCP §170.3(d) specifies exclusive manner of appellate review of ruling on judicial disqualification). But see *People v Brown* (1993) 6 C4th 322, 335, 24 CR2d 710 (§170.3(d) does not apply to appellate review of *nonstatutory* claim that final judgment is constitutionally invalid because of judicial bias). See also *O'Hearn v Hillcrest Gym & Fitness Ctr., Inc.* (2004) 115 CA4th 491, 498, 9 CR3d 342, quoting *Main Fiber Prods., Inc. v Morgan & Franz Ins. Agency* (1999) 73 CA4th 1130, 87 CR2d 108 (party must challenge merits of good faith settlement determination under CCP §877.6(e) by way of writ petition, not by way of appeal from final judgment).

NOTE: The California Supreme Court has rejected constitutional challenges to statutes allowing appellate review only by writ petition. *Leone v Medical Bd.* (2000) 22 C4th 660, 668, 94 CR2d 61 (legislature may restrict appellate review to extraordinary writ petition, rather than appeal, provided it does not substantially impair court's constitutional powers); *Powers v. City of Richmond* (1995) 10 C4th 85, 112, 40 CR2d 839 (upholding state constitutionality of writ review as sole mode of appellate review).

On writ petition as exclusive means of obtaining appellate review, see §§16.2-16.48.

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§17.25 2. Is Writ Petition Prerequisite for Postjudgment Review on Appeal?

A statute may provide that the filing of a timely writ petition is a prerequisite to postjudgment review on appeal. See, *e.g.*, Welf & I C §366(*l*)(1)(a) (order setting hearing to terminate parental rights is not appealable unless petition for extraordinary writ review was timely filed); see also *Premium Commercial Servs. Corp. v National Bank* (1999) 72 CA4th 1493, 1499, 86 CR2d 65 (trial court order setting aside CCP §998 settlement could be challenged on appeal because no statute or other authority required plaintiff to seek writ review). In *Reid v Balter* (1993) 14 CA4th 1186, 1196, 18 CR2d 287, the court of appeal rejected the defendants' appeal on several grounds, including that they had not sought writ relief from an order denying their motion for a discretionary dismissal. The appellate court observed that their failure to challenge the order and allowing the case to proceed to trial thwarted the public policies underlying the dismissal statute.

PRACTICE TIP: Counsel should always consider seeking immediate writ review of an order implicating public policies favoring speedy appellate review, rather than waiting for postjudgment review on appeal.

On when writ petition is a prerequisite for appellate review, see §§16.49-16.52.

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§17.26 C. Calculating Deadline to File Writ Petition

Counsel must calculate when a writ petition would be due and consider whether there is sufficient time in which to prepare it competently. On the duty to represent clients competently, see §17.5.

Many statutes providing for writ review also specify deadlines within which a party must file a writ petition. See §18.62). These deadlines can be extremely short (see §18.63). As a result, counsel should immediately calculate the deadline for filing the writ petition. On when to file an appellate writ petition, see §§18.61-18.76.

PRACTICE TIP: Counsel should immediately consider whether to seek an extension of any statutory deadline for filing a petition if the statute provides for one. See, *e.g.*, CCP §418.10(e) (trial court may extend by 20 days the deadline to file writ petition after order denying motion to quash service of summons for lack of jurisdiction).

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§17.27 VII. DETERMINING WHETHER APPELLATE COURT IS LIKELY TO GRANT EXTRAORDINARY RELIEF

The courts of appeal deny most writ petitions. See §17.28. Accordingly, counsel must weigh the chances of success against the time spent and costs incurred in going forward to determine whether it is prudent to file a writ petition.

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§17.28 A. Most Writ Petitions Are Denied

The appellate courts summarily deny about 90 percent of all writ petitions. See Judicial Council of California, Court Statistics Report, Courts of Appeal, Table 5 (2007), available at http://www.courtinfo.ca.gov/reference/documents/csr2007.pdf; *Premium Commercial Servs. Corp. v National Bank* (1999) 72 CA4th 1493, 1498, 86 CR2d 65. See also *Omaha Indem. Co. v Superior Court* (1989) 209 CA3d 1266, 1272, 258 CR 66 (denial rate shows "courts will not use their scarce resources to second-guess every ruling and order of the trial court, particularly when to do so would save neither time nor aid in the resolution of a lawsuit"). Thus, counsel should carefully consider whether the interim ruling to be challenged, *even if clearly erroneous*, warrants extraordinary relief.

PRACTICE TIP: The courts of appeal vary in the percentage of writ petitions that are not summarily denied. See Judicial Council of California, Court Statistics Report, Courts of Appeal, Tables 11, 13 (2007), available at http://www.courtinfo.ca.gov/reference/ documents/csr2007.pdf. In evaluating the chances of success, counsel might think about which appellate district will consider the petition. Within multi-division districts, summary denial rates also vary from division to division. Usually counsel will not know to which division a writ petition will be assigned unless there has been a prior writ proceeding or appeal in the case, in which case a new writ petition will be assigned to the same division.

Appellate courts are reluctant to grant discretionary writ relief for a number of reasons:

- **Interference with case management.** Writ review can interfere with both appellate and trial court case management. Appellate courts have cautioned that too relaxed a view of the extraordinary nature of prerogative writs "run[s] the risk of fostering the delay of trials, vexing litigants and trial courts with multiple proceedings, and adding to the delay of judgment appeals pending in the appellate court." *Omaha Indem. Co. v Superior Court* (1989) 209 CA3d 1266, 1272, 258 CR 66.
- **Appeal likely to provide better vehicle for review.** An appeal on a fully developed record may provide the court of appeal with a much better vehicle to review the challenged ruling. In contrast to appeals, which are "examined with slow deliberation on a full record after the trial is over," writ petitions are considered when "the record is developing and emotions are running high, often when reporters' transcripts are not ready and additional facts may be necessary." *Jones v Superior Court* (1994) 26 CA4th 92, 100, 31 CR2d 264.
- **Writ may be unnecessary.** Writ review ultimately may prove unnecessary, *e.g.,* when the issue presented is cured or rendered moot before or by the final judgment. *Science Applications Int'l Corp. v Superior Court* (1995) 39 CA4th 1095, 1100, 46 CR2d 332 ("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").

PRACTICE TIP: To highlight the need for extraordinary relief, counsel should consider requesting the trial court to certify under CCP §166.1 "that there is a controlling question of law as to which there are substantial grounds for difference of opinion, appellate resolution of which may materially advance the conclusion of the litigation." Although the trial court's certification is not binding on the appellate court, it may cause the appellate court to give more consideration to entertaining a writ petition.

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§17.29 B. Is Writ Review on the Merits Required?

If a statute provides that writ review is the sole avenue of appellate review (see §§16.2-16.48, 17.24), the appellate court must consider the merits of the petition. *Leone v Medical Bd.* (2000) 22 C4th 660, 670, 94 CR2d 61 (when writ petition is, by statute, exclusive means for appellate review, "an appellate court must judge the petition on its procedural and substantive merits"). In *Powers v City of Richmond* (1995) 10 C4th 85, 114, 40 CR2d 839, the supreme court explained that when the exclusive means of appellate review is by writ petition,

> an appellate court may not deny an apparently meritorious writ petition, timely presented in a formally and procedurally sufficient manner, merely because, for example, the petition presents no important issue of law or because the court considers the case less worthy of its attention than other matters.

Although the appellate court must consider the merits, it remains free to deny the petition summarily without explanation and without oral argument. See *Leone,* 22 C4th at 669.

PRACTICE TIP: When a writ petition is the only authorized mode of appellate review, the petitioner should always stress that point in the petition.

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§17.30 C. Is There an Adequate Remedy at Law?

Writ relief is ordinarily available only when the petitioner lacks an adequate remedy at law, *i.e.,* when an appeal is inadequate. CCP §§1086 (writ of mandate), 1103 (writ of prohibition); see also CCP §1068 (writ of review (certiorari)) (lack of any right to appeal is substantive requirement of writ). In determining whether there is an adequate remedy at law, courts consider the following:

- **Review on appeal is usually adequate remedy.** *Rescue Army v Municipal Court* (1946) 28 C2d 460, 466, 171 P2d 8 (courts usually view as adequate petitioner's remedy of proceeding to trial and appealing from judgment); *Running Fence Corp. v Superior Court* (1975) 51 CA3d 400, 409, 124 CR 339 (right to immediate appeal is adequate remedy absent showing that particular circumstances of case render remedy inadequate).
- **Immediate appeal is presumptively adequate.** The difficulty of showing that a remedy is inadequate is even greater when the challenged order is immediately appealable. See, *e.g., Powers v City of Richmond* (1995) 10 C4th 85, 112, 40 CR2d 839 (party seeking review by extraordinary writ bears burden of showing that appeal would not be adequate remedy under particular circumstances presented). See §§17.21-17.22.
- **Mere delay and expense usually do not make a remedy inadequate.** *Jollie v Superior Court* (1951) 38 C2d 52, 56, 237 P2d 641 (appeal not inadequate simply because it entails large expenditure of time and money); *Rescue Army v Municipal Court* (1946) 28 C2d 460, 466, 171 P2d 8 (remedy not inadequate merely because more time would be consumed by pursuing it than would be required by use of writ of prohibition); *Running Fence Corp. v Superior Court* (1975) 51 CA3d 400, 410, 124 CR 339 (citing *Jollie* and *Rescue Army*).

For further discussion of appeal as an adequate remedy, see §§15.56-15.60.

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§17.31 D. Does Petitioner Face Irreparable Injury?

The prospect of irreparable injury usually goes hand in hand with the absence of any adequate legal remedy (see §17.30). The strongest basis for seeking discretionary writ relief is often when there has been a clear error that will cause irreparable harm to petitioner absent extraordinary relief. Appellate courts are sympathetic to legitimate claims of irreparable injury and will grant writ review in such cases "because the lower court's determination imposes unusually harsh and unfair results for which ordinary appellate review is inadequate." *Science Applications Int'l Corp. v Superior Court* (1995) 39 CA4th 1095, 1100, 46 CR2d 332. See also *Roberts v Superior Court* (1973) 9 C3d 330, 336, 107 CR 309 (writ relief proper when discovery order forces petitioner either to disclose privileged information or be subjected to charge of contempt for refusing to obey court's order pending appeal); *Omaha Indem. Co. v Superior Court* (1989) 209 CA3d 1266, 1272, 258 CR 66 (extensive discussion of factors appellate courts consider in deciding whether to hear a writ petition on the merits).

For further discussion of irreparable injury, see §§15.61-15.65.

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§17.32 E. Is Writ Relief Necessary to Decide Important Issue?

In determining whether extraordinary relief is appropriate, the appellate courts have looked to the public and jurisprudential significance of the issue presented, such as whether:

- The issue is of widespread interest or presents a significant and novel constitutional question; or
- There are conflicting trial court interpretations of the law requiring resolution by the appellate court.

See *Southern Cal. Reg'l Rail Auth. v Superior Court* (2008) 163 CA4th 712, 717, 77 CR3d 765 (trial court certified pre-trial preemption issue under CCP §166.1 as involving controlling question of law on which there were substantial grounds for difference of opinion and appellate resolution would materially advance conclusion of litigation); *Roden v AmerisourceBergen Corp.* (2005) 130 CA4th 211, 218, 29 CR3d 810; *Science Applications Int'l Corp. v Superior Court* (1995) 39 CA4th 1095, 1100, 46 CR2d 332.

A writ petition may meet these criteria when it involves an important legal issue affecting a large number of parties or cases. See, *e.g., California Highway Patrol v Superior Court* (2006) 135 CA4th 488, 496, 38 CR3d 16 (writ review appropriate because petition raised issue of first impression and of widespread interest); *K.R.L. Partnership v Superior Court* (2004) 120 CA4th 490, 494, 15 CR3d 517 (writ review to consider issue of first impression—whether CCP §396b permits party to transfer venue based on allegations in cross-complaint purportedly rendering venue improper); *Smith v Superior Court* (1996) 41 CA4th 1014, 1020, 49 CR2d 20 (writ review proper to consider matter that had been subject of conflicting rulings); *Aktar v Anderson* (1997) 58 CA4th 1166, 1173, 68 CR2d 595 (writ review proper "[d]ue to the statewide importance of the issues presented"). See also *Omaha Indem. Co. v Superior Court* (1989) 209 CA3d 1266, 1272, 258 CR 66 (extensive discussion of factors appellate courts consider in deciding whether to hear a writ petition on the merits).

For further discussion of writ relief to decide novel or important issues, see §§15.67, 15.70.

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§17.33 F. What Is the Standard of Appellate Review?

The chances of success on a writ petition also depend on the standard of review that the appellate court will apply to the challenged order. If the issue is primarily factual rather than legal, and the courts will apply the abuse of discretion or substantial evidence standard, the appellate court will be particularly reluctant to address the issue in a writ proceeding. If the challenged order raises a pure legal question subject to de novo review, the court of appeal may be more willing to consider the issue on a limited record.

On circumstances in which courts have entertained and granted writ petitions, see §§16.86-16.151.

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VIII. POTENTIAL BENEFITS AND RISKS OF SEEKING WRIT

§17.34 A. Benefits of Seeking Writ

There are several significant benefits to seeking writ review. An extraordinary writ can:

- **Dispose of or narrow issues.** If an appellate court issues a writ, it may dispose of the dispute and avoid a costly trial. Even if a writ does not resolve all issues, it may narrow them so the dispute is more readily settled or tried, or it may provide the trial court with guidance to avoid error at trial.
- **Promote settlement.** A writ petition that persuasively shows weakness in the adversary's case can promote settlement even if the court of appeal summarily denies the petition.
- **Test new legal theories.** Important issues of widespread public interest and issues of first impression are properly raised in petitions for extraordinary relief. *California Highway Patrol v Superior Court* (2006) 135 CA4th 488, 496, 38 CR3d 16. If such an issue is raised by an order sustaining a demurrer without leave to amend or granting a summary judgment motion, and the plaintiff can appeal from the resulting judgment, an appellate court will likely be inclined to deny the petition because the appeal is an adequate remedy. When such issues arise in other contexts, however, counsel should consider filing an appellate court writ petition to urge the court to adopt a well-reasoned, innovative solution to an important legal issue, especially if it is an issue of widespread importance.

JUDICIAL PERSPECTIVE: When applicable, the writ petition should discuss the policy reasons calling for writ relief in that particular case, *e.g.*, the resolution of conflicts in the law, the avoidance of a costly trial, or the inadequacy of a resolution by appeal. Whatever the argument, the petition should be direct, concise, and to the point.

CAUTION: A writ may win a battle but lose the war. For example, mandate may be available to enforce a right to priority setting for trial (see CCP §1062.3), but it should not be used unless the case is in its strongest trial posture. Similarly, prohibition may be available to prevent a particular judge from trying a case (see CCP §170.6), but counsel should first ascertain who is likely to be the successor judge. Counsel should try to obtain a writ only if it will help win the case at the end of the day.

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§17.35 B. Risks of Seeking Writ

The most important risk to consider is the strong likelihood that the court of appeal will summarily deny the writ petition. Given that fact, counsel must weigh:

- **Financial costs.** Before undertaking the significant amount of work required to prepare an appellate court writ petition, counsel should attempt a realistic evaluation of the fees and costs that will be incurred (including the filing fee and the cost of preparing exhibits and transcripts). Counsel should also reexamine the original fee agreement with the client to ascertain whether a revised or additional fee agreement is necessary to account for proceedings in the court of appeal. On fee agreements generally, see Fee Agreement Forms Manual (2d ed Cal CEB 2007).
- **Strategic costs.** Counsel should consider the intangible costs of filing a writ petition, *e.g.,* costs that might result from a delay in the trial court proceedings or from a lack of cooperation from opposing counsel and the trial judge.
- **Sanctions.** If the appellate court concludes that a writ petition is wholly without merit or has been filed solely for tactical reasons, it may impose sanctions, including attorney fees. CCP §907; *Jones v Superior Court* (1994) 26 CA4th 92, 96, 31 CR2d 264 (under CCP §1109, CCP §907 is applicable to writs of mandate). See also Cal Rules of Ct 8.492. On sanctions for filing frivolous appeals, see California Attorney Fee Awards §§8.16, 20.28 (2d ed Cal CEB 1994).

JUDICIAL PERSPECTIVE: The court may impose sanctions on its own motion for the filing of a frivolous or dilatory writ petition. Cal Rules of Ct 8.492(a)(1).

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18

Initiating a Writ Proceeding in the Court of Appeal

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I. INTRODUCTION §18.1
A. Scope of Chapter §18.2
B. Seeking Appropriate Type of Writ §18.3
C. Checklist for Petitioner §18.4

II. DRAFTING THE PETITION
A. Format Requirements §18.5
1. In General
a. Type of Paper §18.6
b. Manner of Production §18.7
c. Length §18.8
d. Typeface §18.9
e. Page Layout §18.10
f. Binding §18.11
2. Cover (Caption) Page §18.12
a. Document Title §18.13
b. Court Title §18.14
c. Trial Court Information §18.15
d. Case Numbers §18.16
e. Identifying Counsel §18.17
f. Identifying Parties §18.18
g. If Requesting Stay §18.19
h. If Related Appeal §18.20
B. Contents of Petition
1. Certificate of Interested Entities or Persons §18.21
2. Tables
a. Table of Contents §18.22
b. Table of Authorities §18.23
3. Introductory Statement §18.24
4. Enumerated Allegations §18.25
a. If There Is Related Appeal §18.26
b. Jurisdiction §18.27
c. Standing §18.28
d. Prior Petitions §18.29
e. Factual Allegations §18.30
(1) Procedural Facts §18.31
(2) Other Material Facts §18.32
(3) Facts Showing Petition's Timeliness §18.33
(4) Facts Addressing Inadequacy of Other Remedies §18.34
(5) Facts Showing Preservation of Issue in Trial Court §18.35
5. Prayer for Relief §18.36
a. If Seeking Immediate Stay §18.37
b. If Seeking Issuance of Peremptory Writ in First Instance §18.38
c. If Seeking Issuance of Alternative Writ or Order to Show Cause §18.39
d. If Seeking Writ of Review (Certiorari) §18.40
e. Requesting Costs and Other Relief §18.41
6. Verification
a. Petition Must Be Verified §18.42
b. Verification Must Be Based on Personal Knowledge §18.43
c. Party Litigant Usually Must Verify Petition §18.44
d. Verification of Supporting Documents §18.45

e. Verification of Supplemental Evidence §18.46
f. Verification by State or Public Officials §18.47
g. Form: Verification §18.48
7. Supporting Memorandum §18.49
a. Argument Headings
(1) Use as Effective Advocacy Tool §18.50
(2) Exemplar Headings §18.51
b. Contents
(1) Introduction §18.52
(2) Statement of Facts §18.53
(3) Legal Argument §18.54
(a) Persuasive Arguments §18.55
(b) Legal Support §18.56
8. The Record; Exhibits §18.57
9. Request for Stay §18.58
a. Allegations in Support of Stay §18.59
b. Documents in Support of Stay §18.60

III. WHEN TO FILE WRIT PETITION §18.61
A. Determining Maximum Number of Days in Which to File
1. If Statute Specifies Deadline §18.62
a. Statutory Deadline May Be Short §18.63
b. Statutory Deadlines Generally Treated as Jurisdictional §18.64
c. Extensions Under CCP §1013 Are Generally Inapplicable §18.65
2. If No Applicable Statutory Deadline
a. 60-Day Period Applies §18.66
b. Doctrine of Laches May Apply to Petitions Filed After 60 Days §18.67
c. Court May Exercise Its Discretion and Consider Petitions Filed After 60 Days §18.68
3. If Order Specifies Due Date for Compliance §18.69
B. Determining When to File Writ Petition
1. Events That Trigger Time Period to File
a. Entry of Order §18.70
b. Service of Notice of Entry of Order §18.71
c. Mailing of Minute Order §18.72
d. Notice Given in Open Court §18.73
2. How to Count Days in Which to File §18.74
C. Filing Effective on Receipt by Court §18.75
D. Chart: Time for Filing Petitions §18.76

IV. FILING AND SERVING THE PETITION
A. Serving Procedures
1. When to Serve §18.77
2. How to Serve §18.78
3. Whom to Serve §18.79
4. Proof of Service §18.80
B. Filing Procedures
1. What to File
a. Petition §18.81
b. Record §18.82
c. Information Sheet in Fifth District §18.83
2. Filing Fee §18.84
3. Where to File §18.85
a. File in Lowest Court Capable of Granting Relief §18.86
b. Locations of Courts of Appeal §18.87

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§18.1 I. INTRODUCTION

The procedure for initiating a writ proceeding in the court of appeal is similar to that for filing an opening brief on appeal. For example, the format rules for filing an appellate brief generally apply to writ petitions (except as otherwise noted, this chapter uses the term "writ petition" as inclusive of the formal verified petition and supporting memorandum that are bound together into a single document). See Cal Rules of Ct 8.486(a)(6). A petitioner must take great care to comply with all applicable rules and procedures because the courts of appeal readily dismiss writ petitions that fail to comply.

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§18.2 A. Scope of Chapter

This chapter covers all aspects of initiating a writ proceeding in the court of appeal, beginning with a procedural checklist for petitioners. See §18.4. The chapter next discusses the format and contents of a writ petition. See §§18.5-18.60. The chapter then explains when to file the petition, including time limits and other issues that may affect the filing deadline. See §§18.61-18.76. Finally, the chapter addresses service of the petition on the respondent and real party in interest as well as filing the petition in the appropriate court of appeal. See §§18.77-18.87.

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§18.3 B. Seeking Appropriate Type of Writ

If no particular type of writ is required by statute, counsel should examine the general statutory definitions to determine which type of writ is most appropriate For example, a petitioner challenging an interim ruling by the trial court most frequently will seek a writ of mandate. However, a petitioner seeking review of a contempt order should seek a writ of review (certiorari) or habeas corpus. On common types of writs and their uses, see chaps 15-16.

PRACTICE TIP: If it is unclear which type of writ relief is appropriate, the petitioner should request more than one type of writ in the alternative, *e.g.,* "writ of mandate and/or prohibition or other appropriate extraordinary relief."

Requesting the wrong type of writ may not be fatal. If the court accepts the case and determines that writ relief is warranted, it can issue the appropriate writ, regardless of the writ specifically sought in the petition. See, *e.g., Honore v Superior Court* (1969) 70 C2d 162, 164, 74 CR 233 ("[W]e have concluded that although in seeking prohibition petitioners have mistaken their remedy, they have nevertheless made out a case entitling them to mandate"); *Coelho v State Personnel Bd.* (1989) 209 CA3d 968, 971, 257 CR 557 (petitioner incorrectly requested administrative mandamus, but court examined the petition to determine whether it alleged facts entitling petitioner to some form of relief).

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§18.4 C. Checklist for Petitioner

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- Determine what type of writ to seek. See §18.3.
- Draft petition in compliance with all format requirements. See §§18.5-18.20.
- Use proper paper. See §18.6.
- Do not exceed word limits. See §18.8.
- Include required information on cover, *e.g.,* document title, court title, counsel, and parties. See §§18.12-18.20.
- Make sure formal petition is comprised of:
- Certificate of interested entities or persons (see §18.21);
- Table of contents (see §18.22);
- Table of authorities (see §18.23);
- Introductory statement (see §18.24);
- Allegations (see §§18.25-18.35); and
- Prayer for relief (see §§18.36-18.41).
- Include a verification of the formal petition through either declaration or affidavit. See §§18.42-18.48.
- Include supporting memorandum. See §§18.49-18.56.
- Submit supporting exhibits, either appended to petition or filed separately in appendix. See §18.57; chap 20.
- Consider whether to request stay of trial court proceedings. See §§18.58-18.60; chap 19.
- Determine deadline for filing petition.
- Check for statutory deadline, if any. See §§18.62-18.65, 18.76.
- If there is no statutory deadline, file within 60 days of order to be reviewed or explain reason for filing beyond 60-day period. See §§18.66-18.68.
- Check for any specified date for compliance included in order to be reviewed. See §18.69.
- Determine trigger for deadline to file petition. See §§18.70-18.74.
- Serve petition on respondent, real party in interest, and any other required persons or entities. See §§18.77-18.80.
- File petition in court of appeal. See §§18.81-18.87.

PRACTICE TIP: A petitioner should always check the local rules for the appellate district in which the petition will be filed.

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II. DRAFTING THE PETITION

§18.5 A. Format Requirements

It is extremely important to ensure that a writ petition fully complies with all applicable format rules. Courts are quick to deny a petition, and any format error will give the court an excuse to do so.

Failure to comply with format rules may result in the reviewing clerk declining to file the petition, marking it "received but not filed" and returning it to the party. Cal Rules of Ct 8.204(e)(1). The clerk may file the noncompliant petition, but the court may order it returned for corrections and refiling, strike it with leave to file a new one, or disregard the noncompliance. Cal Rules of Ct 8.204(e)(2).

JUDICIAL PERSPECTIVE: Whether the appellate court clerk will return a noncompliant writ petition for correction and refiling varies by division. Most divisions will probably not return a noncompliant writ petition for refiling because of the urgent nature of writs and strict jurisdictional time limits.

PRACTICE TIP: In addition to compliance with general format rules, the petitioner should always check for and comply with any local rules. For example, the Fourth Appellate District prohibits plastic or acetate covers on petitions. 4th App Dist, Local R 2; Sixth District Outline of Original Proceedings and Relief Ancillary to Appeal on the court's website (http://www.courtinfo.ca.gov/courts/courtsofappeal/6thDistrict/faq/6DCAproc.doc).

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1. In General

§18.6 a. Type of Paper

The petition and other documents must be on paper that is (Cal Rules of Ct 8.4(2), 8.144(a)(1)(A), 8.204(b)(1), 8.485(a)):

- White or unbleached;
- Recycled;
- 8½ by 11 inches; and
- At least 20-pound weight.

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§18.7 b. Manner of Production

It is acceptable to reproduce a brief in any way that produces a clear, black and white image of letter quality. Cal Rules of Ct 8.204(b)(1). Except for typewritten originals (see §18.9), documents can be printed on two sides, with each side numbered as a separate page. Cal Rules of Ct 8.204(b)(11)(B).

PRACTICE TIP: The petitioner should carefully photocopy and examine all copies to be sure they are legible and conform to the production rules. An illegible petition or a petition with unclear exhibits could result in summary denial by the court or rejection by the court clerk. Cal Rules of Ct 8.204(e). See also Cal Rules of Ct 8.18 (giving clerk authority to reject documents that fail to conform to requirements of California Rules of Court).

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§18.8 c. Length

A writ petition (inclusive of all text except the verification, including footnotes) generally may not exceed 14,000 words. Cal Rules of Ct 8.486(a)(6) (Rule 8.204(c) on appellate briefs governs length of writ petition and memorandum). The petition must include a certificate by counsel or an unrepresented party stating the word count. Cal Rules of Ct 8.204(c)(1) (person certifying length may rely on word count of computer program used to prepare brief). The word limit does not include tables, certificate, verification, and any supporting documents. Cal Rules of Ct 8.204(c)(3), 8.486(a)(6). For an example, see form in §28.1. On briefs produced on a typewriter, see §18.9.

PRACTICE TIP: The petitioner should keep supporting documents as short as possible. A lengthy document may evoke a negative reaction from an overburdened appellate court. The same factors that contribute to excessive length (*e.g.,* a rambling style, needless repetition, preoccupation with minutiae) detract from the petition's effectiveness.

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§18.9 d. Typeface

The petitioner may use any conventional typeface, either proportionally spaced or monospaced. Cal Rules of Ct 8.204(b)(2). The type size, including footnotes, must be at least 13 point. Cal Rules of Ct 8.204(b)(4).

Although the type style must be roman, counsel may use italics, boldface, or underscoring for emphasis. Cal Rules of Ct 8.204(b)(3) (case names must be italicized or underscored).

PRACTICE TIP: The petitioner should not overuse methods of showing emphasis; too much of it can be distracting and makes it harder to discern what the petitioner is really emphasizing.

If the writ petition is typewritten (*i.e.,* actually produced on a typewriter), the petitioner should:

- Obtain the presiding justice's permission before filing a typewritten original and carbon copies. File all other typewritten documents as photocopies. Cal Rules of Ct 8.204(b)(11)(A).
- Use only one side of a typewritten original and its carbon copies. It is acceptable to use both sides of a photocopied paper. Cal Rules of Ct 8.204(b)(11)(B).
- Use at least standard pica, 10 characters per inch type size for all text, including footnotes. Unrepresented incarcerated litigants may use elite type, 12 characters per inch, if they lack access to a typewriter with larger characters. Cal Rules of Ct 8.204(b)(11)(C).
- Not exceed 50 pages. Cal Rules of Ct 8.204(c)(2).
- Use any conventional typeface, either proportionally spaced or monospaced. Cal Rules of Ct 8.204(b)(2).

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§18.10 e. Page Layout

The lines of text in a writ petition must be unnumbered (*i.e.,* no pleading paper) and at least one-and-a-half-spaced. Headings and footnotes may be single-spaced, *i.e.,* six lines to a vertical inch. Quotations may be block-indented and single-spaced. Cal Rules of Ct 8.204(b)(5).

The margins must be at least 1½ inches on the left and right and 1 inch on the top and bottom. Cal Rules of Ct 8.204(b)(6).

Consecutively number the pages at the top or bottom. The tables and the brief may have different numbering systems. Cal Rules of Ct 8.204(b)(7).

Headings may be in uppercase letters. Cal Rules of Ct 8.204(b)(3). On headings in the supporting memorandum, see §§18.50-18.51.

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§18.11 f. Binding

The formal, verified petition, bound together with the verification and supporting memorandum, is commonly referred to as the "writ petition." The petitioner should bind the petition on the left margin with a suitable cover. Cal Rules of Ct 8.204(b)(8), (10). On the cover, see §18.12. If the petition is stapled, cover the bound edge and staples with tape. Cal Rules of Ct 8.204(b)(8). Supporting documents should be bound together at the end of the petition or in separate volumes. Cal Rules of Ct 8.486(c)(1)(A). On attaching supporting documents (*i.e.,* the record), see §18.57.

PRACTICE TIP: When binding documents, the petitioner should make sure that full pages are visible and check the local rules of the appellate district (and division) for any specific preferences on binding.

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Source: Civil Litigation/California Civil Writ Practice/18 Initiating a Writ Proceeding in the Court of Appeal/§18.12 2. Cover (Caption) Page

§18.12 2. Cover (Caption) Page

The petition's cover, preferably of card-weight recycled stock, must be red (Cal Rules of Ct 8.40(b)(1)) and must contain (Cal Rules of Ct 8.116(a), 8.486(a)(3), (a)(7)(B), 8.204(b)(10)):

- The document title (see §18.13);
- The court title, trial court number, and court of appeal number of the case (see §§18.14, 18.16);
- The names of the trial court and each participating trial judge (see §18.15);
- The name, address, telephone number, and California State Bar number of each attorney filing or joining in the petition (see §18.17);
- The name of the party that each attorney on the petition represents (see §18.18);
- If a stay is requested, the notice "STAY REQUESTED" prominently displayed (see §18.19); and
- If the petition seeks review of trial court proceedings that are also the subject of a pending appeal, the notice "RELATED APPEAL PENDING" (see §18.20).

For an example, see form in §28.1.

PRACTICE TIP: When supporting documents are separately bound as an appendix to the petition, the petitioner should note that on the petition's cover, *e.g.*, "EXHIBITS BOUND SEPARATELY." On attaching supporting documents (*i.e.,* the record), see §18.57.

In addition to compliance with general format rules, the petitioner should always check for and comply with any local rules relating to the petition's cover. For example, the Fourth and Sixth Appellate Districts prohibit plastic or acetate covers on petitions. See 4th App Dist, Local R 2; Sixth District Outline of Original Proceedings and Relief Ancillary to Appeal (available on the court's website at http://www.courtinfo.ca.gov/courts/courtsofappeal/6thDistrict/faq/6DCAproc.doc).

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§18.13 a. Document Title

The caption on the petition's cover must state the document's title. Cal Rules of Ct 8.204(b)(10)(A). The title should name the type of writ sought, *e.g.,* "Petition for Writ of Mandate." If the petitioner cannot determine what type of writ relief is appropriate, the petition should request a writ of "mandate and/or prohibition or other appropriate extraordinary relief." On determining the appropriate type of writ, see §18.3. For an example, see form in §28.1. On types of writs and their uses, see chaps 15-16.

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Source: Civil Litigation/California Civil Writ Practice/18 Initiating a Writ Proceeding in the Court of Appeal/§18.14 b. Court Title

§18.14 b. Court Title

When seeking extraordinary writ relief in the court of appeal, the petitioner must state the court title on the petition's caption page as follows:

CALIFORNIA COURT OF APPEAL
_ _ _ _ _ _ APPELLATE DISTRICT

In multi-division districts (*i.e.,* first, second, and fourth districts), add:

DIVISION _ _ _ _ _ _

JUDICIAL PERSPECTIVE: In the first and second appellate districts, counsel should leave a space for the clerk to fill in the division on the petition, because those districts do not assign petitions to a division until after filing.

For an example, see form in §28.1.

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Source: Civil Litigation/California Civil Writ Practice/18 Initiating a Writ Proceeding in the Court of Appeal/§18.15 c. Trial Court Information

§18.15 c. Trial Court Information

The cover must include the name of the trial court and each participating trial judge, as well as the trial court and appellate court case numbers. Cal Rules of Ct 8.204(b)(10)(C). For an example, see form in §28.1.

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Source: Civil Litigation/California Civil Writ Practice/18 Initiating a Writ Proceeding in the Court of Appeal/§18.16 d. Case Numbers

§18.16 d. Case Numbers

The cover must include the trial court and appellate court case numbers. Cal Rules of Ct 8.204(b)(10)(B). For an example, see form in §28.1.

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§18.17 e. Identifying Counsel

The petition's cover must state "[t]he name, address, telephone number, and California State Bar number of each attorney filing or joining in the brief." Cal Rules of Ct 8.204(b)(10)(D). For an example, see form in §28.1.

PRACTICE TIP: Although not required, providing counsel's fax number facilitates communication with the court and is especially important when the petitioner requests immediate review or a stay. On requesting a stay, see chap 19.

If appellate counsel is retained to handle the writ petition, include information on both the trial court attorney and the appellate attorney on the petition's cover. Because petitions for extraordinary writs are "original proceedings" (*i.e.,* a new action in the court of appeal), it is the petitioner's first appearance in the new action. As a result, a new attorney retained to file the petition need not file a substitution of attorney in the court of appeal. However, attorneys or unrepresented parties must serve and file a written notice with the appellate court of any change of address or telephone number occurring while the writ petition is pending. Cal Rules of Ct 8.32(b)-(c) (notice must include title and number of case to which it is applicable, or risk clerk using new information in all pending and concluded cases).

JUDICIAL PERSPECTIVE: It is not enough to file a change of address notice in the trial court. Counsel must also file the notice in the court of appeal. The same is true of a "Notice of Association of Counsel" if someone joins as counsel after filing of the first papers in the court of appeal.

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§18.18 f. Identifying Parties

The petitioner must identify the parties and their interest in the proceeding, as follows:

- "Petitioner" is the party seeking appellate court writ review;
- "Respondent" is the trial court or lower body that issued the order from which the petitioner is seeking relief; and
- "Real party in interest" is the adverse party in the respondent court.

The represented party for each attorney must be named on the caption page of all petition documents. If the respondent is a judge, court, board, or other public official, the petition must name any real party in interest. Cal Rules of Ct 8.486(a)(2). See *Tracy Press, Inc. v Superior Court* (2008) 164 CA4th 1290, 80 CR3d 464 (court of appeal dismissed writ petition for failure to name real party in interest, who was indispensible party under CCP §389).

For an example, see form in §28.1.

PRACTICE TIP: The trial court, rather than the judge, is normally the respondent because it is the action or order of the court that the petitioner is seeking to compel, prohibit, or annul. *Lois R. v Superior Court* (1971) 19 CA3d 895, 903, 97 CR 158. In rare cases, however, it may be appropriate to *name* the judge or other judicial officer who issued the order from which the petitioner is seeking relief. This most commonly occurs with challenges to the trial court judge and contempt orders. See §§23.21-23.24.

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§18.19 g. If Requesting Stay

If a stay request is made in the petition, the petitioner must conspicuously state on the cover "STAY REQUESTED." Cal Rules of Ct 8.116(a), 8.486(a)(7). The cover must also describe the act sought to be stayed and the date of the proposed act, *e.g.*, "STAY REQUESTED OF TRIAL SET FOR _ _[*DATE*]_ _." Cal Rules of Ct 8.116(a). See 4th App Dist Local R 1 (cover of petition must contain conspicuous notation "IMMEDIATE RELIEF REQUESTED" or "STAY REQUESTED," or similar wording in compliance with Cal Rules of Ct 8.116). In addition, the petitioner must state the trial court and department involved, and the name and telephone number of the trial judge whose order petitioner seeks to stay on the cover or at the beginning of the text. Cal Rules of Ct 8.116(b).

JUDICIAL PERSPECTIVE: A petition for extraordinary relief with a request for immediate stay sets off a flurry of activity in the reviewing court. As a practical matter, it is often useful to call the reviewing court shortly before filing and warn the clerk that counsel is filing a petition requesting an immediate stay, and when the petition will arrive. For telephone numbers for courts of appeal, see §18.87.

For an example, see form in §28.1. On requesting a stay, see §§18.58-18.60; chap 19.

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Source: Civil Litigation/California Civil Writ Practice/18 Initiating a Writ Proceeding in the Court of Appeal/§18.20 h. If Related Appeal

§18.20 h. If Related Appeal

If the petition seeks review of trial court proceedings that are also the subject of a pending appeal, the cover must include the words "RELATED APPEAL PENDING." Cal Rules of Ct 8.486(a)(3). Counsel should also include the docket number of the related appeal.

JUDICIAL PERSPECTIVE: The reason for this rule is simple: In many courts, once a division has heard any matter (petition or appeal) in a case, the same division hears all subsequent petitions and appeals in that case.

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B. Contents of Petition

§18.21 1. Certificate of Interested Entities or Persons

After the cover page and before the tables of contents and authorities, the petition must include a "certificate of interested entities or persons." The certificate names those with an interest in the proceeding, *e.g.,* those with a 10-percent interest in a party, or those who a party knows have a financial interest in the outcome of the proceeding. Cal Rules of Ct 8.208(e), 8.488(c). The information in the certificate helps the court of appeal justices to "determine whether to disqualify themselves from a proceeding." Cal Rules of Ct 8.208(a).

PRACTICE TIP: The petitioner must list only persons or entities that it *knows* to have an interest in the proceeding; it is not required to conduct an investigation into other possible interested persons or entities.

Failure to include a certificate could result in sanctions. Cal Rules of Ct 8.488(d). For an example of an attorney-drafted certificate, see form in §28.1; for the optional Judicial Council certificate, see §28.2.

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2. Tables

§18.22 a. Table of Contents

The petition must contain a table of contents. Cal Rules of Ct 8.204(a)(1)(A). The table of contents lists each heading and subheading in the petition, *e.g.,* Introduction, Petition, Verification, Memorandum (including all subheadings within the Memorandum), Conclusion. The table of contents may also include the other parts of the petition, *e.g.,* the table of authorities and list of exhibits.

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Source: Civil Litigation/California Civil Writ Practice/18 Initiating a Writ Proceeding in the Court of Appeal/§18.23 b. Table of Authorities

§18.23 b. Table of Authorities

The petition must contain a table of authorities listing each case cited in alphabetical order, each constitutional and code provision, each court rule, and other authorities, cited with their respective pages. Cal Rules of Ct 8.204(a)(1)(A).

JUDICIAL PERSPECTIVE: A table of authorities is crucial because it provides the fastest route to the discussion of the cases that the court believes are determinative.

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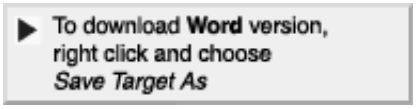
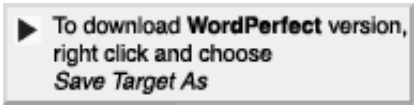
§18.24 3. Introductory Statement





The petition's introduction is crucial to signaling the court of appeal that its intervention is required because something went very wrong below. The first paragraph should generate not just concern, but a sense of disbelief that what occurred in the trial court could actually have happened. For example:

Petitioner is forced to bring this petition for extraordinary relief because the Los Angeles County Superior Court has ordered punitive damages stricken from his complaint for "failure" to do something that the California Supreme Court says he did not have to do in the first place.

Or:

The trial court improperly denied petitioner the opportunity to present evidence of X and then granted real party's motion on the ground that there was no evidence of X.

The court of appeal is far more likely to grant relief if the error is shown to be particularly obvious or egregious. Casting the error below as not just erroneous but impossible to understand increases the long odds of success.

For an example of a full-length introductory statement, see form in §28.1.

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§18.25 4. Enumerated Allegations

The enumerated allegations constitute the formal petition which is the *pleading* that initiates the writ proceeding. It immediately follows the introductory statement. Its allegations identify the parties, recite the operative and material facts, and state how the trial court went astray and why writ relief is appropriate and necessary. The formal petition is drafted in the form of a complaint, *i.e.,* with each paragraph numbered, but petitioner should not use pleading paper.

As with a complaint, the formal petition should include:

- The names of the parties and their status;
- The relevant background and procedural history;
- The action that the respondent took and how the action is erroneous and detrimental to the petitioner;
- A showing that the petition is timely; and
- Why a remedy at law is not available or adequate.

See generally *Omaha Indem. Co. v Superior Court* (1989) 209 CA3d 1266, 258 CR 66.

The formal petition should not be stilted in form. The allegations should be a narrative that is as persuasive as the statement of facts in a good appellate brief. The petitioner should keep the focus on convincing the appellate court to exercise its discretion and decide the writ petition on the merits.

PRACTICE TIP: It is not required that the allegations begin on a new page, and some petitioners begin them on the same page following the introduction, using a heading to make it clear that the formal petition has begun.

For an example, see form in §28.1.

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§18.26 a. If There Is Related Appeal

If the petition seeks review of trial court proceedings that are also the subject of a pending appeal, the first paragraph of the petition must state the appeal's title, the trial court docket number, and the docket number of the pending appeal. Cal Rules of Ct 8.486(a)(3)(A). For an example, see form in §28.1.

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§18.27 b. Jurisdiction

The petition should specifically allege that the appellate court has jurisdiction, and why. This is generally accomplished by simply stating that the petition seeks review of a trial court ruling. See CCP §§1087, 1103. For an example, see form in §28.1. On jurisdictional issues, see §§15.51-15.71, 17.29-17.33.

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§18.28 c. Standing

The petition must show that the petitioner has standing to seek relief, *i.e.,* a beneficial interest in the outcome of the proceedings. CCP §§1086, 1103(a). See, *e.g., Ra v Superior Court* (2007) 154 CA4th 142, 147 n4, 64 CR3d 539 (only party beneficially interested in order challenged may immediate appellate review by writ of mandate).

The petitioner can show standing by stating that:

- The petitioner is a plaintiff or a defendant (or other interested party) in the underlying action; and
- The petitioner is aggrieved by the trial court's order.

For an example, see form in §28.1. On the standing requirement, see §§15.51-15.55.

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Source: Civil Litigation/California Civil Writ Practice/18 Initiating a Writ Proceeding in the Court of Appeal/§18.29 d. Prior Petitions

§18.29 d. Prior Petitions

The petition should state whether there have been any prior writ petitions in the action or a related action. The petition should:

- Identify any prior petitions in the action or a related action;
- State how they were decided; and
- Explain how the instant petition differs from them.

See *Hagan v Superior Court* (1962) 57 C2d 767, 770, 22 CR 206 (to further orderly administration of justice and sound judicial policy, court may refuse to consider repetitive applications of same petition), disapproved on other grounds in *Kowis v Howard* (1992) 3 C4th 888, 899, 12 CR2d 728. Identify any prior petitions by the title, date of filing, and the trial court and appellate court docket numbers.

JUDICIAL PERSPECTIVE: This requirement allows the courts of appeal to be more efficient and assign the petition to the panel or division that considered the prior petition.

On cover requirements when a related appeal is pending, see §18.20.

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§18.30 e. Factual Allegations

The factual allegations in the writ petition tell a story about what happened and to whom. The allegations should tell this story simply and directly. It usually is best to tell the story in chronological order, but the petitioner should use whatever sequence provides the maximum force and continuity. The factual recitation must be accurate and truthful in every respect. Failure to impart the whole story or to tell it fairly can be extremely prejudicial to the petitioner's case.

PRACTICE TIP: When drafting the facts, the petitioner should keep in mind that the reviewing court is not familiar with the case and does not have the trial court file.

It is *essential* to use supporting citations to documents in the record. On supporting documents, see §18.57. On citing to exhibits in the record, see §20.14.

PRACTICE TIP: Because the facts must be verified, they must be in the formal petition. Some appellate districts also require facts to be recited in the supporting memorandum. Counsel should check local court rules and local practice for the preferred placement.

For examples of factual allegations, see form in §28.1.

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§18.31 (1) Procedural Facts

The factual allegations should include a concise statement of procedural facts relevant and material to the petition. The petition should not present a "laundry list" of filings and events; it is boring and unpersuasive.

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§18.32 (2) Other Material Facts

The factual allegations should include all other material facts necessary for the court to hear the matter, and on which petitioner wishes to rely in showing that extraordinary relief is required. For example, when arguing that the trial court acted or is threatening to act without or in excess of its jurisdiction, the petitioner should specifically describe the court's acts and the violation. When alleging that the trial court failed to exercise its discretion after assuming jurisdiction, the petitioner should allege that the trial court had a specific statutory duty to determine the matter on its merits and its failure to perform that duty. The allegation that the trial court abused its discretion should describe specifically the trial court's act, whether it is unconstitutional or unreasonable, and why it was a prejudicial abuse of discretion. On the bases for seeking writ relief, see §§15.51-15.71.

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§18.33 (3) Facts Showing Petition's Timeliness

The factual allegations should include facts showing that the writ petition is timely, *e.g.,* the date of hearing, the date of entry of the challenged order (if different from the date of hearing), the date when notice of the ruling was mailed, the date the petitioner received notice of the ruling, or that petitioner has obtained a statutorily authorized extension of time to file the petition. On the time for filing the petition, see §§18.61-18.76. On writs authorized by statute, including discussion of deadlines and availability of extensions, see chap 16.

JUDICIAL PERSPECTIVE: The court of appeal will deny a writ petition if it is not filed within the applicable deadline.

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§18.34 (4) Facts Addressing Inadequacy of Other Remedies

The factual allegations should include facts showing why other remedies at law, whether by appeal or otherwise, are inadequate. For example, the petition may allege the absence or inadequacy of other remedies by showing that there is no right of appeal, the right of appeal has been lost (*e.g.,* because the opportunity for timely appeal expired without petitioner's fault), or appeal is an inadequate remedy. On availability of appeal, see California Civil Appellate Practice, chap 3 (3d ed Cal CEB 1996). On the requirement of inadequate remedy at law, see §§15.56-15.65, 17.30.

JUDICIAL PERSPECTIVE: If a trial court has issued an order under CCP §166.1 indicating it believes its interlocutory order involves a controlling question of law about which there are substantial grounds for a difference of opinion and appellate resolution may materially advance the conclusion of the litigation, this also should be alleged in the petition. See *Safeco Ins. Co. v Superior Court* (2009) 173 CA4th 814, 825, 92 CR3d 814 (denying writ petition on merits after issuing stay and order to show cause).

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§18.35 (5) Facts Showing Preservation of Issue in Trial Court

The petition must show that the petitioner preserved the issue(s) asserted in the petition while in the trial court. To do this, the petitioner must allege facts showing either that the issues were brought to the attention of the trial court or that raising them below was impossible or futile.

To allege preservation of the issue, the petitioner should use either a statement in the procedural narrative, with citation to the record, or a separate allegation. For example, the petition can include a separate allegation specifically stating that when the objection was raised in the trial court, the trial court either rejected or failed to rule on that objection.

However, in exceptional cases, the courts of appeal will consider legal issues not presented to the trial court and raised for the first time in a writ petition. See, *e.g., Sheller v Superior Court* (2008) 158 CA4th 1697, 1709, 71 CR3d 207.

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§18.36 5. Prayer for Relief

The prayer for relief at the conclusion of the formal petition should set out each requested type of relief in a separate, numbered paragraph (including costs and attorney fees, when relevant). On requesting costs, see §18.41.

JUDICIAL PERSPECTIVE: Prayers for relief must be specific. The petitioner should tell the court precisely what he or she wants and not make the court guess at the relief sought.

For an example of a prayer for relief, see form in §28.1.

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§18.37 a. If Seeking Immediate Stay

If the petitioner seeks a stay, the prayer should mention that first and be specific about what is to be stayed, *i.e.*, an order or the entire action. For an example, see form in §28.1.

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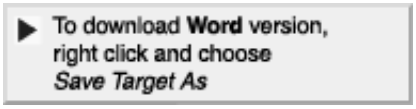
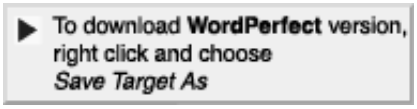
§18.38 b. If Seeking Issuance of Peremptory Writ in First Instance





A prayer for relief may request that the court issue a peremptory writ in the first instance, stressing the desire to avoid the further delay that issuance of an alternative writ or order to show cause would entail. When the court issues a peremptory writ in the first instance, there is no alternative writ, no standard briefing, and usually no oral argument. See §§22.18-22.22.

The following is exemplar language to use when seeking a peremptory writ in the first instance:

[2.] That the Court issue a peremptory writ of _ _[*mandate/prohibition*]_ _ **in the first instance under the seal of this Court commanding** _ _[*respondent(s)/real* _ _[*party/parties*]_ _ *in interest*]_ _ _ _[*specify names of those to whom order is directed*]_ _ _ _[*to vacate its order dated*_ _[*date*]_ _, *and enter a new and different order/to desist and refrain from taking any further action or proceedings* _ _[*including, e.g., trial/continuance/enforcement of earlier proceedings*]_ _ **to** _ _[*set out acts or duties required to be performed*]_ _]_ _**.**

For an example, see form in §28.1.

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Source: Civil Litigation/California Civil Writ Practice/18 Initiating a Writ Proceeding in the Court of Appeal/§18.39 c. If Seeking Issuance of Alternative Writ or Order to Show Cause

§18.39 c. If Seeking Issuance of Alternative Writ or Order to Show Cause

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

The following is exemplar language to use when seeking an alternative writ or order to show cause:

18.39-1 Alternative: Petitioner seeks alternative writ of mandate

[2.] That the Court issue an alternative writ of mandate under seal of this Court commanding _ _[*respondent(s)/real* _ _[*party/parties*]_ _ *in interest*]_ _ _ _[*specify names of those to whom order is directed*]_ _ **to** _ _[*set out acts or duties required to be performed*]_ _**, or to show cause before this Court, at a time and place then or thereafter specified by Court order, why** _ _[*it/they*]_ _ _ _[*has/have*]_ _ **not done so and why a peremptory writ should not issue.**

[3.] On the return of the alternative writ and hearing on the order to show cause, a peremptory writ of mandate issue under the seal of this Court compelling respondent(s) to _ _[*set out acts or duties to be performed*]_ _**.**

18.39-2 Alternative: Petitioner seeks alternative writ of prohibition

[2.] That the Court issue an alternative writ of prohibition under seal of this Court commanding _ _[*respondent(s)/real* _ _[*party/parties*]_ _ *in interest*]_ _ _ _[*specify names of those to whom order is directed*]_ _ **to desist and refrain from taking any further action or proceedings** _ _[*including, e.g., trial/continuance/enforcement of earlier proceedings*]_ _ **in the above described** _ _[*action/matter*]_ _ **until further order of this Court, and directing and requiring respondent(s)** _ _[*and real* _ _[*party/parties*]_ _ *in interest*]_ _ **to show cause before this Court, at a time and place then or thereafter specified by Court order, why** _ _[*it/they*]_ _ **should not be absolutely and forever restrained from any further proceedings in the** _ _[*action/matter*]_ _**; or to show cause before this Court, at a time and place then or thereafter specified by Court order, why** _ _[*it/they*]_ _ _ _[*has/have*]_ _ **not done so and why a peremptory writ should not issue.**

[3.] On the return of the alternative writ and hearing on the order to show cause, a peremptory writ of prohibition issue under seal of this Court restraining respondent(s) absolutely and forever from taking any further proceedings in this _ _[*action/matter*]_ _**.**

For another example, see form in §28.1.

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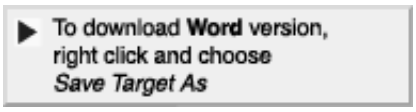
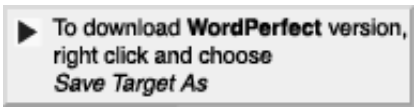
Source: Civil Litigation/California Civil Writ Practice/18 Initiating a Writ Proceeding in the Court of Appeal/§18.40 d. If Seeking Writ of Review (Certiorari)

§18.40 d. If Seeking Writ of Review (Certiorari)





The following is exemplar language to use when seeking a writ of review (certiorari):

[2.] That the Court issue a writ of review (certiorari) under seal of this Court commanding respondent _ _[*state name of court or agency*]_ _ to certify to this Court, at a time and place specified by Court order, a transcript of the record and proceedings of the above described _ _[*action/cause/matter/hearing*]_ _.

On seeking a writ of review, see §§15.27-15.38.

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§18.41 e. Requesting Costs and Other Relief

The party prevailing in an appellate writ proceeding resolved by written opinion after issuance of an alternative writ, order to show cause, or peremptory writ in the first instance is entitled to his or her appellate costs unless the court of appeal finds that the interests of justice dictate otherwise. Cal Rules of Ct 8.493(a)(1)(A). The court's opinion must specify the award or denial of costs. Cal Rules of Ct 8.493(a)(2). On awarding appellate costs, see §§24.23-24.27.

PRACTICE TIP: Attorney fees may be available in some writ proceedings. See §24.28.

Use the following exemplar language to request costs in the petition:

[4.] That the Court award petitioner(s) the costs of this proceeding.

[5.] That the Court grant such other relief as may be just and proper.

For an example, see form in §28.1.

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6. Verification

§18.42 a. Petition Must Be Verified

A writ petition must be verified in the same manner as an ordinary civil complaint. CCP §446(a) (requiring that party or party's attorney sign petition as well as verify its contents), §1109; Cal Rules of Ct 8.486(a)(4). See also CCP §§1069, 1086, 1103(a). The verification follows the formal petition, beginning either on the last page of the petition or on a new page immediately thereafter.

Verify the petition through either (CCP §§2009, 2015.5):

- A declaration under penalty of perjury; or
- An affidavit.

PRACTICE TIP: It is critical to include an adequate verification. The appellate court may decline to consider a petition on the merits for any reason, including lack of, or an inadequate, verification. See *Krueger v Superior Court* (1979) 89 CA3d 934, 939, 152 CR 870 (petition for extraordinary relief fatally defective because verification was dated December 3, but body of petition was dated December 22).

For an example, see form in §28.1.

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§18.43 b. Verification Must Be Based on Personal Knowledge

To the extent the petition alleges facts proffered as evidence, the verification *must* be based on personal knowledge, not information and belief. CCP §§1069, 1086, 1103(a). Verification of evidentiary facts on "information and belief" may be cause for a summary denial. See *Star Motor Imports, Inc. v Superior Court* (1979) 88 CA3d 201, 204, 151 CR 721 (affidavit based on "information and belief" is hearsay and must be disregarded).

The petition may survive if at least the material facts are properly verified or if the issues presented are solely questions of law. See, *e.g.*, *Soltani-Rastegar v Superior Court* (1989) 208 CA3d 424, 428, 256 CR 255 (part of verification stating it was based on information and belief was "mere surplusage"; court found that material facts were all stated to be true and correct of declarant's own knowledge); *Fall River Joint Unified Sch. Dist. v Superior Court* (1988) 206 CA3d 431, 436, 253 CR 587 (court proceeded despite arguably defective verification based on information and belief, because issue presented was purely one of law).

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§18.44 c. Party Litigant Usually Must Verify Petition

The beneficially interested party must verify the petition. CCP §§1069, 1086, 1103(a). In extenuating circumstances, the party's attorney may verify the petition. CCP §446; *Perlman v Municipal Court* (1979) 99 CA3d 568, 574, 160 CR 567 (verification by attorney merely for sake of convenience invalid). Extenuating circumstances might include:

- The party's absence from the county in which the attorney's office is located;
- The party litigant's inability to verify; or
- The existence of facts that are within the knowledge of the attorney (*e.g.,* proceedings that occurred in court).

In *Suzanne J. v Superior Court* (1996) 46 CA4th 785, 54 CR2d 25, the court dismissed a writ petition in a dependency proceeding because the mother's attorney had verified the petition without explaining why the mother had neither verified the petition nor executed a declaration indicating her consent to the attorney's signing the petition.

PRACTICE TIP: When verifying a petition, counsel must be careful not to verify facts that may constitute a waiver of the attorney-client privilege and subject the attorney to deposition inquiries concerning the factual basis for his or her verification. See *Alpha Beta Co. v Superior Court* (1984) 157 CA3d 818, 827, 203 CR 752 (information in declaration did not waive privilege).

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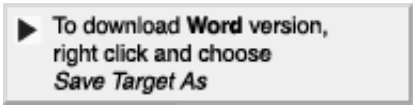
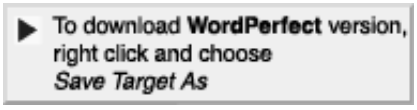
§18.45 d. Verification of Supporting Documents





The petition must include verification of the exhibits included in the record, *e.g.*:

All documents contained in the Appendix filed in conjunction with and in support of this writ petition are true and correct copies of said documents filed in the trial court.

The trial court's order denying summary adjudication is included in the Appendix as "Exhibit J" and is incorporated by reference as though fully set forth herein.

PRACTICE TIP: Given the ponderous effect of authenticating exhibits in the text of a petition, petitioner may choose to do so once, in one plenary authentication at the beginning of the petition, *e.g.,* "This and each subsequent exhibit is a true and correct copy of the document identified, [*and is attached to this petition/is contained in the appendix filed separately with this Court,*] and is incorporated by reference into this petition."

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§18.46 e. Verification of Supplemental Evidence

On rare occasions, counsel may need to supplement the record with new evidence by attaching declarations to the petition to support information not in the record. In such situations, the declaration cannot be made on information and belief, because this makes the facts mere hearsay. See *Star Motor Imports, Inc. v Superior Court* (1979) 88 CA3d 201, 204, 151 CR 721 (declaration made on information and belief is hearsay and does not establish evidentiary facts in petition); see also *DeGrandchamp v Texaco, Inc.* (1979) 100 CA3d 424, 437, 160 CR 899 (court refused to treat premature appeal as petition for writ of mandate based on absence of declaration to support claims of urgency and prejudice), disapproved on other grounds in *Morehart v County of Santa Barbara* (1994) 7 C4th 725, 743 n11, 29 CR2d 804.

PRACTICE TIP: An alternative to including a declaration stating "new" facts (*i.e.,* facts not in the trial court record) is to allege the facts in the petition and have the witness who would have executed the declaration execute a verification of that allegation (identified by paragraph number).

On the record in an appellate court writ proceeding, see chap 20.

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§18.47 f. Verification by State or Public Officials

Petitions generally need not be verified when the petitioner is a public officer acting in his or her official capacity. CCP §446. See, *e.g.*, *Fremont Union High Sch. Dist. v Santa Clara County Bd. of Educ.* (1991) 235 CA3d 1182, 1188, 286 CR 915 (school districts, as public entities, are exempt from verification requirement); *Murrieta Valley Unified Sch. Dist. v County of Riverside* (1991) 228 CA3d 1212, 1221, 279 CR 421 (same); *Crowl v Commission on Prof. Competence of the Governing Bd. of the San Juan Unified Sch. Dist.* (1990) 225 CA3d 334, 342, 275 CR 86 (same); *Elliott v Contractors' State License Bd.* (1990) 224 CA3d 1048, 1054, 274 CR 286 (state agency's unverified answer to petition was not legally incompetent). But see *People v Superior Court (Alvarado)* (1989) 207 CA3d 464, 470, 255 CR 46 (discussed division of authority in criminal cases regarding whether public entities and officials are required to verify writ petitions).

PRACTICE TIP: It is better practice for the state or state subdivision to verify the petition, because it is often used as evidence of the facts stated. See *People v Superior Court, supra* (criminal case holding that because CCP §§1086 and 1089 requiring verification are more specific than CCP §446, they would prevail).

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Source: Civil Litigation/California Civil Writ Practice/18 Initiating a Writ Proceeding in the Court of Appeal/§18.48 g. Form: Verification

§18.48 g. Form: Verification

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18.48-1 Alternative: Affidavit with notary acknowledgment

State of _ _ _ _ _ _, County of _ _ _ _ _ _:

I, the undersigned, being sworn, say:

I am _ _[_ _[*one of***]_ _*/the attorney for*]_ _ the petitioner(s) in this action. _ _[***All facts alleged in the above document are true of my own personal knowledge/I have read the above Petition for Writ of _ _[***Mandate/Prohibition/Review (Certiorari)***]_ _ and know its contents. All facts alleged in the petition are true of my own personal knowledge.***]_ _**

I declare under penalty of perjury that the foregoing is true and correct and that this affidavit was executed on _ _[*date***]_ _, at _ _[***city***]_ _, California.**

__[*Signature of petitioner/petitioner's attorney*]__
_ _[*Typed name*]_ _
_ _[*Petitioner/Attorney for petitioner*]_ _

State of California

County of _ _[*name of county***]_ _**

On _ _[*date***]_ _, before me, _ _[***name and title of notary***]_ _, personally appeared _ _[***name of affiant(s)***]_ _ who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) _ _[***is/are***]_ _ subscribed to the within instrument and acknowledged to me that _ _[***he/she/they***]_ _ executed the same in _ _[***his/her/their***]_ _ authorized capacity(ies), and that by _ _[***his/her/their***]_ _ signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.**

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____ (Seal)

18.48-2 Alternative: Declaration

I, the undersigned, declare:

I am _ _[_ _[*one of***]_ _*/the attorney(s) for*]_ _ the petitioner(s) in this action. _ _[***All facts alleged in the above document are true of my own personal knowledge/I have read the above Petition for Writ of _ _[***Mandate/Prohibition/Review (Certiorari)***]_ _ and know its contents. All facts alleged in the petition are true of my own personal knowledge.***]_ _**

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on _ _[*date***]_ _, at _ _[***city***]_ _, California.**

__[*Signature of petitioner/petitioner's attorney*]__
_ _[*Typed name*]_ _
_ _[*Petitioner/Petitioner's attorney*]_ _

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Source: Civil Litigation/California Civil Writ Practice/18 Initiating a Writ Proceeding in the Court of Appeal/§18.49 7. Supporting Memorandum

§18.49 7. Supporting Memorandum

The petitioner must include a supporting memorandum along with the formal petition. Cal Rules of Ct 8.486(a)(5). The formal petition is the pleading that initiates the writ proceeding; the accompanying memorandum provides the legal argument and authorities supporting issuance of the requested writ. Because the court of appeal may summarily deny the writ petition, foreclosing further written and oral argument, it is imperative that the supporting memorandum be as complete and persuasive as possible.

For an example of a supporting memorandum, see form in §28.1.

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a. Argument Headings

§18.50 (1) Use as Effective Advocacy Tool

The supporting memorandum must be organized so that each point is made under a separate heading or subheading. Cal Rules of Ct 8.204(a)(1)(B). The petitioner should make effective use of these required headings and subheadings by having them concisely summarize the legal arguments presented in the memorandum. Dividing an argument into discrete pieces makes the supporting memorandum easier for the reader to follow and, thus, more effective. It also keeps the writer "honest" by forcing him or her to make each discrete point in a coherent and internally complete manner. Well-crafted headings provide an outline of the arguments that the reader can understand at first glance.

The headings may be in upper case letters. Cal Rules of Ct 8.204(b)(3).

PRACTICE TIP: Repeat each argument heading in the table of contents so that a review of the table gives the court a brief but thorough outline of the petition's contentions. On the table of contents, see §18.22.

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§18.51 (2) Exemplar Headings

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The following are exemplar argument headings:

ARGUMENT

I. THE CONTEMPT PROCEEDING WAS VOID *AB INITIO* AS AN ATTEMPT BY THE RESPONDENT COURT TO ENFORCE AN ORDER AUTOMATICALLY STAYED BY THE PERFECTED APPEAL.

[*Argument omitted*]

II. IN ADDITION TO HAVING NO JURISDICTION TO *COMMENCE* THESE PROCEEDINGS, RESPONDENT COURT HAD NO JURISDICTION TO *PURSUE* THEM UNDER THE PROCEDURES SHOWN IN THIS RECORD.

A. Jurisdiction Never Attached Because of the Absence of an Adequate Initiating Affidavit.

[*Argument omitted*]

B. The Respondent Court Lacked Jurisdiction to Make the Purported Order Because There Was No Evidence, Substantial or Otherwise, of a Prima Facie Case.

[*Argument omitted*]

For an example of a supporting memorandum, see form in §28.1.

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b. Contents

§18.52 (1) Introduction

The memorandum usually begins with an introduction. The introduction should track the organization of the argument, serving as a summary of the argument and preparing the reader to appreciate the material aspects of the factual and procedural background discussed in the body of the writ petition. Its length and substance will depend on the introduction that precedes the formal petition. See §18.24. Often that initial introduction will summarize the case, identify the issues, and summarize why writ relief should be granted. If so, the introduction to the memorandum can be more concise. In fact, depending on the content of the initial introduction, it may be appropriate to dispense with a second introduction.

JUDICIAL PERSPECTIVE: The petitioner can choose to include either a substantive introduction that lets the court know what happened and why it should grant the petition, or a very short introduction in the memorandum and use the petition as the first argument.

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§18.53 (2) Statement of Facts

The memorandum need not repeat the facts alleged in the formal petition. Cal Rules of Ct 8.486(a)(5). Particularly if the facts and procedural background are set forth clearly and persuasively in the formal petition, no purpose is served by restating them in a statement of facts in the memorandum. The formal petition should "tell the story" and the memorandum should supply the argument and legal authority for granting writ relief. The arguments, however, should tie directly to and cite the material facts. All factual statements in the memorandum should be supported by a citation to the record. Cal Rules of Ct 8.204(a)(1)(C). On citing the record, see §20.14.

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§18.54 (3) Legal Argument

The argument must be aimed at obtaining the relief sought, *i.e.,* intervention by the court of appeal. A memorandum that brilliantly vindicates public policy or makes obvious the respondent's error without convincing the court that an exercise of its extraordinary powers is necessary does not increase the petitioner's chance of success of the writ petition. The argument should be organized and supported not just to make the legal point that "we are right and the trial court was wrong," but to show that without immediate intervention by the court of appeal something very bad will happen to the petitioner.

The argument following each heading or subheading must clearly state:

- The precise error or abuse of discretion that allegedly occurred;
- The factual setting that gave rise to the error or abuse of discretion; and
- The relevant law, including the applicable standard of appellate review (sometimes placed in a footnote at the beginning of the argument on an issue), supported with citations of authority and applied to the facts.

PRACTICE TIP: Merely stating the alleged error and the relevant law is meaningless. The petitioner must identify the facts that relate directly to the particular error, and then demonstrate that the law is applicable to this set of facts.

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§18.55 (a) Persuasive Arguments

Persuading the appellate court to intervene can take different routes. If a statute provides for review by writ petition, stress that. On statutorily authorized writs, see chap 16. If appeal after final judgment is inadequate, explain why. On inadequate remedy at law, see chaps 15, 17. In any event, the memorandum should clearly state why relief by extraordinary writ is necessary. Some of the more persuasive reasons include (*Omaha Indem. Co. v Superior Court* (1989) 209 CA3d 1266, 1271, 258 CR 66):

- The trial court's order bars a substantial portion of the plaintiff's or the defendant's case from being heard on the merits.
- The trial court refuses to exercise its discretion in hearing and deciding, or has incorrectly decided, an issue involving a constitutional right or privilege.
- The trial court's order will result in the disclosure of privileged information.
- The trial court took an action clearly in excess of its jurisdiction.
- The trial court's action invades an uninvolved third party's rights.

In attempting to persuade the appellate court, the petitioner must not mislead the court, by either commission or omission, or risk incurring sanctions. On sanctions, see Cal Rules of Ct 8.492; §§24.61-24.65. The petitioner should candidly explain the opponent's arguments from below and why the trial court accepted them. It is also important to address "bad facts" (*i.e.,* those inimical to the petitioner's position) by admitting them and stating why they do not make a difference. Failing to mention such facts is a gift to the opposition; in addition to being able to reveal the "bad fact" to the reviewing court, the opposition may also accuse the petitioner of trying to mislead the reviewing court.

PRACTICE TIP: Although quotations from the record are permitted, and on crucial points may be preferable to summarization, avoid lengthy quotations. Any quoted material should be placed in quotation marks and followed by a citation to the record. See rules on quoted material in Jessen, California Style Manual §§4:12-4:27 (4th ed 2000). On citing the record, see chap 20.

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§18.56 (b) Legal Support

In choosing authority to support a particular point, and especially on issues related to the reason why extraordinary relief is required, counsel should cite a published decision in which a writ issued in an analogous circumstance. Citing authority arising from previous exercises of a reviewing court's extraordinary powers is usually more persuasive than a decision on the same issue rendered on appeal. A decision in a writ case implies that immediate intervention is justified by the circumstances.

PRACTICE TIP: Although not required by the rules, it is better practice to cite official reports for California cases in papers filed in the courts of appeal and the California Supreme Court. See Jessen, California Style Manual §1:12 (4th ed 2000). As a courtesy to opposing counsel, counsel may also provide parallel citations to the unofficial reports.

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§18.57 8. The Record; Exhibits

The petition must be accompanied "by an adequate record." Cal Rules of Ct 8.486(b)(1). If few in number, the documents constituting the record (see Cal Rules of Ct 8.486(b)(1), (3)(A)) can be appended to the petition; otherwise, the documents should be submitted to the court in a bound appendix. Cal Rules of Ct 8.486(c)(1)(A). On contents and format requirements for the record, see §§20.5-20.14. On the importance of filing a supporting record, see §20.4.

All documents in the record must be authenticated. This is usually accomplished by including appropriate language in the verified petition. On verification of exhibits included in the record, see §§18.45-18.46.

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§18.58 9. Request for Stay

To prevent issues raised in a writ petition from becoming moot while the appellate court considers the petition, the petitioner can request a stay of the trial court proceedings. On requesting a stay, see chap 19.

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§18.59 a. Allegations in Support of Stay

When requesting a stay in the petition or in a separate filing, the petitioner should allege facts showing:

- Why a stay is required (*e.g.,* that specific irreparable harm will result to the petitioner if the status quo is not maintained);
- Why the real party in interest will not be prejudiced;
- The date by which the stay must issue to prevent threatened harm;
- Whether and when the stay was requested from the trial court; and
- Facts supporting that the personal service requirements for a request for immediate stay have been satisfied. See, *e.g.,* 4th App Dist, Local R 1.

See Cal Rules of Ct 8.486(a)(7), 8.112(c).

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§18.60 b. Documents in Support of Stay

The record should include a copy of any order of denial and all moving and opposing papers relating to any stay request made in the trial court and any other trial court documents related to the request for a stay. If the record cannot be prepared in time to accompany the request for a stay and the petition, the petitioner should include a declaration of counsel explaining the urgency, describing why the documents are unavailable, and fairly summarizing their substance. Cal Rules of Ct 8.486(a)(4).

JUDICIAL PERSPECTIVE: In stating the facts in the declaration, absolute accuracy is essential. Nothing can be more harmful to a petitioner's cause than overstating or mischaracterizing the facts.

On preparing the record, see §18.57; chap 20. For an example of a stay request, see form in §28.1. On documents filed in support of a stay request, see chap 19.

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Source: Civil Litigation/California Civil Writ Practice/18 Initiating a Writ Proceeding in the Court of Appeal/§18.61 III. WHEN TO FILE WRIT PETITION

§18.61 III. WHEN TO FILE WRIT PETITION

Computing the deadline by which to file a writ petition in the court of appeal is complicated and includes traps for the unwary. The petitioner must identify both:

- The correct maximum number of days allowed for filing the petition (see §§18.62-18.69); and
- The correct date on which to begin counting (see §§18.70-18.74).

JUDICIAL PERSPECTIVE: The petitioner must carefully review the filing deadlines (see chart in §18.76) and file as soon as possible. It is unwise to wait until the last day.

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A. Determining Maximum Number of Days in Which to File

§18.62 1. If Statute Specifies Deadline

Many statutes providing for writ review also specify deadlines for filing a petition. Generally, if a writ is authorized by statute, the petitioner should follow the statutory deadlines. On writs authorized by statute, see chap 16; App A.

CAUTION: Certain statutory time limits for filing a writ petition (*e.g.,* review of the denial of a motion for summary judgment under CCP §437c(m)(1)) are strictly construed and not affected by filing a motion for reconsideration. *Bensimon v Superior Court* (2003) 113 CA4th 1257, 1258, 7 CR3d 151; *Schmidt v Superior Court* (1989) 207 CA3d 56, 61, 254 CR 827.

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§18.63 a. Statutory Deadline May Be Short

Statutory deadlines for filing a writ petition can be *extremely short*. See, *e.g.,* CCP §418.10(c) (writ petition must be filed within 10 days after service of written notice of entry of order denying motion to quash service of summons for lack of jurisdiction). As a result, the petitioner should immediately consider whether to seek an extension for filing a petition if one is available under the pertinent statute. See, *e.g.*, CCP §418.10(c) (trial court may extend by 20 days deadline for writ petition from order denying motion to quash service of summons for lack of jurisdiction). See also *Schmidt v Superior Court* (1989) 207 CA3d 56, 61, 254 CR 827 (court had good cause to grant 20-day extension under CCP §437c(*l*) (now CCP §437c(m)(1))). Some statutes require that petitioners request extensions within the original deadline period (see, *e.g.,* CCP §§405.39, 437c(m)(1)), while others do not (see, *e.g.,* CCP §418.10(c)). To be safe, it is best to always request extensions within the original time period. On statutory deadlines and extensions, see chart in §18.76 and chap 16.

PRACTICE TIP: If the petitioner receives notice of the trial court's ruling so late that only a few days remain before the writ petition must be filed, the petitioner should request an extension, if allowed, and use the extension application to explain why the petitioner needs more time to consider whether to file a writ, noting (if applicable) that the petitioner has or will retain appellate counsel for this purpose.

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§18.64 b. Statutory Deadlines Generally Treated as Jurisdictional

Courts generally treat mandatory statutory deadlines as jurisdictional, *i.e.,* the failure to comply with them results in the court not having power to consider the petition. See, *e.g., Eldridge v Superior Court* (1989) 208 CA3d 1350, 1355, 256 CR 724 (court dismissed untimely writ petition seeking review of denial of summary adjudication motion; time limits for filing petition were mandatory and court was without jurisdiction to entertain untimely petition); *Abadjian v Superior Court* (1985) 168 CA3d 363, 369, 214 CR 234 (limitation period for seeking writ review of summary adjudication decision is jurisdictional).

PRACTICE TIP: As a practical matter, courts treat virtually any statutory deadline as mandatory. See *Eldridge v Superior Court, supra* (court treated statute saying petition "may" be brought within 20 days as mandatory).

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§18.65 c. Extensions Under CCP §1013 Are Generally Inapplicable

Assume that the extensions of time set out in CCP §1013 do not apply to the deadlines for filing writ petitions unless specific statutory or decisional authority indicates otherwise in a particular situation. See *Mario Saikhon, Inc. v Agricultural Labor Relations Bd.* (1983) 140 CA3d 581, 583, 189 CR 632 (because statute at issue required that petition be filed within 30 days of issuance, not service, of decision, §1013 was inapplicable). If a statute states that the time for filing a writ petition begins to run from *service* of a particular paper, courts generally do not apply CCP §1013 to extend the statutory deadline if service was by mail (CCP §1013(a)), express mail, or other overnight delivery method or fax (see CCP §1013(c)).

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2. If No Applicable Statutory Deadline

§18.66 a. 60-Day Period Applies

If there is no statutory time limit for filing a writ petition, the appellate courts generally impose the 60-day filing period applicable to appeals. *Cal W. Nurseries, Inc. v Superior Court* (2005) 129 CA4th 1170, 1173, 29 CR3d 170. Because use of the 60-day filing rule for writ petitions is prudential, it is not jurisdictional. See *Good v Superior Court* (2008) 158 CA4th 1494, 1505 n9, 71 CR3d 125 (refusing to dismiss writ petition filed more than 60 days after trial court ruling). However, a petitioner will be hard pressed to make a case for the necessity of immediate intervention by the court of appeal if he or she delays more than 60 days in filing a writ petition.

JUDICIAL PERSPECTIVE: Filing a petition on the 59th day does not ensure a favorable response from the court. Unless there is good cause for a delay, the petitioner should always file the petition as soon as possible after entry of the challenged order.

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Source: Civil Litigation/California Civil Writ Practice/18 Initiating a Writ Proceeding in the Court of Appeal/§18.67 b. Doctrine of Laches May Apply to Petitions Filed After 60 Days

§18.67 b. Doctrine of Laches May Apply to Petitions Filed After 60 Days

If a petition is filed more than 60 days after issuance of the challenged ruling (and there is no statutory deadline), the respondent or real party in interest may assert the doctrine of laches. Under this doctrine, a writ petition may be denied if:

- A party unreasonably delays in filing the petition; and
- There is prejudice to the real party in interest.

See *Peterson v Superior Court* (1982) 31 C3d 147, 163, 181 CR 784 (laches did not apply because there was neither unreasonable delay in filing writ petition nor prejudice).

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§18.68 c. Court May Exercise Its Discretion and Consider Petitions Filed After 60 Days

Absent a showing of prejudice (and any statutory deadline), the courts of appeal have discretion to entertain a writ petition filed more than 60 days after issuance of the challenged ruling. See, *e.g.*, *Good v Superior Court* (2008) 158 CA4th 1494, 1505 n9, 71 CR3d 125 (refusing to dismiss writ petition filed more than 60 days after trial court ruling); *People v Superior Court (Lopez)* (2005) 125 CA4th 1558, 1562, 24 CR3d 66 (reaching merits of writ petition filed more than 60 days after trial court's order because there was no claim that delay prejudiced real party); *Planned Parenthood Golden Gate v Superior Court* (2000) 83 CA4th 347, 356, 99 CR2d 627 (hearing writ petition filed beyond 60-day period because issue presented implicated important privacy rights of third parties).

JUDICIAL PERSPECTIVE: It is crucial to file a writ petition as soon as possible, especially if the petition seeks a stay of trial court proceedings. The judicial attitude is that, if counsel does not think the matter is important enough to drop everything and immediately seek relief from the court of appeal, why should the court interrupt its work on appeals to let counsel cut in line? Counsel should never test the court's discretionary power unless there is a very good reason why the writ could not have been brought sooner. In addition, counsel should always provide an explanation for the delay to avoid application of the laches doctrine. On application of the laches doctrine, see §18.67.

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§18.69 3. If Order Specifies Due Date for Compliance

In some cases, the trial court's order may require performance of a certain act (*e.g.,* production of documents in discovery) by a certain date. As a practical matter, the date for performance determines the last day to file a writ petition, even if a statutory deadline would seem to grant more time, because counsel either defies the order (with the risks attendant on disregarding any court order) or complies with the order (potentially rendering the petition moot). However, counsel should not wait until the day before performance is required to file a writ petition and seek a stay. The better practice is to give the court of appeal several days to consider and act on a stay request. On requesting a stay, see §§18.19, 18.58-18.60; chap 19.

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B. Determining When to File Writ Petition

1. Events That Trigger Time Period to File

§18.70 a. Entry of Order

The most common trigger for the time period in which to file a writ petition is entry of the challenged order or ruling. If a statute authorizing writ review does not specify the trigger date for the time period in which to file a petition, counsel should consider it to be the date of entry of the order or ruling.

PRACTICE TIP: The appellate court may construe the entry of the order as the time that the petitioner first became *aware* of the trial court's order, such as when the court mailed a copy of the order to the parties. See *Schmidt v Superior Court* (1989) 207 CA3d 56, 60, 254 CR 827 (time for filing writ petition started when trial court mailed its minute order to parties reflecting its order denying summary judgment, even though party later mailed notice of order).

NOTE: If there is any doubt as to which event applies to trigger the time period to file the petition, prudence demands the use of the *first* event that occurs.

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Source: Civil Litigation/California Civil Writ Practice/18 Initiating a Writ Proceeding in the Court of Appeal/§18.71 b. Service of Notice of Entry of Order

§18.71 b. Service of Notice of Entry of Order

Service of a written notice of entry of the trial court's order is the trigger date for filing a writ petition in some statutes. See, *e.g.,* CCP §437c(m)(1) (on entry of order party may, within 20 days after service of written notice of entry of order, petition for peremptory writ). However, when the trial court directs the petitioner to serve notice of the underlying order, the appellate court may calculate the time limitations for filing the petition as though the time ran from the *entry* of the order and not from *service* of the notice. Otherwise, the petitioner could indefinitely extend the usually very short statutory time to file by simply failing to serve the notice.

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§18.72 c. Mailing of Minute Order

The court may also look to the minute order as giving the parties notice of entry of the order and start the time for filing the petition without a "formal" order ever being prepared or served. See *Schmidt v Superior Court* (1989) 207 CA3d 56, 60, 254 CR 827 (because petitioner became aware of trial court's ruling through minute order, that order constituted "written notice of entry of the order"); *Sturm, Ruger & Co. v Superior Court* (1985) 164 CA3d 579, 582, 210 CR 573 (mailing of minute order sufficient to begin running of time for filing writ petition). See also Caution in §18.73.

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§18.73 d. Notice Given in Open Court

For some types of orders, notice in open court may trigger the beginning of a filing period. For example, in *Guedalia v Superior Court* (1989) 211 CA3d 1156, 1163, 260 CR 99, the court held that the deadline for petitioning for relief from denial of a CCP §170.6 peremptory challenge began when the trial judge stated his decision in open court, because the parties were present, and thus received actual notice, and the statute did not expressly require that notice be *written*.

CAUTION: Trial courts often ask counsel to "waive notice" of a ruling, essentially converting the court's minute order into a sufficient notice of ruling and starting the time to petition running. Counsel should *not* waive notice unless the petition is ready, especially if petitioning for relief from denial of summary judgment or adjudication. Insisting on formal notice gives counsel time to prepare a convincing petition that he or she can file quickly once the court or opposing counsel serves notice of the ruling.

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§18.74 2. How to Count Days in Which to File

When calculating the time period to file an appellate court writ petition, counsel should exclude the day of the triggering event and include the last day, unless the last day is a judicial holiday, in which case it is also excluded. See CCP §§12-12a.

On treating any day that a court is authorized to be closed because of the state's fiscal crisis (*i.e.*, a "furlough day") as a holiday, see Govt C §68106(b)(1) (inoperative as of July 1, 2010, and repealed as of January 1, 2011, unless legislation deletes or extends those dates).

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§18.75 C. Filing Effective on Receipt by Court

Filing a writ petition in the court of appeal is effective only on the appellate court's *receipt* of the petition, not on the date that the petition was mailed. See Cal Rules of Ct 8.25(b)(1). The priority mail, express mail, or overnight delivery exceptions in Cal Rules of Ct 8.25(b)(3) do *not* apply to original writ petitions. See Cal Rules of Ct 8.25(b)(4).

PRACTICE TIP: If time is short or there is any question concerning timeliness, counsel should hand deliver the petition to the court.

Most courts do not permit electronic filing or fax filing of writ petitions. But see 2nd App Dist IOPP, "Invitation to File E-Briefs," at http://www.courtinfo.ca.gov/courts/courtsofappeal/2ndDistrict/efile.htm (encouraging filing of briefs electronically, *in addition* to "hard copies" filed with court).

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Source: Civil Litigation/California Civil Writ Practice/18 Initiating a Writ Proceeding in the Court of Appeal/§18.76 D. Chart: Time for Filing Petitions

§18.76 D. Chart: Time for Filing Petitions

Type of Action Being Reviewed	*Number of Days Within Which Petition Must Be Filed*
Order denying or granting motion for judicial disqualification.	Within 10 days after service of written notice of entry; time is extended under CCP §1013(a) if service is by mail. CCP §170.3(d); *People v Hull* (1991) 1 C4th 266, 271, 2 CR2d 526 (10-day limit of §170.3(d) applies to both peremptory and for-cause challenges). See also *Guedalia v Superior Court* (1989) 211 CA3d 1156, 1163, 260 CR 99 (notice may be given in open court).
Review of orders concerning coordination of action.	Within 20 days after service on petitioner of written notice of entry of court's order under CCP §§404-404.9. CCP §404.6. Trial court for good cause may order up to 10 more days if order is made within original 20-day period. CCP §404.6.
Denial of motion to quash service of process.	Within 10 days after service of written notice of entry of order denying motion. CCP §418.10(c). Trial court for good cause may allow up to 20 more days for filing. CCP §418.10(c).
Order denying or granting motion for summary adjudication of issues; denial of motion for summary judgment. (Judgment after order granting motion for summary judgment is appealable and thus not subject to review by writ. See §16.66.)	Within 20 days after service of written notice of entry of denial of motion. CCP §437c(m)(1). File petition 5 days later if court mailed notice of the judgment or order to an address in California, 10 days if mailed to an address in the United States, and 20 days if mailed to an address outside the United States. CCP §437c(m)(1). Trial court for good cause may allow an additional 10 days if motion made before expiration of original 20-day period. CCP §437c(m)(1). *Note:* The filing of a motion for reconsideration does not extend the filing period. *Schmidt v Superior Court* (1989) 207 CA3d

	56, 61, 254 CR 827.
Order on motion to expunge a lis pendens.	Within 20 days after service of written notice of order. CCP §405.39. Trial court may allow an additional 10 days if motion made before expiration of original 20-day period. CCP §405.39.
Order on motion to determine whether a settlement is in good faith.	Within 20 days after service of written notice of determination. CCP §877.6(e). Trial court may allow maximum 20-day extension. CCP §877.6(e).
Order granting or denying motion to change place of trial.	Within 20 days after service of written notice of order. CCP §400. Trial court for good cause may extend time an additional 10 days if motion made before expiration of the 20-day period. CCP §400.
Order granting or denying motion to reclassify an action or proceeding as a limited civil case under CCP §§403.010-403.090.	Within 20 calendar days after service of written notice of order. CCP §403.080. Trial court for good cause may extend time for filing an additional 10 days if motion made before expiration of the 20-day period. CCP §403.080.
Order granting or denying motion concerning disclosure of public records.	Within 20 days after service of written notice of entry of the order. Govt C §6259(c). Trial court may extend time for filing an additional 20 days. Govt C §6259(c).
All other orders and nonappealable judgments, unless a specific time period is provided by statute.	Courts of appeal generally require petitioners to file writ petitions within 60 days after entry of order at issue. *Cal W. Nurseries, Inc. v Superior Court* (2005) 129 CA4th 1170, 1173, 29 CR3d 170. See §18.66. Reviewing courts have discretion to review petition filed after 60-day period. See §18.68.

PRACTICE TIP: When relevant, the deadlines in this chart also apply to original writ proceedings filed in the California Supreme Court. On petitions filed in the supreme court, see §§27.2-27.11.

Counsel should always research the applicable code sections for time limits. For additional examples of statutory time limits, see "Sixth District Outline of Original Proceedings and Relief Ancillary to Appeal," available on the court's

website at http://www.courtinfo.ca.gov/courts/courtsofappeal/6thDistrict/faq/6DCAproc.doc.

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IV. FILING AND SERVING THE PETITION

A. Serving Procedures

§18.77 1. When to Serve

The petitioner must serve the writ petition (which includes the formal petition and the supporting memorandum) and exhibits (either appended to the petition or submitted in a separate appendix) on adverse parties *before* filing them in the court of appeal. Cal Rules of Ct 8.25(a), 8.486(e). In rare situations, the court may permit filing without service, with the proof of service to be filed later. CCP §§1088, 1088.5; Cal Rules of Ct 8.486(e)(6). Some courts have specific rules on service when the petitioner seeks a stay.

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§18.78 2. How to Serve

The petition must be served in the same manner as a brief in an ordinary civil appeal, *i.e.,* personally, by mail, or on counsel. See Cal Rules of Ct 8.25(a).

PRACTICE TIP: If seeking an immediate stay, the petitioner should expedite service through personal delivery (see CCP §1011) or (if there is a prior agreement) facsimile service, with proof of actual delivery filed with the petition. On requesting a stay, see chap 19.

Most courts insist on counsel's best efforts to give the opponent a realistic opportunity to respond. For example, in the Fourth Appellate District, the petitioner must file a declaration establishing prior service by personal delivery or other "expeditious method consented to in advance by the party served" of writ petitions that include a request for stay, injunction, or other form of immediate relief. Without this declaration, the court will not act on the request for 5 days, except to deny it summarily, absent a showing of good cause. See 4th App Dist Local R 1. Similarly, the Sixth Appellate District requires hand service for petitions seeking a temporary stay within 5 days of filing. See "Sixth District Outline of Original Proceedings and Relief Ancillary to Appeal," available on the court's website at http://www.courtinfo.ca.gov/courts/courtsofappeal/6thDistrict/faq/6DCAproc.doc.

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§18.79 3. Whom to Serve

Technically, Cal Rules of Ct 8.486(e) requires the petitioner to serve the respondent and real party in interest. In practice, if a party is represented by counsel in the underlying action, the petitioner may serve counsel; if the party is unrepresented, the petitioner may serve the party. In addition, the petitioner must serve the Attorney General if the petition contests a statute's constitutionality or is filed on behalf of the state, a county, or an officer whom the Attorney General may represent in specified proceedings. Cal Rules of Ct 8.29, 8.486(e)(4).

When serving the respondent trial court, petitioner should deliver the petition to the trial court clerk for forwarding to the trial court judge. In a multi-judge court, serve the presiding judge (CCP §416.50(a)) and deliver a courtesy copy of the petition to the trial judge (through delivery to the court clerk).

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§18.80 4. Proof of Service

The proof of service must name each party and the attorney who represents that party, and that attorney's telephone number. Cal Rules of Ct 8.486(e)(3). The court may accept a petition accompanied by a defective proof of service, but it may strike the petition or impose a lesser sanction if a proper proof of service is not filed within 5 calendar days. Cal Rules of Ct 8.486(e)(5).

A declaration of proof of service by mail creates a rebuttable presumption of receipt. The claimed recipient may rebut this presumption only by producing evidence supporting a finding of no actual notice. See *Bonzer v City of Huntington Park* (1993) 20 CA4th 1474, 1479, 25 CR2d 278 (in their six declarations, respondents had presented detailed, credible, and unimpeached evidence of no actual notice, entitling them to CCP §473 relief).

For sample proofs of service, see California Civil Procedure Before Trial §§18.21-18.24 (4th ed Cal CEB 2004).

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B. Filing Procedures

1. What to File

§18.81 a. Petition

The petitioner must file an original plus four copies of the petition (which consists of the formal petition and the supporting memorandum). Cal Rules of Ct 8.44(b)(3). Petitioner does not need to file any copies with the California Supreme Court.

PRACTICE TIP: Counsel should submit an additional copy for the court to return as a file stamped copy for counsel's files.

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Source: Civil Litigation/California Civil Writ Practice/18 Initiating a Writ Proceeding in the Court of Appeal/§18.82 b. Record

§18.82 b. Record

Only one copy of the record need be filed when it is submitted separately from the petition, unless the court orders otherwise by local rule or in the specific case. Cal Rules of Ct 8.44(b)(5). On submitting the record, see §18.57.

JUDICIAL PERSPECTIVE: Some districts, and divisions within districts, prefer multiple copies of the record unless it is so voluminous that extra copies would be wasteful. Counsel should check with local court clerks.

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§18.83 c. Information Sheet in Fifth District

All writ petitions (except petitions for writs of habeas corpus) filed in the Fifth District Court of Appeal must be accompanied by a completed face sheet entitled Appellate Court Writ Petition Information Sheet, available online at http://www.courtinfo.ca.gov/courts/courtsofappeal/5thDistrict/forms.htm. For an example, see form in §28.22.

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§18.84 2. Filing Fee

The fee for filing a writ petition within the original civil jurisdiction of a court of appeal is $655. Govt C §§68926, 68926.1(b).

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§18.85 3. Where to File

Counsel should file a writ petition in the appellate district with jurisdiction over the trial court in which the case is venued. See *Rivera v Division of Indus. Welfare* (1968) 265 CA2d 576, 581, 71 CR 739. This is a rule of practice, not jurisdictional; courts of appeal have statewide jurisdiction. Cal Const art VI, §10 (courts of appeal possess coequal jurisdiction with California Supreme Court to administer extraordinary relief without regard to existence of appellate jurisdiction over pending lawsuit to which relief relates).

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Source: Civil Litigation/California Civil Writ Practice/18 Initiating a Writ Proceeding in the Court of Appeal/§18.86 a. File in Lowest Court Capable of Granting Relief

§18.86 a. File in Lowest Court Capable of Granting Relief

Counsel should file the writ petition in the lowest court capable of granting relief. Cal Rules of Ct 8.486(a)(1). Technically, writ petitions may be filed in the first instance in the California Supreme Court. See CCP §§1068(a) (writ of review), 1085(a) (writ of mandate), 1103(a) (writ of prohibition). However, this is appropriate only in extraordinary circumstances. Cal Rules of Ct 8.486(a)(1). On writ petitions in the California Supreme Court, see §§27.2-27.11.

JUDICIAL PERSPECTIVE: As a practical matter, skipping a court is almost never justified. Unless counsel is reasonably certain that the higher court will share his or her view of the exceptional urgency or other unique factors concerning the case, applying to a higher court than would ordinarily be the first stop is a waste of time and resources.

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Source: Civil Litigation/California Civil Writ Practice/18 Initiating a Writ Proceeding in the Court of Appeal/§18.87 b. Locations of Courts of Appeal

§18.87 b. Locations of Courts of Appeal

The websites for the individual appellate courts provide local rules as well as the location and mailing address for each court of appeal. The trial court websites provide similar information as well as operating hours, which can be important when seeking an immediate stay of proceedings in connection with a petition for extraordinary relief. On seeking a stay of trial court proceedings, see chap 19.

The following are the locations for filing writ petitions with the courts of appeal, their websites, and the specific web addresses for their local rules.

First Appellate District (serves Alameda, Contra Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Napa, San Francisco, San Mateo, Solano, and Sonoma Counties; all divisions):

350 McAllister Street
San Francisco, CA 94102
(415) 865-7300
http://www.courtinfo.ca.gov/courts/courtsofappeal/1stDistrict
Local Rules:
http://www.courtinfo.ca.gov/courts/courtsofappeal/1stDistrict/localrules.htm

Second Appellate District:

Divisions 1-5, 7-8 (Los Angeles County)

300 S. Spring Street, Second Floor
Los Angeles, CA 90013
(213) 830-7000
http://www.courtinfo.ca.gov/courts/courtsofappeal/2ndDistrict
Local Rules:
http://www.courtinfo.ca.gov/courts/courtsofappeal/2ndDistrict/localrules.htm

Division 6 (San Luis Obispo, Santa Barbara, and Ventura Counties)

200 E. Santa Clara Street
Ventura, CA 93001
(805) 641-4700
http://www.courtinfo.ca.gov/courts/courtsofappeal/2ndDistrict
Local Rules:
http://www.courtinfo.ca.gov/courts/courtsofappeal/2ndDistrict/localrules.htm

Third Appellate District (serves Alpine, Amador, Butte, Calaveras, Colusa, El Dorado, Glenn, Lassen, Modoc, Mono, Nevada, Placer, Plumas, Sacramento, San Joaquin, Shasta, Sierra, Siskiyou, Sutter, Tehama, Trinity, Yolo, and Yuba Counties; no divisions):

900 N Street, Room 400
Sacramento, CA 95814
(916) 654-0209
http://www.courtinfo.ca.gov/courts/courtsofappeal/3rdDistrict
Local Rules:
http://www.courtinfo.ca.gov/courts/courtsofappeal/3rdDistrict/localrules.htm

Fourth Appellate District:

Division 1 (Imperial and San Diego Counties)

750 B Street, Suite 300
San Diego, CA 92101

(619) 645-2760
http://www.courtinfo.ca.gov/courts/courtsofappeal/4thDistrictDiv1
Local Rules:
http://www.courtinfo.ca.gov/courts/courtsofappeal/4thDistrict/documents/localrules2008.pdf

Division 2 (Inyo, Riverside, and San Bernardino Counties)

3389 12th Street
Riverside, CA 92501
(951) 248-0200
http://www.courtinfo.ca.gov/courts/courtsofappeal/4thDistrictDiv2
Local Rules:
http://www.courtinfo.ca.gov/courts/courtsofappeal/4thDistrict/documents/localrules2008.pdf

Division 3 (Orange County)

925 N. Spurgeon Street
Santa Ana, CA 92701
(714) 558-6777
http://www.courtinfo.ca.gov/courts/courtsofappeal/4thDistrictDiv3
Local Rules:
http://www.courtinfo.ca.gov/courts/courtsofappeal/4thDistrict/documents/localrules2008.pdf

Fifth Appellate District (serves Fresno, Kern, Kings, Madera, Mariposa, Merced, Stanislaus, Tulare, and Tuolumne Counties; no divisions):
2424 Ventura Street
Fresno, CA 93721
(559) 445-5491
http://www.courtinfo.ca.gov/courts/courtsofappeal/5thDistrict
Local Rules:
http://www.courtinfo.ca.gov/courts/courtsofappeal/5thDistrict/localrules.htm

Sixth Appellate District (serves Monterey, San Benito, Santa Clara, and Santa Cruz Counties; no divisions):
333 W. Santa Clara Street, Suite 1060
San Jose, CA 95113
(408) 277-1004
http://www.courtinfo.ca.gov/courts/courtsofappeal/6thDistrict
Local Rules:
http://www.courtinfo.ca.gov/courts/courtsofappeal/6thDistrict/localrules.htm

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19

Requesting a Stay in an Appellate Court Writ Proceeding

Christina J. Imre
Douglas J. Collodel

I. SCOPE OF CHAPTER §19.1

II. GENERAL CONSIDERATIONS
- A. Purpose of Stay §19.2
- B. Effect of Alternative Writs
  - 1. Alternative Writ of Mandate or Order to Show Cause Does Not Stay Trial Court Proceedings §19.3
  - 2. Alternative Writ of Prohibition or Order to Show Cause Stays Trial Court Proceedings §19.4
  - 3. Order to Show Cause Re Writ of Review (Certiorari) Does Not Stay Trial Court Proceedings §19.5
- C. Scope of Stay Request §19.6

III. REQUIREMENTS FOR STAY REQUEST
- A. Imminent Injury §19.7
- B. Stay Unsuccessfully Sought From Trial Court §19.8

IV. STAY APPLICATION
- A. Application Should Be Part of Writ Petition, But Can Be Separate Document §19.9
- B. Offer to Provide Undertaking §19.10
- C. Preparation of Documents
  - 1. Cover Requirements §19.11
    - a. Notice of Stay Request §19.12
    - b. Trial Court Identifying Information §19.13
  - 2. Statement of Urgency §19.14
  - 3. Allegations in Support of Stay §19.15
  - 4. Documents in Support of Stay §19.16
- D. Service of Stay Request
  - 1. Request Made in Writ Petition §19.17
  - 2. Request Made in Separate Application §19.18

V. OPPOSITION TO STAY REQUEST §19.19

VI. APPELLATE COURT ACTION ON STAY REQUEST §19.20

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§19.1 I. SCOPE OF CHAPTER

This chapter discusses staying trial court actions during the pendency of an appellate court writ proceeding. The chapter begins with a discussion of why and when a stay request may be necessary, including when an alternative writ acts as a stay. See §§19.2-19.5. It next discusses the scope of a stay request. See §19.6. The chapter then discusses requirements for a stay (see §§19.7-19.8), the contents of a stay application (see §§19.9-19.16), and service requirements. See §§19.17-19.18. The chapter concludes with a discussion of opposition to a stay request and the appellate court's action on a stay request. See §§19.19-19.20.

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II. GENERAL CONSIDERATIONS

§19.2 A. Purpose of Stay

A petitioner seeking writ review of a trial court ruling does not, of course, want to comply with the challenged ruling. Nor does the petitioner want the challenged ruling to dictate the course of further proceedings in the trial court. With very rare exceptions (such as an order expunging a notice of pendency of action; see CCP §405.35), the mere filing of a writ petition does not automatically stay the challenged ruling.

Thus, in many cases, the petitioner will want to seek a stay of the trial court ruling, and perhaps other trial court proceedings, pending the appellate court's disposition of the writ petition. A stay will forestall compliance with the trial court ruling and may halt other trial court proceedings while the challenged ruling is before the appellate court.

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B. Effect of Alternative Writs

§19.3 1. Alternative Writ of Mandate or Order to Show Cause Does Not Stay Trial Court Proceedings

The issuance of an alternative writ of mandate or order to show cause (OSC), in and of itself, does not automatically stay the challenged trial court ruling or further trial court proceedings. See CCP §1087; Cal Rules of Ct 8.486(a)(7), 8.487(a)(4). See also, *e.g.*, *Anglo Irish Bank Corp. v Superior Court* (2008) 165 CA4th 969, 977, 81 CR3d 535 (appellate court stayed trial court proceedings and issued order to show cause); *Zaremberg v Superior Court* (2004) 115 CA4th 111, 114, 8 CR3d 723 (alternative writ of mandate issued but stay request denied because petitioner would not suffer irreparable injury and stay would cause significant hardship); *County of Los Angeles v Superior Court* (1993) 18 CA4th 588, 593, 22 CR2d 409 (alternative writ of mandate issued but stay request initially overlooked; court of appeal subsequently considered request and granted stay).

Accordingly, the petitioner must specifically ask for a stay and do so in accordance with the rules of court. Cal Rules of Ct 8.486(a)(7) (if "petition requests a temporary stay, it must comply with rule 8.116 and explain the urgency"), 8.116(c) (if document fails to comply with rules, appellate court can refuse to consider stay request). See §§19.11-19.13.

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§19.4 2. Alternative Writ of Prohibition or Order to Show Cause Stays Trial Court Proceedings

An alternative writ of prohibition commands the party to whom it is directed (usually a court) "to desist or refrain from further proceedings in the action or matter specified therein, until the further order of the court from which it is issued, and to show cause before such court… why such party should not be absolutely restrained from any further proceedings in such action or matter." CCP §1104. Accordingly, issuance of an alternative writ of prohibition or order to show cause automatically stays the challenged proceedings.

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§19.5 3. Order to Show Cause Re Writ of Review (Certiorari) Does Not Stay Trial Court Proceedings

On receipt of a petition for writ of review (certiorari), the reviewing court "may require a notice of the application to be given to the adverse party, or may grant an order to show cause why it should not be allowed, or may grant the writ without notice." CCP §1069. However, given the due process concerns recognized in *Palma v U.S. Indus. Fasteners, Inc.* (1984) 36 C3d 171, 681 P2d 893, the court cannot issue the writ in the first instance without notice. As the statute provides, the court may issue an order to show cause, which would not of itself stay the underlying proceedings, and the petitioner would need to request an immediate temporary stay.

Upon issuance of the writ, however, the underlying proceedings are in most cases explicitly stayed, as the writ typically commands the party to whom it is directed to certify to the issuing court the record of the underlying proceedings and "in the meantime, to desist from further proceedings in the matter to be reviewed." CCP §1071. If this language is absent from the writ of review, it does not stay the underlying proceedings. CCP §1072. On writs of review (certiorari), see §§4.10-4.16 (in the superior courts), 15.27-15.38 (in the appellate courts).

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§19.6 C. Scope of Stay Request

Often, stay requests are limited to compliance with the challenged ruling, *e.g.*, staying an order compelling production of allegedly privileged information. Sometimes, a stay request seeks suspension of all further trial court proceedings. See *Greenberg v Superior Court* (2009) 172 CA4th 1339, 1345, 92 CR3d 96 (staying trial during writ proceeding challenging denial of summary judgment); *Anglo Irish Bank Corp. v Superior Court* (2008) 165 CA4th 969, 977, 81 CR3d 535 (staying trial court proceedings during writ proceeding challenging denial of motion to quash); *Henry v Superior Court* (2008) 160 CA4th 440, 448, 72 CR3d 808 (staying all trial court activity, including trial, during writ proceeding challenging pre-trial ruling excluding evidence); *California Pub. Employees' Retirement Sys. v Superior Court* (2008) 160 CA4th 174, 187, 72 CR3d 561 (same for challenge of order overruling demurrer); *Zevnik v Superior Court* (2008) 159 CA4th 76, 81, 70 CR3d 817 (staying discovery during writ proceeding challenging ruling on preclusive effect of prior action); *Ombudsman Servs. of N. Cal. v Superior Court* (2007) 154 CA4th 1233, 1240, 65 CR3d 456 (staying discovery during writ proceeding challenging order to produce records).

As these cases illustrate, the scope of a stay request will depend on the substance and impact of the challenged order. The following writ cases also are illustrative:

- Stay prevented disclosure of client information while appellate court considered whether information was subject to disclosure in judgment debtor examination (*Hooser v Superior Court* (2000) 84 CA4th 997, 1001, 101 CR2d 341);
- Stay delayed hearing on motion for return of property while appellate court considered whether defendant could bring or join in motion (*Ensoniq Corp. v Superior Court* (1998) 65 CA4th 1537, 1546, 77 CR2d 507);
- Stay prevented further trial court proceedings while appellate court reviewed order denying motion to stay or dismiss on forum non conveniens grounds (*Chong v Superior Court* (1997) 58 CA4th 1032, 1036, 68 CR2d 427);
- Stay prevented depositions while appellate court considered whether local planning officials could be questioned about alleged informal agreements about zoning (*City of Santa Cruz v Superior Court* (1995) 40 CA4th 1146, 1148, 48 CR2d 216);
- Stay prevented disclosure of records while appellate court considered whether information identifying individuals arrested during 10-year period was subject to disclosure (*County of Los Angeles v Superior Court* (1993) 18 CA4th 588, 593, 22 CR2d 409);
- Stay prevented further trial court proceedings while appellate court considered order disqualifying attorney (*State Water Resources Control Bd. v Superior Court* (2002) 97 CA4th 907, 913, 118 CR2d 784, quoting *Reed v Superior Court* (2001) 92 CA4th 448, 455, 111 CR2d 842 ("petition for extraordinary relief on the merits accompanied by a request for an immediate stay is preferable [to an appeal], because generally extraordinary writs are determined more speedily than appeals. The specter of [improper] disqualification of counsel should not be allowed to hover over the proceedings for an extended period of time for appeal"));
- Stay prevented further trial court proceedings while appellate court considered whether co-defendant's CCP §170.6 challenge was timely (*School Dist. of Okaloosa County v Superior Court* (1997) 58 CA4th 1126, 1130, 68 CR2d 612).

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III. REQUIREMENTS FOR STAY REQUEST

§19.7 A. Imminent Injury

A stay request is proper only if the party seeking relief is threatened with imminent injury. See Cal Rules of Ct 8.486(a)(7)(A) (if petition requests temporary stay, it must explain urgency), 8.487(a)(4) (without requesting opposition or awaiting reply, court can grant or deny a request for temporary stay). On statement of urgency in stay request, see §19.14.

NOTE: A frivolous stay request, especially if based on false representations, may lead to the imposition of sanctions. *Jones v Superior Court* (1994) 26 CA4th 92, 100, 31 CR2d 264. On sanctions for frivolous writ petitions, see §§24.60-24.65.

PRACTICE TIP: A petitioner seeking a stay must act expeditiously, regardless of any time limit for filing a writ petition (see §§18.61-18.76), because stay relief depends on a credible claim of imminent injury. The longer a petitioner waits to seek a stay, the less likely the appellate court will be to credit such a claim.

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§19.8 B. Stay Unsuccessfully Sought From Trial Court

Although it is not statutorily required, as a practical matter, a party should always seek a stay from the trial court before seeking one from the appellate court. Not only might this eliminate the need to seek a stay from the court of appeal, but it also shows the appellate court that the party acted promptly and exhausted all other avenues for immediate relief.

A party therefore should consider, before the trial court hearing, whether it will seek writ review of an adverse ruling. If the party anticipates filing a writ petition, or needs time to consider doing so, he or she should ask the trial court to stay an adverse ruling for (a) a specific period of time (*e.g.*, 20 days) to allow time to seek writ review, and (b) if writ relief is sought, a continuing stay pending the appellate court's disposition of the petition. See CCP §918(a).

A party can make this request orally at the hearing, offering to prepare the written stay order, or through an ex parte application immediately after the trial court issues an adverse ruling.

NOTE: Specific rules of court govern ex parte applications. See Cal Rules of Ct 3.1200-3.1207. On ex parte applications, see California Civil Procedure Before Trial §§13.3-13.14 (4th ed Cal CEB 2004).

PRACTICE TIP: If the trial court grants a stay to allow the aggrieved party to file a writ petition, that party should immediately notify the court of any later decision to forego writ relief.

On stays in a trial court writ proceeding, see chap 6.

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IV. STAY APPLICATION

§19.9 A. Application Should Be Part of Writ Petition, But Can Be Separate Document

A request for an immediate, temporary stay is most commonly made in the writ petition itself. See Cal Rules of Ct 8.486(a)(7)(A) (if petition requests temporary stay, it must, among other requirements, explain urgency). When the petitioner uses this approach, the petition (which is verified) must include all allegations necessary to support issuance of a stay. The cover of the petition should note that a stay is requested, and the introductory section of the petition should explain why a temporary stay is necessary. The prayer for relief, in turn, must include a request for an immediate, temporary stay. Cal Rules of Ct 8.116(a)-(b), 8.486(a)(7). On the cover and introductory section, see §§18.19, 18.24, 18.56-18.60; on the prayer for relief, see §§18.36-18.41.

JUDICIAL PERSPECTIVE: Whether made in a writ petition or a separate document, a request for immediate stay sets off a flurry of activity in the court of appeal. As a practical matter, it is often useful to call the court shortly before filing and let the clerk know that a petition requesting an immediate stay will be filed, and when the petition will arrive. For telephone numbers for courts of appeal, see §18.87.

Alternatively, a petitioner can file, in conjunction with a writ petition, a separate application for a stay. See Cal Rules of Ct 8.50. A separate stay application must comply with the rules of court, including the rules pertaining to stay requests. Cal Rules of Ct 8.50, 8.116(a)-(b), 8.486(a)(7).

JUDICIAL PERSPECTIVE: There is no advantage to making a stay request by separate application. Doing so unnecessarily adds to the amount of paper filed with the court of appeal and creates the danger of delay if the documents are separated at some point.

For an example of a stay request included in the petition, see form in §28.1.

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§19.10 B. Offer to Provide Undertaking

Although it is not a statutory requirement, the court of appeal has discretion to require that a party seeking a stay furnish an undertaking (security) as a condition thereof. Accordingly, if the circumstances warrant, a petitioner seeking a stay may offer to provide an undertaking to enhance the chances the court of appeal will act quickly and favorably on the stay request.

On the requirements for undertakings, see California Civil Appellate Practice §§6.21-6.62 (3d ed Cal CEB 1996).

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C. Preparation of Documents

§19.11 1. Cover Requirements

Any documents requesting a temporary stay from the court of appeal must include (1) a notice of the stay request on the cover (see §19.12) and (2) the trial court identifying information on either the cover or at the beginning of the text (see §19.13). Cal Rules of Ct 8.116(a)-(b). If the document does not comply with these rules, the court of appeal may decline to consider the request. Cal Rules of Ct 8.116(c).

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§19.12 a. Notice of Stay Request

The rules of court require that the cover of any document seeking an immediate stay from the court of appeal or supreme court, including writ petitions (Cal Rules of Ct 8.116(a), 8.486(a)(7)):

- Prominently display the notice "STAY REQUESTED"; and
- Identify the nature and date of the proceeding or act sought to be stayed (*e.g.,* the trial is scheduled to begin on [*insert the scheduled date*], the property at issue will be sold on [*insert the scheduled date*], privileged materials must be produced on [*insert the scheduled date*]).

See, *e.g.*, 4th App Dist Local R 1 (cover of petition must contain conspicuous notation "IMMEDIATE RELIEF REQUESTED" or "STAY REQUESTED" or similar wording in compliance with Cal Rules of Ct 8.116). This information is commonly set out at the top of the cover so it is the first information communicated to the court of appeal.

For an exemplar petition with stay request, see form in §28.1.

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§19.13 b. Trial Court Identifying Information

The following information must be provided either on the cover of the document seeking a stay or at the beginning of the text (Cal Rules of Ct 8.116(b)):

- The trial court and department involved; and
- The name and telephone number of the trial judge whose order the request seeks to stay.

For a sample petition including a stay request, see form in §28.1.

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§19.14 2. Statement of Urgency

Whether a stay request is made in the petition or by separate application (see §19.9), the petitioner must explain the urgency of the situation, *i.e.*, why a stay is necessary and what harm will befall the petitioner in the absence of a stay. Cal Rules of Ct 8.486(a)(7)(A).

If a stay is sought in the petition itself, the petitioner must allege in the verified petition why the situation is urgent. If a stay is sought by way of separate application, the petitioner must support the application by sworn declarations explaining the urgency of the situation. See Cal Rules of Ct 8.50(b).

PRACTICE TIP: Whether seeking a stay in the writ petition or by way of separate application filed in conjunction with a petition, the petitioner should not wait until the last minute to request "urgent" stay relief. See §19.7.

For a sample petition including a stay request, see form in §28.1.

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§19.15 3. Allegations in Support of Stay

When requesting a stay, either in the petition or by separate application, the petitioner should allege facts showing:

- Why a stay is required (*i.e.,* the specific irreparable harm that will result to the petitioner if the status quo is not maintained);
- Why the real party in interest will not be prejudiced;
- The date by which the stay must issue to prevent the threatened harm;
- Whether and when the stay was requested from the trial court (see §19.8); and
- Facts showing that personal service requirements for a request for immediate stay have been satisfied. See, *e.g.,* 4th App Dist, Local R 1. On service of a stay request, see §§19.17-19.18.

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§19.16 4. Documents in Support of Stay

The record filed in support of the writ petition must be adequate to support the relief sought (see chap 20) and should include a copy of any order denying a stay by the trial court and all related moving and opposing papers. However, if the circumstances are so "exigent" that this is not reasonably possible, counsel must instead submit a declaration explaining (Cal Rules of Ct 8.486(b)(2)):

- The urgency for filing the petition;
- The reason why the supporting documents cannot be submitted; and
- The substance of the documents.

If the petitioner does not submit the required documents or an adequate declaration of counsel, the court of appeal may summarily deny the stay request, the petition, or both. Cal Rules of Ct 8.486(b)(4).

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D. Service of Stay Request

§19.17 1. Request Made in Writ Petition

When a stay is sought in the writ petition, the rules governing service of the petition apply. See §§18.77-18.80. Local rules may also include specific service requirements for stay requests. See, *e.g.*, 4th App Dist Local R 1 (requiring prior personal service or "other expeditious method" with the consent of the party so served of urgent stay requests). Even if no local rule applies, counsel should check with the court clerk to determine if the court expects service prior to filing.

PRACTICE TIP: The better practice is always to serve a stay request before filing. The appellate court will likely deny a stay request in the absence of service or if service is made in a manner that does not give the respondent and real party in interest adequate time to respond. In matters of extreme urgency, the court of appeal has the power to issue an immediate, temporary stay, but the court will likely invite opposition within a specified time, *e.g.*, 5 days, following which the court will either extend or lift the stay.

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§19.18 2. Request Made in Separate Application

When the petitioner seeks a stay by separate application filed in conjunction with a writ petition, the petitioner must serve the application before filing, unless advance service is excused by the Chief Justice or presiding justice. Cal Rules of Ct 8.50(a).

Local rules may impose specific service requirements for stay requests. See, *e.g.*, 4th App Dist Local R 1 (requiring prior personal service or "other expeditious method" with the consent of the party so served of urgent stay requests).

PRACTICE TIP: Again, the better practice is to serve a stay application before filing. Otherwise, the court of appeal will likely deny the request. In extenuating circumstances, the court of appeal has the power to issue an immediate, temporary stay. If it does so, the court will probably invite opposition within a specific period of time, *e.g.*, 5 days, following which it will either extend or lift the stay.

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§19.19 V. OPPOSITION TO STAY REQUEST

Opposition to a stay request should be filed promptly. Because the court of appeal can act on a stay request immediately, it is often advisable for the respondent or real party in interest to let the court clerk know whether and when opposition will be filed. On responding to a stay request, see chap 23.

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§19.20 VI. APPELLATE COURT ACTION ON STAY REQUEST

The speed with which the court will act on a stay request is driven largely by the immediacy of the alleged irreparable harm. For example, if a writ challenges an order compelling the production of documents in 48 hours, the court will often issue an immediate temporary stay, with notice to the real party to submit any opposition by a specified date, at which time the court will review the appropriateness of a further stay. If a writ challenges an order compelling production in 30 days, the court may not act on the stay request for a week or two. On actions in an appellate court writ proceeding, including on stay requests, see chaps 22, 24.

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20

The Record in Appellate Court Writ Proceedings

David de Jesus

I. SCOPE OF CHAPTER §20.1

II. RECORD REQUIREMENTS §20.2
- A. Rules of Court §20.3
- B. Necessity of Sufficient Record §20.4

III. PREPARING THE RECORD
- A. Who Prepares the Record §20.5
- B. What the Record Includes
  - 1. All Documents Enabling Appellate Court to Review Ruling at Issue §20.6
  - 2. Opposing Party's Papers §20.7
  - 3. Additional Facts as Necessary §20.8
  - 4. Reporter's Transcript §20.9
- C. Record Requirement for Petition for Writ of Review (Certiorari) §20.10

IV. FORMAT OF THE RECORD
- A. Binding of Documents §20.11
- B. Indexing, Pagination, and Order of Documents §20.12
- C. Visual Quality of Documents §20.13
- D. Citation to the Record §20.14

V. SERVING AND FILING THE RECORD
- A. Serving the Record §20.15
- B. Filing the Record §20.16

VI. JUDICIAL NOTICE §20.17
- A. Materials Presented to Trial Court for Judicial Notice §20.18
- B. Materials Not Presented to Trial Court for Judicial Notice §20.19
- C. Procedure for Requesting Judicial Notice in Appellate Court
  - 1. Motion Requesting Judicial Notice §20.20
  - 2. Timing of Request for Judicial Notice §20.21
  - 3. Opposition to Request for Judicial Notice §20.22

VII. PROTECTING CONFIDENTIAL DOCUMENTS IN THE RECORD
- A. Public Policy Favors Open Records §20.23
- B. Procedures to Seal or Unseal Portions of Record and Briefs §20.24
  - 1. When Trial Court Sealed Records §20.25
  - 2. When Trial Court Did Not Seal Records
    - a. Requesting That Appellate Court Seal Records §20.26
    - b. Lodging the Record §20.27
  - 3. Unsealing Records §20.28

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§20.1 I. SCOPE OF CHAPTER

An appellate court writ petition must be supported by a record, *i.e.,* documents appended to the writ petition itself or bound and submitted separately. Cal Rules of Ct 8.486(b)-(c). This chapter first discusses why a record is required and why it needs to be as complete as possible (see §§20.2-20.4). It next discusses the mechanics of preparing the record (see §§20.5-20.10), including the format of the documents (binding, indexing, and so forth), and citation form (see §§20.11-20.14). The chapter also discusses judicial notice (see §§20.18-20.22). Finally, it discusses protecting confidential information by sealing portions of the record (see §§20.23-20.28).

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§20.2 II. RECORD REQUIREMENTS

The record—the exhibits in support of the writ petition—provides the appellate court with the information it needs to fully consider the issues presented by the petition. Court rules, as well as pragmatic considerations, require that the record be adequate for this purpose. See §§20.3-20.4.

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§20.3 A. Rules of Court

The Rules of Court expressly require that an "adequate record" accompany an appellate court writ petition. Cal Rules of Ct 8.486(b). On contents of the record, see §§20.6-20.10.

The petitioner bears the burden of providing an adequate record and must take this obligation seriously. Cal Rules of Ct 8.486(b)(1). If the petitioner fails to submit an adequate record, the appellate court likely will summarily deny the petition. Cal Rules of Ct 8.486(b)(4).

Only in "exigent circumstances" may a petitioner be excused from filing the required record. Cal Rules of Ct 8.486(b)(2). In such circumstances, counsel must file a declaration (Cal Rules of Ct 8.486(b)(2)):

- Explaining the urgency;
- Explaining the circumstances making the documents unavailable; and
- Summarizing the substance of the absent documents.

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§20.4 B. Necessity of Sufficient Record

The necessity of a sufficient record stems from a straightforward rationale: judgments and orders are presumed correct. Thus, the party challenging a ruling must demonstrate error or an abuse of discretion. Failure to provide a record means that the challenging party has prima facie failed to meet its burden. See *Universal City Studios, Inc. v Superior Court* (2003) 110 CA4th 1273, 1275, 2 CR3d 484 (denial of writ petition "foreordained" because of inadequate record); *Lantz v Superior Court* (1994) 28 CA4th 1839, 1847 n8, 34 CR2d 358 (writ petition summarily denied because of insufficient record); *Lemelle v Superior Court* (1978) 77 CA3d 148, 156, 143 CR 450 (petition denied in part because record failed to permit "intelligent review" of trial court ruling; at minimum, appellate court needed opposing papers, transcript of hearing, and trial court's order). See also *Guardado v Superior Court* (2008) 163 CA4th 91, 95 n1, 77 CR3d 149 (petitioner's motion to "augment" record was improper; augmentation applies to appeals, not original writ proceedings).

JUDICIAL PERSPECTIVE: Lack of an adequate record is one of the most common reasons appellate courts deny writ petitions. Counsel should be sure to provide a reporter's transcript, or, if that is not possible, to explain why. Counsel also should be sure to include the opponent's papers. A writ petition seeks to invoke the court's equitable powers, and clean hands, *i.e.,* full and complete disclosure, are critical. On contents of the record, see §§20.6-20.10.

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III. PREPARING THE RECORD

§20.5 A. Who Prepares the Record

It is the petitioner's responsibility to prepare an adequate record. Cal Rules of Ct 8.486(b). See *Lemelle v Superior Court* (1978) 77 CA3d 148, 156, 143 CR 450 (petitioner required to furnish record sufficient to enable appellate court to evaluate trial court's exercise of discretion). See also *Guardado v Superior Court* (2008) 163 CA4th 91, 95 n1, 77 CR3d 149 (petitioner's motion to "augment" record was improper; augmentation applies to appeals, not original writ proceedings).

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B. What the Record Includes

§20.6 1. All Documents Enabling Appellate Court to Review Ruling at Issue

The record must include all documents the trial court considered in connection with the challenged ruling and supporting the relief sought, including (Cal Rules of Ct 8.486(b)(1)):

- The challenged ruling;
- All documents and exhibits submitted to the trial court supporting and opposing the challenged ruling;
- All other documents submitted to the trial court necessary to a full understanding of the case and the challenged ruling; and
- A reporter's transcript of the oral proceedings on the challenged ruling.

PRACTICE TIP: A copy of the trial court's ruling or order attached to a party's notice of entry of the order is a sufficient copy of the lower court's ruling. In other words, there is no need to include both a copy of the trial court's order and a copy of the notice of entry to which a copy of the order is appended. Counsel should include a copy of the notice of entry to show timeliness in seeking writ relief and, in some cases, to show compliance with the time limit for seeking writ relief. When the trial court has not signed a formal order, counsel should include the minute order. If the trial court has not yet made a final ruling, the appellate court will likely deny the petition as premature.

These documents do not have to be certified copies. See *Olson v Cory* (1983) 35 C3d 390, 401, 197 CR 843. They should, however, be copies of file-endorsed copies.

JUDICIAL PERSPECTIVE: Although it is important to include all required documents, counsel should be careful not to include irrelevant documents, such as discovery motions with no bearing on the issues raised in the petition.

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§20.7 2. Opposing Party's Papers

The record must include all relevant documents filed in the trial court, including those filed by the real party in interest (usually the opposing party in the lower court) and in rare circumstances by the respondent. See §23.21. The reasons for this are threefold. First, the Rules of Court require that the opposing party's documents be included. Cal Rules of Ct 8.486(b)(1)(B). Second, the petition likely will be denied if the record is incomplete. See Cal Rules of Ct 8.486(b)(4). Third, a petitioner that omits relevant opposing documents likely will lose credibility with the court, as the omission suggests that the petitioner is not being completely candid about what transpired below. Conversely, a party that is forthcoming about the entirety of the record and the opposing party's positions gains credibility with the court.

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§20.8 3. Additional Facts as Necessary

In rare circumstances, the record in the trial court may not contain all the facts the petitioner believes are necessary for the court of appeal to understand the case. In that case, the petitioner should allege the additional facts in the verified writ petition.

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§20.9 4. Reporter's Transcript

If the trial court held a hearing and a reporter was present, the record must include all relevant portions of the reporter's transcript. Cal Rules of Ct 8.486(b)(1)(D). See *Snell v Superior Court* (1984) 158 CA3d 44, 49, 204 CR 200 (petitioner could not show trial court abused its discretion, in part, because he failed to provide transcript of hearing); *Lemelle v Superior Court* (1978) 77 CA3d 148, 156, 143 CR 450 (in absence of transcript, reviewing court "will have no way of knowing in many cases what grounds were advanced, what arguments were made and what facts may have been admitted, mutually assumed or judicially noticed at the hearing").

If a reporter's transcript is not available, the record must contain a declaration of counsel (Cal Rules of Ct 8.486(b)(3)):

- Explaining why the transcript is unavailable, and
- Summarizing what was said by both sides and by the trial court; or
- Stating when counsel ordered the transcript and the date by which he or she expects to file it.

PRACTICE TIP: This declaration is particularly important if the grounds of the trial court's order are not otherwise stated on the record. The declaration should not be made on information and belief. See *Star Motor Imports, Inc. v Superior Court* (1979) 88 CA3d 201, 204, 151 CR 721 (affidavit based on "information and belief" is hearsay and must be disregarded).

If a transcript has been ordered, the petitioner must file it with the appellate court as soon as it becomes available. The court will not act in the absence of the transcript other than to issue a temporary stay. Cal Rules of Ct 8.486(b)(3).

If the hearing in the trial court was recorded, the petitioner may lodge the recording itself and a transcription.

JUDICIAL PERSPECTIVE: Counsel should not assume that the appellate court will listen to a recording of a trial court or administrative hearing. Recordings are often inaudible or difficult to understand. Courts that use electronic recording of hearings should also provide certified transcripts.

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§20.10 C. Record Requirement for Petition for Writ of Review (Certiorari)

Even though a petition for a writ of review (certiorari) seeks a writ compelling the clerk of the lower tribunal to transmit and certify the record to the reviewing court, a petitioner seeking a writ of review still must provide a sufficient record with the petition to enable the appellate court to rule on it. The record should include any order to show cause, any opposition, the relevant orders (*e.g.,* the contempt order), and a hearing transcript. *Rose v Superior Court* (1941) 44 CA2d 599, 600, 112 P2d 713.

NOTE: The record submitted with a petition for writ of review need not be certified, but the trial court must supply certified copies of the relevant record to the court of appeal if a writ of review issues.

On writs of review (certiorari) in the court of appeal, see §§15.27-15.38.

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IV. FORMAT OF THE RECORD

§20.11 A. Binding of Documents

Documents submitted in support of a writ petition must be bound together either at the end of the petition, in a separate volume, or in multiple volumes not exceeding 300 pages. Cal Rules of Ct 8.486(c)(1)(A). If the documents consist of more than a few pages, it is better practice to bind and submit them as a separate appendix. Compare Cal Rules of Ct 8.204(d) (attachments to appellate briefs cannot exceed ten pages). The 300-page limit for appendix volumes is a maximum, not a minimum. If a volume is too thick for convenient use, or may come apart, counsel should use two volumes.

PRACTICE TIP: It is the rare petition that is supported by only a few pages of documentation. Thus, counsel normally will need to bind the exhibits in a separate volume.

PRACTICE TIP: It is becoming more common for courts to permit appellate briefing and records to be filed in CD-ROM format (with hyperlinks to authorities and to the record), as well as in hard copy, although this is usually done only in large cases. If an electronic version of the petition and record would be appropriate—or even feasible given the short time limits—in a writ proceeding, counsel should check with the court on its practices.

There is no required title for a separate volume of exhibits. Appropriate wording includes "Exhibits to Writ Petition" or "Appendix in Support of Petition for [TITLE]." A separately bound volume should have the same colored cover page as the writ petition. Courts do not like clear plastic or acetate covers. If there are multiple volumes, the cover page also should identify the number of the volume, *e.g.*, "Vol. 1 of 3."

PRACTICE TIP: The cardinal rule for any separate volume is that it must be easy for the appellate court to use. Counsel should consider spiral-binding the volume, which some judges prefer because the volume lays flat when open and thus is easier to read. Counsel should always check local court rules and practice for special binding requirements.

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§20.12 B. Indexing, Pagination, and Order of Documents

Regardless of whether counsel appends the documents to the petition or includes them in a separate volume (on binding documents, see §20.11), counsel must:

- **Index tab the documents by number or letter.** Tabs should extend below or to the side of the pages, and be of high quality so they stay in place. See Cal Rules of Ct 8.486(c)(1)(B).

PRACTICE TIP: It is generally easier to use numbered tabs rather than letters, because a petition with more than 26 documents will require an additional identifying convention, such as "AA" or "BB." The respondent or real party in interest should use a different system in the response to the petition to avoid confusion, *e.g.*, if the petitioner uses numbers, the respondent should use letters.

- **Consecutively paginate the documents.** Counsel must consecutively paginate the supporting documents throughout, whether appended to the petition or bound in a separate volume(s). The pagination of documents in separate volumes must continue consecutively from one volume to the next. See Cal Rules of Ct 8.486(c)(1)(A).

PRACTICE TIP: The rules do not specify whether documents appended to a petition must pick up from the page number of the last page of the petition, or whether the appended documents should be separately numbered. Whichever method counsel chooses, it is good practice to drop a footnote after the first citation to the record in the petition explaining the citation form.

- **Chronologically order the documents.** Counsel should place supporting documents in chronological order by date filed, with the earliest filed document appearing first.
- **Identify the documents in a table of contents.** A table of contents must precede the documents, identifying each document by title, index-tab number or letter, and a very brief description. If a document has attachments, the table of contents must give the title of each attachment and a brief description of its contents. See Cal Rules of Ct 8.486(c)(1)(C). For an example of a table of exhibits, see §28.3.

PRACTICE TIP: The title of the document is often descriptive enough. Counsel will only rarely need to include any additional description.

JUDICIAL PERSPECTIVE: When the exhibits to a motion or opposition are relevant to the issue raised in the petition, the table of contents should list the exhibits, not just the motion or opposition. As always, the goal is to make the appendix easily accessible for the court.

The clerk must file any documents supporting a petition that do not comply with these requirements. However, the court may notify the petitioner that it will strike or summarily deny the petition unless petitioner brings the documents into compliance within a stated time period of at least 5 days. Cal Rules of Ct 8.486(c)(3).

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§20.13 C. Visual Quality of Documents

All copies of supporting documents should be legible and unmarked. If a document contains handwritten notations that counsel cannot "white out" to produce a clean copy, counsel should obtain another copy from opposing counsel or the trial court's file. If available duplicating equipment will not produce a high-quality copy, counsel should use a professional copy service.

PRACTICE TIP: Counsel for petitioner should always keep in mind the odds against writ relief and that well-organized papers are well received by the courts, whereas messy and disorganized papers are not.

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§20.14 D. Citation to the Record

The petition and supporting memorandum must cite to the record. See §§18.30, 18.53. Record citations should be short and easily understood, *e.g.*, "App., Exh. A at 5," "App. Vol. 2, Exh. 36 at 310." See Cal Rules of Ct 8.486(c).

PRACTICE TIP: To ensure that the court understands the citation format, it is good practice to drop a footnote immediately after the first record citation, explaining the format, *e.g.,* "'App., Exh. A at 5' refers to page 5 of Exhibit A in the Appendix filed in conjunction with this writ petition" or "'Exh. A at 5' refers to page 5 of exhibit A appended to this petition." See Cal Rules of Ct 8.204(d), 8.224.

On index tabbing and pagination of documents in the record, see §20.12. On citation to exhibits in the record, also see §18.57.

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V. SERVING AND FILING THE RECORD

§20.15 A. Serving the Record

The petitioner must serve a copy of the petition and supporting documents on the respondent and any named real party in interest. Cal Rules of Ct 8.486(e)(1)-(2). The proof of service must comply with the requirements of Cal Rules of Ct 8.25 as well as provide the telephone number of each attorney served. Cal Rules of Ct 8.486(e)(3).

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§20.16 B. Filing the Record

If the supporting documents are appended to the writ petition, the petitioner must file an original and four copies of the petition and documents with the appellate court. Cal Rules of Ct 8.44(b)(3). If petitioner binds the supporting documents separately, the petitioner need only file one copy of the separate volume(s) with the court. Cal Rules of Ct 8.44(b)(5).

PRACTICE TIP: Practices vary among the appellate courts as to the filing of separately bound documents, so counsel should always check local rules for the court's preferences before filing.

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§20.17 VI. JUDICIAL NOTICE

The statutes governing judicial notice in ordinary civil actions, Evid C §§450-460, also apply to writ proceedings. See *McMahan v City & County of San Francisco* (2005) 127 CA4th 1368, 1373 n2, 26 CR3d 509 (appellate court applied Evid C §459 in writ proceeding and declined to judicially notice documents); *Resource Defense Fund v County of Santa Cruz* (1982) 133 CA3d 800, 806 n6, 184 CR 371 (appellate court applied evidence code sections in writ proceeding to determine that copies of code provisions were proper subject of judicial notice).

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§20.18 A. Materials Presented to Trial Court for Judicial Notice

The record supporting a writ petition must include any relevant matters that the trial court judicially noticed. If the trial court properly took judicial notice of these matters, judicial notice by the appellate court is mandatory. Evid C §459(a) (appellate court "shall" take judicial notice of any matter properly noticed by trial court).

If the trial court refused to take judicial notice of documents that the petitioner believes are relevant, the lower court's ruling is not conclusive, and the petitioner may ask the court of appeal to take judicial notice of the matters. Evid C §459(a). See *Ward Mfg. Co. v Miley* (1955) 131 CA2d 603, 608, 281 P2d 343; *Greif v Dullea* (1944) 66 CA2d 986, 998, 153 P2d 581 (appellate court could take judicial notice of ordinance trial court refused to judicially notice).

PRACTICE TIP: A party seeking judicial notice of material that the trial court did not judicially notice should (a) include in the record the original request for judicial notice, including the matters as to which judicial notice was sought, and (b) argue in the briefing why the trial court erred in denying the request.

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§20.19 B. Materials Not Presented to Trial Court for Judicial Notice

In rare situations, a party may need to ask the appellate court to take judicial notice of materials that the trial court did not consider, *e.g.*, when new matters affecting the outcome become available. However, the appellate court will not be inclined to take judicial notice of new material unless there are "exceptional circumstances" or compelling reasons why the party did not make a request in the trial court. See *Vons Cos. v Seabest Foods, Inc.* (1996) 14 C4th 434, 444 n3, 58 CR2d 899 (supreme court found no exceptional circumstances to justify deviating from rule that reviewing courts generally do not take judicial notice of evidence not presented to trial court); *Brosterhous v State Bar* (1995) 12 C4th 315, 325, 48 CR2d 87 (although reviewing court may take judicial notice of matters not before trial court, supreme court refused to do so because State Bar gave no reason for its failure to make request in either trial court or court of appeal); *McMahan v City & County of San Francisco* (2005) 127 CA4th 1368, 1373 n2, 26 CR3d 509 (court refused to take judicial notice of documents not presented to trial court).

PRACTICE TIP: Given that a party requesting judicial notice of matters not first presented to the trial court faces an uphill battle, it is critical to plan ahead and make a judicial notice request in the trial court. If judicial notice is requested for the first time in support of a writ petition, the petitioner must explain why there was no such request in the trial court.

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C. Procedure for Requesting Judicial Notice in Appellate Court

§20.20 1. Motion Requesting Judicial Notice

A party must request judicial notice in accordance with Cal Rules of Ct 8.252. See also Cal Rules of Ct 8.54 (general provisions governing motions in appellate courts). An application or motion for judicial notice should not be incorporated in the writ petition or in the opposition or return. If the matter to be judicially noticed is not in the record, a copy must be served and filed with the motion. Cal Rules of Ct 8.252(a)(3).

The application or motion requesting judicial notice must state (Cal Rules of Ct 8.252(a)(2)):

- Why the materials are relevant to the issues before the appellate court;
- Whether the materials were presented to the trial court, and if so, whether that court took judicial notice of them; and
- Whether the materials relate to proceedings occurring after the order or judgment that is on appeal.

See Cal Rules of Court 8.54(a)(1) (general provisions governing motions; motion must state grounds and relief requested and identify documents on which motion is based). See also 1st App Dist Local R 9(a) (requests for judicial notice must show relevance of matters to be judicially noticed).

PRACTICE TIP: Any request for judicial notice of legislative history materials should include legal authority establishing that the history is relevant and properly subject to judicial notice. *Kaufman & Broad Communities, Inc. v Performance Plastering, Inc.* (2005) 133 CA4th 26, 31, 34 CR3d 520.

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§20.21 2. Timing of Request for Judicial Notice

There is no specific time limit for requesting judicial notice. A petitioner seeking judicial notice should file a motion in conjunction with the writ petition, however, because the matters as to which petitioner seeks judicial notice are part of the basis of or support for the petition. Real parties in interest or respondents, in turn, should file a motion for judicial notice in conjunction with any opposition relying on matters as to which judicial notice is sought.

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§20.22 3. Opposition to Request for Judicial Notice

The real party in interest (and in rare cases, the respondent, see §23.21) must file opposition to a motion for judicial notice, if any, within 15 days after petitioner filed the motion. Cal Rules of Ct 8.54(a)(3). Parties are often unaware of this deadline because it is set forth in Rule 8.54, which governs motions generally, and not in Rule 8.252, which specifically addresses judicial notice. However, this is an important deadline, and the courts of appeal frequently grant unopposed motions shortly after the deadline for filing opposition has passed. Cal Rules of Ct 8.54(c).

PRACTICE TIP: The timing for opposition to a motion for judicial notice means that the real party in interest and/or respondent may need to file opposition to a motion before filing opposition to the writ petition (*e.g.*, when an alternative writ or *Palma* notice has been issued and the court has allowed more than 15 days to file, respectively, the return or opposition). Thus, counsel must keep two different deadlines in mind: the date to oppose the petition and the date to oppose a request for judicial notice. On deadlines for filing preliminary opposition, see §§21.14-21.17. On deadlines for filing a return and opposition briefing, see §§23.39-23.41. On deadlines for filing *Palma* opposition, see §§23.11-23.14.

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VII. PROTECTING CONFIDENTIAL DOCUMENTS IN THE RECORD

§20.23 A. Public Policy Favors Open Records

Unless confidentiality is required by law (*e.g.*, family conciliation court records (Fam C §1818(b)), in forma pauperis applications (Cal Rules of Ct 3.54)), the confidentiality of appellate court records is governed by the Rules of Court. Comment to Cal Rules of Ct 8.160. The rules recognize the First Amendment right of access to court documents and adopt the stringent requirements for confidentiality set forth in *NBC Subsidiary (KNBC-TV), Inc. v Superior Court* (1999) 20 C4th 1178, 1181, 86 CR2d 778. In *KNBC-TV*, the supreme court held that before closing civil proceedings to the public and media, the trial court must give notice of its findings that: (1) there is overriding interest in closure; (2) there is substantial probability that interest will be prejudiced without closure; (3) the proposed closure is narrowly tailored; and (4) there is no less restrictive means of achieving overriding interest.

In recent years, the courts have been increasingly more vigilant in enforcing the statutory requirements for sealing court documents. See Judge Kleinberg, *To Seal or Not to Seal: Protecting Confidential Records Under the Rules of Court*, 29 CEB Civ Litigation Rep 131 (Aug. 2007). On sealing of documents generally, see California Civil Procedure Before Trial §§12.122-12.139 (4th ed Cal CEB 2004).

JUDICIAL PERSPECTIVE: Other than cases involving sexual assaults, AIDS, and minors, the courts generally do not view motions to seal favorably.

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Source: Civil Litigation/California Civil Writ Practice/20 The Record in Appellate Court Writ Proceedings/§20.24 B. Procedures to Seal or Unseal Portions of Record and Briefs

§20.24 B. Procedures to Seal or Unseal Portions of Record and Briefs

California Rules of Court 8.160 sets forth the standards and procedures for sealing appellate court records. On standards and procedures for requests to seal records in the trial court, see §§7.27-7.33.

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§20.25 1. When Trial Court Sealed Records

Parties must file under seal any records (including pleadings, briefs, and orders) the trial court ordered sealed. Those records must remain sealed unless the reviewing court orders otherwise. Cal Rules of Ct 8.160(c)(1). For any record the trial court sealed, a party must include in the appellate court record (Cal Rules of Ct 8.160(c)(2)):

- The order sealing the document;
- The motion or application sealing the document; and
- All papers filed in support of or in opposition to the motion or application to seal in the trial court.

Records filed publicly in the reviewing court, including briefs, must not disclose material that has been sealed, has been lodged conditionally under seal, or is the subject of a pending motion to seal. Cal Rules of Ct 8.160(g). Thus, a petitioner must submit sealed records separately from the publicly available version of the petition or appendix. If only portions of a court record are sealed, the petitioner must submit a redacted version for public filing as well as unredacted copies of the documents to be filed separately under seal. Cal Rules of Ct 8.160(e)(4).

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2. When Trial Court Did Not Seal Records

§20.26 a. Requesting That Appellate Court Seal Records

A party cannot file under seal in the appellate court records filed or lodged publicly in the trial court unless the appellate court orders them sealed. Thus, the parties cannot stipulate to filing a record under seal in the appellate court (or in the trial court; see §7.27). Cal Rules of Ct 8.160(d), (e)(1)-(2).

To request that the appellate court file a record under seal:

- The party making the request must file a noticed motion for an order to file the record under seal. Cal Rules of Ct 8.160(e)(2).
- The appellate court must find that an "overriding interest" would be prejudiced if the record is not sealed. Cal Rules of Ct 2.550(d). See Cal Rules of Ct 8.160(e)(6).
- The proposed sealing must be narrowly tailored, and there should be no other less restrictive means available to achieve the overriding interest than sealing the record. Cal Rules of Ct 2.550(d). See Cal Rules of Ct 8.160(e)(6).

The record as to which sealing is sought must be lodged with the appellate court in conjunction with the motion to seal unless good cause exists to do otherwise. The record is "conditionally under seal" pending the court's ruling. Cal Rules of Ct 8.160(e)(2), (5). "Lodged" does not mean filed; it means temporarily placed or deposited with the court. Cal Rules of Ct 8.160(b)(3).

PRACTICE TIP: To preserve confidentiality, a public redacted version of the petition and supporting exhibits must be lodged along with a complete version conditionally placed under seal. Unless the court orders otherwise, any party that already possesses copies of the records placed under seal must be served with a complete, unredacted version as well as a redacted version. Cal Rules of Ct 8.160(e)(4).

If the court denies the motion to seal, the clerk cannot place the lodged record in the file and must return it to the submitting party unless that party notifies the clerk in writing within 10 days after the order denying the motion or application that the record is to be filed. Cal Rules of Ct 8.160(e)(7).

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§20.27 b. Lodging the Record

A party lodges a record with the court by doing all of the following (Cal Rules of Ct 8.160(e)(3)):

- Sealing it in an envelope (or other appropriate sealed container);
- Affixing a cover sheet containing all caption requirements specified in Cal Rules of Ct 8.40(c); and
- Labeling the envelope or container "CONDITIONALLY UNDER SEAL."

The clerk notes the date of receipt on the cover sheet and retains, but does not file, the record. The record remains conditionally under seal pending the court of appeal's determination of the motion or application. Cal Rules of Ct 8.160(e)(5).

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§20.28 3. Unsealing Records

Any person or entity may make a motion, application, or petition to unseal a record. Cal Rules of Ct 8.160(f)(2). If necessary to preserve confidentiality, the moving party must file the motion, application, or petition, as well as any opposition and supporting documents, in both a redacted version and a sealed, complete version. Cal Rules of Ct 8.160(f)(2).

The court of appeal may order the unsealing of a record on its own motion, but if it does so, it must give the parties notice of the proposed unsealing and allow time to serve and file opposition. Cal Rules of Ct 8.160(f)(3).

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21

Preliminary Opposition Authorized by Rules of Court

M.C. Sungaila

I. SCOPE OF CHAPTER §21.1

II. RULE OF COURT 8.487(a) §21.2

III. USE OF PRELIMINARY OPPOSITION
- A. Purpose of Preliminary Opposition §21.3
- B. Preliminary Opposition Is Optional §21.4
- C. Preliminary Opposition Not the Same as Opposition Requested by *Palma* Notice §21.5
- D. If Defects Solely Procedural, Consider Short Letter Before Filing Preliminary Opposition §21.6

IV. APPELLATE COURT CAN ACT BEFORE THE FILING OF PRELIMINARY OPPOSITION §21.7

V. CONTENT AND FORMAT OF PRELIMINARY OPPOSITION
- A. Content of Preliminary Opposition §21.8
- B. Format of Preliminary Opposition
  1. Briefing Format §21.9
  2. Use of Headings §21.10
  3. Citation to the Record §21.11
  4. Citation to Authority §21.12
- C. Preliminary Opposition Need Not Be Verified §21.13

VI. TIME TO FILE PRELIMINARY OPPOSITION
- A. File Within 10 Days After Writ Petition Is Filed §21.14
- B. If Petitioner Requests an Immediate, Temporary Stay
  1. Notifying Court of Intent to Oppose Stay §21.15
  2. Consider Filing Opposition to an Immediate, Temporary Stay Before Filing Preliminary Opposition to the Writ Petition §21.16
  3. Contents of Opposition to Immediate, Temporary Stay §21.17

VII. SERVICE AND FILING FEE
- A. Service §21.18
- B. Filing Fee §21.19
- C. Certificate of Interested Entities or Persons §21.20

VIII. PETITIONER'S REPLY TO PRELIMINARY OPPOSITION §21.21

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§21.1 I. SCOPE OF CHAPTER

This chapter discusses the filing of "preliminary opposition" to a writ petition filed in the appellate courts, as authorized by Cal Rule of Ct 8.487(a)(1). See §21.2. It examines the reasons to file preliminary opposition. See §§21.3-21.6. It also covers the content and format of the preliminary opposition (see §§21.8-21.13); the time for filing (see §§21.14-21.17); and service requirements (§§21.18-21.20). Finally, the chapter discusses replying to preliminary opposition. See §21.21.

On preparing a full, formal opposition to an appellate court writ petition, see chap 23.

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§21.2 II. RULE OF COURT 8.487(a)

California Rule of Court 8.487(a)(1) provides that "[w]ithin 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." See *Nguyen v Superior Court* (2007) 150 CA4th 1006, 1013 n2, 58 CR3d 802 (real party in interest has right to submit unsolicited informal response to writ petition, by way of letter or brief).

JUDICIAL PERSPECTIVE: Some courts of appeal will not act on a petition until after the 10-day period for preliminary opposition expires, unless an immediate stay is requested and, in that case, the courts will usually consider only the stay request. Some courts, however, will act on the petition if no opposition is expected. The real party in interest should contact the court to confirm its procedure and to indicate whether or not it plans to file a preliminary opposition.

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III. USE OF PRELIMINARY OPPOSITION

§21.3 A. Purpose of Preliminary Opposition

The purpose of preliminary opposition is to help the appellate court weed out writ petitions that are procedurally infirm or clearly without merit, thus summarily ending the proceedings without further expenditure of judicial resources and additional expense to the parties. See *Nguyen v Superior Court* (2007) 150 CA4th 1006, 1013 n2, 58 CR3d 802; 8 Witkin, California Procedure, *Extraordinary Writs* §184 (5th ed 2008).

The objective of preliminary opposition is to convince the court not to issue an alternative writ (see §§22.23-22.29) or "*Palma* notice" (see §§22.18-22.22) and to summarily deny the petition. This is the opportunity for the real party in interest (or in rare instances, the respondent) to tell the court of appeal the other side of the story told in the petition. The real party in interest or respondent should point out any procedural defects in the petition (*e.g.*, no verification or failure to submit an adequate record), or explain why the petition has no merit (*e.g.*, the petitioner has an adequate remedy by way of appeal, there is no need for immediate appellate review, or the trial court acted well within its discretion). See chaps 15, 17.

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§21.4 B. Preliminary Opposition Is Optional

Preliminary opposition under Cal Rules of Ct 8.487(a) is optional. In most cases, however, the real party in interest (or, in rare cases, the respondent) should file a preliminary opposition to assist the court in acting quickly on the petition.

PRACTICE TIP: Because the court of appeal summarily denies the majority of writ petitions (see §17.28), filing preliminary opposition may draw the appellate court's attention to a petition that might otherwise be denied. Thus, if a petition is egregiously defective, the real party in interest or respondent might consider not filing preliminary opposition. In general, however, it behooves an opposing party to file preliminary opposition when a petition suffers from procedural defects, misstates significant facts, or appears unmeritorious on its face.

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§21.5 C. Preliminary Opposition Not the Same as Opposition Requested by *Palma* Notice

Counsel should not confuse preliminary opposition permitted by Cal Rules of Ct 8.487(a) with opposition invited by a *Palma* notice. A *Palma* notice is a short order issued by the appellate court, advising that a peremptory writ may issue in the first instance (*i.e.,* without an opportunity for full opposition or oral argument) and inviting the real party in interest and respondent to file opposition by a specified date. On *Palma* notices, see §§22.18-22.22. On preparing and filing opposition solicited by a *Palma* notice, see chap 23.

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Source: Civil Litigation/California Civil Writ Practice/21 Preliminary Opposition Authorized by Rules of Court/§21.6 D. If Defects Solely Procedural, Consider Short Letter Before Filing Preliminary Opposition

§21.6 D. If Defects Solely Procedural, Consider Short Letter Before Filing Preliminary Opposition

If a writ petition suffers from a patent procedural defect (*e.g.*, lack of a verification), the real party in interest (and in rare cases the respondent) should consider sending a short letter to the court (with service on opposing counsel) identifying the defect before filing a preliminary opposition. See *Nguyen v Superior Court* (2007) 150 CA4th 1006, 1013 n2, 58 CR3d 802 (real party in interest filed informal letter raising failure to name indispensable party as grounds to deny petition).

NOTE: Sending a letter may trigger a summary denial of the petition before the 10-day period for filing preliminary opposition runs, thus obviating the need to file further opposition.

PRACTICE TIP: Some courts may consider an informal letter as the party's preliminary opposition, but others may not. If counsel plans to file preliminary opposition in addition to the letter, the letter should so indicate.

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§21.7 IV. APPELLATE COURT CAN ACT BEFORE THE FILING OF PRELIMINARY OPPOSITION

The court of appeal can take action on a writ petition before any preliminary opposition is filed. Cal Rules of Ct 8.487(a)(4). The court can:

- Summarily deny the writ petition (see §§22.14-22.17);
- Issue a *Palma* notice advising that the court may issue a peremptory writ in the first instance and inviting written opposition by a specified date (see §§22.18-22.22); or
- Issue an alternative writ directing the filing of a return and opposition briefing on the merits (see §§22.23-22.29).

In many appellate districts, however, the court will not act on a writ petition before the time to file preliminary opposition has run, except to consider a request for an immediate temporary stay. For example, no division of the Fourth Appellate District will grant "a request for immediate relief, other than a stay or other order necessary to preserve the status quo or the court's jurisdiction, … unless the court has received an unsolicited opposition or, alternatively, has requested opposition." Fourth App Dist Local Rule 1. Similarly, the Sixth Appellate District will not grant relief beyond a temporary stay until opposition has been requested and (if timely submitted) considered. See Sixth District Outline of Original Proceedings and Relief Ancillary to Appeal (July 2007).

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V. CONTENT AND FORMAT OF PRELIMINARY OPPOSITION

§21.8 A. Content of Preliminary Opposition

Preliminary opposition is not meant to be a full briefing on the merits. A preliminary opposition should succinctly identify and discuss the principal reasons the appellate court should deny writ relief, *e.g.*, the petition is procedurally defective, the petitioner has an adequate remedy by way of appeal, the petitioner will not suffer irreparable injury, or the trial court did not err or abuse its discretion. Preliminary opposition should also apprise the court of any material facts or circumstances about which the petitioner has been less than candid. On the purpose of preliminary opposition, see §21.3.

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B. Format of Preliminary Opposition

§21.9 1. Briefing Format

A preliminary opposition "must contain a memorandum and a statement of any material fact not included in the petition." Cal Rules of Ct 8.487(a)(2). In other words, a preliminary opposition should be in the form of a brief and contain an introduction, a statement of facts supported by citations to the record (*e.g.*, the exhibits submitted by the petitioner or additional exhibits submitted by the respondent or real party in interest), a succinct legal argument, and a short conclusion.

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Source: Civil Litigation/California Civil Writ Practice/21 Preliminary Opposition Authorized by Rules of Court/§21.10 2. Use of Headings

§21.10 2. Use of Headings

Counsel should use clear and concise headings and subheadings. Counsel can check whether the headings and subheadings are effective by examining the table of contents. If a reader can understand the organization of the brief, and identify the salient points made in the brief from the table of contents alone, the headings and subheadings are well crafted and serve their purpose.

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§21.11 3. Citation to the Record

All factual statements in the opposition should be supported by citation to the record, *e.g.*, the exhibits submitted by the petitioner or additional exhibits submitted by the real party in interest or the respondent. See Cal Rules of Ct 8.204(a)(1)(C) (factual statements in appellate briefs should be supported by record citation). On the proper form of record citations, see §20.14. On the importance of filing a supporting record, see §20.4.

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Source: Civil Litigation/California Civil Writ Practice/21 Preliminary Opposition Authorized by Rules of Court/§21.12 4. Citation to Authority

§21.12 4. Citation to Authority

Counsel should present arguments with citations to supporting legal authority when available. See Cal Rules of Ct 8.204(a)(1)(B) (points in appellate briefs should, if possible, be supported by authority).

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§21.13 C. Preliminary Opposition Need Not Be Verified

If the real party in interest (or, in rare cases, the respondent) needs to bring additional facts to the attention of the appellate court, this generally can be done by way of additional exhibits (*e.g.,* the real party in interest's trial court papers) attached to and authenticated by declaration of counsel. In the rare case that facts outside the trial court record must be brought to the court's attention, the real party in interest or the respondent should submit a sworn declaration that is based on personal knowledge and compliant with evidentiary rules.

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VI. TIME TO FILE PRELIMINARY OPPOSITION

§21.14 A. File Within 10 Days After Writ Petition Is Filed

If the real party in interest (or, in rare cases, the respondent) decides to file preliminary opposition, it must do so within 10 days after the writ petition is filed. Cal Rules of Ct 8.487(a)(1).

If the real party or respondent needs more time, the appellate courts will usually accommodate a request for a short extension if counsel can show good cause for the request. In some courts, counsel may obtain an extension simply by calling the clerk. In other courts, counsel must file an application for additional time. Check local rules to determine whether the court has specific requirements for applications for extension of time. See, *e.g.*, First App Dist Local Rule 11.

PRACTICE TIP: Before filing an extension request, counsel should check the court's docket (which can be done online) to see whether the court already has taken action on the petition, *i.e.,* summarily denied it, issued a *Palma* notice, or issued an alternative writ. The appellate courts can, and sometimes do, take action before any opposition is filed. On actions the appellate court can take, see chap 22.

NOTE: California Code of Civil Procedure §1107 provides that the real party in interest or respondent "may" file and serve "points and authorities in opposition" within 5 days after filing and service of an "application" for a writ. The Rules of Court for appellate courts also originally provided that informal opposition was to be filed within 5 days after filing and service of a writ petition. The Judicial Council concluded more time was advisable and, thus, doubled the time to 10 days.

Although there is a difference between the 5-day period in §1107 and the 10-day time period in Rule 8.487(a)(1), there is no actual conflict. The memorandum provided for by §1107 is not mandatory, nor is there any suggestion that the statute bars the Judicial Council from providing for optional "preliminary opposition" to be filed in the courts of appeal within a slightly longer period of time. Since the adoption of former Rule 8.490(g) (see now Rule 8.487(a)), the courts of appeal and appellate practitioners have, of course, followed it.

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B. If Petitioner Requests an Immediate, Temporary Stay

§21.15 1. Notifying Court of Intent to Oppose Stay

Sometimes a petitioner will ask for an immediate, temporary stay pending court action on the writ petition. See Cal Rules of Ct 8.486(a)(7). If the situation is very urgent and the real party in interest (or, in rare cases, the respondent) believes it is important to go on record immediately opposing a stay request, counsel should call the clerk's office and let the court know that there will be opposition and when the court can expect it (*e.g.*, the next morning). Counsel should confirm the call and its substance in a letter to the court, with a copy to counsel for the petitioner. On requests for a stay in appellate court writ proceedings, see chap 19.

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§21.16 2. Consider Filing Opposition to an Immediate, Temporary Stay Before Filing Preliminary Opposition to the Writ Petition

The real party in interest (or, in rare cases, the respondent) should file opposition to a request for an immediate, temporary stay within hours or, at most, a day or two. Counsel frequently cannot also prepare preliminary opposition to the writ petition within that tight time frame. If that is the case, counsel should consider submitting opposition to the stay request separately from the preliminary opposition to the petition. Counsel should alert the court that the real party in interest or the respondent plans to oppose the stay request promptly and when counsel will file the opposition. See §21.15.

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§21.17 3. Contents of Opposition to Immediate, Temporary Stay

Opposition to a request for an immediate, temporary stay should show why the petitioner will suffer no or little prejudice without a stay, how a stay would harm the real party in interest (or, in rare cases, the respondent), and why the facts and the law do not support a stay. If the writ petition is procedurally defective on its face or patently without merit, counsel should also succinctly explain those points. In addition, counsel should alert the court that preliminary opposition to the writ petition will be filed within the time prescribed by the rules of court (10 days). See Cal Rules of Ct 8.487(a)(1).

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VII. SERVICE AND FILING FEE

§21.18 A. Service

The real party in interest (or, in rare cases, the respondent) must serve preliminary opposition in the same manner as a brief in an ordinary civil action: personally, or by mail, on counsel. The proof of service must identify the party counsel represents and provide counsel's telephone number. See Cal Rules of Ct 8.486(e); CCP §§1073, 1096, 1105.

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§21.19 B. Filing Fee

There is no filing fee for a preliminary opposition. See Govt C §68926.

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Source: Civil Litigation/California Civil Writ Practice/21 Preliminary Opposition Authorized by Rules of Court/§21.20 C. Certificate of Interested Entities or Persons

§21.20 C. Certificate of Interested Entities or Persons

The preliminary opposition is the first document filed by the real party in interest (or, in rare cases, the respondent) in the court of appeal, and must include a "Certificate of Interested Entities or Persons" as required by Cal Rules of Ct 8.208. For an example of an attorney-drafted certificate, see form in §28.1; for the optional Judicial Council certificate, see §28.2.

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§21.21 VIII. PETITIONER'S REPLY TO PRELIMINARY OPPOSITION

The petitioner may file a reply within 10 days after preliminary opposition is filed. Cal Rules of Ct 8.487(a)(3). Although a reply is optional, a petitioner should take the opportunity to have the last word on the court of appeal's preliminary assessment of the case, particularly given the high percentage of summary denials. See §17.28. The reply should follow briefing format (see §§18.5-18.11) and respond directly and succinctly to the points made in the preliminary opposition.

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22

Initial Action by Court of Appeal

Mitchell E. Abbott
James C. Nielsen

I. SCOPE OF CHAPTER §22.1

II. HOW WRIT PETITIONS ARE ASSIGNED FOR HANDLING WITHIN THE COURT OF APPEAL §22.2
- A. First District §22.3
- B. Second District §22.4
- C. Third District §22.5
- D. Fourth District §22.6
- E. Fifth District §22.7
- F. Sixth District §22.8

III. TYPES OF ACTION COURT OF APPEAL MAY TAKE ON A WRIT PETITION §22.9
- A. Issuance of Temporary Stay Order §22.10
  - 1. Actions on Temporary Stay Request §22.11
  - 2. Contents of Temporary Stay Order §22.12
  - 3. Notice of Temporary Stay Order §22.13
- B. Issuance of Summary Denial
  - 1. Summary Denial Defined §22.14
  - 2. When Summary Denial Is Used §22.15
  - 3. Summary Denial Format §22.16
  - 4. Summary Denial Does Not Establish Law of Case §22.17
- C. Issuance of *Palma* Notice
  - 1. *Palma* Notice Defined §22.18
  - 2. When *Palma* Notice Is Used §22.19
  - 3. When Notice Is Given in Prayer for Relief §22.20
  - 4. Form of *Palma* Notice Given by Court of Appeal §22.21
  - 5. "Suggestive" *Palma* Notice §22.22
- D. Issuance of Alternative Writ or Order to Show Cause
  - 1. Alternative Writ or Order to Show Cause (OSC) Defined §22.23
  - 2. When Alternative Writ/Order to Show Cause (OSC) Is Used §22.24
  - 3. Content and Preparation of Alternative Writ/Order to Show Cause (OSC) §22.25
  - 4. Service and Filing of Alternative Writ/Order to Show Cause (OSC) §22.26
  - 5. "Coercive" Alternative Writ §22.27
    - a. If Trial Court Complies With Alternative Writ §22.28
    - b. If Trial Court Does Not Comply With Alternative Writ §22.29

IV. ISSUANCE OF WRIT OF REVIEW (CERTIORARI) §22.30

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§22.1 I. SCOPE OF CHAPTER

This chapter discusses how the courts of appeal assign and process writ petitions (see §§22.2-22.8) and the actions a court of appeal can take at the outset of a writ proceeding: granting a stay, summarily denying the petition, issuing a *Palma* notice, and issuing an alternative writ or order to show cause (OSC). See §22.9. The appellate courts can issue a stay to maintain the status quo pending further consideration of the writ petition. See §22.10. As for action on the petition itself, the courts of appeal are most likely to issue a summary denial. See §22.14. If an appellate court does not summarily deny a petition, it will likely issue an alternative writ or OSC, allowing for full briefing, oral argument on the merits, and disposition by written opinion. See §§22.23-22.29. In certain circumstances, the court may issue a "*Palma* notice," which permits the court to issue a peremptory writ in the first instance, without formal briefing or oral argument. See §§22.18-22.21.

This chapter also discusses appellate court action on a petition for a writ of review (certiorari). See §22.30.

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§22.2 II. HOW WRIT PETITIONS ARE ASSIGNED FOR HANDLING WITHIN THE COURT OF APPEAL

Three-justice panels hear and determine matters in the courts of appeal. Cal Const art VI, §3; see Internal Operating Practices and Procedures of California Courts of Appeal and Supreme Court ("IOPP").

NOTE: Although no rule governs the speed with which courts of appeal must process writ petitions, the courts usually try to consider them as expeditiously as circumstances permit. The calendaring of any particular writ proceeding depends on the urgency of the relief sought, the adequacy of the petition and the record, whether the court issues an alternative writ or *Palma* notice, and the number of other petitions pending at the time.

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§22.3 A. First District

In the First District Court of Appeal, the court normally assigns writ petitions among the five divisions on a rotational basis. If the petition relates to an appeal or previous petition from the same trial court case, the court will assign the petition to the same division that heard the prior matter. 1st App Dist IOPP §III.A.1. Each division employs a writ attorney supervised by its presiding justice. 1st App Dist IOPP §II.C.

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§22.4 B. Second District

The Second District assigns all cases from Ventura, San Luis Obispo, and Santa Barbara Counties to Division Six. Cases from Los Angeles County are randomly assigned to Divisions One through Five, Seven, and Eight. Within 1 to 2 weeks, a writ attorney will usually review writ petitions that do not seek immediate relief. The court discusses the petition documents and the writ attorney's memorandum at periodic writ conferences, usually weekly or biweekly.

If the petition seeks immediate relief, the writ attorney will review the matter shortly and distribute the same materials to the justices then available for determination. If the court issues an alternative writ, triggering entitlement to a hearing, the court will schedule the hearing at the earliest available date. 2d App Dist IOPP, Assignment of Cases.

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§22.5 C. Third District

In the Third District, a three-justice panel, the composition of which varies, holds weekly conferences at which staff attorneys present writ matters. If a matter has merit, the court will calendar and then decide it. 3d App Dist IOPP §V.

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Source: Civil Litigation/California Civil Writ Practice/22 Initial Action by Court of Appeal/§22.6 D. Fourth District

§22.6 D. Fourth District

The Fourth Appellate District is comprised of three Divisions divided geographically by county:

- In Division One (San Diego and Imperial Counties), a writ panel of three justices who rotate monthly decides writ petitions. The clerk forwards all writ petitions to the supervising writ attorney. If it appears that the matter requires an immediate stay or other urgent action, the writ attorney presents the petition to the writ panel orally. Otherwise, the court processes petitions in order of filing with adjustments for impending hearing or trial dates. The assigned attorney normally reviews the petition, prepares a memorandum evaluating the petition, and circulates it to the writ panel. Generally, the attorney who prepared the written memorandum will assist the lead justice in drafting the opinion when the court intends to issue a peremptory writ in the first instance. Otherwise, one of the lead justice's chambers attorneys will assist in drafting the opinion when the court has issued an alternative writ or an order to show cause. 4th App Dist, Div 1, IOPP §V.
- In Division Two (Riverside, San Bernardino, and Inyo Counties), all writ petitions go first to the writ attorney, who prepares a summary for the writ panel of justices. The real party in interest is not required to file a response unless the court requests one. The justices meet as required, with the panel rotating monthly among them. If the court issues an alternative writ, the court will treat the case as a direct appeal. 4th App Dist, Div 2, IOPP §III.
- In Division Three (Orange County), a writ panel of three justices assigned on a quarterly basis decides writ petitions. The clerk forwards all writs petitions to the managing appellate court attorney, who determines the urgency of the relief sought. The managing appellate attorney will calendar the matter for the weekly writ panel conference. If court action is required earlier, the panel will hold an impromptu writ conference. The managing appellate court attorney and central staff attorneys summarize the writ petition before the weekly conference. 4th App Dist, Div 3, IOPP §III.B.

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§22.7 E. Fifth District

In the Fifth District, the court has two writ panels of three justices each, the membership of which rotates among all the justices from month to month. The court holds writ conferences on a weekly basis. If the court does not summarily deny a petition and the court decides that the petition may have merit, it will normally schedule oral argument and prepare a written opinion. 5th App Dist, IOPP §III.C.

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§22.8 F. Sixth District

In the Sixth District, the court refers writ petitions to a writ attorney for initial review. The writ attorney communicates with the court, which will conduct a writ conference and meet specially when necessary. All participating justices review any parties' written submissions and any staff memorandums. 6th App Dist IOPP §II.D. See "Sixth District Court of Appeal Outline on Original Proceedings and Relief Ancillary to Appeal" on the court's website (http://www.courtinfo.ca.gov/courts/courtsofappeal/6thDistrict/faq/6DCAproc.doc) for more information.

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§22.9 III. TYPES OF ACTION COURT OF APPEAL MAY TAKE ON A WRIT PETITION

The court of appeal may take one or more of the following actions at the outset of a writ proceeding:

- Issue an order staying designated proceedings in the trial court while the court of appeal considers the writ petition (see §§22.10-22.13);
- Deny the petition summarily (the most frequent action) (see §§22.14-22.17);
- Issue a *Palma* notice, which normally is in the form of a letter requesting opposition and cautioning that the court may grant a peremptory writ in the first instance without a hearing (*Palma v U.S. Indus. Fasteners, Inc.* (1984) 36 C3d 171, 203 CR 626; see §§22.18-22.22);
- Request informal opposition and then issue an alternative writ or order to show cause (see *Roman v Superior Court* (2009) 172 CA4th 1462, 1468, 92 CR3d 153); or
- Issue an alternative writ directing the respondent trial court to take a specified act within a specified period of time or to show cause why the court of appeal should not order it to do so (CCP §§1087, 1104; see §§22.23-22.29). Sometimes the appellate courts use only the terminology "order to show cause." See §22.23.

NOTE: The court of appeal may act on a writ petition in any of the above-listed ways without waiting for preliminary opposition or a reply. Cal Rules of Ct 8.487(a)(4). On preliminary opposition and reply to preliminary opposition, see chap 21.

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§22.10 A. Issuance of Temporary Stay Order

No statute expressly authorizes the courts of appeal to temporarily stay trial court proceedings pending the disposition of a writ petition. Compare CCP §923 (expressly authorizing appellate courts to stay proceedings during pendency of appeal). However, Cal Rules of Ct 8.487(a)(4) expressly allows the courts to issue a stay in a writ proceeding without requesting or awaiting opposition. Indeed, "it is accepted that an appellate court has the power to issue a temporary stay of proceedings to maintain the status quo pending the determination of a petition for extraordinary relief." *Markley v Superior Court* (1992) 5 CA4th 738, 750 n15, 7 CR2d 328 (citing predecessor rule).

The court of appeal may issue a temporary stay without taking further action at that time, or it may issue a stay order in conjunction with other action, *e.g.*, issuance of an alternative writ. On court of appeal's possible actions on stay request, see §22.11.

NOTE: If the appellate court stays further proceedings in the trial court, the period during which the stay is in effect is excluded from the 5-year period in which the underlying action must be brought to trial. CCP §583.340(b). On dismissal for failure to prosecute, see California Civil Procedure Before Trial §§39.25-39.62 (4th ed Cal CEB 2004).

On requesting a temporary stay, see chap 19.

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§22.11 1. Actions on Temporary Stay Request

The court of appeal may take any one of the following actions on a request for a temporary stay:

- Issue a temporary stay immediately without requesting or awaiting opposition. See Cal Rules of Ct 8.487(a)(4) (appellate court may grant or deny request for temporary stay "[w]ithout requesting opposition or waiting for a reply").
- Request opposition to the stay only, before taking any other action, *e.g.*, issuing a *Palma* notice or alternative writ.
- Modify or vacate the stay at any time before taking further action on the writ petition if circumstances persuade the court that a stay is no longer warranted.

PRACTICE TIP: Given both the possibility of the court's modifying or vacating a stay and the court's authority to summarily deny a writ petition, the adverse party should file opposition to a stay request pointing out any good grounds to oppose the petition even if the court has not requested opposition to the stay request.

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§22.12 2. Contents of Temporary Stay Order

A temporary stay order generally provides that the stay will remain in effect pending disposition of the writ petition or until further order of the court. The stay order should be specific as to its coverage: *e.g.,* "all proceedings in the trial court are stayed" or "the order to turn over documents is stayed."

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§22.13 3. Notice of Temporary Stay Order

When the appellate court issues a temporary stay, the appellate court clerk may be required to make a reasonable effort to telephone the trial court clerk, who is to notify the trial judge. Cal Rules of Ct 8.489(b)(1) (clerk to make reasonable effort to call when proceedings stayed or prohibited are to occur within 7 days after issuance of stay "or in any other urgent situation").

The clerk is not required to notify the parties of a stay order, but many clerks do so by telephone or fax. Parties can determine whether the appellate court has issued a stay by checking the court's online docket or calling the clerk's office.

PRACTICE TIP: If a stay or its denial is important to a party, counsel should proactively track the status of the request, for example, by signing up for online notification of court actions. For court of appeal contact information, see §18.87.

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B. Issuance of Summary Denial

§22.14 1. Summary Denial Defined

Summary denial occurs when the court of appeal denies a writ petition without providing an opportunity for oral argument and without issuing a written decision with reasons stated. See *Kowis v Howard* (1992) 3 C4th 888, 894, 12 CR2d 728; *Omaha Indem. Co. v Superior Court* (1989) 209 CA3d 1266, 1271, 258 CR 66 (although courts generally do not state reason in summary denial, they occasionally cite authority). For an example of a summary denial, see form in §28.5.

A summary denial becomes final immediately because the court has not taken any action (such as issuing an alternative writ) that makes the proceeding a "cause" requiring disposition after oral argument and through written decision. See Cal Rules of Ct 8.490(b)(1); *Bay Dev., Ltd. v Superior Court* (1990) 50 C3d 1012, 1023, 269 CR 720 (appellate court did not issue immediately final summary denial, but rather issued order setting case for oral argument, which would be treated as alternative writ or order to show cause). On the effect of summary denial on the time to file a petition for review by the California Supreme Court, see §25.30.

PRACTICE TIP: Veteran appellate counsel use the terms "summary denial" and "postcard denial" interchangeably. A "postcard denial" refers to the obsolete practice of sending the petitioner a postcard stating that the court has summarily denied the writ petition.

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§22.15 2. When Summary Denial Is Used

The courts of appeal summarily deny about 90 percent of all writ petitions. See Judicial Council of California, Court Statistics Report, *Courts of Appeal* 5 (2007), available at http://www.courtinfo.ca.gov/reference/documents/csr2007.pdf; *Premium Commercial Servs. Corp. v National Bank* (1999) 72 CA4th 1493, 1498, 86 CR2d 65. See also *Omaha Indem. Co. v Superior Court* (1989) 209 CA3d 1266, 1272, 258 CR 66 (large number of denials shows that appellate "courts will not use their scarce resources to second-guess every ruling and order of the trial court, particularly when to do so would save neither time nor aid in the resolution of a lawsuit"). On analyzing the chances of a writ petition being successful, see §17.28.

The court of appeal considers only the papers (*i.e.*, the petition, supporting exhibits, and any opposition) in deciding whether to summarily deny a petition, to issue an alternative writ or order to show cause, or to issue a *Palma* notice. There is no oral argument.

JUDICIAL PERSPECTIVE: In many appellate districts, the court of appeal will wait to see whether the real party in interest or respondent files preliminary opposition before it issues a summary denial. Counsel should check with the court to learn its practice.

On preliminary opposition, see chap 21.

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§22.16 3. Summary Denial Format

In most cases, a summary denial order is only one or two sentences in length, stating simply that the court has denied the writ petition. Sometimes the court will add several sentences of explanation or cite to a statute or case. See *Omaha Indem. Co. v Superior Court* (1989) 209 CA3d 1266, 1271, 258 CR 66 (although courts generally do not state reasons for summary denial, they occasionally refer to authority). On rare occasions, the court will deny a writ petition "without prejudice," signaling that the court considered the petition premature and that petitioner may refile it later. For example, the court may, and indeed is likely to, deny a petition if the petitioner fails to meet procedural requirements. Cal Rules of Ct 8.486(b)(4). For an example of a summary denial, see form in §28.5.

NOTE: When there is no oral argument, counsel must assume that a denial with some explanation is a summary denial for purposes of determining the deadline for filing a petition for review by the California Supreme Court. See Cal Rules of Ct 8.490(b). On review of a summary denial, see §25.30. On petitions for review by the California Supreme Court, see chap 27.

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§22.17 4. Summary Denial Does Not Establish Law of Case

When an appellate court states a principle or rule of law necessary to its decision, that principle or rule becomes "law of the case" and must be adhered to throughout any subsequent trial and appellate court proceedings. *Kowis v Howard* (1992) 3 C4th 888, 893, 12 CR2d 728. An appellate court's disposition of a writ proceeding can establish law of the case, but only when the court allows briefing on the merits, holds argument, and decides the matter in a written decision with reasons stated; or, in other words, when the appellate court makes the writ proceeding a full-fledged "cause," which generally is accomplished by issuing an alternative writ. 3 C4th at 894. Thus, if an appellate court issues a written opinion following issuance of an alternative writ, the court's decision becomes law of the case. On issuance of an alternative writ, see §22.23.

In contrast, a summary denial, even when accompanied by reasons or citation to authority, does *not* establish law of the case. *Kowis v Howard, supra* (because court did not issue alternative writ or peremptory writ in first instance, it did not decide "cause" and thus did not establish law of case). This is true even when a court has issued an alternative writ but later dismisses it as improvidently granted. *Countrywide Home Loans, Inc. v Superior Court* (1997) 54 CA4th 828, 833, 62 CR2d 899. Thus, a summary denial does not preclude the parties from raising the issues presented in the petition again on appeal from a final judgment.

NOTE: When a writ petition is the only authorized mode of appellate review (see §§16.2-16.48), a summary denial is necessarily on the merits. *Leone v Medical Bd.* (2000) 22 C4th 660, 670, 94 CR2d 61. Even so, a summary denial does not establish the law of the case, whether or not the court intended the ruling to be on the merits. *Kowis v Howard* (1992) 3 C4th 888, 897, 12 CR2d 728 (summary denial of writ petition does not establish law of case even when "sole possible" ground of decision is on merits). See also *Varian Med. Sys., Inc. v Delfino* (2005) 35 C4th 180, 200, 25 CR3d 298.

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C. Issuance of *Palma* Notice

§22.18 1. *Palma* Notice Defined

The term "*Palma* notice" comes from *Palma v U.S. Indus. Fasteners, Inc.* (1984) 36 C3d 171, 180, 203 CR 626, in which the supreme court held that a court of appeal may issue a peremptory writ without awaiting a return or holding oral argument, as long as the court solicits opposition and informs the parties that it may issue a peremptory writ in the first instance.

Thus, the term "*Palma* notice" informally describes the first step in a streamlined procedure for deciding the merits of a writ petition that avoids the more formal procedures triggered by the issuance of an alternative writ. The notice advises the parties that the court is considering issuance of a peremptory writ in the first instance and invites the real party in interest or respondent to submit opposition by a specified date. For examples of *Palma* notices, see forms in §§28.7-28.9.

JUDICIAL PERSPECTIVE: Sometimes the appellate court will simply request opposition, without a formal *Palma* notice. The court may use this option for various reasons, *e.g.,* to decide whether *Palma* relief would be appropriate or whether an order to show cause is called for, or when one panel member has a question and wants to see what the real party in interest or respondent has to say. On preliminary opposition, see chap 21.

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§22.19 2. When *Palma* Notice Is Used

At one time, the courts of appeal regularly issued *Palma* notices instead of alternative writs or orders to show cause (OSC). However, the supreme court has more recently cautioned against issuing peremptory writs in the first instance absent "exceptional" circumstances, *i.e.*, when there is unusual urgency requiring acceleration of the normal decision-making process or the papers adequately address the issues raised by the petition, the issue is well settled, and no factual dispute exists. *Alexander v Superior Court* (1993) 5 C4th 1218, 1222, 23 CR2d 397, disapproved on other grounds in *Hassan v Mercy Am. River Hosp.* (2003) 31 C4th 709, 3 CR3d 623; *Ng v Superior Court* (1992) 4 C4th 29, 35, 13 CR2d 856 (accelerated *Palma* procedure is exception and should not become routine). See also *Lewis v Superior Court* (1999) 19 C4th 1232, 1236, 82 CR2d 85 (reiterating that *Palma* procedure is of limited application, but may be used when circumstances warrant).

JUDICIAL PERSPECTIVE: Courts of appeal still use the *Palma* procedure when they conclude that the trial court was so clearly wrong that the issue need not and should not wait for full briefing and argument. Similarly, the court may use a *Palma* notice when a writ is the only remedy available (*e.g.*, when the trial judge has a conflict of interest and refuses to recuse him or herself) and immediate action is necessary.

Despite the supreme court's stated limitations on the *Palma* procedure, the courts of appeal appreciate the inherent flexibility of the procedure and continue to publish decisions in *Palma*-notice cases. See, *e.g., United Cent. Bank v Superior Court* (2009) 179 CA4th 212, 215, 101 CR3d 395, quoting *Lewis v Superior Court* (1999) 19 C4th 1232, 1260, 82 CR2d 85 (court issued peremptory writ in first instance because petitioner's entitlement to writ relief was "so obvious that no purpose would be served by plenary consideration of the issue"); *C.C. v Superior Court* (2008) 166 CA4th 1019, 1023, 83 CR3d 225 (having satisfied procedural requirements of giving notice and receiving informal briefing, court issued peremptory writ in first instance); *Lempert v Superior Court* (2003) 112 CA4th 1161, 1175, 5 CR3d 700 (court issued peremptory writ finding applicable legal principles well established, relevant facts undisputed, and "petitioner's entitlement to relief is so obvious that plenary consideration of the issues is unwarranted"); *Maldonado v Superior Court* (1996) 45 CA4th 397, 400, 52 CR2d 805 (peremptory writ in first instance is exception, but procedure was warranted under the circumstances). However, the reality of appellate writ practice today is that in the few writ proceedings in which the court of appeal does not summarily deny a writ petition, the court will usually issue an alternative writ or an OSC. The courts use *Palma* notices far less frequently.

JUDICIAL PERSPECTIVE: Some courts of appeal use a "coercive" alternative writ instead of a *Palma* notice, telling the trial court that it appears that the writ petition has merit, giving the trial court a specified number of days to change its order, and stating that the court of appeal will discharge the alternative writ when the trial court complies. On coercive alternative writs, also known as "speaking alternative writs," see §22.27.

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§22.20 3. When Notice Is Given in Prayer for Relief

A writ petition frequently concludes with a stock prayer for relief asking for issuance of a peremptory writ in the first instance and, alternatively, for issuance of an alternative writ followed by issuance of a peremptory writ. The supreme court made it clear in *Palma v U.S. Indus. Fasteners, Inc.* (1984) 36 C3d 171, 180, 203 CR 626 that a prayer for relief, alone, is not sufficient notice that the court of appeal may, in fact, issue a peremptory writ in the first instance. The real party in interest and respondent must receive explicit notice that the court of appeal may issue a peremptory writ in the first instance and be given an opportunity to file opposition.

PRACTICE TIP: Theoretically, the petitioner could give this separate and explicit notice. As a matter of practice, however, the courts of appeal issue such notice when they conclude that the *Palma* procedure is appropriate.

JUDICIAL PERSPECTIVE: Some appellate court divisions regard the prayer for the peremptory writ in the first instance combined with the opportunity to file preliminary opposition (see chap 21) to be sufficient due process to issue a peremptory writ in the first instance. Whether this is permissible under *Palma* is highly questionable, because *Palma* held that "notice" by way of the prayer for relief is not sufficient, and when *Palma* was decided, CCP §1107 allowed opposition to be filed within 5 days. Thus, the supreme court clearly did not view the mere opportunity to file opposition as providing sufficient due process. Nevertheless, the real party and respondent may want to confirm that the court will not issue a peremptory writ in the first instance without issuing a *Palma* notice.

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§22.21 4. Form of *Palma* Notice Given by Court of Appeal

Typically, *Palma* notice is in the form of a letter from the court of appeal requesting opposition from the real party in interest and advising that the court may issue a peremptory writ in the first instance. For examples of *Palma* notices, see forms in §§28.7-28.9.

NOTE: *Palma* notice gives the appellate court the authority to issue a peremptory writ in the first instance. Even after issuing a notice, the court still may (and courts often do) summarily deny the petition or issue an alternative writ and hold oral argument. On summary denials, see §22.14. On issuance of an alternative writ, see §§22.23-22.24.

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§22.22 5. "Suggestive" *Palma* Notice

Some courts of appeal issue "suggestive" *Palma* notices, also known as "speaking" or "coercive" *Palma* notices, in which the court discusses the merits of the writ petition with citation to authority, determines that the trial court ruling was "erroneous," and gives the trial court the "power and jurisdiction" to change its order. See *Brown, Winfield & Canzoneri, Inc. v Superior Court* (Feb. 1, 2010, S156598), 2010 Cal Lexis 588 (describing such notices). For an example of a suggestive *Palma* notice, see §28.9.

Propriety of suggestive *Palma* notice. It has been debatable whether a suggestive *Palma* notice is ever proper absent solicitation of prior opposition. The California Supreme Court addressed that issue in a case that was not final as the current update to this publication went to press. In *Brown, Winfield & Canzoneri, Inc. v Superior Court* (Feb. 1, 2010, S156598), 2010 Cal Lexis 588, the supreme court held that it is not improper for an appellate court to issue a suggestive *Palma* notice, and a court may do so without first having solicited or received opposition from the real party in interest. A suggestive *Palma* notice, the court reasoned, is not the equivalent of a peremptory writ, and although the notice might be styled as an order it in no way requires a lower court to follow the course of action suggested by the appellate court. Instead, the notice is analogous to a tentative ruling and its conclusions are not binding on the appellate or trial court. Thus, a suggestive *Palma* notice may not direct a trial court to change its order (or purport to grant the trial court authority to change its order) without first affording the parties notice and an opportunity to be heard. The supreme court stated that a court of appeal "should refrain from describing its suggestive *Palma* notice as a 'directive,' or otherwise suggesting that the trial court must 'comply' with the notice.… [and such a notice] should acknowledge the procedural safeguards required in the event the trial court does revisit an interim ruling in response to such a notice…." If a trial court does then revisit its ruling, it must inform the parties of its intention to do so and provide them with an opportunity to be heard. Adherence to this procedure, the supreme court concluded, is "consistent with… case law, and reasonably balances the interests of conservation of scarce judicial resources with the parties' right to notice and an opportunity to be heard." *Brown, Winfield & Canzoneri, Inc., supra*.

NOTE: In *Brown*, the supreme court acknowledged that, "although the circumstances in which a *Palma* notice may issue are rare, the availability of [the suggestive *Palma* notice] procedure may place appellate counsel for the real party in interest in a difficult situation." Therefore, the court stated, "although not required, in order to help alleviate this practical dilemma we strongly encourage appellate courts to inform the parties—and invite preliminary opposition—in the event the appellate court anticipates taking any action other than summarily denying the writ petition. *Brown, Winfield & Canzoneri, Inc., supra*. Counsel should verify the finality of *Brown* before citing it as authority.

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D. Issuance of Alternative Writ or Order to Show Cause

§22.23 1. Alternative Writ or Order to Show Cause (OSC) Defined

An alternative writ is an order issued by the appellate court instructing the respondent, almost always the trial court, either to comply with the directions in the alternative writ or to show cause why the appellate court should not order it to do so. CCP §§1087 (mandate), 1104 (prohibition); *Palma v U.S. Indus. Fasteners, Inc.* (1984) 36 C3d 171, 177, 203 CR 626. See *Snyder v Superior Court* (2007) 157 CA4th 1530, 69 CR3d 600 (issuing alternative writ); *Ombudsman Servs. of N. Cal. v Superior Court* (2007) 154 CA4th 1233, 65 CR3d 456 (issuing alternative writ and staying further discovery proceedings). For an example of an alternative writ, see form in §28.6.

Issuance of an alternative writ makes the writ proceeding a "cause," requiring oral argument and a written decision on the merits of the petition. See *Kowis v Howard* (1992) 3 C4th 888, 899, 12 CR2d 728. If the writ proceeding becomes a "cause," the appellate court's decision becomes law of the case. On law of the case, see §22.17.

Issuance of an alternative writ may signal that the court of appeal has concluded that there is no other adequate remedy at law. See *Langford v Superior Court* (1987) 43 C3d 21, 28, 233 CR 387; *County of Sonoma v Superior Court* (2009) 173 CA4th 322, 336 n6, 93 CR3d 39 (by issuing order to show cause, court "necessarily determined the propriety of writ review"). After considering the merits, however, the court still may deny the petition.

Some appellate courts issue what is termed a "coercive" alternative writ or "speaking" alternative writ, which states that it appears the trial court is in error, directs the court to change its ruling within a specified number of days, and provides that the alternative writ will be discharged upon compliance. On coercive alternative writs, see §22.27.

Some appellate courts use only the terminology "order to show cause." See *Henry v Superior Court* (2008) 160 CA4th 440, 72 CR3d 808 (issued OSC and stay); *CenterPoint Energy, Inc. v Superior Court* (2007) 157 CA4th 1101, 1116, 69 CR3d 202 (issued OSC and received further briefing). The mandate and prohibition statutes do not expressly provide for OSCs absent an alternative writ. CCP §§1087 (mandate), 1104 (prohibition). Nevertheless, as the cited cases illustrate, some courts refer only to issuance of an OSC.

NOTE: Even after issuing an alternative writ, the court of appeal can discharge the writ as improvidently granted and deny the petition. This is treated as a summary denial and does not act as law of the case. *Countrywide Home Loans, Inc. v Superior Court* (1997) 54 CA4th 828, 833, 62 CR2d 899. On summary denials and law of the case, see §22.17.

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§22.24 2. When Alternative Writ/Order to Show Cause (OSC) Is Used

The California Supreme Court has stated a strong preference against the simplified *Palma* notice process and in favor of the more deliberate alternative writ process that entails a formal return, full merits briefing, oral argument, and disposition by opinion. See §22.19; *Ng v Superior Court* (1992) 4 C4th 29, 35, 13 CR2d 856. As a result, if the court of appeal does not summarily deny the writ petition, it will generally issue an alternative writ unless there are exceptional circumstances warranting use of the *Palma* procedure. See *Alexander v Superior Court* (1993) 5 C4th 1218, 1222, 23 CR2d 397, disapproved on other grounds in *Hassan v Mercy Am. River Hosp.* (2003) 31 C4th 709, 3 CR3d 623. On limited use of the Palma procedure, see §22.19.

JUDICIAL PERSPECTIVE: In divisions with large backlogs, the decision whether to issue an alternative writ or OSC is sometimes delayed for weeks or even months. Until the court issues an alternative writ or OSC, there is no deadline for the court to act.

When the court of appeal is reasonably certain that the trial court has reached an erroneous result, it may issue a "suggestive" *Palma* notice or a "coercive" alternative writ, stating that it appears the trial court has erred, allowing the trial court the opportunity to change its ruling within a specified period of time, and providing that the alternative writ will be discharged upon compliance by the trial court. The hope is that the trial court will take the hint, avoiding further expenditure of appellate resources and further expense to the parties. On suggestive *Palma* notices, see §22.22; on coercive alternative writs, see §22.27.

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Source: Civil Litigation/California Civil Writ Practice/22 Initial Action by Court of Appeal/§22.25 3. Content and Preparation of Alternative Writ/Order to Show Cause (OSC)

§22.25 3. Content and Preparation of Alternative Writ/Order to Show Cause (OSC)

California Code of Civil Procedure §1087 provides that "an alternative writ must command the party to whom it is directed immediately after receipt of the writ, or at some specified time, to do the act required to be performed, or to show cause before the court at a time then or thereafter specified by court order why he has not done so." See also CCP §1104 (prohibition). Thus, an alternative writ typically specifies a deadline for the real party in interest to file a return, and for the petitioner to file an optional reply.

If the court does not set a deadline, the return is due within 30 days, and the reply is due within 15 days after the return is filed. Cal Rules of Ct 8.487(b)(2)-(3). The alternative writ also may set a date for oral argument, but some courts reserve the setting of a hearing date for later. The alternative writ may also contain a temporary stay order, when appropriate. On issuance of temporary stay orders, see §22.10.

If the court issues only an OSC, the order usually establishes a briefing schedule and either sets an argument date or states that the court will hear the matter when "placed on the calendar."

NOTE: An order directing the parties to appear for oral argument and calling for the filing of a return and reply is the equivalent of an alternative writ. *Keenan v Superior Court* (2002) 27 C4th 413, 420 n7, 117 CR2d 1.

The court usually prepares the alternative writ/OSC, but some courts have ordered the petitioner to prepare it. For an example of an alternative writ, see form in §28.6.

PRACTICE TIP: If the court's order is unclear whether the court or the petitioner will prepare the alternative writ, counsel for the petitioner should check with the court clerk for clarification.

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Source: Civil Litigation/California Civil Writ Practice/22 Initial Action by Court of Appeal/§22.26 4. Service and Filing of Alternative Writ/Order to Show Cause (OSC)

§22.26 4. Service and Filing of Alternative Writ/Order to Show Cause (OSC)

The petitioner normally serves copies of the alternative writ or OSC on all parties, including the trial court, and then files the original with proof of service in the issuing court. See CCP §§1087-1088, 1105. See also Cal Rules of Ct 8.486(e). Some courts direct clerks to furnish the petitioner with sufficient copies of the alternative writ to serve all parties and a certified copy for the trial court, while others direct the clerk to serve all parties and the trial court.

PRACTICE TIP: Absent clear direction to the contrary, petitioners should serve all required parties and the trial court.

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§22.27 5. "Coercive" Alternative Writ

The court of appeal may issue an alternative writ worded to seriously encourage action by the trial court. This type of alternative writ states that it appears the trial court has erred, provides a date by which the trial court is to act, and provides that the alternative writ will be discharged upon compliance by the trial court. Some courts refer to this as a "coercive" alternative writ or a "speaking alternative writ" and use it instead of a *Palma* notice or a "suggestive" or "speaking" *Palma* notice. On *Palma* notice, see §§22.18-22.22. The appellate court's intent is to prompt the trial court to change its ruling without further use of appellate court resources and to save the parties time and money.

PRACTICE TIP: Before preparing briefs in response to an alternative writ, counsel may wish to ask the trial court, by phone call to the clerk, whether the court plans to comply with the writ. The court has no duty to inform counsel but may appreciate the courtesy of the call and may provide the information, which counsel should relay to the appellate court clerk as well.

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§22.28 a. If Trial Court Complies With Alternative Writ

If the trial court complies with the alternative writ, the petitioner promptly should submit to the appellate court clerk a copy of the trial court's order indicating compliance. The court of appeal will then discharge the alternative writ and dismiss the petition as moot. *Palma v U.S. Indus. Fasteners, Inc.* (1984) 36 C3d 171, 177, 203 CR 626.

NOTE: Even if the trial court complies with the appellate court's order, the appellate court still may decide to issue an opinion. See *People v Superior Court (Jump)* (1995) 40 CA4th 9, 12, 46 CR2d 829 (court of appeal discharged alternative writ and denied writ petition as moot, but still issued opinion on merits due to recurring nature and importance of issue).

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§22.29 b. If Trial Court Does Not Comply With Alternative Writ

A respondent trial court's most common response to an alternative writ is no response at all. If the trial court does not change its order, the real party in interest must show cause why the court's order is proper. The real party in interest does this by filing a return, which is similar to an answer in a civil case but which also includes a supporting memorandum and is the opposition to the writ petition. If the real party in interest does not file a return, the court may deem all factual matters in the petition admitted, and only legal issues remain for decision. CCP §1094; *Coppinger v Superior Court* (1982) 134 CA3d 883, 885, 185 CR 24 (real party in interest did not file return to petition but instead submitted memorandum addressing legal issues). On content of the opposition or return, see §23.26. The petitioner may also file a reply to the return with leave of court. On the reply, see §§23.48-23.50.

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§22.30 IV. ISSUANCE OF WRIT OF REVIEW (CERTIORARI)

The initial actions an appellate court can take with respect to a petition for writ of review (certiorari) under CCP §1067 differ somewhat from the initial actions the court can take with respect to a petition for writ of mandate or prohibition. Under CCP §1069, the court "may require a notice of the application [for a writ] to be given to the adverse party, or may grant an order to show cause why it should not be allowed, or may grant the writ without notice." Thus, no alternative writ may issue, only an order to show cause. Although the statute allows for issuance of a writ of review in the first instance without notice, *Palma v U.S. Indus. Fasteners, Inc.* (1984) 36 C3d 171, 180, 203 CR 626, would appear to preclude that option on due process grounds. The supreme court held in *Palma* that a prayer for issuance of a peremptory writ, alone, is not sufficient notice that the court of appeal may, in fact, issue a peremptory writ in the first instance. The real party in interest and respondent must receive explicit notice that the court of appeal may issue a peremptory writ in the first instance and be given an opportunity to file opposition.

In contrast to mandamus and prohibition proceedings, in which a peremptory writ is the ultimate relief sought, issuance of a writ of review only serves to call up the record and stay further proceedings in the lower court. CCP §1071. The appellate court then reviews the record, determines whether the lower court acted in excess of its jurisdiction, and either affirms, annuls, or modifies the proceedings below. CCP §§1074, 1075.

On writs of review, see §§15.27-15.38.

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23

Opposition and Reply

M.C. Sungaila

I. INTRODUCTION
A. Scope of Chapter §23.1
B. Terminology §23.2

II. OPPOSITION AFTER COURT OF APPEAL ISSUES *PALMA* NOTICE
A. Reason for Filing Opposition §23.3
B. Format of Opposition §23.4
1. Basic Briefing Structure §23.5
2. Citation to Record §23.6
3. Citation to Authority §23.7
4. Certificate of Interested Entities or Persons §23.8
C. Content of Opposition
1. Explain Why Court Should Deny Writ Relief §23.9
2. Do Not Raise New Issues §23.10
D. Timing of Opposition
1. Court Usually Sets Deadline §23.11
2. If Court Does Not Set Deadline, File Within 30 Days §23.12
3. Extensions of Time Available by Request
a. Request for Extension §23.13
b. Good Cause Required §23.14
E. Service and Filing of Opposition
1. Whom to Serve §23.15
2. How to File and Serve §23.16

III. REPLY TO *PALMA* OPPOSITION
A. Format and Content of Reply §23.17
B. Service and Filing of Reply §23.18

IV. RETURN AFTER COURT OF APPEAL ISSUES ALTERNATIVE WRIT OR ORDER TO SHOW CAUSE §23.19
A. Return Defined §23.20
1. Real Party in Interest Usually Files Return §23.21
2. When Respondent Court May File Return §23.22
3. When Respondent Is Not Lower Court, Respondent May File Return §23.23
4. Respondent and Real Party in Interest May File Joint Return §23.24
B. Format of Return §23.25
C. Contents of Return §23.26
D. Certificate of Interested Entities or Persons §23.26A
E. Formal Return §23.27
1. Answer §23.28
a. Responding to Verified Allegations in the Petition §23.29
b. Alleging Additional Material Facts §23.30
c. Pleading Affirmative Defenses §23.31
d. Verification §23.32
2. Demurrer §23.33
a. File With Answer §23.34
b. State Grounds for Demurrer §23.35
c. Do Not Raise Affirmative Defenses §23.36
F. Supporting Memorandum §23.37
G. Supporting Exhibits §23.38
H. Timing of Return
1. Court Usually Sets Deadline §23.39
2. If Court Does Not Set Deadline, File Within 30 Days §23.40

3. Extension of Time §23.41
I. Serving Return
1. Whom to Serve §23.42
2. How to Serve §23.43
J. Consequences of Not Filing Proper Return §23.44
K. Return in Writ of Review (Certiorari) Proceedings §23.45
1. Terminology §23.46
2. Demurrer §23.47

V. REPLY (TRAVERSE) TO RETURN §23.48
A. Format and Content of Reply (Traverse) §23.49
B. Filing and Service of Reply (Traverse) §23.50

VI. CHART: DEADLINES FOR *PALMA* OPPOSITION AND REPLY, FOR RETURN AND REPLY §23.51

VII. AMICUS CURIAE BRIEFS §23.52
A. Application to File Amicus Brief §23.53
B. Filing and Service of Amicus Brief §23.54
C. Seek Amicus Participation Only in Exceptional Cases §23.55

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I. INTRODUCTION

§23.1 A. Scope of Chapter

An appellate court can take a variety of actions on a writ petition short of deciding the petition on the merits. The court can summarily deny a petition, either before or after the respondent or real party in interest files preliminary opposition. On filing preliminary opposition, see chap 21. On summary denial, see §§22.14-22.17. Alternatively, a court can issue a *Palma* notice, advising the parties that the court may issue a peremptory writ in the first instance and inviting the respondent and real party in interest to file opposition. On *Palma* notices, see §§22.18-22.22. Or, the court can issue an alternative writ or order to show cause (OSC), specifying the date for a return and sometimes setting an oral argument date (or stating that oral argument will be scheduled at a future date following the completion of briefing). On alternative writs and OSCs, see §§22.23-22.29.

This chapter discusses how and when a respondent or real party in interest opposes a writ petition after the appellate court issues a *Palma* notice or an alternative writ or OSC, and when a petitioner can reply to such opposition.

This chapter first discusses opposition solicited by a *Palma* notice. See §§23.3-23.16. It also covers the petitioner's reply to such opposition. See §§23.17-23.18. The chapter next discusses the respondent's or real party in interest's "return" and merits briefing following the court of appeal's issuance of an alternative writ or OSC. See §§23.19-23.47. It also covers the petitioner's reply (traverse) to a return. See §§23.48-23.50. A chart of deadlines for all responsive documents follows. See §23.51. The chapter concludes with a discussion of amicus briefs in the courts of appeal. See §§23.52-23.55.

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§23.2 B. Terminology

In appellate court writ practice, there are various terms of art used in statutes, in rules, by courts, and by appellate counsel. The following terms refer to the kinds of responsive documents that may be filed in an appellate court writ proceeding:

"Preliminary opposition": Optional (but strongly recommended) document filed within 10 days after filing of a writ petition. Cal Rules of Ct 8.487(a). On preliminary opposition, see chap 21.

"Opposition": Document filed after court of appeal issues a *Palma* notice advising the parties that it may issue a peremptory writ in the first instance. Cal Rules of Ct 8.487(b)(1). This document is sometimes called the "formal" opposition. On such opposition, see §§23.3-23.16.

"Reply": Document petitioner may file within 10 days after preliminary opposition (Cal Rules of Ct 8.487(a)(3)) and document petitioner may file within 15 days after *Palma* opposition (Cal Rules of Ct 8.487(b)(3)). On these replies, see §§21.21, 23.17-23.18.

"Return": Document the respondent or real party in interest files after court of appeal issues an alternative writ or order to show cause. Cal Rules of Ct 8.487(b)(1). The return is made by demurrer, verified answer, or both. Cal Rules of Ct 8.487(b)(1). On the return, see §§23.19-23.47.

"Traverse": Document the petitioner files in response to the return. Cal Rules of Ct 8.487(b)(3). This document is also called a "reply" or "replication." On the traverse, see §§23.48-23.50.

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II. OPPOSITION AFTER COURT OF APPEAL ISSUES *PALMA* NOTICE

§23.3 A. Reason for Filing Opposition

The courts of appeal sometimes issue a short order, called a *Palma* notice, advising the parties that a peremptory writ may issue in the first instance (*i.e.,* without a return, formal briefing, or oral argument) and inviting the respondent and real party in interest to file opposition by a specified date. On *Palma* notices, see §§22.18-22.22.

Although a *Palma* notice does not make opposition mandatory, if an appellate court solicits opposition, the respondent or real party in interest should always file opposition. See Cal Rules of Ct 8.487(b)(1). This may be the *only* opportunity the respondent and real party in interest have to be heard on the merits of the writ petition, since a peremptory writ may issue without further briefing and without oral argument.

PRACTICE TIP: Even if the respondent or real party in interest has filed preliminary opposition (see chap 21), when the court of appeal issues a *Palma* notice, the respondent or real party in interest should file further opposition on the merits.

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§23.4 B. Format of Opposition

The Rules of Court specify the format requirements for an opposition. See Cal Rules of Ct 8.40 (form of documents, including opposition and answers to writ petitions), 8.204 (contents and form of appellate briefs), 8.487(b) (return or opposition).

Although *Palma* opposition should respond fully on the merits, it need not be as formalistic as a return and can be in the form of an appellate brief. See *Payless Drug Store v Superior Court* (1993) 20 CA4th 277, 279, 24 CR2d 506 (peremptory writ issued after court received only "informal" reply to petition in response to *Palma* notice; court held that no purpose would be served by further briefing). On the format and substance of a respondent's brief on appeal, see California Civil Appellate Practice, chap 13 (3d ed Cal CEB 1996).

Unlike a return, which must be verified, the respondent or real party in interest needs to verify a *Palma* opposition only in the rare instance when it includes material facts not already before the court in either the writ petition or exhibits in support of the petition. On the format of a return, see §23.25. On verification of a return, see §23.32.

For an example of *Palma* opposition, see form in §28.10.

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§23.5 1. Basic Briefing Structure

Palma opposition should be akin to a brief and contain an introduction, a statement of facts and procedural history, the legal argument, and a conclusion. See Cal Rules of Ct 8.204 (contents and form of appellate briefs). On basic briefing structure, see §§18.21-18.57.

Throughout the opposition, counsel should use clear and concise headings and subheadings.

PRACTICE TIP: Counsel can determine whether the argument headings and subheadings are clear and effective by examining the table of contents. If a reader can understand the organization of the brief and identify the salient points made in the brief from the table of contents alone, the headings and subheadings are well crafted and serve their purpose.

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§23.6 2. Citation to Record

The respondent or real party in interest should support all factual statements made in the opposition by citation to the record, *e.g.*, the exhibits submitted by the petitioner or additional exhibits submitted by the respondent or real party in interest. See Cal Rules of Ct 8.204(a)(1)(C) (citation to record should support factual statements in appellate briefs). On the proper form of record citations, see §20.14. On the importance of filing a supporting record, see §20.4.

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§23.7 3. Citation to Authority

The respondent or real party in interest should support all arguments with citations to legal authority. See Cal Rules of Ct 8.204(a)(1)(B) (legal authority should support points in appellate briefs, if possible).

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§23.8 4. Certificate of Interested Entities or Persons

Each party to an appellate court writ proceeding must comply with the requirements of Cal Rules of Court 8.208 concerning serving and filing a Certificate of Interested Entities or Persons. Cal Rules of Ct 8.488(a)-(b). The certificates of respondents and real parties in interest must be included in their first filed document, either preliminary opposition under Rule 8.487, *Palma* opposition, or a return. Cal Rules of Ct 8.488(c). The certificate must appear after the cover and before the tables. Cal Rules of Ct 8.488(c)(3).

If the respondent or real party fails to file the required certificate, the clerk must notify the party by mail to file a certificate within 10 days. Cal Rules of Ct 8.488(d)(1). The notice must further advise that failure to file the certificate may result in sanctions or the party's opposition or return being stricken. Cal Rules of Ct 8.488(d)(1)(B), (d)(2).

For sample form Certificate of Interested Entities or Persons (Judicial Council Form APP-008), see §28.2.

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C. Content of Opposition

§23.9 1. Explain Why Court Should Deny Writ Relief

Palma opposition should focus on two things:

- It should explain why writ review is unwarranted, *e.g.*, the petitioner has an adequate remedy by way of appeal and will not suffer irreparable harm if the petition is denied, or the petitioner has no beneficial interest in the outcome (on requirements for writ relief, see §§15.51-15.71); and
- It should explain why the petition lacks merit, *e.g.,* the trial court did not commit error or abuse its discretion.

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§23.10 2. Do Not Raise New Issues

The respondent or real party in interest may not raise new issues in a *Palma* opposition. See, *e.g., Campbell v Superior Court* (2005) 132 CA4th 904, 922, 34 CR3d 68 (real party in interest could not seek review of trial court's attorney fee decision through its opposition to writ petition).

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D. Timing of Opposition

§23.11 1. Court Usually Sets Deadline

Typically, the court of appeal specifies the deadline for filing opposition in its *Palma* notice. Usually, the court allows 20 days to file opposition.

PRACTICE TIP: If the court's notice does not specify a deadline, the respondent and real party in interest should check promptly with the court clerk to determine whether the court has nonetheless set a deadline or otherwise expects to receive an opposition by a specific date.

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Source: Civil Litigation/California Civil Writ Practice/23 Opposition and Reply/§23.12 2. If Court Does Not Set Deadline, File Within 30 Days

§23.12 2. If Court Does Not Set Deadline, File Within 30 Days

Unless the court of appeal orders otherwise, the respondent or real party in interest must serve and file opposition within 30 days after issuance of a *Palma* notice. Cal Rules of Ct 8.487(b)(2).

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3. Extensions of Time Available by Request

§23.13 a. Request for Extension

On a showing of good cause, the courts of appeal generally will grant an extension of time to file opposition under a *Palma* notice. A request for an extension of time must include (Cal Rules of Ct 8.60(c)(2)):

- The current due date of the document for which the party is requesting an extension;
- The length of the extension requested;
- Whether the party has obtained any previous extensions; and
- Good cause (or an exceptional showing of good cause, when required) for granting the extension.

PRACTICE TIP: The parties may not stipulate to an extension, but the respondent or real party in interest should obtain opposing counsel's agreement before applying to the court for an extension and state in the application that the requested extension is unopposed.

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Source: Civil Litigation/California Civil Writ Practice/23 Opposition and Reply/§23.14 b. Good Cause Required

§23.14 b. Good Cause Required

The factors pertaining to good cause include (Cal Rules of Ct 8.63(b)):

- The degree of prejudice, if any, to any party from a grant or denial of an extension;
- The position of the client and any opposing party;
- The length of the record;
- The number and complexity of the issues;
- Whether there are settlement negotiations;
- Whether the case is entitled to priority;
- Whether counsel responsible for handling the writ proceeding is new to the case;
- Whether other counsel or the client needs additional time to review the document;
- Whether counsel responsible for handling the matter has other specific time commitments preventing timely filing;
- Whether any illness or personal emergency prevents timely filing, or whether counsel has a pre-planned vacation that cannot reasonably be rearranged; and
- Any other factor constituting good cause in the context of the case.

Some courts of appeal may have local rules governing extension requests. See, *e.g.*, 1st App Dist, Local R 11. Extension requests may be, and generally are, made on Judicial Council Form APP 006.

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E. Service and Filing of Opposition

§23.15 1. Whom to Serve

The respondent or real party in interest must serve a copy of any written opposition on the petitioner and any other parties that have appeared during the proceeding. CCP §§465, 1109.

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§23.16 2. How to File and Serve

The respondent or real party in interest must serve *Palma* opposition in the same manner as an appellate brief in an ordinary civil action, generally on counsel by mail. Cal Rules of Ct 8.25-8.44. The proof of service must identify the party that counsel represents and provide counsel's telephone number. See Cal Rules of Ct 8.25(a)(2). On service in civil appeals, see California Civil Appellate Practice §12.63 (3d ed Cal CEB 1996).

The respondent or real party in interest must file an original of the opposition and four copies, showing proof of service. Cal Rules of Ct 8.44(b)(3).

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III. REPLY TO *PALMA* OPPOSITION

§23.17 A. Format and Content of Reply

The petitioner may file a reply to *Palma* opposition. Cal Rules of Ct 8.487(b)(3). Although a reply is optional, the petitioner always should take the opportunity to have the final word on the matter. Once the court of appeal has issued a *Palma* notice, the parties must assume the court will make its decision solely on the papers submitted (*i.e.*, the petition, opposition, and reply) and will not call for further briefing or hear oral argument.

A reply should be in the format of a reply brief on appeal, *e.g.,* contain an introduction, argument, and conclusion. On reply briefs on appeal, see California Civil Appellate Practice §§12.67-12.78 (3d ed Cal CEB 1996).

The reply should:

- Refocus the court on the facts and law supporting writ relief and demonstrate the merits of the petition; and
- Respond to the points and arguments made in the opposition.

The petitioner cannot raise new issues for the first time in the reply. See, *e.g., Save the Sunset Strip Coalition v City of W. Hollywood* (2001) 87 CA4th 1172, 1181 n3, 105 CR2d 172 (court refused to consider issue raised for first time in reply brief on appeal from judgment denying writ petition).

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§23.18 B. Service and Filing of Reply

The petitioner must serve and file a reply within 15 days after the respondent or real party in interest files the opposition, unless the court orders otherwise. Cal Rules of Ct 8.487(b)(3).

The petitioner must file an original of the reply with four copies, showing proof of service. Cal Rules of Ct 8.44(b)(3).

The petitioner must serve a reply to *Palma* opposition in the same manner as an appellate brief in an ordinary civil action, generally on counsel by mail. Cal Rules of Ct 8.25-8.44. The proof of service must identify the party that counsel represents and provide counsel's telephone number. See Cal Rules of Ct 8.25(a)(2). On service in civil appeals, see California Civil Appellate Practice §12.63 (3d ed Cal CEB 1996).

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§23.19 IV. RETURN AFTER COURT OF APPEAL ISSUES ALTERNATIVE WRIT OR ORDER TO SHOW CAUSE

An alternative writ of mandate commands the respondent, almost always the trial court in an appellate court writ proceeding, either to perform an act (*e.g.,* vacate its order and enter a new and different order) or show cause why it should not be compelled to do so. CCP §1087. Similarly, an alternative writ of prohibition commands the respondent to desist or to refrain from acting or to show cause why it should not be so ordered. CCP §1104. On alternative writs and orders to show cause, see §§22.23-22.29. If the respondent complies with the court of appeal's command, the court will usually discharge the alternative writ or order to show cause and dismiss the writ petition. Otherwise, the respondent or real party in interest must show cause why the requested writ should not issue by filing a "return," responding to the verified allegations in the petition and arguing that writ relief is unwarranted and should be denied. Cal Rules of Ct 8.487(b).

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§23.20 A. Return Defined

A "return" is the responsive pleading that the respondent or real party in interest files after the court of appeal issues an alternative writ of mandate or prohibition, or an order to show cause.

The vast majority of appellate court writ proceedings challenge a ruling made by a trial court, and thus the respondent in most appellate court writ proceedings is the lower court. When that is the case, the respondent trial court rarely appears. Rather, it is up to the real party in interest to file a return and defend the lower court's ruling. On who files a return, see §§23.21-23.23.

A return may be made by verified answer, demurrer, or both. See Cal Rules of Ct 8.487(b)(1); CCP §1089. On return by answer, see §§23.28-23.32. On return by demurrer, see §§23.33-23.36.

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Source: Civil Litigation/California Civil Writ Practice/23 Opposition and Reply/§23.21 1. Real Party in Interest Usually Files Return

§23.21 1. Real Party in Interest Usually Files Return

The real party in interest usually prepares and files the return because the respondent in most appellate court writ proceedings is the trial court, which is a neutral party. As such, the trial court usually has no beneficial interest in the outcome of the writ proceeding and thus lacks standing to file a return.

JUDICIAL PERSPECTIVE: The parties should not be misled by the nomenclature; the real party in interest is most often the party responsible for filing the return.

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§23.22 2. When Respondent Court May File Return

In rare situations, the respondent trial court has standing, *i.e.,* a beneficial interest in the outcome of the proceeding, and thus can prepare and file a return. This situation may arise if:

- The petition concerns the disqualification of the trial judge;
- The petition presents an issue affecting the court's operations, procedures, or budget;
- The real party in interest cannot meaningfully oppose the petition so as to ensure representation of the adverse position; or
- The petitioner seeks review of an order in which the respondent court refuses to recuse itself.

See, *e.g., James G. v Superior Court* (2000) 80 CA4th 275, 281, 95 CR2d 135 (after considering these grounds for standing, court of appeal held that trial court's participation was justified). See also *Settlemire v Superior Court* (2003) 105 CA4th 666, 129 CR2d 560 (respondent court may oppose writ petition when real party in interest does not appear and issue has direct impact on court's operations and procedures or potentially imposes financial obligations affecting court's operations).

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§23.23 3. When Respondent Is Not Lower Court, Respondent May File Return

In rare cases an appellate court writ proceeding challenges action by a nonjudicial body (*i.e.,* when the petitioner has "skipped over" the trial court or when statutes provide for initial writ review by the courts of appeal). See chaps 15-16. In such cases, the respondent likely will appear and file a return in defense of its action.

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§23.24 4. Respondent and Real Party in Interest May File Joint Return

In appellate court writ proceedings in which the respondent appears and files a return (see §§23.22-23.23), the real party may also file a return, or the respondent and real party may file a joint return. Cal Rules of Ct 8.487(b)(1). Or multiple real parties can file a joint return or file a joinder. See *Alch v Superior Court* (2008) 165 CA4th 1412, 1421, 82 CR3d 470 (two returns were filed on behalf of real parties in interest and others filed joinders in those returns).

PRACTICE TIP: Unless the real party is confident that the respondent has the time and resources to prepare a thorough and persuasive return, the real party should either file a separate return or take the laboring oar in preparing a joint return.

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§23.25 B. Format of Return

The Rules of Court specify the format requirements for a return. See Cal Rules of Ct 8.40 (form of documents, including opposition and answers to writ petitions), 8.204 (contents and form of appellate briefs), 8.487(b) (return or opposition).

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§23.26 C. Contents of Return

The contents of a return are similar to those of a writ petition. The return should include:

- Certificate of Interested Entities or Persons (see §18.21);
- Tables of Authorities and Contents (see §§18.22-18.23);
- Introductory statement (see §18.24);
- Formal return (either by verified answer, demurrer, or both, see §§23.27-23.36);
- Supporting memorandum (see §§18.49-18.56); and
- Exhibits (the record). See §18.57, chap 20.

On format requirements for a writ petition, see §§18.5-18.20. For an example of a return, see form in §28.11.

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Source: Civil Litigation/California Civil Writ Practice/23 Opposition and Reply/§23.26A D. Certificate of Interested Entities or Persons

§23.26A D. Certificate of Interested Entities or Persons

Each party to an appellate court writ proceeding must comply with the requirements of Cal Rules of Court 8.208 concerning serving and filing a Certificate of Interested Entities or Persons. Cal Rules of Ct 8.488(a)-(b). On the Certificate of Interest Entities or Persons, see §18.21.

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§23.27 E. Formal Return

The heart of the return, or the "formal" return, is the pleading part of the document in which the respondent or real party in interest responds to the allegations made in the writ petition. The formal return must be in the form of a verified answer, demurrer, or both. CCP §§1069.1, 1089, 1105, 1109; Cal Rules of Ct 8.487(b)(1).

NOTE: Although there is some authority for use of other pleadings, two courts of appeal have held that a document that is neither an answer nor a demurrer does not constitute a return. See *Shaffer v Superior Court* (1995) 33 CA4th 993, 996 n2, 39 CR2d 506 (supporting memorandum accompanied by counsel's declaration is not return); *County of San Bernardino v Superior Court* (1994) 30 CA4th 378, 382 n6, 35 CR2d 760 (document entitled "responsive brief" that does not attempt to respond to formal allegations of petition is not return).

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§23.28 1. Answer

The respondent or real party in interest may file a verified answer as the formal return. CCP §§1069.1 (review (certiorari)), 1089 (mandate), 1105 (prohibition); Cal Rules of Ct 8.487(b).

The answer must conform to the rules applicable to an answer in a civil action. See *Dulaney v Municipal Court* (1974) 11 C3d 77, 81 n3, 112 CR 777. On answers in civil actions, see California Civil Procedure Before Trial, chap 25 (4th ed Cal CEB 2004).

Unlike a demurrer, an answer may allege matters that are not contained in, or are inadequately alleged in, the writ petition. See §23.30. On demurrers, see §§23.33-23.36. However, an answer to an appellate court writ petition generally cannot raise new arguments that could have been, but were not, raised in the trial court. See, *e.g., Henry v Superior Court* (2008) 160 CA4th 440, 448 n4, 72 CR3d 808 (court refused to consider evidentiary challenges raised for first time in answer to writ petition).

For an example of a return by answer, see form in §28.11.

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§23.29 a. Responding to Verified Allegations in the Petition

The answer must respond to the verified allegations in the writ petition. See, *e.g., Addam v Superior Court* (2004) 116 CA4th 368, 371, 10 CR3d 39 (real party waived issue by not directly responding to verified factual allegations in petition). An answer usually admits some of the allegations, denies other allegations, and alleges additional facts if necessary, including affirmative defenses. CCP §431.30 (made applicable to writ proceedings by CCP §1109).

NOTE: The respondent or real party in interest must deny all allegations in a writ petition that he or she disputes, or risk the allegations being deemed admitted. *Dulaney v Municipal Court* (1974) 11 C3d 77, 81 n3, 112 CR 777.

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§23.30 b. Alleging Additional Material Facts

The answer must not only respond to all verified allegations in the petition, it must affirmatively allege any material facts not included in the petition that support the respondent's challenged action or order. An answer may raise both issues of fact and issues of law.

Just as allegations in a petition should, whenever possible, be supported by citations to supporting exhibits, affirmative allegations in an answer also should, whenever possible, be supported by citations to either the exhibits submitted by the petitioner or additional exhibits submitted by the respondent or real party. See, *e.g., Coy v Superior Court* (1962) 58 C2d 210, 221, 23 CR 393 (real party in interest claimed in return that petitioner's interrogatories were interposed for improper purpose, but failed to include record of any fact to substantiate that claim). On citation to the record in an appellate court writ proceeding, see §20.14.

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§23.31 c. Pleading Affirmative Defenses

An answer also must raise any applicable affirmative defenses, such as mootness, laches, and statutes of limitations. See, *e.g., Resource Defense Fund v County of Santa Cruz* (1982) 133 CA3d 800, 804, 184 CR 371.

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§23.32 d. Verification

Because it responds to a verified pleading, *i.e.,* a writ petition, an answer to a writ petition also must be verified. See CCP §§446(a), 1109; Cal Rules of Ct 8.487(b)(1). See, *e.g., Universal City Studios, Inc. v Superior Court* (2003) 110 CA4th 1273, 1287, 2 CR3d 484 (court of appeal struck unverified return that was not demurrer).

To the extent an answer alleges facts that the respondent or real party in interest will rely on as evidence, the verification must be based on personal knowledge, not information and belief. See CCP §§446(a), 1109; *Star Motor Imports, Inc. v Superior Court* (1979) 88 CA3d 201, 204, 151 CR 721.

NOTE: Certain public entities and officials acting in their public capacity are exempt from verification requirements. CCP §446(a). On verification by state or public officials, see §18.47.

For an example of a verification in a return, see form in §28.11. On verification, see §§18.42-18.48.

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§23.33 2. Demurrer

A return also can be made by way of demurrer, alone or in addition to an answer. CCP §§1069.1 (review (certiorari)), 1089 (mandamus), 1105 (prohibition); Cal Rules of Ct 8.487(b)(1). See, *e.g., Ivory v Superior Court* (1938) 12 C2d 455, 459, 85 P2d 894; *Chapman v Superior Court* (2005) 130 CA4th 261, 271, 29 CR3d 852 (overruled demurrer to petition). See also CCP §§430.10-430.80; Cal Rules of Ct 8.487(b).

On demurrers generally, see California Civil Procedure Before Trial, chap 23 (4th ed Cal CEB 2004).

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§23.34 a. File With Answer

If a demurrer is overruled, the court of appeal may, but is not required to, allow an answer. CCP §§1069.1, 1089, 1105. The court may also immediately consider the merits of the petition and issue a peremptory writ. Cal Rules of Ct 8.487(b)(4). See also Cal Rules of Ct 8.933(b)(4) governing writs in limited jurisdiction civil cases (if return is by demurrer alone and demurrer is not sustained, court may issue peremptory writ without granting respondent or real party in interest leave to answer). Accordingly, the respondent or real party in interest should always accompany a demurrer with an answer. See CCP §§1069.1 (review (certiorari)), 1089 (mandamus), 1105 (prohibition); Cal Rules of Ct 8.487(b)(1).

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§23.35 b. State Grounds for Demurrer

A demurrer must clearly set out and support all grounds asserted for the demurrer. The same or similar grounds for demurring to a civil complaint may apply and thus be interposed in a writ proceeding, *e.g.*, trial court has no jurisdiction, petitioner has no capacity to sue or lacks beneficial interest in the writ proceeding, or petition is not verified. See CCP §§430.10, 1109. On grounds for a demurrer to complaint, see California Civil Procedure Before Trial §23.22-23.24 (4th ed Cal CEB 2004).

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§23.36 c. Do Not Raise Affirmative Defenses

A demurrer is not the vehicle to challenge matters inadequately alleged in the petition or to raise new matters, such as affirmative defenses. Rather, these matters should be addressed and raised in an answer filed in addition to the demurrer. See CCP §430.30(b); *Resource Defense Fund v County of Santa Cruz* (1982) 133 CA3d 800, 804, 184 CR 371 (answer alleged affirmative defenses raised in demurrer, *i.e.,* mootness, laches, statute of limitations). On the answer, see §§23.28-23.32.

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§23.37 F. Supporting Memorandum

Just as the petition must be accompanied by a supporting memorandum (Cal Rules of Ct 8.486(a)(5)), a return also should include a memorandum in opposition to the writ petition. Although the rules of court do not expressly require a memorandum in conjunction with a return, they implicitly do so. Compare Cal Rules of Ct 8.486(a)(5) (petition must be accompanied by memorandum) and 8.487(a)(2) (preliminary opposition must contain memorandum). Indeed, the "formal" return, *i.e.*, the demurrer or answer, is simply a pleading. The legal arguments in support of that pleading and in opposition to the writ petition must be presented to the court of appeal in a memorandum.

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§23.38 G. Supporting Exhibits

In many cases, the petitioner will include all of the documents necessary for the court of appeal to fully consider and rule on the writ petition. Cal Rules of Ct 8.486(b) (petition seeking review of trial court ruling must be accompanied by adequate record), 8.486(c) (specifying format of supporting documents). However, if the respondent or real party believes additional documents should be brought to the court's attention, these documents should be bound with, or submitted in an appendix filed in conjunction with, the return. See Cal Rules of Ct 8.486(c). On submitting and citing to the record, see §§20.11, 20.14.

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H. Timing of Return

§23.39 1. Court Usually Sets Deadline

The court of appeal usually states in its alternative writ or order to show cause the filing date for the return. See CCP §§1069.1, 1089, 1105; Cal Rules of Ct 8.487(b)(2).

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§23.40 2. If Court Does Not Set Deadline, File Within 30 Days

If the appellate court does not specify in its alternative writ the deadline for filing a return, the respondent or real party in interest must serve and file a return no later than 30 days after the court issues the alternative writ. Cal Rules of Ct 8.487(b)(2).

PRACTICE TIP: When in doubt, the respondent or real party should call the clerk's office to confirm the deadline.

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§23.41 3. Extension of Time

On a showing of good cause, the courts of appeal generally will grant an extension of time to file a return. See Cal Rules of Ct 8.63(a)(2)-(3). On what a request for an extension of time must include, see §23.13. On what constitutes good cause under Cal Rules of Ct 8.63(b), see §23.14.

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I. Serving Return

§23.42 1. Whom to Serve

The respondent or real party in interest should serve a copy of the return on the petitioner and any other parties who have appeared during the proceeding. CCP §§465, 1109; Cal Rules of Ct 8.487(b)(1)-(2).

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§23.43 2. How to Serve

The respondent or real party in interest must serve a return in the same manner as a brief in an ordinary civil action, generally on counsel by mail. The proof of service must identify the party that counsel represents and provide counsel's telephone number. See CCP §§465, 1069.1, 1089, 1105, 1109; Cal Rules of Ct 8.25, 8.486(e). On service in civil appeals, see California Civil Appellate Practice §12.63 (3d ed Cal CEB 1996).

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§23.44 J. Consequences of Not Filing Proper Return

If the respondent or real party in interest fails to file a proper return, the court of appeal may accept as true the facts alleged in the writ petition and disregard those stated in the responsive pleading, leaving only legal issues for decision. See, *e.g., Titmas v Superior Court* (2001) 87 CA4th 738, 741, 104 CR2d 803 (despite court of appeal's invitation to do so, real parties did not file return and court accepted all factual allegations in petition as true).

PRACTICE TIP: Courts may invite the respondent and real party in interest to rely on preliminary opposition instead of filing a formal return. See *Lauermann v Superior Court* (2005) 127 CA4th 1327, 1329 n2, 26 CR3d 258 (court did not penalize real parties in interest for failing to file return because court had offered them option of relying on their informal opposition). However, the respondent and real party should usually decline such an invitation because the return presents the only opportunity to fully address and respond to the petition.

JUDGE'S PERSPECTIVE: The court will often treat a preliminary opposition as a return, but sometimes indicate specific issues it would like the real party in interest (or, in rare cases, the respondent) to address in a formal return.

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§23.45 K. Return in Writ of Review (Certiorari) Proceedings

Writs of review (certiorari) under CCP §§1067-1077 are rarely used in the courts of appeal except to review contempt adjudications. Review proceedings also differ somewhat from traditional mandamus and prohibition proceedings. On writs of review (certiorari), see §§15.27-15.38.

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§23.46 1. Terminology

The word "return" in the context of a petition for a writ of review (certiorari) can cause confusion because the statutes provide (a) that the respondent or real party in interest can file a return to the petition by demurrer or answer (CCP §1069.1, referring to CCP §1089) and (b) that when a writ of review is directed to a lower tribunal, the clerk, if there is one, "must return the writ with the transcript requested" (CCP §§1070-1071). Moreover, issuance of a writ of review only sets the stage for a hearing on the merits of the petition; the respondent or real party in interest must then file a response, called a "return" by some courts and "briefing" by others. See *Security-First Nat'l Bank v Board of Supervisors* (1933) 135 CA 208, 216, 26 P2d 862 (discussing use of return in context of writ of certiorari).

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§23.47 2. Demurrer

The respondent or real party in interest can demur to a petition for review (certiorari) on the ground that its allegations are legally insufficient to entitle the petitioner to relief. See CCP §§430.10, 430.30 (made applicable to writ proceedings by CCP §1109); Cal Rules of Ct 8.487(b)(1); *Stoner v Superior Court* (1945) 67 CA2d 760, 761, 155 P2d 697.

A demurrer may also be useful to test the legal sufficiency of a petition for writ of review that does not allege any disputed facts, or that attaches and incorporates by reference a sufficient record of the proceedings below. In these situations, the demurrer effectively makes the petition the return to the writ (see CCP §§1070-1071), making it unnecessary to bring up the entire record of the proceedings below and making consideration of the demurrer the consideration of the merits of the petition. See *Estrin v Superior Court* (1939) 14 C2d 670, 672, 96 P2d 340. If the court of appeal sustains the demurrer, it discharges the writ of review and dismisses the proceedings. See *Ivory v Superior Court* (1938) 12 C2d 455, 85 P2d 894 (writ of certiorari issued, then discharged on demurrer).

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§23.48 V. REPLY (TRAVERSE) TO RETURN

After the respondent or real party in interest files and serves its return, the petitioner may file a reply (also called a traverse or replication) to the return. See CCP §§1091 (mandate), 1105 (making mandate procedures applicable to prohibition); Cal Rules of Ct 8.487(b)(3). On filing and service of the return, see §§23.39-23.43.

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§23.49 A. Format and Content of Reply (Traverse)

The reply to a return (also called a traverse or replication) is a pleading that responds to any new allegations made in the return. See CCP §1091; Cal Rules of Ct 8.487(b)(3). Accordingly, the format of a reply is similar to that of a petition or return—a verified "pleading" denying any disputed allegations made in the return, plus a reply memorandum. On petition format, see §§18.5-18.20. On return format, see §§23.25-23.27.

The purpose of a reply is twofold. First, it puts at issue any new verified allegations made in the return. Indeed, if a petitioner does not dispute new allegations made in a return, those allegations will be deemed admitted. See *Titmas v Superior Court* (2001) 87 CA4th 738, 741, 104 CR2d 803 (despite court of appeal's invitation to do so, real parties did not file return and court accepted all factual allegations in petition as true). Second, the reply, and particularly the memorandum, refocuses the court of appeal on the facts and law that support issuance of the requested writ. A petitioner cannot, however, raise new issues for the first time in a reply. See, *e.g., Bell v Superior Court* (2007) 158 CA4th 147, 172 n25, 69 CR3d 328 (court refused to consider issue raised for first time in reply brief); *Save the Sunset Strip Coalition v City of W. Hollywood* (2001) 87 CA4th 1172, 1181 n3, 105 CR2d 172 (court refused to consider issue raised for first time in reply brief on appeal from judgment denying writ petition).

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§23.50 B. Filing and Service of Reply (Traverse)

The petitioner must serve and file its reply (also called a traverse or replication) within 15 days after the respondent or real party in interest files its return, unless the court of appeal orders otherwise. Cal Rules of Ct 8.487(b)(3). On a showing of good cause, the court of appeal likely will grant an extension of time. On extension requests, see §23.13-23.14.

The petitioner files an original of the reply plus four copies, showing proof of service. Cal Rules of Ct 8.44(b)(3).

The petitioner must serve a reply in the same manner as a reply brief in an ordinary civil action, generally on counsel by mail. The proof of service must identify the party that counsel represents and provide counsel's telephone number. See CCP §§465, 1069.1, 1089, 1105, 1109; Cal Rules of Ct 8.25, 8.486(e). On service in civil appeals, see California Civil Appellate Practice §12.63 (3d ed Cal CEB 1996).

For an example of a reply to a return, see form in §28.12.

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§23.51 VI. CHART: DEADLINES FOR *PALMA* OPPOSITION AND REPLY, FOR RETURN AND REPLY

Action	*Deadline*
Opposition to *Palma* notice	As stated in order or notice, or within 30 days after court issues *Palma* notice, unless court grants extension request. Cal Rules of Ct 8.487(b)(2). See §§23.11-23.14.
Reply to *Palma* opposition	Within 15 days after filing of opposition, unless court orders otherwise or grants extension request. Cal Rules of Ct 8.487(b)(3). See §23.18.
Return, by demurrer, or answer, to alternative writ or order to show cause (OSC)	Stated in alternative writ or OSC, or no later than 30 days after court issues alternative writ or OSC, unless court grants extension request. Cal Rules of Ct 8.487(b)(2). See §§23.39-23.41.
Reply (traverse or replication) to return	Within 15 days after filing of return, unless court orders otherwise or grants extension request. Cal Rules of Ct 8.487(b)(3). See §23.50.

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§23.52 VII. AMICUS CURIAE BRIEFS

A third party may file an amicus curiae brief in support of or in opposition to a writ petition after obtaining permission from the presiding justice of the court (or division of the court). See Cal Rules of Ct 8.200(c) (general amicus rules pertaining to appeals). The Attorney General, however, may file an amicus curiae brief in a writ proceeding in which an alternative writ or order to show cause has issued without leave of court. Cal Rules of Ct 8.487(c).

On filing amicus briefs in the courts of appeal, see California Civil Appellate Practice, chap 14 (3d ed Cal CEB 1996).

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§23.53 A. Application to File Amicus Brief

A party seeking leave to appear as amicus curiae in an appellate court writ proceeding must do so within 14 days after the petitioner's reply (also known as a traverse or replication) is filed or could have been filed. See Cal Rules of Ct 8.212, 8.487(b)(3). An application to file an amicus curiae brief in the court of appeal must (Cal Rules of Ct 8.200(c)(2)-(5)):

- State the applicant's interest;
- Explain how the proposed brief will assist the court in deciding the matter;
- Identify those who authored or monetarily contributed to the preparation or submission of the proposed brief;
- Be accompanied by the proposed brief; and
- Identify on the cover the party the applicant supports, if any.

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§23.54 B. Filing and Service of Amicus Brief

If the application is granted, the court of appeal will set a time within which to file the amicus curiae brief, as well as the time within which any party to the writ proceeding may file an answer to the amicus brief. Both the brief and answer must be served on all parties before being filed. Cal Rules of Ct 8.200(c)(6).

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§23.55 C. Seek Amicus Participation Only in Exceptional Cases

Amicus participation is not warranted if the parties can fully present the case to the court and no public policy issue beyond the interests of the parties are implicated. No purpose is served by, and the appellate courts do not appreciate receiving, amicus briefs which do no more than reiterate points already made by the parties. Thus, parties should be strategic in soliciting amicus support and avoid enlisting amici that add nothing to the briefing already before the court.

In the rare case involving an issue of compelling public importance, amicus participation can be helpful to the court of appeal by explaining the potential ramifications of a decision and by presenting the court with a different take on the issue.

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24

Action by Court of Appeal After Issuance of *Palma* Notice, Alternative Writ, or Order to Show Cause

Mitchell E. Abbott
James C. Nielsen

I. SCOPE OF CHAPTER §24.1

II. ACTION AFTER ISSUANCE OF *PALMA* NOTICE
- A. Possible Actions After Issuance of *Palma* Notice §24.2
- B. Most Writ Petitions Are Denied §24.3
- C. Issuance of Peremptory Writ in First Instance §24.4
- D. Issuance of Alternative Writ or Order to Show Cause (OSC) §24.5

III. ACTION AFTER ISSUANCE OF ALTERNATIVE WRIT OR ORDER TO SHOW CAUSE (OSC)
- A. Discharge of Alternative Writ or Order to Show Cause
  - 1. Writ/Order to Show Cause Improvidently Granted §24.6
  - 2. Trial Court Complies With Alternative Writ/Order to Show Cause §24.7
- B. Oral Argument
  - 1. Hearing Date §24.8
  - 2. Conduct of Hearing
    - a. Parties Present §24.9
    - b. Order of Argument §24.10
    - c. Number of Counsel §24.11
    - d. Time for Argument §24.12
    - e. Strategy for Argument §24.13
- C. Disputed Questions of Fact §24.14
- D. Written Opinion Granting or Denying Writ Petition
  - 1. Required When Proceeding Is a "Cause" §24.15
  - 2. Time for Issuance §24.16
    - a. Opinion Generally Issued Within 90 Days §24.17
    - b. Circumstances Extending Time Beyond 90 Days §24.18
  - 3. Contents of Opinion
    - a. Must State Reasons §24.19
    - b. Relief Not Limited by Petition's Prayer §24.20
    - c. Grant or Denial of Writ
      - (1) Granting Writ of Mandate and Prohibition §24.21
      - (2) Denying Writ of Mandate or Prohibition §24.22
  - 4. Award of Costs
    - a. Prevailing Party Usually Entitled to Costs §24.23
    - b. Opinion Must Specify Costs Award §24.24
    - c. Costs Awarded Against Parties, Not Trial Court §24.25
    - d. Items Recoverable as Costs §24.26
    - e. Procedure for Claiming and Opposing Costs §24.27
  - 5. Attorney Fees §24.28
  - 6. Service §24.29
  - 7. Publication §24.30

IV. DOCUMENTS PREPARED AFTER ISSUANCE OF OPINION
- A. Remittitur §24.31
  - 1. When Issued
    - a. Not Required After Summary Denial §24.32
    - b. After Time for Review by Supreme Court Expires §24.33
    - c. Immediately if Parties Stipulate or Petition Is Dismissed §24.34
  - 2. Clerk's Duties §24.35
  - 3. Stay or Recall of Remittitur §24.36

B. Peremptory Writ of Mandate or Prohibition §24.37
1. Time for Issuance §24.38
2. Clerk Usually Prepares Writ §24.39
3. Clerk Sends Writ to Trial Court §24.40
4. Service of Writ by Petitioner §24.41
5. Writ of Review (Certiorari) §24.42

V. ENFORCEMENT OF PEREMPTORY WRIT
A. Respondent's Return to Peremptory Writ §24.43
1. Return Not Mandatory §24.44
2. Contents of Return §24.45
B. Respondent's Duty to Comply §24.46
C. Remedies if Respondent Refuses to Comply With Writ
1. Possible Remedies §24.47
a. Enforcement Orders §24.48
b. Fine §24.49
c. Imprisonment §24.50
2. Procedure for Compelling Compliance With Writ
a. Motion or New Writ Petition §24.51
b. Challenging Respondent's Return §24.52
D. Methods of Enforcing Decision in Writ of Review (Certiorari) Proceeding §24.53
E. Cost Awards Enforceable in Same Manner as Money Judgments Generally §24.54

VI. TRANSFER OF CASE FROM COURT OF APPEAL TO CALIFORNIA SUPREME COURT BEFORE DECISION §24.55
A. Who Requests Transfer §24.56
B. How to Request Transfer §24.57
C. When to Request Transfer §24.58
D. Responding to Request for Transfer §24.59

VII. SANCTIONS FOR FRIVOLOUS WRIT PETITIONS §24.60
A. Against Party or Attorney §24.61
B. Procedure for Obtaining Sanctions §24.62
C. Types of Sanctions
1. Striking Pleading §24.63
2. Award or Denial of Costs §24.64
3. Attorney Fees or Damages §24.65

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§24.1 I. SCOPE OF CHAPTER

This chapter discusses actions a court of appeal can take after issuing a *Palma* notice, alternative writ, or order to show cause (OSC). These actions include:

- Summarily denying the writ petition (see §§22.14-22.17);
- Issuing a written decision and peremptory writ in the first instance (see §§22.18-22.21);
- Discharging a previously issued alternative writ or OSC (see §§24.6-24.7);
- Setting and holding oral argument (see §§24.8-24.13);
- Deciding how to resolve disputed issues of fact (see §24.14); and
- Issuing a written opinion granting or denying the writ petition (see §§24.15-24.30).

On initial actions a court of appeal can take in a writ proceeding, including summarily denying the petition, issuing a *Palma* notice, or issuing an alternative writ or OSC, see chap 22.

This chapter also discusses the documents prepared after the court issues an opinion, *e.g.,* a peremptory writ and the remittitur. See §§24.31-24.42. It next covers how a petitioner can enforce compliance with a peremptory writ. See §§24.43-24.54. The chapter then discusses the rare situation in which the supreme court transfers a case from the court of appeal to itself. See §§24.55-24.59. The chapter concludes with a discussion of sanctions for filing a frivolous writ petition. See §§24.60-24.65.

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II. ACTION AFTER ISSUANCE OF *PALMA* NOTICE

§24.2 A. Possible Actions After Issuance of *Palma* Notice

After issuing a *Palma* notice and receiving any opposition and reply papers, the court of appeal will:

- Deny the petition, either summarily or in an opinion (see §§22.14-22.17);
- Issue a peremptory writ in the first instance (see §§22.18-22.22); or
- Issue an alternative writ or order to show cause (see §§22.23-22.29).

On issuing a *Palma* notice, see §§22.18-22.21.

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§24.3 B. Most Writ Petitions Are Denied

Although issuance of a *Palma* notice indicates the court of appeal is somewhat interested in the writ petition, the court will probably still deny the petition, usually summarily, after the filing of opposition and any reply. See §22.15. On factors the courts of appeal weigh in determining whether to consider the merits of a writ petition, see §§15.51-15.71.

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§24.4 C. Issuance of Peremptory Writ in First Instance

The California Supreme Court has stated a strong preference for the alternative writ or order to show cause procedure (see §24.5), as opposed to the streamlined *Palma* notice procedure, when the court of appeal is considering issuing a peremptory writ. See §22.24. The supreme court has indicated that the *Palma* procedure, which allows issuance of a peremptory writ in the first instance without further briefing and without oral argument, should be limited to cases of unusual urgency or when further briefing by the parties would not be helpful. See, *e.g., Lewis v Superior Court* (1999) 19 C4th 1232, 1236, 82 CR2d 85 (*Palma* procedure is of limited application, but may be used when circumstances warrant); *Ng v Superior Court* (1992) 4 C4th 29, 35, 13 CR2d 856 (accelerated *Palma* procedure is exception and should not become routine). Nevertheless, the courts of appeal still regularly use the *Palma* procedure. On the *Palma* procedure, see §22.18.

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§24.5 D. Issuance of Alternative Writ or Order to Show Cause (OSC)

The court of appeal may issue an alternative writ or order to show cause (OSC) after issuing a *Palma* notice, but rarely does so. If the court does issue an alternative writ or OSC, the writ proceeding becomes a "cause," entitling the parties to oral argument and requiring disposition by written opinion with reasons stated. See *Countrywide Home Loans, Inc. v Superior Court* (1997) 54 CA4th 828, 832, 62 CR2d 899. On when a writ proceeding becomes a cause and the consequences thereof, see §22.23. On setting writ petition for oral argument, disposition by written opinion, and subsequent matters, see §§24.8-24.22.

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III. ACTION AFTER ISSUANCE OF ALTERNATIVE WRIT OR ORDER TO SHOW CAUSE (OSC)

A. Discharge of Alternative Writ or Order to Show Cause

§24.6 1. Writ/Order to Show Cause Improvidently Granted

After issuing an alternative writ or order to show cause (OSC), the court of appeal may discharge the alternative writ or OSC as improvidently granted and deny the writ petition. See *Countrywide Home Loans, Inc. v Superior Court* (1997) 54 CA4th 828, 831, 62 CR2d 899 (in light of new evidence, court concluded that alternative writ was improvidently granted).

The court may take such action—often after reading the respondent's or real party in interest's opposition papers—for a variety of reasons, including that the proceeding does not in fact present an issue appropriate for immediate discretionary review or that the facts are significantly different than they appeared from the petition and supporting memorandum. See 54 CA4th at 832 (court discharged alternative writ as improvidently granted based on new evidence supplied by real party in interest; had evidence been disclosed in petition, court would not have issued alternative writ). For additional examples, see §25.14. On the issuance of alternative writs and OSCs, see §§22.23-22.29.

For an example of an order discharging an alternative writ as improvidently granted, see form in §28.14.

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§24.7 2. Trial Court Complies With Alternative Writ/Order to Show Cause

If the trial court complies with an alternative writ or order to show cause (OSC), the appellate court will discharge the alternative writ or OSC and likely dismiss the petition as moot. See, *e.g., Palma v U.S. Indus. Fasteners, Inc.* (1984) 36 C3d 171, 177, 203 CR 626; *Environmental Protection Info. Ctr. v State Bd. of Forestry* (1993) 20 CA4th 27, 31, 24 CR2d 344.

NOTE: Even if the trial court complies with the appellate court's alternative writ or order, the appellate court may still decide to issue an opinion. See, *e.g., People v Superior Court (Jump)* (1995) 40 CA4th 9, 12, 46 CR2d 829 (alternative writ discharged and petition denied as moot, but opinion issued on merits because of recurring nature and importance of issue).

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B. Oral Argument

§24.8 1. Hearing Date

After the respondent or real party in interest files a return to the alternative writ or order to show cause (OSC) and the petitioner files a reply (also called a traverse or replication), the court of appeal will hear oral argument on the petition. The court will specify the argument date either in the alternative writ or OSC, or in a separate notice sent to the parties at least 20 days before the hearing date. Cal Rules of Ct 8.256(b).

Some courts of appeal send notice to the parties stating that they may waive oral argument and must file a written request for argument by a specified date or the court will deem argument waived. See 1st App Dist IOPP §III.B.28-29; 3d App Dist IOPP §VIII; 4th App Dist, Div 2 IOPP §VIII; 5th App Dist IOPP §III.C. The parties should check for applicable local rules or Internal Operating Practices and Procedures, or, if there are none, call the court clerk to determine the court's practice.

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2. Conduct of Hearing

§24.9 a. Parties Present

Counsel for petitioner and for real party in interest usually must appear in person for oral argument. There usually is no appearance by the respondent when the respondent is the trial court. See *Solberg v Superior Court* (1977) 19 C3d 182, 189, 137 CR 460 (although named as respondent, trial court is neutral party with no beneficial interest in outcome of case), superseded by statute on other grounds. If the writ proceeding is one of the rare instances in which the respondent is not the trial court, but a government entity or private body, counsel for respondent also must appear.

Some courts allow counsel to appear telephonically. See 1st App Dist Local R 13; 5th App Dist Local R 4; 5th App Dist IOPP §IV; 6th App Dist IOPP §II.A.3.

PRACTICE TIP: Counsel wishing to appear telephonically must fulfill additional procedural requirements and should consult the applicable local rules or procedures carefully.

Clients may attend oral argument but are not required to do so.

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§24.10 b. Order of Argument

The petitioner typically argues first, followed by the real party in interest and, in rare instances, the respondent. The petitioner then has the right to rebut. Cal Rules of Ct 8.256(c)(1). The court always has control of the argument, however, and may turn immediately to the real party or respondent. Amicus curiae, if any, has no right to argue unless the court grants a written request, in which case the court may expand or allocate time. Cal Rules of Ct 8.256(c)(2). On time for argument, see §24.12.

PRACTICE TIP: A request for oral argument by amicus curiae is more likely to be granted if supported by a party and the party offers to cede a portion of its time for argument.

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§24.11 c. Number of Counsel

Unless the court orders otherwise, no more than one counsel may argue for each party who appeared separately in the court below. Cal Rules of Ct 8.256(c)(3).

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§24.12 d. Time for Argument

The rules allow each side 30 minutes for oral argument. Cal Rules of Ct 8.256(c)(2). In exceptional cases, *e.g.,* those involving very complex issues, multiple parties, or issues of public importance, the presiding justice may allow extended argument. In addition, a party can file a written request for additional time, but the courts almost never grant such a request. See 3d App Dist Local R 3; 4th App Dist Div 1 IOPP §VII. Unless local rules specify a particular time, a party making written request for additional time should do so shortly after receipt of the court's notice scheduling oral argument.

PRACTICE TIP: As permitted by Cal Rules of Ct 8.256(c), some appellate districts have reduced the amount of time allotted for oral argument. See 3d App Dist Local R 3 (each side allowed 15 minutes, although court will consider advance, written request for additional time); 4th App Dist Div 1 IOPP §VII (same).

If separate counsel represents multiple parties, or if amicus curiae request and are granted argument, the presiding justice may apportion or expand the time. Cal Rules of Ct 8.256(c)(2). Usually amicus curiae do not participate at oral argument, but if they do, and if they are aligned with a specific party, as they usually are, that party almost always will have to share its argument time with its amicus.

PRACTICE TIP: The courts of appeal do not always slavishly enforce argument time limits. If the justices are interested in the case and want to ask additional questions, they will do so.

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§24.13 e. Strategy for Argument

The usual advice on counsel's presentation and conduct of appellate argument applies to appellate court writ proceedings: Counsel must be fully prepared on the record and the law. The justices will frequently be well prepared on both and naturally expect the same from counsel.

Any of the justices on the panel may ask questions of counsel at any time and repetition of written arguments is not necessary or even desirable. Counsel should focus on one or two principal points at argument (while being prepared to address any issue in response to questions by the court). Questioning by the justices does not extend the time available to counsel for argument, although the justices may allow counsel additional time if they are particularly interested in the case. On time for argument, see §24.12.

JUDICIAL PERSPECTIVE: Oral advocacy is more art than science. The best oral arguments are those in which the court and counsel engage in a dialogue about the issues.

On oral argument, see California Civil Appellate Practice §§16.29-16.33 (3d ed Cal CEB 1996).

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§24.14 C. Disputed Questions of Fact

Appellate courts do not generally resolve disputed issues of fact left undecided by the trial court. If resolution of a legal question in a writ proceeding depends on an unresolved question of fact, the court of appeal may either deny the petition outright or issue a writ and remand the matter to the trial court for a fact hearing. On rare occasions, an appellate court may order a reference by appointing a judge (often a retired judge or justice or a trial court judge) as a special referee, to take evidence and report findings on the disputed factual question. The reviewing court will usually adopt the findings of the special referee, although they are not binding. See *Holt v Kelly* (1978) 20 C3d 560, 562, 143 CR 625 (special referee's findings are not binding, but are entitled to "great weight"); 8 Witkin, California Procedure, *Extraordinary Writs* §203 (5th ed 2008).

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D. Written Opinion Granting or Denying Writ Petition

§24.15 1. Required When Proceeding Is a "Cause"

When the court of appeal issues an alternative writ or order to show cause, the writ proceeding becomes a "cause," and the court's decision must be in writing with reasons stated, regardless of whether it is published. Cal Const art VI, §14; *Lewis v Superior Court* (1999) 19 C4th 1232, 1241, 82 CR2d 85, quoting *Palma v U.S. Indus. Fasteners, Inc.* (1984) 36 C3d 171, 178 n5-6, 203 CR 626 (unless court summarily denies petition or respondent performs act specified in alternative writ, the matter becomes a "cause" that must be decided "in writing with reasons stated"). But see *Countrywide Home Loans, Inc. v Superior Court* (1997) 54 CA4th 828, 833, 62 CR2d 899 (no written opinion required if court discharges alternative writ as improvidently granted); §§22.17, 25.14.

For an example of a decision granting a petition for a writ of mandate, see form in §28.13.

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§24.16 2. Time for Issuance

Whether oral argument is waived or held, after the time has passed for filing all papers (*e.g.,* any supplemental briefing requested or allowed by the court), the matter is submitted for decision. Cal Rules of Ct 8.256(d). The court renders its decision in a written opinion. Cal Rules of Ct 8.264(a).

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§24.17 a. Opinion Generally Issued Within 90 Days

The court of appeal generally issues its opinion within 90 calendar days of the submission date. Although not formally prescribed by statute, court of appeal justices respect the 90-day period because receipt of their salaries is contingent on having no cause undetermined for 90 days after submission. Cal Const art VI, §19; Govt C §68210 (to receive salary, justice must file affidavit stating that no cause remains undetermined for 90 days after submission for decision). On determining submission date, see §24.16.

NOTE: As a practical matter, because the justices file the affidavits only once a month, the court often has slightly more than 90 days (to the end of the month in which the 90th day falls) to issue an opinion.

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§24.18 b. Circumstances Extending Time Beyond 90 Days

A court may issue an opinion beyond the 90-day period if:

- The court vacates the submission in an order stating its reasons for doing so and setting a timetable for resubmission. Cal Rules of Ct 8.256(e)(1).

NOTE: Although the rule requires that the court state its reasons, the rule does not limit the reasons justifying resubmission. Thus, the "reason" can be simply that the court is not yet finished.

- The submission does not coincide with oral argument. If it does not, the 90 days run from the submission date. Cal Rules of Ct 8.256(d)(1).

On determining submission date, see §24.16.

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3. Contents of Opinion

§24.19 a. Must State Reasons

The court's opinion must "be in writing with the reasons stated." Cal Const art VI, §14. This means the opinion usually summarizes the facts, discusses the parties' contentions, and explains the court's acceptance or rejection of those contentions with reference to supporting decisional and statutory law. See *Lewis v Superior Court* (1999) 19 C4th 1232, 1262, 82 CR2d 85 (opinion is sufficient if it "sets forth the grounds or principles upon which the justices concur in the judgment"; court of appeal's three-paragraph opinion was sufficient even though it did not address every issue raised by counsel, discuss potentially dispositive appellate decisions, or include citations to the record). See also *Amwest Sur. Ins. Co. v Wilson* (1995) 11 C4th 1243, 1266, 48 CR2d 12 (court of appeal opinion did not satisfy constitutional requirement because reasons that led one justice to concur in judgment could not be determined).

The court's opinion must identify the participating justices, including the majority opinion's author and the author of any concurring or dissenting opinion, or the justices participating in a *per curiam* ("by the court") opinion. Cal Rules of Ct 8.264(a)(2). The appellate court clerk then files the opinion and sends copies, showing the filing date, to the parties and the respondent. Cal Rules of Ct 8.264(a)(1).

For an example of a decision granting a petition for a writ of mandate, see form in §28.13.

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§24.20 b. Relief Not Limited by Petition's Prayer

The court of appeal is not limited by the petition's prayer and may grant any relief it deems appropriate. *George M. v Superior Court* (1988) 201 CA3d 755, 760, 247 CR 330. In addition, if the court rules in favor of the petitioner, it may grant total or partial relief. See, *e.g.*, *Victoria v Superior Court* (1985) 40 C3d 734, 747, 222 CR 1 (total relief granted; petitioner sought, and court issued, writ of mandate directing trial court to set aside order compelling arbitration in case involving claim of sexual assault); *Sheller v Superior Court* (2008) 158 CA4th 1697, 71 CR3d 207 (appeal treated in part as writ petition; court reversed and ordered trial court to vacate challenged order, but also remanded for trial court to consider removing trial counsel on different basis); *Coulter v Superior Court* (1978) 21 C3d 144, 155, 145 CR 534 (partial relief granted; court issued writ of mandate directing trial court to overrule defendant's demurrer to only one of two challenged causes of action).

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c. Grant or Denial of Writ

§24.21 (1) Granting Writ of Mandate and Prohibition

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When the court grants a petition for a writ of mandate or prohibition, its decision directs the clerk to issue a writ of mandate or prohibition:

LET A PEREMPTORY WRIT OF MANDATE ISSUE, DIRECTING THE TRIAL COURT TO VACATE ITS ORDER OF _ _[*DATE*]_ _, IN THE CASE OF _ _[*NAME v NAME*]_ _, TRIAL COURT NO. _ _ _ _ _ _, AND TO ENTER A NEW AND DIFFERENT ORDER _ _[*GRANTING/DENYING*]_ _ THE _ _[*SPECIFIC SUBJECT, e.g., SUMMARY JUDGMENT*]_ _ ORDER.

See, *e.g., Henry v Superior Court* (2008) 160 CA4th 440, 462, 72 CR3d 808 (court granted petition and directed trial court to vacate its order excluding evidence and to enter new order permitting evidence); *California Pub. Employees' Retirement Sys. v Superior Court* (2008) 160 CA4th 174, 187, 72 CR3d 561 (court granted petition and directed trial court to vacate its order overruling demurrer and to enter new order sustaining demurrer without leave to amend); *Heritage Provider Network, Inc. v Superior Court* (2008) 158 CA4th 1146, 1155, 70 CR3d 645 (court granted petition and directed trial court to vacate its order denying motion to stay pending arbitration proceedings and to enter new order granting motion).

For an example, see form in §28.13. On issuance of a writ of mandate or prohibition, see §§24.37-24.41.

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Source: Civil Litigation/California Civil Writ Practice/24 Action by Court of Appeal After Issuance of Palma Notice, Alternative Writ, or Order to Show Cause/§24.22 (2) Denying Writ of Mandate or Prohibition

§24.22 (2) Denying Writ of Mandate or Prohibition

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When the court denies a petition for a writ of mandate or prohibition, it usually concludes its decision as follows:

THE ALTERNATIVE WRIT IS DISCHARGED AND THE PETITION FOR WRIT OF _ _[*MANDATE/PROHIBITION*]**_ _ IS DENIED.**

See, *e.g.*, *Zevnik v Superior Court* (2008) 159 CA4th 76, 89, 70 CR3d 817; *Los Angeles Unified Sch. Dist. v Superior Court* (2007) 151 CA4th 759, 777, 60 CR3d 445.

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4. Award of Costs

§24.23 a. Prevailing Party Usually Entitled to Costs

The prevailing party is entitled to costs in an original writ proceeding (except one arising from a case in which a party is entitled to court-appointed counsel, such as a criminal or juvenile case) if the reviewing court issues a written opinion in the case granting a peremptory writ in the first instance or after issuing an alternative writ or order to show cause. Cal Rules of Ct 8.493(a)(1)(A). However, the court retains the discretion to award, deny, or apportion costs as it deems proper "in the interests of justice." Cal Rules of Ct 8.493(a)(1)(B). For example, if the petitioner has raised numerous issues and prevails on only one, the court may rule that each party should bear its own costs, even though the court grants the petition and issues a writ. Alternatively, if the court feels the case was a very close one, it may order each side to bear its own costs even though it denies the petition. See, *e.g., Wells Fargo Bank v Superior Court* (2008) 159 CA4th 381, 395, 71 CR3d 506; *Sheller v Superior Court* (2008) 158 CA4th 1697, 1718, 71 CR3d 207.

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§24.24 b. Opinion Must Specify Costs Award

The opinion or order must specify the award or denial of costs, *e.g.,* that the petitioner or the real party in interest is awarded costs or that each side is to bear its own costs. Cal Rules of Ct 8.493(a)(2).

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§24.25 c. Costs Awarded Against Parties, Not Trial Court

The court awards costs against the petitioner or the real party in interest, but not against the respondent judge or trial court if "the proceeding was defended in good faith." *Oksner v Superior Court* (1964) 229 CA2d 672, 690, 40 CR 621.

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§24.26 d. Items Recoverable as Costs

Items recoverable as costs in original writ proceedings are the same as in Cal Rules of Ct 8.278(b)-(d) governing civil appeals, and can include the cost of preparing the record used in the writ proceeding. Cal Rules of Ct 8.493(b).

On the items recoverable as appellate costs, see California Civil Appellate Practice §20.7 (3d ed Cal CEB 1996).

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§24.27 e. Procedure for Claiming and Opposing Costs

Within 40 days after the clerk sends notice of issuance of the remittitur, a party who wishes to claim costs awarded by the appellate court must serve and file in the trial court a verified memorandum of costs under Cal Rules of Ct 3.1700. Cal Rules of Ct 8.493(b), 8.278(c)(1). On issuance of the remittitur, see §§24.31-24.36.

PRACTICE TIP: A party claiming costs should do so using the mandatory Memorandum of Costs on Appeal (Judicial Council Form MC-013).

A party against whom costs have been claimed may move to strike or tax those costs in the same manner and within the same time limits as in the trial court. Cal Rules of Ct 8.493(b), 8.278(c)(2).

On the procedures for claiming and opposing costs, see California Civil Appellate Practice §§20.4-20.12 (3d ed Cal CEB 1996).

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§24.28 5. Attorney Fees

Under certain circumstances, attorney fees incurred in connection with a writ petition can be awarded either by the reviewing court or by the trial court after remittitur issues. See *Laurel Heights Improvement Ass'n v Regents of Univ. of Cal.* (1988) 47 C3d 376, 426, 253 CR 426; *Zuehlsdorf v Simi Valley Unified Sch. Dist.* (2007) 148 CA4th 249, 258, 55 CR3d 467 (affirming award of fees in trial court writ proceeding). On recovery of attorney fees in appellate court proceedings, see California Civil Appellate Practice §§20.13-20.18 (3d ed Cal CEB 1996); California Attorney Fee Awards, chap 15 (2d ed Cal CEB 1994). On requesting attorney fees in an appellate court writ proceeding, see §18.41; on requesting attorney fees in a trial court writ proceeding, see §§5.125-5.126.

PRACTICE TIP: Unless the court of appeal specifies otherwise, the court's award of costs on appeal has no bearing on whether or not attorney fees are recoverable. Cal Rules of Ct 8.278(d)(2).

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§24.29 6. Service

The appellate court clerk must promptly send a copy of the opinion to the lower court and to the parties. See Cal Rules of Ct 8.264(a)(1).

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§24.30 7. Publication

A court of appeal's opinion in a writ proceeding can be published if it meets the requirements for publication, *e.g.*, addresses an issue of first impression. See Cal Rules of Ct 8.1105(c)-(d). If the court has not designated its opinion for publication, but a party believes the court should publish the opinion, he or she should follow the procedures in Cal Rules of Ct 8.1120 to request publication before the opinion becomes final. See California Civil Appellate Practice, chap 21 (3d ed Cal CEB 1996). On determining when the opinion becomes final, see §§25.5-25.10. On criteria for publication, see §11.32.

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IV. DOCUMENTS PREPARED AFTER ISSUANCE OF OPINION

§24.31 A. Remittitur

The remittitur is the document the clerk of the court of appeal prepares and sends to the trial court notifying the lower court that the court of appeal's decision is final. Cal Rules of Ct 8.272(a)-(b), 8.499, See *Schwartz v Schwartz* (1969) 268 CA2d 685, 690, 74 CR 192 (remittitur designates judgment of appellate tribunal and is authenticated to court from which appeal is taken). On the finality of opinions, see §§25.5-25.10. On remittitur, see California Civil Appellate Practice, chap 18 (3d ed Cal CEB 1996).

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1. When Issued

§24.32 a. Not Required After Summary Denial

A remittitur is not required after a summary denial of a writ petition, but it is required in all other writ proceedings. Cal Rules of Ct 8.499. On the summary denial of writ petitions, see §§22.14-22.17.

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§24.33 b. After Time for Review by Supreme Court Expires

The clerk of the court of appeal issues a remittitur immediately after the California Supreme Court denies review, or the time for granting review expires. Cal Rules of Ct 8.272(b)(1)(A). When the supreme court grants but later vacates review (*e.g.*, as improvidently granted), the court of appeal decision is deemed final on the date review is vacated and the court of appeal clerk must promptly issue a remittitur. Cal Rules of Ct 8.272(b)(1)(A).

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§24.34 c. Immediately if Parties Stipulate or Petition Is Dismissed

The court of appeal may, in its discretion, direct the immediate issuance of a remittitur in a writ proceeding on the parties' stipulation or dismissal of the proceeding. See Cal Rules of Ct 8.272(c)(1); California Civil Appellate Practice §§18.6-18.9 (3d ed Cal CEB 1996).

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§24.35 2. Clerk's Duties

The remittitur is considered issued "when the clerk enters it in the record." Cal Rules of Ct 8.272(d)(1). The clerk is required to transmit the remittitur immediately, with a certified copy of the opinion or order, to the lower court. Cal Rules of Ct 8.272(b)(1)(B). As soon as the remittitur issues, the clerk must also mail notice to the parties that the remittitur has issued, showing the date of entry. Cal Rules of Ct 8.272(d)(1).

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§24.36 3. Stay or Recall of Remittitur

For good cause, on its own or a party's motion or by stipulation, the court of appeal may stay the issuance of the remittitur for a reasonable period or order its recall. Cal Rules of Ct 8.272(c)(2). See California Civil Appellate Practice §§18.10-18.21 (3d ed Cal CEB 1996).

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§24.37 B. Peremptory Writ of Mandate or Prohibition

The writ of mandate or prohibition is the document commanding the respondent to take or refrain from taking some action. If the court of appeal grants a petition for a writ of mandate or prohibition, its opinion directs the clerk to issue a writ of mandate or prohibition. See §24.21. For an example of a peremptory writ, see form in §28.15. On writs of mandate, see §§15.2-15.13; on writs of prohibition, see §§15.14-15.26.

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§24.38 1. Time for Issuance

A peremptory writ of mandate or prohibition only issues after the opinion granting the petition has become final and the remittitur has issued. See *Palma v U.S. Indus. Fasteners, Inc.* (1984) 36 C3d 171, 181, 203 CR 626. No court rule sets a specific deadline for issuance of the writ. On the finality of opinions, see §§25.5-25.10; on issuance of the remittitur, see §§24.31-24.36.

PRACTICE TIP: Because the period for issuance of a writ is flexible, the trial court normally will have sufficient time to comply before issuance becomes necessary. Often, no writ is needed or issued because the trial court already will have taken the action the writ would have compelled. *Palma v U.S. Indus. Fasteners, Inc., supra*.

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§24.39 2. Clerk Usually Prepares Writ

Although no court rules address the subject, in practice the appellate court clerk usually prepares the peremptory writ after issuing the remittitur. On issuance of the remittitur, see §§24.31-24.36. Occasionally, the court directs the petitioner to prepare the peremptory writ for filing and service on the other parties. In such cases, the petitioner prepares the writ for signature by the clerk in accordance with the written opinion and submits it to the clerk for approval and issuance.

PRACTICE TIP: The petitioner should call the clerk to determine the court's preferences and practices.

For an example of a peremptory writ, see form in §28.15.

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§24.40 3. Clerk Sends Writ to Trial Court

The clerk must "promptly" send a certified copy of the writ to the trial court to which it is addressed. Cal Rules of Ct 8.489(a). If the writ stays or prohibits proceedings that are set to occur within 7 days or requires action within 7 days—or in any other urgent situation—the clerk must make a reasonable attempt to notify the trial court clerk by telephone, who must then notify the judge directly concerned. Cal Rules of Ct 8.489(b)(1).

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§24.41 4. Service of Writ by Petitioner

Except when the court of appeal expressly orders otherwise, the petitioner must serve a writ of mandate or prohibition in the same manner as a summons in a civil action. CCP §1096. For jurisdictional purposes, this requirement likely supersedes the provision requiring that the clerk give notice of the writ in Cal Rules of Ct 8.489(a). See *Board of Supervisors v Superior Court* (1994) 23 CA4th 830, 840, 28 CR2d 560 (personal service of either alternative writ or petition is required at some point). Thus, counsel may wish to serve such writs by personal service on each party and on the trial judge or the judge's clerk to lay a foundation to compel compliance under CCP §1097 in the unlikely event that the trial court disobeys the writ.

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§24.42 5. Writ of Review (Certiorari)

No postdecision documents need to be prepared in writ of review (certiorari) proceedings because the judgment affirming, annulling, or modifying the proceedings below (see CCP §1075), rather than the writ of review, is the ultimate relief sought. The writ of review merely orders the party to whom it is directed (*e.g.,* the trial court) to certify or return to the reviewing court a record of the proceedings below and to desist from further proceedings in the matter under review. CCP §§1070-1072. On writs of review, see §§15.27-15.38.

Once the judgment in a writ of review proceeding has been entered, the appellate court clerk must transmit a copy to the trial court. CCP §1076.

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V. ENFORCEMENT OF PEREMPTORY WRIT

§24.43 A. Respondent's Return to Peremptory Writ

The respondent should notify the court issuing the peremptory writ of the action the respondent takes in response to the writ. The respondent's formal notification is called a "return" (this is entirely different from the return the respondent or real party in interest files to an alternative writ or order to show cause; see §§23.20-23.44). See CCP §1108.

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§24.44 1. Return Not Mandatory

The respondent need not file a return unless the court issuing the peremptory writ requires a return within a specified period of time. See CCP §1108. Most appellate courts prefer that the respondent make a return, particularly when the respondent is a person or entity other than a trial court.

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§24.45 2. Contents of Return

In the return, the respondent informs the appellate court that:

- The respondent has complied with the writ in whole or in part; or
- The respondent is excused from compliance because respondent or real party in interest is requesting review in the supreme court (*i.e.,* in a petition for review) of the decision directing issuance of the writ. On petitioning for review in the supreme court, see §§25.26-25.30.

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§24.46 B. Respondent's Duty to Comply

When a writ issues under the terms of a final decision, the respondent, whether a trial court or governmental or private entity, is under a legal duty to comply with it. On determining when a decision becomes final, see §§25.5-25.10.

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C. Remedies if Respondent Refuses to Comply With Writ

§24.47 1. Possible Remedies

If the respondent refuses to comply with a peremptory writ of mandate or prohibition (which rarely occurs in connection with an appellate court writ proceeding), the issuing court may order the following penalties (CCP §1097):

- Enforcement;
- A fine not exceeding $1000, if the court finds no good cause for the failure to comply; or
- Imprisonment, if the court finds persistent refusal to comply with the writ.

The court's determination of which of the three available penalties is appropriate depends on the severity of the circumstances and on the nature of the respondent (*e.g.*, if it is the trial court, the only feasible option may be enforcement). *King v Woods* (1983) 144 CA3d 571, 577, 192 CR 724.

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§24.48 a. Enforcement Orders

The appellate court may issue whatever orders are necessary and proper to enforce a writ. CCP §§1097, 1105. The court's power to order compliance with a writ is inherent and the court may use its power when there is any inadequacy in compliance; there is no requirement of a showing of willfulness or persistent refusal. See *King v Woods* (1983) 144 CA3d 571, 578, 192 CR 724 (affirming enforcement order issued in trial court writ proceeding, but generally discussing remedies under CCP §1097). To justify the issuance of an enforcement order, the petitioner need only show that it personally served the responding party or real party in interest and that that party has not adequately complied with the peremptory writ. CCP §§1097, 1105.

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§24.49 b. Fine

The court may impose a fine of up to $1000 for noncompliance with a peremptory writ if (*King v Woods* (1983) 144 CA3d 571, 578, 192 CR 724):

- The party was personally served with the writ;
- The party refused or neglected to obey the writ; and
- The party's refusal or neglect was without just excuse.

The court may impose a fine after finding that the respondent refused or neglected to obey the writ. The court need not find that the respondent deliberately intended to refuse to comply with the writ. 144 CA3d at 579 (fine valid given respondent's refusal or neglect to comply with writ).

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§24.50 c. Imprisonment

The court may order the respondent or real party in interest imprisoned for failure to comply with a peremptory writ if (*King v Woods* (1983) 144 CA3d 571, 578, 192 CR 724):

- The party was personally served with the writ;
- The party refused or neglected to obey the writ;
- The party's refusal or neglect was without just excuse; and
- The party's refusal to comply is persistent.

For the court to order imprisonment, it must find more than mere indifference. The court must find intentional refusal to obey the writ. 114 CA3d at 579. When appropriate, the court can order a willfully disobedient respondent jailed until the writ is fully satisfied.

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2. Procedure for Compelling Compliance With Writ

§24.51 a. Motion or New Writ Petition

In the event that the trial court refuses to comply with an appellate court's ruling, the petitioner may proceed by making a motion seeking one of the remedies listed in CCP §1097 or by filing a new writ petition seeking enforcement of the first writ.

PRACTICE TIP: Courts may treat a motion to compel enforcement brought under CCP §1097 as being "in the nature of sanctions for contempt." *King v Woods* (1983) 144 CA3d 571, 578, 192 CR 724, quoting *Carroll v Civil Serv. Comm'n* (1970) 11 CA3d 727, 733, 90 CR 128. Thus, a respondent's or real party in interest's noncompliance with a peremptory writ can be brought before the court by means of a sworn declaration and an order to show cause re contempt. The petitioner may include an affidavit regarding the facts constituting the failure to comply with the writ (the "contempt"). CCP §1211(a). On contempt procedures, see California Trial Objections, chap 57 (Cal CEB Annual); California Trial Practice: Civil Procedure During Trial §§16.99-16.129 (3d ed Cal CEB 1995); California Criminal Law Procedure and Practice, chap 58 (Cal CEB Annual).

Because a motion calls for the court to exercise its ongoing jurisdiction, the motion should bear the same action number. If the respondent's noncompliance does not appear in the record, the petitioner's motion must include an affidavit setting out the relevant facts. See CCP §1211.

PRACTICE TIP: If the court's original writ has not been discharged, efficiency suggests filing a motion to challenge the respondent's noncompliance rather than a new writ petition.

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§24.52 b. Challenging Respondent's Return

If the petitioner believes that the respondent's or real party in interest's return to a peremptory writ is invalid because of failure to comply with some or all terms of the writ or inaccurately reporting the basis for noncompliance, the petitioner can challenge the return by filing the following:

- An enforcement motion requesting a finding that respondent has not in fact complied with the writ (see *City of Carmel-By-The-Sea v Board of Supervisors* (1982) 137 CA3d 964, 970, 187 CR 379 (affirming enforcement order issued in trial court writ proceeding, but generally discussing enforcement orders under CCP §1097));
- A motion for an order to show cause re contempt; or
- A supplemental writ petition under the original action's case number or a new writ petition.

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§24.53 D. Methods of Enforcing Decision in Writ of Review (Certiorari) Proceeding

In contrast with the statutes applicable to mandamus and prohibition, the code sections dealing specifically with a writ of review (certiorari) (CCP §§1067-1077) contain no express remedy by which the petitioner may enforce a decision annulling a trial court's action. The petitioner's remedy is to file a new petition either for a writ of mandate to compel the trial court or other tribunal to comply with the reviewing court's decision, or for a writ of prohibition to restrain the trial court or other tribunal from acting in excess of its authority.

Although another writ is rarely needed to enforce a writ of review, the same standards applying to enforcement of appellate rulings in general should apply in this setting as well. See *Hampton v Superior Court* (1952) 38 C2d 652, 656, 242 P2d 1 (prohibition is proper remedy to restrain trial court from proceeding to trial in violation of terms of final judgment of reviewing court); *Carter v Superior Court* (1950) 96 CA2d 388, 391, 215 P2d 491 ("when the trial court is about to exceed its authority by proceeding otherwise than in accordance with directions given with respect to the issues to be tried, or judgment to be entered, either mandate or prohibition is a proper remedy to compel obedience to such directions").

PRACTICE TIP: Because it is sometimes unclear whether the more appropriate remedy is mandate or prohibition, the petitioner should seek both remedies in the alternative. See §18.3.

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§24.54 E. Cost Awards Enforceable in Same Manner as Money Judgments Generally

An award of costs in a writ proceeding is enforceable in the same manner provided for money judgments generally, whether the award is made by an appellate court or by a trial court. CCP §§1027, 1095, 1105; Cal Rules of Ct 8.493; Enforcement of Judgments Act (CCP §§680.010-724.260, in particular CCP §§695.010-709.030); *California Labor Fed'n v Occupational Safety & Health Standards Bd.* (1992) 5 CA4th 985, 989 n1, 7 CR2d 399. On cost awards, see §§24.23-24.27.

For procedure and forms for enforcing a judgment for costs, see Debt Collection Practice in California §§7.31-7.37, 7.44-7.57 (2d ed Cal CEB 1999). See also California Trial Practice: Civil Procedure During Trial, chap 27 (3d ed Cal CEB 1995).

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§24.55 VI. TRANSFER OF CASE FROM COURT OF APPEAL TO CALIFORNIA SUPREME COURT BEFORE DECISION

On very rare occasions, the California Supreme Court may transfer a case, including a writ proceeding, to itself after the case is filed in the court of appeal but before decision in that court. Cal Rules of Ct 8.552, 10.1000(A). This may arise if the case involves an "issue of great public importance that the Supreme Court must promptly resolve." Cal Rules of Ct 8.552(c); see *Brosnahan v Brown* (1982) 32 C3d 236, 241, 186 CR 30 (supreme court transferred writ petition to itself, noting that petition presented issue of great public importance, *i.e.,* whether manner in which Victims' Bill of Rights was submitted to voters as ballot initiative was constitutionally defective). A transfer order requires the votes of at least four supreme court justices. Cal Rules of Ct 8.552(e).

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§24.56 A. Who Requests Transfer

The supreme court may itself decide to transfer the case or may do so at a party's request. Cal Rules of Ct 8.552(a).

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§24.57 B. How to Request Transfer

A party requests transfer of a case from the court of appeal to the supreme court in a petition served and filed in the supreme court. Cal Rules of Ct 8.552(d). The petition must explain how the cause satisfies the requirements of Cal Rules of Ct 8.552(c). Cal Rules of Ct 8.552(d). The petition should conform to the format requirements of Cal Rules of Ct 8.504. Cal Rules of Ct 8.552(d). On the format requirements for petitions in the supreme court, see §§27.20-27.24.

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§24.58 C. When to Request Transfer

A party seeking transfer must file and serve a petition "promptly," although no specific time limit applies. Cal Rules of Ct 8.552(d). The transfer itself must take place before the decision in the court of appeal is final. Cal Rules of Ct 8.552(b).

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§24.59 D. Responding to Request for Transfer

The party opposing transfer should file and serve an answer to the petition within 20 calendar days after the filing of the petition. Cal Rules of Ct 8.552(d). The answer should be in the same format as the petition. Cal Rules of Ct 8.552(d).

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§24.60 VII. SANCTIONS FOR FRIVOLOUS WRIT PETITIONS

Under CCP §907 the court of appeal may issue sanctions on appeal when appeal is "frivolous or taken solely for delay." See *Lawrence v Superior Court* (1988) 206 CA3d 611, 619, 253 CR 748 (CCP §907 is made applicable to writ petitions by CCP §1109). Section 907 does not act as a limitation; rather, appellate courts have "inherent authority to impose sanctions." *Bryan v Bank of America* (2001) 86 CA4th 185, 188, 103 CR2d 148. Thus, in writ proceedings, sanctions may also be imposed for "any other unreasonable violation of" the California Rules of Court. Cal Rules of Ct 8.492(a)(2). See also Cal Rules of Ct 8.276 (specifying grounds for sanctions in appeal proceedings).

PRACTICE TIP: Appellate proceedings are more deliberate than those in fast-paced trial courts, in which conflicts over discovery, motions, and trial practice can become heated. Thus the issue of sanctions arises far less frequently in the appellate courts. An appellate court litigant should think carefully before seeking sanctions, and normally is better served by focusing on the merits. Counsel should keep in mind that, if the appellate court concludes that conduct is sanctionable, it has the power to award sanctions on its own motion. Cal Rules of Ct 8.492(a).

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§24.61 A. Against Party or Attorney

The court may award sanctions against a party or an attorney. Cal Rules of Ct 8.492(a).

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§24.62 B. Procedure for Obtaining Sanctions

A party who believes that another party or attorney has committed a sanctionable act (see §24.60) may file a motion seeking sanctions. Cal Rules of Ct 8.492(a). If a party files a sanctions motion, the court will do one of the following (Cal Rules of Ct 8.492(b)-(c)):

- Deny the motion; or
- Send a notice to the party against whom sanctions are sought indicating that the court is considering imposing sanctions and giving that party 10 days to file opposition.

A party may *not* file opposition to the sanctions motion until the court sends notice, and the court will not consider the failure to file opposition as consent to sanctions. Cal Rules of Ct 8.492(c). The court usually will hear oral argument on the sanctions motion with oral argument on the merits of the writ petition. Cal Rules of Ct 8.492(d). If the court imposes sanctions, it will provide counsel with a written statement of reasons for the penalty. See *Marriage of Flaherty* (1982) 31 C3d 637, 654, 183 CR 508 (given due process mandates, court imposing sanctions should provide attorney with written statement of reasons for penalty).

PRACTICE TIP: An appellate court litigant should think carefully before filing a motion seeking sanctions and make certain that the grounds for sanctions are well supported. It usually is sounder practice to forego a sanctions motion and simply accept winning on the merits.

An appellate court may impose sanctions on its own motion, although before doing so, it must give the party against whom sanctions are sought an opportunity to file opposition. Cal Rules of Ct 8.492(a)-(c).

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C. Types of Sanctions

§24.63 1. Striking Pleading

A party requesting sanctions may ask the court to strike the opposing party's petition or pleading. See *Berger v Godden* (1985) 163 CA3d 1113, 1119, 210 CR 109 (court of appeal struck brief and dismissed appeal after failure to comply with court rules in significant, rather than merely technical, ways).

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Source: Civil Litigation/California Civil Writ Practice/24 Action by Court of Appeal After Issuance of Palma Notice, Alternative Writ, or Order to Show Cause/§24.64 2. Award or Denial of Costs

§24.64 2. Award or Denial of Costs

The court may sanction a party by awarding or denying costs under Cal Rules of Ct 8.493. Cal Rules of Ct 8.492(a).

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§24.65 3. Attorney Fees or Damages

The court may impose as a sanction attorney fees or damages. See *Los Angeles Dep't of Children & Family Servs. v Superior Court* (1995) 37 CA4th 439, 457, 43 CR2d 757 (sanction of $1000 for filing frivolous writ petition); *Manzetti v Superior Court* (1993) 21 CA4th 373, 381, 25 CR2d 857 (sanction of $1500 for filing second writ petition following summary denial of prior identical petition); *Coast Sav. & Loan Ass'n v Black* (1986) 187 CA3d 1494, 1500, 232 CR 483 (petitioners fined $10,000 in writ of supersedeas proceeding); *Gottlieb v Superior Court* (1991) 232 CA3d 804, 813, 283 CR 771 (sanction of $5000 for refiling petition with intent to delay). But see *Jones v Superior Court* (1994) 26 CA4th 92, 102, 31 CR2d 264 (court declined to impose sanctions, finding that petition was not filed solely for purpose of delay).

NOTE: Although most of the cases cited above rely on CCP §907 (court may add to costs on appeal "such damages as may be just" when appeal is frivolous or taken solely for delay) in imposing sanctions, they provide support for the same type of sanctions under Cal Rules of Ct 8.492. *Lawrence v Superior Court* (1988) 206 CA3d 611, 619, 253 CR 748 (CCP §907 is made applicable to writ petitions by CCP §1109).

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25

Review of Court of Appeal's Action on Writ Petition

H. Thomas Watson

I. SCOPE OF CHAPTER §25.1

II. POSSIBLE COURT OF APPEAL ACTIONS ON WRIT PETITIONS §25.2

III. WHEN TO SEEK RELIEF FROM A COURT OF APPEAL'S ACTION ON A WRIT PETITION §25.3
- A. Importance of Finality of Court of Appeal's Action §25.4
- B. When Court of Appeal's Action Becomes Final
  - 1. Summary Denial Final Immediately §25.5
  - 2. Decision on Merits Final After 30 Days §25.6
    - a. 30-Day Period May Be Shortened by Court §25.7
    - b. 30-Day Period Shortened When It Ends on Day Court Closed §25.8
  - 3. Postdecision Actions That May Affect Finality Date
    - a. Modification of Decision §25.9
    - b. Publication of Decision §25.10

IV. HOW TO CHALLENGE COURT OF APPEAL ACTION ON WRIT PETITION §25.11
- A. Motion to Discharge Alternative Writ or Order to Show Cause §25.12
  - 1. Alternative Writ or Order to Show Cause Generally Creates "Cause" §25.13
  - 2. Alternative Writ or Order to Show Cause May Be Discharged §25.14
- B. Modification of Court of Appeal Decision §25.15
- C. Petition for Rehearing in the Court of Appeal §25.16
  - 1. Grounds for Rehearing §25.17
  - 2. Standing to Seek Rehearing §25.18
  - 3. Time Limits for Seeking Rehearing §25.19
  - 4. Petition for Rehearing
    - a. Contents of Petition for Rehearing §25.20
    - b. Format of Petition for Rehearing §25.21
  - 5. Answer to Petition for Rehearing §25.22
  - 6. Chart: Rehearing in Court of Appeal §25.23
  - 7. Action by Court of Appeal on Petition for Rehearing
    - a. Denial and Denial by Operation of Law §25.24
    - b. Granting Rehearing §25.25
- D. Petition for Review by the California Supreme Court §25.26
  - 1. Petitions for Review Rarely Granted §25.27
    - a. Same or Similar Issue in Pending Case Before Court §25.28
    - b. Review Sought to Exhaust State Court Remedies §25.29
  - 2. Petitions for Review Only Means of Challenging Summary Denial Order §25.30
- E. Petition for Certiorari by the United States Supreme Court §25.31

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§25.1 I. SCOPE OF CHAPTER

This chapter discusses how to challenge an appellate court's action on a writ petition. It begins with a brief discussion of the types of actions an appellate court can take on a writ petition because the action taken dictates the options for seeking relief. See §25.2. The chapter next explains the timing for seeking relief from a court of appeal's action on a writ petition, and includes a discussion of when a court of appeal's decision becomes final for purposes of seeking review by the California Supreme Court. See §§25.3-25.10.

The chapter then covers the various procedures for seeking relief from a court of appeal's action on a writ petition (see §25.11), including a motion to discharge an alternative writ or order to show cause (see §§25.12-25.14), a petition for modification of the court of appeal's decision (see §25.15), a petition for rehearing by the court of appeal (see §§25.16-25.25), a petition for review by the California Supreme Court (see §§25.26-25.30), and a petition for certiorari by the U.S. Supreme Court (see §25.31).

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§25.2 II. POSSIBLE COURT OF APPEAL ACTIONS ON WRIT PETITIONS

A court of appeal may take the following actions on a writ petition:

- Summarily deny the writ petition (see §§22.14-22.17, 24.3);
- Issue a peremptory writ in the first instance without issuing an alternative writ or order to show cause (see *Alexander v Superior Court* (1993) 5 C4th 1218, 1222, 23 CR2d 397 (*Palma* relief appropriate only when petitioner's right to relief is obvious or unusual urgency justifies expediting writ disposition process), disapproved in part on other grounds in *Hassan v Mercy Am. River Hosp.* (2003) 31 C4th 709, 724 n4, 3 CR3d 623; *Palma v U.S. Indus. Fasteners, Inc.* (1984) 36 C3d 171, 177, 203 CR 626 (on "*Palma*" notice see §§22.18-22.22, 24.4); or
- Issue an alternative writ or order to show cause (see §§22.23-22.29), followed by:
- An order discharging the alternative writ as improvidently granted and denying the writ petition (see §24.6); or
- A decision on the merits granting or denying the petition (see §24.15).

The appellate courts summarily deny most writ petitions. See §22.15. If the court of appeal does not summarily deny the petition, it is more likely to issue an alternative writ than a *Palma* notice. See *Ng v Superior Court* (1992) 4 C4th 29, 35, 13 CR2d 856 (cautioning that expedited *Palma* procedure should be used only when there is clear right to relief or unusual time pressures); §§22.19, 24.4.

The procedure for challenging the court of appeal's action depends on what action the court takes. See §25.11. On the types of action a court of appeal may take on a writ petition, see §§22.9-22.29.

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§25.3 III. WHEN TO SEEK RELIEF FROM A COURT OF APPEAL'S ACTION ON A WRIT PETITION

Until a court of appeal's action on a writ petition becomes final as to that court, an aggrieved party may seek relief directly from the appellate court.

Once the court of appeal's action becomes final, that court no longer has jurisdiction over the matter, and the period for seeking review by the California Supreme Court begins to run. See §25.4. The time period for seeking review differs depending on whether the court of appeal summarily denies the petition (see §25.5) or issues a decision on the merits (see §§25.6-25.8). If the court of appeal modifies its decision or grants rehearing, that also affects the time for seeking review. See §25.9.

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§25.4 A. Importance of Finality of Court of Appeal's Action

Determining when a court of appeal's action on a writ petition becomes final is crucially important for a party seeking review by the California Supreme Court. Finality terminates the court of appeal's jurisdiction to change or modify its order or decision, and triggers the period during which the aggrieved party may file a petition for review by the supreme court. Cal Rules of Ct 8.264(c)(1), 8.268(a). See §§25.15-25.25.

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B. When Court of Appeal's Action Becomes Final

§25.5 1. Summary Denial Final Immediately

If the court of appeal summarily denies a writ petition, its denial order is final immediately. Cal Rules of Ct 8.490(b)(1). Thus, the date of finality of a summary denial is the date the appellate court issues its order. See Cal Rules of Ct 8.264(a)(1), 8.490(b)(1). On supreme court review of summary denials, see §25.30. See also §§22.14-22.17.

PRACTICE TIP: As explained in §22.16, some denial orders include a brief explanation or cite authority and thus are sometimes referred to as not-so-summary denial orders. However, the appellate courts will almost certainly treat such an order as a summary denial. Thus, counsel should treat a not-so-summary denial like any other summary denial. In contrast, if the court of appeal heard oral argument before issuing an explanatory denial order, that may change the analysis and make the order final 30 days after issuance. See *Bay Dev., Ltd. v Superior Court* (1990) 50 C3d 1012, 1024, 269 CR 720 (immediate finality applies only to summary denials, not to cases in which appellate court, without first issuing either alternative writ or order to show cause, hears oral argument and files written opinion denying writ relief).

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§25.6 2. Decision on Merits Final After 30 Days

A court of appeal's written decision on the merits of a writ petition (after issuing an alternative writ, order to show cause, or notice under *Palma v U.S. Indus. Fasteners, Inc.* (1984) 36 C3d 171, 177, 203 CR 626) is usually final as to that court 30 calendar days after filing. Cal Rules of Ct 8.490(b)(2).

NOTE: The finality of a court of appeal's decision may be affected by a grant of rehearing, an order modifying the substance of the opinion, or an order certifying an unpublished decision for publication (in whole or in part). See Cal Rules of Ct 8.264(b)(3), (c)(2), 8.268(d); §§25.9-25.10, 25.25.

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§25.7 a. 30-Day Period May Be Shortened by Court

The court of appeal has discretion to shorten the time for finality of a decision (1) granting a writ or (2) denying a writ after issuance of an alternative writ or order to show cause. Cal Rules of Ct 8.490(b)(3). The court can do so if early finality is necessary to prevent mootness or to prevent frustration of the relief granted, or is otherwise necessary in the interests of justice. Cal Rules of Ct 8.490(b)(3); *Palma v U.S. Indus. Fasteners, Inc.* (1984) 36 C3d 171, 180, 203 CR 626. See *Freedman v Superior Court* (2008) 166 CA4th 198, 208, 82 CR3d 563 (decision final in 10 days in interests of justice); *Amanda H. v Superior Court* (2008) 166 CA4th 1340, 1348, 83 CR3d 229 (decision final immediately); *Woo v Superior Court* (2000) 83 CA4th 967, 979, 100 CR2d 156 (decision final after 7 days "to prevent frustration of the relief granted"); *Kennedy/Jenks Consultants, Inc. v Superior Court* (2000) 80 CA4th 948, 965, 95 CR2d 817 (decision final after 5 days to prevent delay of proceedings below). Thus, even a decision on the merits may be final immediately if the court of appeal determines it is necessary, as provided for by the rules of court.

If the court of appeal shortens the period for finality, that will affect the time a party has to petition for review, because a petition must be filed within 10 days after the court of appeal's decision is final as to that court. Cal Rules of Ct 8.500(e)(1). See *Ng v Superior Court* (1992) 4 C4th 29, 33, 13 CR2d 856. See also §§25.26-25.30 on filing petition for review in supreme court.

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§25.8 b. 30-Day Period Shortened When It Ends on Day Court Closed

The 30-day finality period generally applicable to a decision on the merits is not extended if the 30th day falls on a Saturday, Sunday, holiday, or any other day that the clerk's office is closed. Cal Rules of Ct 8.500(e)(1). Thus, if the 30th day after the decision is filed falls on a day that the clerk's office is closed, the court of appeal's jurisdiction is not extended to the following court day. If the court of appeal intends to act on the matter, then it must do so before that court-closed day, which effectively shortens the 30-day period. Cal Rules of Ct 8.500(e)(1); see CCP §12a.

On treating any day that a court is authorized to be closed because of the state's fiscal crisis (*i.e.*, a "furlough day") as a holiday, see Govt C §68106(b)(1) (inoperative as of July 1, 2010, and repealed as of January 1, 2011, unless legislation deletes or extends those dates).

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3. Postdecision Actions That May Affect Finality Date

§25.9 a. Modification of Decision

If the court of appeal modifies its decision on the merits of a writ petition, that may affect the date of finality. Cal Rules of Ct 8.264(c)(1).

If the modification *does not change* the judgment (*i.e.,* the modification is only as to analysis or style and does not alter the substance of the court's disposition), the modification does not affect the date of finality, which still runs from the original filing date of the decision. If the modification order *changes* the judgment (*i.e.*, alters the substance of the court's disposition), the period for finality begins to run anew from the date the modification order is filed. Cal Rules of Ct 8.264(c)(2).

An order modifying the merits of a decision must specify whether it effects a change in the judgment and thus changes the time for finality. Cal Rules of Ct 8.264(c)(2). See §25.15 on modification of appellate decision.

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§25.10 b. Publication of Decision

The appellate courts do not publish the vast majority of orders and decisions. A court may, on its own or at the request of a party, decide to publish a decision not previously published. Cal Rules of Ct 8.1105(b), 8.1120. The court must take such action before its decision becomes final. Cal Rules of Ct 8.1120(b). If the court certifies a formerly unpublished opinion for either partial or total publication, the finality period runs anew from the date of the publication order. Cal Rules of Ct 8.264(b)(3).

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§25.11 IV. HOW TO CHALLENGE COURT OF APPEAL ACTION ON WRIT PETITION

The procedure for challenging a court of appeal's action on a writ petition depends on the action taken by the appellate court. See §25.2 on possible actions by the court of appeal.

When the court of appeal summarily denies a writ petition, the only means of challenging the action is a petition for review by the California Supreme Court. See §25.26; chap 27. When the court of appeal issues an alternative writ or order to show cause (OSC), the respondent or real party in interest can move to discharge the alternative writ or OSC. See §§25.12-25.14.

When the appellate court issues a decision on the merits, either granting the petition and issuing a peremptory writ (following the issuance of an alternative writ/OSC or a *Palma* notice) or denying the petition, the losing party can:

- Seek modification of the decision (see §25.15);
- File a petition for rehearing by the court of appeal (see §§25.16-25.25);
- File a petition for review by the supreme court (see §§25.26-25.30); or
- Some combination of the above.

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§25.12 A. Motion to Discharge Alternative Writ or Order to Show Cause

An appellate court issues an alternative writ or order to show cause (OSC) when it wants to give serious attention to the petition and wants more than preliminary opposition. On preliminary opposition, see chap 21. On alternative writs and OSCs, see §§22.23-22.29. Issuance of an alternative writ may indicate that the court has decided the petitioner has no other adequate remedy at law. *Langford v Superior Court* (1987) 43 C3d 21, 28, 233 CR 387. An alternative writ is not a determination of the substantive sufficiency of the petition.

PRACTICE TIP: If the real party in interest or respondent believes that it made a strong case against issuance of an alternative writ/OSC in its preliminary opposition (see chap 21), or if subsequent events call into question the continued propriety of an alternative writ/OSC, the real party in interest or respondent should consider moving to discharge the alternative writ/OSC as improvidently granted and for summary denial of the petition. See Cal Rules of Ct 8.54, 8.57 (governing motions in courts of appeal).

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§25.13 1. Alternative Writ or Order to Show Cause Generally Creates "Cause"

Generally, the issuance of an alternative writ or order to show cause makes the writ proceeding a "cause" that the court of appeal must decide on the merits by written opinion after oral argument. See *Lewis v Superior Court* (1999) 19 C4th 1232, 1241, 82 CR2d 85 (unless court summarily denies petition or respondent performs act specified in alternative writ, matter becomes "cause" to be decided on merits); *Kowis v Howard* (1992) 3 C4th 888, 894, 12 CR2d 728 (court of appeal did not decide "cause" when it denied petition with brief explanation and did not issue alternative writ). See §22.17.

If the court of appeal makes a writ proceeding a "cause," its written decision on the merits establishes law of the case, which is controlling in further proceedings in the trial court and any later appeal from a final judgment. 3 C4th at 893. On law of the case, see §22.17.

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§25.14 2. Alternative Writ or Order to Show Cause May Be Discharged

After issuing an alternative writ or order to show cause (OSC) and making a writ proceeding a "cause" (see §22.17), the court of appeal can change its mind and discharge the alternative writ/OSC and deny the petition. Generally, real party in interest (and in rare instances the respondent) will have filed preliminary opposition pointing out any obvious deficiencies in the petition. See chap 21. Presumably, then, the court's issuance of an alternative writ/OSC indicates that the court has concluded the petition is facially sufficient. Sometimes, however, points can be overlooked. If the real party in interest or respondent believes that the court of appeal has inadvertently missed a critical point made in the preliminary opposition, the real party in interest or respondent should consider filing a motion to discharge the alternative writ/OSC as improvidently granted.

PRACTICE TIP: This should be a very rare occurrence; the courts of appeal will not look kindly on a motion to discharge that is a recycled version of the preliminary opposition.

Occasionally, new information comes to light indicating that writ relief cannot or should not be granted. The real party in interest or respondent can bring this information to the attention of the court through a motion to discharge the alternative writ/OSC and deny the petition. See *Countrywide Home Loans, Inc. v Superior Court* (1997) 54 CA4th 828, 829, 62 CR2d 899 (court discharged alternative writ as improvidently issued based on new evidence supplied by real party in interest that, had it been disclosed in petition, would have caused court not to issue alternative writ).

Sometimes, after the court begins working on the matter, it concludes that writ relief cannot or should not be granted. The court, on its own motion, can discharge the alternative writ/OSC as improvidently granted and deny the petition. See *People ex rel. Lynch v Superior Court* (1970) 1 C3d 910, 912, 83 CR 670 (supreme court discharged OSC as improvidently issued after determining attorney general requested an improper advisory opinion); *Krueger v Superior Court* (1979) 89 CA3d 934, 937, 152 CR 870 (court of appeal discharged alternative writ issued under supreme court order because petition procedurally defective); *Star Motor Imports, Inc. v Superior Court* (1979) 88 CA3d 201, 203, 151 CR 721 (court of appeal found alternative writ improvidently granted because writ application was fatally defective).

PRACTICE TIP: Although the rules permit a party to seek supreme court review of an interlocutory court of appeal order issuing an alternative writ or OSC (see Cal Rules of Ct 8.500(a)(1)), it is difficult to conceive of any reason why the supreme court would ever grant review of such an order rather than wait for the final decision by the court of appeal. See Cal Rules of Ct 8.500(b).

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Source: Civil Litigation/California Civil Writ Practice/25 Review of Court of Appeal's Action on Writ Petition/§25.15 B. Modification of Court of Appeal Decision

§25.15 B. Modification of Court of Appeal Decision

A party dissatisfied with a court of appeal's decision on the merits can seek modification of the decision. Cal Rules of Ct 8.264(c). Generally, an aggrieved party seeks modification to clarify the court's decision. If a party wants the court to change its decision, the more commonly used procedure is a petition for rehearing. See §§25.16-25.25.

A party can request modification in one of two ways:

- In conjunction with a petition for rehearing (see §25.16-25.25); or
- By letter filed with the court and served on opposing parties.

PRACTICE TIP: Check with the appellate court clerk's office for any special requirements for a modification request.

A party must make a request for modification before the court of appeal's decision becomes final as to that court. Cal Rules of Ct 8.264(c)(1). The court must state in a modification order whether the modification changes the judgment of the court and thus restarts the period for finality. Cal Rules of Ct 8.264(c)(2).

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§25.16 C. Petition for Rehearing in the Court of Appeal

The most common means of challenging a court of appeal's decision on the merits in the issuing court is a petition for rehearing. See Cal Rules of Ct 8.268. The losing party should file a petition for rehearing if it believes that the court of appeal's opinion misstates or omits pertinent facts or issues.

PRACTICE TIP: If grounds for rehearing exist, the proper protocol is to petition the court of appeal for rehearing before seeking review by the supreme court.

A petition for rehearing is not an express prerequisite for a petition for review by the supreme court. See Cal Rules of Ct 8.500(c)(1)-(2). The supreme court, however, accepts the court of appeal's statement of the issues and facts unless the petitioning party has raised alleged omissions or misstatements in the appellate court's decision on a petition for rehearing. See Cal Rules of Ct 8.500(c)(2).

PRACTICE TIP: Accordingly, a party seeking review by the supreme court may be well advised to file a petition for rehearing in the court of appeal first.

The court of appeal may order a rehearing on petition of a party or on its own motion, until the court of appeal's decision is final as to that court. Cal Rules of Ct 8.268(a)(1). On when a decision is final, see §§25.5-25.10.

NOTE: Rehearing is not available to challenge a summary denial, because such orders are immediately final. See §25.5.

On rehearing in the court of appeal, see §11.34; California Civil Appellate Practice, chap 19 (3d ed CEB 1996).

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§25.17 1. Grounds for Rehearing

Rehearing is appropriate if:

- The decision misstates or omits material facts or issues. See Cal Rules of Ct 8.500(c)(2).
- The decision decides an issue that the parties have not briefed. Govt C §68081; see *California Cas. Ins. Co. v Appellate Dept.* (1996) 46 CA4th 1145, 1147, 54 CR2d 118 (court of appeal issued writ of mandate directing appellate division of superior court to grant rehearing to allow parties to brief new issue).
- There is a procedural defect in the appellate process (*e.g.*, a different panel of justices signed the opinion than heard oral argument, or the court failed to give counsel notice of oral argument). See *Moles v Regents of Univ. of Cal.* (1982) 32 C3d 867, 187 CR 557 (change in panel composition after oral argument but before decision necessitated reargument and decision).
- The decision requires modification to, *e.g.,* correct a clerical error; clarify the directions to the trial court; or explain or eliminate confusing, unnecessary, or potentially troublesome dicta. See *Leamon v Krajkiewcz* (2003) 107 CA4th 424, 434, 132 CR2d 362 (petition for rehearing denied and opinion modified to clarify issues raised in rehearing request); *Consaul v City of San Diego* (1992) 6 CA4th 1781, 1813 n12, 8 CR2d 762 (dissenting opinion of Nares, J; petition for rehearing granted to consider objections to court's opinion); *No Oil, Inc. v Occidental Petroleum Corp.* (1975) 50 CA3d 8, 24, 123 CR 589 (court of appeal noted addition of footnote to supreme court's opinion in response to petition for rehearing).

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§25.18 2. Standing to Seek Rehearing

Any party who had notice and an opportunity to be heard (*i.e.,* the petitioner, respondent, and all real parties in interest) has standing to seek rehearing. See Cal Rules of Ct 8.268. Although Rule 8.268 only refers to parties as having standing to file a petition for rehearing, persons or entities that already have appeared in the writ proceeding as amicus curiae also may have standing to seek rehearing. (Alternatively, amicus can file a petition suggesting that the court grant rehearing on its own motion under Rule 8.268). See *New York Life Ins. Co. v Bank of Italy* (1923) 60 CA 602, 607, 214 P 61 (court permitted amicus curiae to seek rehearing following opinion on appeal), disapproved on other grounds in *In re Marriage of Saslow* (1985) 40 C3d 848, 861, 221 CR 546. See also *Le Francois v Goel* (2005) 35 C4th 1094, 1107, 29 CR3d 249 (party can suggest court reconsider its ruling on its own motion after deadline for moving for reconsideration has past). Other nonparties, such as a person or entity who could have appeared earlier as an amicus but did not, may seek leave to file an amicus petition for rehearing, or to suggest that the court of appeal grant rehearing on its own motion.

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§25.19 3. Time Limits for Seeking Rehearing

Petitions for rehearing in the courts of appeal must be served and filed within 15 calendar days after the filing of one of the following documents (Cal Rules of Ct 8.268(b)(1); see Cal Rules of Ct 1.10):

- The court of appeal's decision;
- An order modifying the judgment;
- An order publishing in whole or in part an unpublished decision; or
- A consent to an increase or decrease in the judgment amount under Cal Rules of Ct 8.264(d).

Before the court of appeal's decision is final and for good cause, the presiding judge may relieve a party from a failure to file a timely petition. Cal Rules of Ct 8.268(b)(4).

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4. Petition for Rehearing

§25.20 a. Contents of Petition for Rehearing

A petition for rehearing in the court of appeal should set out clearly and concisely why the court should rehear the matter. The petition usually should seek rehearing on one or more of the grounds discussed in §25.17.

It is generally unproductive to ask the appellate court to reconsider the same arguments and authorities it already has rejected. In addition, the court of appeal will usually not consider new arguments and authorities raised for the first time in a petition for rehearing. Jurisdictional issues, however, may be raised at any time, including for the first time in a petition for rehearing. *People v Silva* (1995) 36 CA4th 231, 235, 43 CR2d 8 (court's lack of jurisdiction to act is not waived and can be raised at any time).

If the court certified the challenged decision for publication, the challenging party may also, alternatively, ask that the opinion be depublished.

PRACTICE TIP: Counsel may seek depublication in a petition for rehearing, but it is inappropriate to ask the court of appeal to publish its opinion in a rehearing petition. Publication requests must be made by separate letter to the court of appeal within 20 days after the opinion is filed, explaining why the opinion meets the criteria for publication. Cal Rules of Ct 8.1120(a).

JUDICIAL PERSPECTIVE: Counsel does not aid his or her client's cause by telling the court of appeal that it is stupid and/or biased. Unfortunately, that is the tone of many petitions for rehearing. The appellate court, of course, has the last word and will deny petitions that are insulting, offensive, and rude.

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§25.21 b. Format of Petition for Rehearing

The format of a petition for rehearing and any answer is generally the same as for any other appellate brief. Cal Rules of Ct 8.204(b), 8.268(b)(3). See §§18.5-18.20; California Civil Appellate Practice, chap 12 (3d ed Cal CEB 1996).

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§25.22 5. Answer to Petition for Rehearing

The opposing party may not file an answer to a petition for rehearing unless the court of appeal requests one, and then it must be filed within 8 calendar days after the order is filed, unless the court orders otherwise. Cal Rules of Ct 8.268(b)(2). Normally, the appellate court will not grant a petition for rehearing unless it has requested an answer. Cal Rules of Ct 8.268(b)(2). Before the decision is final and for good cause, the presiding judge may relieve a party from a failure to file a timely answer. Cal Rules of Ct 8.268(b)(4).

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§25.23 6. Chart: Rehearing in Court of Appeal

Document	*Deadline*	*Copies*	*Color of Cover*
Petition for rehearing filed by dissatisfied party.	15 calendar days after the decision is filed. Cal Rules of Ct 8.268(b)(1). See §25.19.	Original plus 4 copies. Cal Rules of Ct 8.44(b)(3).	Orange. Cal Rules of Ct 8.40(b)(1).
Answer filed by opposing party.	If requested by the court, an answer may be filed 8 calendar days after the court's order requesting an answer is filed. Cal Rules of Ct 8.268(b)(2). See §25.19.	Original plus 4 copies. Cal Rules of Ct 8.44(b)(3).	Blue. Cal Rules of Ct 8.40(b)(1).

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7. Action by Court of Appeal on Petition for Rehearing

§25.24 a. Denial and Denial by Operation of Law

The courts of appeal deny the vast majority of petitions for rehearing. Usually, a court issues a denial order before its decision becomes final. If the court takes no action before its decision becomes final, the rehearing petition is deemed denied by operation of law. Cal Rules of Ct 8.268(c).

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§25.25 b. Granting Rehearing

If the court of appeal decides to grant rehearing, it must act before its decision becomes final. Cal Rules of Ct 8.268(a). An order granting rehearing vacates the court's opinion and sets the cause at large. Cal Rules of Ct 8.268(d). Unless the appellate court orders further briefing and argument, it often will order the case resubmitted in the same order that grants rehearing and then file a new opinion within 90 days.

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§25.26 D. Petition for Review by the California Supreme Court

A party can challenge an appellate court's action on a writ petition in the California Supreme Court by filing a petition for review. Cal Rules of Ct 8.500(a)(1); *Superior Court v County of Mendocino* (1996) 13 C4th 45, 52 n5, 51 CR2d 837 (supreme court had jurisdiction to review court of appeal's decision granting petition and issuing writ of mandate). See *Freedman v Superior Court* (2008) 166 CA4th 198, 203, 82 CR3d 563 (supreme court granted petition for review of court of appeal's order denying writ petition and retransferred case to court of appeal with directions to issue order to show cause and decide petition on merits). A party must file the petition for review in the supreme court within 10 calendar days after the court of appeal's decision becomes final. Cal Rules of Ct 8.500(e)(1). On finality, see §§25.5-25.10.

PRACTICE TIP: A petition for review by the supreme court is entirely different from the writ petition filed in the court of appeal. The latter is the operative pleading that initiated the original writ proceeding in the court of appeal. A petition for review asks the supreme court to review the court of appeal's action or decision on the original writ petition. A party may file an original writ petition directly in the supreme court, but this is rarely done and only in extraordinary circumstances; see §§27.2-27.11.

For an example of a petition for review, see form in §28.16. On the grounds and procedures for filing a petition for review in the supreme court, as well as possible dispositions of such petitions, see §§27.12-27.33; California Civil Appellate Practice, chap 22 (3d ed CEB 1996).

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§25.27 1. Petitions for Review Rarely Granted

The California Supreme Court summarily denies most petitions for review. Review generally is proper only when necessary to resolve conflicts between the courts of appeal or to settle an important issue of widespread public importance. Cal Rules of Ct 8.500(b)(1). Thus, petitions for review should emphasize one or both of the following (Cal Rules of Ct 8.500(b)(1)):

- Review is needed to resolve a conflict in decisions by the courts of appeal; and
- Review is needed to decide an important legal question that has wide application.

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§25.28 a. Same or Similar Issue in Pending Case Before Court

Sometimes the supreme court has already granted review in another case presenting the same (or similar) issue raised in the writ proceeding. A petitioner should highlight this circumstance in a petition for review and, alternatively, ask the court to grant review and hold the case until it decides the pending case (called a "grant and hold"). See Cal Rules of Ct 8.512(d)(2).

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§25.29 b. Review Sought to Exhaust State Court Remedies

Seeking review in the California Supreme Court is a prerequisite to petitioning the U.S. Supreme Court for a writ of certiorari. See §25.31. Parties planning to seek certiorari of an issue already settled by the California Supreme Court should explain that they are seeking review merely to exhaust state court remedies. See 28 USC §1257(a); *Banks v California* (1969) 395 US 708, 23 L Ed 2d 653, 89 S Ct 1901 (U.S. Supreme Court lacked jurisdiction under 28 USC §1257 to review California court of appeal's judgment because petitioner had not asked California Supreme Court to review judgment first). See also Cal Rules of Ct 8.508 (petition for review to exhaust state remedies in criminal cases).

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§25.30 2. Petitions for Review Only Means of Challenging Summary Denial Order

For all practical purposes, the sole means of challenging a court of appeal's summary denial of a writ petition is a petition for review by the California Supreme Court. See *Hagan v Superior Court* (1962) 57 C2d 767, 769, 22 CR 206.

PRACTICE TIP: In rare situations, relief also may be available by filing a new petition for writ relief in the court of appeal or directly in the California Supreme Court. An aggrieved party should do so only when "unusual or changed circumstances" exist, such as the publication of a new decision by the supreme court addressing the issue presented in the writ petition. See *Hagan v Superior Court*, *supra*.

An aggrieved party must file a petition for review by the supreme court within 10 calendar days after the court of appeal files its summary denial order (*i.e.*, 10 days after the denial order is final in the court of appeal). Cal Rules of Ct 8.490(b), 8.500(e)(1). This 10-day deadline applies even when the summary denial order includes reasons and/or cites to authority that counsel may need to research and analyze. Because this deadline is so short and summary denial orders are so common, counsel should seek the client's authorization regarding a petition for review *before* the court of appeal rules on the writ petition.

PRACTICE TIP: All petitions for review must explain why the case satisfies the Cal Rules of Ct 8.500(b)(1) criteria. Even when it is marginal whether these criteria are met (see §§25.13, 27.27), however, the supreme court may still grant review and transfer the matter back to the court of appeal for further proceedings. Cal Rules of Ct 8.500(b)(4). Thus, a party may seek review even when the court of appeal summarily denies a writ petition addressing a settled area of law that affects only the parties to the litigation. Under such circumstances, counsel, in addition to requesting a grant and transfer, may consider arguing that the supreme court should review the case to provide better guidance to the court of appeal regarding when it should grant writ relief from clear trial court error.

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§25.31 E. Petition for Certiorari by the United States Supreme Court

If a federal question is presented, a party challenging a decision in a writ proceeding may seek certiorari by the U.S. Supreme Court after exhausting all state court appellate remedies. See 28 USC §1257(a); *Bandini Petroleum Co. v Superior Court* (1931) 284 US 8, 13, 76 L Ed 136, 52 S Ct 103 (reaching merits of writ petition after California Court of Appeal denied writ relief and California Supreme Court denied review); *Rescue Army v Municipal Court* (1947) 331 US 549, 552, 91 L Ed 1666, 67 S Ct 1409 (reaching merits of writ petition after California Supreme Court denied relief).

PRACTICE TIP: The U.S. Supreme Court rarely grants certiorari petitions; it is most likely to grant a petition to resolve a split of authority on an important issue of federal law.

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26

Petition for Writ of Supersedeas

Jeremy B. Rosen

I. SCOPE OF CHAPTER §26.1

II. WRIT OF SUPERSEDEAS DEFINED
- A. What Is a Writ of Supersedeas? §26.2
- B. When to Seek Supersedeas Relief §26.3
- C. The Likelihood of Supersedeas Relief §26.4

III. SUPERSEDEAS RELIEF IF TRIAL COURT OR OPPONENT ACTS IN VIOLATION OF STATUTORY STAY PROVISIONS §26.5
- A. Matters Automatically Stayed by Filing Appeal §26.6
  - 1. When Matter Is Embraced in or Affected by Judgment or Order §26.7
  - 2. Examples of Matters Embraced in or Affected by Judgment or Order §26.8
  - 3. Mandatory Injunctions Stayed by Filing Appeal §26.9
  - 4. Mandamus Judgments Stayed by Filing Appeal §26.10
- B. Matters Not Stayed by Filing Notice of Appeal
  - 1. Chart: Judgments and Orders Subject to CCP §§917.1-917.9 §26.11
  - 2. Money Judgments for Which Undertaking (Bond) Is Posted Under CCP §917.1 §26.12
  - 3. Other Judgments and Orders Stayed on Filing Undertaking (Bond) Under CCP §917.9 §26.13
- C. Collateral Matters Are Not Stayed by Filing Appeal §26.14
  - 1. When Matter Is Collateral §26.15
  - 2. Examples of Collateral Matters Appeal §26.16

IV. SUPERSEDEAS RELIEF IN APPELLATE COURT'S INHERENT DISCRETION
- A. Appellate Court's Inherent Power to Grant Supersedeas Relief §26.17
- B. Factors Bearing on Discretionary Supersedeas Relief §26.18
- C. Situations in Which Discretionary Supersedeas May Be Appropriate
  - 1. Appeal From Unbonded Money Judgment §26.19
  - 2. When Judgment or Order Is Subject to CCP §§917.1-917.9 and Appellant Has Not Complied With Conditions for Stay §26.20
  - 3. Prohibitory Injunctions §26.21

V. HOW TO PETITION FOR AND OPPOSE THE ISSUANCE OF A WRIT OF SUPERSEDEAS
- A. Petition for Writ of Supersedeas
  - 1. Contents of Petition
    - a. General Requirements §26.22
    - b. Contents if Record on Appeal Has Not Yet Been Filed §26.23
    - c. Documents Filed With Petition §26.24
  - 2. When Requesting Temporary Stay §26.25
  - 3. Format of Petition §26.26
  - 4. Filing and Service of Petition §26.27
- B. Opposition
  - 1. Contents of Opposition §26.28
  - 2. Format of Opposition §26.29
  - 3. Filing and Service of Opposition §26.30

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§26.1 I. SCOPE OF CHAPTER

This chapter focuses on the use of supersedeas in the appellate and supreme courts to stay activity in a lower court during an appeal. This chapter first discusses the definition and uses of a writ of supersedeas. See §§26.2-26.4. The discussion covers the few instances in which the court is likely to grant supersedeas relief (*e.g.*, to prevent a trial court from acting in violation of automatic stay provisions) (§§26.5-26.16) as well as the far more common situation where supersedeas relief is highly discretionary and rarely granted (§§26.17-26.21). The chapter concludes with a discussion of the procedures for requesting and opposing supersedeas relief. See §§26.22-26.30.

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II. WRIT OF SUPERSEDEAS DEFINED

§26.2 A. What Is a Writ of Supersedeas?

A writ of supersedeas stays enforcement of a judgment or order pending appeal. CCP §923; Cal Rules of Ct 8.112; *Sacramento Newspaper Guild v Sacramento County Bd. of Supervisors* (1967) 255 CA2d 51, 62 CR 819. It is "a purely auxiliary writ, serving the sole function of preserving… appellate jurisdiction pending review of the appeal and a ruling on its merits." *Mills v County of Trinity* (1979) 98 CA3d 859, 861, 159 CR 679.

NOTE: Although most commonly filed in the intermediate appellate courts, the California Supreme Court will entertain supersedeas petitions seeking a stay pending high court review. See *Varian Med. Sys., Inc. v Delfino* (2005) 35 C4th 180, 201 n12, 25 CR3d 298.

On the contents, format, filing, and service of petitions for a writ of supersedeas, see §§26.22-26.27. For an example of a petition for writ of supersedeas, see form in §28.18.

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§26.3 B. When to Seek Supersedeas Relief

In some cases, filing a notice of appeal automatically stays enforcement of a judgment or ruling. CCP §916. If the trial court nevertheless allows further proceedings, the appellant should petition the court of appeal for a writ of supersedeas to enforce the automatic stay. See §§26.6-26.10. See, *e.g., Dowling v Zimmerman* (2001) 85 CA4th 1400, 1405 n6, 103 CR2d 174 (writ of supersedeas proper remedy to enforce automatic stay on appeal and prevent enforcement of judgment); *Gallardo v Specialty Restaurants Corp.* (2000) 84 CA4th 463, 467, 100 CR2d 884 (writ of supersedeas proper remedy to prevent execution on cost award).

In other cases, an appeal does not automatically stay enforcement of the challenged judgment or order. CCP §§917.1-917.9. For example, an appellant must post a bond to stay enforcement of a money judgment. CCP §917.1. If an appellant cannot post a bond, or if there is no bond option for obtaining a stay, the appellant can seek supersedeas relief from the appellate court, although supersedeas is rarely granted in this context. See *Leung v Verdugo Hills Hosp.* (2008) 168 CA4th 205, 212, 85 CR3d 203 (denying petition for writ of supersedeas to direct trial court to reduce amount of its appeal bond).

Thus, a petition for a writ of supersedeas always goes hand in hand with an appeal. It is a procedural vehicle within the appellate proceeding itself to secure an order from the appellate court staying further trial court proceedings. Cal Rules of Ct 8.112. Accordingly, a petition for writ of supersedeas bears the same title and appellate court docket number as the appeal. Cal Rules of Ct 8.112(a)(2). This is in contrast to the prerogative writs—mandamus, prohibition, and review (certiorari)—which are separate and independent (*i.e.*, original) proceedings in the appellate courts.

PRACTICE TIP: Code of Civil Procedure §923 empowers the courts of appeal "to stay" proceedings, "to issue a writ of supersedeas," "to suspend, or modify an injunction" or "to make any order" necessary to aid their appellate jurisdiction. The title of a petition for writ of supersedeas does not limit the appellate court's power to grant whatever order it deems proper. Nevertheless, an appellant may wish to title his or her submission as a "Petition for a Writ of Supersedeas or Appropriate Stay Order," and make a similar reference in the prayer for relief. On requesting an immediate, temporary stay pending action on a petition for a writ of supersedeas, see §26.25.

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§26.4 C. The Likelihood of Supersedeas Relief

Unlike petitions for prerogative writs, which the courts of appeal seldom grant (see §17.28), a well-taken petition for a writ of supersedeas may have a somewhat better chance of success. The courts of appeal have a strong interest in protecting their appellate jurisdiction and ensuring that any relief granted on appeal is real and meaningful. In acting on a supersedeas petition, the appellate court is more focused on weighing the relative hardships and potential for irreparable injury than on examining the merits of the case. An appellate court will not grant supersedeas relief, however, if it is not convinced there is a solid basis for the appeal. Cal Rules of Ct 8.112(a)(4). Thus, an appellant must make a significant showing justifying supersedeas relief, particularly when he or she is asking the court to override statutory provisions imposing conditions on a stay, *e.g.*, a bond requirement.

JUDICIAL PERSPECTIVE: As a condition of supersedeas, courts of appeal almost always set a very tight briefing schedule and inform the parties that, absent extraordinary circumstances, they will not grant any extensions.

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§26.5 III. SUPERSEDEAS RELIEF IF TRIAL COURT OR OPPONENT ACTS IN VIOLATION OF STATUTORY STAY PROVISIONS

The courts of appeal likely will grant supersedeas relief to prevent violation of statutory stay provisions. See *Estate of Dabney* (1951) 37 C2d 402, 408, 232 P2d 481 ("writ of supersedeas will issue 'in a corrective capacity' in case of a violation or threatened violation of such stay"); *Nielsen v Stumbos* (1990) 226 CA3d 301, 303, 276 CR 272 (writ of supersedeas proper remedy to prevent execution on portion of trial court's judgment during pendency of appeal). Trial court stays mandated by statute fall into two categories: those that are automatic upon filing an appeal (§§26.6-26.10) and those that require some additional step to perfect (*e.g.*, posting a bond) (§§26.11-26.13).

If a statute mandates a stay, an appellate court does not need to weigh relative hardships, as it would in other contexts. *Estate of Dabney* (1951) 37 C2d 402, 408, 232 P2d 481. Rather, the questions for the court are whether a statutory stay provision applies and whether the action or threatened action by the lower court or opposing party violates that provision.

NOTE: It is not clear what significance the recent amendment to Cal Rules of Ct 8.112(a)(4), requiring that supersedeas petitions demonstrate "substantial issues" on appeal, will have when the issue raised on supersedeas is violation of a statutory stay provision.

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§26.6 A. Matters Automatically Stayed by Filing Appeal

Under CCP §916(a), the perfecting of an appeal automatically stays proceedings in the trial court on all matters "embraced" in or "affected" by the appeal, "including enforcement of the judgment or order," except as provided in CCP §§917.1-917.9 (which provides a substantial list of exceptions). See §26.11. The purpose of CCP §916(a) is "to protect the appellate court's jurisdiction by preserving the status quo until the appeal is decided." *Varian Med. Sys., Inc. v Delfino* (2005) 35 C4th 180, 189, 25 CR3d 298.

The effect of CCP §916(a) is to deprive the trial court of subject matter jurisdiction. Thus the trial court lacks the power to proceed further on any matter "embraced in" or "affected by" the appeal during its pendency. See 35 C4th at 196; *Lerner v Superior Court* (1952) 38 C2d 676, 680, 242 P2d 321 (trial court loses jurisdiction over subject matter of appeal; parties' consent does not reinvest trial court with jurisdiction); *Betz v Pankow* (1993) 16 CA4th 931, 938, 20 CR2d 841 (trial court is "divested" of subject matter jurisdiction over matters embraced in or affected by appeal). A lack of jurisdiction "means an entire absence of power to hear or determine the case." *Abelleira v District Court of Appeal* (1941) 17 C2d 280, 288, 109 P2d 942.

Accordingly, all trial court proceedings conducted in violation of an automatic stay are void and subject to being vacated. *Varian Med. Sys., Inc. v Delfino* (2005) 35 C4th 180, 200, 25 CR3d 298. Enforcement of the automatic stay is therefore in the interest of all parties, as well as in the interests of the trial court and the appellate courts.

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§26.7 1. When Matter Is Embraced in or Affected by Judgment or Order

A matter is "embraced in" or "affected by" a judgment or appealable order when action on the matter would affect the "effectiveness" of the appeal. *Varian Med. Sys., Inc. v Delfino* (2005) 35 C4th 180, 189, 25 CR3d 298. That an action might render the appeal moot does not mean that the action, in and of itself, "affects" the appeal. Something more is needed, *e.g.*, the trial court directly or indirectly seeks to "enforce, vacate or modify" the judgment or order, or the possible outcomes on appeal and the actual or possible results in the trial court are irreconcilable. 35 C4th at 190.

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§26.8 2. Examples of Matters Embraced in or Affected by Judgment or Order

The automatic stay provisions apply in wide variety of contexts, including:

- **Anti-SLAPP motions.** An appeal from the denial of an anti-SLAPP motion under CCP §425.16 automatically stays further trial court action on the merits of the case. *Varian Med. Sys., Inc. v Delfino* (2005) 35 C4th 180, 186, 25 CR3d 298.
- **Motion to vacate spousal support.** An appeal from the denial of a motion to vacate a spousal support order precludes the trial court from terminating its jurisdiction over spousal support because the termination of jurisdiction is irreconcilable with possible outcomes on appeal. See *Marriage of Varner* (1998) 68 CA4th 932, 937, 80 CR2d 628.
- **Judicial foreclosure.** An appeal from an order declaring that plaintiffs take nothing by way of deficiency after a judicial foreclosure precludes the trial court from setting aside the foreclosure, because it would permit the plaintiffs to recover a deficiency judgment notwithstanding the appeal. See *Nelson v Orosco* (1981) 117 CA3d 73, 80, 172 CR 457.
- **Judgment on pleadings.** An appeal from a judgment on the pleadings precludes a trial court from granting leave to amend the complaint, because affirmance of the judgment is irreconcilable with an order granting leave to amend. See *Olson v Superior Court* (1969) 274 CA2d 311, 314, 79 CR 136.

On when an appeal stays a judgment or order, see California Civil Appellate Practice §§6.18-6.20 (3d ed Cal CEB 1996).

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§26.9 3. Mandatory Injunctions Stayed by Filing Appeal

An appeal stays a mandatory (but not a prohibitory) injunction. *Paramount Pictures Corp. v Davis* (1964) 228 CA2d 827, 835, 39 CR 791, citing *Byington v Superior Court* (1939) 14 C2d 68, 92 P2d 896. Whether an injunction is mandatory or prohibitory may be difficult to determine. An order entirely negative or prohibitory in form may actually be mandatory in essence and effect. Alternatively, an injunction may have a dual nature, in which event an appeal will stay operation of the mandatory, but not of the prohibitory, features of the injunction. *Kettenhofen v Superior Court* (1961) 55 C2d 189, 191, 10 CR 356 (portion of injunction ordering removal of fence mandatory and stayed by appeal).

PRACTICE TIP: It can be difficult to determine whether an injunction is mandatory or prohibitory, especially in light of the few cases on the subject. Thus, to persuade the trial court that an appeal will stay the injunction, counsel should define what constitutes the status quo without the injunction, and then demonstrate how the injunction alters the status quo, thus making it mandatory.

To determine whether an injunction is mandatory, consider whether it requires affirmative action and changes the status quo. *Hayworth v City of Oakland* (1982) 129 CA3d 723, 727, 181 CR 214. An injunction alters the status quo if it "contemplates a change in the relative positions or rights of the parties from those existing at the time the injunction is granted or the decree is entered." *Mark v Superior Court* (1900) 129 C 1, 5, 61 P 436. See *Kettenhofen v Superior Court* (1961) 55 C2d 189, 191, 358 P2d 684 (appeal stayed ruling because effect of removal order was to change status quo); *Dosch v King* (1961) 192 CA2d 800, 804, 13 CR 765 (injunction requiring individual to stay away from business he did not own or possess was prohibitory and not stayed by appeal).

PRACTICE TIP: Because an injunction is an immediately appealable order, it may be prudent to file a petition for a writ of supersedeas along with the notice of appeal to ensure that the court preserves the status quo pending appeal.

JUDICIAL PERSPECTIVE: Most courts disregard the language of the injunction when its effect on the status quo is the opposite of that suggested by its form.

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§26.10 4. Mandamus Judgments Stayed by Filing Appeal

An appeal stays a judgment issuing a writ of traditional mandate under CCP §1085. CCP §§916, 1110b; *Hayworth v City of Oakland* (1982) 129 CA3d 723, 727, 181 CR 214, 217. Either the trial or appellate court can order the stay lifted, however, if the petitioner persuades the court it will suffer irreparable injury if the writ is stayed. CCP §1110b.

An appeal also stays a judgment granting a writ of administrative mandamus, unless the court of appeal orders otherwise. CCP §1094.5(g). An appeal from an order denying a petition for administrative mandamus, however, does not stay the effect of the judgment, *i.e.*, it does not stay the challenged administrative decision, unless the court of appeal orders otherwise. CCP §1094.5(g). Thus, on appeal from a judgment denying a writ of administrative mandamus, the appellant must file a petition for a writ of supersedeas to stay the challenged administrative action during the pendency of the appeal.

JUDICIAL PERSPECTIVE: If the trial court has affirmed an administrative order for the suspension or revocation of a license, a licensee's request for supersedeas to stay the suspension or revocation order should be accompanied by a showing that no harm will result to others.

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B. Matters Not Stayed by Filing Notice of Appeal

§26.11 1. Chart: Judgments and Orders Subject to CCP §§917.1-917.9

Filing an appeal alone will not stay judgments and orders falling under CCP §§917.1-917.9. CCP §916. In some cases, the appellant must post an undertaking (bond) set by the trial court. In other cases, the appellant may be able to secure a stay through an order of the trial court. Failing that, the appellant must file a petition for supersedeas. The following chart shows the actions needed to stay judgments and orders subject to CCP §§917.1-917.8.

On orders and judgments under CCP §917.9, see §26.13.

Type of Judgment or Order	***Condition for Obtaining Stay of Enforcement***	***Method for Computing Amount***	***Procedure for Perfecting Stay***	***Procedure for Objecting***
1. Payment of money. CCP §917.1.	Post security.	Set by statute.	File security in statutory amount.	File objections within 10 days; set for hearing.
2. Assignment, sale, or delivery of personal property. CCP §917.2.	Post security.	Fixed by court.	Set motion to fix amount. File security.	Object to amount of security in hearing on motion to fix. Object to sureties by filing objection within 10 days.
3. Execution of instrument. CCP §917.3.	File executed document with court.	N/A	Deposit executed document.	None specified.
4. Sale, conveyance, or delivery of real property. CCP §917.4.	Post security.	Fixed by court.	Set motion to fix amount. File security.	Object to amount of security in hearing on motion to fix. Object to sureties by filing objection within 10 days.
5. Appointment of receiver. CCP §917.5.	Post security.	Fixed by court.	Set motion to fix amount. File security.	Object to amount of security in hearing on

				motion to fix. Object to sureties by filing objection within 10 days.
6. Attachment orders.				
a. Appealable order to attach. CCP §917.65.	Post security.	Fixed by court in right-to-attach order.	File security in amount set by court in right-to-attach order.	File objections within 10 days.
b. Stay to continue attachment after judgment. CCP §921.	Post security.	Set by statute (CCP §921) unless court orders otherwise under CCP §489.410.	File security in statutory amount unless respondent sets hearing under CCP §489.420.	File motion under CCP §489.410 before appeal perfected. File motion under CCP §921 to increase security after appeal perfected. Object to sureties by filing objection.
7. Child custody; exclusion from dwelling. CCP §917.7.	Stayed only by order of trial or appellate court. CCP §917.7.	Not required; may be ordered by court. CCP §917.9.	Motion for stay.	Object to motion for stay.
8. Public office wrongly held. CCP §917.8.	Stayed only by order of trial court. CCP §917.8.	Not required; may be ordered by court. CCP §917.9.	Motion for stay.	Object to motion for stay.
9. Inspection of corporate records. CCP §917.8.	Stayed only by order of trial court. CCP §917.8.	Not required; may be ordered by court. CCP §917.9.	Motion for stay.	Object to motion for stay.
10. Closure or discontinuance of building as public nuisance. CCP §917.8.	Stayed only by order of trial court. CCP §917.8.	Not required; may be ordered by court. CCP §917.9.	Motion for stay.	Object to motion for stay.
11. Remedy	Stayed only	Not	Petition for	Oppose

threatened release of hazardous substances. CCP §917.15.	by order of appellate court.	required; may be ordered by court. CCP §923.	writ of supersedeas in court of appeal.	petition for writ of supersedeas.

On posting an undertaking for a money judgment under CCP §917.1, see §26.12. On taking action regarding judgments and orders covered in this chart, see California Civil Appellate Practice §§6.21-6.84 (3d ed Cal CEB 1996).

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§26.12 2. Money Judgments for Which Undertaking (Bond) Is Posted Under CCP §917.1

If the appellant posts the required undertaking (bond), an appeal stays enforcement of a judgment or order directing the payment of money. CCP §917.1. The undertaking must be for "double the amount of the judgment or order unless given by an admitted surety insurer in which event it shall be for one and one-half times the amount." CCP §917.1(b). See *Leung v Verdugo Hills Hosp.* (2008) 168 CA4th 205, 212, 85 CR3d 203 (§917.1 is "rigidly formulaic"; trial court properly set amount of appeal bond based on lump-sum present value of judgment).

PRACTICE TIP: The appellant may need to include a cost award when calculating the amount of an undertaking or appeal bond. See CCP §917.1(a)(2)-(3), (d).

To be subject to §917.1, the judgment or order must direct the defendant to pay a specific amount of money that the trial court could directly enforce by a writ of execution. The section does not apply to a judgment that may be satisfied in one of multiple ways or is unenforceable against the defendant until after the plaintiff has exhausted another remedy. See *Kreling v Kreling* (1897) 116 C 458, 460, 48 P 383 (court found predecessor statute to §917.1 inapplicable and granted writ despite failure to post sufficient undertaking); *Peterson v Lampton* (1941) 46 CA2d 751, 753, 116 P2d 952 (bond is required to secure stay when appeal is from judgment for direct payment of money).

PRACTICE TIP: Section 917.1 does not apply when the money due is in the actual or constructive custody of the court; such cases are governed by the provisions of CCP §917.2. CCP §917.1(b).

On furnishing an undertaking (bond), see California Civil Appellate Practice §§6.21-6.62 (3d ed Cal CEB 1996).

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§26.13 3. Other Judgments and Orders Stayed on Filing Undertaking (Bond) Under CCP §917.9

Under CCP §917.9, the trial court may require and set the amount of an undertaking to secure a stay in all cases not otherwise provided for in §§917.1-917.8 if:

- Appellant was found to have money or other property belonging to respondent.
- Appellant is required to perform an act for respondent's benefit under the judgment or order on appeal.
- The judgment against appellant is solely for costs awarded to the respondent by the trial court.

In contrast to CCP §917.1, which specifies the amount of the required undertaking (see §26.12), CCP §917.9 leaves the amount of an undertaking to the trial court's discretion. The court's discretion is not unlimited, however; an excessive bond can be the subject of a petition for a writ of supersedeas and the court of appeal will set aside as an abuse of the trial court's discretion bonds that are "excessive" or based on speculation about harm. See *Vangel v Vangel* (1953) 116 CA2d 615, 632, 254 P2d 919 (trial court's discretion in setting size of appeal bond must be exercised in manner compatible with potential injury respondents might suffer during period of appeal; $100,000 undertaking based in part on claims of waste set aside); *Huston v Huston* (1948) 87 CA2d 8, 10, 195 P2d 551 ($20,000 undertaking set aside as "arbitrary, excessive and an abuse of the discretion of the court").

On when an appeal stays a judgment or order, see California Civil Appellate Practice §§6.18-6.20 (3d ed Cal CEB 1996).

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§26.14 C. Collateral Matters Are Not Stayed by Filing Appeal

An appeal does not stay proceedings on matters ancillary or collateral to the judgment or order on appeal. *Betz v Pankow* (1993) 16 CA4th 931, 938, 20 CR2d 841. A collateral matter, by definition, is not "embraced [in] or affected [by]" the order appealed from, within the meaning of CCP §916(a). On automatic stays of matters "embraced [in] or affected [by]" the order, see §26.6; California Civil Appellate Practice §§6.18-6.20 (3d ed Cal CEB 1996).

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§26.15 1. When Matter Is Collateral

Proceedings that will occur regardless of the outcome of an appeal, or that do not affect the appellate court's ability to grant meaningful relief, are ancillary or collateral to the appeal. *Varian Med. Sys., Inc. v Delfino* (2005) 35 C4th 180, 191, 25 CR3d 298. The courts have determined that certain proceedings are collateral to the merits of an appeal. See §26.16; *Varian Med. Sys., Inc. v Delfino, supra*.

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§26.16 2. Examples of Collateral Matters Appeal

Ancillary or collateral matters an appeal does not stay under CCP §916 include:

- **New trial motions.** A motion for a new trial is collateral to the judgment and may be heard despite an appeal from the judgment. See *Neff v Ernst* (1957) 48 C2d 628, 634, 311 P2d 849.
- **Lis pendens.** A proceeding to expunge a lis pendens is collateral to the judgment in the underlying action. See *Varian Med. Sys., Inc. v Delfino, supra*; *United Prof. Planning, Inc. v Superior Court* (1970) 9 CA3d 377, 383, 88 CR 551.
- **Preliminary injunctions.** An appeal from the denial of a preliminary injunction does not stay further trial court proceedings on the merits. *Gray v Bybee* (1943) 60 CA2d 564, 571, 141 P2d 32.
- **Disqualification of counsel.** An appeal from an order denying a motion to disqualify counsel does not automatically stay further trial court proceedings on the merits, because such proceedings would occur regardless of whether the reviewing court affirms or reverses the order. See *Reed v Superior Court* (2001) 92 CA4th 448, 453, 111 CR2d 842.

On when an appeal stays a judgment or order, see California Civil Appellate Practice §§6.18-6.20 (3d ed Cal CEB 1996).

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IV. SUPERSEDEAS RELIEF IN APPELLATE COURT'S INHERENT DISCRETION

§26.17 A. Appellate Court's Inherent Power to Grant Supersedeas Relief

Under CCP §923, a reviewing court has the inherent power to stay proceedings during the pendency of an appeal, or to issue a writ of supersedeas, or to make any order that will preserve the effectiveness of the judgment to be entered or that will otherwise aid its jurisdiction. *Davis v Custom Component Switches, Inc.* (1970) 13 CA3d 21, 27, 91 CR 181 (supersedeas preserves appellate court's jurisdiction while it considers merits of appeal, and CCP §923 is specifically designed to accomplish that purpose). See *Estate of Lee* (1945) 26 C2d 295, 296, 158 P2d 193 (supersedeas preserves subject matter of proceeding so that "appellant may not lose the fruits of a meritorious appeal").

Thus, even when an appellant is not otherwise entitled to the protection of a statutory stay (see §§26.6-26.13), the court of appeal may, in the exercise of its sound discretion, grant supersedeas relief on terms that adequately protect the respondent's rights. *Food & Grocery Bureau v Garfield* (1941) 18 C2d 174, 177, 114 P2d 579 (appellant's showing justified reviewing court's exercise of its inherent power to issue writ).

JUDICIAL PERSPECTIVE: : The courts of appeal grant very few supersedeas petitions by appellants who are not entitled to a statutory stay. That is because granting such a petition puts the courts in the position of making exceptions to the comprehensive statutory stay scheme, potentially creating uncertainty in the enforcement of important procedural components of the appellate process.

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§26.18 B. Factors Bearing on Discretionary Supersedeas Relief

An appellant seeking supersedeas relief should show that (Cal Rules of Ct 8.112(a)):

- The trial court refused to grant a stay, or extenuating circumstances justified not seeking a stay first from the trial court (*Nuckolls v Bank of Cal., Nat. Ass'n* (1936) 7 C2d 574, 577, 61 P2d 927 (supersedeas refused because appellant did not disclose nature of judgment and court could not determine if appellant had exhausted remedies in lower court, e.g., if judgment could have been stayed by filing bond));
- Irreparable injury will occur absent supersedeas (*Marriage of Dover* (1971) 15 CA3d 675, 679, 93 CR 384 (supersedeas proper when denial of stay would deprive appellant of rights and leave no forum to protect minor child's rights in custody action));
- No undue prejudice will inure to the respondent (*Nuckolls,* 7 C2d at 578);
- Supersedeas will help to preserve the appellate court's jurisdiction (*Nuckolls v Bank of Cal., Nat. Ass'n, supra*); and
- The appeal raises substantial questions (Cal Rules of Ct 8.112(a)(4)(A); *Deepwell Homeowners' Protective Ass'n v City Council* (1965) 239 CA2d 63, 67, 48 CR 321 (supersedeas will not issue when appellant fails to show substantial questions to be presented on appeal)).

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C. Situations in Which Discretionary Supersedeas May Be Appropriate

§26.19 1. Appeal From Unbonded Money Judgment

If an appellant from a money judgment cannot furnish an appeal bond (see CCP §917.1), the court of appeal has discretion to grant supersedeas relief if the appeal presents substantial issues and failure to issue a stay is more likely to injure the appellants than issuance of a stay is likely to injure the respondent. *Estate of Murphy* (1971) 16 CA3d 564, 569, 94 CR 141 (supersedeas without bond appropriate because appeal presented substantial issues relating to interpretation of trust terms and trust administration, and potential damage to appellants if estate were distributed outweighed hardship to respondent if distribution postponed); *Davis v Custom Component Switches, Inc.* (1970) 13 CA3d 21, 27, 91 CR 181 (supersedeas granted because execution against defendant's assets would wipe out minority shareholders).

PRACTICE TIP: It is extremely difficult to secure a writ of supersedeas on an unbonded money judgment. If the appellate courts regularly granted exceptions to the undertaking requirement it would seriously erode the purpose of CCP §917.1. Although there is little published case law on this point, an appellant may be more likely to obtain supersedeas relief if there is also some underlying constitutional or other important right at stake that could be imperiled if enforcement efforts were instituted. The likelihood of a stay may also increase on a compelling showing that the appeal has merit.

JUDICIAL PERSPECTIVE: If supersedeas is requested because the appellant cannot afford the appeal bond, the court will consider the request only if it is accompanied by solid documentation of the appellant's financial condition.

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§26.20 2. When Judgment or Order Is Subject to CCP §§917.1-917.9 and Appellant Has Not Complied With Conditions for Stay

If an appellant cannot satisfy the statutorily required conditions for a stay under CCP §§917.1-917.9 the courts of appeal can grant supersedeas relief. Courts are extremely reluctant, however, to exercise their discretion to eliminate these statutory stay conditions. See §26.19.

On judgments and orders subject to CCP §§917.1-917.9, see §§26.11-26.13.

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§26.21 3. Prohibitory Injunctions

Unlike mandatory injunctions (see §26.9), prohibitory injunctions are self-executing and their operation is not automatically stayed by an appeal. The court of appeal has inherent power, however, to issue a writ of supersedeas if such action is "necessary or proper to the complete exercise of its appellate jurisdiction." *Food & Grocery Bureau v Garfield* (1941) 18 C2d 174, 177, 114 P2d 579; see also *Agricultural Labor Relations Bd. v Tex-Cal Land Mgmt., Inc.* (1987) 43 C3d 696, 709, 238 CR 780. There is little case law on this point in connection with prohibitory injunctions, which likely reflects the difficulty of showing that preserving the status quo would result in irreparable injury requiring immediate relief.

PRACTICE TIP: An injunction may have a dual nature—some aspects may be mandatory while others are prohibitory. An appeal will stay operation of the mandatory features but not the prohibitory ones. *Kettenhofen v Superior Court* (1961) 55 C2d 189, 191, 10 CR 356 (portion of injunction ordering removal of fence is mandatory in character and stayed by appeal). It is important to examine injunctions carefully to identify any mandatory features that an appeal will automatically stay and include those in a petition for supersedeas if the trial court declines to stay those features of its order.

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V. HOW TO PETITION FOR AND OPPOSE THE ISSUANCE OF A WRIT OF SUPERSEDEAS

A. Petition for Writ of Supersedeas

1. Contents of Petition

§26.22 a. General Requirements

A petition for a writ of supersedeas must consist of (Cal Rules of Ct 8.112(a)):

- A verified petition, explaining the need for the stay; and
- A memorandum in support of the petition.

The appellant must combine the petition and supporting memorandum in a single document. Cal Rules of Ct 8.112(a)(3). The petition must have the same title and docket number as the appeal. Cal Rules of Ct 8.112(a)(2).

On the procedure for preparing a petition for a writ of supersedeas, see Cal Rules of Ct 8.112-8.116. On the contents of a petition for a writ of supersedeas, see California Civil Appellate Practice §§6.78-6.85 (3d ed Cal CEB 1996). For an example of a petition for writ of supersedeas, see form in §28.18.

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Source: Civil Litigation/California Civil Writ Practice/26 Petition for Writ of Supersedeas/§26.23 b. Contents if Record on Appeal Has Not Yet Been Filed

§26.23 b. Contents if Record on Appeal Has Not Yet Been Filed

If the appellant has not yet filed the record on appeal in the court of appeal, which is usually the case, the appellant must include a statement of the case in the supersedeas petition showing that appellant will raise substantial issues on appeal. The statement of the case should include (Cal Rules of Ct 8.112(a)(4)(A)):

- A fair summary of the material facts; and
- A recitation of the issues likely to be raised on appeal.

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§26.24 c. Documents Filed With Petition

If the appellant has not yet filed the record on appeal, the appellant also must file the following documents with the supersedeas petition (Cal Rules of Ct 8.112(a)(4)(B)):

- The judgment or order, showing its date of filing;
- The notice of appeal, showing its date of filing;
- A reporter's transcript of any oral statement by the court supporting its rulings on the issues likely to be raised on appeal (if a transcript is unavailable, a declaration fairly summarizing such statements);
- Any application for stay filed in the trial court and opposition to that request, and a reporter's transcript of the oral proceedings on the stay (if a transcript is unavailable, a declaration fairly summarizing the proceedings); and
- Any other document from the trial court proceeding that is necessary for consideration of the petition.

If the appellant needs to file additional documents, appellant must (Cal Rules of Ct 8.112(a)(4)(C)):

- Bind the documents together at the end of the petition or in separate volumes not exceeding 300 pages each, and paginate them consecutively;
- Index-tab the documents by number or letter; and
- Begin with a table of contents listing each document by its title and index-tab number.

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§26.25 2. When Requesting Temporary Stay

An appellant seeking supersedeas relief may obtain an immediate temporary stay pending the appellate court's decision on the petition. The request for an immediate temporary stay may be included in the petition for writ of supersedeas or filed separately. The appellant must serve a separately filed request on the respondent, unless the Chief Justice or presiding justice, for good cause, excuses advance service. Cal Rules of Ct 8.112(c)(2).

The cover of a supersedeas petition seeking an immediate stay must (Cal Rules of Ct 8.116):

- Prominently display the notice "IMMEDIATE STAY REQUESTED";
- Identify the nature and date of the proceeding or act sought to be stayed; and
- State the trial court and department involved as well as the name and telephone number of the trial judge whose order the request seeks to stay (this may appear on cover or at beginning of text).

For an example of a stay request in a petition for writ of supersedeas, see form in §28.18.

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§26.26 3. Format of Petition

Except as otherwise specified by Rule 8.112, the format of the petition must comply with Cal Rules of Ct 8.204(b). Cal Rules of Ct 8.40(a). The cover of the petition should be red. Cal Rules of Ct 8.40(b)(1).

PRACTICE TIP: Counsel need not provide a "writ" because, as a matter of practice, the court does not issue a formal writ. The court's order granting the petition and staying the specified action serves as the writ.

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§26.27 4. Filing and Service of Petition

The appellant must file the original petition for writ of supersedeas and four copies in the court of appeal. Cal Rules of Ct 8.44(b)(3). It is necessary to file only *one* set of any separately bound supporting documents accompanying the petition. Cal Rules of Ct 8.44(b)(5). If the petition is filed in the supreme court, the appellant must file the original and ten copies of all documents, unless otherwise ordered. Cal Rules of Ct 8.44(a)(2). There is no filing fee.

The appellant must serve the petition and one set of any supporting documents on each party. Cal Rules of Ct 8.25(a)(1). The appellant must file proof of appropriate service along with the petition. Cal Rules of Ct 8.25(a)(2).

PRACTICE TIP: Although personal service is not required, it is advisable in all cases in which an appellant requests an immediate stay. On seeking an immediate, temporary stay, see §26.25.

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B. Opposition

§26.28 1. Contents of Opposition

The appellate court cannot issue a writ of supersedeas until the respondent has had an opportunity to file opposition. Cal Rules of Ct 8.112(b)(3). Opposition should demonstrate why the petition fails to meet the requirements for granting relief. The opposition should consist of (Cal Rules of Ct 8.112(b)):

- A verified statement of facts setting out material omissions or misstatements in the petition;
- A memorandum in opposition; and
- Copies of any documents appellant did not attach as exhibits (or in the record on appeal, if filed) supporting the arguments.

Declarations may establish factual statements not otherwise supported.

PRACTICE TIP: Because the appellate courts rarely hold argument on a stay request, the respondent must submit a thorough opposition, including denying any erroneous facts or allegations in the petition. See *Mills v County of Trinity* (1979) 98 CA3d 859, 159 CR 679. The respondent should explain in the opposition all facts that the court needs to understand concerning why it should not grant a stay, including any loss or hardship if a stay is granted, and why the appeal has no merit. The respondent should also consider suggesting conditions that might reduce hardship if a stay is granted, *e.g.,* that a bond be posted in a specified amount, that appellant file the opening brief within a specified time, and that the appeal be expedited or that the stay be for a limited duration.

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§26.29 2. Format of Opposition

Except as otherwise provided by Cal Rules of Ct 8.112, the respondent should base the format of the opposition on the requirements set out in Cal Rules of Ct 8.204(b). Cal Rules of Ct 8.40(a). The cover of the opposition should be red. Cal Rules of Ct 8.40(b)(1).

On the format of opposition papers, see §§23.4-23.8.

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§26.30 3. Filing and Service of Opposition

Unless otherwise ordered, any opposition to a petition for a writ of supersedeas seeking a stay of the enforcement of a judgment or order pending appeal must be served and filed within 15 days after the petition is filed. Cal Rules of Ct 8.112(b).

PRACTICE TIP: The court may not issue a writ of supersedeas until the respondent has had the opportunity to file opposition. Cal Rules of Ct 8.112(b)(3).

The respondent must file the original opposition and four copies in the same court of appeal in which the petition was filed. Cal Rules of Ct 8.44(b)(3). It is necessary to file only *one* set of any separately bound supporting documents accompanying the opposition. Cal Rules of Ct 8.44(b)(5). If the petition is filed in the supreme court, respondent must file the original and ten copies of all documents, unless otherwise ordered. Cal Rules of Ct 8.44(a)(2).

The respondent must serve the opposition and one set of any supporting documents on each party. Cal Rules of Ct 8.25(a)(1). Any method of service is permitted. The respondent must file proof of appropriate service along with the opposition. Cal Rules of Ct 8.25(a)(2).

PRACTICE TIP: On receipt of a petition for writ of supersedeas, the respondent should notify the clerk's office that it intends to file opposition. Because the court may grant an immediate, temporary stay without waiting for opposition, the respondent also should advise the clerk if it intends to oppose an immediate stay and request time (*e.g.,* 24 hours) to file a response.

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27

Petitions in the California Supreme Court

Robert M. Dato

I. SCOPE OF CHAPTER §27.1

II. ORIGINAL WRIT PETITIONS
- A. When Original Jurisdiction Is Appropriate §27.2
  - 1. When Original Writ Is Exclusive Method of Review §27.3
    - a. Decisions of the Energy Resources Conservation and Development Commission §27.4
    - b. Decisions of the Public Utilities Commission §27.5
    - c. Decisions of the State Bar Court §27.6
    - d. Decisions of the Workers' Compensation Appeals Board §27.7
  - 2. When Extraordinary Circumstances Warrant Bypassing Lower Courts §27.8
  - 3. When Only Supreme Court Can Grant Writ Relief §27.9
- B. Filing Petition in Original Proceeding
  - 1. Timing and Procedures for Filing §27.10
  - 2. Content and Format of Petition §27.11

III. PETITIONS FOR REVIEW §27.12
- A. Grounds for Petition for Review §27.13
- B. Deciding Whether to Seek Review §27.14
- C. Procedures for Filing Petition, Answer, and Reply
  - 1. Timing
    - a. Petition §27.15
      - (1) No Extension for Holiday or Weekend §27.16
      - (2) Relief From Failure to File Timely Petition for Review §27.17
    - b. Answer §27.18
    - c. Reply §27.19
  - 2. Format §27.20
    - a. Length §27.21
    - b. Attachments §27.22
    - c. Cover §27.23
    - d. Number of Copies §27.24
  - 3. Contents
    - a. Petition for Review §27.25
    - b. Answer §27.26
    - c. Reply §27.27
  - 4. Chart: Filing Requirements for Petition for Supreme Court Review §27.28
- D. Disposition
  - 1. Types of Rulings §27.29
    - a. Supreme Court Denies Petition for Review §27.30
    - b. Supreme Court Grants Petition for Review §27.31
    - c. Supreme Court Transfers Matter to Court of Appeal §27.32
  - 2. Timing of Court's Action §27.33

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§27.1 I. SCOPE OF CHAPTER

This chapter discusses writ proceedings in the California Supreme Court. It first discusses original writ proceedings in the high court, which are rare and usually involve urgent matters of great public importance. See §§27.2-27.9. This discussion includes preparing and filing petitions in original proceedings. See §§27.10-27.11.

The chapter next discusses petitions for review. Supreme court review is the highest level of appellate review in the California courts. There is no right of "appeal" from the courts of appeal to the supreme court. Rather, the means of seeking appellate review by the supreme court is a petition for review. Review lies solely in the supreme court's discretion and is very rarely granted. This chapter discusses the grounds for review (see §§27.13-27.14) as well as the content of and procedures for filing petitions for review, answers to petitions for review, and replies (see §§27.15-27.28). The chapter closes with a discussion of the supreme court's options when it acts on a petition for review. See §§27.29-27.33.

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II. ORIGINAL WRIT PETITIONS

§27.2 A. When Original Jurisdiction Is Appropriate

In rare instances, the California Supreme Court will exercise original jurisdiction in a writ proceeding seeking a prerogative writ. This occurs when a petitioner seeking a writ of mandate, prohibition, or review (certiorari) files a writ petition in the supreme court in the first instance, bypassing the lower courts. Cal Rules of Ct 8.486(a)(1). In an extremely limited number of circumstances, statutes require that writ relief be sought directly from the supreme court. See §§27.3-27.7.

In other instances, the high court may accept a writ petition to consider an urgent matter of overriding public importance. See, *e.g., Lockyer v City & County of San Francisco* (2004) 33 C4th 1055, 1066, 17 CR3d 225 (original proceedings in supreme court to compel city and county officials to comply with marriage statutes and cease issuing marriage licenses to same-sex couples; court issued writ); *Farley v Healey* (1967) 67 C2d 325, 326, 62 CR 26 (mandamus proceeding filed in supreme court because urgency of issue made appeal to court of appeal inadequate remedy). See §27.8.

PRACTICE TIP: Original writ petitions filed in the supreme court are discouraged and rarely granted. Unless the petitioner feels that the allegations regarding time pressure and public importance are very strong, the prudent course is to file a writ petition in the lowest court capable of granting relief. See §15.68.

JUDICIAL PERSPECTIVE: In most cases, if the petitioner files improperly in the supreme court, the court will transfer the matter to the appropriate court of appeal for appellate review or issue an alternative writ that is returnable in the court of appeal. Filing in the wrong court will delay resolution of the case. See §27.32.

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§27.3 1. When Original Writ Is Exclusive Method of Review

A handful of statutes provide that the only means of appellate review is through an original writ proceeding in the California Supreme Court, although in at least one reported decision, such a statute was found unconstitutional. *Hollywood Park Land Co. v Golden State Transp. Fin. Corp.* (2009) 178 CA4th 924, 928, 100 CR3d 752 (statute dictating that original writ in supreme court is exclusive means for direct review of reverse validation actions concerning contracts and bonds authorized by amended Indian gaming compacts is unconstitutional because it abridges appellate courts' jurisdiction).

Nevertheless, when an original writ proceeding is the only statutory means to obtain appellate review, a denial order (even a summary denial) is a decision on the "merits" of the issues raised in the petition. *In re Rose* (2000) 22 C4th 430, 444, 93 CR2d 298, citing *Napa Valley Elec. Co. v Railroad Comm'n* (1920) 251 US 366, 64 L Ed 310, 40 S Ct 174. Accordingly, in that limited context, the supreme court's summary denial has res judicata effect, unlike summary denials by the courts of appeal or by the supreme court in other circumstances. *Consumers Lobby Against Monopolies v PUC* (1979) 25 C3d 891, 901 n3, 160 CR 124. See §§22.14-22.17.

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§27.4 a. Decisions of the Energy Resources Conservation and Development Commission

Decisions of the Energy Resources Conservation and Development Commission on applications for the certification of sites and related facilities can be reviewed only through a petition for a writ of review in the California Supreme Court. Pub Res C §25531(a). See *County of Sonoma v State Energy Resources Conserv. & Dev. Comm'n* (1985) 40 C3d 361, 363, 220 CR 114 (upholding constitutionality of statutory restriction on method of review); *Santa Teresa Citizen Action Group v California Energy Resources Conserv. & Dev. Comm'n* (2003) 105 CA4th 1441, 1446, 130 CR2d 392 (supreme court had exclusive jurisdiction regarding judicial review of Energy Commission's decision on power plant).

Review is limited to whether the Commission acted under its statutory authority and in conformity with constitutional safeguards. The Commission's findings of fact are final and not subject to review. Pub Res C §25531(b).

On review of State Energy Resources Conservation and Development Commission decisions and for a sample form, see 20 California Forms of Pleading and Practice §247.279 (2007).

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§27.5 b. Decisions of the Public Utilities Commission

Under prior law, Public Utilities Commission (PUC) decisions were subject to review only by the California Supreme Court in an original writ proceeding. Now PUC decisions generally may be challenged by writ petition in either the court of appeal or the supreme court. See Pub Util C §§1756-1756.2.

Some decisions, however, remain in the supreme court's exclusive jurisdiction, including decisions pertaining solely to water corporations that do not concern compliance or enforcement proceedings (Pub Util C §1756(f)), and decisions arising from proceedings concerning applications for Commission authority to complete certain telecommunications mergers or acquisitions (Pub Util C §§854, 1756(g)).

On the timing of applications for writ review of PUC decisions, see Pub Util C §1756(a). On other procedural issues, including parties who must appeal, venue, and the scope of review, see Pub Util C §§1756-1768. On writ review of PUC decisions, see §§16.33-16.45.

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§27.6 c. Decisions of the State Bar Court

Under Bus & P C §6082, either the disciplined attorney or the State Bar's chief trial counsel may file a petition in the supreme court seeking review of a decision in a State Bar Court disciplinary action. On filing procedures and deadlines for review of decisions in State Bar Court disciplinary actions, see Cal Rules of Ct 9.16-9.18.

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§27.7 d. Decisions of the Workers' Compensation Appeals Board

The exclusive method for obtaining review of decisions of the Workers' Compensation Appeals Board (WCAB) is by a special statutory writ of review. Lab C §§5950-5955; Cal Rules of Ct 8.495. Although a party can file a writ petition in the California Supreme Court (Lab C §5950), that court routinely transfers such petitions to the court of appeal without considering the merits.

On writ review of WCAB decisions, see §§16.46-16.48.

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§27.8 2. When Extraordinary Circumstances Warrant Bypassing Lower Courts

When time is critical and an issue of grave importance is at stake, the California Supreme Court may, in its discretion, exercise its original writ jurisdiction. This is an exceedingly rare event; however, the court has exercised its original jurisdiction in the following contexts:

- Challenging a voter-approved initiative. *Strauss v Horton* (2009) 46 C4th 364, 398, 93 CR3d 591 (initiative adding new section to California Constitution providing: "Only marriage between a man and a woman is valid or recognized in California"); *Legislature v Eu* (1991) 54 C3d 492, 500, 286 CR 283 (initiative to impose term and budget limitations on state legislators).
- Preventing Secretary of State from submitting initiative measure to voters. *Brosnahan v Eu* (1982) 31 C3d 1, 181 CR 100.
- Challenging California Industrial Welfare Commission wage orders. *Industrial Welfare Comm'n v Superior Court* (1980) 27 C3d 690, 699, 166 CR 331 (large number of affected employees and litigation history had prevented implementation of majority of wage orders in recent years).
- Protecting voter registration rights. *Jolicoeur v Mihaly* (1971) 5 C3d 565, 570 n1, 96 CR 697 (mandate issued to county registrar of voters after refusal to register persons between 18 and 21 years of age who were not living with parents). See also *Ramirez v Brown* (1973) 9 C3d 199, 203, 107 CR 137 (petition by ex-felons to compel election officials to register them as voters), rev'd on other grounds in *Richardson v Ramirez* (1974) 418 US 24, 41 L Ed 2d 551, 94 S Ct 2655.
- Enforcing State Board of Equalization's request to county assessor for records needed to assist legislative inquiry. *State Bd. of Equalization v Watson* (1968) 68 C2d 307, 310, 66 CR 377 (Board's investigation would not be of value to legislative committee unless records were available as soon as possible).
- Enforcing method of property tax assessment under newly enacted statute. *County of Sacramento v Hickman* (1967) 66 C2d 841, 845, 59 CR 609.
- Securing early hearing on paternity and support issues. *Thurmond v Superior Court* (1967) 66 C2d 836, 839, 59 CR 273 (any substantial delay would materially impair and perhaps destroy right of mother and child to apply for relief pendente lite, implicating serious constitutional questions).
- Compelling Secretary of State to submit initiative measure to voters. *Perry v Jordan* (1949) 34 C2d 87, 90, 207 P2d 47.

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§27.9 3. When Only Supreme Court Can Grant Writ Relief

If a party challenges an action by an appellate court justice or the court of appeal—other than an order or ruling pertaining to the merits of a particular case—the only court that can grant writ relief is the supreme court. Accordingly, a writ petition is properly filed in the supreme court in the first instance. See, *e.g.*, *Kaufman v Court of Appeal* (1982) 31 C3d 933, 184 CR 302 (appellate court justice sought writ nullifying court orders commanding him not to sit on certain matters because of alleged bias).

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B. Filing Petition in Original Proceeding

§27.10 1. Timing and Procedures for Filing

The timing and procedures for filing an original writ petition in the California Supreme Court are the same as the procedures for filing a writ petition in the court of appeal. See Cal Rules of Ct 8.4, 8.485-8.493. On the timing and procedures for filing writ petition in the court of appeal, see §§18.61-18.87.

The petitioner must file the original writ petition plus ten copies with the supreme court. Cal Rules of Ct 8.44(a)(2). The filing fee is $590. Govt C §§68926.1(b), 68927.

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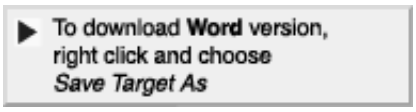
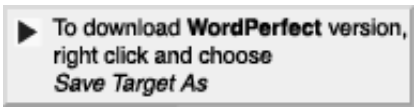
§27.11 2. Content and Format of Petition





The content and format requirements for a prerogative writ petition filed in the supreme court are largely the same as for a writ petition filed in the court of appeal. Cal Rules of Ct 8.485-8.493. See §§18.5-18.60. The petition must also set out the circumstances making it proper for the writ to issue originally from the supreme court. Cal Rules of Ct 8.486(a)(1).

The following is exemplar language for use when alleging that the supreme court should exercise its original jurisdiction:

Petitioner(s) seek(s) extraordinary relief from this Court in the first instance because, in addition to the matters set out above in paragraph(s) _ _, the following circumstances make it proper and necessary that a writ issue from this Court: _ _[*Specify compelling reasons in detail. The main categories are: the matters involved are of compelling and widespread interest to the people of the state of California; their speedy determination is necessary; they present questions of law not previously decided in the state; there is an urgent need for uniformity of decision within the state*]**_ _.**

NOTE: Under Cal Rules of Ct 8.486(a)(1), if petitioner could have filed the petition first in a lower court, the petition must explain why the reviewing court should issue the writ as an original matter. On the judicially created policy requiring that petitioners file in the lowest court capable of granting extraordinary relief absent compelling circumstances, see §15.68.

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§27.12 III. PETITIONS FOR REVIEW

The overwhelming majority of civil matters (as well as criminal matters not involving the death penalty) are presented to the California Supreme Court by way of a petition for review. See Cal Rules of Ct 8.500(a)(1) (party may file petition in supreme court for review of any decision of court of appeal except denial of transfer of case within appellate jurisdiction of superior court).

The supreme court generally accepts for review only cases presenting important legal issues on a well-developed record. This reflects the court's fundamental role: to clarify and chart the development of the state's law. The supreme court is not a court of error, *i.e.*, its purpose is not simply to correct mistakes allegedly made by the lower courts. Accordingly, the supreme court grants review in only a minute number of cases. For example, the court granted only 8 percent of the petitions for review filed in 2005-2006. See Judicial Council of California, Court Statistics Report, *Supreme Court*, Tables 1, 5 (2007), available online at http://www.courtinfo.ca.gov/reference/documents/csr2007.pdf. On maximizing the chances of obtaining review, see California Civil Appellate Practice §22.26 (3d ed Cal CEB 1996).

A party can seek review of a court of appeal's decision in an appeal and in an original writ proceeding. See, *e.g., Goldstein v Superior Court* (2008) 45 C4th 218, 225, 85 CR3d 213 (review granted in original writ proceeding). On the kinds of action an appellate court can take on a writ petition, see §§22.9-22.29, 24.2-24.30.

PRACTICE TIP: The supreme court very rarely grants review and decides the merits of a writ petition that the court of appeal has summarily denied. On review of a summary denial, see §25.30. Instead, if the supreme court entertains the petition for review at all (which is highly unlikely), the court is more likely to grant review and retransfer to the court of appeal with directions to decide the petition on the merits. See §27.32.

For an example of a petition for review, see form in §28.16.

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Source: Civil Litigation/California Civil Writ Practice/27 Petitions in the California Supreme Court/§27.13 A. Grounds for Petition for Review

§27.13 A. Grounds for Petition for Review

The grounds for review by the California Supreme Court are:

- To resolve splits among the courts of appeal and ensure uniformity of the law, or to decide an important legal issue (Cal Rules of Ct 8.500(b)(1));
- The court of appeal lacked jurisdiction (Cal Rules of Ct 8.500(b)(2));
- Insufficient qualified justices concurred in the court of appeal's decision (Cal Rules of Ct 8.500(b)(3)); or
- The supreme court intends to transfer the matter to the court of appeal for further proceedings as ordered (Cal Rules of Ct 8.500(b)(4)).

PRACTICE TIP: The supreme court most commonly grants review when it is necessary for uniformity of decision or to settle an important issue.

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§27.14 B. Deciding Whether to Seek Review

The California Supreme Court takes the grounds for review set forth in Cal Rules of Ct 8.500(b) seriously. For all practical purposes, a party should seek review only in the rare case that presents: (1) a substantial question of law likely to recur or involving important public policy, or (2) a real, not illusory, conflict in the law.

On factors to consider in deciding whether to petition for review, see California Civil Appellate Practice §§22.3-22.13 (3d ed Cal CEB 1996).

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C. Procedures for Filing Petition, Answer, and Reply

1. Timing

§27.15 a. Petition

A party aggrieved by a court of appeal's decision must file a petition for review within 10 days after the decision of the appellate court becomes final as to that court. Cal Rules of Court 8.500(e)(1). Unless the court of appeal grants rehearing, its decision normally becomes final 30 days after filing of the decision. Cal Rules of Ct 8.490(b)(2). When the court of appeal summarily denies a writ petition, however, its decision is final immediately. Cal Rules of Ct 8.490(b)(1); *Kowis v Howard* (1992) 3 C4th 888, 893, 12 CR2d 728. Therefore, a petition for review of a summary denial must be filed within 10 days of the denial order.

PRACTICE TIP: Given the short 10-day period to petition for review, the decision whether to seek review following a summary denial must be made quickly. In addition, in preparing a petition for review after a summary denial, counsel should keep in mind that the most likely outcome if the supreme court gives any consideration to the petition at all is a grant and retransfer back to the court of appeal, with directions to issue an alternative writ and decide the petition on the merits.

On the finality of court of appeal decisions, see §§25.4-25.10. On the time to file petitions for review, see also California Civil Appellate Practice §§22.14-22.23 (3d ed Cal CEB 1996).

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§27.16 (1) No Extension for Holiday or Weekend

For purposes of filing a petition for review, the date of finality is not extended if it falls on a day on which the clerk's office is closed. Cal Rules of Ct 8.500(e)(1).

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§27.17 (2) Relief From Failure to File Timely Petition for Review

The time to file a petition for review may not be extended. The Chief Justice, however, may relieve a party from a failure to file a timely petition for review if the time for the supreme court to order review on its own motion has not expired. Cal Rules of Ct 8.500(e)(2). The supreme court may order review on its own motion within 30 days after the court of appeal decision is final as to that court. Cal Rules of Ct 8.512(c)(1). The supreme court may extend that period up to 90 days after finality in the court of appeal. Cal Rules of Ct 8.512(c)(1).

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§27.18 b. Answer

The respondent or real party in interest must file and serve any answer to a petition for review within 20 days after the petition is filed. Cal Rules of Ct 8.500(e)(4). See California Civil Appellate Practice §§22.40-22.46 (3d ed Cal CEB 1996).

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§27.19 c. Reply

Petitioner may file and serve a reply within 10 days after an answer has been filed. Cal Rules of Ct 8.500(e)(5). See California Civil Appellate Practice §§22.41, 22.46 (3d ed Cal CEB 1996).

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§27.20 2. Format

The petition, answer, and reply generally must conform to the format requirements for briefs. See Cal Rules of Ct 8.504(a); California Civil Appellate Practice, chap 12 (3d ed Cal CEB 1996).

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§27.21 a. Length

The length of the petition or answer (including appended materials, but excluding the attached court of appeal opinion, index, table of contents, table of authorities, and any other indexes) may not exceed 8400 words if produced on a computer and 30 pages if typewritten. Cal Rules of Ct 8.504(d)(1)-(3). A reply may not exceed 4200 words if produced on a computer and 15 pages if typewritten, exclusive of tables and indexes. Cal Rules of Ct 8.504(d)(1)-(3).

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§27.22 b. Attachments

The only attachments that may be bound with a petition for review are: the opinion or order from which the petitioner seeks relief and any order modifying the opinion or ordering it published (these are required attachments under Cal Rules of Ct 8.504(b)(4)), any other court rulings or exhibits that the petitioner considers unusually significant, and copies of local rules, out-of-state statutes, or other similar citable materials that are not readily accessible. Cal Rules of Ct 8.504(e)(1). These attachments cannot exceed ten pages. Cal Rules of Ct 8.504(e)(2). The trial court's ruling and critical exhibits are particularly significant when the court of appeal has summarily denied a writ petition because the supreme court will not have an appellate court opinion summarizing the challenged trial court ruling.

PRACTICE TIP: Although a summary denial is not an "opinion," a copy of the denial must be bound with the petition for review.

For an example of a petition for review, see form in §28.16. See also California Civil Appellate Practice §§22.28-22.33, 22.40-22.46 (3d ed Cal CEB 1996).

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§27.23 c. Cover

The cover of a petition for review must be white. The cover of an answer must be blue. The cover of any reply must be white. Cal Rules of Ct 8.40(b)(1).

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Source: Civil Litigation/California Civil Writ Practice/27 Petitions in the California Supreme Court/§27.24 d. Number of Copies

§27.24 d. Number of Copies

A party must file with the supreme court the original plus 13 copies of a petition for review, answer, or reply. Cal Rules of Ct 8.44(a)(1).

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3. Contents

§27.25 a. Petition for Review

A petition for review must begin with a "concise, nonargumentative" statement of the issue(s) to be reviewed, framing them in terms of the facts of the case but without unnecessary detail. Cal Rules of Ct 8.504(b)(1).

PRACTICE TIP: Petitioner should not inundate the court with issues, particularly in light of its workload; generally, petitioner should only present one or two issues for review.

The remainder of the petition must include (Cal Rules of Ct 8.504(b)):

- A statement as to why review should be granted, identifying the grounds for review, *i.e.*, to address a conflict in the courts of appeal (on grounds for review, see §27.13);
- A concise statement of the case (facts and procedural history), including whether a petition for rehearing was filed and the outcome;
- A concise argument section; and
- A conclusion asking that the petition for review be granted and sometimes for alternative relief, *e.g.,* that the court of appeal's opinion be depublished, or that review be granted and the case held pending determination of a "lead" case in which review has already been granted. See California Civil Appellate Practice §22.25 (3d ed Cal CEB 1996).

PRACTICE TIP: A request for depublication of an opinion cannot be made as part of the petition for review but must instead be made by separate letter, even if depublication is presented as an alternative to granting review. Cal Rules of Ct 8.1125(a)(2).

PRACTICE TIP: Because of the short deadline to file a petition for review following the summary denial of a writ petition (see §27.15), the petitioner can use the appellate court writ petition and supporting memorandum as a beginning for a petition for review. The enumerated allegations in the writ petition can be modified to narrative form, and the legal arguments can be fine tuned. The petition for review must also include at the outset a statement of the issues presented and a section setting forth the reasons and grounds for granting review, neither of which is included in an appellate court writ petition. It should be kept in mind, however, that the supreme court rarely grants review of a summary denial order.

A petition for review cannot incorporate by reference any authorities or argument from another document, except to a petition for review, answer, or reply filed by another party in the case or filed in another case presenting the same issues. Cal Rules of Ct 8.504(e)(3).

For an example of a petition for review, see §28.16. On the drafting of a petition for review, see California Civil Appellate Practice §§22.24-22.39 (3d ed Cal CEB 1996).

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§27.26 b. Answer

A party opposed to supreme court review is not required to file an answer to a petition for review (Cal Rules of Ct 8.500(a)(2)), but it is advisable to do so. Counsel should not risk leaving the analysis of the issues solely to a busy court without providing some assistance. An answer may raise additional issues for review. Cal Rules of Ct 8.504(c).

In many cases, the answer can be fairly brief, pointing out that the petition fails to identify any conflict created by the court of appeal's decision or to raise any issue of pressing public importance, and that the petitioner has done no more than allege error by the lower court (which should, in any event, be followed by a brief explanation as to why the court of appeal did not err). See California Civil Appellate Practice §§22.40-22.44 (3d ed Cal CEB 1996).

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§27.27 c. Reply

The petitioner may, but is not required to, reply to an answer. Cal Rules of Ct 8.500(a)(3). When an answer raises additional issues for review, the petitioner should always file a reply, *e.g.*, to keep the court focused on the significant issues, or to avoid the impression that the case is so factually complicated it is not a good vehicle for deciding the issues presented in the petition. Even when the answer does not raise additional issues, the petitioner should file a reply in any case in which there is a serious case to be made for review. See California Civil Appellate Practice §§22.45-22.46 (3d ed Cal CEB 1996).

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Source: Civil Litigation/California Civil Writ Practice/27 Petitions in the California Supreme Court/§27.28 4. Chart: Filing Requirements for Petition for Supreme Court Review

§27.28 4. Chart: Filing Requirements for Petition for Supreme Court Review

Document	*Deadline*	*Copies*	*Color of Cover*
Petition for review filed by dissatisfied party	10 calendar days after the decision is final in the court of appeal. Cal Rules of Ct 8.500(e)(1). See §§27.15-27.17.	Original plus 13 copies. Cal Rules of Ct 8.44(a)(1). See §27.24.	White. Cal Rules of Ct 8.40(b)(1). See §27.23.
Answer filed by opposing party	An answer to a petition for review may be filed within 20 calendar days after the petition is filed. Cal Rules of Ct 8.500(e)(4). See §27.18.	Original plus 13 copies. Cal Rules of Ct 8.44(a)(1). See §27.24.	Blue. Cal Rules of Ct 8.40(b)(1). See §27.23.
Reply filed by petitioner(s)	Reply brief(s) due within 10 calendar days after the answer brief is filed. Cal Rules of Ct 8.500(e)(5). See §27.19.	Original plus 13 copies. Cal Rules of Ct 8.44(a)(1). See §27.24.	White. Cal Rules of Ct 8.40(b)(1). See §27.23.

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D. Disposition

§27.29 1. Types of Rulings

When ruling on a petition for review, the supreme court will generally do one of the following: (1) deny review; (2) grant review and rule on the merits of the case; or (3) grant review and immediately transfer back to the court of appeal with directions to decide the case (the likely scenario if the supreme court gives any consideration to a petition for review filed after a summary denial of a writ petition (see §27.32)).

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§27.30 a. Supreme Court Denies Petition for Review

The supreme court may, and in the vast majority of cases will, issue a one- to two-line order denying the petition for review. If the court fails to act on a petition within 60 days after the last petition for review in the case is filed, the petition is deemed denied by operation of law. Cal Rules of Ct 8.512(b)(2). The court may extend its time to act to a date not more than 90 days after the last petition in the case was filed. Cal Rules of Ct 8.512(b)(1). See §27.31. Such extensions are common. See California Civil Appellate Practice §22.47 (3d ed Cal CEB 1996).

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§27.31 b. Supreme Court Grants Petition for Review

The supreme court can grant review as to all or only some of the issues presented. Cal Rules of Ct 8.516(a), (b)(1). In most cases, the parties then file briefs on the merits, and the court eventually hears oral argument and decides the case. Cal Rules of Ct 8.520.

If the court has granted review in another case presenting the same issue(s), it likely will "hold" further briefing in the case at hand until it has decided the other case. See Cal Rules of Ct 8.512(d)(2).

On preparing briefs on the merits, see California Civil Appellate Practice §§22.55-22.57 (3d ed Cal CEB 1996). On postbriefing developments, see Civ App Prac §§22.58-22.70.

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§27.32 c. Supreme Court Transfers Matter to Court of Appeal

The supreme court sometimes grants review and immediately transfers the case to the court of appeal, usually with directions and sometimes supported by authority. Cal Rules of Ct 8.528(d). See, *e.g.*, *American Airlines, Inc. v Superior Court* (2003) 114 CA4th 881, 896, 8 CR3d 146 (supreme court transferred matter to court of appeal with directions to vacate order denying motion to compel deposition and to issue order granting motion).

This is the most likely result if the supreme court entertains a petition for review from a summary denial of a writ petition. The court usually directs the court of appeal to issue an alternative writ and decide the writ petition on the merits. See, *e.g., Omaha Indem. Co. v Superior Court* (1989) 209 CA3d 1266, 1270, 258 CR 66 (supreme court granted review and transferred case to court of appeal with direction to issue alternative writ); *Newman v Superior Court* (1986) 179 CA3d 377, 379, 224 CR 538 (same). See California Civil Appellate Practice §22.51 (3d ed Cal CEB 1996).

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§27.33 2. Timing of Court's Action

After the last petition for review is filed in a case (*e.g.*, when there are multiple parties who seek review), the supreme court has 60 calendar days to decide whether to grant review, but may extend the period to 90 calendar days. Cal Rules of Ct 8.512(b). If the court does not issue an order within the specified time limit, the petition is deemed denied. Cal Rules of Ct 8.512(b)(2). See California Civil Appellate Practice §22.47 (3d ed Cal CEB 1996).

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28

Court of Appeal and Supreme Court Forms

I. FORM: PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE RELIEF §28.1

II. FORM: CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (JUDICIAL COUNCIL FORM APP-008) §28.2

III. FORM: TABLE OF EXHIBITS §28.3

IV. FORM: PRELIMINARY OPPOSITION TO PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE WRIT AND STAY REQUEST §28.4

V. FORM: SUMMARY DENIAL §28.5

VI. FORM: ALTERNATIVE WRIT/ORDER TO SHOW CAUSE §28.6

VII. FORM: *PALMA* NOTICE (ORDER) §28.7

VIII. FORM: *PALMA* NOTICE (LETTER) §28.8

IX. FORM: "SUGGESTIVE" *PALMA* NOTICE §28.9

X. FORM: OPPOSITION TO ISSUANCE OF PEREMPTORY WRIT OF MANDATE IN THE FIRST INSTANCE §28.10

XI. FORM: RETURN TO PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER ALTERNATIVE RELIEF §28.11

XII. FORM: TRAVERSE TO RETURN §28.12

XIII. FORM: ORDER DIRECTING ISSUANCE OF PEREMPTORY WRIT OF MANDATE §28.13

XIV. FORM: ORDER DISCHARGING ALTERNATIVE WRIT AS IMPROVIDENTLY GRANTED §28.14

XV. FORM: PEREMPTORY WRIT OF MANDATE §28.15

XVI. FORM: PETITION FOR REVIEW (CALIFORNIA SUPREME COURT) §28.16

XVII. FORM: AMICUS CURIAE LETTER BRIEF §28.17

XVIII. FORM: PETITION FOR WRIT OF SUPERSEDEAS §28.18

XIX. FORM: ORDER GRANTING PETITION FOR WRIT OF SUPERSEDEAS §28.19

XX. FORM: PETITION FOR WRIT OF HABEAS CORPUS (JUDICIAL COUNCIL FORM MC-275) §28.20

XXI. FORM: PETITION FOR WRIT OF HABEAS CORPUS OR CERTIORARI (FILED BY ATTORNEY) §28.21

XXII. FORM: APPELLATE COURT WRIT PETITION INFORMATION SHEET (FIFTH DISTRICT) §28.22

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Source: Civil Litigation/California Civil Writ Practice/28 Court of Appeal and Supreme Court Forms/§28.1 I. FORM: PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE RELIEF

NOTE: The following forms are illustrative only. When drafting papers in writ proceedings, counsel should use his or her own independent legal and professional judgment in light of the particular client and factual situation. As always, counsel should consult all applicable statutes, rules of court, and local rules before filing any papers with the court.

§28.1 I. FORM: PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE RELIEF

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

IMMEDIATE STAY REQUESTED
Confidential Personal Financial Information
Must Be Produced by June 22, 2007

No. _____
(Related Appeal Pending in No. B78945)

In the Court of Appeal of the State of California
Second Appellate District, Division One

JOHN DOE,
Defendant and Petitioner,

vs.

SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent.

JANE DOE,
Plaintiff and Real Party in Interest.

PETITION FOR WRIT OF MANDATE,
PROHIBITION, OR OTHER APPROPRIATE RELIEF

From Orders Compelling the Disclosure of
Personal Financial Information
Los Angeles County Superior Court, No. 123456
The Honorable Rachel Smythe
213-987-6543

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Attorneys for Defendant and
Petitioner John Doe

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rules of Court, rule 8.488, the undersigned, counsel for Defendant and Petitioner

John Doe, certifies that she knows of no other entity or person other than the parties to this proceeding who has a financial or other interest in its outcome.

Executed on June 15, 2007, at Los Angeles, California.

_____

Roberta Jones

TABLE OF CONTENTS

Page

INTRODUCTION: WHY WRIT RELIEF SHOULD BE GRANTED

PETITION

PRAYER

VERIFICATION

MEMORANDUM

[*Include your argument headings here.*]

CONCLUSION

CERTIFICATE OF WORD COUNT

TABLE OF AUTHORITIES

CASES

[*List cases in alphabetical order by name, giving citation for each under name; give page number(s) on which citations are found to the right of the citation.*]

STATUTES

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CONSTITUTIONAL PROVISIONS

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COURT RULES

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OTHER AUTHORITIES

[*List other authorities in alphabetical order by name, giving citation for each under name; give page number(s) on which citations are found to the right of the citation.*]

INTRODUCTION: WHY WRIT RELIEF SHOULD BE GRANTED

This petition challenges an order requiring disclosure of private confidential financial information that is sought by real party in interest Jane Doe to justify an advance of legal fees on appeal—even though any such

fee award would be invalid as a matter of law. Real party in interest is asserting a right under the Family Code that, if it ever existed, was abrogated by a contract signed by the parties 4 years ago.

John Doe ("John") and Jane Doe ("Jane") entered into a marital settlement agreement to dissolve their marriage and to resolve all issues relating to the dissolution, including property division and support. The agreement provides that the prevailing party in any litigation over the contract is entitled to attorney fees.

In 2005, Jane sought a determination by the trial court that John had violated the agreement and breached his fiduciary duties to her. The trial court found that John had violated the agreement, but had not breached any fiduciary duty. Both sides appealed, challenging the court's interpretation and implementation of their contract.

Briefing has not yet begun on those appeals, but Jane has sought discovery of John's financial condition to support her motion for attorney fees under Family Code §2030 to pay for her attorney's efforts to enforce, on appeal, the rights she claims under the parties' contract. On May 24, 2007, the trial court ordered John to produce extensive financial documents by June 22, 2007.

The question presented by this writ petition is (1) whether Jane, who admits that she receives almost $30,000 per month in support from John, earns almost $12,000 per month more in dividends and interest, and has close to $5 million in stocks, bonds, or other relatively liquid assets (Exh. 11, p. 288), is entitled to discovery into John's assets so that she can support her motion under Family Code §2030 for an advance of attorney fees on appeal, or (2) whether the contractually agreed upon prevailing party attorney-fee provision in the parties' marital settlement contract trumps the Family Code and limits attorney fees solely to the prevailing party without any need to take intrusive discovery to determine ability to pay.

The trial court erred as a matter of law in applying a Family Code fee analysis under these circumstances. As part of their settlement contract, John and Jane agreed that they were resolving "all of the issues in this marital dissolution proceeding" and that they were "immediately, completely, and forever sett[ling] and determin[ing] all of his/her property rights and all of the rights, duties, and obligations of each to the other, existing or arising by reason of their marital relationship." (Exh. 16, p. 520.) The parties further agreed that their settlement agreement "shall be interpreted as a contract and in accordance with California law on this subject." (Exh. 3, p. 90.) One of the purposes of the settlement agreement was for both sides "not to proceed with further or complete formal discovery, appraisals, or other economic valuations." (Exh. 16, p. 521.) As to future attorney fees, the agreement provided that the prevailing party in any actions to enforce the agreement would be entitled to fees. (Exh. 16, pp. 523-524.) Such a contractual prevailing-party provision would have no meaning if one party could also seek attorney fees based on something other than prevailing on the merits.

Absent writ relief, John will have no remedy to avoid intrusive discovery into his financial condition by his ex-wife. Accordingly, this Court should grant this petition.

PETITION

John Doe petitions this Court for a writ of mandate and/or prohibition, or other appropriate relief, directing respondent Los Angeles County Superior Court to vacate its order requiring John Doe to comply with real party in interest Jane Doe's discovery requests relating to his personal and confidential finances incidental to Jane's motion for attorney fees.

To these ends, petitioner alleges:

BENEFICIAL INTEREST OF PETITIONER; CAPACITIES OF RESPONDENT AND REAL PARTY IN INTEREST.

1. Petitioner John Doe is a party in various postjudgment motions that are now pending before this Court on appeal (*Doe v Doe* (No. B78945; Super. Ct. No. 123456); see also Exh. 1, p. 8; Exh. 2, p. 70; Exh. 10, pp. 260-261). He has been ordered by the Los Angeles County Superior Court to comply with discovery requests that seek disclosure of his confidential personal financial information. (Exh. 19, p. 541.)

2. Respondent is the Los Angeles County Superior Court, which entered the discovery orders challenged in this petition. (Exh. 19, p. 541.)

3. Real party in interest is Jane Doe, John's ex-wife, who propounded the discovery requests seeking

John's confidential personal financial information. (Exh. 15, p. 375.)

AUTHENTICITY OF EXHIBITS.

4. The exhibits accompanying this petition are true and correct copies of original documents filed with respondent court or with respondent court's designated discovery referee, except for Exhibit 21, which is a true and correct copy of the reporter's transcript of the May 15, 2007 hearing before the Honorable Robert Smith, discovery referee, regarding Jane's motion to compel discovery. The exhibits are paginated consecutively from page 1 to page 673. Page references in this petition are to the consecutive pagination.

TIMELINESS OF THE PETITION.

5. On May 15, 2007, Referee Smith issued a Report and Recommendation granting Jane's motion to compel. (Exh. 19, pp. 542-550.) The trial court approved the Report and Recommendation on May 24, 2007. (Exh. 19, p. 541.) This petition is filed within a month of the trial court's approval of the Report and Recommendation.

SUMMARY OF RELEVANT FACTS AND PROCEDURE.

THE CONTRACTUAL SETTLEMENT BETWEEN THE PARTIES.

6. On July 3, 2003, John Doe and Jane Doe entered into a marital settlement agreement and stipulated judgment concluding their divorce proceedings. (Exh. 3, pp. 84-90.) The stipulated judgment provides that "[s]aid Marital Settlement Agreement resolves all of the issues in this marital dissolution proceeding" and that "[e]ach party has entered into this Stipulated Further Judgment to immediately, completely, and forever settle and determine all of her/his property rights and all of the rights, duties and obligations of each to the other, existing or arising by reason of their marital relationship." (Exh. 16, p. 520.)

7. The stipulated judgment further provided that "Petitioner and Respondent each have represented to the other, for the other to rely upon in entering into this Stipulated Further Judgment, and for the Court to rely upon in approving and signing this Stipulated Further Judgment, that she/he instructed her/his attorney not to proceed with further or complete formal discovery, appraisals or other economic valuations." (Exh. 16, p. 521.)

8. The stipulated further judgment included a bolded section heading entitled "ATTORNEY FEES AND COSTS." (Exh. 16, p. 523.) Attorney fees incurred by either party through the date of execution of the agreement and judgment were to be borne by each side except that John was obligated to pay a lump sum to Jane's counsel. (*Ibid.*) Future attorney fees were provided for as follows:

> **No provision of the Marital Settlement Agreement nor this Stipulated Further Judgment shall be deemed to prevent either party from seeking contribution from the other for the payment of her/his actual, reasonable, and substantiated legal fees and litigation expenses incurred in connection with any further matter pertaining to the Marital Settlement Agreement, this Stipulated Further Judgment, the enforcement of any such documents or provisions contained herein, or any other conditions subsequent contained herein. In the event any party fails to comply with any provision of the Marital Settlement Agreement and/or this Stipulated Further Judgment, she/he shall reimburse the other party for all expense, including reasonable attorney fees and costs of suit, which, as a result of such failure, are incurred to enforce the provisions of the Marital Settlement Agreement and this Stipulated Further Judgment.**

(Exh. 16, pp. 523-524.) The stipulated judgment also provided that "[t]he provisions of this Section do not affect any right to recover attorney fees and costs in any future proceeding relating to child custody or child support issues." (Exh. 16, p. 524.) Finally, the stipulated judgment provided that any issue "relating to the payment of attorney fees and costs of litigation" shall be brought before the court. (*Ibid.*)

[*Remainder of text of allegations 9-17 omitted.*]

BASIS FOR RELIEF.

18. The marital settlement agreement provides for attorney fees to the prevailing party. Permitting Jane to seek attorney fees based on Family Code provisions permitting fees to be paid by the party best able to pay, and the discovery necessary to prove that John has a greater ability to pay (he does not), contradicts the

express terms and purpose of the settlement agreement.

19. A limited protection is given to sensitive information that people may wish to keep confidential, such as their financial dealings (see, *e.g., Valley Bank of Nevada v Superior Court* (1975) 15 C3d 652, 656) and assets (see, *e.g., Richards v Superior Court* (1978) 86 CA3d 265, 271). "Where objection is made to discovery of such sensitive information in the trial court, the court must carefully weigh the competing factors in fashioning an order, considering: '… the purpose of the information sought, the effect that disclosure will have on the parties and on the trial, the nature of the objections urged by the party resisting disclosure, and ability of the court to make an alternative order which may grant partial disclosure, disclosure in another form, or disclosure only in the event that the party seeking the information undertakes certain specified burdens which appear just under the circumstances.' [Citations.] Where the court abuses its discretion in applying this balancing test and fashioning its order, relief is available by writ of mandate." (*Hofmann Corp. v Superior Court* (1985) 172 CA3d 357, 362.)

ABSENCE OF OTHER REMEDIES.

20. John Doe has no adequate, legal remedy other than writ relief. (See Code Civ. Proc., §904.1(a)(1) [interlocutory orders are not appealable].) Unless writ relief is granted, John will be forced to disclose private information about himself. The need for writ relief under these circumstances is obvious. (See *California Highway Patrol v Superior Court* (2000) 84 CA4th 1010, 1018 ["Writ review is appropriate when the petitioner seeks relief from a discovery order which may undermine a privilege or a right of privacy, because appellate remedies are not adequate to remedy the erroneous disclosure of information"].)

GROUNDS FOR AN IMMEDIATE STAY.

21. The trial court's order requires John to produce the demanded documents by June 22, 2007. (Exh. 19, p. 541.) A stay of respondent court's discovery orders is necessary to preserve the status quo and thereby provide this Court with sufficient time to consider this petition. The good faith filing of this writ petition should automatically excuse John from having to comply with the order pending completion of these proceedings. (See *Fairfield v Superior Court* (1966) 246 CA2d 113, 121-122.) However, out of an excess of caution, John requests that this Court order a stay of respondent court's discovery order to the extent the order is not stayed by the filing of this petition. As demonstrated in the following supporting memorandum, respondent court abused its discretion by ordering John to respond to this intrusive and oppressive discovery. Consequently, it would be unjust and unfair to force John to choose between contempt and the needless waste of his resources when this Court could instead ensure that the status quo is preserved by ordering a stay of respondent court's order pending the final resolution of this petition.

PRAYER

Petitioner John Doe prays that this Court:

1. Issue an immediate temporary stay of respondent court's discovery orders pending resolution of this writ petition; and

2. Issue a peremptory writ of mandate and/or prohibition in the first instance (Code Civ. Proc., §§1087-1088, 1104-1105; see *Palma v U.S. Indus. Fasteners, Inc.* (1984) 36 C3d 171, 178) directing respondent trial court to vacate its May 24, 2007 order granting Jane Doe's motion to compel; or

3. Should it deem such action necessary and appropriate, issue an alternative writ directing respondent court either to grant the relief specified in paragraph 2 of this prayer or to show cause why it should not be ordered to do so, and upon the return of the alternative writ, issue a peremptory writ as set forth in paragraph 2 of this prayer; and

6. Award his costs under California Rules of Court, rule 8.485-8.493; and

7. Grant such other relief as may be just and proper.

DATED: June 15, 2007

Respectfully submitted,

JONES & PETERS LLP

By _____
Roberta Jones

Attorneys for Defendant and
Petitioner John Doe

VERIFICATION

I am the petitioner in this matter. I have read the foregoing Petition for Writ of Mandate, Prohibition, or Other Appropriate Relief and know its contents. The facts alleged in this petition are within my own personal knowledge, and I know these facts to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this verification was executed on June __, 2007, at Los Angeles, California.

_____
John Doe

MEMORANDUM

A. THE MOTION TO COMPEL SHOULD BE SET ASIDE BECAUSE JANE DOE HAS NO RIGHT TO EVIDENCE REGARDING JOHN DOE'S PRESENT FINANCES.

1. Jane Doe Has an Extremely High Burden to Justify the Challenged Discovery Because John Doe Has a Significant Privacy Interest in His Personal Financial Information.

The first provision of the California Constitution states that privacy is one of the inalienable rights of all people. (Cal. Const., art. I, §1.) It is a right on a par with defending life and possessing property (*Vinson v Superior Court* (1987) 43 C3d 833, 841) and is a fundamental interest of our society (*Garstang v Superior Court* (1995) 39 CA4th 526, 532; *Kahn v Superior Court* (1987) 188 CA3d 752, 765). "'The right of privacy is the right to be left alone.'" (*Mite v Davis* (1975) 13 C3d 757, 774.)

In addition to the basic right to be left alone, "[i]t is elementary that a party has a privacy interest in his or her personal financial records." (*Babcock v Superior Court* (1994) 29 CA4th 721, 726; accord, *Valley Bank of Nevada v Superior Court, supra,* 15 Cal.3d at p. 656 ["we may safely assume that the right of privacy extends to one's confidential financial affairs as well as to the details of one's personal life"].)

For this reason, "[t]he burden is on the party seeking the constitutionally protected information to establish direct relevance." (*Davis v Superior Court* (1992) 7 CA4th 1008, 1017; accord, *John B. v Superior Court* (2006) 38 C4th 1177, 1200 ["where a plaintiff seeks discovery from a defendant concerning… matters protected by the constitutional right of privacy, the intrusion upon… privacy may only be done on the basis of 'practical necessity'"].)

[*Remainder of text of Memorandum omitted.*]

CONCLUSION

The order granting the motion to compel at issue in this petition is premised on the belief that discovery into John Doe's financial condition is relevant to Jane Doe's motion for an advance of attorney fees pursuant to §2030 of the Family Code. This petition demonstrates that Jane has no right to any advance of attorney fees under section 2030, and that only the prevailing party is entitled to such fees, irrespective of ability to pay. Accordingly, this Court should grant John's writ petition to protect him from this baseless and intrusive discovery.

DATED: June 15, 2008

Respectfully submitted,

JONES & PETERS LLP

By _____
Roberta Jones

Attorneys for Defendant and Petitioner John Doe

CERTIFICATE OF WORD COUNT

The foregoing Petition contains 5164 words (excluding tables and this Certificate). In preparing this certificate, I relied on the word count generated by MS Word 2003.

Executed on June 15, 2008, at Los Angeles, California.

_____
Roberta Jones

Note: This sample brief has not been updated for substantive legal accuracy. It is presented as an example of form, not content, and should not be presumed accurate with regard to the state of the law. The names of the parties and attorneys have been changed for publication.

Comment: The format of attorney-drafted court papers is governed generally by Cal Rules of Ct 8.144, 8.204. Writ petitions must also comply with the formatting requirements of Cal Rules of Ct 8.486, 8.488. If a stay is requested, the petition must comply with Cal Rules of Ct 8.116. On the many specific formatting details required, see §§18.5-18.20.

On drafting a writ petition, see §§18.21-18.60.

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Source: Civil Litigation/California Civil Writ Practice/28 Court of Appeal and Supreme Court Forms/§28.2 II. FORM: CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (JUDICIAL COUNCIL FORM APP-008)

§28.2 II. FORM: CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (JUDICIAL COUNCIL FORM APP-008)

TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, **APPELLATE DISTRICT, DIVISION**	Court of Appeal Case Number:
ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*: — TELEPHONE NO.: FAX NO. *(Optional)*: E-MAIL ADDRESS *(Optional)*: ATTORNEY FOR *(Name)*:	Superior Court Case Number: *FOR COURT USE ONLY*
APPELLANT/PETITIONER: RESPONDENT/REAL PARTY IN INTEREST:	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS *(Check one)*: ☐ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): _____

2. a. ☐ There are no interested entities or persons that must be listed in this certificate under rule 8.208.
   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	**Nature of interest *(Explain):***
(1)	
(2)	
(3)	
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date:

_____ ▶ _____

(TYPE OR PRINT NAME) (SIGNATURE OF PARTY OR ATTORNEY)

Form Approved for Optional Use
Judicial Council of California
APP-008 [Rev. January 1, 2009]

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Cal. Rules of Court, rules 8.208, 8.488
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Comment: The Judicial Council has approved this form for optional use. It is available online at http://www.courtinfo.ca.gov/forms. On certificates of interested entities or persons, see §§21.19, 23.8.

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Source: Civil Litigation/California Civil Writ Practice/28 Court of Appeal and Supreme Court Forms/§28.3 III. FORM: TABLE OF EXHIBITS

§28.3 III. FORM: TABLE OF EXHIBITS

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TABLE OF EXHIBITS SUPPORTING PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION			
EXH. NO.	DOCUMENT	VOL.	PAGE
1	Plaintiff Jane Doe's Notice of Motion and Motion for Summary Judgment [Filed on February 4, 2008]	1	1
2	Memorandum in Support of Plaintiff's Motion for Summary Judgment [Filed on February 4, 2008]	1	3
3	Separate Statement of Undisputed Material Facts in Support of Plaintiff's Motion for Summary Judgment [Filed on February 4, 2008]	1	25
4	Declaration of John Doe in Support of Plaintiff's Motion for Summary Judgment [Filed on February 4, 2008]	1	43
5	Declaration of Roberta Jones in Support of Plaintiff's Motion for Summary Judgment [Filed on February 4, 2008] Exhibit A: Transcript pages from the deposition of John Doe Exhibit B: Transcript pages from the deposition of Elizabeth Bowman Exhibit C: Defendant John Smith's Responses to Plaintiff's Requests for Admission (Set One)	1 1 1 1	50 52 67 85
6	Declaration of Elizabeth Bowman in Support of Plaintiff's Motion for Summary Judgment [Filed February 4, 2008]	1	93
7	Defendant's Opposition to Plaintiff's Motion for Summary Judgment [Filed April 21, 2008]	1	97
8	Defendant's Response to Plaintiff's Separate Statement of Undisputed Material Facts [Filed April 21, 2008]	1	112
9	Declaration of John Smith in Support of Defendant's Opposition to Plaintiff's Motion for Summary Judgment [Filed April 21, 2008] Exhibit A: January 14, 2005 letter from Jane Doe to John Smith	1 1 1 1	132 136 138 188

	Exhibit B: Transcript pages from the deposition of Rachel Smythe Exhibit C: Defendant's Case Management Statement filed on January 9, 2008		
10	Case Management Conference Order filed on January 15, 2008	1	193

Note: This sample table of exhibits is presented as an example of form, not content. The names of the parties and attorneys and the case number information have been changed for publication.

Comment: Whether the exhibits that compose the record are bound together at the end of the petition or in separate volumes, they must begin with a table of contents. See Cal Rules of Ct 8.486(c)(1)(C).

On the format and content of the record, see §§20.6-20.14.

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§28.4 IV. FORM: PRELIMINARY OPPOSITION TO PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE WRIT AND STAY REQUEST

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No. A123456

In the Court of Appeal of the State of California
First Appellate District, Division Four

John Doe, et al.,
Plaintiffs and Petitioners,

vs.

Superior Court of San Francisco County,
Respondent.

ABC Corporation,
Defendant and Real Party in Interest.

PRELIMINARY OPPOSITION TO PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE WRIT AND STAY REQUEST

Writ Petition and Stay Request From Orders Granting
Motions in Limine
San Francisco County Superior Court,
No. 456789
Honorable Jane Smythe

Roberta Jones, SBN 00000	Brian Thomas, SBN 22222
Daniel Peters, SBN 11111	Lucy Adams, SBN 33333
JONES & PETERS LLP	THOMAS & ADAMS LLP
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Telephone: 415-123-4567	Telephone: 925-123-4567
Facsimile: 415-456-7891	Facsimile: 925-456-7891

Attorneys for Defendant and Real Party in Interest ABC Corporation

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rules of Court, rule 8.488, the undersigned, counsel for Defendant and Real Party in Interest ABC Corporation, certifies that she knows of no other entity or person other than the parties to this proceeding who has a financial or other interest in its outcome.

Executed on August 3, 2008, at San Francisco, California.

_____

Roberta Jones

TABLE OF CONTENTS

Page

I. INTRODUCTION

II. NO EXTRAORDINARY CIRCUMSTANCES WARRANT STOPPING THE TRIAL AND ISSUING AN ALTERNATIVE WRIT PETITION

III. ALLOWING THE MATTER TO PROCEED TO TRIAL MAY CURE THE PREJUDICE PLAINTIFFS CLAIM THAT THEY HAVE SUFFERED FROM THE PURPORTEDLY ERRONEOUS IN LIMINE RULINGS

IV. A STAY IS ALSO UNWARRANTED BECAUSE THE BALANCE DOES NOT TIP DECIDEDLY IN FAVOR OF PLAINTIFFS—THE CHALLENGED RULINGS ARE CORRECT

V. CONCLUSION

CERTIFICATE OF WORD COUNT

TABLE OF AUTHORITIES

Page

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OTHER AUTHORITIES

[*List other authorities in alphabetical order by name, giving citation for each under name; give page number(s) on which citations are found to the right of the citation.*]

I. INTRODUCTION

John and Elizabeth Doe, plaintiffs in the San Francisco Superior Court proceeding to which this matter relates, have filed a writ petition and request for immediate stay of trial. The matter was assigned to a trial department on July 18, 2008, and motions in limine were argued and ruled upon on July 21 and 22. Jury

selection and the presentation of evidence are set to begin on August 8.

In their petition, plaintiffs seek to overturn orders on certain oral rulings granting seven motions in limine (MILs) in favor of defendant and real party in interest ABC Corporation ("ABC"). The eight challenged rulings are those on MIL Nos. 2, 3, 4, 5, 7, 8, 13, and 17. (Petition at p. 34 (prayer).) Plaintiffs' principal argument is that those rulings "severely restrict—indeed virtually eliminate"—their damages against real party on plaintiffs' "*tortuous [sic]* interference [claim] to the amount the jury in the first trial found to be the *contract* damages (on a partial cause of action) against then defendants James Monroe, *et al."* (*Id.* at p. 2 (fns. omitted, emphasis in original).)

In this preliminary opposition (filed under California Rules of Court, rule 8.487(a)), ABC urges the Court to summarily deny the petition and the request for an immediate stay. The principal reasons for doing so are that (1) plaintiffs unreasonably delayed filing this petition and, in any event, there are no extraordinary circumstances that warrant halting the trial and entertaining the merits of the petition; (2) the supposedly erroneous limitation on the amount of their recoverable damages will be rendered harmless if real party prevails on liability, so there is no compelling need for writ review; and (3) the trial court's orders were not as a matter of law clearly erroneous and substantially prejudicial.

II. NO EXTRAORDINARY CIRCUMSTANCES WARRANT STOPPING THE TRIAL AND ISSUING AN ALTERNATIVE WRIT

As noted, on July 18, this matter was assigned to a trial department—here, to the Honorable Jane Smythe. On that date and the days following, the parties and the court discussed scheduling, agreed to file and entertain, respectively, additional briefing, and argued and heard, respectively, the motions in limine. Those motions—including the ones at issue in this writ proceeding—were ruled upon orally on July 21 and 22.

On August 8, as noted, the court will empanel a jury and the parties will begin the presentation of their respective cases. The parties agree that trial will take at most 4 to 5 days. (Exh. 19, p. 843-44.)

Plaintiffs have known since the rulings were made on July 21 and 22 that they would be seeking writ review. They have had the reporter's transcript of the two relevant hearings since July 23. Nevertheless, by filing their petition and stay request 11 days after the trial court's rulings on the MILs (and less than one week before jury selection begins), plaintiffs have forced ABC to divide its efforts between the substantial work necessary to prepare for next week's trial and the equally substantial work necessary to prepare and file the present preliminary opposition.

If a stay is denied, plaintiffs will not suffer irreparable injury by being required to proceed to trial, particularly given the parties' estimate that only a week at most of trial time will be required. If a stay is granted, however, defendants will suffer the injury and expense of having prepared their case, including lining up their witnesses and clearing their and their counsel's calendars to ensure that the matter could be tried to judgment. Under these circumstances, and because plaintiffs unreasonably delayed the filing of their petition and stay request, the Court would be well within its discretion in denying relief on laches grounds alone. (See *Peterson v Superior Court* (1982) 31 C3d 147, 163 [laches requires unreasonable delay and prejudice].)

Moreover, the Court should be aware that two key witnesses, James and Patricia Monroe, are leaving the country in mid-August and will be away until after Labor Day. (Exh. 19, p. 843.) It was based on their schedules that, at the July 22 hearing, the parties agreed to slot Mr. Monroe's testimony for August 9 (he leaves on August 10) and Mrs. Monroe for later that same week (she leaves a few days after he leaves). (*Id.*) A stay would disrupt this schedule and render them unavailable until after Labor Day. There is no compelling need to cause that disruption. The petition and stay request should be denied.

III. ALLOWING THE MATTER TO PROCEED TO TRIAL MAY CURE THE PREJUDICE PLAINTIFFS CLAIM THAT THEY HAVE SUFFERED FROM THE PURPORTEDLY ERRONEOUS IN LIMINE RULINGS

The Court should also deny the petition and request for stay because, even assuming that the trial court's challenged MIL rulings were erroneous, any error could turn out to be harmless. This is because the trial court has ruled that ABC is not bound by any issue adjudicated in the Doe-Monroe breach of contract lawsuit. (Exh. 15, p. 710, 723.) Plaintiffs have not challenged that ruling in their petition. As a result, plaintiffs must prove all elements of their cause of action (even those common to breach of contract), and ABC may defeat liability by refuting any one of them.

[*Remainder of text of Section III omitted.*]

IV. A STAY IS ALSO UNWARRANTED BECAUSE THE BALANCE DOES NOT TIP DECIDEDLY IN FAVOR OF PLAINTIFFS—THE CHALLENGED RULINGS ARE CORRECT

Plaintiffs' petition principally challenges the trial court's rulings on those MILs related to certain items of claimed damages. Due in part to plaintiffs' unreasonable delay in filing and serving their petition, real party has not had sufficient opportunity to prepare a comprehensive response to these merits arguments. We nevertheless provide the following overview to show why the equities do not tip in favor of a stay or alternative writ, as the challenged in limine rulings were correct. (See *Omaha Indemn. Co. v Superior Court* (1989) 209 CA3d 1266, 1273-74 [one criteria for writ relief is that challenged order must be both "clearly erroneous as a matter of law and substantially prejudic[ial]"].)

[*Remainder of text of Section IV omitted.*]

V. CONCLUSION

There are no extraordinary circumstances that warrant granting plaintiffs' request to stop an ongoing trial and to entertain a merits challenge to interlocutory orders granting certain of ABC's motions in limine. The Court should summarily deny the petition and accompanying request for an immediate stay.

DATED: August 3, 2008

Respectfully submitted,

JONES & PETERS LLP

THOMAS & ADAMS LLP

By: _____
Roberta Jones

Attorneys for Defendant and Real Party in Interest
ABC Corporation

CERTIFICATE OF WORD COUNT

The foregoing Preliminary Opposition contains 8986 words (inclusive of footnotes, but exclusive of tables and this Certificate). In preparing this certificate, I relied on the word count generated by MS Word 2003.

Executed on August 3, 2008, at San Francisco, California.

_____
Roberta Jones

Note: This sample brief has not been updated for substantive legal accuracy. It is presented as an example of form, not content, and should not be presumed accurate with regard to the state of the law. The names of the parties and attorneys and the case number information have been changed for publication.

Comment: The format of attorney-drafted court papers is governed generally by Cal Rules of Ct 8.144, 8.204. Preliminary oppositions must also comply with the formatting requirements of Cal Rules of Ct 8.487, 8.488. If a stay is requested, the document must comply with Cal Rules of Ct 8.116. On the many specific formatting details required, see §§18.5-18.20. On drafting a preliminary opposition, see §§21.8-21.12.

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§28.5 V. FORM: SUMMARY DENIAL

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

ABC CORPORATION, **Petitioner,**	**No. 123456**
vs.	**(Superior Court No. 456789)**
THE SUPERIOR COURT OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES, **Respondent.**	**ORDER**
JANE DOE, **Real Party in Interest.**	

THE COURT:

The Court has read and considered the petition for a writ of mandate and request for a stay of proceedings filed on January 18, 2008. The petition is denied.

_____

SMITH, P.J., JONES, J., ROBERTS, J.

Note: This sample order is presented as an example of form, not content. The names of the parties have been changed for publication.

Comment: The court will sometimes indicate the reason for the summary denial, *e.g.*, untimeliness or inadequate record. On summary denials, see §§22.14-22.17.

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§28.6 VI. FORM: ALTERNATIVE WRIT/ORDER TO SHOW CAUSE

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

JANE DOE,	)	**No. 123456**
Petitioner,	)	
	)	**(Superior Court No. 456789)**
vs.	)	
	)	**(John Doe, Judge)**
SUPERIOR COURT OF	)	
CALIFORNIA FOR THE	)	**ORDER AND ALTERNATIVE**
COUNTY OF ALAMEDA,	)	**WRIT OF MANDATE**
Respondent.	)	
_____	)	
ABC CORPORATION,	)	
Real Party in Interest.	)	
_____	)	

TO THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES:

Good cause appearing therefor, you are commanded, immediately upon receipt of this writ, either to:

(1) Vacate your order of January 22, 2008, in Los Angeles County Superior Court case number 456789 expunging the lis pendens recorded by petitioner, and thereafter make a new and different order denying real party in interest's motion to expunge; or

(2) In the alternative, SHOW CAUSE, before this Court, in its courtroom at 300 South Spring Street, Los Angeles, California, 90013, at 10:00 a.m. on March 12, 2008, why you have not done so and why a peremptory writ of mandate requiring you to do so should not issue.

In the event that you comply with alternative (1) above, you shall so inform this Court by transmitting a copy of your minute order to this Court forthwith. In the event that you fail to comply with alternative (1) above, the written return to this writ shall be served and filed on or before February 15, 2008. Should petitioner wish to file a reply, such reply shall be served and filed on or before February 22, 2008.

Pending further order of this Court, all proceedings in Los Angeles County Superior Court case number 456789 are hereby stayed, provided however that the respondent shall have the power to comply with alternative (1) above.

By order of this Court.

ATTEST my hand and the seal of this court this 8th day of February 2008.

JOHN DOE, CLERK

By: _____
Deputy Clerk

Let the foregoing writ issue.

SMITH, P.J., JONES, J., ROBERTS, J.

Note: This sample order and writ is presented as an example of form, not content. The names of the parties and the case number information have been changed for publication.

Comment: On alternative writs and orders to show cause, see §§22.23-22.29.

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§28.7 VII. FORM: *PALMA* NOTICE (ORDER)

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

JANE DOE,	)	**No. 123456**
Petitioner,	)	
	)	**(Superior Court No. 456789)**
vs.	)	
	)	**(John Doe, Judge)**
SUPERIOR COURT OF	)	
CALIFORNIA FOR THE	)	**ORDER**
COUNTY OF LOS ANGELES,	)	
Respondent.	)	
_____	)	
ABC CORPORATION,	)	
Real Party in Interest.	)	
_____	)	

THE COURT:

The petition for writ of mandate or prohibition filed herein January 15, 2008, has been read and considered.

The parties are notified that the court may issue an order for a peremptory writ in the first instance requiring the respondent to release the appeal bond currently in place. (*Palma v U.S. Indus. Fasteners, Inc.* (1984) 36 C3d 171, 180.) The real party in interest is requested to file and serve opposition on or before January 29, 2008.

_____
SMITH, P.J., JONES, J., ROBERTS, J.

Note: This sample order is presented as an example of form, not content. The names of the parties and the case number information have been changed for publication.

Comment: On *Palma* notices, see §§22.18-22.22.

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§28.8 VIII. FORM: *PALMA* NOTICE (LETTER)

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FIRST APPELLATE DISTRICT

JANE DOE, CLERK

Joseph A. Smith
Attorney at Law
123 First Street, Suite 1000
San Francisco, CA 94111

December 1, 2008

350 McAllister Street
San Francisco, CA 94102

Re: A123456; *Robert Smythe v Superior Court*
(Elizabeth Jones, Real Party in Interest)

Dear Counsel:

Your client is named as a real party in interest to the above-captioned writ petition, which has been assigned to Division Two of this court. The court asks that you serve and file opposition to the petition within 10 days from the date of this letter. Your opposition should address all issues raised by the petition.

Take note that if circumstances warrant, the court may issue a peremptory writ in the first instance. (See Code Civ. Proc., §1088; *Palma v U.S. Indus. Fasteners, Inc.* (1984) 36 C3d 171, 180.)

Please direct inquiries to Deputy Clerk John Roe at 415-123-4567.

Very truly yours,
JANE DOE, Clerk

By: _____
Deputy Clerk

cc: John B. Jones

Note: This sample letter is presented as an example of form, not content. The names of the parties and the case number information have been changed for publication.

Comment: On *Palma* notices, see §§22.18-22.22.

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§28.9 IX. FORM: "SUGGESTIVE" *PALMA* NOTICE

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

DEPARTMENT OF RECORDS, **Petitioner,**	**No. 123456**
	(Superior Court No. 456789)
vs.	
	(John Smith, Judge)
SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, **Respondent.**	**ORDER**
JANE DOE, **Real Party in Interest.**	

THE COURT:

Petitioner challenges the respondent's order compelling disclosure of matters contained in peace officer personnel records (*e.g.*, names and addresses of complainants and witnesses to personnel complaints), without first conducting in camera review of the material as required by Evidence Code §1045(b).

In view of the apparent merit of the petition, we stayed enforcement of the order and requested opposition from the real party in interest. In lieu of opposition, real party has submitted a letter response acknowledging that the respondent was required to conduct in camera review of the personnel records before ordering disclosure of the information sought by real party in her discovery motions. Real party thus agrees that petitioner is entitled to relief.

The court has also read and considered the separate, unrequested response to the petition filed by county counsel on behalf of the respondent court. This response too acknowledges that section 1045 and the case law construing that statute require *in camera* review before disclosure of the requested material. (See *Pierre C. v Superior Court* (1984) 159 CA3d 1120.) The respondent, however, contends that *Pierre C.* was incorrectly decided and urges this court to "reconsider, clarify, or modify" that case's holding. We are not inclined to engage in such reconsideration under the circumstances of the instant case. Accordingly, the parties are notified of our intention to issue a peremptory writ in the first instance granting the relief requested by petitioner.

The respondent may wish to avoid issuance of a peremptory writ by (1) vacating its order of March 27, 2008, in Los Angeles Superior Court case number 456789 requiring petitioner to make disclosure of peace officer personnel record information, and (2) thereafter conducting *in camera* review of the relevant personnel files as required by Evidence Code §1045(b). If so, respondent shall, before April 23, 2008, transmit a copy of its minute order to this court.

In the event the respondent does not vacate its order, it is given leave to serve and file additional opposition to the petition, on or before April 21, 2008, with a view to expeditious disposition of this matter. (See *Ng v Superior Court* (1992) 4 C4th 29, 35.)

The stay of proceedings is modified to permit the respondent court to comply herewith and avoid issuance

of a peremptory writ.

SMITH, P.J., JONES, J., ROBERTS, J.

Note: This sample order is presented as an example of form, not content. The names of the parties and the case number information have been changed for publication.

Comment: On *Palma* notices, see §§22.18-22.22. On suggestive *Palma* notices, see *Brown, Winfield & Canzoneri, Inc. v Superior Court* (Feb. 1, 2010, S156598), 2010 Cal Lexis 588; §22.22.

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§28.10 X. FORM: OPPOSITION TO ISSUANCE OF PEREMPTORY WRIT OF MANDATE IN THE FIRST INSTANCE

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No. 0123456

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

ABC CORPORATION,
Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES,
Respondent.

SMITH CORPORATION,
Real Party in Interest.

Superior Court for Los Angeles County (Case No. 456789)
The Honorable Elizabeth Smythe

OPPOSITION TO ISSUANCE OF PEREMPTORY WRIT OF MANDATE IN THE FIRST INSTANCE

Roberta Jones (SBN 00001)
JONES & PETERS LLP
100 Main Street, 2nd Floor
Los Angeles, CA 90004
Telephone: 213-123-4567
Facsimile: 213-456-7891
Attorneys for Real Party in Interest
Smith Corporation

TABLE OF CONTENTS

Page

INTRODUCTION

LEGAL DISCUSSION

[*Copy your argument headings here.*]

CONCLUSION

CERTIFICATE OF WORD COUNT

TABLE OF AUTHORITIES

CASES

[*List cases in alphabetical order by name, giving citation for each under name; give page number(s) on which citations are found to the right of the citation.*]

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CONSTITUTIONAL PROVISIONS

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COURT RULES

[*List court rules in numerical order, giving citation for each under name; give page number(s) on which citations are found*
to the right of the citation.]

OTHER AUTHORITIES

[*List other authorities in alphabetical order by name, giving citation for each under name; give page number(s) on which citations are found to the right of the citation.*]

INTRODUCTION

This court has given notice pursuant to *Palma v U.S. Indus. Fasteners, Inc.* ("*Palma*") (1984) 36 C3d 171 that the court might issue a peremptory writ in the first instance without an alternative writ or order to show cause and without oral argument. This opposition brief explains why this *Palma* notice is precluded by repeated admonitions from the California Supreme Court and should not be followed by issuance of a peremptory writ in the first instance (or by any writ relief at all). In addition, plaintiffs' petition is untimely, fails to demonstrate an inadequate remedy at law, and fails to comply with procedural requirements set forth in the Rules of Court.

***Palma* writs are reserved for exceptional cases in which either (1) a compelling temporal urgency requires an immediate decision, or (2) the petitioner's entitlement to relief is indisputably established by well-settled principles of law set forth in squarely applicable controlling authority and no reasonable contrary argument can be made. Neither is the situation here.**

Petitioner has pointed to no temporal urgency that would warrant depriving real party in interest of the opportunity for full briefing and oral argument. To the contrary, petitioner's own delay in seeking appellate review of the trial court's order directing opt-in notice demonstrates a *lack* of urgency to have the notice issue resolved.

Moreover, petitioner has no indisputable entitlement to relief. Real party in interest has presented several reasonable (indeed, meritorious) bases for denial of writ relief, including the trial court's broad discretion to order opt-in notice. The majority opinion in *Hypertouch, Inc. v Superior Court* ("*Hypertouch*") (2005) 128 CA4th 1527*,* on which petitioner relies, does not support writ relief here because the opinion does not address the circumstances of this case. In addition, in *Hypertouch*, one justice dissented in part and would have granted a petition for rehearing, demonstrating that the authority of trial courts to certify an opt-in class remains, at a minimum, disputable. (See *id.* at pp. 1556-1562 [conc. & dis. opn. of Haerle, J.].)

Accordingly, the *Palma* procedure has no proper role in this writ proceeding and would unlawfully deprive real party in interest of the right to oral argument should this court entertain the petition on its merits. In the event that the Court decides to reach the merits, real party in interest hereby requests an opportunity to submit a formal opposition. (See *Palma v U.S. Industrial Fasteners, Inc., supra,* 36 Cal.3d at p. 180.)

This opposition brief addresses the impropriety of the *Palma* procedure in this case. On all other points, this brief adopts by reference the preliminary opposition brief filed by real party in interest on March 31, 2008. (Cal. Rules of Court, rule 8.200(a)(5).)

LEGAL DISCUSSION

I. THIS COURT SHOULD NOT ISSUE A PEREMPTORY WRIT IN THE FIRST INSTANCE

A. THE *PALMA* PROCEDURE IS RESTRICTED TO EXCEPTIONAL CASES OF TEMPORAL URGENCY OR INDISPUTABLE ENTITLEMENT TO RELIEF

The California Supreme Court has repeatedly admonished that *Palma* writs are appropriate only in a narrow class of exceptional cases. The Supreme Court made that point clear in *Palma* itself, calling the *Palma* procedure a "rarity." *(Palma, supra,* 36 Cal.3d at p. 179.) Eight years later, in *Ng v Superior Court* (1992) 4 C4th 29, the court explained that "the accelerated *Palma* procedure is the exception; it should not become routine. Generally, that procedure should be adopted only when *petitioner's entitlement to relief is so obvious* that no purpose could reasonably be served by plenary consideration of the issue—for example, when such entitlement is conceded or when there has been clear error under well-settled principles of law and undisputed facts—or when there is an *unusual urgency requiring acceleration of the normal process.* If there is no compelling temporal urgency, and if the law and facts mandating the relief sought are not entirely clear, the normal writ procedure, including issuance of an alternative writ [citation] should be followed." (*Id.* at p. 35, italics added.)

Applying these principles in *Alexander v Superior Court* (1993) 5 C4th 1218, 1223, disapproved on another ground in *Hassan v Mercy Am. River Hosp.* (2003) 31 C4th 709, 724, fn. 4, the Supreme Court held that the Court of Appeal erred by directing issuance of a peremptory writ of mandate in the first instance when "[n]othing in the record suggests any 'unusual urgency'" and "the Court of Appeal could not legitimately have concluded that petitioners' 'entitlement to relief [was] so obvious that no purpose could reasonably be served by plenary consideration of the issue,' or that the matter involved 'conceded or… clear error under well-settled principles of law.'"

[*Remainder of text of Section A omitted.*]

B. IN THE PRESENT CASE THERE IS NO TEMPORAL URGENCY OR INDISPUTABLE ENTITLEMENT TO RELIEF

1. There Is No Temporal Urgency

Here, there is no "compelling temporal urgency requiring an immediate decision." (*Lewis v Superior Court, supra,* 19 Cal.4th at p. 1261.) Indeed, there is no urgency at all—compelling or otherwise—to justify a departure from "the normal writ procedure, including issuance of an alternative writ." (*Ng v Superior Court, supra,* 4 Cal.4th at p. 35.)

Petitioner's own actions prove this point. Petitioner failed to seek review of the trial court's July 2004 opt-in order when it was issued. It was not until almost 15 months later that petitioner asked this court to examine the ruling. (See Petition for Writ of Mandate, Prohibition, or Other Alternative Relief ("Petition") 2 ["issue presented" by petitioner is whether it was "an abuse of discretion for the trial court *to order that a certified California class be noticed as an opt-in class"* (emphasis added)].) If petitioner felt any urgency about obtaining review of the trial court's decision to certify an opt-in class, he should have challenged the ruling when made.

[*Remainder of text of Section 1 omitted.*]

2. There Is No Indisputable Entitlement to Relief

Likewise, this writ proceeding does not involve any "clear error under well-settled principles of law and undisputed facts." (*Ng v Superior Court, supra,* 4 Cal.4th at p. 35.) To the contrary, petitioner has presented—at a minimum—"[a] reasonable argument that the applicable law is unsettled or does not govern the precise issue presented in light of the particular undisputed facts… [or that] the application of legal principles set forth in various sources of law might lead to different results." (*Lewis v Superior Court, supra,* 19 Cal.4th at p. 1261.)

Real party in interest presented a "reasonable argument" that the trial court properly exercised its wide discretion in determining the manner of giving notice to class members. (See Opposition to Writ Petition at p. 14-26.) Real party in interest explained that no statute, rule, or decision by the California or United States

Supreme Courts prohibits opt-in classes. Indeed, the California Supreme Court has urged trial courts to be innovative and pragmatic in adopting procedures to administer class actions based on their broad discretionary authority in this area. (See, *e.g.*, *Vasquez v Superior Court* (1971) 4 C3d 800, 820-821.) Many other courts have recognized that potential class members may be required to act affirmatively, or "opt in," to join or remain in the class in appropriate circumstances. (See Opposition to Writ Petition at pp. 16-20 [citing cases].) Here, the trial court properly exercised its discretion in choosing an opt-in notice procedure to avoid the logistical nightmare of trying to administer a class action in which it is undisputed that the vast majority of notice recipients were not proper class members.

[*Remainder of text of Section 2 omitted.*]

C. THE *PALMA* PROCEDURE HERE WOULD UNLAWFULLY DEPRIVE REAL PARTY IN INTEREST OF ITS RIGHT TO ORAL ARGUMENT

There is no right to oral argument when a court has given *Palma* notice. (*Lewis v Superior Court, supra,* 19 Cal.4th at pp. 1260-1261.) The rarity of the *Palma* procedure, restricting it to exceptional cases of temporal urgency or indisputable entitlement to relief, justifies the extraordinary measure of dispensing with oral argument. "Denying an opportunity for oral argument before the issuance of a peremptory writ of mandate or prohibition in the first instance would be unfair to the parties… if the court's use of the accelerated *Palma* procedure were unwarranted. The remedy for such unfairness is not uniformly to require oral argument before a peremptory writ is issued in the first instance, but rather to restrict the use of that procedure to the narrow category of cases described above." (*Id.* at p. 1261.)

If this Court were to issue a *Palma* writ in the present case, the result would be an unlawful denial of real party in interest's right to oral argument, due to the absence of temporal urgency or indisputable entitlement to relief. (See *Lewis v Superior Court, supra,* 19 Cal.4th at p. 1261.)

II. THE PETITION IS UNTIMELY

Petitioner's petition challenging the method of determining class membership in this action was filed more than 10 months after the ruling that is at the heart of this challenge. (See Appendix of Exhibits in support of Writ Petition (App.) 183-186.) Petitioner took no action to seek review of the order when it was made. Now, however, it asks this Court to examine the ruling in light of the First District Court of Appeal's decision in *Hypertouch, Inc. v Superior Court* (2005) 128 CA4th 1527. Petitioner's decision to delay asserting any appellate challenge until this late date warrants denial of the petition.

[*Remainder of text of Section II omitted.*]

III. PETITIONER HAS FAILED TO DEMONSTRATE THAT ITS REMEDY BY APPEAL IN DUE COURSE IS INADEQUATE

Independent of the laches problem, petitioner has not demonstrated the lack of an adequate remedy at law, as is required to obtain extraordinary relief by writ. (See Code Civ. Proc., §§1086, 1103; accord, *Science Applications Int'l Corp. v Superior Court* (1995) 39 CA4th 1095, 1100.)

Absent interlocutory review, the parties here can simply proceed to trial with no threat of impeding judicial economy. *If* petitioner wins on the merits, and *if* it then successfully appeals the "opt-in" ruling, that ruling can be corrected after appeal without undoing all the proceedings on liability. On the other hand, if petitioner *loses* on the merits at trial, any supposed error with respect to the opt-in nature of the class will presumably be moot. Consequently, there is no compelling reason for this Court to allow plaintiffs to jump ahead of the line of litigants waiting for appellate review after final judgment.

Petitioner argues that interlocutory review must be afforded now because, if the trial court's order stands undisturbed, absent class members—*i.e.,* those who chose not to opt in to assert claims against real party in interest—will have no standing to object to a hypothetical class settlement if the case is resolved before trial and judgment. But the class notice recipients were individually identified and received a targeted mailing advising them of their rights. (App. 204-231.) It therefore seems inconceivable that any dentist who was unmoved to opt into the class in the first place would later take affirmative steps to challenge the settlement of an action that the dentist did not think was worth joining. Interlocutory review is therefore unnecessary for any reason.

IV. THE PETITION SUFFERS FROM RULE VIOLATIONS THAT PROVIDE AN INDEPENDENT BASIS FOR DENYING WRIT RELIEF

The petition demonstrates other defects warranting denial, such as the failure to include in the exhibits reporter's transcripts relating to the original notice ruling. California Rules of Court, rule 8.486(b) provides that a writ petition must be accompanied by "a reporter's transcript of the oral proceedings that resulted in the ruling under review" and if a transcript is unavailable, a declaration by counsel "explaining why the transcript is unavailable and fairly summarizing the proceedings, including counsel's arguments and any statement by the court supporting its ruling." (Cal. Rules of Court, rules 8.486(b)(1)(D) & (b)(3)(A).) "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… the petition." (Cal. Rules of Court, rule 8.486(b)(4).)

In the exhibits accompanying the writ petition, petitioner included the reporter's transcript relating to its motion to vacate the notice for an opt-in class (see A pp. 304-319), but failed to include pertinent oral proceedings on February 25 and March 14, 2008, which addressed the opt-in/opt-out issue that resulted in the April 2008 ruling that the class should be noticed as an opt-in class. It is the substance of this ruling that petitioner is now challenging in this writ petition. On this basis alone, the petition should be summarily denied. (See *Sherwood v Superior Court* (1979) 24 C3d 183, 186-187; *Lemelle v Superior Court* (1978) 77 CA3d 148, 156-157.)

V. IF THIS COURT ISSUES A PEREMPTORY WRIT, IT SHOULD DIRECT THE SUPERIOR COURT TO RECONSIDER WHETHER CLASS CERTIFICATION IS APPROPRIATE

If this court proceeds with issuance of a peremptory writ in the first instance, the court should order the trial court to reconsider its prior order certifying the class as framed by petitioner—of some *29,000* potential claimants—and to certify the class only if it finds certification *as an opt-out class* is warranted. After all, fewer than 180 opted into the class, demonstrating that the existing class definition encompasses many thousands of members with no interest in this litigation. At a minimum, this court should not prohibit the trial court from exercising its discretion to decertify, narrow, or otherwise modify the class.

CONCLUSION

For the foregoing reasons, and for those set forth in real party in interest's previously filed preliminary opposition to petitioner's writ petition, this court should summarily deny the petition. At a minimum, this court should adhere to normal writ procedures by issuing an alternative writ or order to show cause, obtaining a full-scale response from real party in interest, hearing oral argument, and issuing a written opinion.

However, if this court grants the petition, it should remand to the trial court with directions to consider whether to decertify the class.

DATED: April 16, 2008

Respectfully submitted,

JONES & PETERS LLP

By _____
Roberta Jones

Attorneys for Defendant
and Real Party in Interest
Smith Corporation

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.204(c)(1).)

The text of this brief consists of 5784 words as counted by the Corel WordPerfect version 12 word-processing program used to generate the brief.

Executed on __, at San Francisco, California.

_____
Roberta Jones

Note: This sample brief has not been updated for substantive legal accuracy. It is presented as an example of form, not content, and should not be presumed accurate with regard to the state of the law. In addition, because the real party in interest in this case had already filed a preliminary opposition addressing the merits of the writ petition, this brief's argument is limited to addressing the propriety of the *Palma* procedure. Had the party not done so, this opposition would also address the merits. The names of the parties and attorneys have been changed for publication.

Comment: The format of attorney-drafted court papers is governed generally by Cal Rules of Ct 8.144, 8.204. Oppositions to the issuance of peremptory writs in the first instance must also comply with the formatting requirements of Cal Rules of Ct 8.487(b). If this is the first paper being filed by a respondent or real party in interest, that party should include a certificate of interested entities or persons as required by Cal Rules of Ct 8.488. For an example, see §28.2. If a stay is requested, the document must comply with Cal Rules of Ct 8.116. On the many specific formatting details required, see §§18.5-18.20. On drafting an opposition to the issuance of a peremptory writ in the first instance, see §§23.3-23.10.

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§28.11 XI. FORM: RETURN TO PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER ALTERNATIVE RELIEF

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No. 0123456

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

ABC CORPORATION,
Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES,
Respondent.

SMITH CORPORATION,
Real Party in Interest.

Superior Court for Los Angeles County (Case No. 456789)
The Honorable Elizabeth Smythe

RETURN TO PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER ALTERNATIVE RELIEF; SUPPORTING MEMORANDUM

Roberta Jones (SBN 00001)
JONES & PETERS LLP
100 Main Street, 2nd Floor
Los Angeles, CA 90004
Telephone: 213-123-4567
Facsimile: 213-456-7891
ATTORNEYS FOR REAL PARTY IN INTEREST
SMITH CORPORATION

TABLE OF CONTENTS

Page

INTRODUCTION

RETURN BY ANSWER TO PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER ALTERNATIVE RELIEF

PRAYER

VERIFICATION

MEMORANDUM

[*Copy here your argument headings.*]

CONCLUSION

CERTIFICATE OF WORD COUNT

TABLE OF AUTHORITIES

CASES

[*List cases in alphabetical order by name, giving citation for each under name; give page number(s) on which citations are found to the right of the citation.*]

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[*List court rules in numerical order, giving citation for each under name; give page number(s) on which citations are found to the right of the citation.*]

OTHER AUTHORITIES

[*List other authorities in alphabetical order by name, giving citation for each under name; give page number(s) on which citations are found to the right of the citation.*]

INTRODUCTION

The *Hypertouch* majority held that the California Rules of Court governing class action management deprive trial courts of discretion to order opt-in notice. *(Hypertouch, Inc. v Superior Court* (2005) 128 CA4th 1527*,* 1550). This court has indicated it may adopt the *Hypertouch* majority's analysis.

***Hypertouch* was wrongly decided for the reasons previously outlined in real party in interest's briefing to this court, and for the reasons further explained below concerning the proper interpretation of the governing rules of court. In fact, the Rules of Court discussed in *Hypertouch* and emphasized in this court's order *invite* trial courts to craft procedural orders not specifically mentioned in the rules that would facilitate the management of a class action. (Cal. Rules of Court, rule 3.767(a)(4) & (5).) The rules even authorize trial courts to depart from the rules in appropriate cases. (Cal. Rules of Court, rule 3.760(b).) Thus, far from *prohibiting* opt-in notice as the *Hypertouch* majority believed, the rules of court *contemplate* the issuance of orders outside the rules' own confines based on a trial court's exercise of reasoned discretion within the circumstances of a particular case. Orders directing opt-in notice fall squarely within this category.**

Here, to facilitate the management of this class action, and after considering the circumstances of the case, the trial court ruled that the class would consist of those who opted into the class. The Rules of Court fully support this ruling. For this reason, and for the additional reasons set forth in real party in interest's preliminary opposition to petitioner's petition and real party in interest's opposition to issuance of a peremptory writ in the first instance, this court should deny the petition.

RETURN BY ANSWER TO PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER ALTERNATIVE RELIEF

Real party in interest, in answer to petitioner's Petition for Writ of Mandate, Prohibition, or Other Alternative Relief, admits, denies, and alleges as follows:

1. Real party in interest admits the allegation in paragraph 1.

2. Real party in interest admits the allegation in paragraph 2 based on information provided by petitioner.

3. Real party in interest admits the allegation in paragraph 3 based on information provided by petitioner.

4. Real party in interest admits the allegation in paragraph 4.

5. Real party in interest admits the allegation in the first sentence of paragraph 5. Assuming that the term "At all relevant times" (Petition at p. 3) in paragraph 5 refers to the period from January 1, 2007, to December 31, 2007, real party in interest manufactured and sold the dental cement at issue in this case at all relevant times to California dentists.

6. Real party in interest admits the allegation in the first sentence of paragraph 6 that real party in interest manufactured and sold the dental cement to ABC Corporation between January 1, 2007 and December 31, 2007. Real party in interest admits that, as stated in the first sentence of paragraph 6, the dental cement was a resin-reinforced glass ionomer dental cement.

Real party in interest admits that, as stated in the second sentence of paragraph 6, the dental cement was sold for use in such applications as the attachment of crowns and bridges, the buildup of core material under crowns, temporary tooth fillings, and cementing inlay and onlay fillings.

7. Real party in interest denies the allegation in paragraph 7 that it conducted no long-term testing of the dental cement.

Real party in interest denies that the dental cement had an unusual and excessive expansion characteristic.

Real party in interest admits that a few instances of breakage of ceramic and porcelain crowns were reported following, but not necessarily caused by, the application of the dental cement.

Real party in interest admits that it confirmed that under certain circumstances all-porcelain and all-ceramic crowns could fracture following the use, but not necessarily the proper and indicated use, of the dental cement as a luting cement.

Real party in interest denies that "an outside study by an academic consultant named John Doe reaffirmed real party in interest's findings." (Petition at p. 3.)

Real party in interest denies that "[t]he in-house scientist responsible for the product" was James Smith, and denies that such person "twice asked management to recall the product due to the expansion defect, but was rebuffed and ultimately fired." (Petition at p. 3.) Real party in interest alleges that, *after* experiencing performance problems and being denied a promotion, James Smith sent a letter regarding a possible recall.

Real party in interest admits the allegation that use of the dental cement was discontinued in January 2008.

8. Real party in interest denies the allegation in paragraph 8 that "[s]ubsequently published peer-reviewed testing of the dental cement confirmed universal expansion of more than 40 percent over the first 2 years after application." (Petition at p. 3.)

Real party in interest denies that "[s]uch inherent expansion also was found to cause unique and readily identifiable failures, including the cracking of crowns from internal pressure, lifting of crowns from their seatings, and fracturing of teeth in which the cement had been used." (Petition at p. 3.) Real party in interest alleges that all failures reported in connection with application of the dental cement are also known to occur clinically in the absence of its use.

For lack of information, real party in interest neither admits nor denies that "petitioner experienced such failures of his patients' dental work after application of the dental cement, necessitating repair or replacement of the dental work at his own expense." (Petition at p. 3-4.)

[*Remainder of text of Return omitted.*]

PRAYER

Real party in interest prays that this court deny the Petition for Writ of Mandate, Prohibition, or Other Alternative Relief.

Real party in interest further prays that, if this court grants the petition, it remand to the trial court with directions to consider whether to decertify the class.

VERIFICATION

I, Roberta Jones, declare as follows:

I am one of the attorneys for real party in interest. I have read the foregoing Return to Petition for Writ of Mandate, Prohibition, or Other Alternative Relief and know its contents. The facts alleged in this return are within my own knowledge and I know them to be true. Because of my familiarity with the rulings and facts pertaining to the trial court's proceedings, I, rather than any officer of real party in interest, verify this return.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this verification was executed on February __, 2008, in Los Angeles, California.

_____
Roberta Jones

MEMORANDUM

I. CONTRARY TO THE *HYPERTOUCH* MAJORITY'S HOLDING, THE CALIFORNIA RULES OF COURT DO NOT RESTRICT TRIAL COURTS' DISCRETION TO ORDER OPT-IN NOTICE.

In its Order, this court relied on rule 3.766 of the California Rules of Court, as interpreted in *Hypertouch*, to support the tentative conclusion that trial courts lack discretion to order opt-in notice. (See November 13, 2007 Order at p. 4.) However, the *Hypertouch* decision—like the analysis in this court's November 13 order—is flawed because it fails to consider the framework of class action rules of which rule 3.766 is a part.

[*Remainder of text of Memorandum omitted.*]

CONCLUSION

For the reasons stated above, and for those set forth in real party in interest's previously filed preliminary opposition to petitioner's writ petition and in real party in interest's opposition to issuance of a peremptory writ in the first instance, this court should deny the petition.

However, if this court grants the petition, it should remand to the trial court with directions to consider whether to decertify the class.

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.204(c)(1))

The text of this brief consists of 2000 words as counted by the Corel WordPerfect version 12 word-processing program used to generate this brief.

Executed on February __, 2008, at Los Angeles, California.

_____
Roberta Jones

Note: This sample brief has not been updated for substantive legal accuracy. It is presented as an example of form, not content, and should not be presumed accurate with regard to the state of the law. The names of the parties and attorneys have been changed for publication.

Comment: The format of attorney-drafted court papers is governed by Cal Rules of Ct 8.144, 8.204. Oppositions to the issuance of peremptory writs in the first instance must also comply with the formatting requirements of Cal Rules of Ct 8.487(b). If this is the first paper being filed by a respondent or real party in interest, that party should include a certificate of interested entities or persons as required by Cal Rules of Ct 8.488. For an example, see §28.2. If a stay is requested, the petition must comply with Cal Rules of Ct 8.116. On the many specific formatting details required, see §§18.5-18.20. On drafting a return to a writ petition, see §§23.20-23.38.

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§28.12 XII. FORM: TRAVERSE TO RETURN

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No. C00001

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

JOHN DOE,
Petitioner,

vs.

SUPERIOR COURT OF YOLO COUNTY,
Respondent.

CLAUDIA ALLEN,
Real Party in Interest.

TRAVERSE TO RETURN

Alameda County Superior Court, No. 123456
The Honorable Jane Smythe

Roberta Jones (SBN 00001)
JONES & PETERS LLP
100 Main Street, 2nd Floor
Los Angeles, CA 90004
Telephone: 213-123-4567
Facsimile: 213-456-7891
ATTORNEYS FOR PETITIONER JOHN DOE

TABLE OF CONTENTS

Page

INTRODUCTION

VERIFIED RESPONSE TO THE NEW FACTUAL ALLEGATIONS MADE IN RETURN

VERIFICATION

LEGAL ARGUMENT

[*Copy your argument headings here.*]

CONCLUSION

CERTIFICATE OF WORD COUNT

TABLE OF AUTHORITIES

CASES

[*List cases in alphabetical order by name, giving citation for each under name; give page number(s) on which citations are found to the right of the citation.*]

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CONSTITUTIONAL PROVISIONS

[*List constitutional provisions in alphabetical/numerical order, giving citation for each under name; give page number(s) on which citations are found to the right of the citation.*]

COURT RULES

[*List court rules in numerical order, giving citation for each under name; give page number(s) on which citations are found to the right of the citation.*]

OTHER AUTHORITIES

[*List other authorities in alphabetical order by name, giving citation for each under name; give page number(s) on which citations are found to the right of the citation.*]

INTRODUCTION

The limitations period on Real Party in Interest Claudia Allen's malpractice action against Petitioner John Doe expired in or before July 2007, which was one year after Allen had (a) learned of the factual basis for her malpractice claim against Doe; (b) suffered actual injury; and (c) terminated her attorney-client relationship with Doe. Accordingly, Allen's subsequent December 2007 malpractice complaint was untimely, and Doe is entitled to judgment as a matter of law. Nothing in Allen's return changes that fact.

VERIFIED RESPONSE TO THE NEW FACTUAL ALLEGATIONS MADE IN RETURN

In her return to Doe's writ petition, Allen answered Doe's factual allegations and made new factual allegations of her own. Code of Civil Procedure §1091 authorizes a petitioner to reply or answer the new allegations asserted in the real party in interest's return. (*Scott v Superior Court* (1928) 205 C 525, 526; see 8 Witkin, Cal. Procedure (4th ed. 1997) Extraordinary Writs, §197, p. 989.) Doe responds to Allen's new factual allegations as follows:

43a-b. Doe objects on relevancy grounds. The issue of who paid for Allen's appeal in the underlying action has no bearing on whether Allen's malpractice action against Doe is untimely. Regardless of whether Doe stated that an insurance carrier funded the underlying appeal based on his hope that the trial court's forfeiture order would be reversed (why else would he?), that statement has nothing to do with when Allen suffered actual injury. Doe also objects on the ground that Allen's spin on Doe's statement and notions about when injury occurred are arguments, not factual allegations.

43c. Admit. This allegation is consistent with the allegations in paragraph 6 (page 9) of Doe's petition; the additional details supplied by Allen are irrelevant to this writ proceeding.

43d. Admit. This allegation is consistent with the allegations in paragraph 8 (pages 9-10) of Doe's petition; the additional details supplied by Allen are irrelevant to this writ proceeding.

43e-f. Admit. This allegation is consistent with the allegations in paragraphs 9-10 (page 10) of Doe's petition; the additional details supplied by Allen are irrelevant to this writ proceeding.

43g. Admit that Allen did not file her malpractice action against Doe until December 3, 2007, but deny that Allen's lawsuit was timely.

43h. Admit, but object on relevancy grounds.

43i. Doe lacks the personal knowledge needed to admit or deny the truth of Allen's allegations regarding the transfer of her home, relinquishment of her stock, and her resignation from the board of directors of ABC Corporation. Doe admits that Allen repeats these allegations in the statement of damages portion of her malpractice complaint against Doe.

43j. Doe denies this allegation in so far as it claims Allen did not learn of the factual basis for her malpractice claim against Doe until December 5, 2006. Doe objects on relevancy grounds in so far as this allegation claims Allen did not understand the legal significance of that factual basis, her legal remedy, or the legal theory underlying her malpractice action against Doe until December 5, 2006.

44k-*l*. Admit. These allegations are consistent with the allegations found at paragraph 10 (page 10) of Doe's petition.

43m. Doe lacks the personal knowledge needed to admit or deny the truth of Allen's allegations regarding whether the children beneficiaries made false allegations about Allen during the trust and probate proceedings. Doe objects to these allegations on relevancy grounds.

VERIFICATION

I, Roberta Jones, declare as follows:

I am one of the attorneys for Petitioner John Doe in the proceedings captioned above. I have read this traverse to Real Party in Interest Claudia Allen's return to Doe's petition for a writ of mandate or prohibition or other appropriate relief and know its contents. I know, based on my own personal knowledge, that the facts alleged in this traverse are true according to the undisputed evidence before respondent court at the time that it denied Doe's motion for summary judgment. Because of my familiarity with the trial court's records, files, and proceedings described herein, I, rather than my client, verify this traverse.

Allen asserts in her return that "the exhibits are incomplete or inaccurate in the attachments" and specifically complains about Exhibit G. (Return, at p. 6.) The exhibits are true and correct copies of certified documents obtained from the trial court in the underlying estate and probate matters. Exhibit G contains two no-contest applications because one was filed as a "proposed" application when Allen sought declaratory relief from the court. The application was never refiled, but was merely redated after the court granted Allen's declaratory relief petition and the application was no longer a mere proposal.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this verification was executed on January __, 2008, at Los Angeles, California.

_____
Roberta Jones

LEGAL ARGUMENT

ALLEN'S MALPRACTICE ACTION IS UNTIMELY BECAUSE IT WAS FILED MORE THAN ONE YEAR AFTER SHE: (A) LEARNED THE FACTUAL BASIS OF HER CLAIM, (B) SUFFERED ACTUAL INJURY, AND (C) TERMINATED HER ATTORNEY-CLIENT RELATIONSHIP WITH DOE

A. Allen Learned the Factual Basis of Her Malpractice Claim Against Doe No Later Than July 2006.

The factual basis of Allen's malpractice claim was Doe's filing of Allen's IRA petition without first filing a safe harbor petition. (1 Exh. 2-3, ¶ 8; see Petition for Writ of Mandate at p. 14, ¶26.) Allen disputes this

characterization of the factual basis of her complaint against Doe, contending that it is "inaccurate and incomplete" (Return at p. 12, ¶26) and not supported by the cited evidence (3 Exh. 644). But Allen fails to identify any meaningful deficiency. In any event, no factual dispute is created by Allen's refusal to acknowledge what her complaint plainly states, since this court interprets the language of a complaint de novo. (*McCall v PacCare of Cal., Inc.* (2001) 25 C4th 412, 415 ["we examine the complaint de novo"]; see *Zelig v County of Los Angeles* (2002) 27 C4th 1112, 1126 ["we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context"]; *Berg & Berg Enterprises v Sherwood Partners, Inc.* (2005) 131 CaA4th 802, 836 ["the scope of our de novo review extends to all the claims pleaded against [the defendant]"].)

[*Remainder of text of Legal Argument omitted.*]

CONCLUSION

For the reasons presented in Doe's writ petition and this traverse, this court should grant writ relief from respondent court's February 10, 2008 order denying Doe's motion for summary judgment.

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.204(c)(1))

The text of this brief consists of 3568 words as counted by the Corel WordPerfect version 12 word-processing program used to generate this brief.

Executed on January __, 2008, at Los Angeles, California.

_____
Roberta Jones

Note: This sample brief has not been updated for substantive legal accuracy. It is presented as an example of form, not content, and should not be presumed accurate with regard to the state of the law. The names of the parties and attorneys have been changed for publication.

Comment: The format of attorney-drafted court papers is governed by Cal Rules of Ct 8.144, 8.204. On the many specific formatting details required, see §§18.5-18.20. On drafting a reply (traverse), see §§23.48-23.50.

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§28.13 XIII. FORM: ORDER DIRECTING ISSUANCE OF PEREMPTORY WRIT OF MANDATE

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

ABC INVESTMENT GROUP, **Petitioner,**	**No. 123456**
	(Superior Court No. 456789)
vs.	**ORDER**
THE SUPERIOR COURT OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES, **Respondent.**	
JANE DOE, **Real Party in Interest.**	

ORIGINAL PROCEEDING; petition for a writ of mandate. Rachel Smythe, Judge. Petition granted.

Jones & Peters LLP, Roberta Jones, and Daniel Peters for Petitioner.

No appearance for Respondent.

Law Offices of Brian Thomas and Lucy Adams for Real Party in Interest.

I. INTRODUCTION

An investor opened a checking account with a bank and a brokerage account with an affiliated broker. The checking account agreement required that disputes between the parties be resolved through arbitration before the American Arbitration Company ("AAC"). The brokerage account agreement required arbitration before the National Association of Securities Dealers ("NASD").

The investor filed this action against the broker and other affiliates (brokers), but not the bank, alleging that the brokers had provided false and misleading investment advice, resulting in a substantial loss in the value of her initial investment. The brokers moved to compel arbitration before the NASD. The trial court concluded that the arbitration provision governing the brokerage account lacked mutuality of obligation and was unenforceable. Nevertheless, the trial court ordered the parties to arbitrate the dispute before the AAC.

The brokers sought relief in this court by way of a petition for a writ of mandate. Having issued an order to show cause, and having considered the parties' arguments, we conclude that the parties' dispute concerns the brokerage account, and that the arbitration provision applicable to that account, which requires arbitration before the NASD, is enforceable. Accordingly, we direct the trial court to compel arbitration before the NASD.

II. BACKGROUND

In January 2001, Plaintiff and Real Party in Interest Jane Doe opened a "Master Relationship Account" with defendant and petitioner ABC Investment Group ("ABC"), a registered broker-dealer. The account consisted of a brokerage account with ABC and a checking account with Metropolitan Bank (not a defendant). Doe later opened other accounts.

[*Remainder of text of Background omitted.*]

III. DISCUSSION

"On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists." (Code Civ. Proc., §1281.2.) In a petition to compel arbitration, "the moving party, in essence, requests specific performance of a contractual agreement to arbitrate the controversy.... The trial court must determine in advance whether there is a duty to arbitrate the controversy.... This determination 'necessarily requires the court to examine and, to a limited extent, construe the underlying agreement.'" (*Green v Mt. Diablo Hosp. Dist.* (1989) 207 CA3d 63, 69, citations omitted.)

[*Remainder of text of Discussion omitted.*]

IV. DISPOSITION

Let a peremptory writ of mandate issue, commanding respondent court to: (1) vacate its order denying ABC's motion to compel arbitration before the NASD; (2) vacate its order granting Doe's request to compel arbitration before the AAC; and (3) enter a new order granting ABC's motion to compel arbitration before the NASD. The parties are to bear their own costs in connection with this proceeding.

BROWN, J.

We concur:

JONES, P.J.
SMITH, J.

Note: This sample order is presented as an example of form, not content. The names of the parties and the case number information have been changed for publication.

Comment: On orders granting writ petitions, see §§24.15-24.21.

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§28.14 XIV. FORM: ORDER DISCHARGING ALTERNATIVE WRIT AS IMPROVIDENTLY GRANTED

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

JANE DOE,	)	**No. 123456**
Petitioner,	)	
	)	**(Superior Court No. 456789)**
vs.	)	
	)	**(Elizabeth Smythe, Judge)**
SUPERIOR COURT OF	)	
CALIFORNIA FOR THE	)	**ORDER**
COUNTY OF LOS ANGELES,	)	
Respondent.	)	
_____	)	
JOE SMITH,	)	
Real Party in Interest.	)	
_____	)	

THE COURT:

An examination of the exhibits provided by real party in interest in his return to the alternative writ issued herein on April 10, 2008, discloses that petitioner has failed to provide to this court items of evidence presented to the trial court indicating that said court acted well within its discretion in granting real party's motion to expunge the lis pendens recorded by petitioner.

The alternative writ is discharged as improvidently granted, the petition is denied, and the stay of trial court proceedings is vacated.

_____
SMITH, P.J., JONES, J., ROBERTS, J.

Note: This sample order is presented as an example of form, not content. The names of the parties and the case number information have been changed for publication.

Comment: On the discharge of an alternative writ as improvidently granted, see §24.6.

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§28.15 XV. FORM: PEREMPTORY WRIT OF MANDATE

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COURT OF APPEAL—STATE OF CALIFORNIA
FIRST JUDICIAL DISTRICT
DIVISION ONE

PEREMPTORY WRIT OF MANDATE

JANE DOE, **Petitioner,**	**No. 123456**
vs.	**(Superior Court No. 456789)**
THE SUPERIOR COURT OF CALIFORNIA, IN AND FOR THE COUNTY OF ALAMEDA, **Respondent.**	**(Robert Smythe, Judge)**
ABC CORPORATION, **Real Party in Interest.**	

The People of the State of California to the Superior Court of the State of California, in and for the County of Alameda:

The petition for writ of mandate on file herein having been considered, and this court having ordered that a peremptory writ of mandate issue, WE DO COMMAND YOU forthwith upon receipt of this writ to set aside your order of December 6, 2006, denying petitioner's motion for summary judgment and to issue a new order granting the motion, consistent with the views expressed in this court's July 16, 2007 order and in conformance with Code of Civil Procedure §437c(c). Petitioner is awarded its costs, which shall be borne by Real Party ABC Corporation.

By order of the court.

Witness,
the Honorable Oliver Dennis
(Acting) Presiding Justice of the Court of Appeal of the State of California,
First Appellate District, Division One

Attest my hand and the seal of this Court on February __, 2008.

_____
Clerk Administrator

By:_____
Deputy Clerk

Note: This sample writ is presented as an example of form, not content. The names of the parties and attorneys have been changed for publication.

Comment: On writs of mandate, prohibition, and review (certiorari), see §§24.37, 24.42.

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Source: Civil Litigation/California Civil Writ Practice/28 Court of Appeal and Supreme Court Forms/§28.16 XVI. FORM: PETITION FOR REVIEW (CALIFORNIA SUPREME COURT)

§28.16 XVI. FORM: PETITION FOR REVIEW (CALIFORNIA SUPREME COURT)

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STAY REQUESTED
Trial Court-Ordered 30-Day Jury Survey Must Start by February 2, 2007

No. _____

In the Supreme Court of California

Department of Records,
Nonparty and Petitioner,

vs.

Superior Court of San Francisco County
Respondent.

John Doe,
Real Party in Interest.

PETITION FOR REVIEW

From an Order Summarily Denying a Writ Petition
Court of Appeal, First Appellate District, Division Two,
No. A123456

Petition From Order Directing Countywide Juror Survey
San Francisco County Superior Court, No. 987654
Elizabeth Smythe, Judge
415-987-6543

Roberta Jones, SBN 00000 Daniel Peters, SBN 11111 JONES & PETERS LLP 10 Main St., 2nd Fl. San Francisco, CA 94111 Tel: 415-123-4567 Fax: 415-456-7891	Brian Thomas, SBN 22222 Lucy Adams, SBN 33333 THOMAS & ADAMS LLP 100 University Ave., Ste. 100 Oakland, CA 94607 Tel: 510-123-4567 Fax: 510-456-7891	Jane Allen, SBN 44444 LAW OFFICES OF JANE ALLEN 15 Winter Dr., Ste. 200 Walnut Creek, CA 94597 Tel: 925-123-4567 Fax: 925-456-7891
Attorneys for Nonparty & Petitioner Department of Records		

TABLE OF CONTENTS

Page

I. ISSUES PRESENTED

II. WHY REVIEW SHOULD BE GRANTED

III. REASON WHY A STAY SHOULD BE GRANTED

IV. STATEMENT OF THE CASE

[*Copy any headings here.*]

V. LEGAL DISCUSSION

[*Copy argument headings here.*]

VI. CONCLUSION

CERTIFICATE OF WORD COUNT

TABLE OF AUTHORITIES

CASES

[*List cases in alphabetical order by name, giving citation for each under name; give page number(s) on which citations are found to the right of the citation.*]

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OTHER AUTHORITIES

[*List other authorities in alphabetical order by name, giving citation for each under name; give page number(s) on which citations are found to the right of the citation.*]

I. ISSUES PRESENTED

Code of Civil Procedure §205(c) states that "[t]he court may require a prospective juror to complete such additional questionnaires as may be deemed relevant and necessary… to ascertain whether a fair cross section of the population is represented as required by law, if such procedures are established by local court rule."

1. Does this statute authorize every individual trial judge—or only the superior court as a whole, acting through its presiding judge and jury commissioner—to order a countywide survey of prospective jurors?

2. Where no local court rule establishes "such procedures," may a court order a survey of prospective

jurors?

II. WHY REVIEW SHOULD BE GRANTED

A trial judge handling a capital murder prosecution in the San Francisco County Superior Court has ordered that court's Jury Commissioner to conduct a countywide survey of prospective jurors to ascertain whether they represent a fair cross section of the population. The content of the proposed survey is not at issue here. This petition presents more fundamental questions of judicial authority and superior court administration, including whether a single trial judge handling a single case may compel a jury commissioner to conduct a countywide survey of prospective jurors.

John Doe is the defendant in this capital murder case. Several months ago, he began questioning the fairness of the jury selection process in San Francisco County. He subpoenaed the superior court's jury selection records. The trial court upheld the subpoena and the Jury Commissioner complied with the trial court's discovery order in all but one respect. The Jury Commissioner filed a writ petition challenging that portion of the order requiring disclosure of Department of Motor Vehicles records, an apparent violation of Code of Civil Procedure §197(c). (*Garner v Superior Court* (D012345).) The Court of Appeal stayed that portion of the trial court's order, issued an order to show cause, and agreed to consider the petition with a nearly identical petition filed by the jury commissioner for Yolo County. (*Swanson v Superior Court* (D045678)).

The trial court then turned its focus to a different aspect of the jury system in San Francisco County. In response to Doe's three-sentence written request, the trial court ordered the Jury Commissioner to conduct the countywide survey of prospective jurors that is at issue here. But the trial court failed to consider the threshold issue of whether it had the broad authority necessary to do so.

This is an important question concerning the administration of justice, a question that is unanswered by case law. As we explain, however, the Trial Jury Selection and Management Act (Code Civ. Proc., §§190-237) demonstrates that the Legislature intended to preclude a single trial judge from ordering a countywide juror survey. Rather, such a survey can be ordered only by the superior court as a whole, acting through its presiding judge.

One section of the Act, Code of Civil Procedure §205, governs juror questionnaires, and subdivision (c) authorizes a juror survey to ascertain whether the jury pool represents a fair cross section of the community. But section 205, subdivision (c), confers no authority on individual trial judges. This interpretation is confirmed by the statute's plain language, the relationship between its subdivisions, its legislative history, and the structure and purpose of the Act as a whole.

Onerous consequences to superior court administration could flow from a contrary interpretation. This petition concerns one survey ordered by one judge. But the authority for that order—if left intact by this Court—could lead different judges in different cases to order different surveys. Prospective jurors could be deterred or become confused if they were required to complete multiple surveys, particularly if they posed conflicting questions. In addition, the administration of the jury system would be severely compromised if even a fraction of the 128 judges of the San Francisco Superior Court insisted on their own surveys. To avoid subjecting jury commissioners and prospective jurors to needless work and conflicting directives, the Legislature vested authority for conducting fair cross section surveys in the superior court as a whole, which can speak with one voice through its presiding judge, jury commissioner, and local rules.

Although it has already agreed to decide one aspect of Doe's inquiry into the San Francisco County Superior Court's jury system, the Court of Appeal summarily denied the Jury Commissioner's writ petition challenging the juror survey order and no court has squarely addressed the pertinent portions of the Trial Jury Selection and Management Act. This Court should grant review because the petition presents issues of statewide importance that affect the daily operations of the superior courts of this state.

These issues should not wait for resolution. There is little doubt that this trial court judge will continue to exercise his authority over the County's jury system—"whatever that ultimate outcome is in this case, the system is going to benefit from a tuneup" (Exh. K, p. 306)—even as he refuses to acknowledge the limits of his authority—"I haven't historically gotten too caught up in the procedural hoops I think. I would rather get to the substance of the matter." (*Ibid.*)

Moreover, neither the Department of Records nor any jury commissioner will ever have an opportunity to

appeal from a trial court's juror survey order because only the parties in a criminal case may appeal. (See Pen. Code, §1235(a).) These issues must be presented in a writ petition, and the Jury Commissioner's writ petition provides a suitable vehicle for resolving these questions of judicial authority and superior court administration. Indeed, because this is the Jury Commissioner's only chance to obtain appellate review, the Court of Appeal's summary denial of his writ petition may have been an abuse of discretion. (See *Powers v City of Richmond* (1995) 10 Cal.4th 85, 113-114.)

For these reasons, this Court should either grant review and decide the issues presented, or grant review and transfer the matter to the Court of Appeal with directions to consider the Jury Commissioner's writ petition on the merits. (See Cal. Rules of Court, rules 8.500(b)(1) & (b)(4), 8.528(a) & (d).)

III. REASON WHY A STAY SHOULD BE GRANTED

The Jury Commissioner believes that the trial court abused its discretion and exceeded its jurisdiction in ordering him to conduct a countywide survey of prospective jurors. But the Jury Commissioner will have no choice but to comply with the trial court's order unless this Court intervenes. Because the trial court ordered the Jury Commissioner to complete the 30-day juror survey by March 5, 2007 (Exh. K, pp. 309-311), he could not postpone starting the survey beyond February 2, which is even before the due date for any answer to this petition. (See Cal. Rules of Court, rule 8.500(e)(4).) Thus, to allow time to consider this petition before the Jury Commissioner must begin complying with the trial court's order, this Court should stay the order pending final action on this petition.

IV. STATEMENT OF THE CASE

A. THE TRIAL COURT GRANTS JOHN DOE'S REQUEST FOR DISCOVERY OF JURY SELECTION RECORDS. THE COURT OF APPEAL ISSUES A STAY AND AN ORDER TO SHOW CAUSE WHEN THE JURY COMMISSIONER CHALLENGES PART OF THE DISCOVERY ORDER.

John Doe is a defendant in a pending capital murder case in the San Francisco County Superior Court. (Exh. A, pp. 1-2.) He served a subpoena duces tecum on the superior court's jury commissioner (see Gov. Code, §71620(b)), demanding copies of jury selection records for San Francisco County so that his own experts could review the data and prepare for a potential jury selection challenge. (Exh. B, pp. 3-11; Exh. C, pp. 42-45, 53.)

The trial court upheld the subpoena and ordered the Jury Commissioner to produce his records subject to a protective order. (See Exh. E, p. 215; Exh. F. p. 226; Exh. G, pp. 242-243.) The Jury Commissioner subsequently provided Doe nearly all the jury selection records he sought. (See Exh. H, pp. 274-275.) But the Jury Commissioner filed a writ petition challenging the portion of the trial court's order requiring him to disclose Department of Motor Vehicles records. (See *Garner v Superior Court* (D012345).) On November 20, 2006, the Court of Appeal stayed that portion of the order, and on December 6 that court issued an order to show cause.

[*Remainder of text of Statement of the Case omitted.*]

V. LEGAL DISCUSSION

A. THIS COURT SHOULD GRANT REVIEW TO DECIDE WHETHER, UNDER CODE OF CIVIL PROCEDURE SECTION 205, SUBDIVISION (c), ONLY THE SUPERIOR COURT AS A WHOLE—NOT INDIVIDUAL JUDGES OF THAT COURT—MAY ORDER SURVEYS OF PROSPECTIVE JURORS TO ASCERTAIN THE FAIRNESS OF THE JURY POOL.

1. The statute's plain language demonstrates that only the superior court as a whole is authorized to conduct a survey to ascertain the fairness of the jury pool.

A single trial court judge has ordered the Jury Commissioner to conduct a countywide survey of prospective jurors. This Court should decide the important issue of whether one trial judge—and thus each individual trial judge in the state—has such broad authority. There is no case law on the issue, but all indications are that the Legislature intended to restrict power over matters affecting the entire court to the court as a whole acting through its presiding judge.

[*Remainder of text from Section A omitted.*]

B. THIS COURT SHOULD GRANT REVIEW TO DETERMINE WHETHER A COURT MAY ORDER A SURVEY OF PROSPECTIVE JURORS TO ASCERTAIN THE FAIRNESS OF THE JURY POOL IN THE ABSENCE OF A LOCAL COURT RULE SPECIFYING THE PROCEDURE FOR CONDUCTING A SURVEY.

Under Code of Civil Procedure §205(c), a court may order a fair cross section juror survey only "if such procedures are established by local court rule." The Legislature apparently decided that courts should not exercise their authority to order juror surveys in the absence of a specific protocol for conducting them described in local court rules. This requirement is sensible. A '"[p]rospective juror' means a juror whose name appears on the master list" (Code Civ. Proc., §194(i)); thus any survey of "prospective jurors" will necessarily include persons who never come to the attention of a particular trial judge in a particular courtroom. Because such a survey is a courtwide endeavor, the Legislature has required that it be performed under procedures adopted by the full court in its local rules.

In this case, there is no local rule establishing a protocol for administering the survey ordered by the trial court. The Superior Court has adopted a local rule requiring attorneys who propose jury questionnaires to use cover sheets provided by the court. (Super. Ct. San Francisco County, Local Rules, rule 0.0.0.) This local rule establishes a formatting requirement comparable to a local rule on page limits for criminal motions (*Id.*, rule 0.0.1), but it does not implement section 205, subdivision (c), by establishing a protocol for fair cross section juror surveys.

This Court should grant review and decide whether, in the absence of a local court rule, any court can order a fair cross section juror survey.

VI. CONCLUSION

This Court should grant review and decide the issues presented. In the alternative, the Court should grant review and transfer the matter to the Court of Appeal with directions to consider on the merits the relief sought by the Jury Commissioner.

DATED: January 15, 2007

Respectfully submitted,

JONES & PETERS LLP
THOMAS & ADAMS LLP
LAW OFFICES OF JANE ALLEN

By: _____
Roberta Jones

Attorneys for Nonparty and Petitioner Department of Records

CERTIFICATE OF WORD COUNT

The foregoing Petition for Review contains 8190 words (excluding tables and this certificate). In preparing this certificate, I have relied on the word count generated by Microsoft Office Word 2003.

Executed on January 15, 2007, at San Francisco, California.

_____
Roberta Jones

Note: This sample brief has not been updated for substantive legal accuracy. It is presented as an example of form, not content, and should not be presumed accurate with regard to the state of the law. The names of the parties and attorneys have been changed for publication.

Comment: The format of attorney-drafted court papers is governed by Cal Rules of Ct 8.144, 8.204. In addition, petitions for review filed in the California Supreme Court must comply with Cal Rules of Ct 8.504. If a stay is requested, the petition must comply with Cal Rules of Ct 8.116. On the many specific formatting details required, see

§§18.5-18.20, 27.20. On drafting petitions for review, see §27.25.

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§28.17 XVII. FORM: AMICUS CURIAE LETTER BRIEF

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January 28, 2008

Chief Justice Ronald M. George
and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-7303

Re: ***Jones v Superior Court of Contra Costa County***
Supreme Court No.: S123456
Amicus Curiae Letter in Support of Petition for Review

TO THE HONORABLE RONALD GEORGE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Human Rights Advocacy Group, Inc. respectfully submits the following amicus curiae letter in support of the petition for review in the above case. This letter is submitted under California Rules of Court, rule 8.500(g).

INTEREST OF AMICUS CURIAE

Human Rights Advocacy Group, Inc. (HRAG) is a private nonprofit agency established under federal law to protect, advocate for, and advance the human, legal, and service rights of Californians with disabilities. HRAG works in partnership with people with disabilities, striving toward a society that values all people and supports their rights to dignity, freedom, choice, and quality of life.

HRAG works with people with all categories of disability—sensory, physical, medical, learning, cognitive, genetic, emotional, and psychiatric. HRAG's services are client-directed, and include direct representation in administrative and court proceedings. HRAG has extensive experience advocating for Californians with disabilities under the Disabled Persons Act and other state and federal antidiscrimination statutes.

HRAG has a direct interest in the outcome of this case. The organization represents numbers of Californians whose right to access goods and services, right to be free from discrimination, and right to be fully included and integrated in their communities are contingent on the interpretation, application, and enforcement of State antidiscrimination statutes, including the Disabled Persons Act. HRAG also has an interest in ensuring that individuals have access to the full scope of remedies intended by the California Legislature when they experience discrimination as prohibited by these laws.

DISCUSSION

The State of California has required buildings to be designed to provide access to persons with disabilities for 35 years. In 1968, Government Code §4450 was enacted to require accessibility for publicly funded buildings and, in 1969, Health & Safety Code §19955 et seq. was added to deal with privately funded public accommodations. Thus, for more than 20 years, disability access provisions have been not only part of the State's building code (see Cal. Code Regs., tit. 24) but also available and familiar to architects and contractors licensed in this State. Additionally, the Americans With Disabilities Act's access guidelines have been in effect for more than 10 years. (See Appendix A of 28 C.F.R. §36, called the "ADA Accessibility Guidelines").

Violations of these longstanding accessibility laws and standards—including the undisputed violation of California Code of Regulations, title 24, §1129B—cannot be excused, ignored, or justified. Businesses must be

held liable for the damages that result from the blatant disregard of these well-established accessibility standards. To do otherwise will encourage noncompliance by businesses, frustrate the legislative intent and mission of State disability discrimination law, and render unachievable its vision of a more accessible society.

Through Ms. Jones's petition, which involves claims under the Disabled Persons Act and its implementing standards (see Cal. Code Regs., tit. 24), this Court has been presented with an issue of first impression in which HRAG takes particular interest. That is, whether the Disabled Persons Act excludes "personal injury" damages. This issue is of sufficient importance, particularly to Californians with disabilities, to support review under California Rules of Court, rule 8.500(b).

The Disabled Persons Act expressly provides for the recovery of "actual damages." (Civ. Code, §54.3(a)). "[T]he phrase 'actual damages'… means compensatory damages," and "compensatory damages include nonquantifiable general damages for emotional distress and pecuniarily measurable special damages for out-of-pocket losses." (*Walnut Creek Manor v Fair Employment and Hous. Comm'n* (1991) 54 C3d 245, 255.)

The trial court's ruling that the Act "was not intended by the Legislature to provide for personal injury damages" (App. 224) was entirely without reason or support. Had the Legislature intended to restrict damages available under the Act, they could have and would have done so. Moreover, there have been a number of attempts by the Legislature to limit liability under the Act and none of them have included proposed limitation on the "type" of damages recoverable. Rather, these bills have focused on issues including notification (*e.g.*, 2005's AB 855; 2004's AB 69 and AB 2594; 2003's AB 209; and 2001's AB 1040), and the type of violations/discrimination for which damages are available (*e.g.*, 2005's AB 20). Ninth Circuit case law also supports a determination that personal injury damages are available under the Act. (See, *e.g., Molski v Gleich* (9th Cir 2003) 318 F3d 937, 945-46 ["[a]ctual damages," for purposes of the Act, means compensatory damages, including general noneconomic damages and special economic damages—potentially covering, among other things, "physical injury" and "emotional distress"].) Notably, there is no case law to the contrary.

If the trial court's decision is permitted to stand, it will run afoul of legislative intent. It will directly, and without justification, limit the remedies available to persons with disabilities who have experienced discrimination, and will encourage businesses to wait until they are sued to make their establishments accessible. This, in turn, completely frustrates the purpose and goals of the Disabled Persons Act.

On the basis of the foregoing, HRAG respectfully requests that this Court grant Ms. Jones's petition for review.

Respectfully submitted,

_____
Jane Doe
Human Rights Advocacy
Group, Inc.

Note: This sample letter brief has not been updated for substantive legal accuracy. It is presented as an example of form, not content, and should not be presumed accurate with regard to the state of the law. The names of the parties and attorneys have been changed for publication.

Comment: The format of amicus curiae letters is governed by Cal Rules of Ct 8.500(g)(2).

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§28.18 XVIII. FORM: PETITION FOR WRIT OF SUPERSEDEAS

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IMMEDIATE TEMPORARY STAY REQUESTED OF ORDER MODIFYING CUSTODY
CRITICAL DATE: DECEMBER 22, 2007

No. _____
(Notice of Appeal Filed 11/21/07; appeal not yet docketed)

In the Court of Appeal of the State of California
First Appellate District, Division One

IN RE MARRIAGE OF JOHN DOE AND JANE DOE

JOHN DOE,
Petitioner and Appellant,

vs.

SAN MATEO COUNTY SUPERIOR COURT
Respondent.

JANE BENDER,
Real Party in Interest and Appellee.

PETITION FOR WRIT OF SUPERSEDEAS

_____

Appeal From an Order Modifying Custody of Minor Children
San Mateo County Superior Court, No. FAM 123456 (Dept. 00)
Honorable Robert Smythe, Commissioner,
Telephone 650-123-4567

Roberta Jones (SBN 00000) Daniel Peters (SBN 11111) JONES & PETERS LLP 100 Main St., 2nd Fl. San Francisco, CA 94111 Tel: 415-123-4567 Fax: 415-456-7891	Brian Thomas (SBN 22222) Lucy Adams (SBN 33333) THOMAS & ADAMS LLP 200 Wilshire Blvd., Ste. 250 Los Angeles, CA 90025 Tel: 310-123-4567 Fax: 310-456-7891
Attorneys for Petitioner and Appellant John Doe	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rules of Court, rule 8.488, the undersigned, counsel for Petitioner and Appellant John Doe, certifies that she knows of no other entity or person other than the parties to this proceeding who has a financial or other interest in its outcome.

Executed on December 6, 2007, at San Francisco, California.

Roberta Jones

TABLE OF CONTENTS

Page

INTRODUCTION: WHY WRIT RELIEF SHOULD BE GRANTED

PETITION

PRAYER

VERIFICATION

MEMORANDUM

[*Copy your argument headings here.*]

CONCLUSION

CERTIFICATE OF WORD COUNT

TABLE OF AUTHORITIES

CASES

[*List cases in alphabetical order by name, giving citation for each under name; give page number(s) on which citations are found to the right of the citation.*]

STATUTES

[*List statutes in alphabetical/numerical order; give page number(s) on which citations are found to the right of the citation.*]

CONSTITUTIONAL PROVISIONS

[*List constitutional provisions in alphabetical/numerical order, giving citation for each under name; give page number(s) on which citations are found to the right of the citation.*]

COURT RULES

[*List court rules in numerical order, giving citation for each under name; give page number(s) on which citations are found to the right of the citation.*]

OTHER AUTHORITIES

[*List other authorities in alphabetical order by name, giving citation for each under name; give page number(s) on which citations are found to the right of the citation.*]

I. INTRODUCTION

A writ of supersedeas is available to stay enforcement of a trial court order pending appeal whenever an appellant will raise substantial questions on appeal and would be deprived of the benefits of a successful appeal in the absence of supersedeas. A temporary and immediate stay pending supersedeas is similarly available whenever the appellant would otherwise be denied the relief he or she would likely obtain by supersedeas. As will appear here, petitioner John Doe is entitled to both supersedeas and a temporary stay pending the determination of his petition.

The October 23, 2007 order from which petitioner has appealed ordered a modification of custody of the twin 11-year-old children of petitioner and his former wife, real party in interest Jane Bender (formerly Doe), from sole legal and physical custody by petitioner to joint legal custody by petitioner and real party.

Nine years ago, the San Mateo County Superior Court dissolved petitioner's and real party's marriage. One year later, after a trial, the court awarded petitioner sole legal and physical custody, in part because of real party's history of abuse of drugs and alcohol. On four occasions over the ensuing years, real party moved for modification of custody. Under settled law, to succeed she had to prove that there had been a substantial change of circumstances affecting the children and that modification of custody was essential to their welfare. The court denied those motions (or real party withdrew them), and sanctioned her for filing two of them, because she was unable to prove a substantial change of circumstances: she had continued to abuse drugs and alcohol and was therefore unable to prove year-long sobriety, which she had stipulated was a necessary, but not sufficient, condition for changed circumstances. Then, in 2004 and 2005, respectively, the two twins, were admitted to a residential therapeutic treatment program for needed care.

Earlier this year, real party filed her fifth post-trial motion for modification of custody. This time, however, the trial court modified custody, awarding her joint legal, but not physical, custody, and requiring the children to be removed by December 22, 2007 from their current stable custody arrangements and to be placed in petitioner's home and enrolled, immediately, in public middle school without the support of a residential therapeutic treatment program, with regular visitation by real party.

Petitioner has appealed from that order, and now seeks supersedeas to stay its enforcement pending appeal. He also seeks a temporary and immediate stay pending the final disposition of this supersedeas petition.

Supersedeas is appropriate because petitioner will raise substantial questions on appeal. First, the trial court committed reversible error by failing to issue a requested written statement of decision or statement of reasons, as the law requires. Moreover, its oral statement failed to show, as the law requires, that real party proved there was a substantial change of circumstances affecting the children and modification of their current stable custody arrangements was essential to their welfare. Second, real party failed to show that there was such a substantial change and that the children's welfare required a modification in custody. Real party never offered substantial evidence of year-long sobriety and in any event did not offer any evidence of her fitness to assume joint legal custody. In addition, she offered no evidence that the children's welfare required a change from their current stable custody arrangements.

Supersedeas is also appropriate because, in its absence, petitioner would be deprived of the benefits of his appeal—namely, the preservation of the children's current stable custody arrangements. Without supersedeas, the trial court's order modifying custody would change the children's custody arrangements abruptly and would thereby set them back irreparably, contravening this State's policy to protect such arrangements.

Not only is supersedeas appropriate, so too is a temporary and immediate stay. Without such a stay, petitioner would be denied the relief he would likely obtain by supersedeas. To minimize the setbacks threatened, the children would require substantial preparation for the abrupt change looming against them. But such substantial preparation, which would itself be unsettling, would likely itself produce setbacks. Accordingly, a temporary and immediate stay is warranted to preserve the status quo pending the final determination of this petition.

Because both supersedeas and a temporary and immediate stay are warranted, this Court should grant petitioner the relief he seeks and stay enforcement of the trial court's order modifying custody pending an expedited appeal.

II. PETITION

Petitioner John Doe petitions this Court for a writ of supersedeas to stay enforcement, pending appeal, of the October 23, 2007 order of Respondent San Mateo County Superior Court (Hon. Robert Smythe, Commissioner), entered in *In re Marriage of John Doe and Jane Doe*, San Mateo County Superior Court No. FAM 0123456, modifying the custody of two minor children of petitioner and real party in interest Jane Bender (formerly Doe), namely, Joey and Emily Doe. Petitioner also asks the Court to immediately stay enforcement of that order temporarily, pending final determination of his petition for writ of supersedeas.

To these ends, petitioner presents the following allegations, which constitute a statement of the case including a summary of the material facts (Cal. Rules of Court, rule 8.112(a)(4)(A)):

1. Petitioner is John Doe, the petitioner in *In re Marriage of John Doe and Jane Doe*, San Mateo County Superior Court No. FAM 0123456, a proceeding for dissolution of marriage. (1 App. 47; "App." refers to the five-volume Appendix that petitioner is lodging in support of this Petition.)

2. Respondent is the San Mateo County Superior Court, which entered the order modifying custody challenged here. (4 App. 907-09.)

3. Real party in interest is Jane Bender, formerly Doe, the respondent in *In re Marriage of John Doe and Jane Doe*, San Mateo County Superior Court No. FAM 0123456. (1 App. 47.)

4. In 1996, petitioner filed a petition seeking dissolution of his marriage to real party and resolution of matters encompassing the custody of their children, twins born in 1995, arising in part from real party's history of abuse of drugs and alcohol. (2 App. 317-19, 394.)

5. In 1997, petitioner and real party's marriage was dissolved, and temporary custody arrangements were made for the children. (2 App. 394.)

6. In 1998, following a trial, petitioner was awarded sole legal and physical custody of the children; real party was allowed visitation, but in the face of her continuing abuse of drugs and alcohol was ordered to submit to substance abuse testing immediately upon the direction of an authorized person—so-called "stat testing." (2 App. 317-18, 399.)

7. A month later in 1998, real party filed her first post-trial motion for modification of custody. (2 App. 318-19, 388-91.) The motion proved unsuccessful because of real party's continuing abuse of drugs and alcohol. (*Id.*) Provisions for supervised visitation were put, and would remain, in place, and stat testing was maintained, and would be maintained, in effect. (*Id.*)

8. In 1999, real party filed her second post-trial motion for modification of custody. (2 App. 319.) This motion too proved unsuccessful because of real party's continuing abuse of drugs and alcohol. (*Id.*)

[*Allegations 9-21 omitted.*]

22. On October 23, 2007, shortly after the presentation of evidence and argument, respondent made an oral order, memorialized by a written minute order, in which it: (1) modified the custody arrangement concerning the twin children from sole legal and physical custody by petitioner to joint legal custody with respondent; (2) required the children to be removed from the residential treatment program no later than December 22, 2007; (3) required the children to live with petitioner but permitted respondent an unsupervised weekly dinner visit on Wednesdays and unsupervised visitation on alternating weekends; (4) mandated that the children attend Washington Middle School in Springfield and prohibited their enrollment in a private or boarding school; (5) appointed counsel for the children; and (6) discontinued stat and all other drug and alcohol testing for real party but directed her to attend a 16-month anger-management program. (4 App. 907-09.)

23. Also on October 23, 2007, in connection with its oral order, respondent orally stated that (1) real party was angry and frustrated and had an identified problem with anger but that she was sober; (2) petitioner wished to be in control, his exercise of sole legal custody had not worked, and he was not good at sharing information with real party; (3) it was time for the twin children to have a healthy relationship with both their parents and there was no reason not to order joint legal custody; and (4) real party could have the prescribed visitation with the children without monitoring. (4 App. 979.) In the course of its oral statement, respondent queried why the twins were at the residential treatment program and found they no longer needed to be there. (*Id.*) Respondent gave no explanation or reason for discontinuing stat and all other drug and alcohol testing for real party or for directing her to attend the 16-month anger-management program. (*Id.*)

24. On November 20, 2007, petitioner moved to stay enforcement of respondent's October 23, 2007 order modifying custody pending appeal. (4 App. 910-55; see 4 App. 980-87.) Respondent set a hearing on that motion for December 18, 2007. (*Id.*) As of today, November 29, 2007, real party has not filed opposition.

25. On November 21, 2007, petitioner filed a notice of appeal from respondent's October 23, 2007 order modifying custody. (4 App. 953-54.)

26. On November 22, 2007, petitioner applied to have respondent conduct the hearing on his motion to stay enforcement of respondent's October 23, 2007 order modifying custody pending appeal on shortened time. (4 App. 959-71.) As of today, November 29, 2007, real party has not filed opposition.

27. As of today, November 29, 2007, respondent has not acted on petitioner's application to conduct the hearing on his motion to stay enforcement of respondent's October 23, 2007 order modifying custody pending appeal on shortened time. (4 App. 980, 983-84.) In view of the urgency of this matter, and in order to allow this Court to consider and decide it in an orderly fashion, petitioner is filing this petition at this time. (4 App. 983-84.) Should respondent act on petitioner's application to conduct the hearing on his motion on shortened time while this petition is pending, he will inform this Court immediately that it has acted and also what action, if any, it has taken. (4 App. 984.)

28. Petitioner's appeal from respondent's October 23, 2007 order modifying custody raises substantial questions because respondent failed to issue the required statement of decision or statement of reasons in writing and because real party failed to present sufficient evidence to support the order—that is, to support the legally required elements that there had been a substantial change of circumstances affecting the twin children and that modification of their current stable custody arrangements was essential to their welfare.

29. Without supersedeas, petitioner would be deprived of the benefits of success on appeal because the twins' current stable custody arrangements would be upset irreparably.

30. In addition, petitioner will not benefit from the relief sought in this petition unless this Court issues an immediate stay of respondent's October 23, 2007 order modifying custody pending the final determination of this petition. Even if proceedings on the petition proceed expeditiously, they will not conclude in time to allow the staff at the residential treatment program a meaningful opportunity to mitigate the detriment the twins will suffer from preparations necessary to comply with the order or to allow them a meaningful opportunity to benefit from the staff's efforts in this regard. Furthermore, any attempt to mitigate will likely prove unsuccessful, since they need to continue in treatment through the planned discharge date of March 2008.

31. Petitioner explains the points made in the three preceding paragraphs in greater detail in the accompanying supporting memorandum, incorporated herein.

32. This petition is timely, inasmuch as (a) no statutory deadline applies; (b) the order challenged here issued only on October 23, 2007; and (c) petitioner attempted to obtain relief in the trial court by way of a motion to stay enforcement of that order (which also involved procuring contemporaneous declarations from the twins' therapists at the residential treatment program), which took more than a week, including the intervening Thanksgiving holiday.

Therefore, petitioner prays that:

1. This Court immediately issue a temporary stay of enforcement of respondent's October 23, 2007 order modifying custody, pending final determination of this petition;

2. This Court, after providing real party the opportunity to file opposition and after conducting a hearing (see Cal. Rules of Court, rule 8.112(b)(3) and (d)), cause issuance of a writ of supersedeas staying enforcement of respondent's October 23, 2007 order modifying custody pending appeal; and

3. This Court award petitioner costs and such other relief as may be appropriate.

DATED: December 6, 2007

Respectfully submitted,

JONES & PETERS LLP
THOMAS & ADAMS LLP

By: _____

Roberta Jones

Attorneys for Petitioner and Appellant John Doe

III. VERIFICATION

I, Roberta Jones, declare:

1. I am an attorney admitted to practice before the courts of this state and am a counsel in the law firm Jones & Peters LLP, which together with the law firm Thomas & Adams LLP, represents petitioner John Doe. I make this verification because I am familiar with the proceedings giving rise to this Petition.

2. I have read this Petition, and either know its allegations to be true or believe them to be true based on the documents contained in the accompanying Appendix. Further, the Appendix contains true and correct copies of documents filed or lodged in respondent San Mateo County Superior Court relating to the order in *In re Marriage of John Doe and Jane Doe*, San Mateo County Superior Court No. FAM 0123456, entered on October 23, 2007, modifying custody, which is the subject of this Petition.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this Verification was executed in San Francisco, California, on December 6, 2007.

_____
Roberta Jones

IV. MEMORANDUM

A. THIS COURT SHOULD ISSUE A WRIT OF SUPERSEDEAS STAYING ENFORCEMENT, PENDING APPEAL, OF THE TRIAL COURT'S OCTOBER 23, 2007 ORDER MODIFYING CUSTODY BECAUSE PETITIONER'S APPEAL RAISES SUBSTANTIAL QUESTIONS AND HE WOULD OTHERWISE BE DEPRIVED OF THE BENEFITS OF SUCCESS ON APPEAL

1. A Writ of Supersedeas Is Appropriate When the Petitioner's Appeal Raises Substantial Questions and the Petitioner Would Otherwise Be Deprived of the Benefits of Prevailing on Appeal

This Court has the power to direct the issuance of a writ of supersedeas to stay enforcement of a trial court order pending appeal, including an order modifying custody. (*In re Christy L.* (1986) 187 CA3d 753, 758; *Mancini v Superior Court* (1964) 230 CA2d 547, 553.) Its authority to do so arises from its "inherent power" to do whatever is "'necessary or proper to the complete exercise of its appellate jurisdiction.'" (*Deepwell Homeowners' Protective Ass'n v City Council of Palm Springs* (1965) 239 CA2d 63, 65 (quoting *Food & Grocery Bureau of S. Cal. v Garfield* (1941) 18 C2d 174, 177); see, *e.g.*, *Nuckolls v Bank of California, National Ass'n* (1936) 7 C2d 574, 578.) California Code of Civil Procedure §923 recognizes this power and places no limit on its exercise. (Code Civ. Proc., §923 [referring to "power of a reviewing court… to issue a writ of supersedeas"]; see, *e.g.,* Cal. Rules of Court, rules 8.112, 8.116 [setting out procedures for supersedeas].)

As prerequisites to the seeking of supersedeas, a petitioner should exhaust any available trial court remedies to obtain a stay of the order in question (see, *e.g.*, *Reed v Superior Court* (2001) 92 CA4th 448, 455; *Mancini v Superior Court, supra,* 230 Cal.App.2d at p. 553), and should file a notice of appeal from that order (*Solomon v Solomon* (1952) 110 CA2d 660, 662; see *In re Christy L., supra,* 187 Cal.App.3d at p. 759 [appeal must remain pending at time of issuance of supersedeas]).

To establish the appropriateness of supersedeas, moreover, the petitioner must show that he or she will raise "substantial questions… upon the appeal." (*Deepwell Homeowners' Protective Ass'n v City Council of Palm Springs, supra,* 239 CA2d at p. 67; accord, *Nuckolls v Bank of California, National Ass'n, supra,* 7 C2d at p. 578 ["probable error"]; *Reed v Superior Court, supra,* 92 CA4th at p. 455 ["arguably meritorious claim"].) The petitioner need not demonstrate he or she will *succeed* on appeal, inasmuch as it is "not the function of [the appellate] court in passing upon an application for supersedeas to pass upon the merits of the [order] appealed from; the validity of such [order] is to be reviewed on the appeal therefrom." (*Deepwell Homeowners' Protective Ass'n v City Council of Palm Springs, supra,* 239 CA2d at p. 67; see *Solomon v Solomon, supra,* 110 CA2d at p. 662 [implying as much].) Instead, the petitioner need only show the questions to be raised on appeal are "substantial."

The petitioner must also show he or she would be "depriv[ed]" of the "fruits" of a "successful" "appeal" if the order is not stayed by supersedeas. (*Deepwell Homeowners' Protective Ass'n v City Council of Palm Springs, supra,* 239 CA2d at p. 65; see, *e.g.*, *Reed v Superior Court, supra,* 92 CA4th at p. 455 [supersedeas may issue to prevent "prejudice"]; *Mills v County of Trinity* (1979) 98 CA3d 859, 861 [supersedeas should issue to prevent "irreparable injury"].) On this point, this Court must balance any harm that might arise from issuance of supersedeas against any harm that might arise from nonissuance. (See, *e.g.*, *id.* at p. 861 [balancing harms on issuance and nonissuance of supersedeas]; see also *Nuckolls v Bank of California, National Ass'n, supra,* 7 C2d at p. 578 [finding, on balance, "risk of destroying rights" on issuance of supersedeas]; *Julian v Schwartz* (1935) 2 C2d 280, 281-82 [finding, on balance, no "substantial damages" on issuance of supersedeas].)

2. Petitioner's Appeal Raises Substantial Questions Concerning the Correctness of the Trial Court's Order Modifying Custody

Petitioner has satisfied the prerequisites for supersedeas of the trial court's October 23, 2007 order modifying custody. He filed a notice of appeal from that order on November 21, 2007. (4 App. 953-54.) He also exhausted available trial court remedies by moving for an immediate stay in that court—but to no avail, since as of today the court has not acted. (4 App. 980, 983-84.)

Moreover, petitioner's appeal raises substantial questions. To understand why, some background concerning the law governing modification of custody is useful. (See *Mancini v Superior Court, supra,* 230 CA2d at p. 555-56 [implying that issuance of supersedeas to stay enforcement of order modifying custody depends on law governing modification of custody].)

[*Remainder of text from Section 2 omitted.*]

3. Without Supersedeas, Petitioner Would Be Deprived of the Benefits of His Success on Appeal Because Stable Custody Arrangements Would Be Upset Irreparably

Not only does petitioner's appeal raise substantial questions, but without supersedeas he would be deprived of the benefits of his success on appeal. Supersedeas is appropriate for this reason as well.

Unlike in most other matters, the benefits of success on appeal here consist of preserving the twin children's current stable custody arrangements for their own welfare. If supersedeas issues, they would remain in a caring and therapeutic environment—where they are enjoying stability and are making steady progress in integrating their feelings and attitudes toward themselves, petitioner, real party, and others—until they are ready to transition to another environment. As Emily's therapist stated in her November 16, 2007 declaration, Emily has made a "great deal of progress in treatment" and "uses staff and therapy well." (4 App. 928.) She should be ready to enroll in an appropriate boarding school—where she believes she will be going—in the near future. (*Id.*) As for Joey, his therapist states in his November 16, 2007 declaration that Joey has continued to make progress over the past several months but "has only recently been able to be open and clear with [real party]… about his feelings." (4 App. 926.) He needs further time—it would be in his "best interests to… remain in treatment through the planned discharge date of March 2008"—to continue along this positive path. (*Id.*)

By contrast, in the absence of supersedeas, the children would experience untoward consequences if the trial court's October 23, 2007 order modifying custody were implemented by the prescribed December 22 date—including immediate enrollment in a public middle school without the support of a residential therapeutic treatment program. Given Emily's repeated statements to staff that she does not wish to live with or have any other appreciable contact with real party in the near future, she would be at risk of experiencing the hostility that sent her into treatment in the first place, and of exhibiting the aggression and dangerous behavior that attended that hostility. (4 App. 928.) As her therapist explains, "[s]he needs time to adjust to the [trial court's] decision [modifying custody] and make some sort of peace with [real party] if she is to be successful in post-discharge living arrangement." (*Id.*)

[*Text omitted*]

In short, without supersedeas, implementing the trial court's October 23, 2007 order modifying custody by the prescribed December 22 date would produce setbacks for the children that would be irreparable in the sense it will take longer to return them to their present condition before they can progress. The harm that might arise from issuance of supersedeas, moreover, would not outweigh the harm that would arise from

nonissuance. For one thing, no harm threatens the children. Whether any harm threatens *real party* seems immaterial, since in custody-modification matters the "emphasis is not on the parents, but on the child[ren]." (*In re Marriage of Melville, supra,* 122 CA4th at p. 611.) In any event, any harm likely to befall real party would be reducible to that caused by "delay." (*Estate of Murphy* (1971) 16 Cal.App.3d 564, 569.) But that kind of harm could be "mitigated by expeditious prosecution and determination of the appeal." (*Id.*)

Here, petitioner intends to pursue his appeal expeditiously, is amenable to any reasonable briefing schedule, and knows this Court will decide his appeal in the same fashion. Moreover, during the limited period the appeal would be pending, real party would continue to be allowed to visit the children freely to develop her relationship with them in a positive manner, enabling their orderly transition from the treatment program to be in her best interests as well as theirs.

In short, without supersedeas petitioner would be deprived of the benefits of success on appeal, because by the time he prevailed (even if expeditiously), the children's now-stable custody arrangements would have been upset irreparably.

B. THIS COURT SHOULD IMMEDIATELY STAY THE TRIAL COURT'S ORDER MODIFYING CUSTODY PENDING THE FINAL DETERMINATION OF THIS PETITION.

This Court may temporarily stay enforcement of any appealed order pending final determination of a petition seeking supersedeas. (See *Mills,* 98 Cal.App.3d at p. 861 [temporarily staying enforcement of order pending determination of supersedeas petition].) Here, too, the law recognizes this power and places no limit on its exercise. (See Code Civ. Proc., §923 [reviewing court has power "to make any order appropriate to preserve the status quo, the effectiveness of the judgment subsequently to be entered, or otherwise in aid of its jurisdiction"]; see, *e.g.,* Cal. Rules of Court, rule 8.112(c)), 8.116 [setting out procedures for stay pending supersedeas].)

Without a temporary and immediate stay, petitioner would be denied the relief he would likely obtain by supersedeas. As things stand, the children require substantial preparation, through their therapists and others, for the attendant abrupt change in environment that the trial court's October 23, 2007 order modifying custody requires. (4 App. 926, 928.) That preparation itself would likely produce setbacks, since preparing for the abrupt change the October 23 order requires by December 22 would itself be unsettling. As explained, the children's welfare requires the Court to issue supersedeas to preserve the status quo pending an appeal that raises substantial issues. A temporary and immediate stay is therefore needed to preserve the status quo pending the final determination of this petition. The threat of irreparable harm that petitioner has shown to justify supersedeas pending appeal likewise justifies a temporary and immediate stay pending the disposition of this petition.

V. CONCLUSION

For these reasons, this Court should: (1) immediately issue a temporary stay of respondent's October 23, 2007 order modifying custody, pending final determination of this petition; (2) after soliciting opposition and conducting a hearing, cause issuance of a writ of supersedeas staying enforcement of that order pending appeal; and (3) award petitioner costs and such other relief as may be appropriate.

DATED: December 6, 2007

Respectfully submitted,

JONES & PETERS LLP
THOMAS & ADAMS LLP

By: _____
Roberta Jones

Attorneys for Petitioner and Appellant John Doe

CERTIFICATE OF WORD COUNT

The foregoing Petition contains 8163 words (including footnotes, but excluding tables and this certificate). In

preparing this certificate, I have relied on the word count generated by Microsoft Office Word 2003.

Executed on December 6, 2007, at San Francisco, California.

Roberta Jones

Note: This sample brief has not been updated for substantive legal accuracy. It is presented as an example of form, not content, and should not be presumed accurate with regard to the state of the law. The names of the parties and attorneys have been changed for publication.

Comment: The format of attorney-drafted court papers is governed by Cal Rules of Ct 8.144, 8.204. In addition, petitions for writs of supersedeas must comply with Cal Rules of Ct 8.112, 8.116. On the many specific formatting details required, see §§18.5-18.20, 26.26. On drafting a writ of supersedeas, see §26.22.

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§28.19 XIX. FORM: ORDER GRANTING PETITION FOR WRIT OF SUPERSEDEAS

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

ABC CORPORATION,	)	**No. 123456**
Plaintiff and	)	
Respondent,	)	**(Superior Court No. 456789)**
	)	
vs.	)	**(John Smith, Judge)**
	)	
JANE DOE,	)	**ORDER**
Defendant and	)	
Appellant.	)	
_____	)	

THE COURT:

The court has read and considered the petition for a writ of supersedeas filed herein by appellant on March 11, 2008, and respondent's opposition thereto filed on March 21, 2008. IT IS ORDERED that enforcement of the judgment in Los Angeles County Superior Court case number 456789, and all further proceedings thereon, are stayed pending final disposition of this appeal. (Code Civ. Proc., §923.)

_____
SMITH, P.J., JONES, J., ROBERTS, J.

Note: This sample order is presented as an example of form, not content. The names of the parties and the case number information have been changed for publication.

Comment: On writs of supersedeas, see chap 26.

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Source: Civil Litigation/California Civil Writ Practice/28 Court of Appeal and Supreme Court Forms/§28.20 XX. FORM: PETITION FOR WRIT OF HABEAS CORPUS (JUDICIAL COUNCIL FORM MC-275)

§28.20 XX. FORM: PETITION FOR WRIT OF HABEAS CORPUS (JUDICIAL COUNCIL FORM MC-275)

Name: _____

Address: _____

_____

_____

CDC or ID Number: _____

_____

_____

(Court)

_____

Petitioner

vs.

_____

Respondent

PETITION FOR WRIT OF HABEAS CORPUS

No. _____

(To be supplied by the Clerk of the Court)

INSTRUCTIONS—READ CAREFULLY

- **If you are challenging an order of commitment or a criminal conviction and are filing this petition in the Superior Court, you should file it in the county that made the order.**
- **If you are challenging the conditions of your confinement and are filing this petition in the Superior Court, you should file it in the county in which you are confined.**

- Read the entire form *before* answering any questions.
- This petition must be clearly handwritten in ink or typed. You should exercise care to make sure all answers are true and correct. Because the petition includes a verification, the making of a statement that you know is false may result in a conviction for perjury.
- Answer all applicable questions in the proper spaces. If you need additional space, add an extra page and indicate that your answer is "continued on additional page."
- If you are filing this petition in the superior court, you only need to file the original unless local rules require additional copies. Many courts require more copies.
- If you are filing this petition in the Court of Appeal and you are an attorney, file the original and 4 copies of the petition and, if separately bound, 1 set of any supporting documents (unless the court orders otherwise by local rule or in a specific case). If you are filing this petition in the Court of Appeal and you are *not* represented by an attorney, file the original and one set of any supporting documents.
- If you are filing this petition in the California Supreme Court, file the original and 10 copies of the petition and, if separately bound, an original and 2 copies of any supporting documents.
- Notify the Clerk of the Court in writing if you change your address after filing your petition.

Approved by the Judicial Council of California for use under rule 8.380 of the California Rules of Court (as amended effective January 1, 2007). Subsequent amendments to rule 8.380 may change the number of copies to be furnished to the Supreme Court and Court of Appeal.

Form Approved for Optional Use
Judicial Council of California
MC-275 [Rev. January 1, 2010]

CEB

Penal Code, § 1473 at seq.;
Cal. Rules of Court, rule 8.380
www.courtinfo.ca.gov

This petition concerns:

- ☐ A conviction
- ☐ Parole
- ☐ A sentence
- ☐ Credits
- ☐ Jail or prison conditions
- ☐ Prison discipline
- ☐ Other *(specify)*: _____

1. Your name: _____
2. Where are you incarcerated? _____
3. Why are you in custody? ☐ Criminal conviction ☐ Civil commitment

   Answer items a through i to the best of your ability.

   a. State reason for civil commitment or, if criminal conviction, state nature of offense and enhancements (for example, "robbery with use of a deadly weapon").

   _____

   _____

   b. Penal or other code sections: _____

   c. Name and location of sentencing or committing court: _____

   _____

   d. Case number: _____

   e. Date convicted or committed: _____

   f. Date sentenced: _____

   g. Length of sentence: _____

   h. When do you expect to be released? _____

   i. Were you represented by counsel in the trial court? ☐ Yes ☐ No *If yes, state the attorney's name and address:*

   _____

   _____

4. What was the LAST plea you entered? *(Check one)*:

   ☐ Not guilty ☐ Guilty ☐ Nolo contendere ☐ Other: _____

5. If you pleaded not guilty, what kind of trial did you have?

   ☐ Jury ☐ Judge without a jury ☐ Submitted on transcript ☐ Awaiting trial

6. GROUNDS FOR RELIEF

Ground 1: State briefly the ground on which you base your claim for relief. For example, "The trial court imposed an illegal enhancement." *(If you have additional grounds for relief, use a separate page for each ground. State ground 2 on page 4. For additional grounds, make copies of page 4 and number the additional grounds in order.)*

a. Supporting facts:
Tell your story briefly without citing cases or law. If you are challenging the legality of your conviction, describe the facts on which your conviction is based. *If necessary, attach additional pages.* CAUTION: You must state facts, not conclusions. For example, if you are claiming incompetence of counsel, you must state facts specifically setting forth what your attorney did or failed to do and how that affected your trial. Failure to allege sufficient facts will result in the denial of your petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.) A rule of thumb to follow is, *who* did exactly *what* to violate your rights at what time *(when)* or place *(where)*. *(If available, attach declarations, relevant records, transcripts, or other documents supporting your claim.)*

b. Supporting cases, rules, or other authority (optional):
(Briefly discuss, or list by name and citation, the cases or other authorities that you think are relevant to your claim. If necessary, attach an extra page.)

7. **Ground 2 or Ground** _____ *(if applicable):*

a. Supporting facts:

b. Supporting cases, rules, or other authority:

8. Did you appeal from the conviction, sentence, or commitment? ☐ Yes ☐ No If yes, give the following information:
   a. Name of court ("Court of Appeal" or "Appellate Division of Superior Court"):

   b. Result: _____ c. Date of decision: _____
   d. Case number or citation of opinion, if known: _____
   e. Issues raised: (1) _____
      (2) _____
      (3) _____
   f. Were you represented by counsel on appeal? ☐ Yes ☐ No If yes, state the attorney's name and address, if known:

9. Did you seek review in the California Supreme Court? ☐ Yes ☐ No If yes, give the following information:
   a. Result: _____ b. Date of decision: _____
   c. Case number or citation of opinion, if known: _____
   d. Issues raised: (1) _____
      (2) _____
      (3) _____
10. If your petition makes a claim regarding your conviction, sentence, or commitment that you or your attorney did not make on appeal, explain why the claim was not made on appeal:

11. Administrative review:
   a. If your petition concerns conditions of confinement or other claims for which there are administrative remedies, failure to exhaust administrative remedies may result in the denial of your petition, even if it is otherwise meritorious. (See *In re Muszalski* (1975) 52 Cal.App.3d 500.) Explain what administrative review you sought or explain why you did not seek such review:

   b. Did you seek the highest level of administrative review available? ☐ Yes ☐ No
      Attach documents that show you have exhausted your administrative remedies.

12. Other than direct appeal, have you filed any other petitions, applications, or motions with respect to this conviction, commitment, or issue in any court? ☐ Yes If yes, continue with number 13. ☐ No If no, skip to number 15.

13. a. (1) Name of court: _____

(2) Nature of proceeding (for example, "habeas corpus petition"): _____

(3) Issues raised: (a) _____

(b) _____

(4) Result *(attach order or explain why unavailable):* _____

(5) Date of decision: _____

b. (1) Name of court: _____

(2) Nature of proceeding: _____

(3) Issues raised: (a) _____

(b) _____

(4) Result *(attach order or explain why unavailable):* _____

(5) Date of decision: _____

c. *For additional prior petitions, applications, or motions, provide the same information on a separate page.*

14. If any of the courts listed in number 13 held a hearing, state name of court, date of hearing, nature of hearing, and result:

_____

_____

15. Explain any delay in the discovery of the claimed grounds for relief and in raising the claims in this petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.)

_____

_____

16. Are you presently represented by counsel? ☐ Yes ☐ No If yes, state the attorney's name and address, if known:

_____

_____

17. Do you have any petition, appeal, or other matter pending in any court? ☐ Yes ☐ No If yes, explain:

_____

_____

18. If this petition might lawfully have been made to a lower court, state the circumstances justifying an application to this court:

_____

_____

I, the undersigned, say: I am the petitioner in this action. I declare under penalty of perjury under the laws of the State of California that the foregoing allegations and statements are true and correct, except as to matters that are stated on my information and belief, and as to those matters, I believe them to be true.

Date:

▶ _____

(SIGNATURE OF PETITIONER)

Comment: This form must be used by a petitioner who is not represented by an attorney. Cal Rules of Ct 8.380(a).

An attorney may use this form (see Cal Rules of Ct 8.384(a)(1)); however, an attorney not using this form must make certain the petition contains all of the information requested in the form and that the petition complies with Cal Rules of Ct 8.40(b)-(c) and 8.204(a)-(b) (see Cal Rules of Ct 8.384(a)(1)). This form is available online at http://www.courtinfo.ca.gov/forms. On petitions for writs of habeas corpus, see §§15.39-15.43.

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§28.21 XXI. FORM: PETITION FOR WRIT OF HABEAS CORPUS OR CERTIORARI (FILED BY ATTORNEY)

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No. _____

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

JOHN DOE,
Petitioner,

vs.

CONTRA COSTA COUNTY SUPERIOR COURT,
Respondent.

ABC Corporation, et al.,
Real Parties in Interest.

PETITION FOR WRIT OF HABEAS CORPUS OR CERTIORARI

From Civil Contempt Orders
Contra Costa County Superior Court, No. 123456
The Honorable Rachel Smythe

Roberta Jones, SBN 00001
Daniel Peters, SBN 11112
JONES & PETERS LLP
10 Main Street, 2nd Floor
Oakland, CA 94612
Telephone: 510-123-4567
Facsimile: 510-456-7891
Attorneys for Petitioner John Doe

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rules of Court, rule 8.488, the undersigned, counsel for Petitioner John Doe, certifies that she knows of no other entity or person other than the parties to this proceeding who has a financial or other interest in its outcome.

Executed on April 17, 2008, at Oakland, California.

_____
Roberta Jones

TABLE OF CONTENTS

Page

INTRODUCTION

PETITION FOR WRIT OF HABEAS CORPUS OR CERTIORARI

PRAYER

VERIFICATION

MEMORANDUM

CONCLUSION

CERTIFICATE OF WORD COUNT

TABLE OF AUTHORITIES

CASES

[*List cases in alphabetical order by name, giving citation for each under name; give page number(s) on which citations are found to the right of the citation.*]

STATUTES

[*List statutes in alphabetical/numerical order; give page number(s) on which citations are found to the right of the citation.*]

CONSTITUTIONAL PROVISIONS

[*List constitutional provisions in alphabetical/numerical order, giving citation for each under name; give page number(s) on which citations are found to the right of the citation.*]

COURT RULES

[*List court rules in numerical order, giving citation for each under name; give page number(s) on which citations are found*
to the right of the citation.]

OTHER AUTHORITIES

[*List other authorities in alphabetical order by name, giving citation for each under name; give page number(s) on which citations are found to the right of the citation.*]

INTRODUCTION

Our worst fears have been realized. Petitioner has been ordered to jail for civil contempt, in conjunction with enforcement of a judgment that we believe imposes an unconstitutional prior restraint on speech and awards unrecoverable general damages.

This petition seeks a writ of habeas corpus or certiorari, which are the appropriate methods of review of a civil contempt order when the petitioner is incarcerated or threatened with incarceration. This petition adopts by reference two prior writ petitions in this case, filed on April 12 and April 15, 2008, seeking supersedeas, prohibition, and/or other appropriate relief.

Petitioner has appealed a judgment of $775,000 for libel and appropriation of name, which also includes an injunction commanding it to stop making statements on the Internet which the jury found to be tortious. The writ petition filed on April 12, 2008, asked this court to stay contempt proceedings on the appealed injunction, including discovery of proprietary and privileged information. The writ petition filed on April 15, 2008, asked this court to stay proceedings scheduled for today, April 17, in connection with enforcement of the damages portion of the judgment.

Today the trial court held petitioner in contempt for invoking the Fifth Amendment and the attorney-client privilege at a judgment debtor proceeding in enforcement of the damages portion of the judgment. For the reasons set forth in the writ petitions of April 12 and April 15—specifically, because the appeal presents compelling issues in favor of reversal and the balance of hardships favors petitioner—we urge this Court to

grant a writ of habeas corpus or certiorari precluding petitioner's incarceration and to stay further proceedings in enforcement of the judgment during the pendency of petitioner's appeal from the judgment.

PETITION FOR WRIT OF HABEAS CORPUS OR CERTIORARI

1. This petition adopts by reference the Petition for Writ of Supersedeas, Prohibition, and/or Other Appropriate Relief filed in this Court on April 12, 2008, and the Supplemental Petition for Writ of Supersedeas, Prohibition, and/or Other Appropriate Relief filed on April 15, 2008.

2. Exhibit 1 accompanying this petition is a declaration of appellate counsel summarizing the judgment debtor examination hearing of April 17, 2008, and stating that a reporter's transcript of the hearing has been ordered and is expected to be filed by April 19, 2008.

3. At the hearing of April 17, petitioner invoked the Fifth Amendment and the attorney-client privilege in response to certain questions posed to him, as described in the declaration of attached hereto as Exhibit 1.

4. Upon petitioner's invocation of the Fifth Amendment and the attorney-client privilege, the trial court held him in contempt and ordered him incarcerated on April 17, 2008.

5. Petitioner's incarceration is illegal and in contravention of rights guaranteed by the First and Fifth Amendments of the United States Constitution and by Articles 1, 2, 7, and 15 of the California Constitution, and should be stayed for the reasons set forth in the writ petitions of April 12 and 15, 2008.

6. This petition is addressed to this Court's original jurisdiction because petitioner has no other plain, speedy, or adequate remedy at law and has no other remedy at the trial court or at this court. The petition is timely filed on the same day that the trial court ordered petitioner's incarceration.

PRAYER

Petitioner prays that this Court:

1. Grant relief as prayed in the writ petitions filed in this Court on April 12 and 15, 2008, which are adopted herein by reference;

2 Issue a writ of habeas corpus or certiorari prohibiting the incarceration of petitioner for civil contempt;

3. Award petitioner his costs under California Rules of Court, rule 8.493; and

4. Grant such other relief as may be just and proper.

DATED: April 17, 2008

Respectfully submitted,

JONES & PETERS LLP

By: _____
Roberta Jones

Attorneys for Petitioner
John Doe

VERIFICATION

I, Roberta Jones, declare as follows:

I am one of the attorneys for petitioner herein. I have read the foregoing Petition for Writ of Habeas Corpus or Certiorari and know its contents. The facts alleged in the petition are within my own knowledge and I know these facts to be true. Based on my familiarity with these facts, I, rather than petitioner, verify this petition.

I declare under penalty of perjury that the foregoing is true and correct and that this verification was executed on April 17, 2008, at Oakland, California.

_____
Roberta Jones

MEMORANDUM

The remedy of a writ of habeas corpus or in the alternative a writ of certiorari "is properly invoked" when the petitioner is incarcerated or threatened with incarceration for civil contempt. (*In re Buckley* (1973) 10 C3d 237, 240, fn. 1; *Davidson v Superior Court* (1999) 70 CA4th 514, 522.)

The remedy is compelled here for the reasons set forth in the writ petitions of April 12 and 15, 2008. Petitioner has been ordered incarcerated in enforcement of a civil judgment that is not likely to survive appeal, because the judgment imposes an unconstitutional prior restraint on speech and because the case was wrongly tried on a theory of libel rather than slander. All trial court proceedings in enforcement of the judgment should be stayed during the pendency of petitioner's appeal from the judgment. The balance of hardships favors petitioner, for any injury to plaintiffs from delay in enforcement of the judgment pales in comparison to the injury to petitioner from incarceration, discovery of proprietary and privileged information, and infringement of his First Amendment rights.

The unthinkable and unprecedented have now occurred. Petitioner has been ordered incarcerated as a result of a judgment against him imposing an unconstitutional prior restraint on speech and awarding damages for speech that caused plaintiffs no pecuniary loss. It is time for a pause—and a stay of all further proceedings in enforcement of the appealed judgment—to allow careful, collegial reflection by this Court on the merits of the pending appeal before the judgment is enforced.

CONCLUSION

For the foregoing reasons, as set forth herein and in the April 12 and April 15, 2008 writ petitions, petitioner respectfully and urgently requests a writ of habeas corpus or, alternatively, certiorari, prohibiting his incarceration for civil contempt.

DATED: April 17, 2008

Respectfully submitted,

JONES & PETERS LLP

By: _____
Roberta Jones

Attorneys for Petitioner
John Doe

CERTIFICATE OF WORD COUNT

The foregoing Petition contains 2000 words (excluding tables and this Certificate). In preparing this certificate, I relied on the word count generated by MS Word 2003.

Executed on April 17, 2008, at Oakland, California.

_____
Roberta Jones

DECLARATION OF ROBERTA JONES

I, Roberta Jones, declare:

1. I am an attorney at law licensed to practice in the State of California and a partner in the law firm of Jones & Peters LLP, appellate counsel for Petitioner John Doe.

2. On April 17, 2008, in the Contra Costa County Superior Court, at a judgment debtor examination hearing in enforcement of a judgment currently on appeal to the First Appellate District, Judge Rachel Smythe held Petitioner John Doe in civil contempt for invoking the Fifth Amendment and the attorney-client privilege in response to questions regarding transfer of property, his business affairs, and attorney-client matters that petitioner believes are privileged and could furnish links in a chain of evidence that could incriminate him in proceedings to hold him in contempt of an injunction imposing an unconstitutional prior restraint on speech.

3. At the April 17 hearing, the judge ordered petitioner incarcerated in the Contra Costa County Jail for 10 days, beginning on April 17, 2008.

4. A reporter's transcript of the oral proceedings of April 17, 2008, was ordered that same day.

5. I expect to receive the transcript by Friday, April 19, and will forward it to the Court of Appeal, First Appellate District, immediately upon receiving it.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on April 17, 2008, at Oakland, California.

Note: This sample brief has not been updated for substantive legal accuracy. It is presented as an example of form, not content, and should not be presumed accurate with regard to the state of the law. The names of the parties and attorneys have been changed for publication.

Comment: An attorney filing a habeas corpus petition must make certain that the petition includes all of the information requested in *Petition for Writ of Habeas Corpus* (Judicial Council Form MC-275) and that the petition complies with Cal Rules of Ct 8.40(b)-(c) and 8.204(a)-(b). Cal Rules of Ct 8.384(a)(1). See §28.20. On petitions for writs of habeas corpus, see §§15.39-15.43.

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Source: Civil Litigation/California Civil Writ Practice/28 Court of Appeal and Supreme Court Forms/§28.22 XXII. FORM: APPELLATE COURT WRIT PETITION INFORMATION SHEET (FIFTH DISTRICT)

§28.22 XXII. FORM: APPELLATE COURT WRIT PETITION INFORMATION SHEET (FIFTH DISTRICT)

APPELLATE COURT WRIT PETITION INFORMATION SHEET

PETITIONER: RESPONDENT:	CASE NUMBER:

INSTRUCTIONS 1. This information sheet must be completed and inserted as page one of the petition for writ.
2. Exhibits must be tabbed or consecutively paginated with an index.

1. ☐ Trial is set for *(date)*:
2. The trial court order asserted to be erroneous was entered as follows:
   a. Title and location of court *(specify)*:
   b. Date of each order *(specify)*:
3. ☐ Reason for delay in filing this petition *(specify)*:

4. The record filed or lodged in support of this petition includes a copy of the lower court
   a. ☐ order.
   b. ☐ pleadings.
   c. ☐ motion with supporting and opposition papers.
   d. ☐ reporter s transcripts.
   e. ☐ other *(specify)*:
5. The following record was not filed or lodged in support of this petition:
   a. Record *(specify)*:
   b. Reason *(specify)*:
   c. Will be filed or lodged on *(date)*:
6. ☐ A petition concerning the subject of this petition was previously filed as follows:
   a. Title and location of court:
   b: Case number:
   c. Disposition:
7. ☐ A temporary stay order is requested pending the determination of the petition, and a court reporter s transcript will not be filed or lodged with the court before the stay order is decided.
   a. Real parties in interest ☐ have received ☐ have not received actual notice of the request for a stay order.
   b. A summary of all evidence concerning the matter of this petition and in support of the stay order is set forth *(include any testimony adverse to your petition)* ☐ in attachment 7b. ☐ as follows:

8. ☐ This petition seeks review of an order denying a motion to
   a. ☐ suppress evidence
   b. ☐ set aside an information
   AND
   c. defendant was arraigned on *(date)*:
   d. the trial court motion was
      ☐ made within 60 days following the date of the arraignment.
      ☐ not made within 60 days following the date of the arraignment for the reason set forth *(specify facts showing why defendant was unaware of any issue or had no opportunity to raise the issue of the motion)*
      ☐ in attachment 8d. ☐ as follows:

9. ☐ This petition seeks review of an order
   a. ☐ granting or denying a motion for change of venue
   b. ☐ denying a motion to quash service of summons
   c. ☐ granting or denying a motion to expunge notice of lis pendens
   AND
   d. ☐ written notice of the lower court order was served on (date):
   e. ☐ the lower court extended time to file this petition and a copy of the order is attached.
   f. ☐ other (specify):

10. I understand that the court must be advised of any matters affecting this petition which happen after the filing of this petition.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: ➤ _____
(SIGNATURE OF PETITIONER OR ATTORNEY)

(THIS FORM IS NOT REQUIRED FOR A PETITION FOR A WRIT OF HABEAS CORPUS)

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APPENDIX A

Chart: Review Method for Superior Court Orders

The following chart lists superior court orders and the proper method for obtaining review, *e.g.*:

- Wait until end of case and *appeal judgment*;
- *Appeal order* immediately; or
- Petition for writ of:
- Mandate;
- Prohibition; or
- Review (certiorari).

Issue/Procedure/Order/Code Sections	*Method of Review*	*Illustrative Cases/Circumstances*
1. Abatement		
Order of Abatement Granted	Mandate	See *Daum v Superior Court* (1964) 228 CA2d 283, 39 CR 443 (order denying amendment until future occurrence is order of abatement, which may be reviewed by mandate).
	Appeal judgment	Another action pending—CCP §597.
2. Advancement to Trial—CCP §36		
Motion to Advance—Denied	Appeal judgment	*Salas v Sears, Roebuck & Co.* (1986) 42 C3d 342, 345 n3, 228 CR 504.
	Mandate	*Rice v Superior Court* (1982) 136 CA3d 81, 185 CR 853.
Motion to Advance—Granted	Mandate	*Koch-Ash v Superior Court* (1986) 180 CA3d 689, 225 CR 657 (writ lies to challenge stay of order for advancement).
3. Amendment of Pleadings—CCP §§471.5, 473 (Supplementary Pleadings)		
Amended Pleading Not Timely Filed and Matter Dismissed	Appeal order of dismissal	*Leader v Health Indus. of Am., Inc.* (2001) 89 CA4th 603, 611, 107 CR2d 489.
Motion to Amend—Granted	Appeal judgment	*Deetz v Carter* (1965) 232 CA2d 851, 43 CR 321 (order granting motion to amend reviewed on appeal from judgment).
Motion to Amend—Denied	Appeal order	*Dominguez v City of Alhambra* (1981) 118 CA3d 237, 173 CR 345 (order denying leave to amend is final judgment if it disposes of all claims by or against one party); *American Advertising & Sales Co. v Mid-Western Transp.* (1984) 152 CA3d 875, 877 n1, 199 CR 735 (same). But see *Rainer v Community Memorial Hosp. (*1971) 18 CA3d 240, 95 CR 901 (motion to amend denied, but reviewed and

		reversed on appeal from judgment).
	Mandate	*Daum v Superior Court (*1964) 228 CA2d 283, 39 CR 443 (order denying amendment of complaint until future occurrence is unauthorized order of abatement that may be reviewed by mandate); *California Cas. Gen. Ins. Co. v Superior Court* (1985) 173 CA3d 274, 279, 218 CR 817, disapproved on other grounds in *Kransco v International Ins. Co.* (2000) 23 C4th 390, 407 n18, 97 CR2d 151.
Motion to File Supplementary Complaint—Denied	Mandate	*Louie Queriolo Trucking, Inc. v Superior Court* (1967) 252 CA2d 194, 196, 60 CR 389.
4. Anti-SLAPP—Order Granting or Denying a Special Motion to Strike Under CCP §425.16	Appeal	§CCP 425.16(i).
5. Arbitration—CCP §§1294, 1294.2		
Petition to Compel—Granted	Appeal judgment of confirmation	*Villacreses v Molinari* (2005) 132 CA4th 1223, 1229, 34 CR3d 281; *Maddy v Castle* (1976) 58 CA3d 716, 130 CR 160, disapproved in part on other grounds by *Doers v Golden Gate Hwy. & Transp. Dist.* (1979) 23 C3d 180, 188, 151 CR 837. See also *Graham v Scissor-Tail, Inc.* (1981) 28 C3d 807, 811 n1, 171 CR 604.
	Mandate or Prohibition	*Bertero v Superior Court* (1963) 216 CA2d 213, 222, 30 CR 719 (mandate lies to attack order before arbitration takes place), disapproved in part on other grounds by *St. Agnes Med. Ctr. v PacifiCare of Cal.* (2003) 31 C4th 1187, 1192, 8 CR3d 517. See also *Melchor Inv. Co. v Rolm Sys.* (1992) 3 CA4th 587, 592, 4 CR2d 343 (writ of prohibition is appropriate remedy if arbitration is unjustifiably ordered); *Atlas Plastering, Inc. v Superior Court* (1977) 72 CA3d 63, 68, 140 CR 59 (mandate or prohibition lies if matters ordered arbitrated fall outside scope of arbitration agreement or if arbitration would appear to be unduly time consuming or expensive). But see *International Film Inv. v Arbitration Tribunal of Directors Guild* (1984) 152 CA3d 699, 704, 199 CR 690 (prohibition not proper remedy because there was no judicial act to be restrained; prohibition does not lie to restrain acts of arbitrator). See §§16.99-16.101.
Petition to Compel—Dismissed or Denied	Appeal order	CCP §1294(a); *Porter v United Servs. Auto. Ass'n* (2001) 90 CA4th 837, 108

		CR2d 860.
Petition to Enjoin Arbitration—Granted	Appeal order	*International Film Inv. v Arbitration Tribunal of Directors Guild (*1984) 152 CA3d 699, 704, 199 CR 690 (dicta).
Petition to Enjoin Arbitration—Denied	Appeal judgment of confirmation	*International Film Inv. v Arbitration Tribunal of Directors Guild, supra* (characterizing petition for writ of prohibition to prevent arbitration as petition for injunction, and analogizing denial of writ to order compelling arbitration, which in the better view is not appealable).
Petition to Confirm Award—Granted	Appeal judgment of confirmation	CCP §1294(b).
Petition to Confirm Award—Denied	Appeal order	CCP §1294(b).
Petition to Vacate Award—Granted	Appeal order	CCP §1294(c) (order vacating award is appealable unless rehearing in arbitration is ordered).
6. Attachment—CCP §§482.010, 485.240		
Application for Right to Attach Order or Writ of Attachment—Granted	Appeal order	CCP §904.1(a)(5) or §904.2(f).
Application for Right to Attach Order or Writ of Attachment—Denied	Mandate	*San Diego Wholesale Credit Men's Ass'n v Superior Court* (1973) 35 CA3d 458, 461, 110 CR 657. See also *International Typographical Union Negotiated Pension Plan v Ad Compositors, Inc.* (1983) 142 CA3d 733, 735, 191 CR 227.
Application for Order to Set Aside Right-to-Attach Order and to Quash Writ of Attachment—Granted	Appeal judgment	*Islander Yachts, Inc. v One Freeport 36-Ft. Vessel* (1985) 173 CA3d 1081, 1086 n6, 219 CR 654.
Motion to Discharge an Attachment—Granted	Appeal order	CCP §§904.1(a)(5), 904.2(f).
Motion to Discharge an Attachment—Denied	Appeal order	CCP §§904.1(a)(5), 904.2(f).
7. Attorneys (see Counsel)		
8. Attorney Fees (see also Costs, Sanctions, Liens)		
Motion for Fees—CCP §1021.5—Granted	Appeal order	CCP §904.1(a)(2); *Nestande v Watson* (2003) 111 CA4th 232, 238, 4 CR3d 18.
Motion for Fees—CCP §1021.5—Denied	Appeal order	CCP §904.1(a)(2); *Consumer Cause, Inc. v Mrs. Gooch's Natural Food Markets, Inc.* (2005) 127 CA4th 387, 405, 25 CR3d 514; *Otto v Los Angeles Unified Sch. Dist.* (2003) 106 CA4th 328, 335, 130 CR2d 512.
Motion for Fees—CCP §§1717, 1033.5(a)(10)—Granted or Denied	Appeal order	CCP §904.1(a)(2); *Allstate Ins. Co. v Loo* (1996) 46 CA4th 1794, 1797, 54 CR2d 541.

9. Capacity to Sue (see Motion to Strike, Demurrer, Summary Judgment)		
10. Claim of Exemption After Levy—CCP §703.600		
Motion for Claim of Exemption—Granted	Appeal order	CCP §703.600.
Motion for Claim of Exemption—Denied	Appeal order	CCP §703.600.
11. Claims Statutes—Govt C §§911.2, 911.4, 945.4, 946.6		
Petition to Present Late Claim (for Relief from Claim Requirements)—Granted	Mandate	*County of Alameda v Superior Court* (1987) 196 CA3d 619, 622, 242 CR 215.
Petition to Present Late Claim (for Relief from Claim Requirements)—Denied	Appeal order	*Munoz v State* (1995) 33 CA4th 1767, 1772 n1, 39 CR2d 860; *Garcia v Los Angeles Unified Sch. Dist. (*1985) 173 CA3d 701, 706 n1, 219 CR 544.
12. Class Actions		
Motion to Certify Class—Granted	Mandate	*Sav-On Drug Stores, Inc. v Superior Court* (2004) 34 C4th 319, 17 CR3d 906; *Blue Chip Stamps v Superior Court* (1976) 18 C3d 381, 387 n4, 134 CR 393.
Motion to Certify Class—Denied	Appeal order	*Daar v Yellow Cab Co.* (1967) 67 C2d 695, 699, 63 CR 724 (discussing "death knell" doctrine*, i.e.,* order is appealable when it has effect of making further proceedings impractical); *Stephen v Enterprise Rent-A-Car* (1991) 235 CA3d 806, 811, 1 CR2d 130.
	Mandate	*General Motors Corp. v Superior Court* (1988) 199 CA3d 247, 250, 244 CR 776 (discussing split of authority on whether or not order denying class certification is appealable and deciding that mandate is only means of judicial review when "death knell" doctrine does not apply); *Hogya v Superior Court* (1977) 75 CA3d 122, 142 CR 325 (detailed discussion of why mandate lies in certain cases).
Motion to Dismiss Class Action—Granted	Appeal order	*Alch v Superior Court* (2004) 122 CA4th 339, 359, 19 CR3d 29 (court consolidated appeals and writ petitions to review trial court's dismissal of class action age discrimination claims).
	Mandate	*Alch v Superior Court* (2004) 122 CA4th 339, 359, 19 CR3d 29 (court consolidated appeals and writ petitions to review trial court's dismissal of class action age discrimination claims).
Motion to Dismiss Class Action—Denied	Appeal order	
13. Consolidation/Bifurcation/Severance		

—CCP §§597, 1048(a)

Motion to Consolidate/Sever—Granted	Appeal judgment	*State Farm Mut. Auto. Ins. Co. v Superior Court* (1956) 47 C2d 428, 432, 304 P2d 13 (consolidation order not appealable, reviewable on appeal from final judgment).
	Mandate	*State Farm Mut. Auto. Ins. Co. v Superior Court, supra* (when appeal from judgment would be inadequate).
Motion to Consolidate/Sever—Denied	Mandate	*Fisher v Superior Court* (1980) 103 CA3d 434, 163 CR 47 (issue of first impression).

14. Contempt—CCP §§904.1(a)(1)(B), 904.2(a)(2), 1222

Judgment of Contempt (Civil)	Review (certiorari)	*John Breuner Co. v Bryant* (1951) 36 C2d 877, 229 P2d 356; *Grant v Superior Court* (1963) 214 CA2d 15, 19, 29 CR 125.
	Prohibition	*Cohen v Superior Court* (1959) 173 CA2d 61, 343 P2d 286 (to restrain enforcement of judgment ordering petitioner committed to county jail for contempt).
Judgment of Contempt (Criminal)	Review (certiorari)	CCP §1209(d)
	Habeas corpus	*In re DeSilva* (1948) 33 C2d 76, 199 P2d 6.

15. Continuance—CCP §§594-595.4; Cal Rules of Ct 3.1332

Motion to Continue Trial—Granted	Appeal judgment	*Eastwood v Froehlich* (1976) 60 CA3d 523, 131 CR 577 (order not directly appealable, but reviewable on appeal from final judgment).
Motion to Continue Trial—Denied	Appeal judgment	*Oliveros v Couny of Los Angeles* (2004) 120 CA4th 1389, 1393, 16 CR3d 638.
	Mandate	*Polibrid Coatings, Inc. v Superior Court* (2003) 112 CA4th 920, 924, 6 CR3d 7.

16. Coordination—CCP §§404-404.9; Cal Rules of Ct 3.501-3.550

Motion to Coordinate—Granted or Denied	Mandate	CCP §404.6; Cal Rules of Ct 3.505(b). See §§16.8-16.10.

17. Counsel

Motion to Appoint Counsel—Granted	Mandate	*Brown v Superior Court* (1981) 119 CA3d 189, 173 CR 803 (without discussion of why writ lies).
	Review (certiorari)	*Estate of Bodger* (1954) 128 CA2d 710, 276 P2d 83 (special rule for probate proceeding).
Motion to Appoint Counsel—Denied	Appeal judgment	*In re Jacqueline H.* (1979) 94 CA3d 808, 156 CR 765 (without discussion).

Motion to Disqualify Counsel—Granted	Appeal order	*Cal Pak Delivery, Inc. v United Parcel Serv., Inc.* (1997) 52 CA4th 1, 8, 60 CR2d 207.
Motion to Disqualify Counsel—Denied	Appeal order	*Truck Ins. Exch. v Fireman's Fund Ins. Co.* (1992) 6 CA4th 1050, 1052, 8 CR2d 228; *Gregori v Bank of Am.* (1989) 207 CA3d 291, 300, 254 CR 853. See also *Kraus v Davis* (1970) 6 CA3d 484, 85 CR 846 (characterized as order to restrain counsel from proceeding (see CCP §904.1(a)(6)) and as final order on collateral matter).
Motion to Substitute (or to Withdraw as) Counsel—CCP §284(2)—Granted	Appeal judgment	*Messih v Lee Drug, Inc.* (1985) 174 CA3d 312, 220 CR 43.
Motion to Substitute (or to Withdraw as) Counsel—CCP §284—Denied	Mandate	*Ferruzzo v Superior Court* (1980) 104 CA3d 501, 163 CR 573 (corporate client); *Redevelopment Agency v Superior Court* (1961) 195 CA2d 591, 16 CR 45 (without discussion).
18. Cross-Complaints—CCP §426.10. See also Demurrer; Motion to Strike; Settlement		
Motion to File Cross-Complaint—Denied	Mandate	*Nelson v Superior Court* (1950) 97 CA2d 78, 217 P2d 119.
19. Default—CCP §§473, 585-587		
Request to Enter Default—Denied	Prohibition and mandate	*W. A. Rose Co. v Municipal Court* (1959) 176 CA2d 67, 1 CR 49 (prohibition to restrain further proceedings, mandate to compel entry of default).
Motion to Compel Entry of Default—Denied	Mandate	*California Pine Box & Lumber Co. v Superior Court* (1910) 13 CA 65, 108 P 882.
Motion to Set Aside Default—Granted	Appeal judgment	*Davis v Taliaferro* (1963) 218 CA2d 120, 32 CR 208.
Motion to Set Aside Default—Denied	Appeal judgment	*Rappleyea v Campbell* (1994) 8 C4th 975, 35 CR2d 669.
Motion to Vacate Default Judgment and Set Aside Default—Granted	Appeal order	*Baske v Burke* (1981) 125 CA3d 38, 43, 177 CR 794; *Yarbrough v Yarbrough* (1956) 144 CA2d 610, 301 P2d 426 (order is one after judgment and immediately appealable).
Motion to Vacate Default Judgment—Denied	Appeal order	CCP §904.1(a)(1)-(2); *Tunis v Barrow* (1986) 184 CA3d 1069, 1074, 229 CR 389.
20. Demurrer		
Demurrer Sustained *With* Leave to Amend	Mandate	Not an appealable order under CCP §904.1. See §16.110.
Demurrer Sustained *Without* Leave to Amend	Appeal judgment	CCP §472c(a). See §16.110.
Demurrer Overruled	Mandate	*State v Superior Court (Bodde)* (2004)

		32 C4th 1234, 1238, 13 CR3d 534 (court overruled demurrer); *Mitsubishi Materials Corp. v Superior Court* (2003) 113 CA4th 55, 6 CR3d 159 (after remand from supreme court, writ issued commanding superior court to vacate order). See §16.108.
21. Discovery—CCP §§2016.010-2036.050		
Issue Presented Is of First Impression or of General Importance to the Trial Courts of the Profession	Mandate	*Britt v Superior Court* (1978) 20 C3d 844, 851, 143 CR 695*; Save Open Space Santa Monica Mountains v Superior Court (2000) 84 CA4th 235, 245, 100 CR2d 725. See §16.116.*
Violation of a Privilege	Prohibition or mandate	*Sav-On Drugs, Inc. v Superior Court* (1975) 15 C3d 1, 3, 123 CR 283; *Titmas v Superior Court* (2001) 87 CA4th 738, 744 n4, 104 CR2d 803. See §§16.120-16.122.
Discovery Ruling Denies Party Fair Opportunity to Litigate the Case	Mandate	*Waicis v Superior Court* (1990) 226 CA3d 283, 287, 276 CR 45.
Motion to Compel Production/Answers—Granted	Prohibition	*Costco Wholesale Corp. v Superior Court* (2009) 47 C4th 725, 101 CR3d 758; *Roberts v Superior Court* (1973) 9 C3d 330, 107 CR 309; *Sav-On Drugs, Inc. v Superior Court* (1975) 15 C3d 1, 123 CR 283 (writ lies when discovery would invade privilege). See §16.124.
Motion to Compel Production/Answers—Denied	Mandate	*Rojas v Superior Court* (2004) 33 C4th 407, 15 CR3d 643; *2,022 Ranch v Superior Court* (2003) 113 CA4th 1377, 1381, 7 CR3d 197, disapproved in part on other grounds in *Costco Wholesale Corp. v Superior Court* (2009) 47 C4th 725, 101 CR3d 758. See §16.123.
Motion to Quash Subpoena or for Protective Order—Denied	Mandate	*Aetna Cas. & Sur. Co. v Superior Court* (1984) 153 CA3d 467, 471, 200 CR 471.
Motion for Protective Order (Nonparty Witness)—Denied	Appeal order	*Brun v Bailey* (1994) 27 CA4th 641, 32 CR2d 624 (appealable as collateral order).
	Mandate	*Monarch Healthcare v Superior Court* (2000) 78 CA4th 1282, 1290, 93 CR2d 619.
Nonparty Expert Witness Challenges Amount of Fee	Appeal order	*Marsh v Mountain Zephyr, Inc.* (1996) 43 CA4th 289, 298, 50 CR2d 493.
Order That Plaintiff Submit to Physical Examination—Granted	Mandate	*Browne v Superior Court* (1979) 98 CA3d 610, 613, 159 CR 669. See §16.118.
22. Dismissal—CCP §§583.110-583.430		
Motion to Dismiss—Granted	Appeal judgment	*Daley v County of Butte* (1964) 227 CA2d 380, 38 CR 693 (order is final

		judgment and appealable).
	Mandate	*Brown v Superior Court* (1970) 7 CA3d 366, 86 CR 670 (without discussion of why writ lies).
Motion to Dismiss—Denied	Prohibition	*J. C. Penney Co. v Superior Court* (1959) 52 C2d 666, 343 P2d 919. See §16.54.
	Mandate	*McDonough Power Equip. Co. v Superior Court* (1972) 8 C3d 527, 530, 105 CR 330 (mandate to compel dismissal or prohibition to restrain trial). See §16.54.
Motion to Vacate Dismissal—Denied	Appeal order	*Peltier v McCloud River R.R.* (1995) 34 CA4th 1809, 41 CR2d 182 (motion to vacate under CCP §473).
23. Dissolution of Partnership		
Order Granting	Appeal judgment	*Kinoshita v Horio* (1986) 186 CA3d 959, 231 CR 241 (judgment dissolving partnership and directing sale of assets interlocutory and appealable only on final judgment).
24. Dissolution of Marriage—CCP §904.1(a)(10); Fam C §2404		
Judgment—"Status Only"	Appeal judgment	Fam C §§2025, 2337.
Orders for Support	Appeal order	*Marriage of Skelley* (1976) 18 C3d 365, 134 CR 197; *Marriage of Hunt* (1985) 172 CA3d 872, 218 CR 451.
Order on Bifurcated Issue	Appeal order (with leave)	Fam C §2025; Cal Rules of Ct 5.175, 5.180.
Temporary Custody Orders	Mandate	*Lester v Lennane* (2000) 84 CA4th 536, 560 n13, 101 CR2d 86.
25. Good Faith Settlement (see Settlement)		
26. Government Claims Act		
Review of Agency Decision Not to Defend Public Employee Under Govt C §995.2(a)	Mandate	*Stone v Regents of Univ. of Cal.* (1999) 77 CA4th 736, 746, 92 CR2d 94. See also *Sparks v Kern County Bd. of Supervisors* (2009) 173 CA4th 794, 798, 93 CR3d 173 (public employee seeking reimbursement for defense costs must satisfy claims statutes before filing petition for writ of mandate).
27. Guardian ad Litem—CCP §§372-373.5		
Motion to Appoint—Granted or Revoked	Appeal order	*Estate of Hathaway* (1896) 111 C 270, 43 P 754; Prob C §1301(a) (granting or revoking letters of guardianship is appealable).
Motion to Remove—Granted	Review (certiorari)	*Hollaway v Scripps Mem. Hosp.* (1980)

		111 CA3d 719, 168 CR 782 (temporary removal of guardian ad litem).
28. Guardianship (Conservatorship)—		
The following motions are immediately appealable whether granted or denied:		
Granting or revoking letters, except temporary letters	Appeal order	CCP §904.1(a)(10); Prob C §1301(a).
Granting permission to fix ward's residence not within state	Appeal order	CCP §904.1(a)(10); Prob C §1301(b).
Directing, authorizing, approving, or modifying payments for support, maintenance, or education	Appeal order	CCP §904.1(a)(10); Prob C §1301(c).
Granting or denying petition under Prob C §2423 or Prob C §§2580-2586	Appeal order	CCP §904.1(a)(10); Prob C §1301(d).
Affecting legal capacity of conservatee under Prob C §§1870-1901	Appeal order	CCP §904.1(a)(10); Prob C §1301(e).
Adjudicating merits of claim under Prob C §§2500-2507	Appeal order	CCP §904.1(a)(10); Prob C §1301(f).
Granting or denying petition under Prob C §§3100-3154	Appeal order	CCP §904.1(a)(10); Prob C §1301(g).
29. Inconvenient Forum		
Motion to Dismiss—Granted	Appeal order	CCP §904.1(a)(3).
Motion to Dismiss or Stay—Denied	Mandate	See *Appalachian Ins. Co. v Superior Court* (1984) 162 CA3d 427, 208 CR 627; *Outboard Marine Corp. v Superior Court* (1976) 59 CA3d 434, 130 CR 642. See §16.54.
30. Injunctions—CCP §§525-534		
Injunction—Granted or Denied	Appeal order	CCP §§904.1(a)(6), 940.2(g). See §§16.150-16.151.
Motion to Dissolve—Granted	Appeal order	CCP §§904.1(a)(6), 904.2(g).
Motion to Dissolve—Denied	Appeal order	CCP §904.1(a)(6); *In re Glacier Gen. Ins. Co*. (1991) 234 CA3d 1549, 286 CR 262; *Welsch v Goswick* (1982) 130 CA3d 398, 181 CR 703; CCP §904.2(g); (by analogy to *Northcutt v Superior Court* (1924) 66 CA 350, 226 P 25, prohibition should lie in certain circumstances).
31. Interpleader—CCP §§386-386.6		
Application for Order Substituting Parties and Discharging Applicant—Granted	Appeal judgment	*Neilsen v Saylors* (1956) 146 CA2d 139, 303 P2d 781 (order not appealable, reviewable on appeal from subsequent judgment); *Camp v Oakland Mortgage & Fin. Co.* (1928) 205 C 380, 270 P 685 (writ of review will not issue).
Application for Order to Deliver Property—Denied	Appeal judgment	*Crocker-Anglo Nat'l Bank v American Trust Co.* (1959) 170 CA2d 289, 338

		P2d 617.
Application for Order Restraining Other Proceedings—Denied	Mandate	*Department of Educ. v Superior Court* (1979) 97 CA3d 977, 159 CR 265 (without discussion of why writ lies).
Application for Order Restraining Other Proceedings—Granted	Appeal order	*Surety Co. of the Pac. v Piver* (1983) 149 CA3d Supp 29, 31, 197 CR 531.
Judgment on Complaint in Interpleader—Granted	Appeal judgment	*Lincoln Nat'l Life Ins. Co. v Mitchell* (1974) 41 CA3d 16, 115 CR 723 (interlocutory judgment reviewable on appeal from final judgment on conflicting claims).
32. Intervention—CCP §387		
Application to Intervene—Granted	Appeal judgment	*Taylor v Western States Land & Mortgage Co.* (1944) 63 CA2d 401, 147 P2d 36 (order not appealable, reviewable on appeal from final judgment).
Application to Intervene—Denied	Appeal order denying motion	*Braun v Brown* (1939) 13 C2d 130, 87 P2d 1009; *City & County of San Francisco v State* (2005) 128 CA4th 1030, 1036, 27 CR3d 722; *City of Malibu v California Coastal Comm'n* (2005) 128 CA4th 897, 27 CR3d 501).
33. Judge's Disqualification—CCP §§170.1, 170.3(d), 170.6		
Motion to Disqualify—Granted	Mandate	CCP §170.3(d); *Curle v Superior Court* (2001) 24 C4th 1057, 1059, 103 CR2d 751 (CCP §170.1); *In re Sheila B.* (1993) 19 CA4th 187, 23 CR2d 482. See §§16.3-16.7.
Motion to Disqualify—Denied (CCP §§170.1, 170.6)	Mandate	CCP §170.3(d). See §§16.3-16.7.
34. Judgment		
Motion for Judgment—Granted	Appeal judgment	*Adohr Milk Farms, Inc. v Love* (1967) 255 CA2d 366, 63 CR 123 (nonappealable order, reviewable on appeal from final judgment).
Motion for Judgment—Denied	Mandate	CCP §904.1.
35. Jurisdiction—CCP §§418.10, 904.1(a)(3), 904.2(d)		
Motion to Quash—Granted	Appeal order	CCP §§904.1(a)(3), 904.2(d).
Motion to Quash—Denied	Mandate	CCP §418.10(c). See §§16.54-16.57.
36. Jury Trial—CCP §§592, 1090		
Motion for Jury Trial—Granted	Prohibition	*Southern Pac. Transp. Co. v Superior Court* (1976) 58 CA3d 433, 129 CR 912 (without discussion of why writ lies). See §§16.148-16.149.
Motion for Jury Trial—Denied	Prohibition	*Mallarino v Superior Court* (1953) 115 CA2d 781, 252 P2d 993 (writ issued to restrain trial without

		jury).
37. Liens		
Motion to Expunge Attorney Lien—Denied	Appeal order	*Trimble v Steinfeldt* (1986) 178 CA3d 646, 650, 224 CR 195.
38. Lis Pendens—CCP §§405-405.61		
Motion to Expunge—Granted or Denied	Mandate	CCP §405.39 (order not appealable, reviewable by mandate only). See §§16.11-16.13.
39. Mistrial		
Motion for Mistrial—Granted	Appeal judgment	*Bauguess v Paine* (1978) 22 C3d 626, 634 n3, 150 CR 461.
	Mandate	*Juarez v Superior Court* (1982) 31 C3d 759, 765, 183 CR 852.
Motion for Mistrial—Denied	Appeal judgment	*Blair v Williams* (1952) 109 CA2d 516, 561, 240 P2d 1043.
40. Nonsuit—CCP §581c		
Motion for Nonsuit—Granted	Appeal order	*Shepardson v McLellan* (1963) 59 C2d 83, 27 CR 884 (when order terminates litigation as to one party and does not indicate it would be followed by formal written judgment).
Motion for Nonsuit—Denied	Petition for extraordinary writ	Not appealable under CCP §904.1.
41. Partition		
Interlocutory Judgments	Appeal judgment	CCP §904.1(a)(9).
42. Pretrial Conference Order, Amendment of—CCP §576	Mandate	*Universal Underwriters Ins. Co. v Superior Court* (1967) 250 CA2d 722, 58 CR 870 (without discussion of why writ lies).
43. Powers of Attorney—Prob C §1302		
The following motions are immediately appealable whether granted or denied:		
Any final order under Prob C §4541, except order under §4541(c)	Appeal order	CCP §904.1(a)(10); Prob C §1302(a).
Any final order under Prob C §4766(c)	Appeal order	CCP §904.1(a)(10); Prob C §1302(b).
An order dismissing the petition or denying a motion to dismiss under Prob C §4953	Appeal order	CCP §904.1(a)(10); Prob C §1302(b).
44. Probate Orders—Prob C §§1300, 1303		
The following motions for Probate Orders are immediately appealable whether granted or denied:		
Directing, authorizing, approving, or confirming sale, lease, encumbrance, grant of option, purchase, conveyance, or exchange of property	Appeal order	CCP §904.1(a)(10); Prob C §1300(a).
Settling account of fiduciary	Appeal order	CCP §904.1(a)(10); Prob C §1300(b).

Authorizing, instructing, or directing fiduciary	Appeal order	CCP §904.1(a)(10); Prob C §1300(c).
Approving or confirming acts of fiduciary	Appeal order	CCP §904.1(a)(10); Prob C §1300(c).
Directing or allowing payment of debt, claim, or cost	Appeal order	CCP §904.1(a)(10); Prob C §1300(d).
Fixing, directing, authorizing, or allowing payment of compensation or expenses of attorney	Appeal order	CCP §904.1(a)(10); Prob C §1300(e).
Fixing, directing, authorizing, or allowing payment of compensation or expenses of fiduciary	Appeal order	CCP §904.1(a)(10); Prob C §1300(f).
Surcharging, removing, or discharging fiduciary	Appeal order	CCP §904.1(a)(10); Prob C §1300(g).
Transferring property of estate to fiduciary in another jurisdiction	Appeal order	CCP §904.1(a)(10); Prob C §1300(h).
Allowing or denying fiduciary's petition to resign	Appeal order	CCP §904.1(a)(10); Prob C §1300(i).
Discharging surety on fiduciary's bond	Appeal order	CCP §904.1(a)(10); Prob C §1300(j).
Adjudicating the merits of a claim made under Prob C §§850-859	Appeal order	CCP §904.1(a)(10); Prob C §1300(k).
Granting or revoking letters to personal representative (except special administration)	Appeal order	CCP §904.1(a)(10); Prob C §1303(a).
Admitting a will to probate or revoking probate	Appeal order	CCP §904.1(a)(10); Prob C §1303(b).
Setting aside an estate of less than $20,000 (Prob C §6609)	Appeal order	CCP §904.1(a)(10); Prob C §1303(c).
Setting apart homestead or other exempt property	Appeal order	CCP §904.1(a)(10); Prob C §1303(d).
Granting, modifying, or terminating family allowance	Appeal order	CCP §904.1(a)(10); Prob C §1303(e).
Determining heirship, succession, entitlement, or person to whom distribution should be made	Appeal order	CCP §904.1(a)(10); Prob C §1303(f).
Directing distribution of property	Appeal order	CCP §904.1(a)(10); Prob C §1303(g).
Determining or confirming property's passage to, or ownership by, surviving spouse	Appeal order	CCP §904.1(a)(10); Prob C §1303(h).
Authorizing investment or reinvestment of surplus by personal representative	Appeal order	CCP §904.1(a)(10); Prob C §1303(i).
Determining whether action constitutes contest under Prob C §§21310-21315, as those sections read before their repeal effective 1/2009.	Appeal order	CCP §904.1(a)(10); Prob C §1303(j).
Determining priority of debts under Prob C §§11440-11446	Appeal order	CCP §904.1(a)(10); Prob C §1303(k).

Any final order under Prob C §§20100-20125 or §§20200-20225	Appeal order	CCP §904.1(a)(10); Prob C §1303(*l*).
Motion for Leave to File Creditor's Claim—Denied	Mandate	*Estate of Hoertkorn* (1979) 88 CA3d 461, 151 CR 806 (mandate lies because order not appealable by Prob C §1240).
45. Public Records Act—Govt C §6259(c)	Mandate	*Filarsky v Superior Court* (2002) 28 C4th 419, 426, 121 CR2d 844. See §§16.14-16.17.
46. Receiver—CCP §§564-570		
Petition to Appoint Receiver—Granted	Appeal order	*Carpenson v Najarian* (1967) 254 CA2d 856, 861, 62 CR 687 (order must be appealed under CCP §§904.1(a)(7), 904.2(h)).
	Prohibition	*Rondos v Superior Court* (1957) 151 CA2d 190, 311 P2d 113 (writ available when under circumstances appeal not adequate remedy).
Petition to Appoint—Denied	Appeal order	*Conaway v Conaway* (1963) 218 CA2d 427, 32 CR 890 (questionable whether order appealable; appeal taken).
	Mandate	*Guay v Superior Court* (1957) 147 CA2d 764, 769, 305 P2d 990.
Motion to Vacate Appointment—Denied	Appeal order	*Raff v Raff* (1964) 61 C2d 514, 518, 39 CR 366 (order appealable in that essentially it is an order that receiver continue to serve, analogous to original order of appointment); *City & County of San Francisco v Shers* (1995) 38 CA4th 1831, 1837, 46 CR2d 57. But see *Title Ins. & Trust Co. v California Dev. Co.* (1911) 159 C 484, 114 P 838 (appeal judgment).
Motion to Discharge—Granted	Appeal order	*Hibernia Sav. & Loan Soc'y v Ellis Estate Co.* (1932) 216 C 280, 13 P2d 929 (characterized as final order on collateral matter).
Motion to Discharge—Denied	Mandate	*Fairbank v Superior Court* (1917) 34 CA 66, 166 P 864 (without discussion of why writ lies).
47. Reclassification—CCP §403.080		
Motion to Reclassify—Granted	Mandate	*Garau v Torrance Unified Sch. Dist.* (2006) 137 CA4th 192, 199, 40 CR3d 108. See §§16.58-16.61
48. Remand Proceedings—Superior Court Fails to Follow Court of Appeal's Instructions	Mandate	*Butler v Superior Court* (2002) 104 CA4th 979, 128 CR2d 403.
49. Sanctions—CCP §§128.5, 2023.030		
Motion for Sanctions—Granted against party or attorney if over $5000	Appeal	CCP §904.1(a)(11)-(12).
Motion for Sanctions—Granted against	Mandate,	CCP §904.1(b) (CCP §904.1(a)(11)-

party or attorney if $5000 or less	prohibition, or appeal judgment	(12). See §§16.81-16.85.
Motion for Sanctions—Denied	Mandate	*Do v Superior Court* (2003) 109 CA4th 1210, 135 CR2d 855; *Wells Props. v Popkin* (1992) 9 CA4th 1053, 1056, 11 CR2d 845. But see *Muller v Fresno Community Hosp. & Med. Ctr.* (2009) 172 CA4th 887, 905, 91 CR3d 617 (under circumstances, order denying motion for sanctions was appealable as collateral order). See §16.125.
Motion for Non-Monetary Discovery Sanctions—Granted		
	Mandate or Prohibition	*Maggi v Superior Court* (2004) 119 CA4th 1218, 15 CR3d 161 (protective order violated Fifth Amendment). See §16.117.
	Appeal order	*Barton v Ahmanson Devs. Inc.* (1993) 17 CA4th 1358, 1361, 22 CR2d 56.
50. Security for Costs—CCP §§1029.5, 1030; Corp C §800		
Motion for Security for Costs—Granted	Appeal judgment	*Woodman v Ackerman* (1967) 249 CA2d 644, 57 CR 687 (nonappealable order, reviewable on appeal from judgment of dismissal entered after party refused to post security under former Corp C §834 (now Corp C §800)).
	Prohibition	*Hagan v Superior Court* (1960) 53 C2d 498, 2 CR 288 (writ may issue to restrain court from enforcing order to post security).
Motion for Security for Costs—Denied	Appeal judgment	*Efron v Kalmanovitz* (1960) 185 CA2d 149, 8 CR 107 (nonappealable order).
	Prohibition	*Kennaley v Superior Court* (1954) 43 C2d 512, 514, 275 P2d 1.
51. Settlement		
Motion to Determine Good Faith of Settlement—Granted or Denied	Mandate	CCP §877.6(e). See §§16.49-16.51.
Dismissal of Cross-Complaint After Granting of Motion to Determine Good Faith of Settlement	Appeal order	*Greshko v County of Los Angeles* (1987) 194 CA3d 822, 827 n1, 239 CR 846 (order appealable as final judgment if dismissal terminates action as to party).
52. SLAPP—See Anti-SLAPP		
53. Stay—CCP §§418.10, 904.1(a)(3), 904.2(d)		
Motion for Stay—Granted	Appeal order	CCP §§904.1(a)(3) (if granted on grounds of inconvenient forum), 904.2(d) (same in limited jurisdiction cases).

	Mandate	*James v Superior Court* (1968) 261 CA2d 415, 67 CR 783 (without discussion of why writ lies in other cases). See §16.56-16.59.
Motion for Stay—Denied	Mandate	CCP §418.10(c) (if inconvenient forum); *Simmons v Superior Court* (1950) 96 CA2d 119, 214 P2d 844 (on grounds of comity). See §16.54-16.57.
54. Strike, Motion to—CCP §§435-437, 472c		
Motion to Strike—Granted	Appeal judgment	CCP §472c(b)(3) (nonappealable order, reviewable on appeal from final judgment).
	Appeal order	*Garza v Kantor* (1976) 54 CA3d 1025, 127 CR 164 (order appealable if it terminates action as to at least one party). See also CCP §586(a)(7).
Motion to Strike—Denied	Prohibition	*Tide Water Assoc. Oil Co. v Superior Court* (1955) 43 C2d 815, 279 P2d 35 (writ may lie to restrain trial of issues underlying motion when petitioner has no other adequate remedy).
55. Summary Adjudication of Issues and Orders Under CCP §437c (Other than Summary Judgment)	Mandate or Prohibition	CCP §437c(m)(1); *Whitney's at the Beach v Superior Court* (1970) 3 CA3d 258, 83 CR 237 (full discussion of when writ lies). See §16.68.
56. Summary Judgment—CCP §437c		
Motion for Summary Judgment—Granted	Appeal judgment	CCP §437c(m)(1). See §16.68.
Motion for Summary Judgment—Denied; Motion for Summary Adjudication Granted or Denied	Mandate or Prohibition	CCP 437c(m)(1). See §16.67.
Trial Court Takes Motion Off Calendar	Mandate	*Wells Fargo Bank v Superior Court* (1988) 206 CA3d 918, 254 CR 68. See §16.71.
Trial Court Shortens Motion Notice Period	Mandate	*McMahon v Superior Court* (2003) 106 CA4th 112, 130 CR2d 407. See §16.72.
Trial Court Denies Oral Argument	Mandate	*Brannon v Superior Court* (2004) 114 CA4th 1203, 1211, 8 CR3d 491. See §16.74.
Trial Court Denies Right to File Motion	Mandate	*Polibrid Coatings, Inc. v Superior Court* (2003) 112 CA4th 920, 6 CR3d 7. See §16.73.
Trial Court Refused to Consider Summary Adjudication in the Alternative	Mandate	*Hope Int'l Univ. v Superior Court* (2004) 119 CA4th 719, 744, 14 CR3d 643. See §16.75.
57. Tort Claims Act (see Government Claims Act)		
58. Trusts—Prob C §1304		
Any of the following orders are immediately		

appealable whether they are granted or denied:		
Any final order under Prob C §§17200-17211, except one compelling trustee to submit account or report acts as trustee, or accepting trustee's resignation	Appeal order	CCP §904.1(a)(10); Prob C §1304(a).
Any final order under Prob C §§19020-19030	Appeal order	CCP §904.1(a)(10); Prob C §1304(b).
Any final order under Prob C §§20100-20125 or Prob C §§20200-20225	Appeal order	CCP §904.1(a)(10); Prob C §1304(c).
Determining whether an action constitutes a contest under Prob C §§21320-21322, as those sections read before their repeal effective 1/2009.	Appeal order	CCP §904.1(a)(10); Prob C §1304(d).
59. Unlawful Detainer—CCP §1176		
Motion for Stay—Denied	Mandate	CCP §1176(a). See §§16.78-16.80.
60. Venue—CCP §§400, 904.2(c)		
Motion for Change of Venue—Granted or Denied	Mandate	CCP §400; *Mission Imports, Inc. v Superior Court* (1982) 31 C3d 921, 927 n4, 184 CR 296; *Hennigan v Boren* (1966) 243 CA2d 810, 814, 52 CR 748. But see CCP §904.2(c) (order granting or denying motion to change venue in limited civil case is appealable order). See §§16.62-16.65.

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APPENDIX B

Sacramento Superior Court Guide to the Procedures for Prosecuting Petitions for Prerogative Writs

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GUIDE TO THE PROCEDURES FOR PROSECUTING PETITIONS FOR PREROGATIVE WRITS

(as specified in Local Rule 2.01)

This guide to the procedures for prosecuting petitions for writs of mandate and other prerogative writs in the Sacramento Superior Court is made available for your general information pursuant to Local Rule 2.01(E). The department to which the writ is assigned (hereinafter "assigned writ department") should be contacted for additional information concerning the scheduling of hearings and filing of papers.

Topic **Page**

Filing a Writ Petition 2
Serving a Writ Petition 2
Filing Subsequent Papers 2
Noticing Related Writ Cases and Possible Consolidation 3
Applying for a Temporary Stay in Administrative Mandate Proceedings
(CCP § 1094.5 (g) or (h)) 4
Applying for a Temporary Stay in Traditional Mandate Proceedings (CCP § 1085) 5
Bringing Motions before the Hearing on the Merits of a Writ Petition 6
Setting a Hearing on the Merits of a Writ Petition 7
(1) By noticing a hearing on a writ petition 7
(2) By securing issuance of an alternative writ 8
Applying for a Continuance 9
Dismissing a Writ Petition 10
Lodging an Administrative Record 10
The Hearing on the Merits 10
Appearing by Telephone 11
Preparing a Judgment and Peremptory Writ 11

Print

Filing a Writ Petition:

Step	Action
1.	File an original and two copies of the petition and a civil case cover sheet at the civil front counter in Room 102 on the first floor of the main courthouse. *Or* mail an original and two copies of the petition and a civil case cover sheet to the Civil Division - Room 102, 720 9th Street, Sacramento, CA 95814.
2.	Pay the filing fee pursuant to Government Code section 70611 in Room 102.
3.	Receive from the civil front counter clerk a Notice of Case Assignment and a copy of this Guide to the Procedures for Prosecuting Petitions for Prerogative Writs.

Serving a Writ Petition:

Step	Action
1.	Serve the writ petition on respondent(s) and real party(ies) in compliance with the requirements of Code of Civil Procedure (CCP) sections 1107 and 1088.5. Until compliance with these statutory service requirements is established by the filing of an appropriate proof of service, the court cannot hear or act on the petition.
2.	Along with the writ petition, serve copies of the Notice of Case Assignment and this Guide to the Procedures for Prosecuting Petitions for Prerogative Writs.

For service of an application for an alternative writ, see below, "Setting a Hearing on the Merits of a Writ Petition, (2) Securing issuance of an alternative writ."

Filing Subsequent Documents:

Step	Action
1.	File an original and two copies of all subsequent documents related to the writ petition either at the civil front counter in Room 102 or by mail addressed to the Civil Division - Room 102, 720 9th Street, Sacramento, CA 95814. *Exception*: Documents filed one day before or on the day of the hearing shall be filed with the courtroom clerk in the assigned writ department after any applicable fees have been paid in Room 102.
2.	File documents by fax in compliance with rule 2.303 of the California Rules of Court and Local Rule 9.20. Documents faxed directly to the court **will not be filed**.
3.	Specify on the first page of each document the date, time and department of any scheduled hearing to which the document applies. To set a hearing, see below, "Bringing Motions before the Hearing on the Merits of a Writ Petition" and "Setting a Hearing on the Merits of a Writ Petition."

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Noticing Related Writ Cases and Possible Consolidation:

Step	Action
1.	When filing a Notice of Related Case pursuant to rule 3.300 of the California Rules of Court regarding two or more writ cases assigned to different judges in this court, file the Notice **in each writ case**.
2.	When filing a Response to a Notice of Related Case pursuant to rule 3.300 of the California Rules of Court, file the Response **in each writ case**.
3.	Serve the Notice or Response on **each party to each case**.

Note that the court proceeds with respect to related writ cases as follows:

When a judge becomes aware that a Notice of Related Case has, or should have, been filed concerning two or more writ cases assigned to different judges in this court and that the cases have not been consolidated, the judge may, if appropriate, issue a minute order indicating that a Notice of Related Case has, or should have, been filed concerning two or more writ cases pending in this court, that a Response to the Notice has or has not been filed by another party, that the cases are being referred to the Presiding Judge for determination as to the appropriateness of their assignment to a single judge or their consolidation before a single judge, and any other information the judge deems relevant. The judge shall serve the minute order on each party to each case, send it to each judge assigned to one of the cases and forward it to the Presiding Judge for determination as to the appropriateness of assignment or consolidation. Prior to determining the matter, the Presiding Judge may seek briefing from the parties and/or schedule a hearing regarding the assignment or consolidation of the cases.

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Applying for a Temporary Stay in Administrative Mandate Proceedings (CCP § 1094.5 (g) or (h)):

Step	Action
1.	Prepare an ex parte application for an order temporarily staying operation of the administrative decision under review in the proceeding. Identify whether the temporary stay order is requested pursuant to subdivision (g) or (h) of the CCP § 1094.5. Specify "Ex Parte" in the title of the application. Pursuant to rules 3.1201 and 3.1202 of the California Rules of Court and this Guide to the Procedures for Prosecuting Petitions for Prerogative Writs, an ex parte application for a stay order includes the following supporting documents and papers: ▪ Endorsed copy of the petition. ▪ Points and authorities, declarations and other supporting documents, including relevant portions of the administrative record if available. ▪ Proposed order to show cause why the administrative decision under review in the proceeding should not be temporarily stayed pending a hearing on the merits of the writ petition (OSC). This proposed OSC should contain: - blank spaces for the date and time of the hearing on the OSC, - an order for service of the OSC and any supporting papers not previously served with a blank space for a date of service prior to the hearing on the OSC, and - an order staying the administrative decision pending the hearing on the OSC. ▪ Proposed stay order. ▪ Notice of hearing on the petition with blank spaces for date and time (unless the stay is being requested in conjunction with an application for an alternative writ). ▪ Declaration regarding notice, as specified in rule 3.1204. In addition, CCP § 1094.5 (g) and (h) require that proof of service of a copy of the application on the respondent accompany an application for a stay. See subdivisions (g) and (h) for required manner of service.
2.	Contact the assigned writ department to reserve an ex parte hearing date and time and to determine whether the assigned writ department requires any of the documents or papers listed above in Step 1 to be filed before the hearing. Note that some writ departments hear writ matters only on Fridays.
3.	Notify respondent(s) and real party(ies) of the hearing on the ex parte stay application in accordance with rule 3.1203 of the California Rules of Court. Include the details of this notification in the declaration regarding notice prepared pursuant to rule 3.1204. **Note:** The Court prefers at least 48 hours' notice but, upon a showing of urgency, will accept less notice.
4.	If the assigned writ department does not require any of the documents listed above in Step 1 to be filed before the ex parte hearing, file and serve the documents and papers as soon as possible and no later than the time of the hearing. (See rule 3.1206 of the California Rules of Court.)

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At the ex parte hearing, depending on the nature of the factual and legal issues raised by the stay application and the practical exigencies of the matter, the court will either rule on the stay application immediately or issue the proposed OSC with or without a temporary stay order pending the hearing on the OSC at a specified date and time.

If the court grants a stay at the ex parte hearing or the hearing on the OSC, the court will sign and file the proposed stay order and set a date and time for a hearing on the merits of the petition. The court clerk will record the hearing date and time in the notice of hearing on the petition, or if the court has ordered the issuance of an alternative writ, in the alternative writ.

If the Court denies a stay at the ex parte hearing or the hearing on the OSC, the court, upon petitioner's request, will set a date and time for a hearing on the merits of the petition. The clerk will record the hearing date and time in the notice of hearing on the petition, or if the court has ordered the issuance of an alternative writ, in the alternative writ.

Applying for a Temporary Stay in Traditional Mandate Proceedings (CCP § 1085):

Step	Action
1.	Follow the statutory and regulatory provisions for obtaining a temporary restraining order (TRO), an order to show cause why a preliminary injunction should not be issued (OSC), and/or a preliminary injunction, set forth in the Code of Civil Procedure (including but not limited to CCP §§ 525, 526, 527, 528 and 529) and rule 3.1150 of the California Rules of Court. These provisions constitute rules of practice for temporary stays in mandate proceedings brought under CCP § 1085 in the absence of temporary stay provisions specific to such mandate proceedings. (See CCP § 1109.)
2.	When following the statutory and regulatory procedures for obtaining a TRO and/or an OSC, comply with the ex parte procedures outlined above in "Applying for a Temporary Stay in Administrative Mandate Proceedings" and in rule 3.1201 et seq. of the California Rules of Court.
3.	If no TRO or OSC is sought, notice a motion for a preliminary injunction following the procedures set forth below in "Bringing Motions Before the Hearing on the Merits

Note that a temporary stay in proceedings on a petition for a writ of prohibition may be obtained by following the procedures set forth below under "Setting a Hearing on the Merits of a Petition, (2) Securing issuance of alternative writ." An alternative writ of prohibition, unlike an alternative writ of mandate, stays specified action by the respondent until further order of the court. (See CCP §§ 1087, 1104.)

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Bringing Motions before The Hearing on the Merits of a Writ Petition:

Motions on the pleadings and other pretrial matters brought in civil actions -- including motions for change of venue, demurrers, motions to strike, motions to dismiss, discovery motions, and motions for summary judgment -- may generally be brought in writ proceedings. (See CCP § 1109.)

Motions addressing the merits of the petition in whole or in part should be calendared for a hearing at the same time as the hearing on the merits. Motions directed at resolving issues preliminary to and distinct from the issues related to the merits of the petition, such as untimeliness of the petition under an applicable statute of limitations, should be calendared before the hearing on the merits of a writ petition. The court, in the exercise of its discretion to control the order of litigation before it, may advance the hearing on a motion to a date before the hearing on the merits or may postpone a motion to the hearing on the merits when such advancement or postponement will promote the efficient conduct and disposition of the proceeding.

Because a writ petition is usually disposed of by a hearing on the merits which is limited to oral argument on written briefs and documentary evidence, the usefulness of a motion for summary judgment or summary adjudication in economically disposing of an unmeritorious case or claim is substantially reduced in writ proceedings. Thus, before bringing a motion for summary judgment or summary adjudication, counsel should carefully evaluate whether the purpose of the motion can be achieved more directly and completely through a hearing on the merits of the petition.

Step	Action
1.	Contact the assigned writ department to reserve a date and time available on the department's calendar for a hearing on the motion. Prior to reserving a date, contact the other parties to the writ petition and determine their availability on the date. Some assigned writ departments hear writ matters only on Fridays.
2.	Notice the motion in accordance with the civil law and motion procedures in CCP § 1005 and in compliance with the California Rules of Court, including rules 3.1110 through 3.1113, 3.1115-3.1116, 3.1300, and 3.1320 through 3.1324. Comply with the page limits for memoranda set forth in rule 3.1113. If the assigned writ department uses the tentative ruling system, the notice of motion must contain tentative ruling language available from the department.

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Setting a Hearing on the Merits of a Writ Petition:

If a hearing on the merits of a writ petition has not been set in conjunction with an ex parte hearing on an application for a temporary stay, it may be set either by (1) noticing a hearing on the petition or (2) securing issuance of an alternative writ. **Note:** The court prefers, as more efficient and economical for both itself and the parties, the procedure of noticing a hearing on the petition.

The date set for a hearing on the merits of a writ petition, whether by notice or alternative writ, should allow the parties to file briefs in accordance with the following schedule established in Local Rule 2.01(D):

Opening brief:	Due 45 days before the hearing
Opposition brief:	Due 25 days before the hearing
Reply brief:	Due 15 days before the hearing

Note that Local Rule 2.01(D) limits the length of each of these briefs to 50 pages instead of the page limits in rule 3.1113 of the California Rules of Court.

The date of the hearing on the merits may be expedited and the briefing schedule shortened upon an application setting forth circumstances warranting an expedited hearing. The application for an expedited hearing may be made orally at a hearing for a temporary stay or alternative writ or on an ex parte basis in accordance with rules 3.1201 through 3.1206 of the California Rules of Court.

(1) Noticing a hearing on a writ petition

Step	Action
1.	Contact the assigned writ department to reserve an available date and time for a hearing on the writ petition. Prior to reserving a date, contact the other parties to the writ petition and determine their availability on the date. Writ petitions are normally heard on Fridays.
2.	Prepare and file a notice of hearing on the writ petition specifying the reserved hearing date and time. If the assigned writ department uses the tentative ruling system, the notice of hearing must contain tentative ruling language available from the department.
3.	File the notice of hearing either at the civil front counter in Room 102 or by mail addressed to the Civil Division - Room 102, 720 9th Street, Sacramento, CA 95814.
4.	Serve a copy of the notice of hearing on respondent(s) and real party(ies) no later than the time allowed for filing and serving the opening brief. If not previously served, the writ petition, the Notice of Assignment, and this Guide should also be served no later than the time for filing and serving the opening brief.

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(2) Securing issuance of an alternative writ

The alternative writ is an order to show cause that calendars a writ petition for a hearing on the merits. With the exception of an alternative writ of prohibition issued pursuant to CCP § 1104, the alternative writ does not, in and of itself, accomplish a stay or afford any affirmative relief.

Note that, with the alternative writ method, two writs may be issued in the proceeding. First, the alternative writ is issued to set a hearing on the merits of the petition. Second, a peremptory writ may issue after the hearing on the merits.

Step	Action
1.	Prepare an ex parte application for an alternative writ. Specify "Ex Parte" in the title of the application. As provided in rules 3.1201 and 3.1202 of the California Rules of Court and this Guide, an ex parte application for an alternative writ includes the following supporting documents and papers: ▪ Endorsed copy of the petition. ▪ Points and authorities and any other supporting documents. ▪ Proposed order directing issuance of alternative writ. ▪ Proposed alternative writ with blank spaces for the date and time of a hearing on the petition. (Include a signature block for the clerk, not the judge.) ▪ Declaration regarding notice, as specified in rule 3.1204.
2.	Contact the assigned writ department to reserve an available date and time for an ex parte hearing on the application for an alternative writ and to determine whether the department requires the papers listed above in Step 1 to be filed before the hearing. Note that some writ departments hear writ matters only on Fridays. Also note that, absent a showing of good cause or waiver by the respondent(s) and real party(ies), some departments will not issue an alternative writ unless the writ petition and application for the alternative writ have been served on respondent(s) and real party(ies) at least five days before the ex parte hearing. (See CCP § 1088, requiring service of copy of petition in conjunction with application for alternative writ; CCP § 1107, providing a five-day period for respondent(s) and real party(ies) to respond to a writ petition after receiving service of the petition.)
3.	Notify the respondent(s) and real party(ies) of the date and time of the ex parte hearing on the alternative writ pursuant to rule 3.1203 of the California Rules of Court. Include the details of this notification in the declaration regarding notice pursuant to rule 3.1204. **Note**: The Court prefers at least 48 hours' notice but, upon a showing of urgency, will accept less notice.
4.	If the assigned writ department does not require any of the documents listed above in Step 1 to be filed before the hearing, file and serve on all parties the documents and papers as soon as possible and no later than the time of the hearing.

If the court grants the application for an alternative writ, the court signs and files the proposed order directing issuance of the alternative writ that sets the petition for a

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hearing on the merits. The clerk then issues the proposed alternative writ with the date and time of the hearing and provides it to the petitioner after the petitioner has paid the issuance fee in Room 102. The writ must be served upon respondent(s) and real party(ies) in the same manner as a summons in a civil action unless the court expressly orders otherwise. (See CCP §§ 1073, 1096.) Once served, the writ must be filed with a proof of service.

Applying for a Continuance:

After a hearing has been set on a motion or on the merits of a petition, it may be continued only upon approval of the Court. If the continuance requires a change in the briefing schedule, such change must also be approved.

Step	Action
1.	Present a telephone request for a continuance of the hearing to the clerk in the assigned writ department, including the reason(s) for the continuance and any necessary changes in the briefing schedule. Present the request as far in advance of the scheduled hearing date as possible. Upon the court's approval, the clerk will provide available dates on the court's calendar to which the hearing may be continued.
2.	Promptly confer with all counsel to agree upon a mutually convenient hearing date from among the dates provided by the clerk and any necessary changes in the briefing schedule. If counsel cannot agree to a continuance, a new hearing date and/or changes in the briefing schedule, the party seeking the continuance may apply for a continuance by noticed motion.
3.	Promptly present to the court a stipulation signed by all parties, including the reason for the continuance, the agreed upon hearing date and any agreed upon changes in the briefing schedule, with a proposed order. Pay the filing fee for the stipulation pursuant to subdivision (c) of Government Code section 70617 in Room 102.
4.	When the stipulation and order has been signed and filed by the Court, serve the stipulation and order on all parties.

Note that these procedures do not apply when a motion is dropped from the calendar by the moving party. In such circumstances, the moving party must telephonically notify the court and all other parties as far as possible in advance of the date on which the motion is to be heard and send a confirming letter to the court with copies to the other parties.

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Dismissing a Writ Petition:

Step	Action
1.	Promptly notify the assigned writ department pursuant to rule 3.1385 of the California Rules of Court when a writ proceeding is settled or otherwise disposed of.
2.	File a dismissal of the writ proceeding in the assigned writ department within 45 days after the date of the settlement pursuant to rule 3.1385(b) or after the date specified in the notice of conditional settlement pursuant to rule 3.1385(c).

Lodging an Administrative Record:

Step	Action
1.	When securing a date and time for a hearing on the merits of the petition, inform the clerk in the assigned writ department about the size of any administrative record in the case. Determine the department's preferences regarding the format, binding and container for the administrative record.
2.	Lodge the administrative record with the assigned writ department no later than 25 days prior to the hearing on the merits of a writ petition. If the record is not lodged by this time, some assigned writ departments may take the matter off calendar. Consult with the assigned writ department if you wish to lodge the administrative record more than 25 days before the hearing on the merits of a writ petition.
3.	Attach a cover sheet to the administrative record and any boxes containing the record that lists the: • Case name, • Case number, • Date and time of the hearing.

At the hearing on the merits of the petition, the court will mark the administrative record as an exhibit and admit it into evidence. At the conclusion of the proceedings on the petition, the court may return the administrative record to the party who lodged it or destroy it pursuant to CCP § 1952 through 1952.3.

The Hearing on the Merits:

All hearings on writ petitions proceed by way of oral argument. If a party wishes to present oral testimony at the hearing, the party must obtain permission pursuant to rule 3.1306 of the California Rules of Court.

If the assigned writ department uses a tentative ruling system and posts a tentative ruling on the court day before the hearing on the writ petition, a party desiring to be heard must contact the clerk and request oral argument by the time designated in the

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posted tentative ruling. When requesting oral argument, the party must advise the clerk that all other parties have been notified.

Appearing by Telephone:

Parties may appear by telephone in accordance with Local Rule 9.10.

Note that some assigned writ departments permit telephonic appearances in hearings on motions only on a limited basis and in hearings on the merits of a writ petition only under compelling circumstances.

Preparing a Judgment and Peremptory Writ:

If the court denies the writ petition, the party designated by the court shall, pursuant to rule 3.1312 of the California Rules of Court, prepare, serve on all parties, and present to the court a judgment denying the petition.

If the court grants the writ petition:

Step	Action
1.	The party designated by the court prepares (1) a judgment granting the writ petition and (2) a peremptory writ. The peremptory writ includes a signature block for the clerk, not the judge.
2.	Pursuant to rule 3.1312 of the California Rules of Court, prepare, serve on all parties, and present to the court a judgment granting the petition and the peremptory writ. The judgment, when approved, will be signed by the court. The clerk will issue the peremptory writ and provide it to the petitioner for service upon respondent(s) and real party(ies) after the petitioner pays the issuance fee in Room 102.
3.	Serve a copy of both the judgment granting the writ petition and the peremptory writ on the respondent(s) and real party(ies). The writ must be served in the same manner as summons in a civil action. (CCP §§ 1073, 1097.)
4.	Return the original peremptory writ with a proof of service to the assigned writ department for filing.
5.	Prepare, serve, and file in the assigned writ department a notice of entry of judgment pursuant to CCP § 664.5(a).

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Table of Statutes, Regulations, and Rules

CALIFORNIA

Constitution

Art I, §1: §§16.118, 16.120
Art I, §2: §16.121
Art I, §2(b): §16.132
Art II, §4: §2.56
Art II, §8(d): §2.48
Art VI, §3: §22.2
Art VI, §10: §§4.10, 4.17, 18.85
Art VI, §11: §§4.2, 16.14
Art VI, §12(b): §11.35
Art VI, §13: §11.15
Art VI, §14: §§24.15, 24.19
Art VI, §19: §§11.32, 24.17

Statutes

BUSINESS AND PROFESSIONS CODE

6068(e): §17.13
6082: §27.6
17200-17210: §16.148
23077: §16.22
23084: §16.22
23089: §16.22
23090: §§16.22-16.23
23090-23090.7: §16.22
23090.2: §16.24
23090.2(d): §16.24
23090.4: §16.22
23090.5: §§16.22, 16.25

CIVIL CODE

54.3(a): §28.17

CODE OF CIVIL PROCEDURE

2 of Code of Civil Procedure: §5.4
12-12a: §18.74
12a: §25.8
23: §5.4
36: App A
85: §12.2
86: §12.2
86(a)(8): §4.33
116.710(a): §12.26
116.710(b): §12.26
116.780(a): §12.27
128(a)(3): §12.9
128.5: App A
166(a)(1): §9.4
166.1: §§15.70, 17.28, 17.32, 18.34
170.1: App A
170.1-170.5: §16.3
170.1(a)(6)(A)(iii): §16.4
170.1(a)(6)(C) (former): §16.4
170.3: §16.3
170.3(b)(2)(B): §16.3

170.3(c): §16.3
170.3(d): §§16.3-16.6, 17.24, 18.76, App A
170.6: §§6.39, 16.3, 16.5, 17.34, 18.73, 19.6, App A
190-237: §28.16
194(i): §28.16
197(c): §28.16
205: §28.16
205(c): §28.16
284: App A
284(2): App A
307-1062.20: §§5.4, 6.20, 8.58
335.1: §16.108
337(1): §5.73
338: §5.73
338(a): §5.73
340(c): §16.108
363: §§5.4, 5.78
372-373.5: App A
386-386.6: App A
387: App A
389: §§5.34-5.35, 18.18
393(b): §5.75
396b: §17.32
400: §§16.62, 16.64, 18.76, App A
403.010-403.090: §18.76
403.080: §§16.58-16.60, 18.76, App A
404-404.9: §18.76, App A
404.2: §16.9
404.6: §§16.8-16.9, 18.76, App A
405-405.61: App A
405.35: §19.2
405.38: §16.11
405.39: §§16.11-16.12, 18.63, 18.76, App A
410.50: §16.94
410.50(a): §9.11
412.20: §5.4
413.10-417.40: §5.83
416 (former): §16.94
416.10-416.80: §9.15
416.50(a): §18.79
416.90: §9.15
417.10-417.40: §9.11
417.10(a): §5.85
417.10(f): §5.85
418.10: §16.112, App A
418.10(a): §16.54
418.10(c): §§16.54-16.55, 16.57, 18.63, 18.76, App A
418.10(e): §17.26
418.10(e)(1): §8.56
422.30: §5.31
422.40: §5.31
425.13(a): §16.105
425.14: §16.106
425.16: §§16.115, 16.117, 26.8, App A
426.10: App A
430.10: §§23.35, 23.47
430.10-430.80: §§8.40, 23.33
430.30: §23.47
430.30(b): §23.36
430.40(b): §8.58
430.80: §8.48
430.80(a): §8.48
431.10-431.30: §8.45
431.30: §§8.46, 23.29
435-437: App A

435(b)(1): §8.58
437c: §§16.66, 16.68-16.69, 16.71-16.72, App A
437c(a): §§8.54, 16.71
437c(b)(6): §16.76
437c(c): §28.15
437c(f)(1): §16.68
437c(g): §16.70
437c(l): §18.63
437c(m)(1): §§16.66, 16.76, 18.62-18.63, 18.71, 18.76, App A
438: §8.53
446: §§5.64-5.65, 5.67, 13.11, 18.44, 18.47
446(a): §§5.65, 8.49, 18.42, 23.32
465: §§8.13, 8.30, 8.61, 23.15, 23.42-23.43, 23.50
471.5: App A
472a(c): §9.18
472c: App A
472c(a): App A
472c(b)(3): App A
473: §§15.48, 18.80, App A
475: §11.15
481.010-492.090: §4.29
482.010: App A
483.010(a): §4.29
485.240: App A
489.410: §26.11
489.420: §26.11
515.010(a): §6.31
525: §4.33
525-534: §4.33, App A
526-527: §4.33
526(a): §13.1
526(a)(1): §13.8
526(a)(4)-(5): §13.8
527: §6.31
527(c)-(d): §6.31
527(d)(1): §§6.31, 6.35
527(d)(2): §6.35
527(d)(3): §6.35
529(a): §§6.37-6.38
529(b): §6.37
529(b)(2): §6.37
529(b)(3): §6.37
564-570: App A
576: App A
581(f)(1): §8.42
581a: §16.112
581a (former): §16.112
581c: App A
581d: §8.42
583 (former): §§16.112-16.113
583(b) (former): §16.112
583.110: §16.54
583.110-583.160: §15.26
583.110-583.430: App A
583.210-583.250: §§8.51, 16.54, 16.112
583.310: §16.114
583.310-583.360: §§8.51, 16.112
583.340(b): §22.10
583.410-583.430: §8.51
585-587: App A
586(a)(7): App A
592: App A
594-595.4: App A
597: App A
632: §§9.34-9.35, 9.37

656-662.5: §11.3
660: §15.26
663: §11.4
664.5: §5.123
680.010-724.260: §§4.30, 24.54
695.010-695.070: §4.30
695.010-709.030: §24.54
699.010-701.830: §4.30
703.600: App A
712.010-712.070: §§4.31-4.32
714.010-714.030: §4.31
715.010-715.050: §4.31
716.010-716.030: §4.32
803: §4.27
803-811: §§2.10, 4.27, 15.50
871.1: §16.148
877: §16.49
877-877.6: §16.49
877.6: §§16.49, 16.51
877.6(e): §§16.49-16.50, 17.24, 18.76, App A
904.1: §§6.27, 12.20, 16.127, 17.21, App A
904.1-904.2: §§15.57-15.58
904.1(11): §16.127
904.1(a): §12.20
904.1(a)(1): §§11.7, 28.1
904.1(a)(1)-(2): App A
904.1(a)(1)(B): §§15.37, 16.133, App A
904.1(a)(2): §11.13, App A
904.1(a)(3): App A
904.1(a)(5): App A
904.1(a)(6): §16.150, App A
904.1(a)(7): App A
904.1(a)(9): App A
904.1(a)(10): App A
904.1(a)(11): §16.127
904.1(a)(11)-(12): §§16.81, 16.127, App A
904.1(a)(12): §16.127
904.1(b): §§16.81, 16.83, 16.126, App A
904.1(f) (former): §16.150
904.2: §12.22
904.2(a)(2): App A
904.2(c): §16.63, App A
904.2(d): App A
904.2(f): App A
904.2(g): §16.150, App A
904.2(h: App A
904.3: §§12.18-12.20
907: §§17.35, 24.60, 24.65
909: §15.48
911: §12.23
916: §§12.28, 26.3, 26.10-26.11, 26.16
916(a): §§11.24, 26.6, 26.14
917.1: §§26.3, 26.11-26.13, 26.19
917.1-917.8: §§26.11, 26.13
917.1-917.9: §§26.3, 26.6, 26.11, 26.20
917.1(a)(2)-(3): §26.12
917.1(b): §26.12
917.1(d): §26.12
917.2: §§26.11-26.12
917.3: §26.11
917.4: §26.11
917.5: §26.11
917.7: §26.11
917.8: §26.11
917.9: §§26.11, 26.13

917.15: §26.11
917.65: §26.11
918(a): §19.8
921: §26.11
923: §§11.24, 15.49, 22.10, 26.2-26.3, 26.11, 26.17, 28.18-28.19
940.2(g): App A
995.010-996.560: §6.20
995.210: §6.20
995.220: §§6.20, 6.37
995.240: §6.37
998: §§17.23, 17.25
1003-1020: §§5.104, 8.50
1005: §16.76
1005(b): §§5.106, 8.17, 8.62-8.63
1005.5: §5.91
1008: §§11.5-11.6, 17.2
1008(b): §15.48
1010-1020: §§5.105, 8.14, 8.31, 8.61
1011: §18.78
1013: §§5.123, 16.47, 16.76, 18.65
1013(a): §§11.22, 12.13, 16.19, 16.30, 16.55, 18.65, 18.76
1013(c): §18.65
1021.5: §11.13, App A
1027: §24.54
1029.5: App A
1030: App A
1032: §5.121
1033: §5.121
1033.5: §§5.121-5.123, 5.127, 7.17
1033.5(a)(10): App A
1048(a): App A
1054: §15.38
1062.3: §17.34
1063: §§5.32, 5.85
1063-1064: §5.3
1064: §§9.54, 11.5, 11.7-11.8
1067: §§4.10, 15.27, 22.30
1067-1068: §15.30
1067-1077: §§5.3, 10.20, 16.22, 16.39, 23.45, 24.53
1067-1110b: §5.4
1068: §§4.4, 4.11, 12.3, 17.30
1068(a): §§4.10, 5.54, 12.26, 15.27, 15.31-15.32, 15.57-15.58, 18.86
1068(b): §§4.10, 12.3, 15.28
1069: §§5.64, 5.67, 9.49, 15.51, 18.42-18.44, 19.5, 22.30
1069.1: §§8.43-8.45, 9.49-9.50, 23.27-23.28, 23.33-23.34, 23.39, 23.43, 23.46, 23.50
1070-1071: §§4.10, 15.28, 23.46-23.47
1070-1072: §24.42
1071: §§6.4, 9.50, 19.5, 22.30
1072: §§6.4, 6.13, 19.5
1073: §21.18
1074: §§4.10-4.11, 9.50-9.51, 15.27, 15.31, 22.30
1074-1075: §9.51
1075: §§4.12, 9.51-9.52, 15.28, 22.30, 24.42
1076: §§9.52, 10.20, 24.42
1084: §§2.1, 3.2, 15.2
1084-1097: §5.3
1085: §§1.2, 2.1, 2.5, 2.33, 2.38, 3.2-3.3, 3.6, 3.18, 3.21, 4.4, 5.31, 5.37, 5.119, 6.4, 6.13, 6.27, 7.2, 7.6, 7.9, 7.12, 7.18, 7.25, 11.16, 12.3, 13.1, 13.3, 13.7, 13.12, 15.2, 16.33, 16.46, 26.10
1085-1086: §3.20
1085-1094: §2.2
1085(a): §§2.3-2.4, 15.3, 15.5-15.6, 18.86
1085(b): §12.3
1086: §§2.3, 2.11-2.12, 2.15, 5.53, 5.64, 5.67, 12.26, 13.3, 15.34, 15.51, 15.57, 17.30, 18.28, 18.42-18.44, 18.47, 28.10
1087: §§5.112, 6.4, 8.32, 9.7, 9.44, 18.27, 19.3, 22.9, 22.23, 22.25, 23.19
1087-1088: §§8.21, 9.2, 22.26, 28.1

1088: §§5.19, 5.81-5.82, 5.113, 8.6, 8.15, 8.21-8.22, 8.25, 8.27, 8.37, 8.44, 9.3, 9.12, 9.16, 9.20, 9.23, 9.25, 18.77
1088.5: §§5.81-5.82, 5.84, 18.77
1089: §§5.17, 5.120, 8.34-8.36, 8.43-8.45, 8.49, 9.5, 9.9, 10.3, 18.47, 23.20, 23.27-23.28, 23.33-23.34, 23.39, 23.43, 23.46, 23.50
1089-1090: §9.24
1089.5: §§5.4, 5.17, 5.128, 7.4, 8.6-8.9, 8.45
1090: §§7.10-7.11, 9.6, 9.31, App A
1090-1091: §9.28
1091: §§8.57-8.59, 23.48-23.49, 28.12
1092: §11.3
1094: §§8.6, 8.15, 8.37, 8.44, 9.6, 9.24-9.26, 22.29
1094.5: §§1.2, 2.1, 2.27, 2.32-2.33, 2.40, 3.2-3.8, 3.14, 3.18, 3.20-3.21, 4.13-4.14, 5.3, 5.37, 6.13, 7.1-7.2, 7.4, 7.6, 7.9, 7.12, 7.14, 7.25, 9.1, 15.2, 16.24
1094.5(a): §§2.32, 3.4-3.7, 3.20, 7.4, 7.8, 7.17
1094.5(b): §§3.8, 3.12, 15.13
1094.5(e): §§3.7, 7.9, 16.124
1094.5(g): §26.10
1094.5(g)-(h): §§6.2, 6.13
1094.6: §3.19
1094.6(c): §§7.4, 7.7-7.8, 7.15
1094.8(d)(1): §§7.4, 7.15
1095: §§5.57, 5.121, 9.38, 9.48, 24.54
1096: §§9.11, 9.15, 9.45, 10.12, 21.18, 24.41
1097: §§9.46, 10.2, 10.11-10.14, 10.16-10.20, 24.41, 24.47-24.48, 24.51-24.52
1102: §§4.2, 4.4-4.5, 11.16, 15.14-15.15, 15.18, 15.31
1102-1103: §§4.7-4.9, 15.22, 16.138
1102-1105: §5.3
1103: §§12.3, 17.30, 18.27, 28.10
1103(a): §§5.53, 5.64, 5.67, 12.26, 15.34, 15.51, 15.57, 18.28, 18.42-18.44, 18.86
1103(b): §§4.2, 12.3
1104: §§5.51, 5.112, 6.4, 8.32, 9.2, 9.8, 9.38, 9.44, 19.4, 22.9, 22.23, 22.25, 23.19
1104-1105: §28.1
1105: §§5.81-5.82, 5.121, 8.15, 8.34-8.37, 8.43-8.45, 8.57, 9.3, 9.5-9.6, 9.9, 9.11, 9.20, 9.23-9.26, 9.28, 9.31, 9.45-9.46, 10.3, 10.11-10.13, 10.17-10.20, 11.3, 21.18, 22.26, 23.27, 23.34, 23.38-23.39, 23.43, 23.48, 23.50, 24.48, 24.54
1107: §§5.81-5.84, 5.115, 8.14, 8.25, 8.31, 9.3, 9.23, 21.14, 22.20
1107-1110b: §5.3
1108: §§10.2-10.3, 24.43-24.44
1109: §§5.4, 5.64, 5.73, 5.75, 5.121, 6.20, 8.6, 8.13-8.14, 8.17, 8.30-8.31, 8.40, 8.42, 8.45-8.46, 8.48-8.49, 8.51, 8.55, 8.58, 8.61-8.62, 9.18, 9.22, 9.53, 17.35, 18.42, 23.15, 23.27, 23.29, 23.32, 23.35, 23.42-23.43, 23.47, 23.50, 24.60, 24.65
1109-1110: §§11.3-11.4
1110: §11.20
1110a: §11.25
1110b: §§10.8, 11.24-11.25, 26.10
1126: §3.3
1176: App A
1176(a): §§16.78-16.79, App A
1209(d): App A
1211: §24.51
1211-1218: §16.138
1211(a): §§10.14, 16.139, 24.51
1222: §§15.37, 16.133, App A
1281.2: §28.13
1286.2: §16.99
1286.6: §16.99
1294: App A
1294-1294.2: §16.99
1294(a): App A
1294(b): App A
1294(c): App A
1294.2: App A
1295: §16.100
1717: App A
1781(c)(3): §16.66
2009: §§5.64, 18.42
2015.5: §§5.64, 5.69, 18.42

2016.010-2036.050: App A
2023.030: App A
2024(a) (former): §16.123
2024.020(a): §16.123
2025 (former): §§16.119, 16.123
2025.010-2025.620: §§16.119, 16.123
2030.030: §16.116
2031(l) (former): §16.119
2031.300: §16.119
2032.320: §16.119
2034(i)(2) (former): §16.119
2034.430-2034.450: §16.119

CORPORATIONS CODE
800: App A
834 (former): App A

EDUCATION CODE
47611.5(e): §2.51

EVIDENCE CODE
450-460: §20.17
451: §13.13
452: §13.13
459: §20.17
459(a): §20.18
996: §16.121
1016: §16.121
1043: §16.121
1043(b): §16.124
1045: §16.121
1045(b): §28.9
1045(b)(1): §16.124
1070: §§16.121, 16.132
1115-1128: §16.121
1119: §16.121
1119(c): §16.121
1122(a)(2): §16.121

FAMILY CODE
1818(b): §20.23
2025: App A
2337: App A
2404: App A

GOVERNMENT CODE
800: §5.124
810-997.6: §16.108
911.2: App A
911.4: App A
945.4: App A
946.6: App A
965.5-965.6: §2.66
995.2(a): App A
3500-3508.5: §4.27
3542: §2.50
3542(b): §16.29
3542(c): §§16.30-16.31
3542(d): §16.32
4450: §28.17
6250-6276.48: §§2.68, 16.14
6254.5(e): §16.122
6258: §§2.68-2.69
6259: §§2.68, 16.16-16.17
6259(c): §§16.14-16.16, 17.24, 18.76, App A

11340-11529: §3.10
11425.50: §3.14
11521(a): §3.10
11523: §§3.19, 7.5, 7.7-7.8, 7.16-7.17, 8.9
12965(b): §16.129A
17559: §3.3
65009(c): §5.72
65009(c)(1): §3.19
66499.37: §5.72
68081: §§11.34, 25.17
68106(b)(1): §§18.74, 25.8
68210: §§11.32, 24.17
68600-68620: §5.120
68603: §5.120
68605.5: §5.120
68616(b): §§5.120, 8.10
68926: §§18.84, 21.19
68926.1(b): §§18.84, 27.10
68927: §27.10
70603(a)(3)-(5): §§8.12, 8.29
70611: §5.79
70612(a): §§8.12, 8.29
70616(b): §§8.12, 8.29
70626(a)(1): §9.41
71620(b): §28.16

HEALTH AND SAFETY CODE
19955: §28.17

LABOR CODE
98: §5.44
1160.8: §§4.28, 16.18-16.21
1160.9: §16.18
5901: §16.46
5950: §§16.46-16.47, 27.7
5950-5955: §27.7
5952-5953: §16.48
5955: §16.46

PENAL CODE
1235(a): §28.16
1265: §15.45
1473: §16.136
1473-1508: §4.26
1473(a): §§4.17, 15.39

PROBATE CODE
850-859: App A
1240: App A
1240 (former): §16.143
1297 (former): §16.143
1300: §16.143, App A
1300-1301: §16.144
1300(a): App A
1300(b): App A
1300(c): App A
1300(d): App A
1300(e): App A
1300(f): App A
1300(g): App A
1300(h): App A
1300(i): App A
1300(j): App A
1300(k): App A
1301(a): App A

1301(b): App A
1301(c): App A
1301(d): App A
1301(e): App A
1301(f): App A
1301(g): App A
1302: App A
1302(a): App A
1302(b): App A
1303: App A
1303(a): App A
1303(b): App A
1303(c): App A
1303(d): App A
1303(e): App A
1303(f): App A
1303(g): App A
1303(h): App A
1303(i): App A
1303(j): App A
1303(k): App A
1303(l): App A
1304: App A
1304(a): App A
1304(b): App A
1304(c): App A
1304(d): App A
1630 (former): §16.144
1870-1901: App A
2423: App A
2500-2507: App A
2580-2586: App A
3100-3154: App A
4541: App A
4541(c): App A
4766(c): App A
4953: App A
6609: App A
7240 (former): §16.143
11440-11446: App A
17200-17211: App A
19020-19030: App A
20100-20125: App A
20200-20225: App A
21310-21315: App A
21320-21322: App A

PUBLIC RESOURCES CODE
21000-21177: §5.72
21167: §5.72
21167.6(a): §7.14
25500-25543: §16.28
25531(a): §§16.26, 27.4
25531(b): §§16.26, 16.28, 27.4

PUBLIC UTILITIES CODE
854: §27.5
1709: §16.45
1731: §16.34
1731(b): §16.38
1732: §16.34
1733: §16.36
1733(a): §16.34
1756: §§16.33, 16.44
1756-1756.2: §27.5

1756-1768: §§4.15, 27.5
1756(a): §§16.37-16.38, 27.5
1756(d): §16.38
1756(f): §§16.33, 27.5
1756(g): §27.5
1756.2: §16.38
1757: §16.41
1757(a): §16.40
1757.1(a): §16.41
1757.1(b): §16.42
1757.1(c): §16.43
1758(a): §16.38
1758(b): §16.39
1758(c): §16.33
1758(d): §16.33
1759(a): §16.33
1759(b): §16.33
1760: §16.43A

REVENUE AND TAXATION CODE
4807: §2.63

VEHICLE CODE
13559: §2.40

WELFARE AND INSTITUTIONS CODE
317: §4.20
317.5: §4.20
366(l)(1)(a): §17.25
366.26: §§4.18, 16.52
366.26(l)(1)(A)-(C): §16.52
366.28: §16.52
366.28(b)(1): §16.52
4800(a): §4.25
5000-5550: §4.22
5150: §4.22
5254: §4.22
5254.1: §4.22
5256-5256.8: §4.22
5275: §4.22
5275-5277: §4.22
5276: §§4.22, 4.26
6000(b): §4.23
7250: §4.24
14171(j): §3.3

ACTS BY POPULAR NAME
Administrative Procedure Act (APA): §§2.65, 3.10, 3.14, 7.7-7.8
California Environmental Quality Act (CEQA): §§2.25, 3.16, 5.72
Consumers Legal Remedies Act (CLRA): §16.66
Enforcement of Judgments Act: §§4.30, 24.54
Fair Employment and Housing Act (FEHA): §§16.67, 16.129A
Government Claims Act: §§2.64, 16.108, App A
Indian Child Welfare Act: §16.143A
Lanterman-Petris-Short Act: §4.22
Meyers-Milias-Brown Act: §4.27
Proposition 103: §2.37
Proposition 51: §15.70
Public Records Act (PRA): §§2.68, 15.4, 15.59, 16.14-16.17, App A
Tort Claims Act: §16.108, App A
Trial Court Delay Reduction Act: §§5.1, 5.120, 8.10
Trial Jury Selection and Management Act: §28.16
Unfair Competition Law: §§16.129A, 16.148
Uniform Parentage Act (UPA): §16.143A
Unruh Act: §16.105

Workers' Compensation Act: §16.46

Rules

CALIFORNIA RULES OF COURT

1.6: §§5.5, 5.78
1.10: §25.19
2.1-2.1100: §5.5
2.2: §§5.5, 5.87, 8.19
2.100: §5.87
2.100-2.119: §§5.21, 5.87, 8.19, 13.1-13.15
2.100(a): §8.19
2.101(a): §5.23
2.102: §5.22
2.103: §5.23
2.104: §5.22
2.105-2.106: §5.22
2.107: §5.24
2.108(1): §5.22
2.108(4): §5.25
2.109: §5.26
2.110: §5.30
2.111: §§5.31, 7.31
2.113: §§5.27, 8.19
2.114: §5.29
2.115: §§5.28, 8.19
2.550-2.551: §7.26
2.550(c): §7.26
2.550(d): §§7.27, 20.26
2.551(b)(1): §7.29
2.551(b)(2): §7.29
2.551(b)(3)(A)(i): §7.30
2.551(b)(4): §7.30
2.551(b)(5): §7.29
2.551(d): §§7.30, 7.32
2.551(d)(1)-(2): §7.31
2.551(d)(3)(A)-(B): §7.31
2.551(d)(4): §7.32
2.551(g): §7.32
3.10: §§8.10, 8.43
3.54: §20.23
3.110(d): §8.10
3.220: §5.78
3.220(b): §5.78
3.501-3.550: App A
3.505(a): §16.9
3.505(b): §§16.8-16.9, App A
3.516: §16.5
3.760(b): §28.11
3.670(g)(1): §6.23
3.670(l): §6.23
3.710-3.715: §5.120
3.766: §28.11
3.767(a)(4): §28.11
3.767(a)(5): §28.11
3.1100: §§5.5, 5.87, 8.19, 9.18, 9.22, 13.1-13.15
3.1100-3.1370: §§5.5, 5.126, 6.10, 6.22, 8.50, 9.22
3.1103(a)(1): §6.10
3.1103(a)(2): §§5.5, 5.87, 5.110, 7.4, 7.9, 7.18-7.21, 7.23, 8.18-8.19, 8.40, 8.60, 9.18, 9.22, 9.29, 9.32-9.33, 13.1-13.15
3.1103(c): §§13.10-13.15
3.1109: §9.33
3.1110-3.1116: §§13.1-13.15
3.1110-3.1370: §§5.21, 5.87
3.1110(a): §5.89
3.1110(b): §5.87

3.1110(c): §§5.26, 8.19
3.1110(c)-(g): §§7.4, 7.18
3.1110(e): §5.27
3.1110(e)-(f): §§7.19-7.20
3.1110(f): §§5.93, 7.20-7.21, 8.18
3.1110(f)-(g): §5.29
3.1112: §5.91
3.1112(a): §5.88
3.1112(c): §5.27
3.1112(d): §5.90
3.1113: §§5.93, 6.12
3.1113(a): §5.110
3.1113(b): §8.18
3.1113(d): §§5.95, 8.19
3.1113(e): §§5.95, 8.19
3.1113(f): §8.19
3.1113(h): §5.94
3.1113(i): §8.18
3.1113(j): §§7.18-7.20
3.1113(k): §§7.4, 7.21, 7.23
3.1113(l): §7.9
3.1113(m): §5.103
3.1140: §§7.4, 7.18, 7.25
3.1150(b): §6.32
3.1200-3.1207: §§5.113-5.114, 6.11, 13.2-13.9, 19.8
3.1201: §5.114
3.1202: §5.114
3.1202(c): §5.114
3.1203(a): §§5.114, 9.3
3.1204: §5.114
3.1204(b): §6.15
3.1206: §5.115
3.1207: §5.116
3.1300(a): §5.126
3.1302(a): §5.107
3.1306: §§8.20, 9.30
3.1306(a): §9.29
3.1306(b): §§8.60, 9.30
3.1308: §9.32
3.1308(c): §9.32
3.1312: §§9.37, 9.47
3.1320(g): §§8.42-8.43, 9.18
3.1332: App A
3.1590: §§9.34, 9.36-9.37
3.1700: §24.27
3.1700(a)(1): §5.123
3.1700(b)(3): §5.123
3.1702(b)(1): §5.125
3.1702(b)(2): §5.125
3.1702(d): §5.125
4.550-4.552: §4.26
5.175: App A
5.180: App A
8.4: §27.10
8.4(2): §18.6
8.18: §18.7
8.25: §§20.15, 23.43, 23.50
8.25-8.44: §§23.16, 23.18
8.25(a): §§11.21, 18.77-18.78
8.25(a)(1): §§26.27, 26.30
8.25(a)(2): §§23.16, 23.18, 26.27, 26.30
8.25(b)(1): §18.75
8.25(b)(3): §18.75
8.25(b)(4): §18.75
8.29: §§12.10, 18.79

8.32(b)-(c): §18.17
8.40: §§12.14-12.15, 23.4, 23.25
8.40(a): §§26.26, 26.29
8.40(b)-(c): §§28.20-28.21
8.40(b)(1): §§18.12, 25.23, 26.26, 26.29, 27.23, 27.28
8.40(c): §20.27
8.44(a)(1): §§27.24, 27.28
8.44(a)(2): §§26.27, 26.30, 27.10
8.44(b)(3): §§18.81, 20.16, 23.16, 23.18, 23.50, 25.23, 26.27, 26.30
8.44(b)(5): §§18.82, 20.16, 26.27, 26.30
8.50: §19.9
8.50(a): §19.18
8.50(b): §19.14
8.54: §§20.20, 20.22, 25.12
8.54(a)(1): §20.20
8.54(a)(3): §20.22
8.54(c): §20.22
8.57: §25.12
8.60(c)(2): §23.13
8.63(a)(2)-(3): §23.41
8.63(b): §§23.14, 23.41
8.100(a)(1): §11.21
8.100(a)(2): §11.21
8.100(b)(1): §11.21
8.104: §§5.125, 11.11
8.104(a): §11.22
8.104(b): §11.23
8.108: §§5.125, 11.22
8.112: §§26.2-26.3, 26.26, 26.29, 28.18
8.112-8.116: §26.22
8.112(a): §§26.18, 26.22
8.112(a)(1): §15.49
8.112(a)(2): §§26.3, 26.22
8.112(a)(3): §26.22
8.112(a)(4): §§26.4-26.5
8.112(a)(4)(A): §§26.18, 26.23, 28.18
8.112(a)(4)(B): §26.24
8.112(a)(4)(C): §26.24
8.112(b): §§26.28, 26.30
8.112(b)(3): §§26.28, 26.30, 28.18
8.112(c): §§18.59, 28.18
8.112(c)(2): §26.25
8.122(d): §28.18
8.116: §§12.9, 18.19, 19.12, 26.25, 28.1, 28.4, 28.10-28.11, 28.16, 28.18
8.116(a): §§18.12, 18.19, 19.12
8.116(a)-(b): §§19.9, 19.11
8.116(b): §§18.19, 19.13
8.116(c): §§19.3, 19.11
8.120(a): §11.26
8.120(b): §11.26
8.121(a): §11.26
8.122: §11.26
8.124: §11.26
8.128: §11.26
8.130: §11.26
8.134(a)(2): §11.26
8.137: §11.26
8.144: §§28.1, 28.4, 28.10-28.12, 28.16, 28.18
8.144(a)(1)(A): §18.6
8.160: §20.24
Comment: §20.23
8.160(b)(3): §20.26
8.160(c)(1): §20.25
8.160(c)(2): §20.25
8.160(d): §20.26

8.160(e)(1)-(2): §20.26
8.160(e)(2): §20.26
8.160(e)(3): §20.27
8.160(e)(4): §§20.25-20.26
8.160(e)(5): §§20.26-20.27
8.160(e)(6): §20.26
8.160(e)(7): §20.26
8.160(f)(2): §20.28
8.160(f)(3): §20.28
8.160(g): §20.25
8.200(a)(3): §11.30
8.200(a)(5): §28.10
8.200(c): §23.52
8.200(c)(2)-(5): §23.53
8.200(c)(6): §23.54
8.204: §§11.28-11.29, 12.12, 12.14-12.15, 23.4-23.5, 23.25, 28.1, 28.4, 28.10-28.12, 28.16, 28.18
8.204(a)-(b): §§28.20-28.21
8.204(a)(1)(A): §§18.22-18.23
8.204(a)(1)(B): §§5.94, 18.50, 21.12, 23.7
8.204(a)(1)(C): §§18.53, 21.11, 23.6
8.204(b): §§25.21, 26.26, 26.29
8.204(b)(1): §§18.6-18.7
8.204(b)(2): §18.9
8.204(b)(3): §§18.9-18.10, 18.50
8.204(b)(4): §18.9
8.204(b)(5): §18.10
8.204(b)(6): §18.10
8.204(b)(7): §18.10
8.204(b)(8): §18.11
8.204(b)(10): §§18.11-18.12
8.204(b)(10)(A): §18.13
8.204(b)(10)(B): §18.16
8.204(b)(10)(C): §18.15
8.204(b)(10)(D): §18.17
8.204(b)(11)(A): §18.9
8.204(b)(11)(B): §§18.7, 18.9
8.204(b)(11)(C): §18.9
8.204(c): §18.8
8.204(c)(1): §§11.28, 18.8, 28.10-28.12
8.204(c)(2): §18.9
8.204(c)(3): §18.8
8.204(d): §§20.11, 20.14
8.204(e): §18.7
8.204(e)(1): §18.5
8.204(e)(2): §18.5
8.208: §§21.20, 23.8, 23.26A
8.208(a): §18.21
8.208(e): §18.21
8.212: §§11.28, 23.53
8.220: §11.28
8.224: §20.14
8.252: §§20.20, 20.22
8.252(a)(2): §20.20
8.252(a)(3): §20.20
8.256: §11.31
8.256(b): §24.8
8.256(c): §24.12
8.256(c)(1): §24.10
8.256(c)(2): §§24.10, 24.12
8.256(c)(3): §24.11
8.256(d): §24.16
8.256(d)(1): §§11.31, 24.18
8.256(e)(1): §24.18
8.264: §11.34
8.264(a): §24.16

8.264(a)(1): §§24.19, 24.29, 25.5
8.264(a)(2): §24.19
8.264(b): §11.34
8.264(b)(3): §§25.6, 25.10
8.264(c): §25.15
8.264(c)(1): §§25.4, 25.9, 25.15
8.264(c)(2): §§25.6, 25.9, 25.15
8.264(d): §25.19
8.268: §§11.34, 25.16, 25.18
8.268(a): §§25.4, 25.25
8.268(a)(1): §§11.34, 25.16
8.268(b)(1): §§25.19, 25.23
8.268(b)(2): §§25.22-25.23
8.268(b)(3): §25.21
8.268(b)(4): §§25.19, 25.22
8.268(c): §25.24
8.268(d): §§25.6, 25.25
8.272: §11.33
8.272(a)-(b): §24.31
8.272(b)(1)(A): §24.33
8.272(b)(1)(B): §24.35
8.272(c)(1): §24.34
8.272(c)(2): §24.36
8.272(d)(1): §24.35
8.276: §24.60
8.278(a)(1)-(2): §11.33
8.278(a)(3): §11.33
8.278(a)(5): §11.33
8.278(b)-(d): §24.26
8.278(b)(1): §11.33
8.278(c)(1): §§11.33, 24.27
8.278(c)(2): §24.27
8.278(d)(1): §11.33
8.278(d)(2): §§11.33, 24.28
8.380(a): §28.20
8.384(a)(1): §§28.20-28.21
8.406: §16.52
8.450-8.452: §16.52
8.450(a): §16.52
8.454-8.456: §16.52
8.454(a): §16.52
8.470: §16.52
8.472: §16.52
8.485-8.493: §§12.4, 12.14-12.15, 27.10-27.11, 28.1
8.485(a): §18.6
8.486: §28.1
8.486(a)(1): §§18.86, 27.2, 27.11
8.486(a)(2): §18.18
8.486(a)(3): §§18.12, 18.20
8.486(a)(3)(A): §18.26
8.486(a)(4): §§18.42, 18.60
8.486(a)(5): §§5.110, 18.49, 18.53, 23.37
8.486(a)(5): §23.37
8.486(a)(6): §§18.1, 18.8
8.486(a)(7): §§18.19, 18.59, 19.3, 19.9, 19.12, 21.15
8.486(a)(7)(A): §§19.7, 19.9, 19.14
8.486(a)(7)(B): §18.12
8.486(b): §§7.7, 20.3, 20.5, 23.38, 28.10
8.486(b)-(c): §§7.4, 20.1
8.486(b)(1): §§18.57, 20.3, 20.6
8.486(b)(1)(B): §§7.8, 20.7
8.486(b)(1)(D): §§7.8, 17.18, 20.9, 28.10
8.486(b)(2): §§19.16, 20.3
8.486(b)(3): §§17.7, 17.19, 20.9
8.486(b)(3)(A): §§18.57, 28.10

8.486(b)(4): §§19.16, 20.3, 20.7, 22.16, 28.10
8.486(c): §§7.23, 20.14, 23.38
8.486(c)(1)(A): §§7.19, 7.21, 18.11, 18.57, 20.11-20.12
8.486(c)(1)(B): §20.12
8.486(c)(1)(C): §§20.12, 28.3
8.486(c)(3): §20.12
8.486(e): §§18.77, 18.79, 21.18, 22.26, 23.43, 23.50
8.486(e)(1)-(2): §20.15
8.486(e)(3): §§18.80, 20.15
8.486(e)(4): §18.79
8.486(e)(5): §18.80
8.486(e)(6): §18.77
8.487: §§23.8, 28.4
8.487(a): §§21.4-21.5, 23.2, 28.4
8.487(a)(1): §§8.21, 21.1-21.2, 21.4, 21.14, 21.17
8.487(a)(2): §§12.12, 21.9, 23.37
8.487(a)(3): §§21.21, 23.2
8.487(a)(4): §§19.3, 19.7, 21.7, 22.9-22.11
8.487(b): §§23.4, 23.19, 23.25, 23.28, 23.33, 28.10-28.11
8.487(b)(1): §§23.2-23.3, 23.20, 23.24, 23.27, 23.32-23.34, 23.47
8.487(b)(1)-(2): §23.42
8.487(b)(2): §§23.12, 23.39-23.40, 23.51
8.487(b)(2)-(3): §22.25
8.487(b)(3): §§23.2, 23.17-23.18, 23.48-23.51, 23.53
8.487(b)(4): §23.34
8.487(c): §23.52
8.488: §§28.1, 28.4, 28.10-28.11, 28.18, 28.21
8.488(a)-(b): §§23.8, 23.26A
8.488(c): §§18.21, 23.8
8.488(c)(3): §23.8
8.488(d): §18.21
8.488(d)(1): §23.8
8.488(d)(1)(B): §23.8
8.488(d)(2): §23.8
8.489(a): §§24.40-24.41
8.489(b)(1): §§22.13, 24.40
8.490(b): §§22.16, 25.30
8.490(b)(1): §§16.44, 22.14, 25.5, 27.15
8.490(b)(2): §§25.6, 27.15
8.490(b)(3): §25.7
8.491: §16.57
8.492: §§17.35, 18.55, 24.65
8.492(a): §§24.60-24.62, 24.64
8.492(a)-(c): §24.62
8.492(a)(1): §17.35
8.492(a)(2): §24.60
8.492(b)-(c): §24.62
8.492(c): §24.62
8.492(d): §24.62
8.493: §§5.121, 24.54, 24.64, 28.21
8.493(a)(1)(A): §§18.41, 24.23
8.493(a)(1)(B): §24.23
8.493(a)(2): §§18.41, 24.24
8.493(b): §§24.26-24.27
8.495: §27.7
8.495-8.498: §2.50
8.498: §§16.19, 16.29
8.499: §§24.31-24.32
8.500(a)(1): §§11.35, 25.14, 25.26, 27.12
8.500(a)(2): §27.26
8.500(a)(3): §27.27
8.500(b): §§25.14, 27.14, 28.17
8.500(b)(1): §§25.27, 25.30, 27.13, 28.16
8.500(b)(2): §27.13
8.500(b)(3): §27.13

8.500(b)(4): §§25.30, 27.13, 28.16
8.500(c)(1)-(2): §25.16
8.500(c)(2): §§11.34, 25.16-25.17
8.500(e)(1): §§16.44, 25.7-25.8, 25.26, 25.30, 27.15-27.16, 27.28
8.500(e)(2): §27.17
8.500(e)(4): §§27.18, 27.28, 28.16
8.500(e)(5): §§27.19, 27.28
8.500(g): §28.17
8.500(g)(2): §28.17
8.504: §§12.24, 24.57, 28.16
8.504(a): §27.20
8.504(b): §27.25
8.504(b)(1): §27.25
8.504(b)(4): §27.22
8.504(c): §27.26
8.504(d)(1)-(3): §27.21
8.504(e)(1): §27.22
8.504(e)(2): §27.22
8.504(e)(3): §27.25
8.508: §25.29
8.512(b): §27.33
8.512(b)(1): §27.30
8.512(b)(2): §§27.30, 27.33
8.512(c)(1): §27.17
8.512(d)(2): §§25.28, 27.31
8.516(a): §27.31
8.516(b)(1): §27.31
8.520: §27.31
8.528(a): §28.16
8.528(d): §27.32
8.552: §24.55
8.552(a): §24.56
8.552(b): §24.58
8.552(c): §§24.55, 24.57
8.552(d): §§24.57-24.59
8.552(e): §24.55
8.824: §12.28
8.824(a): §12.28
8.824(a)(4): §12.28
8.824(a)(4)(C): §12.28
8.824(b)(1): §12.28
8.824(b)(2): §12.28
8.824(c): §12.28
8.824(d)(1): §12.28
8.843(a): §12.6
8.843(d): §12.6
8.888: §12.23
8.891(c): §12.25
8.930: §12.4
8.931: §12.4
8.931(a): §12.4
8.931(b): §§12.4, 12.6
8.931(b)(1): §12.6
8.931(b)(2): §12.6
8.931(c)(1): §12.7
8.931(c)(2): §12.8
8.931(d): §12.10
8.932: §12.4
8.932(b): §12.4
8.932(b)(5): §§12.5, 12.15
8.932(b)(7): §12.9
8.933(a): §12.12
8.933(a)(1): §12.13
8.933(a)(2): §12.12
8.933(a)(3): §12.16

8.933(a)(4): §§12.11-12.12
8.933(b)(1)-(2: §12.14
8.933(b)(1)-(2): §12.15
8.933(b)(3): §12.17
8.933(b)(4): §§8.44, 12.15, 23.34
8.936(a): §12.25
8.1000-1018: §12.23
8.1002: §12.23
8.1005(a): §12.23
8.1005(b): §12.23
8.1005(b)(1): §12.23
8.1005(b)(2): §12.23
8.1005(b)(3): §12.23
8.1005(c): §12.23
8.1005(d): §12.23
8.1005(e): §12.23
8.1005(f)(1): §12.23
8.1005(f)(2): §12.23
8.1008(a): §12.24
8.1008(b): §12.24
8.1008(b)(2): §12.24
8.1008(b)(3): §12.24
8.1008(b)(4): §12.24
8.1008(b)(5): §12.24
8.1008(c)(1)-(2): §12.24
8.1008(c)(3): §12.24
8.1008(e): §12.24
8.1010: §§12.23-12.24
8.1012: §12.24
8.1014: §12.23
8.1016(a): §12.24
8.1016(b)(1): §12.24
8.1018: §12.24
8.1105(b): §§11.32, 25.10
8.1105(c): §11.32
8.1105(c)-(d): §24.30
8.1120: §§24.30, 25.10
8.1120(a): §25.20
8.1120(b): §25.10
8.1125(a): §11.36
8.1125(a)(2): §27.25
8.1125(d): §11.36
9.16-9.18: §27.6
10.1000: §16.9
10.1000(A): §24.55
1515 (former): §16.5

CALIFORNIA RULES OF PROFESSIONAL CONDUCT

3-110: §17.4
3-110(C): §§17.4-17.5
3-300: §17.8
3-310
Comment: §17.14
3-310(A): §17.12
3-310(B)(1): §17.12
3-310(B)(2): §17.12
3-310(B)(3): §17.12
3-310(B)(4): §17.12
3-310(C)(1)-(2): §17.10
3-310(C)(3): §17.10
3-310(E): §17.11
3-310(F): §17.13
3-310(F)(1)-(3): §17.13
3-320: §17.12
Comment: §17.12

3-500: §§17.4, 17.6

Local Court Rules

FIRST APPELLATE DISTRICT
IOPP §II.C: §22.3
IOPP §III.A.1: §22.3
IOPP §III.B.28-29: §24.8
Local R 2(d): §11.19
Local R 9(a): §20.20
Local R 11: §§21.14, 23.14
Local R 13: §24.9

SECOND APPELLATE DISTRICT, POLICY STATEMENT
IOPP: §18.75
IOPP, Assignment of Cases: §22.4

THIRD APPELLATE DISTRICT
IOPP §V: §22.5
IOPP §VIII: §24.8
Local R 3: §24.12

FOURTH APPELLATE DISTRICT
Local R 1: §§18.19, 18.59, 18.78, 19.12, 19.15, 19.17-19.18, 21.7
Div 1
IOPP §III: §22.6
IOPP §VII: §24.12
Div 2
IOPP §V: §22.6
IOPP §VIII: §24.8
Local R 2: §§18.5, 18.12
Div 3
IOPP §III.B: §22.6

FIFTH APPELLATE DISTRICT
IOPP §III.C: §§22.7, 24.8
IOPP §IV: §24.9
Local R 4: §24.9

SIXTH APPELLATE DISTRICT
IOPP §II.D: §22.8
IOPP §II.A.3: §24.9

AMADOR COURT RULES
11.18: §§5.7, 5.9, 8.3

CALAVERAS COURT RULES
1.4: §8.3

CONTRA COSTA COURT RULES
7(G)(1)(a): §§5.7, 5.9

IMPERIAL COURT RULES
3.4.0: §8.3
3.4.0(a): §§5.7, 5.9

LOS ANGELES COURT RULES
9.5: §8.3
9.5(c): §5.82
9.5(d)(1): §§5.7, 5.9, 9.21
9.5(e): §9.10
9.5(e)(1): §§5.115, 9.3
9.5(e)(2): §5.113
9.5(g): §9.30
9.9(a): §6.23

SACRAMENTO COURT RULES
2.01(E): §9.21

SAN DIEGO COURT RULES
2.4.8: §8.3
2.4.8(A): §§5.7, 5.9, 9.21

SAN FRANCISCO COURT RULES
8.1(A)(3)(a): §5.7
9.0(A): §6.23
9.0(B): §6.17

SAN LUIS OBISPO COURT RULES
7.17(b): §6.23

UNITED STATES

Constitution

Amend I: §§2.56, 7.4, 16.124, 16.132, 16.150, 20.23
Amend V: App A

Statutes

UNITED STATES CODE
Title 28
1257: §25.29
1257(a): §§25.29, 25.31

ACTS BY POPULAR NAME
Americans with Disabilities Act of 1990 (ADA): §2.56
Defense Bases Act: §16.92
Federal Arbitration Act (FAA): §16.99
Longshoremen's and Harbor Workers' Compensation Act: §16.92
Securities and Exchange Act: §16.99

Regulations

CODE OF FEDERAL REGULATIONS
Title 12
21.11(k): §16.121

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Table of Cases

2,022 Ranch v Superior Court (2003) 113 CA4th 1377, 7 CR3d 197, disapproved in part on other grounds in Costco Wholesale Corp. v Superior Court (2009) 47 C4th 725, 101 CR3d 758: App A

A

ALRB v Tex-Cal Land Mgmt., Inc. (1987) 43 C3d 696, 238 CR 780: §4.28
Aas v Superior Court (2000) 24 C4th 627, 101 CR2d 718: §16.147
Abadjian v Superior Court (1985) 168 CA3d 363, 214 CR 234: §18.64
Abelleira v District Court of Appeal (1941) 17 C2d 280, 109 P2d 942: §§4.3, 15.23, 15.26, 26.6
Abex Corp. v Superior Court (1989) 209 CA3d 755, 257 CR 498: §16.123
Academy of Cal. Optometrists, Inc. v Superior Court (1975) 51 CA3d 999, 124 CR 668: §16.103
Adair v Stockton Unified Sch. Dist. (2008) 162 CA4th 1436, 77 CR3d 62: §§2.1, 2.24, 2.42
Adams v Superior Court (1992) 2 CA4th 521, 3 CR2d 49: §16.103
Adcock v Board of Educ. (1973) 10 C3d 60, 109 CR 676: §2.56
Addam v Superior Court (2004) 116 CA4th 368, 10 CR3d 39: §23.29
Adohr Milk Farms, Inc. v Love (1967) 255 CA2d 366, 63 CR 123: App A
Adolph v Municipal Court (1960) 181 CA2d 198, 5 CR 212: §16.93
Adoption of Alexander S. (1988) 44 C3d 857, 245 CR 1: §4.18
Advanced Micro Devices, Inc. v Intel Corp. (1994) 9 C4th 362, 36 CR2d 581: §16.99
Aetna Cas. & Sur. Co. v Superior Court (1984) 153 CA3d 467, 200 CR 471: App A
Agricultural Labor Relations Bd. v Tex-Cal Land Mgmt., Inc. (1987) 43 C3d 696, 238 CR 780: §26.21
Agua Caliente Band of Cahuilla Indians v Superior Court (2006) 40 C4th 239, 52 CR3d 659: §16.54
Aguiar v Superior Court (2009) 170 CA4th 313, 87 CR3d 813: §16.145
Akin v Board of Educ. of Riverside Unified Sch. Dist. (1968) 262 CA2d 161, 68 CR 557: §2.43
Aktar v Anderson (1997) 58 CA4th 1166, 68 CR2d 595: §17.32
Albin v Railroad Comm'n (1932) 216 C 655, 15 P2d 860: §16.34
Alch v Superior Court (2008) 165 CA4th 1412, 82 CR3d 470: §§16.118, 23.24
Alch v Superior Court (2004) 122 CA4th 339, 19 CR3d 29: §§16.109, 16.129A, App A
Alden v Superior Court (1963) 212 CA2d 764, 28 CR 387: §15.26
Alexander v Superior Court (1993) 5 C4th 1218, 23 CR2d 397: §25.2
Alexander v Superior Court (2003) 114 CA4th 723, 8 CR3d 111: §16.62
Alexander S., Adoption of (1988) 44 C3d 857, 245 CR 1: §4.18
Alexander v Superior Court (1993) 5 C4th 1218, 23 CR2d 397, disapproved on other grounds in Hassan v Mercy Am. River Hosp. (2003) 31 C4th 709, 3 CR3d 623: §§22.19, 22.24
Alice, People v (2007) 41 C4th 668, 61 CR3d 648: §11.34
Allen v Los Angeles County Dist. Council of Carpenters (1959) |51 C2d 805, 337 P2d 457: §7.8
Allen v Pitchess (1973) 36 CA3d 321, 111 CR 658: §6.33
Alliance for a Better Downtown Millbrae v Wade (2003) 108 CA4th 123, 133 CR2d 249: §§2.19-2.20, 2.47
Allstate Ins. Co. v Loo (1996) 46 CA4th 1794, 54 CR2d 541: App A
Alpha Beta Co. v Superior Court (1984) 157 CA3d 818, 203 CR 752: §§5.67, 18.44
Amanda H. v Superior Court (2008) 166 CA4th 1340, 83 CR3d 229: §§16.143A, 25.7
American Advertising & Sales Co. v Mid-Western Transp. (1984) 152 CA3d 875, 199 CR 735: App A
American Airlines, Inc. v Superior Court (2003) 114 CA4th 881, 8 CR3d 146: §§16.121, 27.32
American Bd. of Cosmetic Surgery v Medical Bd. (2008) 162 CA4th 534, 75 CR3d 574: §§2.22, 2.32
American Booksellers Ass'n v Superior Court (1982) 129 CA3d 197, 181 CR 33: §16.150
American Distilling Co. v City Council (1950) 34 C2d 660, 213 P2d 704: §2.24
American Employers Group, Inc. v Employment Dev. Dep't (2007) 154 CA4th 836, 65 CR3d 233: §2.16
American Fed'n of State, County & Mun. Employees v Metropolitan Water Dist. (2005) 126 CA4th 247, 24 CR3d 285: §§2.5, 2.51, 9.29
American Int'l Group, Inc. v Superior Court (1991) 234 CA3d 749, 285 CR 765: §16.106
American Radio Ass'n v Superior Court (1965) 237 CA2d 891, 47 CR 419: §15.24
Ameriloan v Superior Court (2008) 169 CA4th 81, 86 CR3d 572: §16.54
Amwest Sur. Ins. Co. v Wilson (1995) 11 C4th 1243, 48 CR2d 12: §24.19
Anderson v Superior Court (1995) 11 C4th 1152, 48 CR2d 766: §16.90
Anderson v Superior Court (1998) 68 CA4th 1240, 80 CR2d 891: §16.135
Anderson v Superior Court (1989) 213 CA3d 1321, 262 CR 405: §15.70
Andrews v Valdez (1995) 40 CA4th 492, 46 CR2d 744: §2.45
Angelucci v Century Supper Club (2007) 41 C4th 160, 59 CR3d 142: §16.107

Anglo Irish Bank Corp. v Superior Court (2008) 165 CA4th 969, 81 CR3d 535: §§16.54, 16.56, 19.3, 19.6
Annette F. v Sharon S. (2005) 130 CA4th 1448, 30 CR3d 914: §15.58
Antelope Valley Press v Poizner (2008) 162 CA4th 839, 75 CR3d 887: §§3.8, 3.16-3.17
Appalachian Ins. Co. v Superior Court (1984) 162 CA3d 427, 208 CR 627: App A
Apple Computer, Inc. v Superior Court (2005) 126 CA4th 1253, 24 CR3d 818, quoting Reed v Superior Court (2001) 92 CA4th 448, 111 CR2d 842: §17.22
Arens v Superior Court (1955) 45 C2d 623, 290 P2d 257: §15.36
Armstrong v Superior Court (1916) 173 C 341, 159 P 1176: §6.33
Arnold v California Exposition & State Fair (2004) 125 CA4th 498, 22 CR3d 790: §§11.5, 11.13
Aronoff v Franchise Tax Bd. (1963) 60 C2d 177, 32 CR 1: §15.18
Art Movers, Inc. v Ni W., Inc. (1992) 3 CA4th 640, 4 CR2d 689: §16.150
Artesia Dairy v ALRB (2008) 168 CA4th 598, 86 CR3d 91: §§16.18, 16.21
Associated Builders & Contractors, Inc. v San Francisco Airports Comm'n (1999) 21 C4th 352, 87 CR2d 654: §2.12
Atlas Plastering, Inc. v Superior Court (1977) 72 CA3d 63, 140 CR 59: §16.100, App A
Auerbach v Los Angeles County Assessment Appeals Bd. No. 2 (2008) 167 CA4th 1415, 85 CR3d 118: §§3.16-3.17
Auto Equity Sales, Inc. v Superior Court (1962) 57 C2d 450, 20 CR 321: §§12.22, 15.15, 15.22-15.23, 15.26-15.27, 15.29, 15.31
Azzarella, In re (1989) 207 CA3d 1240, 254 CR 922: §15.43

B

B & E Convalescent Ctr. v State Compensation Ins. Fund (1992) 8 CA4th 78, 9 CR2d 894: §16.69
BRV, Inc. v Superior Court (2006) 143 CA4th 742, 49 CR3d 519: §2.68
Babb v Superior Court (1971) 3 C3d 841, 92 CR 179: §§4.4, 16.105, 16.110
Baccus v Superior Court (1989) 207 CA3d 1526, 255 CR 781: §16.114
Baker v Osborne Dev. Corp. (2008) 159 CA4th 884, 71 CR3d 854: §16.101
Baker v Superior Court (1887) 71 C 583, 12 P 685: §15.38
Baker Manock & Jensen v Superior Court (2009) 175 CA4th 1414, 96 CR3d 785: §16.102
Bakersfield City Sch. Dist. v Superior Court (2004) 118 CA4th 1041, 13 CR3d 517: §2.68
Bakkebo v Municipal Court (1981) 124 CA3d 229, 177 CR 239: §10.15
Ballard v Taylor (1993) 20 CA4th 1736, 25 CR2d 384: §16.127
Balloon v Superior Court (1995) 39 CA4th 1116, 46 CR2d 161: §16.67
Bandini Petroleum Co. v Superior Court (1931) 284 US 8, 76 L Ed 136, 52 S Ct 103: §25.31
Bank of Am. Nat'l Trust & Sav. Ass'n v Superior Court (1942) 20 C2d 697, 128 P2d 357: §15.33
Banks v California (1969) 395 US 708, 23 L Ed 2d 653, 89 S Ct 1901: §25.29
Barber v Long Beach Civil Serv. Comm'n (1996) 45 CA4th 652, 53 CR2d 4: §3.17
Barnes v Molino (1980) 103 CA3d 46, 162 CR 786: §16.117
Barnes v Wong (1995) 33 CA4th 390, 39 CR2d 417: §2.45
Barr, In re (1952) 39 C2d 25, 243 P2d 787: §4.18
Barratt Am., Inc. v City of Rancho Cucamonga (2005) 37 C4th 685, 37 C3d 149: §2.15
Barrera, People v (1999) 70 CA4th 541, 82 CR2d 755: §16.3
Barton v Ahmanson Devs. Inc. (1993) 17 CA4th 1358, 22 CR2d 56: App A
Baske v Burke (1981) 125 CA3d 38, 177 CR 794: App A
Bauguess v Paine (1978) 22 C3d 626, 150 CR 461: App A
Baumgardner v City of Hawthorne (1951) 104 CA2d 512, 231 P2d 864: §8.47
Bay Dev., Ltd. v Superior Court (1990) 50 C3d 1012, 269 CR 720: §§22.14, 25.5
Be v Western Truck Exch. (1997) 55 CA4th 1139, 64 CR2d 527: §16.51
Beesley v Superior Court (1962) 58 C2d 205, 23 CR 390: §16.123
Bell v Superior Court (2007) 158 CA4th 147, 69 CR3d 328: §§15.11, 15.13, 15.56, 15.61, 15.63, 23.49
Belridge Farms v ALRB (1978) 21 C3d 551, 147 CR 165: §2.30
Benjamin G. v California Special Educ. Hearing Office (2005) 131 CA4th 875, 32 CR3d 366: §2.28
Bensen v WCAB (2009) 170 CA4th 1535, 89 CR3d 166: §§16.46, 16.48
Bensimon v Superior Court (2003) 113 CA4th 1257, 7 CR3d 151: §§16.76, 17.2, 18.62
Berger v Godden (1985) 163 CA3d 1113, 210 CR 109: §24.63
Bermudez v Municipal Court (1992) 1 C4th 855, 4 CR2d 609: §12.20
Berry, In re (1968) 68 C2d 137, 65 CR 273: §§16.134, 16.136
Bertero v Superior Court (1963) 216 CA2d 213, 30 CR 719: App A
Best Prods., Inc. v Superior Court (2004) 119 CA4th 1181, 15 CR3d 154: §16.122
Betz v Pankow (1993) 16 CA4th 931, 20 CR2d 841: §§15.44, 26.6, 26.14
Bevill, In re (1968) 68 C2d 854, 69 CR 599: §16.88
Biasca v Superior Court (1924) 194 C 366, 228 P 861: §6.33
Big Valley Band of Pomo Indians v Superior Court (2005) 133 CA4th 1185, 35 CR3d 357: §16.108
Bigbee v Pacific Tel. & Tel. Co. (1983) 34 C3d 49, 192 CR 857: §9.55
Billig v Voges (1990) 223 CA3d 962, 273 CR 91: §2.47
Biosense Webster, Inc. v Superior Court (2006) 135 CA4th 827, 37 CR3d 759: §§15.11, 16.150
Bixby v Pierno (1971) 4 C3d 130, 93 CR 234: §3.17
Blache v Superior Court (1939) 35 CA2d 740, 96 P2d 970: §15.19

Black Diamond Asphalt, Inc. v Superior Court (2003) 114 CA4th 109, 7 CR3d 466: §15.67
Blair v Williams (1952) 109 CA2d 516, 240 P2d 1043: App A
Blegen v Superior Court (1981) 125 CA3d 959, 178 CR 470: §16.106
Block v Superior Court (1998) 62 CA4th 363, 72 CR2d 610: §9.25
Blue Chip Stamps v Superior Court (1976) 18 C3d 381, 134 CR 393: App A
Blue Cross v Department of Health Care Servs. (2007) 153 CA4th 322, 62 CR3d 772: §2.33
Blue Cross v State Dep't of Health Servs. (2007) 153 CA4th 322, 62 CR3d 772: §3.4
Blue Cross v Superior Court (1998) 67 CA4th 42, 78 CR2d 779: §16.99
Board of Educ. v Round Valley Teachers Ass'n (1996) 13 C4th 269, 52 CR2d 115: §16.99
Board of Educ. v Watson (1966) 63 C2d 829, 48 CR 481: §2.61
Board of Med. Quality Assur. v Superior Court (1980) 114 CA3d 272, 170 CR 468: §6.27
Board of Supervisors v Superior Court (1995) 33 CA4th 1724, 39 CR2d 906: §16.142
Board of Supervisors v Superior Court (1994) 23 CA4th 830, 28 CR2d 560: §24.41
Bodenheimer v Superior Court (1980) 108 CA3d 885, 167 CR 26: §16.118
Bodger, Estate of (1954) 128 CA2d 710, 276 P2d 83: §15.35, App A
Bonzer v City of Huntington Park (1993) 20 CA4th 1474, 25 CR2d 278: §18.80
Boren v State Personnel Bd. (1951) 37 C2d 634, 234 P2d 981: §4.15
Brady, People v (1973) 30 CA3d 81, 105 CR 280: §15.44
Braewood Convalescent Hosp. v WCAB (1983) 34 C3d 159, 193 CR 157: §16.48
Branciforte Heights, LLC v City of Santa Cruz (2006) 138 CA4th 914, 42 CR3d 96: §11.16
Brand v 20th Century Ins. Co./21st Century Ins. Co. (2004) 124 CA4th 594, 21 CR3d 380: §17.11
Brandt v Superior Court (1985) 37 C3d 813, 210 CR 211: §16.105
Brannon v Superior Court (2004) 114 CA4th 1203, 8 CR3d 491: §16.74, App A
Braun v Brown (1939) 13 C2d 130, 87 P2d 1009: App A
BreakZone Billiards v City of Torrance (2000) 81 CA4th 1205, 97 CR2d 467: §3.16
Bridgestone/Firestone, Inc. v Superior Court (1992) 7 CA4th 1384, 9 CR2d 709: §16.124
Bright Dev. v City of Tracy (1993) 20 CA4th 783, 24 CR2d 618: §§7.6, 7.11, 9.28
Britt v Superior Court (1978) 20 C3d 844, 143 CR 695: §§16.118, 16.121, App A
Britts v Superior Court (2006) 145 CA4th 1112, 52 CR3d 185: §16.129
Brodie v WCAB (2007) 40 C4th 1313, 57 CR3d 644: §16.48
Brooks v State Personnel Bd. (1990) 222 CA3d 1068, 272 CR 292: §3.9
Brosnahan v Brown (1982) 32 C3d 236, 186 CR 30: §24.55
Brosnahan v Eu (1982) 31 C3d 1, 181 CR 100: §§2.48, 27.8
Brosterhous v State Bar (1995) 12 C4th 315, 48 CR2d 87: §20.19
Brown v Superior Court (1971) 5 C3d 509, 96 CR 584: §11.38
Brown v Superior Court (1981) 119 CA3d 189, 173 CR 803: App A
Brown v Superior Court (1970) 7 CA3d 366, 86 CR 670: App A
Brown, People v (1993) 6 C4th 322, 24 CR2d 710: §17.24
Brown, Winfield & Canzoneri, Inc. v Superior Court (Feb. 1, 2010, S156598), 2010 Cal Lexis 588: §§22.22, 28.9
Browne v Superior Court (1979) 98 CA3d 610, 159 CR 669: App A
Bruce v Gregory (1967) 65 C2d 666, 56 CR 265: §8.33
Brun v Bailey (1994) 27 CA4th 641, 32 CR2d 624: App A
Bruno v Superior Court (1981) 127 CA3d 120, 179 CR 342: §16.106
Bryan v Bank of America (2001) 86 CA4th 185, 103 CR2d 148: §24.60
Buckley, In re (1973) 10 C3d 237, 110 CR 121: §§15.37, 15.41, 16.133-16.134, 16.136
Building Indus. Ass'n v Marin Mun. Water Dist. (1991) 235 CA3d 1641, 1 CR2d 625: §2.8
Building Material & Constr. Teamsters Union, Local 216 v Farrell (1986) 41 C3d 651, 224 CR 688: §5.34
Bunker v County of Orange (2002) 103 CA4th 542, 126 CR2d 825: §2.62
Bunnett v Regents of Univ. of Cal. (1995) 35 CA4th 843, 41 CR2d 567: §§2.1, 2.33, 3.4, 3.18, 7.12
Burke v Superior Court (1969) 71 C2d 276, 78 CR 481: §16.123
Burke Concrete Accessories, Inc. v Superior Court (1970) 8 CA3d 773, 87 CR 619: §16.69
Burlage v Superior Court (2009) 178 CA4th 524, 100 CR3d 531: §16.99
Burlingame v Justice's Court of the City of Berkeley (1934) 1 C2d 71, 33 P2d 669: §15.53
Burt v County of Orange (2004) 120 CA4th 273, 15 CR3d 373: §3.5
Butchers' Union Local 229 v Cudahy Packing Co. (1967) 66 C2d 925, 59 CR 713: §2.51
Butler v Superior Court (2002) 104 CA4th 979, 128 CR2d 403: App A
Butt v State (1992) 4 C4th 668, 15 CR2d 480: §§6.30, 6.36
Byington v Superior Court (1939) 14 C2d 68, 92 P2d 896: §26.9

C

C. S. Smith Metro. Mkt. Co. v Superior Court (1940) 16 C2d 226, 105 P2d 587: §15.14
C.C. v Superior Court (2008) 166 CA4th 1019, 83 CR3d 225: §§16.5, 22.19
Cable Connection, Inc. v DIRECTV, Inc. (2008) 44 C4th 1334, 82 CR3d 229: §16.99
Cade v Superior Court (1961) 191 CA2d 554, 12 CR 847: §16.94
Cal Pak Delivery, Inc. v United Parcel Serv., Inc. (1997) 52 CA4th 1, 60 CR2d 207: App A

Cal W. Nurseries, Inc. v Superior Court (2005) 129 CA4th 1170, 29 CR3d 170: §§5.73, 16.102, 16.104, 18.66, 18.76
Calhoun v Superior Court (1958) 51 C2d 257, 331 P2d 648: §16.5
Calhoun v Vallejo City Unified Sch. Dist. (1993) 20 CA4th 39, 24 CR2d 337: §16.62
California Ass'n for Health Servs. at Home v State Dep't of Health Servs. (2007) 148 CA4th 696, 56 CR3d 102: §§2.5, 2.8, 2.12, 2.28
California Cas. Gen. Ins. Co. v Superior Court (1985) 173 CA3d 274, 218 CR 817, disapproved on other grounds in Kransco v International Ins. Co. (2000) 23 C4th 390, 97 CR2d 151: App A
California Cas. Ins. Co. v Appellate Dept. (1996) 46 CA4th 1145, 54 CR2d 118: §25.17
California Correctional Peace Officers Ass'n v State Personnel Bd. (1995) 10 C4th 1133, 43 CR2d 693: §§2.20, 2.31, 3.9, 5.34
California Dental Ass'n v American Dental Ass'n (1979) 23 C3d 346, 152 CR 546: §2.55
California Faculty Ass'n v PERB (2008) 160 CA4th 609, 72 CR3d 654: §§16.29, 16.31
California Faculty Ass'n v Superior Court (1998) 63 CA4th 935, 75 CR2d 1: §16.99
California Highway Patrol v Superior Court (2008) 162 CA4th 1144, 76 CR3d 578: §16.67
California Highway Patrol v Superior Court (2006) 135 CA4th 488, 38 CR3d 16: §§15.70, 17.32, 17.34
California Labor Fed'n v Occupational Safety & Health Standards Bd. (1992) 5 CA4th 985, 7 CR2d 399: §§10.11, 24.54
California Pine Box & Lumber Co. v Superior Court (1910) 13 CA 65, 108 P 882: App A
California Pub. Employees' Retirement Sys. v Superior Court (2008) 160 CA4th 174, 72 CR3d 561: §§15.6, 15.52, 15.56, 15.60-15.61, 15.64, 19.6, 24.21
California Sch. Bds. Ass'n v State (2009) 171 CA4th 1183, 90 CR3d 501: §§2.24, 5.119
California Standardbred Sires Stakes Comm., Inc. v California Horse Racing Bd. (1991) 231 CA3d 751, 282 CR 656: §§9.26-9.27
California Trial Lawyers Ass'n, Inc. v Eu (1988) 200 CA3d 351, 245 CR 916: §2.46
California Water Impact Network v Newhall County Water Dist. (2008) 161 CA4th 1464, 75 CR3d 393: §§2.1, 2.16, 2.22, 2.24, 2.30, 2.32, 2.34, 2.37, 8.53
Camp v Oakland Mortgage & Fin. Co. (1928) 205 C 380, 270 P 685: App A
Camp Meeker Water Sys. v PUC (1990) 51 C3d 845, 274 CR 678: §16.45
Campbell v Superior Court (2005) 132 CA4th 904, 34 CR3d 68: §§12.14, 23.10
Campbell v Superior Court (1996) 44 CA4th 1308, 52 CR2d 385: §§16.105, 16.109
Camper v WCAB (1992) 3 C4th 679, 12 CR2d 101: §16.47
Canandaigua Wine Co. v County of Madera (2009) 177 CA4th 298, 99 CR3d 264: §11.9
Canon v Justice Court (1964) 61 C2d 446, 39 CR 228: §16.89
Canova v Trustees of Imperial Irrig. Dist. Employee Pension Plan (2007) 150 CA4th 1487, 59 CR3d 587: §2.15
Capitol People First v State Dep't of Dev. Servs. (2007) 155 CA4th 676, 66 CR3d 300: §16.129D
Capo for Better Representation v Kelley (2008) 158 CA4th 1455, 71 CR3d 354: §§2.19, 11.7, 11.33
Cardiff Equities, Inc. v Superior Court (2008) 166 CA4th 1541, 83 CR3d 699: §16.101
Carl v Superior Court (2007) 157 CA4th 73, 68 CR3d 566: §16.6
Carmel Valley Fire Protection Dist. v State (2001) 25 C4th 287, 105 CR2d 636: §2.23
Carpenson v Najarian (1967) 254 CA2d 856, 62 CR 687: App A
Carpenter v Superior Court (2006) 141 CA4th 249, 45 CR3d 821: §16.119
Carrancho v California Air Resources Bd. (2003) 111 CA4th 1255, 4 CR3d 536: §§2.7, 2.23
Carrie M., In re (2001) 90 CA4th 530, 108 CR2d 856: §4.20
Carroll v Civil Serv. Comm'n (1970) 11 CA3d 727, 90 CR 128: §§10.11, 10.14
Carter v Superior Court (1990) 218 CA3d 994, 267 CR 290: §16.119
Carter v Superior Court (1950) 96 CA2d 388, 215 P2d 491: §24.53
CashCall, Inc. v Superior Court (2008) 159 CA4th 273, 71 CR3d 441: §§15.56, 15.70, 16.116
Cason v Glass Bottle Blowers Ass'n (1951) 37 C2d 134, 231 P2d 6: §2.52
Cassel v Superior Court (review granted Feb. 3, 2010, B215215; superseded opinion at 179 CA4th 152, 101 CR3d 501): §16.121
Castro v Superior Court (2004) 116 CA4th 1010, 10 CR3d 865: §16.11
Catalano, In re (1981) 29 C3d 1, 171 CR 667: §§4.17, 15.39
Catanese v Superior Court (1996) 46 CA4th 1159, 54 CR2d 280: §§16.115-16.116
CenterPoint Energy, Inc. v Superior Court (2007) 157 CA4th 1101, 69 CR3d 202: §§15.61, 15.64, 15.70, 16.56, 22.23
Chambers v Superior Court (1981) 121 CA3d 893, 175 CR 575: §16.102
Chapman v Superior Court (2005) 130 CA4th 261, 29 CR3d 852: §23.33
Charles A. Pratt Constr. Co. v California Coastal Comm'n (2008) 162 CA4th 1068, 76 CR3d 466: §2.41
Charrot v Municipal Court (1968) 260 CA2d 208, 66 CR 903: §16.88
Chase v Superior Court (1962) 210 CA2d 872, 27 CR 383: §§15.18, 15.21
Chavez v Superior Court (1984) 153 CA3d 130, 200 CR 75: §12.18
Chodos v Superior Court (1964) 226 CA2d 703, 38 CR 301: §15.19
Chong v Superior Court (1997) 58 CA4th 1032, 68 CR2d 427: §19.6
Church of Hakeem, Inc. v Superior Court (1980) 110 CA3d 384, 168 CR 13: §§16.118, 16.134
Ciro's of San Francisco, Inc. v State Bd. of Equalization (1956) 143 CA2d 99, 299 P2d 985: §§6.24, 6.28
Citizens Utils. Co. of Cal. v Superior Court (1963) 59 C2d 805, 31 CR 316: §15.68
Citizens for Planning Responsibly v County of San Luis Obispo (2009) 176 CA4th 357, 97 CR3d 636: §2.24
City & County of San Francisco v Ballard (2006) 136 CA4th 381, 39 CR3d 1: §16.84
City & County of San Francisco v Farrell (1982) 32 C3d 47, 184 CR 713: §2.58
City & County of San Francisco v Shers (1995) 38 CA4th 1831, 46 CR2d 57: App A

City & County of San Francisco v Small Claims Court (1983) 141 CA3d 470, 190 CR 340: §16.92
City & County of San Francisco v State (2008) 43 C4th 757, 76 CR3d 683: §2.56
City & County of San Francisco v State (2005) 128 CA4th 1030, 27 CR3d 722: App A
City & County of San Francisco v Superior Court (1959) 53 C2d 236, 1 CR 158: §§15.20, 15.23
City of Carmel-By-The-Sea v Board of Supervisors (1982) 137 CA3d 964, 187 CR 379: §§10.10, 10.15, 24.52
City of Dinuba v County of Tulare (2007) 41 C4th 859, 62 CR3d 614: §§2.5, 2.19, 2.57-2.58, 2.64
City of Fresno v Superior Court (1988) 205 CA3d 1459, 253 CR 296: §16.121
City of Gilroy v State Bd. of Equalization (1989) 212 CA3d 589, 260 CR 723: §2.12
City of King City v Community Bank (2005) 131 CA4th 913, 32 CR3d 384: §§2.1, 2.6, 15.3
City of Los Angeles v Superior Court (2002) 29 C4th 1, 124 CR2d 202: §16.124
City of Los Angeles v Superior Court (1959) 51 C2d 423, 333 P2d 745: §15.26
City of Malibu v California Coastal Comm'n (2005) 128 CA4th 897, 27 CR3d 501: App A
City of Oakland v Superior Court (1996) 45 CA4th 740, 53 CR2d 120: §16.68
City of Poway v City of San Diego (1991) 229 CA3d 847, 280 CR 368: §11.3
City of San Diego v Superior Court (2006) 137 CA4th 21, 40 CR3d 26: §16.67
City of Santa Barbara v Superior Court (1966) 240 CA2d 612, 49 CR 798: §§15.18, 15.26
City of Santa Clara v Von Raesfeld (1970) 3 C3d 239, 90 CR 8: §2.67
City of Santa Cruz v Municipal Court (1989) 49 C3d 74, 260 CR 520: §16.124
City of Santa Cruz v Superior Court (1995) 40 CA4th 1146, 48 CR2d 216: §19.6
City of Santa Monica v Grubb (1966) 245 CA2d 718, 54 CR 210: §2.67
City of Santa Monica v Superior Court (1964) 231 CA2d 223, 41 CR 824: §15.26
Civil Serv. Employees Ins. Co. v Superior Court (1978) 22 C3d 362, 149 CR 360: §15.68
Cleveland Bd. of Educ. v Loudermill (1985) 470 US 532, 84 L Ed 2d 494, 105 S Ct 1487: §3.11
Cloer v Superior Court (1969) 271 CA2d 143, 76 CR 217: §16.103
Coan v California (1974) 11 C3d 286, 113 CR 187: §2.64
Coast Sav. & Loan Ass'n v Black (1986) 187 CA3d 1494, 232 CR 483: §24.65
Coelho v State Personnel Bd. (1989) 209 CA3d 968, 257 CR 557: §§3.20, 5.36, 18.3
Coffelt v Coffelt (1964) 229 CA2d 659, 40 CR 513: §5.31
Cohen v Board of Supervisors (1985) 40 C3d 277, 219 CR 467: §6.36
Cohen v Superior Court (1967) 248 CA2d 551, 56 CR 813: §15.8
Cohen v Superior Court (1959) 173 CA2d 61, 343 P2d 286: App A
Coleman, In re (1974) 12 C3d 568, 116 CR 381: §16.135
Commercial Ins. Co. v Superior Court (1969) 272 CA2d 321, 77 CR 769: §16.92
Committee for Responsible Sch. Expansion v Hermosa Beach City Sch. Dist. (2006) 142 CA4th 1178, 48 CR3d 705: §11.16
Committee to Save the Hollywoodland Specific Plan v City of Los Angeles (2008) 161 CA4th 1168, 74 CR3d 665: §3.16
Community Facilities Dist. v Harvill (1999) 74 CA4th 876, 88 CR2d 405: §2.63
Conaway v Conaway (1963) 218 CA2d 427, 32 CR 890: App A
Conlan v Bonta (2002) 102 CA4th 745, 125 CR2d 788: §§2.1, 2.28, 3.18
Connolly v County of Orange (1992) 1 C4th 1105, 4 CR2d 857: §2.63
Consaul v City of San Diego (1992) 6 CA4th 1781, 8 CR2d 762: §25.17
Consolidated Title Sec. Co. v Hopkins (1934) 1 C2d 414, 35 P2d 320: §2.59
Consumer Cause, Inc. v Mrs. Gooch's Natural Food Markets, Inc. (2005) 127 CA4th 387, 25 CR3d 514: App A
Consumers Lobby Against Monopolies v PUC (1979) 25 C3d 891, 160 CR 124: §§16.44, 27.3
Consumers Union, Inc. v California Milk Producers Advisory Bd. (1978) 82 CA3d 433, 147 CR 265: §11.11
Continental Ins. Co. v Superior Court (1985) 165 CA3d 1069, 212 CR 140: §16.70
Cooke v Superior Court (1989) 213 CA3d 401, 261 CR 706 (writ relief denied after county passed resolution making changes sought by writ petition), disapproved on other grounds by County of San Diego v State (1997) 15 C4th 68, 61 CR2d 134: §15.66
Coombs v Pierce (1991) 1 CA4th 568, 2 CR2d 249: §2.40
Coppinger v Superior Court (1982) 134 CA3d 883, 185 CR 24: §22.29
Corbett v Superior Court (2002) 101 CA4th 649, 125 CR2d 46: §§15.71, 16.129A
Cornell Univ. Med. College v Superior Court (1974) 38 CA3d 311, 113 CR 291: §16.55
Corona Unified Hosp. Dist. v Superior Court (1964) 61 C2d 846, 40 CR 745: §15.23
Corrales v Bradstreet (2007) 153 CA4th 33, 62 CR3d 440: §§2.1, 2.5, 15.67
Costa v Superior Court (2006) 37 C4th 986, 39 CR3d 470: §2.48
Costco Wholesale Corp. v Superior Court (2009) 47 C4th 725, 101 CR3d 758: §15.62, App A
Coulter v Superior Court (1978) 21 C3d 144, 145 CR 534: §§16.105, 16.109, 24.20
Countrywide Home Loans, Inc. v Superior Court (1997) 54 CA4th 828, 62 CR2d 899: §§22.17, 22.23, 24.5-24.6, 24.15, 25.14
County Sanitation Dist. No. 2 v County of Kern (2005) 127 CA4th 1544, 27 CR3d 28: §2.37
County of Alameda v Superior Court (1987) 196 CA3d 619, 242 CR 215: App A
County of Los Angeles v Civil Serv. Comm'n (1995) 39 CA4th 620, 46 CR2d 256: §3.16
County of Los Angeles v Superior Court (1975) 13 C3d 721, 119 CR 631: §16.121
County of Los Angeles v Superior Court (2008) 159 CA4th 353, 71 CR3d 485: §§15.70, 16.129A, 16.129D
County of Los Angeles v Superior Court (2005) 130 CA4th 1099, 30 CR3d 708: §16.122
County of Los Angeles v Superior Court (1993) 18 CA4th 588, 22 CR2d 409: §§19.3, 19.6
County of Marin v Superior Court (1960) 53 C2d 633, 2 CR 758: §15.38

County of Orange v Superior Court (2007) 155 CA4th 1253, 66 CR3d 689: §16.91
County of Orange v Superior Court (2000) 79 CA4th 759, 94 CR2d 261: §16.121
County of Sacramento v Hickman (1967) 66 C2d 841, 59 CR 609: §§2.58, 2.61, 27.8
County of San Bernardino v Superior Court (1994) 30 CA4th 378, 35 CR2d 760: §23.27
County of San Diego v Bowen (2008) 166 CA4th 501, 82 CR3d 818: §2.37
County of San Diego v State (2008) 164 CA4th 580, 79 CR3d 489: §§2.3, 2.6, 2.12, 2.24, 5.119
County of San Luis Obispo v Superior Court (2001) 90 CA4th 288, 108 CR2d 753: §2.14
County of Santa Clara v Superior Court (2009) 170 CA4th 1301, 89 CR3d 374: §§16.14, 16.17
County of Sonoma v Commission on State Mandates (2000) 84 CA4th 1264, 101 CR2d 784: §3.3
County of Sonoma v State Energy Resources Conserv. & Dev. Comm'n (1985) 40 C3d 361, 220 CR 114: §§16.26, 27.4
County of Sonoma v Superior Court (2009) 173 CA4th 322, 93 CR3d 39: §§15.56, 15.61, 15.70-15.71, 16.100, 22.23
Covenant Care, Inc. v Superior Court (2004) 32 C4th 771, 11 CR3d 222: §16.105
Cox v Superior Court (2002) 98 CA4th 670, 120 CR2d 45: §16.145
Coy v Superior Court (1962) 58 C2d 210, 23 CR 393: §§8.46, 23.30
Crab Addison, Inc. v Superior Court (2008) 169 CA4th 958, 87 CR3d 400, quoting People ex rel Lockyer v Superior Court (2004) 122 CA4th 1060, 19 CR 3d 324: §16.120
Crawford v City of Los Angeles (2009) 175 CA4th 249, 95 CR3d 550: §11.26
Crittenden v Superior Court (1964) 61 C2d 565, 39 CR 380: §15.26
Crocker-Anglo Nat'l Bank v American Trust Co. (1959) 170 CA2d 289, 338 P2d 617: App A
Crowl v Commission on Prof. Competence of the Governing Bd. of the San Juan Unified Sch. Dist. (1990) 225 CA3d 334, 275 CR 86: §§8.49, 18.47
Cruz v Superior Court (2004) 120 CA4th 175, 14 CR3d 917: §15.8
Cuadros v Superior Court (1992) 6 CA4th 671, 8 CR2d 18: §16.106
Cubalevic v Superior Court (1966) 240 CA2d 557, 49 CR 698: §15.26
Cuneo, Estate of (1963) 214 CA2d 381, 29 CR 497: §16.143
Curle v Superior Court (2001) 24 C4th 1057, 103 CR2d 751: §§15.55, 16.4, 17.24, App A

D

Daar v Yellow Cab Co. (1967) 67 C2d 695, 63 CR 724: App A
Dabney, Estate of (1951) 37 C2d 402, 232 P2d 481: §26.5
Daily Journal Corp. v County of Los Angeles (2009) 172 CA4th 1550, 92 CR3d 219: §§2.8, 2.20, 2.30
Daley v County of Butte (1964) 227 CA2d 380, 38 CR 693: App A
Daly v Superior Court (1977) 19 C3d 132, 137 CR 14: §16.116
Daniel V. v Superior Court (2006) 139 CA4th 28, 42 CR3d 471: §16.7
Dare v Board of Med. Exam'rs (1943) 21 C2d 790, 136 P2d 304: §§7.11, 9.17, 9.28
Darley v Ward (1980) 28 C3d 257, 168 CR 481: §7.3
Darlice C., In re (2003) 105 CA4th 459, 129 CR2d 472: §§4.18, 4.20
Daro v Superior Court (2007) 151 CA4th 1079, 61 CR3d 716: §15.52
Dashaway Ass'n, People v (1890) 84 C 114, 24 P 277: §4.27
Daum v Superior Court (1964) 228 CA2d 283, 39 CR 443: App A
David L. v Superior Court (2008) 166 CA4th 387, 83 CR3d 14: §16.143A
Davidson v Superior Court (1999) 70 CA4th 514, 82 CR2d 739: §15.37
Davies v Superior Court (1984) 36 C3d 291, 204 CR 154: §16.118
Davis v Custom Component Switches, Inc. (1970) 13 CA3d 21, 91 CR 181: §§26.17, 26.19
Davis v Superior Court (1992) 7 CA4th 1008, 9 CR2d 331: §15.62
Davis v Superior Court (1980) 102 CA3d 164, 162 CR 167: §§12.26-12.27
Davis v Taliaferro (1963) 218 CA2d 120, 32 CR 208: App A
De Luca v Superior Court (1968) 262 CA2d 254, 68 CR 535: §15.26
DeCastro West Chodorow & Burns, Inc. v Superior Court (1996) 47 CA4th 410, 54 CR2d 792: §16.68
DeCuir v County of Los Angeles (1998) 64 CA4th 75, 75 CR2d 102: §§3.18, 3.20
DeGrandchamp v Texaco, Inc. (1979) 100 CA3d 424, 160 CR 899: §18.46
DeLucia v County of Merced (1968) 257 CA2d 620, 65 CR 177: §4.14
DeSilva, In re (1948) 33 C2d 76, 199 P2d 6: App A
Deacon v International Union of Operating Eng'rs, Local No. 12 (1965) 236 CA2d 302, 46 CR 11: §2.53
Dedrick v California Whaling Co. (1936) 16 CA2d 284, 60 P2d 551.: §2.54
Deepwell Homeowners' Protective Ass'n v City Council (1965) 239 CA2d 63, 48 CR 321: §26.18
Deetz v Carter (1965) 232 CA2d 851, 43 CR 321: App A
Defend Bayview Hunters Point Comm. v City & County of San Francisco (2008) 167 CA4th 846, 84 CR3d 486: §§2.19, 2.47
Dep't of Corporations, People ex rel v SpeeDee Oil Change Sys., Inc. (1999) 20 C4th 1135, 86 CR2d 816: §16.104
Department of Alcoholic Beverage Control v Alcoholic Beverage Control Appeals Bd. (2006) 40 C4th 1, 50 CR3d 585: §3.11
Department of Alcoholic Beverage Control v Alcoholic Beverage Control Appeals Bd. (2002) 99 CA4th 880, 121 CR2d 729: §3.11
Department of Conserv., People ex rel v El Dorado County (2005) 36 C4th 971, 32 CR3d 109: §2.12
Department of Corrections & Rehabilitation v WCAB (2008) 166 CA4th 911, 82 CR3d 920: §16.46
Department of Educ. v Superior Court (1979) 97 CA3d 977, 159 CR 265: App A
Depretto v Superior Court (1981) 116 CA3d 36, 171 CR 810: §16.99

Dept. of Corporations, People ex rel v SpeeDee Oil Change Sys., Inc. (1999) 20 C4th 1135, 86 CR2d 816: §17.11
Deputy Sheriffs' Ass'n, People ex rel v County of Santa Clara (1996) 49 CA4th 1471, 57 CR2d 322: §4.27
Derek W., In re (1999) 73 CA4th 828, 86 CR2d 742: §15.44
DiPirro v Bondo Corp. (2007) 153 CA4th 150, 62 CR3d 722: §16.149
Dinong v Superior Court (1981) 120 CA3d 300, 174 CR 590: §16.100
Discover Bank v Superior Court (2005) 36 C4th 148, 30 CR3d 76: §16.100
District Election of Supervisors Comm. v O'Connor (1978) 78 CA3d 261, 144 CR 442: §16.150
Dixon, In re (1953) 41 C2d 756, 264 P2d 513: §4.18
Do v Superior Court (2003) 109 CA4th 1210, 135 CR2d 855: §16.125, App A
Doe 1 v Superior Court (2005) 132 CA4th 1160, 34 CR3d 248: §16.121
Dominguez v City of Alhambra (1981) 118 CA3d 237, 173 CR 345: App A
Donnellan v City of Novato (2001) 86 CA4th 1097, 103 CR2d 882: §3.19
Dorel Indus., Inc. v Superior Court (2005) 134 CA4th 1267, 36 CR3d 742: §16.56
Dosch v King (1961) 192 CA2d 800, 13 CR 765: §26.9
Dover, Marriage of (1971) 15 CA3d 675, 93 CR 384: §26.18
Dowling v Zimmerman (2001) 85 CA4th 1400, 103 CR2d 174: §26.3
Doyle v Superior Court (1996) 50 CA4th 1878, 58 CR2d 476: §§16.118, 16.124
Dresser v Superior Court (1964) 231 CA2d 68, 41 CR 473: §§15.21, 15.23, 15.26
Drummey v State Bd. of Funeral Dirs. & Embalmers (1939) 13 C2d 75, 87 P2d 848: §2.6
Duke v Justice's Court (1940) 42 CA2d 178, 108 P2d 707: §§15.17-15.18
Dulaney v Municipal Court (1974) 11 C3d 77, 112 CR 777: §§8.47, 23.28-23.29
Duncan v Department of Personnel Admin. (2000) 77 CA4th 1166, 92 CR2d 257: §3.16
Duran v Cassidy (1972) 28 CA3d 574, 104 CR 793: §2.47
Dyer, In re (1948) 85 CA2d 394, 193 P2d 69: §15.48

E

Eastwood v Froehlich (1976) 60 CA3d 523, 131 CR 577: App A
Eder v California Dep't of Fish & Game (2009) 170 CA4th 216, 87 CR3d 788: §5.37
Efron v Kalmanovitz (1960) 185 CA2d 149, 8 CR 107: App A
Eight Unnamed Physicians v Medical Exec. Comm. of the Med. Staff of Washington Township Hosp. (2007) 150 CA4th 503, 59 CR3d 100: §§2.16, 2.34, 2.55
El Dorado Palm Springs, Ltd. v Rent Review Comm'n (1991) 230 CA3d 335, 281 CR 327: §5.74
Eldridge v Superior Court (1989) 208 CA3d 1350, 256 CR 724: §§16.76, 18.64
Elizabeth D. v Zolin (1993) 21 CA4th 347, 25 CR2d 852: §3.17
Elliott v Contractors' State License Bd. (1990) 224 CA3d 1048, 274 CR 286: §§5.65, 8.49, 8.57, 18.47
Emerson Elec. Co. v Superior Court (1997) 16 C4th 1101, 68 CR2d 883: §16.123
Emilye A., In re (1992) 9 CA4th 1695, 12 CR2d 294: §§4.19-4.20
Employers Reinsurance Co. v Superior Court (2008) 161 CA4th 906, 74 CR3d 733: §16.145
English v City of Long Beach (1952) 114 CA2d 311, 250 P2d 298: §§8.59, 9.26, 9.28, 9.31
Ensoniq Corp. v Superior Court (1998) 65 CA4th 1537, 77 CR2d 507: §19.6
Environmental Council v Board of Supervisors (1982) 135 CA3d 428, 185 CR 363: §2.25
Environmental Protection & Info. Ctr. v California Dep't of Forestry & Fire Protection (2008) 44 C4th 459, 80 CR3d 28: §3.14
Environmental Protection Info. Ctr. v State Bd. of Forestry (1993) 20 CA4th 27, 24 CR2d 344: §24.7
Estate of _____ (*see* name of decedent)
Estrin v Superior Court (1939) 14 C2d 670, 96 P2d 340: §23.47
Eureka Citizens for Responsible Gov't v City of Eureka (2007) 147 CA4th 357, 54 CR3d 485: §3.7
Eureka Teachers Ass'n v Board of Educ. of the Eureka City Schs. (1988) 199 CA3d 353, 244 CR 240: §§3.21, 5.36
Evans v Superior Court (1939) 14 C2d 563, 96 P2d 107: §§15.14, 15.20
Excelsior College v Board of Registered Nursing (2006) 136 CA4th 1218, 39 CR3d 618: §§2.33, 2.39

F

FEHC v Superior Court (Las Brisas Apartment, Ltd.) (2004) 115 CA4th 629, 9 CR3d 409: §3.19
Fair Employment & Hous. Comm'n v Superior Court (2004) 115 CA4th 629, 9 CR3d 409: §15.64
Fairbank v Superior Court (1917) 34 CA 66, 166 P 864: App A
Fairfield v Superior Court (1966) 246 CA2d 113, 54 CR 721: §16.125
Fall River Joint Unified Sch. Dist. v Superior Court (1988) 206 CA3d 431, 253 CR 587: §18.43
Farb v Superior Court (2009) 174 CA4th 678, 94 CR3d 586: §16.108
Farley v Healey (1967) 67 C2d 325, 62 CR 26: §§2.46, 11.38, 27.2
Farmers Ins. Exch. v Superior Court (1992) 10 CA4th 1509, 13 CR2d 449: §16.5
Farnham v Superior Court (1961) 188 CA2d 451, 10 CR 615: §§16.131, 16.139
Fascination, Inc. v Hoover (1952) 39 C2d 260, 246 P2d 656: §7.12
Fatica v Superior Court (2002) 99 CA4th 350, 120 CR2d 904: §16.145
Ferruzzo v Superior Court (1980) 104 CA3d 501, 163 CR 573: App A
Figgs v Superior Court (1962) 204 CA2d 231, 22 CR 199: §16.94
Filarsky v Superior Court (2002) 28 C4th 419, 121 CR2d 844: §§2.68, 16.14, App A

Fine v Superior Court (2002) 97 CA4th 651, 119 CR2d 376: §§15.37, 15.41
Finot v Pasadena City Bd. of Educ. (1967) 250 CA2d 189, 58 CR 520: §2.42
Fire Ins. Exch. v Superior Court (2004) 116 CA4th 446, 10 CR3d 617: §16.106
First Fed. Bank. v Superior Court (2006) 143 CA4th 310, 49 CR3d 296: §16.5
Fiscal v City & County of San Francisco (2008) 158 CA4th 895, 70 CR3d 324: §§2.1, 2.24, 7.9, 11.33
Fisher v Superior Court (1980) 103 CA3d 434, 163 CR 47: App A
Fisherman's Wharf Bay Cruise Corp. v Superior Court (2003) 114 CA4th 309, 7 CR3d 628: §§15.4-15.6, 15.10-15.11, 15.13, 16.68
Flaherty, Marriage of (1982) 31 C3d 637, 183 CR 508: §24.62
Flatt v Superior Court (1994) 9 C4th 275, 36 CR2d 537: §17.11
Flora Crane Serv., Inc. v Ross (1964) 61 C2d 199, 37 CR 425: §2.64
Florence W. Med. Clinic v Bont (2000) 77 CA4th 493, 91 CR2d 609, citing Ryne v Municipal Court (1980) 113 CA3d 807, 170 CR 312: §8.44
Flores v Transamerica HomeFirst, Inc. (2001) 93 CA4th 846, 113 CR2d 376: §16.101
Flying Dutchman Park, Inc. v City & County of San Francisco (2001) 93 CA4th 1129, 113 CR2d 690: §16.111
Fonseca v Fong (2008) 167 CA4th 922, 84 CR3d 567: §§2.28, 5.34, 8.40-8.41, 11.16
Fontana v Superior Court (1977) 72 CA3d 159, 139 CR 851: §16.133
Fontana Unified Sch. Dist. v City of Rialto (1985) 173 CA3d 725, 219 CR 254: §2.41
Food & Grocery Bureau v Garfield (1941) 18 C2d 174, 114 P2d 579: §§26.17, 26.21
Forrest v Trustees of Cal. State Univ. & Colleges (1984) 160 CA3d 357, 206 CR 595: §2.31
Franchise Tax Bd. v Superior Court (1950) 36 C2d 538, 225 P2d 905: §16.131
Fredrickson v Superior Court (1952) 38 C2d 593, 241 P2d 541: §16.143
Freedman v Superior Court (2008) 166 CA4th 198, 82 CR3d 563: §§16.106, 25.7, 25.26
Fremont Indem. Co. v Fremont Gen. Corp. (2006) 143 CA4th 50, 49 CR3d 82: §17.11
Fremont Indem. Co. v Superior Court (1982) 137 CA3d 554, 187 CR 137: §16.117
Fremont Union High Sch. Dist. v Santa Clara County Bd. of Educ. (1991) 235 CA3d 1182, 286 CR 915: §§5.65, 18.47
Friends of Bay Meadows v City of San Mateo (2007) 157 CA4th 1175, 68 CR3d 916: §§2.19, 2.46-2.47, 7.6
Friends of Mammoth v Board of Supervisors (1972) 8 C3d 247, 104 CR 761: §2.34
Friends of the Old Trees v Department of Forestry & Fire Protection (1997) 52 CA4th 1383, 61 CR2d 297: §3.4
Fullerton Joint Union High Sch. Dist. v State Bd. of Educ. (1982) 32 C3d 779, 187 CR 398: §2.45
Fults v Superior Court (1979) 88 CA3d 899, 152 CR 210: §16.118

G

GT, Inc. v Superior Court (1984) 151 CA3d 748, 198 CR 892: §16.118
Gallardo v Specialty Restaurants Corp. (2000) 84 CA4th 463, 100 CR2d 884: §26.3
Gallardo, People v (2000) 77 CA4th 971, 92 CR2d 161: §15.48
Gandolfo, In re (1984) 36 C3d 889, 206 CR 149: §4.25
Garamendi, People ex rel v American Autoplan, Inc. (1993) 20 CA4th 760, 25 CR2d 192: §§16.93-16.94
Garau v Torrance Unified Sch. Dist. (2006) 137 CA4th 192, 40 CR3d 108: §16.58, App A
Garcia v Los Angeles Unified Sch. Dist. (1985) 173 CA3d 701, 219 CR 544: App A
Garrett v Superior Court (1967) 248 CA2d 263, 56 CR 418: §16.65
Garza v Kantor (1976) 54 CA3d 1025, 127 CR 164: App A
Gelson's Mkts., Inc. v WCAB (2009) 179 CA4th 201, 101 CR3d 548: §§16.46, 16.48
General Elec. Capital Auto Fin. Servs. v Appellate Div. (2001) 88 CA4th 136, 105 CR2d 552: §§12.3, 12.18, 12.27
General Motors Corp. v Superior Court (1966) 65 C2d 88, 52 CR 460: §15.26
General Motors Corp. v Superior Court (1988) 199 CA3d 247, 244 CR 776: App A
Gentry v Superior Court (2007) 42 C4th 443, 64 CR3d 773: §16.100
George M. v Superior Court (1988) 201 CA3d 755, 247 CR 330: §24.20
Ghanooni v Super Shuttle (1992) 2 CA4th 380, 3 CR2d 43: §16.127
Gibson v Savings & Loan Comm'r (1970) 6 CA3d 269, 85 CR 799: §11.10
Gilbert v Homar (1997) 520 US 924, 138 L Ed 2d 120, 117 S Ct 1807: §3.11
Gilliland v County of Los Angeles (1981) 126 CA3d 610, 179 CR 73: §§2.23, 2.41
Ginns v Savage (1964) 61 C2d 520, 39 CR 377: §3.19
Glacier Gen. Ins. Co., In re (1991) 234 CA3d 1549, 286 CR 262: App A
Glendale City Employees Ass'n v City of Glendale (1975) 15 C3d 328, 124 CR 513: §2.25
Glendale Mem. Hosp. & Health Ctr. v State Dep't of Mental Health (2001) 91 CA4th 129, 110 CR2d 101: §3.14
Goble v Municipal Court (1956) 138 CA2d 725, 292 P2d 585: §15.33
Golden Drugs Co. v Maxwell-Jolly (2009) 179 CA4th 1455, 102 CR3d 446: §§2.9, 7.12
Golden State Glass Corp. v Superior Court (1939) 13 C2d 384, 90 P2d 75: §16.103
Goldstein v Superior Court (2008) 45 C4th 218, 85 CR3d 213: §27.12
Gong v RFG Oil, Inc. (2008) 166 CA4th 209, 82 CR3d 416: §16.102
Gonzales v Superior Court (1980) 117 CA3d 57, 178 CR 358: §16.117
Good v Superior Court (2008) 158 CA4th 1494, 71 CR3d 125: §§11.16, 16.87, 18.66, 18.68
Gottlieb v Superior Court (1991) 232 CA3d 804, 283 CR 771: §24.65
Grafton Partners L.P. v Superior Court (2005) 36 C4th 944, 32 CR3d 5: §16.106
Graham v Scissor-Tail, Inc. (1981) 28 C3d 807, 171 CR 604: App A

Grant v Superior Court (1963) 214 CA2d 15, 29 CR 125: App A
Gray v Bybee (1943) 60 CA2d 564, 141 P2d 32: §26.16
Gray v Superior Court (2005) 125 CA4th 629, 23 CR3d 50: §4.17
Great Oaks Water Co. v Santa Clara Valley Water Dist. (2009) 170 CA4th 956, 88 CR3d 506: §7.21
Greater Irvine Credit Union v Superior Court (1986) 186 CA3d 1189, 231 CR 296: §16.70
Green v Obledo (1981) 29 C3d 126, 172 CR 206: §2.13
Green v Superior Court (1974) 10 C3d 616, 111 CR 704: §15.67
Greenberg v Superior Court (2009) 172 CA4th 1339, 92 CR3d 96: §§16.67, 19.6
Greene v Municipal Court (1975) 51 CA3d 446, 124 CR 139: §12.22
Greene v Superior Court (1951) 37 C2d 307, 231 P2d 821: §16.144
Greener v WCAB (1993) 6 C4th 1028, 25 CR2d 539: §16.46
Gregori v Bank of Am. (1989) 207 CA3d 291, 254 CR 853: App A
Greif v Dullea (1944) 66 CA2d 986, 153 P2d 581: §20.18
Greshko v County of Los Angeles (1987) 194 CA3d 822, 239 CR 846: App A
Greyhound Lines, Inc. v PUC (1968) 68 C2d 406, 67 CR 97: §16.39
Gridley v Gridley (2008) 166 CA4th 1562, 83 CR3d 715: §15.66
Griffiths v Superior Court (2002) 96 CA4th 757, 117 CR2d 445: §3.17
Grinbaum v Superior Court (1923) 192 C 528, 221 P 635: §15.36
Griset v Fair Political Practices Comm'n (2001) 25 C4th 688, 107 CR2d 149: §§11.6, 11.9
Guardado v Superior Court (2008) 163 CA4th 91, 77 CR3d 149: §§16.5, 20.4-20.5
Guay v Superior Court (1957) 147 CA2d 764, 305 P2d 990: App A
Guedalia v Superior Court (1989) 211 CA3d 1156, 260 CR 99: §§18.73, 18.76
Guilbert v Regents of Univ. of Cal. (1979) 93 CA3d 233, 155 CR 583: §3.10

H

H.D. Arnaiz, Ltd. v County of San Joaquin (2002) 96 CA4th 1357, 118 CR2d 71: §16.87
Haas v County of San Bernardino (2002) 27 C4th 1017, 119 CR2d 341: §3.11
Hackett v Superior Court (1993) 13 CA4th 96, 16 CR2d 405: §16.121
Hadley v Superior Court (1972) 29 CA3d 389, 105 CR 500: §11.8
Hagan v Superior Court (1962) 57 C2d 767, 22 CR 206: §§18.29, 25.30
Hagan v Superior Court (1960) 53 C2d 498, 2 CR 288: §15.26, App A
Haight v City of San Diego (1991) 228 CA3d 413, 278 CR 334: §11.9
Hallinan v Mellon (1963) 218 CA2d 342, 32 CR 446: §2.10
Hamilton v Superior Court (1974) 37 CA3d 418, 112 CR 450: §16.62
Hammond Lumber Co. v Board of Supervisors (1948) 85 CA2d 568, 193 P2d 503: §8.52
Hampton v Superior Court (1952) 38 C2d 652, 242 P2d 1: §24.53
Hanna v Bankamerica Bus. Credit, Inc. (1993) 16 CA4th 913, 20 CR2d 430: §16.127
Hardy v Stumpf (1974) 37 CA3d 958, 112 CR 739: §2.56
Harris v Alcoholic Beverage Control Appeals Bd. (1965) 62 C2d 589, 43 CR 633, citing Bailey v Taaffe (1866) 29 C 422: §8.44
Harris v Alcoholic Beverage Control Appeals Bd. (1961) 197 CA2d 759, 18 CR 151: §5.75
Hartman v Hollingsworth (1967) 255 CA2d 579, 63 CR 563: §2.54
Hartwell Corp. v Superior Court (2002) 27 C4th 256, 115 CR2d 874: §16.33
Hassan v Mercy Am. River Hosp. (2003) 31 C4th 709, 3 CR3d 623: §25.2
Hatch v Superior Court (2000) 80 CA4th 170, 94 CR2d 453: §16.90
Hathaway, Estate of (1896) 111 C 270, 43 P 754: App A
Hayden v Robertson Stephens, Inc. (2007) 150 CA4th 360, 58 CR3d 333: §16.101
Hayward Area Planning Ass'n v Superior Court (1990) 218 CA3d 53, 266 CR 745: §11.37
Hayworth v City of Oakland (1982) 129 CA3d 723, 181 CR 214: §§26.9-26.10
Hebbard v Colgrove (1972) 28 CA3d 1017, 105 CR 172: §5.34
Hegwer v Board of Civil Serv. Comm'rs (1992) 5 CA4th 1011, 7 CR2d 389: §2.56
Heldt v Municipal Court (1985) 163 CA3d 532, 209 CR 579: §12.19
Helena F. v West Contra Costa Unified Sch. Dist. (1996) 49 CA4th 1793, 57 CR2d 605: §2.43
Helene Curtis, Inc. v Los Angeles County Assessment Appeals Bds. (2004) 121 CA4th 29, 16 CR3d 658: §§3.4, 3.20
Helzel v Superior Court (1981) 123 CA3d 652, 176 CR 740: §16.100
Hemingway v Superior Court (2004) 122 CA4th 1148, 19 CR3d 363: §16.7
Hennigan v Boren (1966) 243 CA2d 810, 52 CR 748: §16.62, App A
Henry v Superior Court (2008) 160 CA4th 440, 72 CR3d 808: §§15.6, 15.52, 15.56, 15.60-15.61, 15.63, 15.70, 16.145, 19.6, 22.23, 23.28, 24.21
Heritage Provider Network, Inc. v Superior Court (2008) 158 CA4th 1146, 70 CR3d 645: §§15.56, 15.61, 16.99, 24.21
Hernandez v County of Los Angeles (2008) 167 CA4th 12, 84 CR3d 10: §§2.24, 2.48, 11.4, 11.16
Hernandez v Superior Court (2003) 112 CA4th 285, 4 CR3d 883: §§16.106-16.107
Hewlett-Packard Co. v Superior Court (2008) 167 CA4th 87, 83 CR3d 836: §16.129A
Heyman & Co. v Landers (1859) 12 C 107: §6.33
Hibernia Sav. & Loan Soc'y v Ellis Estate Co. (1932) 216 C 280, 13 P2d 929: App A
Higgins v Superior Court (2006) 140 CA4th 1238, 45 CR3d 293: §16.101

Hillsboro Props. v Public Utils. Comm'n (2003) 108 CA4th 246, 133 CR2d 343: §15.38
Hobbs v Northeast Sacramento County Sanitation Dist. (1966) 240 CA2d 552, 49 CR 606: §2.66
Hobbs v Tom Reed Gold Mining Co. (1913) 164 C 497, 129 P 781: §2.54
Hock v Superior Court (1990) 221 CA3d 670, 270 CR 579: §15.8
Hodge v Superior Court (2006) 145 CA4th 278, 51 CR3d 519: §16.148
Hoertkorn, Estate of (1979) 88 CA3d 461, 151 CR 806: App A
Hoffman v State Bar (2003) 113 CA4th 630, 6 CR3d 592: §2.45
Hogar Dulce Hogar v Community Dev. Comm'n (2003) 110 CA4th 1288, 2 CR3d 497: §2.13
Hogya v Superior Court (1977) 75 CA3d 122, 142 CR 325: §15.60, App A
Hollaway v Scripps Mem. Hosp. (1980) 111 CA3d 719, 168 CR 782: App A
Hollister Convalescent Hosp., Inc. v Rico (1975) 15 C3d 660, 125 CR 757: §11.23
Holloway, People v (2004) 33 C4th 96, 14 CR3d 212: §16.121
Hollywood Circle, Inc. v Department of Alcoholic Beverage Control (1961) 55 C2d 728, 13 CR 104: §§3.10, 9.54
Hollywood Park Land Co. v Golden State Transp. Fin. Corp. (2009) 178 CA4th 924, 100 CR3d 752: §27.3
Holt v Kelly (1978) 20 C3d 560, 143 CR 625: §24.14
Honore v Superior Court (1969) 70 C2d 162, 74 CR 233: §18.3
Hooser v Superior Court (2000) 84 CA4th 997, 101 CR2d 341: §19.6
Hop, In re (1981) 29 C3d 82, 171 CR 721: §4.25
Hope Int'l Univ. v Superior Court (2004) 119 CA4th 719, 14 CR3d 643: §16.75, App A
Horner v Board of Trustees (1964) 61 C2d 79, 37 CR 185: §3.9
Houghtaling v Superior Court (1993) 17 CA4th 1128, 21 CR2d 855: §12.27
Houser v Superior Court (1932) 121 CA 31, 8 P2d 483: §6.31
Housing Auth. of the City of Eureka v Superior Court (1950) 35 C2d 550, 219 P2d 457, superseded by statute on other grounds: §15.16
Howard v Superior Court (1944) 25 C2d 784, 154 P2d 849: §§15.31, 15.33, 15.35
Howard S. Wright Constr. Co. v Superior Court (2003) 106 CA4th 314, 130 CR2d 641: §16.13
Howell v Superior Court (1962) 211 CA2d 487, 27 CR 149: §§15.68, 16.97
Hughson v Superior Court (1932) 120 CA 658, 8 P2d 227: §15.34
Hull, People v (1991) 1 C4th 266, 2 CR2d 526: §§16.3, 16.5-16.6, 18.76
Hunt, Marriage of (1985) 172 CA3d 872, 218 CR 451: App A
Hunter v Superior Court (1939) 36 CA2d 100, 97 P2d 492: §16.131
Huntington Beach Police Officers Ass'n v City of Huntington Beach (1976) 58 CA3d 492, 129 CR 893: §2.50
Huntington Park Redev. Agency v Martin (1985) 38 C3d 100, 211 CR 133: §2.58
Huson v Superior Court (1963) 220 CA2d 140, 33 CR 568: §15.25
Huston v Huston (1948) 87 CA2d 8, 195 P2d 551: §26.13
Hypertouch, Inc. v Superior Court (2005) 128 CA4th 1527, 27 CR3d 839: §16.129B

I

IT Corp. v County of Imperial (1983) 35 C3d 63, 196 CR 715: §§6.30, 6.36
Imagistics Int'l, Inc. v Department of Gen. Servs. (2007) 150 CA4th 581, 59 CR3d 18: §§2.16, 2.34, 5.34
Imuta v Nakano (1991) 233 CA3d 1570, 285 CR 681: §16.127
Independent Energy Producers Ass'n v McPherson (2006) 38 C4th 1020, 44 CR3d 644: §§2.48, 15.67
Industrial Welfare Comm'n v Superior Court (1980) 27 C3d 690, 166 CR 331: §27.8
Inland Counties Reg'l Ctr. v Office of Admin. Hearings (1987) 193 CA3d 700, 238 CR 422: §5.35
In re _____ (*see* name of party)
Interinsurance Exch. of the Automobile Club v Superior Court (2007) 148 CA4th 1218, 56 CR3d 421: §§15.56, 15.61, 15.70
International Ass'n of Fire Fighters v City of Oakland (1985) 174 CA3d 687, 220 CR 256: §4.27
International Film Inv. v Arbitration Tribunal of Directors Guild (1984) 152 CA3d 699, 199 CR 690: App A
International Typographical Union Negotiated Pension Plan v Ad Compositors, Inc. (1983) 142 CA3d 733, 191 CR 227: App A
International Union of Operating Eng'rs v Superior Court (1989) 207 CA3d 340, 254 CR 782: §6.31
Irvine v Citrus Pest Dist. No. 2 (1944) 62 CA2d 378, 144 P2d 857: §4.14
Irwin Mem. Blood Ctrs. v Superior Court (1991) 229 CA3d 151, 279 CR 911: §16.87
Islander Yachts, Inc. v One Freeport 36-Ft. Vessel (1985) 173 CA3d 1081, 219 CR 654: App A
Isrin v Superior Court (1965) 63 C2d 153, 45 CR 320: §15.8
Ivory v Superior Court (1938) 12 C2d 455, 85 P2d 894: §§15.32, 23.33, 23.47

J

J. C. Penney Co. v Superior Court (1959) 52 C2d 666, 343 P2d 919: §16.113, App A
JKH Enters., Inc. v Department of Indus. Relations (2006) 142 CA4th 1046, 48 CR3d 563: §11.8
Jackson v Gourley (2003) 105 CA4th 966, 130 CR2d 72: §2.28
Jacqueline H., In re (1979) 94 CA3d 808, 156 CR 765: App A
Jacuzzi v Jacuzzi Bros., Inc. (1963) 218 CA2d 24, 32 CR 188: §16.102
Jaffe v Carroll (1973) 35 CA3d 53, 110 CR 435: §5.31
Jakks Pac., Inc. v Superior Court (2008) 160 CA4th 596, 72 CR3d 914: §16.99
James v Superior Court (1968) 261 CA2d 415, 67 CR 783: App A

James G. v Superior Court (2000) 80 CA4th 275, 95 CR2d 135: §23.22
Jenkins v Knight (1956) 46 C2d 220, 293 P2d 6: §§2.6, 2.45, 15.7
Jennifer T. v Superior Court (2007) 159 CA4th 254, 71 CR3d 293: §16.52
Jensen v Superior Court (2008) 160 CA4th 266, 72 CR3d 594: §11.16
Jessen v Hartford Cas. Ins. Co. (2003) 111 CA4th 698, 3 CR3d 877: §17.11
Jevne v Superior Court (2005) 35 C4th 935, 28 CR3d 685: §16.99
Jogani v Superior Court (2008) 165 CA4th 901, 81 CR3d 503: §16.148
John B. v Superior Court (2006) 38 C4th 1177, 45 CR3d 316: §16.118
John Breuner Co. v Bryant (1951) 36 C2d 877, 229 P2d 356: App A
Johnson v Langdon (1902) 135 C 624, 67 P 1050: §2.54
Johnson v Superior Court (2006) 143 CA4th 297, 49 CR3d 52: §15.63
Jolicoeur v Mihaly (1971) 5 C3d 565, 96 CR 697: §27.8
Jollie v Superior Court (1951) 38 C2d 52, 237 P2d 641: §17.30
Jonathan L. v Superior Court (2008) 165 CA4th 1074, 81 CR3d 571: §§15.67, 16.143A
Jonathon M. v Superior Court (2006) 141 CA4th 1093, 46 CR3d 798: §16.5
Jones v Superior Court (1994) 26 CA4th 92, 31 CR2d 264: §§17.28, 17.35, 19.7, 24.65
Jones v Superior Court (1981) 119 CA3d 534, 174 CR 148: §16.118
Juarez v Superior Court (1982) 31 C3d 759, 183 CR 852: App A
Justin L. v Superior Court (2008) 165 CA4th 1406, 81 CR3d 884: §16.143A

K

K.R.L. Partnership v Superior Court (2004) 120 CA4th 490, 15 CR3d 517: §17.32
KB Home v Superior Court (2003) 112 CA4th 1076, 5 CR3d 587: §16.147
KSDO v Superior Court (1982) 136 CA3d 375, 186 CR 211: §16.121
Kahn v Superior Court (1987) 188 CA3d 752, 233 CR 662: §16.118
Kaplan v Coldwell Banker Residential Affiliates, Inc. (1997) 59 CA4th 741, 69 CR2d 640: §11.34
Kaplan's Fruit & Produce Co. v Superior Court (1979) 26 C3d 60, 160 CR 745: §16.150
Karriker, People v (2007) 149 CA4th 763, 57 CR3d 412: §2.22
Katosh v Sonoma County Employees' Retirement Ass'n (2008) 163 CA4th 56, 77 CR3d 324: §§2.1, 2.32, 3.3, 3.13
Kaufman v Court of Appeal (1982) 31 C3d 933, 184 CR 302: §27.9
Kaufman & Broad Communities, Inc. v Performance Plastering, Inc. (2005) 133 CA4th 26, 34 CR3d 520: §20.20
Kavanaugh v West Sonoma County Union High Sch. Dist. (2003) 29 C4th 911, 129 CR2d 811: §§2.5-2.6, 2.20, 15.7
Kawasaki Motors Corp. v Superior Court (2000) 85 CA4th 200, 101 CR2d 863: §15.56
Keeler v Superior Court (1956) 46 C2d 596, 297 P2d 967: §§2.33, 3.4
Keenan v Superior Court (2002) 27 C4th 413, 117 CR2d 1: §22.25
Kennaley v Superior Court (1954) 43 C2d 512, 275 P2d 1: App A
Kennedy/Jenks Consultants, Inc. v Superior Court (2000) 80 CA4th 948, 95 CR2d 817: §25.7
Kentucky Fried Chicken v Superior Court (1997) 14 C4th 814, 59 CR2d 756: §16.67
Kerr-McGee Chem. Corp. v Superior Court (1984) 160 CA3d 594, 206 CR 654: §16.112
Kettenhofen v Superior Court (1961) 55 C2d 189, 10 CR 356: §§26.9, 26.21
Kettenhofen v Superior Court (1961) 55 C2d 189, 358 P2d 684: §26.9
Kim, People v (2009) 45 C4th 1078, 90 CR3d 355: §15.44
King v Martin (1971) 21 CA3d 791, 98 CR 711: §10.9
King v Meese (1987) 43 C3d 1217, 240 CR 829: §6.36
King v Woods (1983) 144 CA3d 571, 192 CR 724: §§10.9, 10.16-10.19, 24.47-24.51
Kingston v Department of Motor Vehicles (1969) 271 CA2d 549, 76 CR 614: §9.17
Kinoshita v Horio (1986) 186 CA3d 959, 231 CR 241: App A
Kirby v Alcoholic Beverage Control Appeals Bd. (1968) 261 CA2d 119, 67 CR 628: §16.24
Kirschenman v Superior Court (1994) 30 CA4th 832, 36 CR2d 166: §16.82
Klose v Superior Court (1950) 96 CA2d 913, 217 P2d 97: §2.10
Knight v Ferguson (2007) 149 CA4th 1207, 57 CR3d 823: §17.11
Knoll v Davidson (1974) 12 C3d 335, 116 CR 97: §15.21
Koch-Ash v Superior Court (1986) 180 CA3d 689, 225 CR 657: App A
Koehn v State Bd. of Equalization (1958) 166 CA2d 109, 333 P2d 125: §4.15
Kohn v Superior Court (1966) 239 CA2d 428, 48 CR 832: §16.5
Kowis v Howard (1992) 3 C4th 888, 12 CR2d 728: §§9.55, 18.29, 22.14, 22.17, 22.23, 25.13, 27.15
Kramer v Superior Court (1950) 36 C2d 159, 222 P2d 874: §16.143
Kraus v Davis (1970) 6 CA3d 484, 85 CR 846: App A
Kreling v Kreling (1897) 116 C 458, 48 P 383: §26.12
Kresteller v Superior Court (1967) 248 CA2d 545, 56 CR 771: §16.93
Kristin H., In re (1996) 46 CA4th 1635, 54 CR2d 722: §4.20
Krueger v Superior Court (1979) 89 CA3d 934, 152 CR 870: §§5.64, 18.42, 25.14
Kugler v Yocum (1968) 69 C2d 371, 71 CR 687: §2.46
Kumar v Superior Court (1982) 32 C3d 689, 186 CR 772: §16.54
Kwolek, People v (1995) 40 CA4th 1521, 48 CR2d 325: §4.27

L

La Prade v Department of Water & Power (1945) 27 C2d 47, 162 P2d 13: §4.14
La Seigneurie U.S. Holdings, Inc. v Superior Court (1994) 29 CA4th 1500, 35 CR2d 175: §16.5
Lambert v Municipal Court (1960) 53 C2d 690, 3 CR 168: §16.89
Lambert v Municipal Court (1960) 179 CA2d 682, 3 CR 894: §15.18
Langan v City of El Monte (2000) 79 CA4th 608, 94 CR2d 254: §3.9
Langford v Superior Court (1987) 43 C3d 21, 233 CR 387: §§22.23, 25.12
Lantz v Superior Court (1994) 28 CA4th 1839, 34 CR2d 358: §§12.8, 20.4
Larsen v DMV (1995) 12 C4th 278, 48 CR2d 151: §2.40
Larson v City of Redondo Beach (1972) 27 CA3d 332, 103 CR 592: §§8.40-8.41
Lauermann v Superior Court (2005) 127 CA4th 1327, 26 CR3d 258: §23.44
Laurel Heights Improvement Ass'n v Regents of Univ. of Cal. (1988) 47 C3d 376, 253 CR 426: §24.28
Lautrup, Inc. v Trans-West Discount Corp. (1976) 64 CA3d 316, 134 CR 348: §16.8
Lawrence v Superior Court (1988) 206 CA3d 611, 253 CR 748: §§24.60, 24.65
Lazar v Hertz Corp. (1999) 69 CA4th 1494, 82 CR2d 368: §16.107
Le Francois v Goel (2005) 35 C4th 1094, 29 CR3d 249: §25.18
Leader v Health Indus. of Am., Inc. (2001) 89 CA4th 603, 107 CR2d 489: App A
League of Women Voters v Eu (1992) 7 CA4th 649, 9 CR2d 416: §5.66
League of Women Voters v McPherson (2006) 145 CA4th 1469, 52 CR3d 585: §2.56
Leal v Gourley (2002) 100 CA4th 963, 123 CR2d 220: §3.12
Leamon v Krajkiewcz (2003) 107 CA4th 424, 132 CR2d 362: §25.17
Lee v Blue Shield (2007) 154 CA4th 1369, 65 CR3d 612: §§2.38, 2.55, 5.31, 5.36
Lee v Superior Court (1961) 196 CA2d 161, 16 CR 268: §15.19
Lee, Estate of (1945) 26 C2d 295, 158 P2d 193: §26.17
Legislature v Eu (1991) 54 C3d 492, 286 CR 283: §27.8
Legislature v Reinecke (1972) 6 C3d 595, 99 CR 481; see also Silver v Brown (1965) 63 C2d 270, 46 CR 308: §2.44
Lemelle v Superior Court (1978) 77 CA3d 148, 143 CR 450: §§20.4-20.5, 20.9
Lempert v Superior Court (2003) 112 CA4th 1161, 5 CR3d 700: §22.19
Leone v Medical Bd. (2000) 22 C4th 660, 94 CR2d 61: §§16.14, 17.24, 17.29, 22.17
Lerner v Superior Court (1952) 38 C2d 676, 242 P2d 321: §26.6
Lesko v Superior Court (1982) 127 CA3d 476, 179 CR 595: §16.112
Lester v Lennane (2000) 84 CA4th 536, 101 CR2d 86: App A
Leung v Verdugo Hills Hosp. (2008) 168 CA4th 205, 85 CR3d 203: §§26.3, 26.12
Lewis v Superior Court (1999) 19 C4th 1232, 82 CR2d 85: §§8.22, 9.20, 22.19, 24.4, 24.15, 24.19, 25.13
Leyva v Superior Court (1985) 164 CA3d 462, 210 CR 545: §16.67
Liberal Catholic Church v Rogers (1944) 65 CA2d 196, 150 P2d 486: §2.54
Lin v City of Pleasanton (2009) 176 CA4th 408, 96 CR3d 730: §2.46
Lincoln Nat'l Life Ins. Co. v Mitchell (1974) 41 CA3d 16, 115 CR 723: App A
Lippman v City of Los Angeles (1991) 234 CA3d 1630, 286 CR 406: §§11.3-11.4
Lister v Superior Court (1979) 98 CA3d 64, 159 CR 280: §16.133
Little v Los Angeles County Assessment Appeals Bds. (2007) 155 CA4th 915, 66 CR3d 401: §§2.15, 2.60, 2.62, 5.121, 11.7
Little Co. of Mary Hosp. v Superior Court (2008) 162 CA4th 261, 75 CR3d 519: §16.106
Lockyer v City & County of San Francisco (2004) 33 C4th 1055, 17 CR3d 225: §§2.21, 27.2
Lockyer v County of Santa Cruz (2006) 416 F Supp 2d 797: §2.56
Lockyer, People ex rel v Superior Court (2004) 122 CA4th 1060, 19 CR3d 324: §15.62
Lois M., In re (1989) 214 CA3d 1036, 263 CR 100: §15.43
Lois R. v Superior Court (1971) 19 CA3d 895, 97 CR 158: §18.18
Lomeli v Department of Corrections (2003) 108 CA4th 788, 134 CR2d 179: §§2.28, 2.36
Lompoc Unified Sch. Dist. v Superior Court (1993) 20 CA4th 1688, 26 CR2d 122: §16.67
Long Beach Mem. Med. Ctr. v Superior Court (2009) 172 CA4th 865, 91 CR3d 494: §16.51
Los Angeles Airways, Inc. v Hughes Tool Co. (1979) 95 CA3d 1, 156 CR 805: §§15.47-15.48
Los Angeles County Dep't of Children & Family Servs. (2008) 162 CA4th 1408, 77 CR3d 52: §16.143A
Los Angeles County Employees Ass'n, Local 660 v County of Los Angeles (1973) 33 CA3d 1, 108 CR 625: §§2.7-2.8, 2.22, 2.50
Los Angeles County Metro. Transp. Auth. v Superior Court (2004) 123 CA4th 261, 20 CR3d 92: §16.105
Los Angeles Dep't of Children & Family Servs. v Superior Court (1995) 37 CA4th 439, 43 CR2d 757: §24.65
Los Angeles Teachers Union, Local 1021 v Los Angeles City Bd. of Educ. (1969) 71 C2d 551, 78 CR 723: §2.56
Los Angeles Times v Superior Court (2003) 114 CA4th 247, 7 CR3d 524: §15.68
Los Angeles Unified Sch. Dist. v Superior Court (2007) 151 CA4th 759, 60 CR3d 445: §§16.14-16.15, 16.17, 24.22
Louie Queriolo Trucking, Inc. v Superior Court (1967) 252 CA2d 194, 60 CR 389: App A
Loustalot v Superior Court (1947) 30 C2d 905, 186 P2d 673: §16.46
Lowell v Mother's Cake & Cookie Co. (1978) 79 CA3d 13, 144 CR 664: §8.46
Lund v Superior Court (1964) 61 C2d 698, 39 CR 891: §§15.20, 16.82, 16.125, 16.131, 16.138
Lyle v Superior Court (1981) 122 CA3d 470, 175 CR 918: §16.102
Lynch, People ex rel v Superior Court (1970) 1 C3d 910, 83 CR 670: §25.14

M

MCM Constr. Inc. v City & County of San Francisco (1998) 66 CA4th 359, 78 CR2d 44: §11.8
MHC Operating Ltd. Partnership v City of San Jose (2003) 106 CA4th 204, 130 CR2d 564: §11.12
Maben v Superior Court (1967) 255 CA2d 708, 63 CR 439: §15.26
MacFarland v Superior Court (1934) 3 CA2d 173, 38 P2d 800: §15.25
Maddy v Castle (1976) 58 CA3d 716, 130 CR 160, disapproved in part on other grounds by Doers v Golden Gate Hwy. & Transp. Dist. (1979) 23 C3d 180, 151 CR 837: App A
Maggi v Superior Court (2004) 119 CA4th 1218, 15 CR3d 161: §§16.117, 16.125, App A
Mahdavi v Superior Court (2008) 166 CA4th 32, 82 CR3d 121: §12.22
Main Fiber Prods., Inc. v Morgan & Franz Ins. Agency (1999) 73 CA4th 1130, 87 CR2d 108: §§16.49, 17.24
Maldonado v Superior Court (1996) 45 CA4th 397, 52 CR2d 805: §22.19
Malibu W. Swimming Club v Flournoy (1976) 60 CA3d 161, 131 CR 279: §2.57
Mallarino v Superior Court (1953) 115 CA2d 781, 252 P2d 993: App A
Manela v Superior Court (2009) 177 CA4th 1139, 99 CR3d 736: §16.121
Manhattan Sepulveda, Ltd. v City of Manhattan Beach (1994) 22 CA4th 865, 27 CR2d 565: §§11.5, 11.8
Manufactured Home Communities, Inc. v County of San Luis Obispo (2008) 167 CA4th 705, 84 CR3d 367: §§3.8, 3.11
Manzetti v Superior Court (1993) 21 CA4th 373, 25 CR2d 857: §24.65
Marcus v Superior Court (1971) 18 CA3d 22, 95 CR 545: §16.120
Marcus, In re (2006) 138 CA4th 1009, 41 CR3d 861: §16.142
Mardardo F. v Superior Court (2008) 164 CA4th 481, 78 CR3d 884: §16.143A
Mario Saikhon, Inc. v Agricultural Labor Relations Bd. (1983) 140 CA3d 581, 189 CR 632: §§16.19, 18.65
Mark v Superior Court (1900) 129 C 1, 61 P 436: §26.9
Markley v Superior Court (1992) 5 CA4th 738, 7 CR2d 328: §22.10
Marriage of Dover (1971) 15 CA3d 675, 93 CR 384: §26.18
Marriage of Flaherty (1982) 31 C3d 637, 183 CR 508: §24.62
Marriage of Hunt (1985) 172 CA3d 872, 218 CR 451: App A
Marriage of Skelley (1976) 18 C3d 365, 134 CR 197: §§15.57, 17.21, App A
Marriage of Varner (1998) 68 CA4th 932, 80 CR2d 628: §26.8
Marron v Superior Court (2003) 108 CA4th 1049, 134 CR2d 358: §16.68
Marsh v Mountain Zephyr, Inc. (1996) 43 CA4th 289, 50 CR2d 493: App A
Maryland Cas. Co. v Andreini & Co. (2000) 81 CA4th 1413, 97 CR2d 752: §16.49
Mason v Superior Court (1985) 163 CA3d 989, 210 CR 63: §15.13
Mass v Superior Court (1961) 197 CA2d 430, 17 CR 549: §15.26
Mathew Zaheri Corp. v New Motor Vehicle Bd. (1997) 55 CA4th 1305, 64 CR2d 705: §11.15
Mauro B. v Superior Court (1991) 230 CA3d 949, 281 CR 507: §15.58
May v Board of Dirs. of El Camino Irrigation Dist. (1949) 34 C2d 125, 208 P2d 661: §2.58
McComb v Superior Court (1977) 68 CA3d 89, 137 CR 233: §16.133
McDonald v Antelope Valley Community College Dist. (2008) 45 C4th 88, 84 CR3d 734: §16.67
McDonald v Structured Asset Sales, LLC (2007) 154 CA4th 1068, 65 CR3d 366: §16.143
McDonough Power Equip. Co. v Superior Court (1972) 8 C3d 527, 530, 105 CR 330: App A
McGhan Med. Corp. v Superior Court (1992) 11 CA4th 804, 14 CR2d 264: §16.10
McGill v Regents of the Univ. of Cal. (1996) 44 CA4th 1776, 52 CR2d 466: §§2.1, 2.23, 2.32-2.33
McHugh v Santa Monica Rent Control Bd. (1989) 49 C3d 348, 261 CR 318: §4.14
McKesson HBOC, Inc. v Superior Court (2004) 115 CA4th 1229, 9 CR3d 812: §16.122
McLellan v McLellan (1972) 23 CA3d 343, 100 CR 258: §16.107
McMahan v City & County of San Francisco (2005) 127 CA4th 1368, 26 CR3d 509: §§20.17, 20.19
McMahan's of Santa Monica v City of Santa Monica (1983) 146 CA3d 683, 194 CR 582: §8.46
McMahon v Superior Court (2003) 106 CA4th 112, 130 CR2d 407: §16.72, App A
McMahon v Superior Court (1967) 255 CA2d 363, 62 CR 873: §§16.131, 16.139
McManus v KPAL Broad. Corp. (1960) 182 CA2d 558, 6 CR 441: §6.31
McPheeters v Board of Med. Exam'rs (1946) 74 CA2d 46, 168 P2d 65: §11.14
Meadow v Superior Court (1963) 59 C2d 610, 30 CR 824: §16.103
Medical Bd. v Superior Court (1991) 227 CA3d 1458, 278 CR 247: §§6.24, 6.27
Mediterranean Exports, Inc. v Superior Court (1981) 119 CA3d 605, 174 CR 169: §16.106
Mednik v State Dep't. of Health Care Servs. (2009) 175 CA4th 631, 96 CR3d 112: §§2.3, 11.16
Medrano v WCAB (2008) 167 CA4th 56, 83 CR3d 802: §16.48
Mehr v Superior Court (1983) 139 CA3d 1044, 189 CR 138: §16.80
Mejia v City of Los Angeles (2007) 156 CA4th 151, 67 CR3d 228: §5.124
Melancon v Superior Court (1954) 42 C2d 698, 268 P2d 1050: §§15.18, 16.89
Melchor Inv. Co. v Rolm Sys. (1992) 3 CA4th 587, 4 CR2d 343: App A
Mendez v Superior Court (2001) 87 CA4th 791, 104 CR2d 839: §15.40
Mendoza v Continental Sales Co. (2006) 140 CA4th 1395, 45 CR3d 525: §16.107
Mendoza v Small Claims Court (1958) 49 C2d 668, 321 P2d 9: §16.88
Mendoza v State (2007) 149 CA4th 1034, 57 CR3d 505: §2.25
Meranda P., In re (1997) 56 CA4th 1143, 65 CR2d 913: §§4.18, 4.20, 15.58

Merced County Taxpayers Ass'n v Cardella (1990) 218 CA3d 396, 267 CR 62: §2.63
Mercuro v Superior Court (2002) 96 CA4th 167, 116 CR2d 671: §16.100
Messih v Lee Drug, Inc. (1985) 174 CA3d 312, 220 CR 43: App A
Mike Moore's 24-Hour Towing v City of San Diego (1996) 45 CA4th 1294, 53 CR2d 355: §3.20
Mileikowsky v Tenet Healthsystem (2005) 128 CA4th 262, 26 CR3d 831: §16.127
Mileikowsky v Tenet Healthsystem (2005) 128 CA4th 531, 27 CR3d 171: §§2.1, 2.38, 2.55
Mileikowsky v West Hills Hosp. & Med. Ctr. (2009) 45 C4th 1259, 91 CR3d 516: §§2.1, 2.38, 2.55
Miller v Municipal Court (1967) 249 CA2d 531, 57 CR 578: §§16.135-16.136
Miller v Superior Court (1968) 69 C2d 14, 69 CR 583: §15.21
Mills v County of Trinity (1979) 98 CA3d 859, 159 CR 679: §§26.2, 26.28
Mission Hosp. Reg'l Med. Ctr. v Shewry (2008) 168 CA4th 460, 85 CR3d 639: §§2.1, 2.5, 2.11-2.12, 2.19, 2.24, 2.28, 2.37, 11.7
Mission Imports, Inc. v Superior Court (1982) 31 C3d 921, 184 CR 296: App A
Mitchell v Superior Court (1984) 37 C3d 591, 208 CR 886: §16.122
Mitsubishi Materials Corp. v Superior Court (2003) 113 CA4th 55, 6 CR3d 159: §16.108, App A
Moffat v Moffat (1980) 27 C3d 645, 165 CR 877: §§15.37, 16.135
Moles v Regents of Univ. of Cal. (1982) 32 C3d 867, 187 CR 557: §§11.31, 25.17
Monarch Healthcare v Superior Court (2000) 78 CA4th 1282, 93 CR2d 619: App A
Moncharsh v Heily & Blase (1992) 3 C4th 1, 10 CR2d 183: §16.99
Monsan Homes, Inc. v Pogrebneak (1989) 210 CA3d 826, 258 CR 676: §15.48
Monterey Club v Superior Court (1941) 48 CA2d 131, 119 P2d 349: §§15.53, 15.68
Monterey Club v Superior Court (1941) 44 CA2d 351, 112 P2d 321: §15.34
Moore v City of Los Angeles (2007) 156 CA4th 373, 67 CR3d 218: §3.7
Moosa v State Personnel Bd. (2002) 102 CA4th 1379, 126 CR2d 321: §2.42
Moran v Department of Motor Vehicles (2006) 139 CA4th 688, 43 CR3d 116: §15.5
Moran v Superior Court (1983) 35 C3d 229, 197 CR 546: §16.112
Morehart v County of Santa Barbara (1994) 7 C4th 725, 29 CR2d 804: §§5.119, 11.9, 12.19, 18.46
Morelli v Superior Court (1969) 1 C3d 328, 82 CR 375: §16.139
Morongo Band of Mission Indians v State Water Resources Control Bd. (2009) 45 C4th 731, 88 CR3d 610: §3.11
Morris v Harper (2001) 94 CA4th 52, 114 CR2d 62: §§2.1, 2.5-2.7
Morrisette v Superior Court (1965) 236 CA2d 597, 46 CR 153: §16.93
Morton v Superior Court (1953) 119 CA2d 665, 260 P2d 215: §6.28
Mosk v Superior Court (1979) 25 C3d 474, 159 CR 494: §2.65
Moskowitz v Superior Court (1982) 137 CA3d 313, 187 CR 4: §16.118
Moss v County of Humboldt (2008) 162 CA4th 1041, 76 CR3d 428: §§3.13, 3.16
Most v First Nat'l Bank (1966) 246 CA2d 425, 54 CR 669: §2.54
Motors Ins. Corp. v Division of Fair Employment Practices (1981) 118 CA3d 209, 173 CR 332: §2.33
Muller v Fresno Community Hosp. & Med. Ctr. (2009) 172 CA4th 887, 91 CR3d 617: App A
Municipal Court v Superior Court (1993) 5 C4th 1126, 22 CR2d 504: §15.55
Municipal Court v Superior Court (1988) 202 CA3d 957, 249 CR 182: §15.55
Municipal Court v Superior Court (1988) 199 CA3d 19, 244 CR 591: §5.65
Munoz v State (1995) 33 CA4th 1767, 39 CR2d 860: App A
Munroe v Los Angeles County Civil Serv. Comm'n (2009) 173 CA4th 1295, 93 CR3d 716: §§2.3, 2.5, 2.9, 11.16
Murphy, Estate of (1971) 16 CA3d 564, 94 CR 141: §26.19
Murrieta Valley Unified Sch. Dist. v County of Riverside (1991) 228 CA3d 1212, 279 CR 421: §§5.65, 18.47
Musicians Union, Local No. 6 v Superior Court (1968) 69 C2d 695, 73 CR 201: §16.92

N

NBC Subsidiary (KNBC-TV), Inc. v Superior Court (1999) 20 C4th 1178, 86 CR2d 778: §§15.67, 20.23
Napa Valley Elec. Co. v Railroad Comm'n (1920) 251 US 366, 64 L Ed 310, 40 S Ct 174: §27.3
Nasha v City of Los Angeles (2004) 125 CA4th 470, 22 CR3d 772: §7.12
Nasha, LLC v City of Los Angeles (2004) 125 CA4th 470, 22 CR3d 772: §3.11
Nassif v Municipal Court (1989) 214 CA3d 1294, 263 CR 195: §12.19
Nathanson v Superior Court (1974) 12 C3d 355, 115 CR 783: §16.143
Neff v Ernst (1957) 48 C2d 628, 311 P2d 849: §26.16
Neighbors in Support of Appropriate Land Use v County of Tuolumne (2007) 157 CA4th 997, 68 CR3d 882: §§2.9, 2.41, 5.37
Neilsen v Saylors (1956) 146 CA2d 139, 303 P2d 781: App A
Nelson v Anderson (1999) 72 CA4th 111, 84 CR2d 753: §5.123
Nelson v Orosco (1981) 117 CA3d 73, 172 CR 457: §26.8
Nelson v Superior Court (1937) 9 C2d 729, 73 P2d 232: §16.131
Nelson v Superior Court (1950) 97 CA2d 78, 217 P2d 119: App A
Nerhan v Stinson Beach County Water Dist. (1994) 27 CA4th 536, 33 CR2d 10: §11.6
Nestande v Watson (2003) 111 CA4th 232, 4 CR3d 18: App A
New W. Fed. Sav. & Loan Ass'n v Superior Court (1990) 223 CA3d 1145, 273 CR 37: §§16.112, 16.114
New York Life Ins. Co. v Bank of Italy (1923) 60 CA 602, 214 P 61 (court permitted amicus curiae to seek rehearing following opinion on appeal), disapproved on other grounds in In re Marriage of Saslow (1985) 40 C3d 848, 221 CR 546: §25.18

New York Times Co. v Superior Court (1990) 51 C3d 453, 273 CR 98: §16.132
Newland v Kizer (1989) 209 CA3d 647, 257 CR 450: §2.29
Newland v Superior Court (1995) 40 CA4th 608, 47 CR2d 24: §16.125
Newman v Superior Court (1986) 179 CA3d 377, 224 CR 538: §27.32
Ng v Superior Court (1992) 4 C4th 29, 13 CR2d 856: §§8.22, 9.20, 22.19, 22.24, 24.4, 25.2, 25.7
Ng v Superior Court (1997) 52 CA4th 1010, 61 CR2d 49: §15.55
Nguyen v Superior Court (2007) 150 CA4th 1006, 58 CR3d 802: §§15.69, 21.2-21.3, 21.6
Nielsen v Stumbos (1990) 226 CA3d 301, 276 CR 272: §26.5
Nightlife Partners, Ltd. v City of Beverly Hills (2003) 108 CA4th 81, 133 CR2d 234: §3.11
No Oil, Inc. v Occidental Petroleum Corp. (1975) 50 CA3d 8, 123 CR 589: §25.17
Noonan, Estate of (1952) 113 CA2d 899, 249 P2d 306: §16.143
Northcutt v Superior Court (1924) 66 CA 350, 226 P 25: App A
Norton v San Bernardino City Unified Sch. Dist. (2008) 158 CA4th 749, 69 CR3d 917: §2.19
Nuckolls v Bank of Cal., Nat. Ass'n (1936) 7 C2d 574, 61 P2d 927: §26.18

O

O. S., In re (2002) 102 CA4th 1402, 126 CR2d 571: §4.20
O.W.L. Found. v City of Rohnert Park (2008) 168 CA4th 568, 86 CR3d 1: §§2.16, 2.22, 2.32-2.34, 2.41, 3.4, 3.18
OXY Resources Cal. LLC v Superior Court (2004) 115 CA4th 874, 9 CR3d 621: §§16.115, 16.122
Oaks Mgmt. Corp. v Superior Court (2006) 145 CA4th 453, 51 CR3d 561: §15.67
O'Brien v Olson (1941) 42 CA2d 449, 109 P2d 8: §4.6
Ocean Park Assoc. v Santa Monica Rent Control Bd. (2004) 114 CA4th 1050, 8 CR3d 421: §3.6
Oceanside Union Sch. Dist. v Superior Court (1962) 58 C2d 180, 23 CR 375: §§16.115-16.116
O'Connell v Superior Court (2006) 141 CA4th 1452, 47 CR3d 147: §§16.150-16.151
O'Connor v Superior Court (1979) 90 CA3d 107, 153 CR 306: §16.150
O'Hearn v Hillcrest Gym & Fitness Ctr., Inc. (2004) 115 CA4th 491, 9 CR3d 342: §§16.49, 17.24
Ohton v Board of Trustees of Cal. State Univ. (2007) 148 CA4th 749, 56 CR3d 111: §§2.1, 2.32
Oksner v Superior Court (1964) 229 CA2d 672, 40 CR 621: §24.25
Oliveros v Couny of Los Angeles (2004) 120 CA4th 1389, 16 CR3d 638: App A
Olson v Cory (1983) 35 C3d 390, 197 CR 843: §20.6
Olson v Superior Court (1969) 274 CA2d 311, 79 CR 136: §26.8
Olympic Club v Superior Court (1991) 229 CA3d 358, 282 CR 1: §16.124
Omaha Indem. Co. v Superior Court (1989) 209 CA3d 1266, 258 CR 66: §§15.58, 15.69, 15.71, 16.106-16.107, 17.28, 17.31-17.32, 18.25, 18.55, 22.14-22.16, 27.32
Ombudsman Servs. of N. Cal. v Superior Court (2007) 154 CA4th 1233, 65 CR3d 456: §§15.12, 15.53, 15.62, 15.67, 16.118, 19.6, 22.23
Orloff, People ex rel v Pacific Bell (2003) 31 C4th 1132, 7 CR3d 315: §16.33
Otto v Los Angeles Unified Sch. Dist. (2003) 106 CA4th 328, 130 CR2d 512: App A
Outboard Marine Corp. v Superior Court (1976) 59 CA3d 434, 130 CR 642: App A
Overstreet v County of Butte (1962) 57 C2d 504, 20 CR 631: §9.54

P

PG&E v State Bd. of Equalization (1980) 27 C3d 277, 165 CR 122: §2.62
PG&E Corp. v PUC (2004) 118 CA4th 1174, 13 CR3d 630: §15.59
Pacific Bell v Public Utils. Comm'n (2000) 79 CA4th 269, 93 CR2d 910: §§15.38, 16.44
Pacific Indem. Co. v Superior Court (1966) 246 CA2d 63, 54 CR 470: §15.12
Pacific Legal Found. v California Coastal Comm'n (1982) 33 C3d 158, 188 CR 104: §2.37
Pacific Tel. & Tel. Co. v Superior Court (1970) 2 C3d 161, 84 CR 718: §§16.115, 16.120
Page v Insurance Co. of N. Am. (1969) 3 CA3d 121, 83 CR 44: §15.48
Palay v Superior Court (1993) 18 CA4th 919, 22 CR2d 839: §§16.116, 16.118, 16.121
Palma v U.S. Indus. Fasteners (1984) 36 C3d 171, 681 P2d 893: §19.5
Palma v U.S. Indus. Fasteners, Inc. (1984) 36 C3d 171, 178 n5-6, 203 CR 626: §24.15
Palma v U.S. Indus. Fasteners, Inc. (1984) 36 C3d 171, 203 CR 626: §§8.22, 8.27, 8.39, 9.55, 22.9, 22.18, 22.20, 22.23, 22.28, 22.30, 24.7, 24.38, 25.2, 25.6-25.7
Palos Verdes Faculty Ass'n v Palos Verdes Peninsula Unified Sch. Dist. (1978) 21 C3d 650, 147 CR 359: §11.7
Pandazos v Superior Court (1997) 60 CA4th 324, 70 CR2d 669: §16.5
Paneno v WCAB (1992) 4 CA4th 136, 5 CR2d 461: §16.47
Parada v Small Claims Court (1977) 70 CA3d 766, 139 CR 87: §12.26
Parada v Superior Court (2009) 176 CA4th 1554, 98 CR3d 743: §16.100
Paramount Pictures Corp. v Davis (1964) 228 CA2d 827, 39 CR 791: §26.9
Parker v Bowron (1953) 40 C2d 344, 254 P2d 6: §8.48
Paterno v Superior Court (2008) 163 CA4th 1342, 78 CR3d 244: §§16.115, 16.117
Patterson v Board of Supervisors (1947) 79 CA2d 670, 180 P2d 945: §§8.26, 9.4
Patterson v Municipal Court (1965) 232 CA2d 289, 42 CR 769: §16.88
Patterson v Sharp (1967) 253 CA2d 838, 61 CR 517: §§2.65, 15.9

Patterson Flying Serv. v Department of Pesticide Regulation (2008) 161 CA4th 411, 74 CR3d 290: §3.16
Paul W., In re (2007) 151 CA4th 37, 60 CR3d 329: §§4.18-4.19, 15.39, 15.42
Pavlovich v Superior Court (2002) 29 C4th 262, 127 CR2d 329: §16.56
Payless Drug Store v Superior Court (1993) 20 CA4th 277, 24 CR2d 506: §23.4
Payne v Superior Court (1976) 17 C3d 908, 132 CR 405: §15.10
Peltier v McCloud River R.R. (1995) 34 CA4th 1809, 41 CR2d 182: App A
Penney, J. C., Co. v Superior Court (1959) 52 C2d 666, 343 P2d 919: §16.113, App A
People v _____ (*see* name of defendant)
People ex rel _____ (*see* name of relator)
Peralta Fed'n of Teachers v Peralta Community College Dist. (1979) 24 C3d 369, 155 CR 679: §5.73
Perlman v Municipal Court (1979) 99 CA3d 568, 160 CR 567: §§5.67, 18.44
Perry v Jordan (1949) 34 C2d 87, 207 P2d 47: §27.8
Peters v Superior Court (1989) 212 CA3d 218, 260 CR 426: §15.8
Peterson v Lampton (1941) 46 CA2d 751, 116 P2d 952: §26.12
Peterson v Superior Court (1982) 31 C3d 147, 181 CR 784: §§16.87, 16.106, 18.67
Pfeiffer Venice Props. v Superior Court (2003) 107 CA4th 761, 132 CR2d 400: §16.5
Phelan v Superior Court (1950) 35 C2d 363, 217 P2d 951: §§5.54, 15.58, 15.60, 15.65, 15.68
Phelps v State Water Resources Control Bd. (2007) 157 CA4th 89, 68 CR3d 350: §3.3
Philippine Export & Foreign Loan Guarantee Corp. v Chuidian (1990) 218 CA3d 1058, 267 CR 457: §15.48
Planned Parenthood Golden Gate v Superior Court (2000) 83 CA4th 347, 99 CR2d 627: §§16.87, 18.68
Polibrid Coatings, Inc. v Superior Court (2003) 112 CA4th 920, 6 CR3d 7: §16.73, App A
Pollak v State Personnel Bd. (2001) 88 CA4th 1394, 107 CR2d 39: §11.3
Pomona College v Superior Court (1996) 45 CA4th 1716, 53 CR2d 662: §3.4
Pomona Valley Hosp. Med. Ctr. v Superior Court (1997) 55 CA4th 93, 63 CR2d 743: §§7.3, 16.124
Popelka, Allard, McCowan & Jones v Superior Court (1980) 107 CA3d 496, 165 CR 748: §16.87
Porter v United Servs. Auto. Ass'n (2001) 90 CA4th 837, 108 CR2d 860: App A
Potomac Oil Co. v Dye (1909) 10 CA 534, 102 P 677: §2.54
Poway Royal Mobilehome Owners Ass'n v City of Poway (2007) 149 CA4th 1460, 58 CR3d 153: §16.107
Powers v City of Richmond (1995) 10 C4th 85, 40 CR2d 839: §§15.4, 15.59, 16.14-16.15, 16.20, 17.21, 17.24, 17.29-17.30
Pratt-Low Preserving Co. v Jordan (1933) 217 C 292, 18 P2d 676: §2.54
Premium Commercial Servs. Corp. v National Bank (1999) 72 CA4th 1493, 86 CR2d 65: §§17.23, 17.25, 17.28, 22.15
Prentiss v City of S. Pasadena (1993) 15 CA4th 85, 18 CR2d 641: §2.41
Preserve Shorecliff Homeowners v City of San Clemente (2008) 158 CA4th 1427, 71 CR3d 332: §7.9
Princess Cruise Lines, Ltd. v Superior Court (2009) 179 CA4th 36, 101 CR3d 323: §16.66
Professional Eng'rs in Cal. Gov't v State Personnel Bd. (1980) 114 CA3d 101, 170 CR 547: §10.14
Public Defenders' Org. v County of Riverside (2003) 106 CA4th 1403, 132 CR2d 81: §§11.5, 11.8, 11.12

Q

Quinchard v Board of Trustees of Alameda (1896) 113 C 664, 45 P 856: §15.29
Quintero v City of Santa Ana (2003) 114 CA4th 810, 7 CR3d 896: §3.11

R

R.S. v Superior Court (2009) 172 CA4th 1049, 91 CR3d 546: §16.118
Ra v Superior Court (2007) 154 CA4th 142, 64 CR3d 539: §§15.52, 16.68, 18.28
Raff v Raff (1964) 61 C2d 514, 39 CR 366: App A
Rail-Transport Employees Ass'n v Union Pac. Motor Freight (1996) 46 CA4th 469, 54 CR2d 713: §16.127
Rainer v Community Memorial Hosp. (1971) 18 CA3d 240, 95 CR 901: App A
Ramirez v Superior Court (1977) 72 CA3d 351, 140 CR 108: §§16.133, 16.140
Ramirez v Brown (1973) 9 C3d 199, 107 CR 137 (petition by ex-felons to compel election officials to register them as voters), rev'd on other grounds in Richardson v Ramirez (1974) 418 US 24, 41 L Ed 2d 551, 94 S Ct 2655: §27.8
Ramon v Aerospace Corp. (1996) 50 CA4th 1233, 58 CR2d 217: §11.5
Rancho Bernardo Dev. Co. v Superior Court (1992) 2 CA4th 358, 2 CR2d 878: §16.119
Rao v Campo (1991) 233 CA3d 1557, 285 CR 691: §16.127
Rappleyea v Campbell (1994) 8 C4th 975, 35 CR2d 669: App A
Redevelopment Agency v Superior Court (1961) 195 CA2d 591, 16 CR 45: App A
Redevelopment Agency of the City of San Bernardino v County of San Bernardino (1978) 21 C3d 255, 145 CR 886: §2.57
Redlands High Sch. Dist. v Superior Court (1942) 20 C2d 348, 125 P2d 490: §§15.23, 15.31
Reed v Superior Court (2001) 92 CA4th 448, 111 CR2d 842: §§16.152, 19.6, 26.16
Reese v Wal-Mart Stores, Inc. (1999) 73 CA4th 1225, 87 CR2d 346: §16.129D
Regents of Univ. of Cal. v PERB (1986) 41 C3d 601, 224 CR 631: §16.29
Reid v Balter (1993) 14 CA4th 1186, 18 CR2d 287: §§16.54, 17.25
Rental Hous. Ass'n v City of Oakland (2009) 171 CA4th 741, 90 CR3d 181: §2.24
Rescue Army v Municipal Court (1947) 331 US 549, 91 L Ed 1666, 67 S Ct 1409: §25.31
Rescue Army v Municipal Court (1946) 28 C2d 460, 171 P2d 8: §§16.89, 17.30
Resource Defense Fund v County of Santa Cruz (1982) 133 CA3d 800, 184 CR 371: §§8.48, 20.17, 23.31, 23.36

Rice v Superior Court (1982) 136 CA3d 81, 185 CR 853: App A
Rich v State Bd. of Optometry (1965) 235 CA2d 591, 45 CR 512: §2.39
Richards v Superior Court (1978) 86 CA3d 265, 150 CR 77: §16.118
Ridgecrest Charter Sch. v Sierra Sands Unified Sch. Dist. (2005) 130 CA4th 986, 30 CR3d 648: §§2.6-2.7, 2.9, 2.22
Rio Del Mar Country Club, Inc. v Superior Court (1948) 84 CA2d 214, 190 P2d 295: §16.113
Rittenhouse v Superior Court (1991) 235 CA3d 1584, 1 CR2d 595: §16.121
Rivera v Division of Indus. Welfare (1968) 265 CA2d 576, 71 CR 739: §§2.25, 18.85
Robbins v Superior Court (1985) 38 C3d 199, 211 CR 398: §§15.12, 16.150-16.151
Roberts v Superior Court (1973) 9 C3d 330, 107 CR 309: §§15.62, 17.31, App A
Roden v AmerisourceBergen Corp. (2005) 130 CA4th 211, 29 CR3d 810: §§15.69, 16.115, 17.32
Rodrigues v Superior Court (2005) 127 CA4th 1027, 26 CR3d 194: §17.22
Rodriguez v Municipal Court (1972) 25 CA3d 521, 102 CR 45: §9.25
Rodriquez v Superior Court (2009) 176 CA4th 1461, 98 CR3d 728 (writ of mandate issued directing trial court to vacate order compelling plaintiff to arbitrate wrongful death claim): §16.100
Roe v Superior Court (1990) 224 CA3d 642, 273 CR 745: §16.119
Roger S., In re (1977) 19 C3d 921, 141 CR 298: §4.23
Rogers v Municipal Court (1988) 197 CA3d 1314, 243 CR 530: §12.19
Rohr Indus., Inc. v First State Ins. Co. (1997) 59 CA4th 1480, 69 CR2d 872: §16.49
Rojas v Superior Court (2004) 33 C4th 407, 15 CR3d 643: §16.121, App A
Rollins v City & County of San Francisco (1974) 37 CA3d 145, 112 CR 168: §15.48
Roman v Superior Court (2009) 172 CA4th 1462, 92 CR3d 153: §§16.100, 22.9
Rondon v Alcoholic Beverage Control Appeals Bd. (2007) 151 CA4th 1274, 60 CR3d 295: §§15.28, 16.22, 16.24
Rondos v Superior Court (1957) 151 CA2d 190, 311 P2d 113: App A
Rose v Superior Court (1941) 44 CA2d 599, 112 P2d 713: §20.10
Rose, In re (2000) 22 C4th 430, 93 CR2d 298: §§16.44, 27.3
Rosenfield v Superior Court (1983) 143 CA3d 198, 191 CR 611: §16.100
Running Fence Corp. v Superior Court (1975) 51 CA3d 400, 124 CR 339: §§15.22, 17.30
Russell v General Motors Corp. (1992) 3 CA4th 1114, 4 CR2d 750: §16.127

S

S.T. v Superior Court (2009) 177 CA4th 1009, 99 CR3d 412: §16.143A
SN Sands Corp. v City & County of San Francisco (2008) 167 CA4th 185, 83 CR3d 885: §§2.1, 2.5, 2.9, 2.19, 2.24, 7.9-7.11, 11.7, 11.16
Saad v City of Berkeley (1994) 24 CA4th 1206, 30 CR2d 95: §3.14
Sacramento County Alliance of Law Enforcement v County of Sacramento (2007) 151 CA4th 1012, 60 CR3d 202: §11.7
Sacramento Newspaper Guild v Sacramento County Bd. of Supervisors (1967) 255 CA2d 51, 62 CR 819: §26.2
Saeta v Superior Court (2004) 117 CA4th 261, 11 CR3d 610: §16.121
Safeco Ins. Co. v Superior Court (2009) 173 CA4th 814, 92 CR3d 814: §18.34
Salas v Sears, Roebuck & Co. (1986) 42 C3d 342, 228 CR 504: App A
Saleeby v State Bar (1985) 39 C3d 547, 216 CR 367: §§2.9, 2.24, 2.31, 2.37
Samson Mkt. Co. v Kirby (1968) 261 CA2d 577, 68 CR 130: §16.25
San Diego Gas & Elec. Co. v Superior Court (1996) 13 C4th 893, 55 CR2d 724: §16.33
San Diego Water Co. v Pacific Coast S.S. Co. (1894) 101 C 216, 35 P 651: §6.31
San Diego Wholesale Credit Men's Ass'n v Superior Court (1973) 35 CA3d 458, 110 CR 657: App A
San Franciscans Upholding the Downtown Plan v City & County of San Francisco (2002) 102 CA4th 656, 125 CR2d 745: §3.16
San Francisco Bay Conserv. & Dev. Comm'n, People ex rel v Town of Emeryville (1968) 69 C2d 533, 72 CR 790: §15.49
San Francisco Found. v Superior Court (1984) 37 C3d 285, 208 CR 31: §16.62
San Gabriel Tribune v Superior Court (1983) 143 CA3d 762, 192 CR 415: §11.37
San Joaquin County Local Agency Formation Comm'n v Superior Court (2008) 162 CA4th 159, 76 CR3d 93: §§2.24, 7.11, 16.115, 16.121
San Jose Fed'n of Adult Educ. Teachers v Superior Court (1982) 132 CA3d 861, 183 CR 410: §16.100
San Mateo Fed'n of Teachers v Public Employment Relations Bd. (1994) 28 CA4th 150, 33 CR2d 387: §16.30
Santa Clara County v Superior Court (1949) 33 C2d 552, 203 P2d 1: §15.26
Santa Clara County Counsel Attorneys Ass'n v Woodside (1994) 7 C4th 525, 28 CR2d 617: §§2.1, 2.19, 2.50
Santa Clara County Local Transp. Auth. v Guardino (1995) 11 C4th 220, 45 CR2d 207: §2.58
Santa Teresa Citizen Action Group v California Energy Resources Conserv. & Dev. Comm'n (2003) 105 CA4th 1441, 130 CR2d 392: §27.4
Santa Teresa Citizen Action Group v State Energy Resources Conserv. & Dev. Comm'n (2003) 105 CA4th 1441, 130 CR2d 392: §16.26
Satinover v Dean (1988) 202 CA3d 1298, 249 CR 277: §6.38
Sav-On Drug Stores, Inc. v Superior Court (2004) 34 C4th 319, 17 CR3d 906: §16.129A, App A
Sav-On Drugs, Inc. v Superior Court (1975) 15 C3d 1, 123 CR 283: §§16.115, 16.118, App A
Save Open Space Santa Monica Mountains v Superior Court (2000) 84 CA4th 235, 100 CR2d 725: App A
Save the Sunset Strip Coalition v City of W. Hollywood (2001) 87 CA4th 1172, 105 CR2d 172: §§11.30, 23.17, 23.49
Savient Pharms., Inc. v Department of Health Servs. (2007) 146 CA4th 1457, 53 CR3d 689: §§2.12, 5.34

Schellinger Bros. v City of Sebastopol (2009) 179 CA4th 1245, 102 CR3d 394: §§3.19, 5.74
Schenley Affiliated Brands Corp. v Kirby (1971) 21 CA3d 177, 98 CR 609: §16.25
Schmidt v Superior Court (1989) 207 CA3d 56, 254 CR 827: §§16.76, 18.62-18.63, 18.70, 18.72, 18.76
Schoenfeldt v Municipal Court (1960) 187 CA2d 748, 9 CR 912: §15.14
School Dist. of Okaloosa County v Superior Court (1997) 58 CA4th 1126, 68 CR2d 612: §19.6
Schwartz v Schwartz (1969) 268 CA2d 685, 74 CR 192: §§11.33, 24.31
Science Applications Int'l Corp. v Superior Court (1995) 39 CA4th 1095, 46 CR2d 332: §§15.62, 17.28, 17.31-17.32
Scott v Common Council (1996) 44 CA4th 684, 52 CR2d 161: §2.26
Scott v Industrial Acc. Comm'n (1956) 46 C2d 76, 293 P2d 18: §16.96
Scott v Superior Court (2009) 171 CA4th 540, 89 CR3d 843: §16.143A
Scripps Clinic v Superior Court (2003) 108 CA4th 917, 134 CR2d 101: §16.77
Sea & Sage Audubon Soc'y v Planning Comm'n (1983) 34 C3d 412, 194 CR 357: §5.56
Sears, Roebuck & Co. v Nat'l Union Fire Ins. Co. (2005) 131 CA4th 1342, 32 CR3d 717: §§16.3, 16.127
Security-First Nat'l Bank v Board of Supervisors (1933) 135 CA 208, 26 P2d 862: §23.46
See Mission Hosp. Reg'l Med. Ctr. v Shewry (2008) 168 CA4th 460, 85 CR3d 639: §2.3
Sego v Santa Monica Rent Control Bd. (1997) 57 CA4th 250, 67 CR2d 68: §2.22
Senate v Jones (1999) 21 C4th 1142, 90 CR2d 810: §2.48
Serna v Superior Court (1985) 40 C3d 239, 219 CR 420: §12.21
Settlemire v Superior Court (2003) 105 CA4th 666, 129 CR2d 560: §23.22
Seven Up Bottling Co. v Superior Court (1951) 107 CA2d 75, 236 P2d 623: §15.53
Sexton v Superior Court (1997) 58 CA4th 1403, 68 CR2d 708: §16.119
Shadow Traffic Network v Superior Court (1994) 24 CA4th 1067, 29 CR2d 693: §16.102
Shaffer v Superior Court (1995) 33 CA4th 993, 39 CR2d 506: §§8.15, 8.37, 23.27
Shah v McMahon (2007) 148 CA4th 526, 55 CR3d 792: §16.11
Shamsian v Department of Conserv. (2006) 136 CA4th 621, 39 CR3d 62: §§2.8, 2.30
Shapell Indus., Inc. v Governing Bd. (1991) 1 CA4th 218, 1 CR2d 818: §§2.9, 7.11
Shearer v Superior Court (1977) 70 CA3d 424, 138 CR 824: §16.55
Sheila B., In re (1993) 19 CA4th 187, 23 CR2d 482: §16.3, App A
Sheller v Superior Court (2008) 158 CA4th 1697, 71 CR3d 207: §§15.68, 16.103, 18.35, 24.20, 24.23
Shepardson v McLellan (1963) 59 C2d 83, 27 CR 884: App A
Shepherd v Superior Court (1976) 17 C3d 107, 130 CR 257: §16.121
Sherwood v Superior Court (1979) 24 C3d 183, 154 CR 917: §7.3
Shively v Stewart (1966) 65 C2d 475, 55 CR 217: §2.65
Shooker v Superior Court (2003) 111 CA4th 923, 4 CR3d 334: §16.122
Silva, People v (1995) 36 CA4th 231, 43 CR2d 8: §25.20
Silverbrand v County of Los Angeles (2009) 46 C4th 106, 92 CR3d 595: §§11.22-11.23
Simac Design, Inc. v Alciati (1979) 92 CA3d 146, 154 CR 676: §11.4
Simmons v Superior Court (1959) 52 C2d 373, 341 P2d 13: §§15.33, 15.36
Simmons v Superior Court (1950) 96 CA2d 119, 214 P2d 844: App A
Skelley, Marriage of (1976) 18 C3d 365, 134 CR 197: §§15.57, 17.21, App A
Sklar v Franchise Tax Bd. (1986) 185 CA3d 616, 230 CR 42: §§2.23, 2.29-2.30
Slater v City Council of City of Los Angeles (1965) 238 CA2d 864, 47 CR 837: §15.66
Smiley, In re (1967) 66 C2d 606, 58 CR 579: §4.17
Smith v Anderson (1967) 67 C2d 635, 63 CR 391: §2.61
Smith v California State Bd. of Pharmacy (1995) 37 CA4th 229, 43 CR2d 532: §3.11
Smith v Superior Court (1996) 41 CA4th 1014, 49 CR2d 20: §§15.69, 15.71, 17.32
Snell v Superior Court (1984) 158 CA3d 44, 204 CR 200: §20.9
Snyder v Superior Court (2007) 157 CA4th 1530, 69 CR3d 600: §§15.6, 15.52, 15.56, 15.60-15.61, 15.63, 15.70, 16.122, 22.23
Solberg v Superior Court (1977) 19 C3d 182, 137 CR 460: §§15.55, 24.9
Soltani-Rastegar v Superior Court (1989) 208 CA3d 424, 256 CR 255: §§5.66, 18.43
Sonoma County Nuclear Free Zone 86 v Superior Court (1987) 189 CA3d 167, 234 CR 357: §§5.34-5.35, 15.51
Sonora Diamond Corp. v Superior Court (2000) 83 CA4th 523, 99 CR2d 824: §16.56
South Dakota v Brown (1978) 20 C3d 765, 144 CR 758: §2.20
Southern Cal. Reg'l Rail Auth. v Superior Court (2008) 163 CA4th 712, 77 CR3d 765: §§15.70, 16.145, 17.32
Southern Pac. Transp. Co. v Superior Court (1976) 58 CA3d 433, 129 CR 912: §16.148, App A
Southwest Airlines v WCAB (1991) 234 CA3d 1421, 286 CR 347: §16.47
Sparks v Kern County Bd. of Supervisors (2009) 173 CA4th 794, 93 CR3d 173: App A
Spielbauer v County of Santa Clara (2009) 45 C4th 704, 88 CR3d 590: §11.35
Standard Oil Co. v State Bd. of Equalization (1936) 6 C2d 557, 59 P2d 119: §§4.13-4.15
Standon Co. v Superior Court (1990) 225 CA3d 898, 275 CR 833: §16.119
Stanton v Dumke (1966) 64 C2d 199, 49 CR 380: §8.54
Star Motor Imports, Inc. v Superior Court (1979) 88 CA3d 201, 151 CR 721: §§5.66, 5.101, 8.49, 18.43, 18.46, 20.9, 23.32, 25.14
State v Superior Court (2004) 32 C4th 1234, 13 CR3d 534: §16.108
State v Superior Court (Bodde) (2004) 32 C4th 1234, 13 CR3d 534: App A
State Bd. of Chiropractic Exam'rs v Superior Court (2009) 45 C4th 963, 89 CR3d 576: §3.4

State Bd. of Chiropractic Exam'rs v Superior Court (1927) 201 C 108, 255 P 749: §4.13
State Bd. of Equalization v Superior Court (1937) 9 C2d 252, 70 P2d 482: §15.34
State Bd. of Equalization v Watson (1968) 68 C2d 307, 66 CR 377: §§2.59, 27.8
State Bldg. & Constr. Trades Council v Duncan (2008) 162 CA4th 289, 76 CR3d 507: §§2.9, 2.37, 11.8
State Dep't of Health Servs. v Superior Court (2003) 31 C4th 1026, 6 CR3d 441: §16.67
State Farm Fire & Cas. Co. v Superior Court (2008) 164 CA4th 317, 78 CR3d 828: §16.145
State Farm Mut. Auto. Ins. Co. v Superior Court (1956) 47 C2d 428, 304 P2d 13: §§16.106-16.107, App A
State Farm Mut. Auto. Ins. Co. v Superior Court (2003) 114 CA4th 434, 8 CR3d 56: §§16.95, 16.98
State Personnel Bd. v Department of Personnel Admin. (2005) 37 C4th 512, 36 CR3d 142: §2.31
State Route 4 Bypass Auth. v Superior Court (2007) 153 CA4th 1546, 64 CR3d 286: §§16.90, 16.145
State Water Resources Control Bd. v Superior Court (2002) 97 CA4th 907, 118 CR2d 784: §§16.152, 17.22, 19.6
Stationary Eng'rs Local 39 v County of Sacramento (1997) 59 CA4th 1177, 69 CR2d 598: §§2.19, 2.25
Stavropoulos v Superior Court (2006) 141 CA4th 190, 45 CR3d 705: §16.108
St. Agnes Med. Ctr. v PacifiCare of Cal. (2003) 31 C4th 1187, 8 CR3d 517: App A
Ste. Marie v Riverside County Reg'l Park & Open-Space Dist. (2009) 46 C4th 282, 93 CR3d 369: §§2.41, 11.35
Stearns v Los Angeles City School Dist. (1966) 244 CA2d 696, 53 CR 482: §16.93
Steen v Board of Civil Serv. Comm'rs (1945) 26 C2d 716, 160 P2d 816: §§11.5, 11.8
Stegs Invs. v Superior Court (1991) 233 CA3d 572, 284 CR 495: §16.5
Stephen v Enterprise Rent-A-Car (1991) 235 CA3d 806, 1 CR2d 130: App A
Stern v Superior Court (2003) 105 CA4th 223, 129 CR2d 275: §16.129A
Stevens v Fox Realty Corp. (1972) 23 CA3d 199, 100 CR 63: §2.62
Stier, In re (2007) 152 CA4th 63, 61 CR3d 181: §15.40
Stone v Board of Dirs. (1941) 47 CA2d 749, 118 P2d 866: §2.56
Stone v Regents of Univ. of Cal. (1999) 77 CA4th 736, 92 CR2d 94: App A
Stoner v Superior Court (1945) 67 CA2d 760, 155 P2d 697: §§15.32, 23.47
Stonewall Ins. Co. v City of Palos Verdes Estates (1996) 46 CA4th 1810, 54 CR2d 176: §12.19
Strand Prop. Corp. v Municipal Court (1983) 148 CA3d 882, 200 CR 47 (noting that no appeal lies from order denying petition for writ of prohibition in pending municipal court case), disapproved on other grounds in People v Superior Court (1989) 49 C3d 14, 259 CR 740: §12.18
Strauss v Horton (2009) 46 C4th 364, 93 CR3d 591: §27.8
Strumsky v San Diego County Employees Retirement Ass'n (1974) 11 C3d 28, 112 CR 805: §§2.23, 3.16-3.17, 3.20, 4.5, 4.14-4.15
Stryker v Antelope Valley Community College Dist. (2002) 100 CA4th 324, 122 CR2d 489: §2.42
Sturm, Ruger & Co. v Superior Court (1985) 164 CA3d 579, 210 CR 573: §18.72
Sullivan v Superior Court (1954) 128 CA2d 476, 275 P2d 595: §15.9
Summers v Superior Court (1959) 53 C2d 295, 1 CR 324: §15.38
Sunseri v Board of Med. Exam'rs (1964) 224 CA2d 309, 36 CR 553: §11.14
Sunset Retirement Villa v Dear (1997) 58 CA4th 948, 68 CR2d 416: §2.60
Superior Court v County of Mendocino (1996) 13 C4th 45, 51 CR2d 837: §25.26
Superior Court, People v (Alvarado) (1989) 207 CA3d 464, 255 CR 46: §§5.65, 8.49, 18.47
Superior Court, People v (Brent) (1992) 2 CA4th 675, 3 CR2d 375: §16.87
Superior Court, People v (Clements) (1988) 200 CA3d 491, 246 CR 122: §16.87
Superior Court, People v (Dyke Water Co.) (1965) 62 C2d 515, 42 CR 849: §16.92
Superior Court, People v (Jump) (1995) 40 CA4th 9, 46 CR2d 829: §§22.28, 24.7
Superior Court, People v (Lopez) (2005) 125 CA4th 1558, 24 CR3d 66: §18.68
Superior Court, People v (Williams) (1992) 8 CA4th 688, 10 CR2d 873: §15.55
Superior Court, State v (2004) 32 C4th 1234, 13 CR3d 534: §16.108
Superior Court, State v (Bodde) (2004) 32 C4th 1234, 13 CR3d 534: App A
Surety Co. of the Pac. v Piver (1983) 149 CA3d Supp 29, 197 CR 531: App A
Sustainability of Parks, Recycling & Wildlife Legal Defense Fund v County of Solano Dep't of Resource Mgmt. (2008) 167 CA4th 1350, 84 CR3d 889: §§2.5-2.6, 2.28, 2.31, 5.33, 8.40, 11.7, 11.16
Sutro Heights Land Co. v Merced Irrigation Dist. (1931) 211 C 670, 296 P 1088: §10.9
Sutter Union High Sch. Dist. v Superior Court (1983) 140 CA3d 795, 190 CR 182: §5.75
Suzanne J. v Superior Court (1996) 46 CA4th 785, 54 CR2d 25: §§5.67, 18.44
Swars v Council of the City of Vallejo (1944) 64 CA2d 858, 149 P2d 397: §8.51
Swartz v California Olive Growers' Packing Corp. (1942) 56 CA2d 168, 133 P2d 20: §16.65
Swift v Superior Court (2009) 172 CA4th 878, 91 CR3d 504: §16.5
Syngenta Crop Protection, Inc. v Helliker (2006) 138 CA4th 1135, 42 CR3d 191: §2.12

T

TJX Cos. v Superior Court (2008) 163 CA4th 80, 77 CR3d 114: §16.106
TSI Seismic Tenant Space, Inc. v Superior Court (2007) 149 CA4th 159, 56 CR3d 751: §§15.12, 15.67, 16.51
Tahoe Keys Prop. Owners' Ass'n v State Water Resources Control Bd. (1994) 23 CA4th 1459, 28 CR2d 734: §6.36
Tarkington v California Unemployment Ins. Appeals Bd. (2009) 172 CA4th 1494, 92 CR3d 131: §2.34
Taylor v State Personnel Bd. (1980) 101 CA3d 498, 161 CR 677: §3.5

Taylor v Western States Land & Mortgage Co. (1944) 63 CA2d 401, 147 P2d 36: App A
Tech-Bilt, Inc. v Woodward-Clyde & Assoc. (1985) 38 C3d 488, 213 CR 256: §16.51
Tera Pharms., Inc. v Superior Court (1985) 170 CA3d 530, 215 CR 923: §16.70
Terminal Plaza Corp. v City & County of San Francisco (1986) 186 CA3d 814, 230 CR 875: §2.19
Tevis v City & County of San Francisco (1954) 43 C2d 190, 272 P2d 757: §2.64
Tex-Cal Land Mgmt., Inc. v ALRB (1979) 24 C3d 335, 156 CR 1: §§16.20-16.21
The MEGA Life & Health Ins. Co. v Superior Court (2009) 172 CA4th 1522, 92 CA4th 399: §16.68
The Rescue Army v Municipal Court (1946) 28 C2d 460, 171 P2d 8: §15.23
The Termo Co. v Luther (2008) 169 CA4th 394, 86 CR3d 687: §3.17
Thelander v Superior Court (1962) 58 C2d 811, 26 CR 643: §15.38
Thomas v DMV (1970) 3 C3d 335, 90 CR 586: §2.40
Thomas v Shewry (2009) 170 CA4th 1480, 89 CR3d 105: §2.34
Thurmond v Superior Court (1967) 66 C2d 836, 59 CR 273: §§15.10, 27.8
Tide Water Assoc. Oil Co. v Superior Court (1955) 43 C2d 815, 279 P2d 35: App A
Tielsch v City of Anaheim (1984) 160 CA3d 570, 206 CR 738: §3.21
Timmons v McMahon (1991) 235 CA3d 512, 286 CR 620: §2.13
Title Ins. & Trust Co. v California Dev. Co. (1911) 159 C 484, 114 P 838: App A
Titmas v Superior Court (2001) 87 CA4th 738, 104 CR2d 803: §§8.15, 8.37, 23.44, 23.49, App A
Titolo v Cano (2007) 157 CA4th 310, 68 CR3d 616: §16.101
Tobe v City of Santa Ana (1995) 9 C4th 1069, 40 CR2d 402: §2.24
Tom v Schoolhouse Coins, Inc. (1987) 191 CA3d 827, 236 CR 541: §16.117
Tomlin v WCAB (2008) 162 CA4th 1423, 76 CR3d 672: §16.48
Topanga Ass'n for a Scenic Community v City & County of Los Angeles (1974) 11 C3d 506, 113 CR 836: §§3.4, 3.14
Torrey Pines Inn, Inc. v Superior Court (1964) 227 CA2d 265, 38 CR 565: §16.94
Toward Util. Rate Normalization v PUC (1978) 22 C3d 529, 149 CR 692: §16.35
Townsel v San Diego Metro. Transit Dev. Bd. (1998) 65 CA4th 940, 77 CR2d 231: §§11.5, 11.8
Tracy Press, Inc. v Superior Court (2008) 164 CA4th 1290, 80 CR3d 464: §§5.34-5.35, 18.18
Travelers Cas. & Sur. Co. v Superior Court (1998) 63 CA4th 1440, 75 CR2d 54: §16.77
Traverso v Department of Transp. (1996) 46 CA4th 1197, 54 CR2d 434: §2.41
Trend Homes, Inc. v Superior Court (2005) 131 CA4th 950, 32 CR3d 411: §16.100
Tri Counties Bank v Superior Court (2008) 167 CA4th 1332, 84 CR3d 835: §16.3
Trickey v Superior Court (1967) 252 CA2d 650, 60 CR 761: §15.8
Trimble v Steinfeldt (1986) 178 CA3d 646, 224 CR 195: App A
Tritek Telecom, Inc. v Superior Court (2009) 169 CA4th 1385, 87 CR3d 455: §16.122
Truck Ins. Exch. v Fireman's Fund Ins. Co. (1992) 6 CA4th 1050, 8 CR2d 228: App A
Trump v Superior Court (1981) 118 CA3d 411, 173 CR 403: §16.99
Tunis v Barrow (1986) 184 CA3d 1069, 229 CR 389: App A
Tunis v Superior Court (1963) 59 C2d 465, 30 CR 135: §16.112
Tuolumne County Citizens for Responsible Growth, Inc. v City of Sonora (2007) 155 CA4th 1214, 66 CR3d 645: §7.9
Turlock Golf & Country Club v Superior Court (1966) 240 CA2d 693, 50 CR 70: §§15.26, 16.89
20th Century Ins. Co. v Garamendi (1994) 8 C4th 216, 32 CR2d 807: §2.37
Tyler v Superior Court (1980) 102 CA3d 82, 162 CR 82: §7.3
Tylo v Superior Court (1997) 55 CA4th 1379, 64 CR2d 731: §16.118

U

US Ecology, Inc. v State (2001) 92 CA4th 113, 111 CR2d 689: §2.6
Unified Teachers—Los Angeles v Los Angeles Unified Sch. Dist. (1994) 24 CA4th 1510, 29 CR2d 897: §11.10
Union Bank of Cal. v Superior Court (2005) 130 CA4th 378, 29 CR3d 894: §16.121
Union Pac. R.R. v State Bd. of Equalization (1989) 49 C3d 138, 260 CR 565: §§4.2, 11.24
Union Pac. R.R. Co. v State Bd. of Equalization (1989) 49 C3d 138, 260 CR 565: §11.24
United Cent. Bank v Superior Court (2009) 179 CA4th 212, 101 CR3d 395: §22.19
United Farm Workers v ALRB (1977) 74 CA3d 347, 141 CR 437: §16.19
United Farm Workers of Am. v Superior Court (1975) 14 C3d 902, 122 CR 877: §16.150
United Prof. Planning, Inc. v Superior Court (1970) 9 CA3d 377, 88 CR 551: §26.16
United Teachers Los Angeles v Los Angeles Unified Sch. Dist. (review granted Dec. 23: §2.51, S177403; superseded opinion at 177 CA4th 863, 99 CR3d 524): §2.51
Universal City Studios, Inc. v Superior Court (2003) 110 CA4th 1273, 2 CR3d 484: §§20.4, 23.32
Universal Underwriters Ins. Co. v Superior Court (1967) 250 CA2d 722, 58 CR 870: App A
Unnamed Physician v Board of Trustees of St. Agnes Med. Ctr. (2001) 93 CA4th 607, 113 CR2d 309: §§2.16, 2.38, 2.55
Upson Metal Fabricators v Superior Court (1988) 203 CA3d 67, 251 CR 304: §12.26
Urban Pac. Equities Corp. v Superior Court (1997) 59 CA4th 688, 69 CR2d 635: §16.116
Usher v County of Monterey (1998) 65 CA4th 210, 76 CR2d 274: §3.13
Utility Reform Network v PUC (2008) 166 CA4th 522, 82 CR3d 791: §16.40

V

V.S. v Allenby (2008) 169 CA4th 665, 87 CR3d 143: §§2.3, 2.5
Vai, Estate of (1959) 168 CA2d 147, 335 P2d 501: §16.143
Valley Bank v Superior Court (1975) 15 C3d 652, 125 CR 553: §16.120
Vangel v Vangel (1953) 116 CA2d 615, 254 P2d 919: §26.13
Vannier v Superior Court (1982) 32 C3d 163, 185 CR 427: §15.68
Varian Med. Sys., Inc. v Delfino (2005) 35 C4th 180, 25 CR3d 298: §§22.17, 26.2, 26.6-26.8, 26.15
Varner, Marriage of (1998) 68 CA4th 932, 80 CR2d 628: §26.8
Vasquez v Happy Valley Union Sch. Dist. (2008) 159 CA4th 969, 72 CR3d 15: §§2.19, 5.34, 5.121, 11.7, 11.33
Veguez v Governing Bd. of Long Beach Unified Sch. Dist. (2005) 127 CA4th 406, 25 CR3d 526: §2.64
Venice Canals Resident Home Owners Ass'n v Superior Court (1977) 72 CA3d 675, 140 CR 361: §6.24
Verga v WCAB (2008) 159 CA4th 174, 70 CR3d 871: §16.48
Vernon Fire Fighters Ass'n v City of Vernon (1986) 178 CA3d 710, 223 CR 871: §3.19
Vick v Superior Court (1965) 239 CA2d 105, 47 CR 840: §16.92
Victoria v Superior Court (1985) 40 C3d 734, 222 CR 1: §24.20
Villa, People v (2009) 45 C4th 1063, 90 CR3d 344: §15.39
Villacreses v Molinari (2005) 132 CA4th 1223, 34 CR3d 281: App A
Vineyard Springs Estates, LLC v Superior Court (2004) 120 CA4th 633, 15 CR3d 587: §16.70
Vinson v Superior Court (1987) 43 C3d 833, 239 CR 292: §16.118
Violet C., In re (1989) 213 CA3d 86, 261 CR 470: §4.25
Voices of Wetlands v California State Water Resources Control Bd. (review granted Mar. 19, 2008 superseded opinion at 157 CA4th 1268, 69 CR3d 487: §3.7
Vons Cos. v Seabest Foods, Inc. (1996) 14 C4th 434, 58 CR2d 899: §§16.56, 20.19
Vose, Estate of (1970) 4 CA3d 454, 84 CR 347: §16.143

W

W. A. Rose Co. v Municipal Court (1959) 176 CA2d 67, 1 CR 49: §§15.9, 15.26, App A
Wagner v Superior Court (1993) 12 CA4th 1314, 16 CR2d 534: §§16.87, 16.123
Waicis v Superior Court (1990) 226 CA3d 283, 276 CR 45: App A
Walker v County of Los Angeles (1961) 55 C2d 626, 12 CR 671: §2.24
Wallace v Superior Court (1956) 141 CA2d 771, 298 P2d 69: §15.21
Ward Mfg. Co. v Miley (1955) 131 CA2d 603, 281 P2d 343: §20.18
Ware v Stafford (1962) 206 CA2d 232, 24 CR 153: §5.68
Warrack Med. Ctr. Hosp. v California State Bd. of Pharmacy (1967) 249 CA2d 118, 57 CR 85: §2.39
Wayne F. v Superior Court (2006) 145 CA4th 1331, 52 CR3d 519: §16.52
Weisman v Board of Bldg. & Safety Comm'rs (1927) 85 CA 493, 259 P 768: §9.25
Wells Fargo Bank v Superior Court (2008) 159 CA4th 381, 71 CR3d 506: §§15.64, 16.91, 16.108, 24.23
Wells Fargo Bank v Superior Court (1988) 206 CA3d 918, 254 CR 68: §16.71, App A
Wells Props. v Popkin (1992) 9 CA4th 1053, 11 CR2d 845: App A
Welsch v Goswick (1982) 130 CA3d 398, 181 CR 703: App A
Wenzler v Municipal Court (1965) 235 CA2d 128, 45 CR 54: §2.64
West Shield Investigations & Sec. Consultants v Superior Court (2000) 82 CA4th 935, 98 CR2d 612: §16.77
Western Digital Corp. v Superior Court (1998) 60 CA4th 1471, 71 CR2d 179: §16.102
Western States Petroleum Ass'n v Superior Court (1995) 9 C4th 559, 38 CR2d 139: §§2.32, 7.10-7.11
Wetteland v Superior Court (1967) 251 CA2d 607, 59 CR 605: §16.88
Wheeler v St. Joseph Hosp. (1976) 63 CA3d 345, 133 CR 775: §16.100
Wheelwright v County of Marin (1970) 2 C3d 448, 85 CR 809: §2.46
Whitney's at the Beach v Superior Court (1970) 3 CA3d 258, 83 CR 237: §16.67, App A
Whitten v California State Bd. of Optometry (1937) 8 C2d 444, 65 P2d 1296: §4.5
Wilde v Superior Court (1942) 53 CA2d 168, 127 P2d 560: §16.136
Wilder v Superior Court (1998) 66 CA4th 77, 77 CR2d 629: §2.69
Wilhelm, Estate of (1957) 152 CA2d 803, 313 P2d 161: §16.143
Wilshire Ins. Co. v Tuff Boy Holding, Inc. (2001) 86 CA4th 627, 103 CR2d 480: §16.49
Wilson v Eu (1991) 54 C3d 471, 286 CR 280: §2.44
Wilson v Hidden Valley Mun. Water Dist. (1967) 256 CA2d 271, 63 CR 889: §2.37
Wiltsie v Board of Supervisors (1966) 65 C2d 314, 54 CR 320: §2.44
Windiate, Estate of (1961) 197 CA2d 560, 17 CR 297: §16.143
Witt Home Ranch, Inc. v County of Sonoma (2008) 165 CA4th 543, 81 CR3d 123: §3.11
Women Organized for Employment v Stein (1980) 114 CA3d 133, 170 CR 176: §2.19
Wong v Superior Court (1966) 246 CA2d 541, 54 CR 782: §§15.24, 15.26
Woo v Superior Court (2000) 83 CA4th 967, 100 CR2d 156: §25.7
Wood v City Civil Serv. Comm'n (1975) 45 CA3d 105, 119 CR 175: §3.11
Woodland Hills Residents Ass'n, Inc. v City Council (1980) 26 C3d 938, 164 CR 255: §2.25
Woodman v Ackerman (1967) 249 CA2d 644, 57 CR 687: App A
Woodmansee v Lowery (1959) 167 CA2d 645, 334 P2d 991: §§2.10, 2.49
Woods v Superior Court (1981) 28 C3d 668, 170 CR 484: §2.37

Y

Y.K.A. Indus., Inc. v Redevelopment Agency (2009) 174 CA4th 339, 94 CR3d 424: §2.31
Yamaha Motor Co. v Superior Court (2009) 174 CA4th 264, 94 CR3d 494: §15.70
Yarbrough v Yarbrough (1956) 144 CA2d 610, 301 P2d 426: App A
Yarnell & Assocs. v Superior Court (1980) 106 CA3d 918, 165 CR 421: §16.82
Yellen v Fidelity & Cas. Co. (1931) 115 CA 434, 1 P2d 1019: §6.31
Young v Gannon (2002) 97 CA4th 209, 118 CR2d 187: §§3.13, 3.16, 5.37
Ytuarte v Superior Court (2005) 129 CA4th 266, 28 CR3d 474: §16.61

Z

Zaremberg v Superior Court (2004) 115 CA4th 111, 8 CR3d 723: §19.3
Zembsch v Superior Court (2006) 146 CA4th 153, 53 CR3d 69.: §16.100
Zenith Ins. Co. v O'Connor (2007) 148 CA4th 998, 55 CR3d 911: §16.111
Zenith Ins. Co. v WCAB (2008) 159 CA4th 483, 71 CR3d 724: §16.48
Zerbe, In re (1964) 60 C2d 666, 36 CR 286: §16.88
Zevnik v Superior Court (2008) 159 CA4th 76, 70 CR3d 817: §§15.6, 15.52, 15.56, 15.61, 16.106, 19.6, 24.22
Zuehlsdorf v Simi Valley Unified Sch. Dist. (2007) 148 CA4th 249, 55 CR3d 467: §§2.43, 5.124, 24.28
Zumwalt v Superior Court (1989) 49 C3d 167, 260 CR 545: §16.90
Zuniga v Los Angeles County Civil Serv. Comm'n (2006) 137 CA4th 1255, 40 CR3d 863: §3.9
Zurich Am. Ins. Co. v Superior Court (2007) 155 CA4th 1485, 66 CR3d 833: §11.5

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Table of References

A Litigator's Guide to Effective Use of ADR in California (Cal CEB 2005): §§17.4, 17.6
Appeals and Writs in Criminal Cases (3d ed Cal CEB 2007): §§4.17, 4.26, 15.39, 15.44, 15.46, 16.133
California Administrative Hearing Practice (2d ed Cal CEB 1997): §§3.13-3.14
California Administrative Mandamus (3d ed Cal CEB 2003): §§2.2, 2.65, 3.1-3.2, 3.4-3.8, 3.10-3.13, 3.15-3.17, 3.19, 4.5, 4.13, 5.3, 5.56, 5.75, 6.2, 7.16-7.17, 9.1, 11.26, 15.2, 16.24
California Attorney Fee Awards (3d ed Cal CEB 2010): §§5.121, 5.124, 5.126, 17.35, 24.28, App C
California Child Custody Litigation and Practice (Cal CEB 2006): §4.18
California Civil Appellate Practice (3d ed Cal CEB 1996): §§6.20, 11.1-11.4, 11.14-11.16, 11.21-11.22, 11.24, 11.26, 11.28-11.37, 12.20, 12.26, 15.49, 15.57-15.58, 16.85, 16.99, 16.127, 17.21, 18.34, 19.10, 23.4, 23.16-23.18, 23.43, 23.50, 23.52, 24.13, 24.26-24.28, 24.30-24.31, 24.34, 24.36, 25.16, 25.21, 25.26, 26.8, 26.11-26.14, 26.16, 26.22, 27.12, 27.14-27.15, 27.18-27.20, 27.22, 27.25-27.27, 27.30-27.33
California Civil Litigation Forms Manual. 2 vols (Cal CEB 1980): §5.85
California Civil Procedure Before Trial (4th ed Cal CEB 2004): §§4.33, 5.34, 5.75, 5.82-5.83, 5.85, 5.89, 5.106, 5.113, 5.119, 6.10-6.12, 6.16, 6.19, 6.22, 6.30-6.33, 6.36-6.38, 7.26, 7.28, 8.14, 8.31, 8.41, 8.49-8.54, 8.58, 8.61, 9.22, 9.53, 12.2, 12.26, 17.2, 17.8, 17.10-17.13, 18.80, 19.8, 20.23, 22.10, 23.28, 23.33, 23.35
California Conservatorship Practice (Cal CEB 2005): §§4.22, 4.24-4.25, 16.144
California Criminal Law Procedure and Practice (Cal CEB Annual): §§10.14, 10.20, 15.37, 24.51
California Forms of Pleading and Practice. San Francisco, Matthew Bender, 2007: §§16.26, 16.45, 27.4
California Government Tort Liability Practice (4th ed Cal CEB 1999): §5.57
California Guardianship Practice (Cal CEB Annual): §§4.22, 16.144
California Juvenile Dependency Practice (Cal CEB Annual): §16.52
California Trial Objections (Cal CEB Annual): §§10.14, 10.20, 15.37, 24.51
California Trial Practice: Civil Procedure During Trial. 3 vols (3d ed Cal CEB 1995): §§5.121-5.124, 6.39, 9.34, 9.36, 9.39, 10.14, 10.20, 11.3-11.4, 15.37, 17.4-17.5, 24.51, 24.54
Debt Collection Practice in California (2d ed Cal CEB 1999): §§4.29-4.32, 24.54
Fee Agreement Forms Manual (2d ed Cal CEB 2007): §17.35
Witkin, Bernard E. California Procedure. Multivolume. San Francisco, Bancroft-Whitney, 4th ed 1996-: §§2.64, 4.27, 4.33, 5.35, 5.73, 5.75, 7.8, 15.15, 15.22, 15.29-15.31, 15.37, 16.65, 16.106, 16.134, 16.143-16.144, 21.3, 24.14

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Table of Forms

California Supreme Court, petition for review, 28.16
Court of appeal
- Alternative writ as improvidently granted, order discharging, 28.14
- Alternative writ/order to show cause, 28.6
- Amicus curiae letter brief, 28.17
- Appellate court writ petition information sheet (Fifth District), 28.22
- Certificate of interested entities or persons (Judicial Council Form APP-008), 28.2
- Exhibits, table of, 28.3
- Habeas corpus or certiorari, petition for writ of (filed by attorney), 28.21
- Habeas corpus, petition for writ of (Judicial Council Form MC-275), 28.20
- Memorandum in support of petition, exemplar headings, 18.51
- Prayer for relief in writ petition
  - Alternative writ or order to show cause, petitioner seeking, 18.39
  - Peremptory writ in first instance, petitioner seeking, 18.38
- Summary denial of writ, 28.5
- Traverse to return, 28.12
- Verification of petition, 18.48

Limited civil cases
- Information on writ proceedings in misdemeanor, infraction, and limited civil cases (Judicial Council Form APP-150-INFO), 13.16
- Petition for writ (misdemeanor, infraction, or limited civil case) (Judicial Council Form APP-151), 13.17

Mandate in court of appeal
- Opposition to issuance of peremptory writ of mandate in first instance, 28.10
- Order directing issuance of peremptory writ of mandate, 28.13
- Peremptory writ of mandate, 28.15
- Petition for writ of mandate, prohibition, or other appropriate relief, 28.1
- Preliminary opposition to petition for writ of mandate, prohibition, or other appropriate writ and stay request, 28.4
- Return to petition for writ of mandate, prohibition, or other alternative relief, 28.11

Mandate in superior court
- Demurrer
  - Memorandum in support of demurrer to petition for writ of mandate, 13.11
  - Petition for writ of mandate, demurrer to, 13.10
- Ex parte proceeding
  - Application for alternative writ of mandate and order to show cause, 13.2
  - Declaration of notice in support of ex parte application for alternative writ of mandate and order to show cause, 13.4
  - Memorandum in support of ex parte application for alternative writ of mandate and order to show cause, 13.3
  - Proposed order directing issuance of alternative writ of mandate, 13.5
- Notice of hearing on petition for writ of mandate, 13.7
- Opposition to petition for writ of mandate
  - Declaration in opposition to petition for writ of mandate, 13.14
  - Proposed order denying petition for writ of mandate, 13.15
  - Request for judicial notice in opposition to petition for writ of mandate, 13.13
  - Sample form of opposition to petition for writ of mandate, 13.12
- Sample form of alternative writ of mandate, 13.6
- Verified petition for alternative writ of mandate and verified complaint for declaratory relief, 13.1

Palma notice
- Letter, 28.8
- Order, 28.7
- Suggestive *Palma* notice, 28.9

Prohibition in court of appeal
- Petition for writ of mandate, prohibition, or other appropriate relief, 28.1
- Preliminary opposition to petition for writ of mandate, prohibition, or other appropriate writ and stay request, 28.4
- Return to petition for writ of mandate, prohibition, or other alternative relief, 28.11

Superior court writ petition
- Absence or inadequacy of other remedies, 5.54
- Costs and attorney fees, 5.61
- Exhaustion of administrative remedies, 5.56
- Identity of parties

Petitioner, 5.41
Real party in interest, 5.43
Respondent, 5.42
Nonjudicial action, petition challenging, 5.44
Ongoing administrative proceeding, petitioner party to, 5.45
Other appropriate relief, 5.62
Signature block, 5.63
Types of relief, 5.60
Verification of, 5.69
Supersedeas
Order granting petition for writ of supersedeas, 28.19
Petition for writ of, 28.18
Temporary restraining order and order to show cause in superior court
Ex parte application for temporary restraining order and order to show cause, 13.8
Proposed temporary restraining order and order to show cause, 13.9

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Index

A B C D E F G H I J K L M N O P Q R S T U V W X Y Z

The symbol "" after a section number indicates that a form appears in the section.

Abuse of Discretion
See also **Discretion of Court**
Court of appeal
Class certification order, abuse of discretion as standard for reviewing, 16.129A, 16.129D
Disqualification of attorney, abuse of discretion as standard of review, 16.104
Good faith settlement determination, abuse of discretion as standard of review, 16.51
Injunction ruling, abuse of discretion as standard for reviewing, 16.151
In limine motions, abuse of discretion as standard for reviewing orders on, 16.147
Mandate challenging judicial disqualification, abuse of discretion as standard of review, 16.7
Mandate to correct abuse of discretion, 15.11-15.12
Mandatory dismissal, abuse of discretion as standard for reviewing order denying motion for, 16.114
Monetary sanction or judgment order of $5000 or less, abuse of discretion as standard of review, 16.85
Reclassify action or proceeding, abuse of discretion as standard of review, 16.61
Unlawful detainer action, abuse of discretion as standard for reviewing denial of stay in, 16.80
Defined, 15.11
Superior court
Administrative mandamus to review administrative body's abuse of discretion. See **Administrative Mandamus in Superior Court**
Traditional mandate, petition to correct abuse of discretion, 2.9

Adequate Remedy at Law
Appeal as adequate remedy. See **Appeals**
Drafting writ petition in superior court, allegations concerning lack of adequate legal remedies. See **Drafting Writ Petition for Superior Court**
Petitioner's lack of adequate remedy at law. See **Courts of Appeal**
Sustaining demurrer without leave to amend, appeal from resulting judgment of dismissal as adequate remedy, 16.110
Traditional mandate in superior court. See **Traditional Mandate in Superior Court**

Administrative Agencies' Acts and Decisions, Traditional Mandate to Compel
Generally, 2.27
Final administrative decision, traditional mandate to compel agency to comply with, 2.36
Mandatory duty, compelling agency, official, or employee to perform
Discretion, compelling administrative agencies to exercise, 2.30
Funds to perform mandatory duty, mandate to compel legislative action to provide, 2.26
Legally required hearings or comply with administrative procedures, compelling agency to hold, 2.31
Legally required ministerial duties, traditional mandate to compel administrative agencies to perform, 2.28
Regulations, compelling administrative agencies to adopt statutorily required, 2.29
Quasi-judicial agency decisions, review of
Generally, 2.32
Exhaustion of administrative remedies as prerequisite for seeking review, 2.34
Special writ proceedings for certain administrative agencies, 2.35
Statutory requirements for administrative mandamus not met, applicability of traditional mandate if, 2.33
Quasi-legislative acts, review of, 2.37

Administrative Mandamus in Superior Court
See also **Traditional Mandate in Superior Court**
Generally, 3.1
Administrative record, review limited to, 3.7
Defined, 3.2
Differences between traditional and administrative mandamus
Generally, 3.18

Checklist for choosing between traditional and administrative mandamus, 3.20
Filing deadlines, 3.19
Discretion of administrative body
Hearing officer or decision-maker's discretion to determine contested factual issues, 3.6
Prejudicial abuse of discretion (see Prejudicial abuse of discretion by administrative body, review of, below)
Due process (see Scope of judicial review in administrative mandamus proceedings, below)
Evidence
Legal requirement of presentation of evidence at underlying administrative hearing as prerequisite for administrative mandamus, 3.5
Prejudicial abuse of discretion by administrative body, agency's findings not supported by evidence as, 3.15-3.17
Findings (see Prejudicial abuse of discretion by administrative body, review of, below)
Hearing
Fair hearing, determining if petitioner received, 3.11
Underlying administrative proceeding, hearing in as prerequisite for administrative mandamus (see Requirements for administrative mandamus, below)
Jurisdiction, review of administrative body exceeding or acting without
Independent judgment standard, review of administrative decisions under, 3.17
Reconsideration or modification of decision by administrative body, express authorization required for, 3.10
Statute or constitution, jurisdiction limited by, 3.9
Pleading administrative and traditional mandamus in the alternative, 3.21
Prejudicial abuse of discretion by administrative body, review of
Generally, 3.12
Evidence, agency's findings not supported by, 3.15-3.17
Failure of administrative body to proceed as required by law, 3.13
Findings, agency's decision not supported by, 3.14
Substantial evidence, determining if administrative findings supported by, 3.16
Quasi-judicial agency decisions, review of, 2.32
Questions of law. See **Questions of Law and Fact**
Requirements for administrative mandamus
Generally, 3.3
Evidence presented at administrative hearing, legal requirement of, 3.5
Hearing officer or decision-maker's discretion to determine contested factual issues, 3.6
Underlying administrative proceeding, requirement of hearing in, 3.4
Scope of judicial review in administrative mandamus proceedings
Generally, 3.8
Fair hearing, determining if petitioner received, 3.11
Jurisdiction (see Jurisdiction, review of administrative body exceeding or acting without, above)
Prejudicial abuse of discretion (see Prejudicial abuse of discretion by administrative body, review of, above)
Statute of limitations for filing, 3.19
Statutory authority for, 5.3
Statutory requirements for administrative mandamus not met, applicability of traditional mandate, 2.33

Administrative Proceedings, Writ Review of
Agricultural Labor Relations Board. See **Agricultural Labor Relations Board (ALRB)**
Alcoholic Beverage Control Appeals Board. See **Alcoholic Beverage Control Appeals Board**
Energy Resources Conservation and Development Commission, review of decisions by. See **Review in California Supreme Court**
Public Employment Relations Board. See **Public Employment Relations Board, Petition for Writ of Review of Decisions by**
Public Utilities Commission. See **Public Utilities Commission (PUC)**
Workers' Compensation Appeals Board. See **Workers' Compensation Appeals Board (WCAB), Petition for Review of Decisions by**

Affidavits and Declarations
Court of appeal
Contempt cases, using writ of prohibition to challenge defective affidavits in, 16.139
Hearsay, declaration made on information and belief constituting, 18.46
Preliminary opposition, real party in interest or respondent submitting sworn declaration of facts, 21.13
Record accompanying writ petition in court of appeal, counsel's declaration explaining absence of, 20.3
Stay by appellate court, declaration explaining urgency and unavailability of supporting documents, 18.60, 19.16
Transcript of proceedings in lower court, declaration explaining absence of, 17.19
Mandate in superior court
Alternative writ of mandate or prohibition. See **Alternative Writs of Mandate or Prohibition in Superior Court**
Opposition to petition for writ of mandate, declaration in, 13.14
Superior court
Limited jurisdiction civil cases, declaration explaining unavailability of documents supporting writ petition filed in, 12.6

Mandate (see Mandate in superior court, above)
Noticed motion for writ in superior court, declaration supporting, 5.101
Record in superior court writ proceedings, supporting declarations. See **Record in Superior Court Writ Proceeding**
Stay pending superior court's decision on merits of writ petition. See **Stay of Proceedings Pending Writ Petition in Superior Court**

Affirmative Defenses. See **Defenses to Writ Petition**

Agencies. See **State and Local Agencies**

Agricultural Labor Relations Board (ALRB)
Enforcement of orders issued by, 4.28
Final order, petition for review of
Deadline for filing writ petition, 16.19
Discretion of appellate court to summarily deny petition, 16.20
Exclusive means of obtaining appellate review of ALRB's final order, writ petition as, 16.18
Standard of review if writ petition accepted, 16.21

Alcoholic Beverage Control Appeals Board
Deadline to file and serve writ petition, 16.23
Exclusive means of obtaining review of Board's adjudicatory order, petition for writ as, 16.22
Mandate in appellate court challenging nonadjudicatory action by Board, 16.25
Standard of review if writ petition accepted, 16.24

Alternative Writs in Courts of Appeal
See also **Order to Show Cause (OSC)**
Generally, 22.24
Action by court of appeal after issuing alternative writ
Generally, 24.1
Discharge of alternative writ (see Discharge of alternative writ or order to show cause, below)
Disputed questions of fact, appellate court appointing special referee to resolve, 24.14
Opinion granting or denying writ petition. See **Opinion by Appellate Court Granting or Denying Writ Petition**
Oral argument. See **Oral Argument in Appellate Court**
Coercive alternative writ
Generally, 22.23, 22.27
Compliance with writ by trial court, 22.28
Defined, 22.23
Failure of trial court to respond to writ, 22.29
Palma notice, use of coercive alternative writ in lieu of, 22.19, 22.27
Content and preparation of alternative writ, 22.25
Definitions
Alternative writ, 22.23
Coercive writ, 22.23
Denial of writ
Discharge of alternative writ (see Discharge of alternative writ or order to show cause, below)
Opinion granting or denying writ petition. See **Opinion by Appellate Court Granting or Denying Writ Petition**
Discharge of alternative writ or order to show cause
Generally, 25.12
"Cause," alternative writ or order to show cause creating, 25.13
Denial of petition, discharge resulting in, 25.14
Denial of writ petition on grounds alternative writ or order to show cause improvidently granted, 24.6
Opinion of appellate court discharging alternative writ, 24.22
Order discharging alternative writ as improvidently granted, 28.14
Trial court's compliance with alternative writ or order to show cause, appellate court discharging alternative writ or OSC, 24.7
Form, alternative writ/order to show cause, 28.6
Opinion granting or denying writ petition. See **Opinion by Appellate Court Granting or Denying Writ Petition**
Palma notice. See ***Palma* Notice**
Prayer for relief seeking alternative writ or order to show cause, 18.39
Preparation of, 22.25
Return to alternative writ. See **Return to Alternative Writ in Appellate Court Proceedings**
Service and filing of, 22.26
Speaking alternative writ (see Coercive alternative writ, above)
Stay of writ proceeding, effect of alternative writ on. See **Stay of Proceedings by Appellate Court**
Time
Issuance of alternative writ, lack of deadline for, 22.24

Return. See **Return to Alternative Writ in Appellate Court Proceedings**

Alternative Writs of Mandate or Prohibition in Superior Court
See also **Noticed Motion in Superior Court**
Generally, 1.3, 5.9, 5.108, 9.1
Action by court on application for alternative writ
Generally, 9.2
Content of writ (see Content of alternative writ, below)
Denial of writ (see Denial of writ if petition defective or meritless, below)
Effect of issuing alternative writ, 8.32, 9.6
Ex parte application (see Ex parte application for writ, below)
Merits of petition (see Merits of petition, below)
Peremptory writ of mandate or prohibition, court's issuance of, 9.20
Rulings and judgments (see Rulings and judgments, below)
Advantages and disadvantages of alternative writ procedure
Denial of alterative writ and dismissal of petition, 5.18
Early hearing on writ, 5.17
Immediate relief, availability of, 5.16
Compliance with writ by respondent
Generally, 8.33
Noncompliance with writ, effect of, 8.34
Content of alternative writ
Hearing on merits of return and petition, alternative writ specifying date for, 9.10, 9.24
Mandate, action commanded by writ of, 9.7
Prohibition, action commanded by writ of, 9.8
Return to writ petition, alternative writ specifying date for, 9.9
Date for hearing
Briefing schedule and hearing date on merits of petition, court setting, 9.5
Minimum notice before court can issue peremptory writ, 9.23
Noticed motion, setting hearing date for, 9.21
Return and writ petition, alternative writ setting date for hearings on, 9.10, 9.24
Standard law and motion rules, applicability of, 9.22
Declarations
Generally, 5.111
Evidence, presenting by declaration, 9.29
Ex parte application for alternative writ of mandate and order to show cause, declaration of notice in support of, 5.114, 13.4
Default, superior court prohibited from issuing writ by, 9.25
Denial of writ if petition defective or meritless
Generally, 5.18, 9.17
Leave to amend, court granting, 8.42, 9.18
Noticed motion seeking issuance of peremptory writ, 9.19
Res judicata, inapplicability to denial of alternative writ, 9.55
Discretion of court
Jury trial on factual disputes, court's discretion to allow, 9.31
Oral testimony, discretion of court to allow, 9.30
Evidence on merits of petition, parties' right to present
Generally, 9.28
Declaration or judicial notice, presenting evidence by, 9.29
Oral testimony, discretion of court to allow, 9.30
Ex parte application for writ
Generally, 5.113, 9.3
Action by court on, 5.118
Contents of ex parte application, 5.114
Declaration of notice in support of ex parte application for alternative writ of mandate and order to show cause, 5.114, 13.4
Form, ex parte application for alternative writ of mandate and order to show cause, 13.2
Hearing on ex parte application (see Hearing, below)
Issuance of writ, 9.5
Local rules and policies, attorney consulting, 5.117
Minimal notice to opposing party of ex parte appearance, 9.3
Opposition memorandum in response to ex parte application for alternative writ, time for filing, 8.24
Opposition to application if petitioner seeks ex parte issuance of writ, 8.21, 8.26
Proposed order directing issuance of alternative writ of mandate, 13.5
Service of, 5.115
Supporting memorandum for ex parte application for alternative writ of mandate and order to show cause, 13.3
Ex parte hearing

Generally, 9.4
Personal appearance by petitioner or counsel at ex parte hearing, 5.116
Service of ex parte application before hearing, 5.115
Factual disputes, return raising
Burden of proof on petitioner to establish disputed facts, 9.27
Evidence (see Evidence on merits of petition, parties' right to present, above)
Jury trial on factual disputes, court's discretion to allow, 9.31
Form, alternative writ of mandate, 13.6
Hearing
Date for hearing (see Date for hearing, above)
Early hearing on writ, 5.17
Ex parte hearing (see Ex parte hearing, above)
Factual disputes (see Factual disputes, return raising, above)
Judgments (see Rulings and judgments, below)
Notice of hearing on petition for writ of mandate, 13.7
Return (see Return to alternative writ, below)
Judgments (see Rulings and judgments, below)
Local rules of court
Ex parte application for writ, attorney consulting local rules and policies concerning, 5.117
Preference for noticed motion or alternative writ, local rules expressing, 5.9, 9.21
Memorandums
Ex parte application for alternative writ (see Ex parte application for writ, above)
Opposition to petition for writ, 9.23
Return to alternative writ, memorandum of opposition accompanying, 8.38
Supporting memorandum, 5.110
Merits of petition
Court hearing merits of return, 9.6
Date for hearing (see Date for hearing, above)
Evidence (see Evidence on merits of petition, parties' right to present, above)
Hearing (see Hearing, above)
Notice
Date for hearing (see Date for hearing, above)
Declaration or judicial notice, presenting evidence by, 9.29
Hearing on petition for writ, notice of, 13.7
Noticed motion. See **Noticed Motion in Superior Court**
Palma notices not used in superior court writ proceedings, 8.39
10 days notice of application for writ by petitioner, requirement of filing written opposition if petitioner gives, 8.22, 8.27
Opposition to application for alternative writ
Generally, 8.2
All parties, service of opposition on, 8.30
Appellate division of superior court, opposition and return if alternative writ issued by, 12.15
Content of opposition, 8.26-8.27
Ex parte application for writ, opposition to (see Ex parte application for writ, above)
Filing fee, 8.29
Filing opposition in same court as writ petition, 8.28
Memorandum in opposition, 9.23
Method of service, statutes governing, 8.31
Return to alternative writ, memorandum of opposition accompanying, 8.38
10 days notice of application for writ by petitioner, requirement of filing written opposition if petitioner gives, 8.22, 8.27
Time for filing opposition (see Time for filing opposition to application for alternative writ, below)
Orders
Proposed order directing issuance of alternative writ of mandate, 13.5
Service of order (see Service of alternative writ, below)
Order to show cause (see Ex parte application for writ, above)
Petitioner prevailing
Preparation of judgment (see Preparation of judgment by petitioner, below)
Preparation of peremptory writ (see Preparation of peremptory writ by petitioner, below)
Preparation of judgment by petitioner
Generally, 9.37
Conformed copies for parties, petitioner submitting to court clerk, 9.40
Content of judgment, 9.39
Denial of writ, preparation of judgment by respondent, 9.47
Purpose of judgment, 9.38
Submission of proposed peremptory writ with proposed judgment and proposed statement of decision, 9.43
Preparation of papers

Exhibits and declarations, 5.111
Memorandum in support of writ petition, 5.110
Proposed alternative writ, submission of, 5.112
Writ petition, 5.109
Preparation of peremptory writ by petitioner
Content of writ, 9.44
Enforcement of writ, laying foundation for, 9.46
Proposed peremptory writ, 9.41
Return date in peremptory writ for respondent, petitioner including, 9.42
Service of writ, 9.45
Submission of proposed peremptory writ with proposed judgment and proposed statement of decision, 9.43
Respondent prevailing
Content of judgment, 9.48
Preparation of judgment denying writ by respondent, 9.47
Responsive pleading (see Opposition to application for alternative writ, above)
Return to alternative writ
Generally, 8.35
Appellate division of superior court, opposition and return if alternative writ issued by, 12.15
Date of return to writ petition, alternative writ specifying, 9.9
Defective return or no return, consequences of filing, 8.37
Defined, 8.2
Factual disputes (see Factual disputes, return raising, above)
Hearing merits of return and petition, alternative writ specifying date for, 9.10, 9.24
Memorandum in opposition to petition accompanying return, 8.38
Merits of return, court hearing, 9.6
No return filed, superior court assuming truth of petitioner's factual allegations, 9.25
Petitioner including return date in peremptory writ for respondent, 9.42
Questions of law, hearing on return raising, 9.26
Time for filing, 8.36
Rulings and judgments
Conclusion of hearing, ruling at, 9.33
Petitioner prevailing (see Petitioner prevailing, above)
Respondent prevailing (see Respondent prevailing, above)
Statement of decision (see Statement of decision, below)
Submission of case, ruling after, 9.33
Tentative rulings before hearing based on review of submitted papers, 9.32
Service of alternative writ
Copy of petition, requirement of serving with alternative writ, 9.12
Ex parte application for writ, service of, 5.115
Issuance of alternative writ, service of order directing, 9.13
Opposition to application for alternative writ, service of (see Opposition to application for alternative writ, above)
Petitioner's responsibility for serving alternative writ, 9.11
Respondents and real parties in interest, service on, 9.15
Stay order, service in conjunction with alternative writ, 9.14
Time for serving alternative writ, 9.16
Service of peremptory writ, 9.45
Statement of decision
Generally, 9.34
Content of, 9.36
Respondent preparing proposed statement of decision, 9.47
Submission of proposed peremptory writ with proposed judgment and proposed statement of decision, 9.43
Timing of request for, 9.35
Time
Amended petition, time to file and serve, 8.42, 9.18
Chronology of alternative writ procedure, 5.15
Opposition, time for filing (see Time for filing opposition to application for alternative writ, below)
Return to alternative writ, time for filing, 8.36
Service of alternative writ, time for, 9.16
Statement of decision, timing of request for, 9.35
Time for filing opposition to application for alternative writ
Generally, 8.23
Ex parte application for alternative writ, time to file opposition memorandum in response to, 8.24
10 days notice of application for issuance of writ, time for filing opposition if petitioner gives, 8.25
Verified writ petition for alternative writ of mandate and verified compliant for declaratory relief, 13.1

Amendments and Modifications
Administrative body, express authorization required for modification of decision by, 3.10
Alternative writ of mandate or prohibition in superior court, leave to amend petition for, 8.42, 9.18
Complaint, mandate to compel trial court to permit amended, 16.106
Court of appeal's decision, modification of. See **Courts of Appeal**
Denial of motion to amend writ petition, nonappealability of, 11.14
Stay of proceedings in superior court, modification of, 6.28
Sustaining demurrer without leave to amend, appeal from resulting judgment of dismissal as adequate remedy, 16.110

Amicus Curiae
Generally, 23.52
Application to file amicus brief, 23.53
Exceptional cases, seeking amicus participation only in, 23.55
Filing and service of amicus brief, 23.54
Letter brief, 28.17
Oral argument, amicus curiae request to participate in, 24.10
Rehearing in court of appeal, amicus curiae's standing to file petition for, 25.18

Answers in Courts of Appeal
Rehearing in court of appeal, answer to petition for, 25.22
Return to alternative, verified answer as formal. See **Return to Alternative Writ in Appellate Court Proceedings**

Answers in Superior Court
Generally, 8.45
Content of answer
Generally, 8.46
Affirmative defenses, raising in answer, 8.48
Allegations deemed admitted if not denied in answer, 8.47
Defined, 8.2, 8.45
Demurrer. See **Demurrer**
Reply to answer. See **Replication (Petitioner's Reply) in Superior Court**
Responsive motion, filing answer in conjunction with, 8.56
Verification of answer, 8.49

Answer to Petition for Review in California Supreme Court. See **Review in California Supreme Court**

Appeals
See also **Courts of Appeal**
Adequate remedy, appeal as
Generally, 15.56
Final judgment, appeal from, 15.58
Interlocutory orders and judgments, immediate appeal from, 15.57
Agricultural Labor Relations Board, appealability of superior court orders enforcing final order issued by, 4.28
Arbitration issues, appealability of, 16.99-16.100
Briefs. See **Briefs**
Contempt cases, nonappealability of judgments or orders in, 16.133
Coordination of actions, nonappealability of order concerning, 16.8
Costs on appeal
Factor in considering appeal, costs as, 11.17
Opinion by appellate court, award of costs in. See **Opinion by Appellate Court Granting or Denying Writ Petition**
Prayer for costs in writ petition to court of appeal, 18.41
Prevailing party's recovery of costs, 11.33
Remittitur, awards of costs in, 11.33
Risk of seeking writ, financial costs as, 17.35
Sanctions for frivolous writ petition, court awarding or denying costs as, 24.64
Discovery sanctions, appealability of, 16.126-16.127
Disqualification of attorney, appeal of order, 16.102, 17.22
Disqualification of judge, nonappealability of order granting or denying motion for, 16.3
Extraordinary circumstances requiring filing both writ and appeal, 16.152
Factors in considering appeal of superior court's decision on writ
Generally, 11.15
Consequences of adverse judgment, severity of, 11.18
Standard of review on appeal, 11.16
Time and financial costs, 11.17
Final decision of superior court on writ petition, appeal of

Generally, 11.7
Disposal of all issues and causes of action between parties, requirement of, 11.9-11.11
Factors in considering appeal (see Factors in considering appeal of superior court's decision on writ, above)
Formal judgment, no requirement of, 11.8
Interlocutory rulings, nonappealability of, 11.13
Multi-party cases, appealability of order resolving all issues with respect to one party, 11.11
Noncompliance with writ, finality of decision despite, 11.12
Post-judgment orders, appealability of, 11.13
Without prejudice, appealability of order denying writ petition, 11.10
Final judgment, appeal from, 15.58
Grounds for not complying with writ, appeal as, 10.8
Injunction, appealability of, 16.150, 26.9
Interlocutory orders and judgments, immediate appeal from, 15.57
Jurisdiction of appellate court. See **Jurisdiction**
Limited jurisdiction civil cases, appeal to appellate division of superior court. See **Limited Jurisdiction Civil Cases**
Lis pendens, nonappealability of order granting or denying expungement of, 16.11
Notice of appeal
Generally, 11.21
Filing writ petition in court of appeal, effect on time limit for filing notice of appeal, 11.37
Jurisdiction, failure to timely file notice of appeal resulting in loss of, 11.23
Supersedeas. See **Supersedeas**
Time to file, 11.22
Opinions of court of appeal
Generally, 11.32
Grant or denial of writ petition. See **Opinion by Appellate Court Granting or Denying Writ Petition**
Publication of opinion. See **Publication of Opinion**
Oral argument. See **Oral Argument in Appellate Court**
Probate orders, appealability of, 16.143
Record on appeal. See **Record in Appellate Court Writ Proceeding**
Review, no right of appeal from challenged action of lower court as prerequisite for writ of. See **Review (Certiorari) in Courts of Appeal**
Rules governing appeals of writ proceedings, 11.20
Settlement of writ proceeding on appeal, 11.19
Small claims court judgment, defendant appealing, 12.26
Stay of proceedings pending writ petition in superior court, appeal of order granting or denying application for, 6.27
Stay on appeal. See **Stay of Proceedings by Appellate Court**
Summary judgment, appealability of order granting, 16.66
Supersedeas, filing writ petition with appeal, 26.3
Time
Memorandum of costs, time limit for filing, 11.33
Notice of appeal (see Notice of appeal, above)
Opinion, deadline for court of appeal to issue, 11.32
Traditional writ of mandate in superior court compelling Board of Equalization to hear appeal challenging assessment, 2.60

Appearance
Ex parte proceedings. See **Ex Parte Proceedings**
Hearing on stay request, respondent appearing at, 6.19
Oral argument. See **Oral Argument in Appellate Court**
Return to alternative writ in appellate court proceedings, serving return on petitioner and parties appearing in proceeding, 23.42

Appellate Courts. See **Courts of Appeal**

Arbitration
See also **Mediation**
Generally, 16.99
Appealability of arbitration issues, 16.99-16.100
Compelling arbitration
Orders compelling arbitration, writ petition as exclusive means of reviewing, 16.100
Traditional mandate petition to compel arbitration, 2.51
Questions of first impression, writ review limited to, 16.99
Standard of review if writ petition accepted, 16.101

Assessments. See **Taxes, Traditional Writ of Mandate Concerning**

Associations, Actions by. See **Traditional Mandate in Superior Court**

Attachment
Superior court issuing writ of, 4.29

Attorney-Client Privilege
Discovery order affecting attorney-client privilege, writ review of, 16.122

Attorney General
Amicus curiae brief filed by, 23.52
Service of writ petition contesting statute's constitutionality on, 18.79

Attorneys
Appointment of counsel for person detained under Lanterman-Petris-Short (LPS) Act, 4.22
Courts of appeal. See **Courts of Appeal**
Disciplinary action by State Bar Court, disciplined attorney or chief trial counsel for State Bar filing petition with California Supreme Court for review of, 27.6
Ineffective assistance of counsel in proceedings involving children, habeas petition raising issue of, 4.20
Orders concerning counsel, petition for writ to review
Disqualification of attorney, writ petition to review. See **Disqualification**
Other issues involving attorney representation, writ proceedings over, 16.103
Standard of review if writ petition accepted, 16.104
Verification of writ petition by attorney, 5.67, 18.44
Work product, review of discovery order affecting, 16.122
Work product, writ review of discovery order affecting, 16.112

Attorneys' Fees
Court of appeal
Award of costs by appellate court, effect on fee award, 11.33
Conflict of interest arising from payment for legal services, 17.13
Lis pendens, writ of mandate challenging attorney fee order in action for expungement of, 16.11
Sanctions for frivolous writ petition, attorney fees awarded as, 24.65
Superior court
Contents of fee motion, 5.126
Prayer for attorney fees in writ petition, 5.61
Procedure for recovering fees, 5.125-5.126
Separate documents required to recover fees and costs, 5.127
Statute or contractual attorney fees provision, recovery of fees under, 5.124
Stay of proceedings pending writ petition in superior court, court requiring undertaking to cover enjoined party's attorney fees, 6.38
Time to file motion for fees, 5.125
Trial court or reviewing court, award of fees by, 24.28

Automatic Stay
Generally. See **Stay of Proceedings by Appellate Court**
Supersedeas. See **Supersedeas**

Beneficial Interest, Requirement Petitioner Have. See **Courts of Appeal**

Bias and Prejudice
Administrative mandamus to review prejudicial abuse of discretion by administrative body. See **Administrative Mandamus in Superior Court**
Court of appeal's discretion to consider writ petition filed more than 60 days after issuance of challenged ruling absent showing of prejudice, 18.68
Irreparable injury to petitioner, trial court's erroneous and substantially prejudicial ruling resulting in, 15.64
Supersedeas relief, appellant's burden of showing lack of prejudice to respondent, 26.18

Board of Equalization
Traditional writ of mandate in superior court compelling Board of Equalization to hear appeal challenging assessment, 2.60

Bonds and Undertakings
Stay of enforcement of money judgment by appellate court, bond required for, 26.3, 26.12
Stay of proceedings, appellate court's discretion to require undertaking, 19.10
Stay pending superior court's decision on merits of writ petition, request for undertaking. See **Stay of Proceedings Pending Writ Petition in Superior Court**

Supersedeas. See **Supersedeas**

Briefs
Generally, 11.27
Amicus curiae briefs. See **Amicus Curiae**
Appellant's opening brief, 11.28
Appellant's reply brief, 11.30
CD-ROM format, filing briefs in, 20.11
Respondent's brief, 11.29

Burden of Proof
Alternative writ of mandate or prohibition in superior court, petitioner's burden of proof to establish disputed facts at hearing on, 9.27
Inadequacy of other remedies, writ petitioner's burden to show, 15.60
Irreparable injury, writ petitioner's burden to show, 15.65
Issues presented in writ petition, burden on petitioner to submit information for superior court to decide, 7.2
Prohibition in appellate court, petitioner's burden of proof to show lower court has decided to take challenged action, 15.19
Supersedeas relief, appellant's burden of showing grounds for, 26.18

California Public Records Act. See **Public Records Act**

California Rules of Court. See **Rules of Court**

California Supreme Court
See also **Review in California Supreme Court**
Appellate division of superior court's writ decision, filing new writ petition in California Supreme Court seeking review of, 12.21
Discretion of Supreme Court to grant review. See **Review in California Supreme Court**
Exclusive method of review, original writ as
Generally, 27.3
Denial order, effect of, 27.3
Energy Resources Conservation and Development Commission's decisions on application for certification of sites, review of, 27.4
Public Utilities Commission's decisions, review of. See **Public Utilities Commission (PUC)**
State Bar Court disciplinary action, disciplined attorney or chief trial counsel for State Bar filing petition for review of, 27.6
Workers' Compensation Appeals Board, special statutory writ of review for decisions by, 27.7
Filing petition in original proceedings
Content and format of petition, 27.11
Fee for filing petition, 27.10
Timing and procedures for filing, 27.10
Format of petitions. See **Format of Petitions and Other Documents**
Jurisdiction
Grounds for review by California Supreme Court, court of appeal's lack of jurisdiction as, 27.13
Original jurisdiction in writ proceeding (see Original writ petitions, below)
Original writ petitions
Generally, 11.38
Challenge to action by appellate court justice or court of appeal, writ relief from supreme court, 27.9
Distinction between seeking petition for review challenging court of appeal's opinion from petition invoking supreme court's original jurisdiction seeking issuance of prerogative writ of mandate, prohibition, or review, 11.35
Exclusive method of review (see Exclusive method of review, original writ as, above)
Extraordinary circumstances warranting bypassing lower courts, 27.8
Filing petition in original proceedings (see Filing petition in original proceedings, above)
Original jurisdiction in writ proceeding, Supreme Court exercising, 27.2
Petitions for writs
Generally, 27.1
Original writ petitions (see Original writ petitions, above)
Review. See **Review in California Supreme Court**
Supersedeas. See **Supersedeas**
Transfer of case from appellate court to California Supreme Court before decision
Generally, 24.55
Court or party initiating request for transfer, 24.56
Petition requesting transfer, 24.57
Timing of request for transfer, 24.58

Certificates and Certification

Class certification. See **Class Certification**
Court of appeal certifying opinion for publication, 11.32
Filing of certificates (see Interested Entities or Persons, Certificate of, below)
Initiative or referendum petition, certification of. See **Election Processes, Traditional Mandate Challenging**
Interested Entities or Persons, Certificate of
Generally, 18.21
Judicial Council Form APP-008, 28.2
Opposition to writ petition filed in court of appeal, service and filing of certificate, 23.8
Preliminary opposition to writ petition filed in court of appeal, inclusion of certificate in, 21.20
Return to alternative writ in appellate court proceedings, requirements for serving and filing certificate, 23.26A
Sanctions for failing to file certificate. See **Penalties**
Limited jurisdiction civil case, party seeking certification to court of appeal, 12.23
Peremptory writ of mandate or prohibition, clerk of appellate court transmitting certified copy to trial court, 24.40
Question of law, request that trial court certifying existence of, 17.28
Service of certificates (see Interested Entities or Persons, Certificate of, above)
Traditional mandate challenging professional certificating decisions, 2.39

Certiorari in Courts of Appeal. See **Review (Certiorari) in Courts of Appeal**

Certiorari in Superior Court. See **Review (Certiorari) in Superior Court**

Certiorari in U.S. Supreme Court
Challenging court of appeal decision by seeking certiorari in U.S. Supreme Court, 25.31
Review in California Supreme Court, petition for as prerequisite to petitioning U.S. Supreme Court for certiorari, 25.29

Change of Venue. See **Venue**

Charts, Checklists, Questionnaires, and Tables
Court of appeal
Drafting writ petition. See **Drafting Writ Petition for Court of Appeal**
Exhibits, table of, 28.3
Initiating writ proceeding in court of appeal, checklist for petitioner, 18.4
Judgments and orders subject to CCP §917.1-917.9, chart, 26.11
Palma opposition and reply, return and reply, deadlines for filing, 23.51
Rehearing in court of appeal, chart, 25.23
Time for filing petitions, chart, 18.76
Petition for review in California Supreme Court, filing requirements for, 27.28
Superior court
Administrative and traditional mandamus, checklist for choosing between, 3.20
Pitfalls to avoid in writ petitions, checklist of, 5.128
Review method for superior court orders, chart, App A
Sacramento Superior Court guide to procedures for prosecuting petitions for prerogative writs, App B
Stay of proceedings pending writ petition in superior court, checklist for obtaining order, 6.39

Children. See **Parent and Child**

Civil Commitment Proceedings, Habeas Corpus Challenging. See **Habeas Corpus in Superior Court**

Civil Rights
Traditional writ of mandate to enforce, 2.56

Class Certification
Notification issues, 16.129B
60-day rule, applicability of, 16.129C
Standard of review for order on class certification, abuse of discretion as, 16.129A, 16.129D

Coercive Alternative Writ. See **Alternative Writs in Courts of Appeal**

Complaints
Amended complaint, issuance of mandate to compel trial court to permit, 16.106
Combining writ petition with complaint for damages, 5.119
Demurrer. See **Demurrer**

Compliance with Writ
Alternative writ, effect of respondent complying with. See **Alternative Writs of Mandate or Prohibition in Superior Court**

Alternative writ, trial court's compliance with. See **Alternative Writs in Courts of Appeal**
Penalties for noncompliance. See **Enforcement of Writs of Mandate or Prohibition in Courts of Appeal**
Peremptory writ, compliance with See **Enforcement of Writs of Mandate or Prohibition in Superior Court**

Computers and Computer Software
CD-ROM format, filing briefs and records in, 20.11

Confidentiality
Appellate court records, confidentiality of. See **Record in Appellate Court Writ Proceeding**
Information received from client, presumption of confidentiality, 17.11
Record in superior court, protecting confidential documents. See **Record in Superior Court Writ Proceeding**

Conflict of Interest in Representing Client. See **Courts of Appeal**

Consent
Client consenting to payment for legal services by third party, 17.13

Conservatorships and Guardianships
Petition for writ to review conservatorship or guardianship orders, 16.144

Constitutional Law
Administrative mandamus to determine if administrative body exceeded constitutional authority, 3.9
Attorney General, service of writ petition contesting statute's constitutionality on, 18.79
Discovery, writ review of constitutional issues arising during. See **Discovery**
Due process. See **Administrative Mandamus in Superior Court**
Jurisdiction of superior court, challenge based on unconstitutional law. See **Jurisdiction**
Mandate in court of appeal to test statute's constitutionality, 16.90
Prohibition in appellate court to test law's constitutionality, 16.89
Public Utilities Commission's orders, reviewing court's exercise of independent judgment in reviewing constitutional questions involving, 16.43A
Statewide agencies
Certiorari, availability to review adjudicatory decisions of constitutional statewide agencies, 4.15
Prohibition, availability to review adjudicatory decisions of constitutional statewide agencies, 4.6
Statutes allowing appellate review solely by writ petition, constitutionality of, 17.24
Traditional writ of mandate. See **Traditional Mandate in Superior Court**
Workers' compensation legislation, challenging constitutionality of, 16.46

Construction and Interpretation
Statutory time limits for filing writ petition with court of appeal, strict construction of, 17.2

Contempt
Before contempt adjudication, review of order
Newspersons' shield law not providing relief before contempt adjudication, 16.132
Prohibition, seeking writ before contempt adjudication, 16.131
Enforcement of peremptory writ in appellate court by seeking sanctions for contempt, 24.51
Enforcement of writ by superior court, order to show cause re contempt, 10.14
Prohibition, filing writ in appellate court to prevent enforcement of contempt
Defective affidavits, use of prohibition to challenge, 16.139
Payment of fine or completed jail sentence, writ of prohibition unavailable after, 16.137
Prescribed contempt procedures, prohibition restraining court's failure to comply with, 16.138
Prohibition, seeking writ before contempt adjudication, 16.131
Review of judgments and orders in contempt cases
Generally, 16.130, 16.133
Before adjudication (see Before contempt adjudication, review of order, above)
Habeas corpus, review of incarceration by writ of, 15.37, 15.41, 16.136
Mandate, review of contempt order by writ of, 16.140
Prohibition (see Prohibition, filing writ in appellate court to prevent enforcement of contempt, above)
Review (certiorari) in court of appeal, challenging contempt ruling by seeking writ of, 15.37, 16.133, 16.135
Scope of review, 16.134
Standard of review if writ petition accepted, 16.142
Time to file writ petition, 16.141

Coordination of Actions, Appellate Review of Order Concerning. See **Mandate in Courts of Appeal**

Coram Nobis and Coram Vobis

See also **Vacating and Setting Aside**
Generally, 15.44
Case law governing writs, 15.45
Civil cases, availability of writ in, 15.48
Criminal cases, writs used in, 15.46
Requirements for issuance of writ, 15.47

Corporations
Prohibition, applicability to corporations, 4.7
Traditional mandate to compel performance by, 2.38, 2.54
Water corporations, limits on judicial review cases pertaining to, 16.42

Costs
See also **Expenses and Expenditures; Fees**
Appeals, costs on. See **Appeals**
Enforcement of costs award, 24.54
Limited jurisdiction civil cases, prevailing party's entitlement to costs in, 12.25
Prohibition in appellate court to prevent award of costs not provided for by statute, 15.26
Superior court
Appeal of superior court's final decision on writ petition, costs of. See **Appeals**
Items of recoverable costs, statute specifying, 5.122
Prayer for costs in writ petition, 5.61
Prevailing party, recovery of costs by, 5.121
Procedure for claiming costs, 5.123
Record in underlying proceeding, requesting cost estimate for preparation of, 7.16
Separate documents required to recover attorney fees and costs, 5.127
Time limit for filing memorandum of costs, 5.123

Court Clerk
Court of appeal
Mandate. See **Mandate in Courts of Appeal**
Prohibition. See **Prohibition in Courts of Appeal**
Remittitur, clerk's duties regarding, 24.35
Temporary stay order, appellate court clerk notifying trial judge and parties of, 9.40
Superior court
Alternative writ of mandate or prohibition in superior court, petitioner submitting conformed copies for parties to court clerk, 9.40
Ex parte proceeding, scheduling with court clerk, 6.17

Courts of Appeal
See also **Appeals; Superior Court**
Generally, 14.1, 15.1, 22.1
Actions by court of appeal on writ petition
Generally, 25.2
Challenging court's action on writ petition (see Challenging court of appeal's action on writ petition, below)
Types of actions (see Types of action appellate court can take on writ petition, below)
Adequate remedy at law, petitioner's lack of
Generally, 17.30
Appeal as remedy, adequacy as. See **Appeals**
Burden on petitioner to show inadequacy of other remedies, 15.60
Drafting writ petition, facts addressing inadequacy of other remedies at law, 18.34
Drafting writ petition for court of appeal, facts addressing inadequacy of other remedies at law, 18.34
Exclusive means of appellate review, writ proceeding as, 15.59
Review (certiorari), effect of appeal failing to provide plain, speedy, or adequate remedy on right to writ of, 15.34
Alternatives to seeking writ relief, 17.2
Alternative writs. See **Alternative Writs in Courts of Appeal**
Assignment of writ petitions for handling within court of appeal
Generally, 22.2
Fifth District Court of Appeal, 22.7
First District Court of Appeal, 22.3
Fourth District Court of Appeal, 22.6
Second District Court of Appeal, 22.4
Sixth District Court of Appeal, 22.8
Third District Court of Appeal, 22.5
Attorneys

Conflict of interest (see Conflicts of interest, counsel checking for, below)
Cover for writ petition in appellate court, identification of counsel on, 18.17
Disqualification of attorney, writ petition in court of appeal for review of, 17.22
Ethical considerations (see Ethical considerations for appellate specialist, below)
Fees. See **Attorneys' Fees**
Frivolous writ petitions. See **Frivolous Writ Petitions in Courts of Appeal, Sanctions for Filing**
Handling writ proceedings (see Handling appellate court writ proceedings, below)
Preparation of writ petition (see Preparation of writ petition, gathering information for, below)
Beneficial interest in outcome of proceeding, requirement petitioner have
Definition of beneficial interest, 15.51
Nonjudicial action, petitioner challenging in court of appeal, 15.54
Trial court ruling, aggrieved party having beneficial interest in, 15.52
Trial court's lack of beneficial interest in proceeding, 15.55
Underlying action, no requirement petitioner be party in, 15.53
Benefits of seeking writ, 17.34
Burden of proof. See **Burden of Proof**
Certiorari. See **Review (Certiorari) in Courts of Appeal**
Challenging court of appeal's action on writ petition
Generally, 25.11
Certiorari, petitioning U.S. Supreme Court for writ of, 25.31
Discharge of alternative writ, motion for. See **Alternative Writs in Courts of Appeal**
Modification of decision, party seeking (see Modification of court's decision, below)
Rehearing. See **Rehearing in Court of Appeal**
Review by California Supreme Court. See **Review in California Supreme Court**
Conflicts of interest, counsel checking for
Generally, 17.8
Accepting clients with adverse positions on same legal question, conflict arising from, 17.14
Confidential information received from client or former client, conflict arising from, 17.11
Current client, conflict with interests of another, 17.10
Discussion of case, checking for conflicts before, 17.9
Payment for legal services, conflict arising from, 17.13
Potential conflicts, 17.10-17.14
Subject matter of action and relationships, conflict arising from attorney's interest in, 17.12
Contents of petition
Generally, 14.2
Alternative writ, contents of, 22.25
Drafting petition. See **Drafting Writ Petition for Court of Appeal**
Opposition to writ petition. See **Opposition to Writ Petition Filed in Court of Appeal**
Rehearing, contents of petition for, 25.20
Reporter's transcript, appellate court writ petition accompanied by copy of, 17.18
Supersedeas. See **Supersedeas**
Coram vobis. See **Coram Nobis and Coram Vobis**
Costs. See **Costs**
Court clerk. See **Court Clerk**
Decision on merits. See **Decision on Merits**
Declarations. See **Affidavits and Declarations**
Denial of writ. See **Denial of Writ by Appellate Court**
Determining appealability of challenged order or ruling
Correctness of order, presumption affecting, 20.4
Exception to presumption against writ relief for appealable orders, 17.22
Unavailability of writ relief if order appealable, presumption of, 17.21
Discretion of court. See **Discretion of Court**
Distinguishing appellate and superior court writ proceedings, 14.1
Ethical considerations for appellate specialist
Client's awareness of appellate counsel's involvement in case, appellate counsel's duty to ensure, 17.6
Competent representation, duty to provide, 17.5
Conflicts of interest (see Conflicts of interest, counsel checking for, above)
Exclusive means of appellate review, writ proceeding as
Generally, 15.59
Arbitration, review of order compelling, 16.100
Statutes specifying use of writ petition. See **Statutes Specifying Use of Writ Petition to Obtain Appellate Review**
Exhibits. See **Exhibits**
Extraordinary circumstances requiring filing both writ and appeal, 16.152
Extraordinary relief, determining if appellate court likely to grant
Generally, 17.27

Adequate remedy at law, effect of existence or lack of, 17.30
Denial of writ. See **Denial of Writ by Appellate Court**
Important issue, necessity of writ relief to decide, 17.32
Irreparable injury, effect of petitioner facing, 17.31
Merits of petition, review on, 17.29
Standard of appellate review, 17.33
Filing writ petition in
Generally, 11.37, 17.1
Alternative writ in court of appeal, filing petition for, 22.26
Fee for filing, 18.84
Frivolous writ petitions. See **Frivolous Writ Petitions in Courts of Appeal, Sanctions for Filing**
Information sheet (Fifth District), filing with writ petition, 18.83
Jurisdiction over trial court, filing writ petition with appellate district having, 18.85
Locations of courts of appeal, 18.87
Lowest court capable of granting relief, filing writ petition in, 18.86
Original and copies of petition and supporting memorandum, filing requirements for, 18.81
Preliminary opposition to writ petition. See **Preliminary Opposition to Writ Petition Filed in Appellate Courts**
Record, filing of, 18.82, 20.16
Rehearing in court of appeal, filing petition for, 25.19
Return to alternative writ. See **Return to Alternative Writ in Appellate Court Proceedings**
Supersedeas, filing petition for writ of. See **Supersedeas**
Time limits for filing writ petition. See **Time**
Finality of court's decision. See **Finality of Court of Appeal's Decision**
Format of petitions. See **Format of Petitions and Other Documents**
Habeas corpus. See **Habeas Corpus in Courts of Appeal**
Handling appellate court writ proceedings
Generally, 17.3
Allocation of responsibility between trial and appellate counsel, 17.7
Assignment of writ petitions (see Assignment of writ petitions for handling within court of appeal, above)
Conflicts of interest (see Conflicts of interest, counsel checking for, above)
Ethical considerations for appellate specialist (see Ethical considerations for appellate specialist, above)
Ethical considerations for trial counsel, 17.4
Information sheet for appellate court writ (Fifth District), 18.83, 28.22
Initiating writ petition in court of appeal
Generally, 18.1-18.2
Checklist for petitioner, 18.4
Determining most appropriate writ to file, 18.3
Drafting writ petition. See **Drafting Writ Petition for Court of Appeal**
Time to file writ petition. See **Time**
Wrong type of writ, effect of requesting, 18.3
Irreparable injury, requirement petitioner facing
Generally, 15.61
Burden on petitioner to show irreparable injury, 15.65
Erroneous and substantially prejudicial ruling by trial court, 15.64
Extraordinary relief, effect of petitioner facing irreparable injury on appellate court granting, 17.31
Present case, trial court's ruling depriving petitioner of opportunity to present case, 15.63
Specific and immediate harm, 15.62-15.64
Judicial notice. See **Judicial Notice**
Jurisdiction of. See **Jurisdiction**
Mandate. See **Mandate in Courts of Appeal**
Memorandum. See **Memorandum in Support or Opposition**
Modification of court's decision
Finality of court's decision, effect of order modifying substance of opinion on, 25.6, 25.9, 25.15
Methods for requesting modification of decision, 25.15
Rehearing to seek modification of court's decision. See **Rehearing in Court of Appeal**
Mootness of issue, effect on writ relief
Generally, 15.66
Public interest in issue, court hearing case despite mootness of issue, 15.67
Nonstatutory writ relief. See **Discretion of Court**
Notice. See **Notice and Notification**
Opinion by appellate court. See **Opinion by Appellate Court Granting or Denying Writ Petition**
Opposition to writ petition. See **Opposition to Writ Petition Filed in Court of Appeal**
Oral argument. See **Oral Argument in Appellate Court**
Orders
Alternative writs. See **Alternative Writs in Courts of Appeal**

Appeal from final order. See **Appeals**
Copy of order to be challenged, obtaining copy of, 17.15
Finality of court's decision, effect of order modifying substance of opinion on, 25.6, 25.9, 25.15
Mandate, appellate court order directing issuance of peremptory writ of, 24.37, 28.13
Palma notice, 28.7
Preliminary research on challenged order or ruling (see Preliminary research on challenged order or ruling, below)
Presumption affecting correctness of, 20.4
Stay of proceedings by appellate court, order for. See **Stay of Proceedings by Appellate Court**
Supersedeas, order granting petition for writ of, 28.19
Temporary stay order, court's issuance of. See **Stay of Proceedings by Appellate Court**
Time period to file writ petition in court of appeal, entry of order triggering, 18.70
Preliminary opposition. See **Preliminary Opposition to Writ Petition Filed in Appellate Courts**
Preliminary research on challenged order or ruling
Appealability of order or ruling (see Determining appealability of challenged order or ruling, above)
Calculating deadline for filing writ petition, 17.26
Statute providing for writ review. See **Statutes Specifying Use of Writ Petition to Obtain Appellate Review**
Preparation of writ petition, gathering information for
Declaration explaining absence of transcript of proceedings in lower court, 17.19
Order to be challenged, obtaining copy of, 17.15
Register of actions, obtaining copy of, 17.16
Relevant pleadings and trial court documents, counsel identifying and reviewing, 17.17
Reporter's transcript, obtaining copy of, 17.18
Sample writ petition, counsel obtaining from another case, 17.20
Presumptions (see Determining appealability of challenged order or ruling, above)
Procedures for prosecuting appellate court writs, 14.2
Prohibition. See **Prohibition in Courts of Appeal**
Public Utilities Commission's decisions, review of. See **Public Utilities Commission (PUC)**
Record in appellate court writ proceeding. See **Record in Appellate Court Writ Proceeding**
Rehearing in court of appeal. See **Rehearing in Court of Appeal**
Requirements for writ relief
Adequate remedy at law (see Adequate remedy at law, petitioner's lack of, above)
Beneficial interest (see Beneficial interest in outcome of proceeding, requirement petitioner have, above)
Irreparable injury (see Irreparable injury, requirement petitioner facing, above)
Mootness of issue (see Mootness of issue, effect on writ relief, above)
Omaha factors, 15.69-15.71
Raising issue in trial court as prerequisite for writ relief, 15.68
Standing (see Standing to seek writ, below)
Trial courts reaching conflicting results, effect of, 15.71
Widespread public importance or first impression, issue one of, 15.70
Return to writ. See **Return to Alternative Writ in Appellate Court Proceedings**
Review in California Supreme Court. See **Review in California Supreme Court**
Review. See **Review (Certiorari) in Courts of Appeal**
Risks of seeking writ, 17.35
Rules of court. See **Rules of Court**
Seeking relief directly from court of appeal, 25.3
Service of papers. See **Service of Process and Papers**
Standing to seek writ
Allegation in petition for writ in court of appeal concerning petitioner's standing, 18.28
Beneficial interest (see Beneficial interest in outcome of proceeding, requirement petitioner have, above)
Disqualification of judge, standing to file petition for writ of mandate for review of, 16.4
Rehearing in court of appeal, standing to seek, 25.18
Return, standing to file in appellate court. See **Return to Alternative Writ in Appellate Court Proceedings**
Statutes specifying use of writ petition. See **Statutes Specifying Use of Writ Petition to Obtain Appellate Review**
Stay of proceedings. See **Stay of Proceedings by Appellate Court**
Supersedeas. See **Supersedeas**
Time. See **Time**
Transcript (see Preparation of writ petition, gathering information for, above)
Transfer of case to California Supreme Court before decision. See **California Supreme Court**
Trial counsel (see Handling appellate court writ proceedings, above)
Types of action appellate court can take on writ petition
Generally, 22.9
Alternative writs. See **Alternative Writs in Courts of Appeal**
Palma notice, issuance of. See ***Palma* Notice**
Summary denial of writ. See **Denial of Writ by Appellate Court**
Temporary stay order, court's issuance of. See **Stay of Proceedings by Appellate Court**

Verification of writ petition. See **Verification**

Criminal Law
See also **Prison and Prisoners**
Coram nobis and coram vobis, 15.46
Habeas corpus, 15.40

Damages
Combining writ petition with complaint for damages, 5.119
Drafting writ petition in superior court, allegations concerning damages, 5.57
Sanctions for filing frivolous writ petition, damages awarded as, 24.65

Deadlines. See **Time**

Decision on Merits
Finality of court's decision. See **Finality of Court of Appeal's Decision**
Law of case, decision on merits creating, 25.13

Declarations. See **Affidavits and Declarations**

Declaratory Relief
Verified writ petition for alternative writ of mandate and verified complaint for declaratory relief, 13.1

Defamation
Mandate nullifying trial court's order requiring production of newsperson's notes in libel action, 16.121

Default
Alternative writ of mandate or prohibition, superior court prohibited from issuing by default, 9.25
Prohibition to prevent court from proceeding if defendant failed to answer and plaintiff requests default judgment, 15.26

Defenses to Writ Petition
Affirmative defenses
Failure to raise affirmative defenses in answer in superior court, effect of, 8.48
Return to alternative writ. See **Return to Alternative Writ in Appellate Court Proceedings**
Laches, 3.19
Unclean hands, 7.8

Definitions
Abuse of discretion, 15.11
Actions, 5.5
Administrative mandamus, 3.2
Administrative record, 3.7
Alcoholic Beverage Control Appeals Board, 16.22
Alternative writ, 22.23
Ancillary matters, 26.14
Answer, 8.2, 8.45
Bad facts, 18.55
Beneficial interest, 2.12
Beneficial interest in outcome of proceeding, 15.51
Beneficially interested party, 15.51
Civil case, 5.5
Coercive writ, 22.23
Collateral maters, 26.14
Discretion of public functionaries, 2.7
Docket sheet, 17.16
Extra-record evidence, 7.9
Final order, 11.9
Formal return (court of appeal), 23.27
Grant and hold, 25.28
Injunction, 4.33
Judgment (in writ proceedings), 11.5
Jurisdictional error, 4.3
Jurisdiction, lack of, 26.6
Limited jurisdiction civil case, 12.2

Lodged with court, 20.26
Mandate, 15.3
Ministerial act, 2.6, 15.7
Ministerial duty, 2.6, 2.19, 15.7
Motion, 6.10
Nonjudicial action, 15.54
Notice of motion, 5.89
Opposition (court of appeal), 23.2
Opposition memorandum, 8.2
Opposition to application for alternative writ, 8.2
Ordinary mandate, 2.1
Palma notice, 21.5, 22.18
Petitioner, 5.32, 18.18
Postcard denial, 22.14
Preliminary opposition (court of appeal), 23.2
Prohibition, writ of, 15.14
Real party in interest, 18.18
Register of actions, 17.16
Remittitur, 11.33, 24.31
Replication, 8.2
Reply (court of appeal), 23.2
Reply memorandum, 8.2
Reply to return, 23.49
Respondent, 5.33, 18.18
Responsive pleading, 8.6
Return (court of appeal), 23.2, 23.20, 23.46
Return (superior court), 8.2
Return filed after issuance of peremptory writ, 10.3
Speaking alternative writ, 22.23
Statutory writs, 16.53
Substantial evidence, 3.15
Summary denial of writ, 22.14
Superior court appellate division, 12.4
Supersedeas, writ of, 26.2
Temporary restraining order (TRO), 6.31
Traverse (court of appeal), 23.2
Without or in excess of jurisdiction, 15.23
Writ petition, 18.77

Demurrer
Answer in superior court
Filing answer in conjunction with demurrer, 8.44
Overruling demurrer, time limit for filing answer after, 8.43
Basis for demurrer, 8.41
Dismissal of action
Order for dismissal with or without leave to amend, court sustaining demurrer by entering, 8.42
Sustaining demurrer without leave to amend, appeal from resulting judgment of dismissal as adequate remedy, 16.110
Legal sufficiency of writ petition, demurrer testing, 8.40
Mandate, demurrer to petition for writ of. See **Mandate in Superior Court**
Return to alternative writ in appellate court, demurrer as. See **Return to Alternative Writ in Appellate Court Proceedings**
Return to alternative writ in appellate division of superior court, demurrer as, 12.15
Review (certiorari) in court of appeal, demurrer to petition for, 23.47
Rulings on demurrer, writ petition to review
Overruling demurrer in entirety, writ review of order, 16.108
Standard of review if writ petition accepted, 16.111
Sustaining demurrer to only part of complaint or answer, availability of writ relief, 16.109
Sustaining demurrer without leave to amend, appeal from resulting judgment of dismissal as adequate remedy, 16.110

Denial of Writ by Appellate Court
See also **Opinion by Appellate Court Granting or Denying Writ Petition**
Alternative writs. See **Alternative Writs in Courts of Appeal**
Discharge of alternative writ resulting in denial of petition, 24.6, 25.14
Insufficient record as grounds for, 20.4
Mandate to review denial of motion to dismiss. See **Mandate in Courts of Appeal**
Palma notice, appellate court denying petition after issuance of, 24.3

Postcard denial (see Summary denial, below)
Rate of denial, 14.1, 15.4
Summary denial
Generally, 17.28, 22.15
Defined, 22.14
Finality of court's order denying writ, 25.5
Format for summary denial order, 22.16
Grounds for, 17.28
Law of case, summary denial not establishing, 22.17
Oral argument, lack of, 22.15
Rehearing in court of appeal, unavailability after summary denial, 25.16
Remittitur not required after, 24.32
Review of denial by petitioning California Supreme Court for review, 25.11, 25.30
Sample form, 28.5
Time limit for petitioning for review by California Supreme Court, 25.30
Verification of petition
Information and belief, denial of petition if verification based on, 18.43
Lack of verification resulting in denial of petition, 18.42

Denial of Writ in Superior Court
Adequate record, lack of as grounds for denial of writ, 7.3, 12.8
Alternative writs. See **Alternative Writs of Mandate or Prohibition in Superior Court**
Appeal from order granting or denying writ. See **Appeals**
Traditional mandate, loss of beneficial interest during proceeding resulting in denial of writ, 2.14

Department of Motor Vehicles (DMV)
Traditional mandate to review DMV suspension or revocation of license, 2.40

Depublication of Opinion. See **Publication of Opinion**

Disabled Persons, Habeas Corpus Challenging Commitment of. See **Habeas Corpus in Superior Court**

Discharge of Alternative Writ. See **Alternative Writs in Courts of Appeal**

Disclosure
Attorney's disclosure to client of interest in subject matter of representation or relationship with other parties and witnesses, 17.12

Discovery
Constitutional issues arising during discovery, writ review of
Generally, 16.117
Privacy rights, effect of, 16.118
Motion for, 8.55
Petition for writ review of discovery order
Generally, 16.115
Constitutional issues (see Constitutional issues arising during discovery, writ review of, above)
Denying discovery, mandate for review of order, 16.123
Grant of discovery, availability of writ review in actions involving, 16.124
Privilege (see Privileged communications, writ review of discovery orders affecting, below)
Recurring procedural issues, effect of, 16.119
Sanctions (see Sanctions, writ review of order imposing, below)
Significant issues of first impression, effect of discovery order presenting, 16.116
Standard of review if writ petition accepted, 16.129
Time to file writ petition, 16.128
Privileged communications, writ review of discovery orders affecting
Generally, 16.120
Attorney-client privilege and work product doctrine, writ review of discovery order impacting, 16.122
Examples of writ review of privilege issues, 16.121
Requesting stay in connection with filing writ petition for review of discovery order requiring disclosure of privileged information, 16.118
Sanctions, writ review of order imposing
Generally, 16.125
$5000 or less, review of discovery sanctions of, 16.126
Greater than $5000, review of discovery sanctions of, 16.127

Discretion of Court
See also **Abuse of Discretion**
Court of appeal
Abuse of discretion, appellate review of. See **Abuse of Discretion**
Appellate division of superior court's judgment granting or denying writ petition, court of appeal's discretion to review. See **Limited Jurisdiction Civil Cases**
Costs, appellate court's discretion to award, deny, or apportion, 11.33, 24.23
Erroneous appeal, appellate court's discretion to treat as writ petition, 12.19
Finality of court of appeal's decision, discretion of court to shorten time for, 25.7
Mandate. See **Mandate in Courts of Appeal**
Nonstatutory writ relief (see Nonstatutory writ relief, appellate court's discretion to consider writ petition on the merits, below)
Petition for writ filed in appellate court more than 60 days after issuance of challenged ruling, court's discretion to consider, 18.68
Public Records Act, limits on appellate court's discretion to deny writ petition for review of trial court order under, 16.15
Remittitur, court's discretion to order immediate issuance on parties' stipulation, 24.34
Stay of proceedings, appellate court's discretion to require undertaking, 19.10
Supersedeas relief, discretion of appellate court to grant. See **Supersedeas**
Nonstatutory writ relief, appellate court's discretion to consider writ petition on the merits
Generally, 16.86
Arbitration issues. See **Arbitration**
Attorneys, orders concerning. See **Attorneys**
Contempt. See **Contempt**
Demurrer. See **Demurrer**
Discovery order. See **Discovery**
Dismissal of action. See **Dismissal of Actions**
Guardianship and conservatorship orders, petition for review of, 16.144
Injunctions. See **Injunctions**
In limine motions. See **In Limine Motions, Writ Petition Challenging Ruling on**
Jurisdiction. See **Jurisdiction**
Jury trial, review order requiring. See **Jury Trial**
Pleadings. See **Pleadings**
Probate orders, writ of review (certiorari) for reviewing, 16.143
Time to file nonstatutory writ petition, 16.87, 16.129C
Superior court
Abuse of discretion. See **Abuse of Discretion**
Alternative writ of mandate or prohibition in superior court. See **Alternative Writs of Mandate or Prohibition in Superior Court**
Stay of proceedings, discretion of court regarding. See **Stay of Proceedings Pending Writ Petition in Superior Court**
Supreme Court's discretion to grant petitions for review. See **Review in California Supreme Court**

Dismissal of Actions
Abuse of discretion as standard for reviewing order denying motion for mandatory dismissal, 16.114
Alternative writ of mandate or prohibition, dismissal of petition as result of respondent complying with, 8.33
Demurrer. See **Demurrer**
5-year period for bringing action to trial, effect of temporary stay on, 22.10
Mandate to overturn order denying dismissal. See **Mandate in Courts of Appeal**
Motion to dismiss in response to writ petition, 8.51
Remittitur, discretion of court to order immediate issuance on dismissal of proceeding, 24.34

Disqualification
Attorney disqualification
Appellate review of, 16.102, 16.104, 17.22
Petition for writ to review, 16.102
Judges. See **Mandate in Courts of Appeal**

DMV. See **Department of Motor Vehicles (DMV)**

Drafting Writ Petition for Court of Appeal
Contents of petition
Allegations (see Enumerated allegations, below)
Certificate of interested parties or persons, 18.21
Introductory statement, 18.24
Memorandum (see Memorandum in support of petition, below)
Prayer for relief (see Prayer for relief, below)
Record attached to petition, 18.57

Stay request. See **Stay of Proceedings by Appellate Court**
Table of authorities, 18.23
Table of contents, 18.22
Verification of petition. See **Verification**
Cover (caption) page
Generally, 18.12
Case number, 18.16
Counsel, identification of, 18.17
Parties, identification of, 18.18
Related pending appeal, cover indicating, 18.20
Stay, request for, 18.19, 19.9, 19.11
Title of court, 18.14
Title of document, 18.13
Trial court information, 18.15
Enumerated allegations
Generally, 18.25
Factual allegations (see Factual allegations, below)
Jurisdiction of appellate court, allegation concerning, 18.27
Prior petitions, 18.29
Related pending appeal, allegations stating information about, 18.26
Standing of petitioner, 18.28
Factual allegations
Generally, 18.30
Inadequacy of other remedies at law, facts addressing, 18.34
Material facts, inclusion of, 18.32
Preservation of issues in trial court, facts showing, 18.35
Procedural facts, concise statement of, 18.31
Stay, factual allegations supporting request for, 18.59, 19.15
Timeliness of petition, facts showing, 18.33
Format requirements
Generally, 18.5
Binding, 18.11
Length of petition, 18.8-18.9
Page layout, 18.10
Production and legibility of petition, 18.7
Typeface, 18.9
Type of paper, 18.6
Memorandum in support of petition
Generally, 18.49
Contents of, 18.52-18.56
Exemplar headings, 18.51
Introduction, 18.52
Legal argument, 18.54-18.56
Legal authority, citation of, 18.56
Organization of supporting memorandum into headings or subheadings, 18.50
Persuasive arguments, 18.55
Statement of facts, 18.53
Prayer for relief
Generally, 18.36
Alternative writ or order to show cause, petitioner seeking, 18.39
Costs and other relief, request for, 18.41
Immediate stay, petitioner seeking, 18.37
Peremptory writ in first instance, petitioner seeking, 18.38
Review (certiorari), petitioner seeking, 18.40
Related pending appeal
Allegations stating information about, 18.26
Cover page indicating, 18.20
Supporting documents, 18.8
Tables (see Contents of petition, above)
Time for filing writ petition. See **Time**

Drafting Writ Petition for Superior Court
Generally, 5.20
Adequate legal remedy, allegations concerning lack of
Absence or inadequacy of other remedies, 5.54

Mandate and prohibition, lack of adequate legal remedy at law as prerequisite for, 5.53
Alternative forms of writ relief (see Requesting alternative forms of writ relief, below)
Basis for challenging action
Generally, 5.49
Mandate, specific allegations required for, 5.50
Prohibition, specific allegations required for, 5.51
Review (certiorari), specific allegations required for, 5.52
Contents of petition
Enumerated allegations (see Enumerated allegations, below)
Exhibits, 5.29, 5.70
Opening paragraph, 5.38
Signature block, 5.63
Stay, request for, 5.39, 5.58
Verification (see Verification of petition, below)
Description of challenged action and factual background
Legal basis for relief, relating factual allegations to, 5.48
Statement of facts, 5.46
Supporting citations, use of, 5.47
Designation of parties
Petitioner, 5.32
Real party in interest (see Real party in interest, below)
Respondent, 5.33
Enumerated allegations
Generally, 5.40
Adequate legal remedy (see Adequate legal remedy, allegations concerning lack of, above)
Basis for challenging action (see Basis for challenging action, above)
Damages, allegations concerning, 5.57
Description of challenged action (see Description of challenged action and factual background, above)
Exhaustion of administrative remedies, 5.55, 5.56
Identity of parties (see Identity of parties, below)
Legal basis for relief, relating factual allegations to, 5.48
Nonjudicial action, petition challenging, 5.44
Factual background (see Description of challenged action and factual background, above)
Format requirements
Generally, 5.21
Binding, 5.27
Exhibits, attachment of, 5.29
First (caption) page, requirements for, 5.31
Footer, 5.30
Hole punching, 5.28
Line numbers, 5.25
Margins, 5.24
Page numbers, 5.26
Type and size of paper, 5.23
Typewritten or printed papers, 5.22
Identity of parties
Ongoing administrative proceeding, petitioner as party to, 5.45
Real party in interest, allegation concerning, 5.43
Respondent, 5.42
Petitioner
Allegation concerning, 5.41
Designation of, 5.32
Prayer for relief
Generally, 5.59
Costs and attorney fees, 5.61
Other appropriate relief, request for, 5.62
Types of relief, 5.60
Real party in interest
Allegation concerning, 5.43
Determining existence of, 5.34
Notice and hearing, real party in interest's right to, 5.35
Requesting alternative forms of writ relief
Pleading and praying for different forms of writ relief, 5.37
Selection of wrong writ, effect of, 5.36
Respondent

Allegation concerning, 5.42
Designation of, 5.33
Verification of petition
Generally, 5.64
Attorney, verification by, 5.67
Defects in verification, opposing party challenging, 5.68
Personal knowledge, verification based on, 5.66
Petitioner, verification by, 5.67
Public entities' exemption from verification requirements, 5.65
Sample form, 5.69

Due Process. See **Administrative Mandamus in Superior Court**

Education. See **Schools**

Election Processes, Traditional Mandate Challenging
Generally, 2.45
Initiative or referendum petition, certification of
Placement of initiative or referendum on ballot, mandate challenging, 2.46
Pre- or post-election review of initiative, 2.48
Process initiative petition, compelling election officials to, 2.47
Reapportionment and redistricting, mandate challenging, 2.44

Employers and Employees
Public employees. See **Public Entities and Officials**
Workers' Compensation Appeals Board (WCAB). See **Workers' Compensation Appeals Board (WCAB), Petition for Review of Decisions by**

Energy Resources Conservation and Development Commission, Review of Decisions by. See **Review in California Supreme Court**

Enforcement of Judgment. See **Judgments**

Enforcement of Writs of Mandate or Prohibition in Courts of Appeal
Duty of respondent to comply with writ, 24.46
Penalties for noncompliance with writ (see Remedies if respondent refuses to comply with writ, below)
Procedure for compelling compliance with writ
Challenging respondent's return, 24.52
Motion for remedies or filing new writ petition seeking enforcement of original writ, 24.51
Remedies if respondent refuses to comply with writ
Challenging respondent's return, 24.52
Fine for noncompliance with writ, 24.49
Imprisonment of respondent or real party in interest for failure to comply with writ, 24.50
Orders for enforcement of writ, court issuing, 24.48
Possible remedies, 24.47-24.50
Procedure for compelling compliance (see Procedure for compelling compliance with writ, above)
Return to peremptory writ, respondent filing
Generally, 24.43
Challenging respondent's return, 24.52
Contents of return, 24.45
Mandatory filing of return, no requirement of, 24.44
Sample form, return to petition for writ of mandate, prohibition, or other alternative relief, 28.11

Enforcement of Writs of Mandate or Prohibition in Superior Court
Generally, 10.1
Certiorari. See **Review (Certiorari) in Superior Court**
Compliance with peremptory writ
Obligation to comply with peremptory writ of mandate or prohibition, 10.2
Penalties for noncompliance (see Penalties for noncompliance, below)
Return regarding compliance (see Return regarding compliance, respondent filing, below)
Contents of return
Generally, 10.4
Failure of respondent or real party in interest to comply with writ, contents of return if, 10.7
Full compliance with writ by respondent or real party in interest, contents of return if, 10.5

Partial compliance with writ by respondent or real party in interest, contents of return if, 10.6
Jurisdiction to enforce writ, court's retention of, 10.11
Laying foundation for, 9.46
Methods of enforcing writ
Contempt, order to show cause re, 10.14
Motion to enforce compliance, 10.13
New or supplemental writ petition, 10.15
Penalties for noncompliance
Generally, 10.16
Contempt, order to show cause re, 10.14
Fine for noncompliance, 10.18
Imprisonment of respondent, court ordering, 10.19
Order for enforcement of writ, court issuing, 10.17
Personal service of writ on petitioner as prerequisite for enforcement, 10.12
Return regarding compliance, respondent filing
Generally, 10.3
Acceptable reasons for not complying with writ, 10.8
Challenging return, 10.10
Contents of return (see Contents of return, above)
Definition of return, 10.3
Financial burden not acceptable reason for noncompliance with peremptory writ, 10.9
Review. See **Review (Certiorari) in Superior Court**

Ethics. See **Legal Ethics**

Evidence
Administrative mandamus. See **Administrative Mandamus in Superior Court**
Alternative writ, parties' right to present evidence concerning factual disputes at hearing on petition for. See **Alternative Writs of Mandate or Prohibition in Superior Court**
Enforcement of peremptory writ by superior court, petitioner's evidence supporting motion for, 10.13
Hearsay, declaration made on information and belief constituting, 18.46
Judicial notice. See **Judicial Notice**
Noticed motion in superior court, citations to evidence in memorandum in support of, 5.99
Noticed motion in superior court for writ, citations to evidence in supporting memorandum, 5.99
Public Utilities Commission (PUC), prohibition against introducing new or additional evidence in writ proceeding reviewing decisions by, 16.43
Record in superior court writ proceedings, inclusion of evidence in. See **Record in Superior Court Writ Proceeding**
Replication (reply) made by evidence presented at hearing, requirement of advance notice if, 8.60
Substantial evidence defined, 3.16
Verification of supplemental evidence in writ petition, 18.46

Execution, Writ of
Superior court issuing writ of, 4.30

Exhaustion of Administrative Remedies
Drafting writ petition for superior court, allegations concerning exhaustion of administrative remedies, 5.55, 5.56
Quasi-judicial agency decisions, exhaustion of administrative remedies as prerequisite for seeking review of, 2.34

Exhaustion of State Court Remedies
Seeking review in California Supreme Court for purposes of exhausting state remedies, 25.29

Exhibits
Court of appeal
Record in appellate court writ proceeding, separate volume for exhibits, 20.11
Return to alternative writ in appellate court, exhibits supporting, 23.38
Table of exhibits, 28.3
Superior court
Alternative writs of mandate or prohibition in superior court, exhibits supporting petition for, 5.111
Attachment of exhibits, 5.29, 5.70
Format requirements for exhibits, 5.29
Limited jurisdiction civil cases. See **Limited Jurisdiction Civil Cases**
Noticed motion for writ in superior court, exhibits supporting, 5.101
Record in superior court writ proceedings. See **Record in Superior Court Writ Proceeding**

Ex Parte Proceedings

Alternative writ of mandate or prohibition, ex parte application for. See **Alternative Writs of Mandate or Prohibition in Superior Court**
Appearance
Noticed motion for writ in superior court, no requirement of ex parte appearance, 5.11
Personal appearance by petitioner or counsel at ex parte hearing on alternative writ of mandate or prohibition in superior court, 5.116
Court clerk, scheduling ex parte proceeding with, 6.17
Stay, application for. See **Stay of Proceedings Pending Writ Petition in Superior Court**
TRO. See **Temporary Restraining Order (TRO)**

Expenses and Expenditures
See also **Costs; Fees**
Adequate remedy at law, effect of expenditure of time and money on determining existence of, 17.30

Expungement of Lis Pendens, Appellate Review of Order for. See **Mandate in Courts of Appeal**

Extension and Shortening of Time
Court of appeal
Change of venue order, extension of time to file writ petition under CCP §400 for review of, 16.64
Expiration of deadline for filing writ petition in court of appeal, requesting extension of time before, 18.63
Finality of court of appeal's decision, discretion of court to shorten time for, 25.7
Good faith settlement determination, extension of time to file writ petition to review grant or denial of motion for, 16.50
Mandate. See **Mandate in Courts of Appeal**
Maximum number of days to file writ petition in court of appeal, inapplicability of extension of time under CCP §1013, 18.65
Opinion by appellate court granting or denying writ petition, extension of time for issuance of, 24.18
Opposition to writ petition filed in court of appeal, extension of time to file. See **Opposition to Writ Petition Filed in Court of Appeal**
Points and authorities in opposition, real party in interest or respondent filing, 21.14
Preliminary opposition, extension of time to file, 21.15
Quash service of summons, stay or dismiss for inconvenient forum, or dismiss for delay in prosecution, extension of deadline for filing writ of mandate to overturn order denying motion for, 16.55
Reclassify action or proceeding, extension of time to file writ petition for review of order granting or denying motion to, 16.59
Reply (traverse) to return in appellate court, extension of time to file, 23.50
Return to alternative writ in appellate court, extension of time to file, 23.41
Statutory deadline for filing writ petition, extension of, 17.26
Summary judgment order, extension of time to file writ petition for review of, 16.76
Notice of appeal, time limit for filing not extended by filing writ petition in court of appeal, 11.37
Review in California Supreme Court. See **Review in California Supreme Court**
Superior court
Memorandum of costs, extension of time to file, 5.123
Responsive pleading, stipulation or application for extension of time to file, 8.10

Extraordinary Writs
Mandate. See **Mandate in Courts of Appeal; Mandate in Superior Court**
Prohibition. See **Prohibition in Courts of Appeal; Prohibition in Superior Court**
Public Records Act. See **Public Records Act**
Review (certiorari). See **Review (Certiorari) in Courts of Appeal; Review (Certiorari) in Superior Court**

Family Law
Petition for writ review of family law and dependency matters, 16.143A

Fees
See also **Costs; Expenses and Expenditures**
Alternative writs of mandate or prohibition in superior court, filing fee for opposition to application for, 8.29
Attorney fees. See **Attorneys' Fees**
California Supreme Court, fee for filing original writ petition in, 27.10
Court of appeal, fee for filing writ petition in, 18.84
Noticed motion for writ in superior court. See **Noticed Motion in Superior Court**
Peremptory writ, filing fee for, 9.41
Preliminary opposition to writ petition, no filing fee for, 21.19
Responsive pleadings. See **Responsive Pleadings**
Supersedeas petition, lack of filing fee for, 26.27

Filing of Petitions

California Supreme Court, filing petition in original proceedings. See **California Supreme Court**
Court of appeal, filing writ petition in. See **Courts of Appeal**
Fees for filing. See **Fees**
Limited jurisdiction civil cases. See **Limited Jurisdiction Civil Cases**
Preliminary opposition. See **Preliminary Opposition to Writ Petition Filed in Appellate Courts**
Review in California Supreme Court. See **Review in California Supreme Court**
Service of petition. See **Service of Process and Papers**
Stay application and writ petition, filing in superior court, 6.17
Superior court, filing writ petition in. See **Superior Court**

Finality of Court of Appeal's Decision
Decision on merits
Discretion of court to shorten time for finality of decision, 25.7
30 days, finality of decision after, 25.6
Weekend or holiday, effect of end of 30-day period falling on, 25.8
Determining when court's action on writ petition becomes final, importance of, 25.4
Jurisdiction of court, effect of finality on, 25.3
Post-decision actions affecting finality date
Modification of decision, 25.6, 25.9, 25.15
Publication of decision, 25.6, 25.10
Summary denial of writ petition, immediate finality of order, 25.5

Findings
Deferential substantial evidence standard, court of appeal reviewing superior court's factual findings under, 11.16
Prejudicial abuse of discretion by administrative body, review of. See **Administrative Mandamus in Superior Court**

Foreign Languages. See **Translations**

Format of Petitions and Other Documents
California Supreme Court
Content and format of petition to, 27.11
Review in California Supreme Court. See **Review in California Supreme Court**
Court of appeal
Drafting writ petition for court of appeal, format requirements. See **Drafting Writ Petition for Court of Appeal**
Opposition to writ petition. See **Opposition to Writ Petition Filed in Court of Appeal**
Preliminary opposition. See **Preliminary Opposition to Writ Petition Filed in Appellate Courts**
Record in appellate court, format of. See **Record in Appellate Court Writ Proceeding**
Rehearing in court of appeal, formation of petition for, 25.21
Return to alternative writ. See **Return to Alternative Writ in Appellate Court Proceedings**
Summary denial of writ by appellate court, format for order, 22.16
Supersedeas, petition and opposition to, 26.26, 26.29
Superior court
Drafting writ petition. See **Drafting Writ Petition for Superior Court**
Limited jurisdiction civil cases. See **Limited Jurisdiction Civil Cases**
Noticed motion. See **Noticed Motion in Superior Court**
Record in superior court writ proceedings. See **Record in Superior Court Writ Proceeding**

Frivolous Writ Petitions in Courts of Appeal, Sanctions for Filing
Generally, 17.35, 24.60
Opposition to sanctions motion, 24.62
Party or attorney, sanctions awarded against, 24.61
Procedure for obtaining sanctions, 24.62
Risk of filing appellate court writ petition, sanctions for filing frivolous petition as, 17.35
Stay, sanctions for frivolous request for, 19.7
Types of sanctions
Attorney fees or damages, award of, 24.65
Costs, award or denial of, 24.64
Striking opposing party's petition or pleading, 24.63

Good Faith
Settlement in good faith, review of trial court's determination of. See **Settlement**

Government Claims Act
Demurrer to complaint failing to plead facts demonstrating or excusing compliance with claim presentation requirement of,

16.108

Guardianships. See **Conservatorships and Guardianships**

Habeas Corpus in Courts of Appeal
Generally, 15.39
Alternatively requesting review or habeas relief, 15.37
Civil proceedings
Child custody proceedings, availability of habeas corpus in, 15.42
Commitment to psychiatric facility, petitioner challenging, 15.43
Contempt, petition for habeas if wrongfully imprisoned for, 15.37, 15.41, 16.136
Criminal cases, use of habeas corpus in, 15.40
Incarcerated person seeking writ of habeas corpus, 15.37, 15.41, 16.136
Petition for writ of habeas corpus (Judicial Council Form MC-275), 28.20
Petition for writ of habeas corpus or certiorari (filed by attorney), 28.21
Purpose of writ, 15.39

Habeas Corpus in Superior Court
Generally, 4.17
Children, proceedings involving
Custody proceedings, 4.18
Ineffective assistance of counsel, habeas petition based on, 4.20
Juvenile dependency proceedings, 4.19
Termination of parental rights, use of habeas corpus to challenge, 4.18
Civil commitment proceedings
Generally, 4.21
Developmentally disabled, commitment to state hospital for, 4.25
Lanterman-Petris-Short (LPS) Act, commitment of mentally disordered persons under, 4.22
Mentally disordered, commitment to state hospital for, 4.24
Parental commitment of minor to state hospital, 4.23
Purpose of writ, 4.17
Requirements for writ, 4.26

Hearings
Administrative mandamus. See **Administrative Mandamus in Superior Court**
Alternative writs of mandate or prohibition. See **Alternative Writs of Mandate or Prohibition in Superior Court**
Noticed motion. See **Noticed Motion in Superior Court**
Oral argument. See **Oral Argument in Appellate Court**
Rehearing in court of appeal. See **Rehearing in Court of Appeal**
Review. See **Review (Certiorari) in Superior Court**
Stay pending superior court's decision on merits of writ petition, hearing on application for. See **Stay of Proceedings Pending Writ Petition in Superior Court**
Traditional writ of mandate. See **Traditional Mandate in Superior Court**

Hearsay
Declaration made on information and belief constituting, 18.46

Holidays. See **Saturdays, Sundays, and Holidays**

Immediate Temporary Stay, Request For. See **Preliminary Opposition to Writ Petition Filed in Appellate Courts**

Inconvenient Forum, Mandate Overturning Order Denying Motion to Dismiss for. See **Mandate in Courts of Appeal**

Inferences. See **Presumptions and Inferences**

In Forma Pauperis
Record in underlying proceedings, petitioner proceeding in forma pauperis not required to pay agency's preparation costs, 7.17

Initiatives. See **Election Processes, Traditional Mandate Challenging**

Injunctions
See also **Temporary Restraining Order (TRO)**
Appeal of, 16.150, 26.9

Defined, 4.33
Distinction between mandatory and prohibitory injunctions, 26.9
Mandatory injunctions stayed by filing appeal, 26.9
Order granting injunction, petition for writ review of
Generally, 16.150
Standard of review if writ petition accepted, 16.151
Preliminary injunction
Generally, 4.33
Order granting preliminary injunction (see Order granting injunction, petition for writ review of, above)
Stay of proceedings, preliminary injunction for. See **Stay of Proceedings Pending Writ Petition in Superior Court**
Prohibition in appellate court to restrain enforcement of, 15.20, 15.26
Prohibitory injunctions
Discretion of appellate court to issue writ of supersedeas to stay, 26.21
Distinction between mandatory and prohibitory injunctions, 26.9
Types of injunctive relief, 4.33

In Limine Motions, Writ Petition Challenging Ruling on
Generally, 16.145
Standard of review if writ petition accepted, 16.147
Time to file writ petition, 16.146

Inspection of Records
Corporation's records, traditional mandate to compel inspection of, 2.54
Union's records, traditional mandate to compel inspection of by union member, 2.53

Interested Entities or Persons, Certificate of. See **Certificates and Certification**

Interlocutory Orders and Judgments
Immediate appealability from, 15.57
Nonappealability of interlocutory rulings, 11.14

Interpretation of Cases and Statutes. See **Construction and Interpretation**

Irreparable Injury, Petitioner Facing. See **Courts of Appeal**

Jail. See **Prison and Prisoners**

Judges, Disqualification of. See **Mandate in Courts of Appeal**

Judgment on the Pleadings
Answer to writ petition in superior court, filing motion for judgment on the pleadings after filing, 8.53
Vacate order granting or denying motion for judgment on pleadings, issuance of mandate to compel trial court to, 16.106

Judgments
Alternative writ of mandate or prohibition. See **Alternative Writs of Mandate or Prohibition in Superior Court**
Appeal of. See **Appeals**
Contempt, writ petition to review judgment of. See **Contempt**
Defined, 11.5
Enforcement of judgment
Execution, writ authorizing seizure and appropriation of defendant's property to satisfy money judgment, 4.30
Possession, writ enforcing judgment for possession of real or personal property, 4.31
Prohibition to prevent enforcement of void judgment, 15.26
Review (certiorari), filing new writ of mandate or prohibition petition to enforce judgment on merits issued after issuance of writ of, 10.21
Sale, writ enforcing judgment for sale of real or personal property, 4.32
Stay of enforcement of judgment. See **Stay of Proceedings by Appellate Court**
Noticed motion for writ in superior court, submission of proposed order and judgment, 5.103
Presumption affecting correctness of, 20.4
Real property, enforcing judgment for (see Enforcement of judgment, above)
Res judicata. See **Res Judicata**
Review (certiorari). See **Review (Certiorari) in Superior Court**
Small claims court judgment. See **Small Claims Court**
Summary judgment. See **Summary Judgment**

Judicial Notice
Generally, 20.17
Extra-record evidence, request for judicial notice of, 7.9
Legislative history, request for judicial notice of, 7.9
Mandate
Alternative writ of mandate or prohibition in superior court, presenting evidence at hearing by judicial notice, 9.29
Request for judicial notice in opposition to petition for writ of mandate, 13.13
Materials not presented to trial court for judicial notice, 20.19
Materials presented to trial court for judicial notice, 20.18
Procedure for requesting judicial notice in appellate court
Motion requesting judicial notice, 20.20
Opposition to request for judicial notice, 20.22
Timing of request for judicial notice (see Time, below)
Time
Opposition to request for judicial notice, time limit for filing, 20.22
Request for judicial notice, 20.21

Jurisdiction
California Supreme Court. See **California Supreme Court**
Conflicting or concurrent jurisdiction, trial courts with
Generally, 16.93
Choice of law, writ of mandate determining, 16.95
Determining which trial court has jurisdiction, 16.94
Objection in second tribunal as prerequisite to seeking writ, 16.97
Other tribunals with conflicting or concurrent jurisdictions, 16.96
Standard of review if writ petition accepted, 16.98
Court of appeal
Allegation in writ petition concerning appellate court's jurisdiction, 18.27
Filing writ petition with appellate district having jurisdiction over trial court, 18.85
Finality of court of appeal's decision, effect on court's jurisdiction, 25.3
Notice of appeal, failure to timely file resulting in loss of jurisdiction, 11.23
Prohibition to prevent tribunal or person from erroneously assuming jurisdiction. See **Prohibition in Courts of Appeal**
Review, writ of. See **Review (Certiorari) in Courts of Appeal**
Supersedeas, effect of writ on appellate jurisdiction, 26.2
Enforcement of peremptory writ, court's retention of jurisdiction for purposes of, 10.11
Habeas corpus proceedings, original jurisdiction of all California courts in, 4.17
Invalidity of statute or ordinance, challenging superior court's jurisdiction on basis of
Generally, 16.88
Mandate, testing statute's constitutionality with petition for writ of, 16.90
Prohibition, testing constitutionality of law through use of, 16.89
Standard of review if writ petition accepted, 16.91
Limited jurisdiction civil cases. See **Limited Jurisdiction Civil Cases**
Mandatory statutory deadlines treated as jurisdictional, 18.64
Superior court
Actions in excess or without jurisdiction, writ of prohibition challenging, 16.92
Administrative mandamus to determine if administrative body exceeded or acted without jurisdiction. See **Administrative Mandamus in Superior Court**
Certiorari to review actions without or in excess of jurisdiction, 4.10
Conflicting or concurrent jurisdiction (see Conflicting or concurrent jurisdiction, trial courts with, above)
Invalidity of statue or ordinance (see Invalidity of statute or ordinance, challenging superior court's jurisdiction on basis of, above)
Limited jurisdiction civil cases. See **Limited Jurisdiction Civil Cases**
Perfecting appeal, effect on trial court's subject matter jurisdiction, 26.6
Prohibition to prevent tribunal or person from erroneously assuming jurisdiction, 4.3
Remittitur by appellate court returning jurisdiction to superior court, 11.33
Subject matter jurisdiction of trial court, effect of perfecting appeal on, 26.6
Unconstitutional law (see Invalidity of statute or ordinance, challenging superior court's jurisdiction on basis of, above)

Jury Trial
Alternative writ of mandate or prohibition in superior court, court's discretion to allow jury trial on factual issues, 9.31
Order requiring jury trial, petition for writ of prohibition to review
Generally, 16.148
Standard of review if writ petition accepted, 16.149
Timely request for jury trial, prohibition to prevent court from denying, 15.26

Juvenile Dependency Proceedings
Challenging order setting termination hearing or post-termination placement order, writ petition, 16.52
Habeas corpus challenging dependency order, 4.19

Labor Unions. See **Unions, Traditional Mandate to Compel Action by**

Laches
Court of appeal, applicability of laches to writ petition filed more than 60 days after issuance of challenged ruling, 18.67
Defense to writ petition, laches as, 3.19
Nonstatutory writ petition, effect of laches on, 16.87
Superior court writ petition, effect of laches on late filing of, 5.74

Land Use. See **Zoning and Land Use**

Law of the Case
Decision on merits creating, 25.13
Issuance of written opinion after issuance of alternative writ establishing, 22.17
Summary denial of writ petition not establishing, 22.17

Legal Ethics
Appellate specialist, ethical considerations for. See **Courts of Appeal**
Trial counsel's ethical duties in handling appellate writ proceedings, 17.4

Legislation Actions Subject to Traditional Writ of Mandate. See **Public Entities and Officials**

Legislative History
Judicial notice of legislative history materials, request for, 20.20

Libel. See **Defamation**

Licenses and Permits
Suspension or revocation of license, licensee's request for supersedeas to stay, 26.10
Traditional mandate
DMV suspension or revocation of driver's license, review of, 2.40
Land use permits, challenging issuance or denial of, 2.41
Professional licensing decisions, challenges to, 2.39

Limine, Motions in. See **In Limine Motions, Writ Petition Challenging Ruling on**

Limitation of Actions. See **Statutes of Limitations**

Limited Jurisdiction Civil Cases
Generally, 12.1
Change of venue order, appealability of, 16.63
Costs, prevailing party's entitlement to, 12.25
Definitions
Limited jurisdiction civil case, 12.2
Superior court's appellate division, 12.4
Discretion of appellate court
Certification of case to court of appeal by appellate division, court of appeal's discretion to accept, 12.24
Review of appellate division's writ decision (see Review of appellate division's decision on writ petition, below)
Exhibits (see Supporting record, below)
Format of petitions
Generally, 12.4
Preliminary opposition to writ petition, format of, 12.12
Supporting record, format of, 12.7
Information on writ proceedings in misdemeanor, infraction, and limited civil cases (Judicial Council Form APP-150-INFO), 13.16
Initial actions on writ petition by superior court's appellate division, 12.11
Initiating writ proceeding in appellate division of superior court
Filing and service of writ petition, 12.10
Format and contents of petition, 12.4
Memorandum in support of writ petition, 12.5
Stay, request for, 12.9
Supporting record (see Supporting record, below)

Jurisdiction of superior court's appellate division to grant writs of mandate, prohibition, or review (certiorari) in limited jurisdiction civil cases, 12.3
Memorandum
Preliminary opposition to writ petition, inclusion of memorandum in, 12.12
Supporting memorandum, 12.5
Opposition to writ petition
Alternative writ, opposition and return if appellate division issues, 12.15
New issues for interlocutory appellate review, respondent prohibited from raising in opposition to writ petition, 12.14
Peremptory writ in first instance, opposition if appellate division notifies parties of possibility of issuing, 12.14
Preliminary opposition (see Preliminary opposition to writ petition, below)
Reply to opposition and return, 12.17
Petition for writ (misdemeanor, infraction, or limited civil case) (Judicial Council Form APP-151), 13.17
Preliminary opposition to writ petition
Format and contents of preliminary opposition, 12.12
Reply to, 12.16
Time limit for filing preliminary opposition, 12.13
Reply by petitioner
Opposition and return, reply to, 12.17
Preliminary opposition, petitioner's reply to, 12.16
Return (see Opposition to writ petition, above)
Review of appellate division's decision on writ petition
California Supreme Court, filing new writ petition in, 12.21
Erroneous appeal, court of appeal's discretion to treat as writ petition, 12.19
Mandate and prohibition, nonappealability of appellate division's judgment granting or denying writ of, 12.18-12.19
New writ petition, filing in court of appeal, 12.18
Review (certiorari) cases, filing appeal in, 12.20
Review of appellate division's judgment on appeal
Certification of case to court of appeal, party seeking, 12.23
Filing writ petition in court of appeal, 12.22
Transfer of case to court of appeal, petition for, 12.24
Superior court as "inferior tribunal" to appellate division of superior court, 12.3
Supersedeas, petitioning appellate division of superior court for writ of, 12.28
Supporting record
Contents of record, 12.6
Declaration explaining unavailability of documents, 12.6
Filing and service of, 12.10
Format of record, 12.7
Inadequate or nonconforming record as grounds for denial of writ petition, 12.8
Time
Petition for writ, time limit for filing, 12.10
Preliminary opposition to writ petition, time limit for filing, 12.13
Reply to opposition, time limit for filing, 12.17

Liquor. See **Alcoholic Beverage Control Appeals Board**

Lis Pendens, Appellate Review of Order Expunging. See **Mandate in Courts of Appeal**

Local Agencies. See **State and Local Agencies**

Local Rules of Court
See also **Rules of Court**
Generally, 5.6-5.7
Alternative writ of mandate or prohibition. See **Alternative Writs of Mandate or Prohibition in Superior Court**
Unwritten procedures, 5.8

Lodging Documents with Superior Court. See **Sealing Documents in Superior Court**

Lodging Record with Court of Appeal. See **Sealing Appellate Court Records**

Malicious Prosecution
Statute of limitations for malicious prosecution action, 16.108

Mandate in Courts of Appeal
Generally, 15.2

Alcoholic Beverage Control Appeals Board's nonadjudicatory action, writ of mandate challenging, 16.25
Arbitration. See **Arbitration**
Constitutionality of statute, using mandate to test, 16.90
Contempt order, petition for writ of mandate to review, 16.140
Coordination of actions, order concerning (CCP §404.6)
  Deadline to file writ petition, 16.9
  Exclusive means of obtaining appellate review, writ proceeding as, 16.8
  Standard on review if writ petition accepted, 16.10
Court clerk
  Issuance of writ by, 24.37
  Preparation of writ by, 24.39
  Trial court, clerk transmitting certified copy of writ to, 24.40
Defined, 15.3
Delay in prosecution (see Quash service of summons, stay or dismiss for inconvenient forum, or dismiss for delay in prosecution, petition to overturn order denying motion for (CCP §418.10(c)), below)
Denial of motion to dismiss, petition for writ to review
  Generally, 16.112
  Standard of review if writ petition accepted, 16.114
Discovery orders, review of, 16.123
Discretion, mandate to compel exercise of
  Generally, 15.10
  Abuse of discretion. See **Abuse of Discretion**
  Error of law committed by trial court, 15.13
Discretion of court to issue writ, 15.4
Dismissal of action
  Generally, 16.112
  Denial of motion to dismiss (see Denial of motion to dismiss, petition for writ to review, above)
  Inconvenient forum (see Quash service of summons, stay or dismiss for inconvenient forum, or dismiss for delay in prosecution, petition to overturn order denying motion for (CCP §418.10(c)), below)
Disqualification of judges (see Judicial disqualification or challenge, reviewing grant or denial of (CCP §170.3), below)
Enforcement of petition. See **Enforcement of Writs of Mandate or Prohibition in Courts of Appeal**
Expungement of lis pendens (see Lis pendens, grant or denial of motion to expunge (CCP §405.39), below)
Extension of time
  Coordination of actions, extension of time to file writ petition concerning, 16.9
  Lis pendens, extension of time to file writ petition concerning expungement of, 16.12
Good faith settlement determination, reviewing grant or denial of motion for. See **Settlement**
Inconvenient forum, stay or dismiss action on grounds of (see Quash service of summons, stay or dismiss for inconvenient forum, or dismiss for delay in prosecution, petition to overturn order denying motion for (CCP §418.10(c)), below)
Issuance of writ by court clerk, 24.21
Judicial disqualification or challenge, reviewing grant or denial of (CCP §170.3)
  Generally, 16.3
  Deadline to file writ petition under CCP §170.3(d), 16.6
  Examples of cases showing availability of mandate to review judicial challenge orders, 16.5
  Exclusive means of obtaining appellate review, writ proceeding as, 16.3
  Standard of review if writ petition accepted, 16.7
  Standing to file writ petition, judge's lack of, 16.4
Jurisdictions, writ of mandate to determine appropriate law among competing, 16.95
Lis pendens, grant or denial of motion to expunge (CCP §405.39)
  Deadline to file writ petition, 16.12
  Exclusive means of obtaining appellate review, writ proceeding as, 16.11
  Standard of review if writ petition accepted, 16.13
Mediation confidentiality privilege, mandate prohibiting release of records in violation of, 16.121
Ministerial duty, mandate to compel performance of
  Generally, 15.6
  Definition of ministerial duty, 15.7
  Examples of ministerial trial court actions, 15.8
  Examples of nonjudicial court officer's ministerial duties, 15.9
Opinion by appellate court. See **Opinion by Appellate Court Granting or Denying Writ Petition**
Opposition to issuance of peremptory writ of mandate, 28.10
Order directing issuance of peremptory writ of mandate, 24.37, 28.13
Petition for writ of mandate or other appropriate relief, 28.1
Physician-patient privilege, mandate directing trial court to quash deposition subpoenas for records protected by, 16.121
Pleadings, mandate to review orders on. See **Pleadings**
Prayer for relief seeking alternative writ of mandate, 18.39
Preliminary opposition to petition for writ of mandate or other appropriate writ and stay request, 28.4

Public entities and officials (see Ministerial duty, mandate to compel performance of, above)
Public Utilities Commission's decisions, petition for mandate seeking review of. See **Public Utilities Commission (PUC)**
Purpose of mandate
Generally, 15.3
Discretion (see Discretion, mandate to compel exercise of, above)
Ministerial duty (see Ministerial duty, mandate to compel performance of, above)
Quash service of summons, stay or dismiss for inconvenient forum, or dismiss for delay in prosecution, petition to overturn order denying motion for (CCP §418.10(c))
Generally, 16.54
Deadline to file writ petition, 16.55
Responsive pleading, effect of filing petition on time to file, 16.57
Standard of review if writ petition accepted, 16.56
Raising issue in trial court as prerequisite for, 15.68
Reclassify action or proceeding, mandate to review order granting or denying motion to (CCP §403.080)
Generally, 16.58
Deadline to file writ petition under CCP §403.080, 16.59
Standard of review if writ petition accepted, 16.61
Trial court, filing copy of petition in, 16.60
Return to petition for writ of mandate, prohibition, or other alternative relief, 28.11
Sample form, peremptory writ of mandate, 28.15
Service of writ by petitioner, 24.41
Statutes authorizing appellate review
CCP §170.3 (see Judicial disqualification or challenge, reviewing grant or denial of (CCP §170.3), above)
Coordination of actions (see Coordination of actions, order concerning (CCP §404.6), above)
Lis pendens (see Lis pendens, grant or denial of motion to expunge (CCP §405.39), above)
Public Records Act. See **Public Records Act**
Quash service of summons (see Quash service of summons, stay or dismiss for inconvenient forum, or dismiss for delay in prosecution, petition to overturn order denying motion for (CCP §418.10(c)), above)
Reclassify action or proceeding (see Reclassify action or proceeding, mandate to review order granting or denying motion to (CCP §403.080), above)
Summary judgment order, writ review of (CCP §437c). See **Summary Judgment**
Venue, grant or denial of motion to change (CCP §400). See **Venue**
Stay of execution of writ of mandate, appeal resulting in, 11.24, 26.10
Substantive requirements for issuance of writ of mandate, 15.5
Time
Change of venue order, deadline to file writ petition under CCP §400 for review of, 16.64
Coordination of actions, deadline to file writ petition concerning, 16.9
Disqualification of judge, deadline to file writ petition challenging order concerning, 16.6
Extension of time (see Extension of time, above)
Issuance of mandate, 24.38
Lis pendens, deadline to file writ petition to review expungement of, 16.12
Quash service of summons, stay or dismiss for inconvenient forum, or dismiss for delay in prosecution, deadline for filing writ petition to overturn order denying motion for, 16.55
Reclassify action or proceeding, deadline for filing writ petition for review of order granting or denying motion to, 16.59
Trial court's completion of challenged act before appellate court's ruling on petition for prohibition, treatment of proceeding as petition for mandate, 15.21
Workers' Compensation Appeals Board, statute authorizing issuance of mandate to, 16.46

Mandate in Superior Court
Administrative mandamus. See **Administrative Mandamus in Superior Court**
Alternative writ. See **Alternative Writs of Mandate or Prohibition in Superior Court**
Appeal from order granting or denying writ. See **Appeals**
Declarations. See **Affidavits and Declarations**
Demurrer
Memorandum in support of demurrer to petition for writ of mandate, 13.11
Petition for writ of mandate, demurrer to, 13.10
Distinguishing writ of prohibition from mandate, 4.4
Drafting writ petition. See **Drafting Writ Petition for Superior Court**
Enforcement of writ. See **Enforcement of Writs of Mandate or Prohibition in Superior Court**
Judicial notice. See **Judicial Notice**
Limited jurisdiction civil cases, appellate division of superior court granting writ of mandate in. See **Limited Jurisdiction Civil Cases**
Opposition to petition for writ of mandate
Declaration in opposition to petition for writ of mandate, 13.14
Proposed order denying petition for writ of mandate, 13.15

Request for judicial notice in opposition to petition for writ of mandate, 13.13
Sample form, opposition to petition for writ of mandate, 13.12
Review (certiorari), filing new writ of mandate petition to enforce judgment on merits issued after issuance of writ of, 10.21
Stay, alternative writ of mandate not acting as, 6.4
Traditional mandate. See **Traditional Mandate in Superior Court**

Mediation
See also **Arbitration**
Mandate prohibiting release of records in violation of mediation confidentiality privilege, 16.121

Memorandum in Support or Opposition
See also **Preliminary Opposition to Writ Petition Filed in Appellate Courts**
Agricultural Labor Relations Board's final order, memorandum in support of writ petition to review, 16.20
Alternative writ of mandate or prohibition in superior court, respondent filing memorandum in opposition to petition for, 9.23
Attorney fees, memorandum in support of motion for, 5.126
Definition of opposition memorandum, 8.2
Demurrer to petition for writ of mandate in superior court, memorandum in support of, 13.11
Drafting petition for writ on court of appeal, memorandum in support of. See **Drafting Writ Petition for Court of Appeal**
Limited jurisdiction civil cases. See **Limited Jurisdiction Civil Cases**
Noticed motion, filing memorandum in support or opposition to. See **Noticed Motion in Superior Court**
Original and copies of petition and supporting memorandum, filing requirements for, 18.81
Preliminary opposition, real party in interest or respondent filing points and authorities in opposition, 21.14
Replication (petitioner's reply), memorandum filed by petitioner. See **Replication (Petitioner's Reply) in Superior Court**
Return to writ petition in appellate court proceedings, supporting memorandum for, 22.29, 23.37
Sealing documents in superior court, memorandum supporting motion for, 7.29
Stay application in superior court. See **Stay of Proceedings Pending Writ Petition in Superior Court**
Supersedeas, memorandum in support or opposition to petition for, 26.22, 26.28

Mentally Disordered Persons
Habeas corpus challenging commitment of, 4.24

Ministerial Duty of Public Entities and Officials. See **Public Entities and Officials**

Minors. See **Parent and Child**

Modifications. See **Amendments and Modifications**

Mootness of Issue. See **Courts of Appeal**

Motor Vehicles. See **Department of Motor Vehicles (DMV)**

Multiple Parties
Appealability of superior court's final order resolving all issues with respect to one party, 11.11
Review sought by multiple parties, time limit for California Supreme Court to grant or deny, 27.33

Newspersons' Shield Law
Contempt adjudication, shield law not providing relief before, 16.132
Mandate nullifying trial court's order requiring production of newsperson's notes in libel action, 16.121

New Trial
Superior court's final decision on writ, motion for new trial to challenge, 11.3

Nonstatutory Writ Relief. See **Discretion of Court**

Notice and Notification
Alternative writs. See **Alternative Writs of Mandate or Prohibition in Superior Court**
Appeal, notice of. See **Appeals**
Court of appeal
Class notice, issuance of mandate to correct ruling on, 16.106
Class notice, writ relief granted to correct rulings on, 16.129B
Immediate temporary stay, notifying appellate court of intent to oppose, 21.15
Review (certiorari), appellate court requiring notice to adverse party of application for writ of, 22.30
Stay of proceedings, notice of request for. See **Stay of Proceedings by Appellate Court**
Time period for filing writ petition in court of appeal, notice triggering. See **Time**

Unsealing of record by appellate court, notice to parties of, 20.28
Ex parte application for alternative writ of mandate or prohibition in superior court, notice to opposing parties of, 9.3
Judicial notice. See **Judicial Notice**
Palma notice. See ***Palma* Notice**
Real party in interest, notifying of writ proceeding, 5.35
Replication (reply) made by evidence presented at hearing, requirement of advance notice if, 8.60
Summary judgment motion, writ of mandate to vacate trial court order shortening notice period for, 16.72
Traditional mandate to compel publication of public notices, 2.67
Waiving notice of court ruling, effect of, 18.73

Noticed Motion in Superior Court
See also **Alternative Writs of Mandate or Prohibition in Superior Court**
Generally, 1.3, 5.9
Additional papers, submission of
Administrative record, 5.102
Declaration supporting petition, 5.101
Exhibits, 5.101
Proposed order and judgment, submission of, 5.103
Advantages of
Control over timing of hearing on merits, 5.14
Ex parte appearance, no requirement of, 5.11
Greater likelihood of hearing merits of petition, 5.13
Time savings for court, 5.12
Chronology of noticed motion procedure, 5.10
Fees
Generally, 5.79
Responsive pleading or motion, filing fee for, 8.12
Filing of motion papers, 5.107
Filing of writ petition
Generally, 5.76
Civil case cover sheet, requirement of, 5.78
Copies of petition, 5.80
Fee for filing, 5.79
Place of filing, 5.77
Responsive pleading, filing in same court as writ petition, 8.11
Format of papers
Generally, 5.87
Memorandum in opposition to motion for issuance of writ, format of, 8.19
Memorandum in support of motion for issuance of writ, format of, 5.94
Proof of service, 5.85
Hearings
Advantages of noticed motion procedure (see Advantages of, above)
Setting hearing date for noticed motion in superior court, 9.21
Stay of proceedings pending writ petition in superior court, noticed motion procedure for hearing on application for, 6.22
Local rules of court expressing preference for noticed motion or alternative writ, 5.9, 9.21
Memorandum in opposition to motion for issuance of writ
Generally, 8.16
Contents of, 8.18
Evidence in opposition, 8.20
Format of opposition papers, 8.19
Time for filing opposition papers, 8.17
Memorandum in support of motion for issuance of writ
Basis for issuance of writ, statement of, 5.98
Evidence, citations to, 5.99
Format of, 5.94
Page limits, 5.95
Persuasiveness of, 5.97
Purpose of, 5.92
Quotations, use of, 5.100
Required contents of supporting memorandum, 5.93
Style of supporting memorandum, 5.96-5.100
Preparing motion for issuance of requested writ, 5.86
Proof of service
Format of, 5.85
Time of filing, 5.84

Required papers
Generally, 5.88
Additional papers (see Additional papers, submission of, above)
Combining notice of motion and motion, 5.91
Memorandum in support of motion (see Memorandum in support of motion for issuance of writ, above)
Motion, 5.90
Notice of motion, 5.89
Responsive pleading or motion
Generally, 8.6
Consequences of not filing responsive pleading, 8.15
Filing fee, 8.12
Filing responsive pleading in same court as writ petition, 8.11
Opposition papers (see Memorandum in opposition to motion for issuance of writ, above)
Service of (see Service of responsive pleadings, below)
Time to file (see Time to file responsive pleading or motion, below)
Service of motion
Generally, 5.104
All parties, service of motion on, 5.105
Time for serving, 5.106
Service of petition
Generally, 5.76
Manner of service, 5.83
Proof of service (see Proof of service, above)
Respondent and real party in interest, service of, 5.82
Time for serving, 5.81
Service of responsive pleadings
All parties, requirement of serving responsive pleading or motion on, 8.13
Method of service, 8.14
Time
Chronology of noticed motion procedure, 5.10
Proof of service, time for filing, 5.84
Service of motion, time for, 5.106
Service of petition, time for, 5.81
Time to file responsive pleading or motion
Generally, 8.7
Administrative record filed or unnecessary, time for filing responsive pleading in event of, 8.8
Administrative record requested but not filed, time for filing responsive pleading, 8.9
Extension of time by stipulation or application, 8.10

Opinion by Appellate Court Granting or Denying Writ Petition
See also **Denial of Writ by Appellate Court**
Attorney fee, award of, 24.28
"Cause," requirement of opinion if proceeding becomes, 24.15
Contents of opinion
Generally, 24.19
Denial of writ, discharge of alternative writ, 24.22
Granting writ, court directing clerk to issue writ of mandate or prohibition, 24.21
Relief granted by court not limited by petitioner's prayer for relief, 24.20
Written opinion, requirement of, 24.19
Costs, award of
Discretion of court to award, deny, or apportion costs, 24.23
Items recoverable as costs, 24.26
Party, award of costs against, 4.25
Petitioner or real party in interest, award of costs against, 24.25
Prevailing party's entitlement to costs, 24.23
Procedure for claiming and opposing costs, 24.27
Specify costs award, requirement that opinion, 24.24
Depublication of opinion. See **Publication of Opinion**
Documents prepared after issuance of opinion
Mandate. See **Mandate in Courts of Appeal**
Prohibition. See **Prohibition in Courts of Appeal**
Remittitur. See **Remittitur**
Review (certiorari), post-decision documents not required for writ of, 24.42
Law of case, issuance of written opinion after issuance of alternative writ establishing, 22.17

Publication of opinion. See **Publication of Opinion**
Service of opinion on lower court and parties, 24.29
Time for issuance of opinion
Generally, 24.16
Circumstances extending time for issuance of opinion beyond 90 days, 24.18
90 calendar days, court issuing opinion within, 24.17
Time limit for submitting memorandum of costs, 24.27

Opinion of California Supreme Court. See **Review in California Supreme Court**

Opposition to Writ Petition Filed in Court of Appeal
See also **Preliminary Opposition to Writ Petition Filed in Appellate Courts**
Generally, 23.1
Amicus curiae briefs. See **Amicus Curiae**
Contents of opposition
Generally, 23.5
New issues, raising in opposition prohibited, 23.10
Reasons why writ review unwarranted, opposition explaining, 23.9
Definitions, 23.2
Extension of time to file opposition
Good cause required for extension, 23.14
Request for, 23.13
Format of opposition
Generally, 23.4
Authority, citation to, 23.7
Certificate of Interested Entities or Persons, service and filing of, 23.8
Organization of, 23.5
Palma opposition, format and content of reply to, 23.17
Record, citation to, 23.6
Reasons for filing opposition, 23.3
Reply to *Palma* opposition
Chart, deadlines for *Palma* opposition, 23.51
Format and content of, 23.17
Service and filing of reply, 23.18
Service and filing of
Certificate of Interested Entities or Persons, service and filing of, 23.8
Manner of serving opposition, 23.16
Reply, service and filing of, 23.18
Respondent or real party in interest serving opposition on petitioner and other parties, 23.15
Timing of opposition
Chart, deadlines for opposition, 23.51
Extension of time (see Extension of time to file opposition, above)
Reply to *Palma* opposition, time limit for filing, 23.18
Setting of deadline by court of appeal, 23.11
30 days for filing opposition if court of appeal fails to set deadline, 23.12

Opposition to Writ Petition in Superior Court
Alternative writ, opposition to application for. See **Alternative Writs of Mandate or Prohibition in Superior Court**
Limited jurisdiction civil cases, opposition to writ petition in. See **Limited Jurisdiction Civil Cases**
Mandate, opposition to writ petition for. See **Mandate in Superior Court**

Oral Argument in Appellate Court
Generally, 11.31
Appearance by parties
Equivalent of alternative writ, order directing parties to appear for oral argument, 22.25
Telephone appearance, permissibility at oral argument on writ petition, 24.9
Conduct of hearing
Amicus curiae request to participate in oral argument, 24.10
Appearance by petitioner and real party in interest, requirement of, 24.9
Number of counsel, limits on, 24.11
Order of argument, 24.10
Questions by justices, effect on time limits for oral argument, 24.13
Strategy for argument, 24.13
Time for argument, 24.12
Date of hearing, alternative writ or OSC specifying, 22.25, 24.8

Ex parte application for alternative writ of mandate and order to show cause, 13.2
Stay request, argument on, 26.28
Summary denial of writ petition, lack of oral argument, 22.15
Summary judgment motion, court's error in denying oral argument on, 16.74
Waiver of oral argument
Generally, 11.31
Alternative writ, party's failure to file written request for oral argument resulting in waiver of oral argument, 24.8

Orders
Agricultural Labor Relations Board's orders. See **Agricultural Labor Relations Board (ALRB)**
Appellate court orders. See **Courts of Appeal**
Arbitration, writ petition as exclusive means of reviewing orders compelling, 16.100
Attorneys, petition for writ to review orders concerning. See **Attorneys**
Contempt, writ petition to review. See **Contempt**
Demurrer. See **Demurrer**
Denial of writ. See **Denial of Writ by Appellate Court**
Discovery orders. See **Discovery**
Discretion of court to review. See **Discretion of Court**
Injunction, writ review of order granting. See **Injunctions**
Interlocutory orders, immediate appeal from, 15.57
Jury trial, review of order requiring. See **Jury Trial**
Juvenile dependency order, habeas corpus challenging, 4.19
Pleadings, review of orders on. See **Pleadings**
Prohibition to prevent enforcement of void order, 15.26
Superior court orders
Agricultural Labor Relations Board, enforcement of order issued by, 4.28
Alternative writs. See **Alternative Writs of Mandate or Prohibition in Superior Court**
Chart, review method for superior court orders, App A
Definition of final order, 11.9
Mandate in superior court. See **Mandate in Superior Court**
Noticed motion for writ in superior court, submission of proposed order and judgment, 5.103
Sealing documents in superior court, motion for order, 7.29
Stay pending superior court's decision on merits of writ petition, order for. See **Stay of Proceedings Pending Writ Petition in Superior Court**
TRO. See **Temporary Restraining Order (TRO)**

Order to Show Cause (OSC)
See also **Alternative Writs in Courts of Appeal**
Alternative writs in superior court. See **Alternative Writs of Mandate or Prohibition in Superior Court**
Enforcement of writ by superior court, order to show cause re contempt, 10.14
Form, alternative writ/order to show cause, 28.6
Review (certiorari), appellate court granting OSC against, 22.30
Review (certiorari), superior court's issuance of OSC stating why writ should not be allowed, 9.49
TRO. See **Temporary Restraining Order (TRO)**

Ordinary Mandate. See **Traditional Mandate in Superior Court**

***Palma* Notice**
Generally, 22.19
Actions by court of appeal after issuance of *Palma* notice
Generally, 24.1
Alternative writ or order to show cause, court's issuance of, 24.5
Denial of petition, 24.3
Peremptory writ in first instance, limits on issuance of, 24.4
Possible actions after issuing *Palma* notice, 24.2
Alternative writ
Coercive alternative writ, using in lieu of *Palma* notice, 22.19, 22.27
Issuance of alternative writ or order to show cause, 24.5
Definition of *Palma* notice, 22.18
Form of *Palma* notice given by court of appeal, 22.21
Letter, 28.8
Opposition to writ petition after appellate court's issuance of *Palma* notice. See **Opposition to Writ Petition Filed in Court of Appeal**
Order, 28.7
Prayer for relief, effect of giving notice of request for peremptory writ in, 22.20

Preliminary opposition distinguished from, 21.5
"Suggestive" or "speaking" *Palma* notice
Issuance of, 22.22
Sample form, 28.9
Superior court writ proceedings, *Palma* notices not used in, 8.39

Parent and Child
Habeas corpus in proceedings involving children
Child custody proceedings, availability of habeas corpus in appellate court, 15.42
Superior court, habeas corpus in. See **Habeas Corpus in Superior Court**
Juvenile dependency proceedings. See **Juvenile Dependency Proceedings**

Penalties
Certificate of Interested Entities or Persons
Opposition to writ petition filed in court of appeal, sanctions for failure to file certificate, 23.8
Writ petition in court of appeals, sanctions for omitting certificate from, 18.21
Contempt. See **Contempt**
Discovery sanctions. See **Discovery**
Enforcement of writ
Peremptory writ, court of appeal imposing penalties for noncompliance with. See **Enforcement of Writs of Mandate or Prohibition in Courts of Appeal**
Superior court writ, penalties for noncompliance with. See **Enforcement of Writs of Mandate or Prohibition in Superior Court**
Frivolous writ petitions. See **Frivolous Writ Petitions in Courts of Appeal, Sanctions for Filing**
Imprisonment for failure to comply with peremptory writ. See **Prison and Prisoners**
Monetary sanction judgment or order of $5000 or less, petition for writ of review under CCP §904.1(a)(11)-(12)
Generally, 16.81
Abuse of discretion as standard of review, 16.85
Requesting writ of mandate or prohibition in alternative, 16.82
Standard of review if writ petition accepted, 16.84
Statutory deadline for filing petition, lack of, 16.83

Peremptory Writs
Clerk of appellate court transmitting certified copy of peremptory writ of mandate or prohibition to trial court, 24.40
Enforcement of writs
Courts of appeal. See **Enforcement of Writs of Mandate or Prohibition in Courts of Appeal**
Superior court. See **Enforcement of Writs of Mandate or Prohibition in Superior Court**
Filing fee for, 9.41
Imprisonment for failure to comply with peremptory writ. See **Prison and Prisoners**
Issuance of peremptory writ in first instance, 5.19
Mandate
Alternative writs. See **Alternative Writs of Mandate or Prohibition in Superior Court**
Courts of appeal. See **Mandate in Courts of Appeal**
Superior court. See **Mandate in Superior Court**
Opposition to peremptory writ if appellate division notifies parties of possibility of issuing peremptory writ in first instance, 12.14
Palma notice. See ***Palma* Notice**
Prayer for relief, requesting peremptory writ in, 18.38, 22.20
Prohibition
Alternative writs. See **Alternative Writs of Mandate or Prohibition in Superior Court**
Courts of appeal. See **Prohibition in Courts of Appeal**
Superior court. See **Prohibition in Superior Court**
Res judicata of superior court's judgment granting or deny issuance of peremptory writ. See **Res Judicata**
Service of. See **Service of Process and Papers**

Permits. See **Licenses and Permits**

Pleadings
See also **Responsive Pleadings**
Administrative and traditional mandamus, pleading in the alternative, 3.21
Answers. See **Answers in Courts of Appeal; Answers in Superior Court**
Appellate court writ review, counsel reviewing pleadings relevant to order or ruling to be challenged, 17.17
Complaints. See **Complaints**
Judgment on the pleadings. See **Judgment on the Pleadings**
Orders on pleadings or at pleading stage, writ petition for review of

Demurrer. See **Demurrer**
Scope or nature of action, ruling on pleading affecting, 16.106
Standard of review if writ petition accepted, 16.107
Substantial issue or resolution of issue resulting in final disposition of case as to party, 16.105
Verification of. See **Verification**

Possession
Superior court issuing writ of, 4.31

Postcard Denial of Writ. See **Denial of Writ by Appellate Court**

Prayer for Relief in Writ Petition
Court of appeal. See **Drafting Writ Petition for Court of Appeal**
Peremptory writ, effect of giving notice of request in prayer for relief, 22.20
Superior court. See **Drafting Writ Petition for Superior Court**

Prejudice. See **Bias and Prejudice**

Preliminary Injunction. See **Injunctions**

Preliminary Opposition to Writ Petition Filed in Appellate Courts
See also **Memorandum in Support or Opposition; Opposition to Writ Petition Filed in Court of Appeal**
Generally, 21.1
Action by appellate court on writ petition before filing of preliminary opposition, 21.7
Additional facts, bringing to attention of trial court, 21.13
Contents of preliminary opposition
Generally, 21.8
Certificate of Interested Entities or Persons, inclusion in preliminary opposition, 21.20
Declaration of facts, real party in interest or respondent submitting sworn, 21.13
Distinction between preliminary opposition and opposition requested by *Palma* notice, 21.5
Filing fee, lack of, 21.19
Format of preliminary opposition
Authority, citation to, 21.12
Briefing format, 21.9
Headings, use of, 21.10
Record, factual statements supported by citation to, 21.11
Immediate temporary stay, petitioner's request for
Contents of opposition to immediate temporary stay, 21.17
Filing opposition to stay before filing preliminary opposition, 21.16
Form, preliminary opposition to petition for writ of mandate, prohibition, or other appropriate writ and stay request, 28.4
Notifying court of intent to oppose stay, 21.15
Optional use of preliminary opposition by real party in interest, 21.4
Procedural defect in writ petition, real party in interest sending short letter to court identifying defect before filing preliminary opposition, 21.6
Purpose of preliminary opposition, 21.3
Reply by petitioner to preliminary opposition, 21.21
Return to alternative writ, court treating preliminary opposition to, 23.44
Rule of Court 8.490(g), preliminary opposition authorized under, 21.2
Service of preliminary opposition, 21.18
Stay (see Immediate temporary stay, petitioner's request for, above)
Time to file preliminary opposition
Generally, 21.14
Extension of time, 21.14
Reply to preliminary opposition, time limit for filing, 21.21

Preliminary Opposition to Writ Petition Filed in Superior Court's Appellate Division. See **Limited Jurisdiction Civil Cases**

Presumptions and Inferences
Court records, presumption of openness to public, 7.26
Declaration of proof of service by mail, rebuttable presumption of receipt created by, 18.80
Information received from client, presumption of confidentiality, 17.11
Judgment, presumption affecting correctness of, 20.4
Petition for writ relief in appellate court, presumption affecting. See **Courts of Appeal**

Prison and Prisoners

See also **Criminal Law**
Appellate court writ of mandate or prohibition, imprisonment of respondent for failure to comply with, 24.50
Superior court writ of mandate or prohibition, imprisonment of respondent for failure to comply with, 10.19

Privacy
Discovery order, effect of privacy rights on petition for writ review of, 16.118

Privileged Communications. See **Discovery**

Probate
Review (certiorari), petition for writ to review probate orders, 16.143

Prohibition in Courts of Appeal
Generally, 15.14
Constitutionality of law, using prohibition to test, 16.89
Contempt, petition for prohibition to prevent enforcement of. See **Contempt**
Court clerk
Issuance of writ by, 24.37
Preparation of writ by clerk, 24.39
Trial court, clerk transmitting certified copy of writ to, 24.40
Defined, 15.14
Enforcement of writ. See **Enforcement of Writs of Mandate or Prohibition in Courts of Appeal**
Issuance of writ by court clerk, 24.21
Judicial acts
Substantive requirements for writ (see Substantive requirements for writ, below)
Threatened judicial acts (see Threatened but not completed exercise of judicial power, applicability of writ to, below)
Judicial disqualification, unavailability of prohibition to challenge, 16.5
Jurisdictional defect as prerequisite for issuance of writ
Generally, 15.22
Actions by trial court in excess or without jurisdiction, 16.92
Conflicting or concurrent jurisdiction, prohibition restraining second court from proceeding with case until first court renders final decision, 16.93
Existence of jurisdictional defect, test for determining existence of, 15.23
Portion of threatened judicial action exceeds court's jurisdiction, availability of prohibition to restrain, 15.24
Raising jurisdictional challenge in trial court as prerequisite to seeking writ in appellate court, 15.25
Jury trial, prohibition to review order requiring. See **Jury Trial**
Ministerial acts performed by court or officers not qualifying as judicial acts for purposes of writ of prohibition, 15.17
Opinion by appellate court. See **Opinion by Appellate Court Granting or Denying Writ Petition**
Petition for writ of prohibition or other appropriate relief, 28.1
Pleadings, prohibition to review orders on. See **Pleadings**
Prayer for relief seeking alternative writ of prohibition, 18.39
Preliminary opposition to petition for writ of prohibition or other appropriate writ and stay request, 28.4
Prevent trial, use of prohibition to, 16.113
Purpose of writ, 15.14
Raising issue in trial court as prerequisite for, 15.68
Return to petition for writ of mandate, prohibition, or other alternative relief, 28.11
Service of writ by petitioner, 24.41
Stay of execution of writ of prohibition mandate, appeal not resulting in, 11.24
Substantive requirements for writ
Courts subject to prohibition, 15.16
Judicial act, challenged action as, 15.15
Ministerial actions performed by court or officers not qualifying as judicial acts, 15.17
Threatened but not completed exercise of judicial power, applicability of writ to
Generally, 15.18
Burden of proof on petitioner to show lower court has decided to take challenged action, 15.19
Continuing or incomplete judicial action, prohibition restraining, 15.20
Examples of threatened judicial acts in excess of jurisdiction, 15.26
Trial court's completion of act before appellate court's ruling on petition, treatment of proceeding as petition for writ of review (certiorari) or mandate, 15.21
Time for issuance of, 24.38

Prohibition in Superior Court
Generally, 4.2
Alternative writ. See **Alternative Writs of Mandate or Prohibition in Superior Court**
Applicability of prohibition

Corporations, 4.7
Persons, 4.8
State agencies (see State agencies, below)
Distinction between writ of prohibition and other writs, 4.4
Drafting writ petition. See **Drafting Writ Petition for Superior Court**
Enforcement of writ. See **Enforcement of Writs of Mandate or Prohibition in Superior Court**
Limited jurisdiction civil cases, appellate division of superior court granting writ of prohibition in. See **Limited Jurisdiction Civil Cases**
Public officials, applicability of writ to, 4.8
Purpose of writ, 4.2
Requirements for, 4.9
Review (certiorari), filing new writ of prohibition petition to enforce judgment on merits issued after issuance of writ, 10.21
Scope of review limited to jurisdictional error, 4.3
State agencies
Constitutional statewide agencies, availability of prohibition to review adjudicatory decisions of, 4.6
Legislative origin, inapplicability of prohibition to state agencies of, 4.5
Statutory authority for, 5.3
Stay, alternative writ of prohibition acting as, 6.4

Prohibitory Injunctions. See **Injunctions**

Proof
Burden of proof. See **Burden of Proof**
Service, proof of. See **Service of Process and Papers**

Property Taxes
Traditional writ of mandate, unavailability to prevent collection of property taxes, 2.63

Publication of Opinion
Generally, 24.30
Certification of opinion for publication, 11.32
Criteria for publishing opinion, 11.32
Depublication of opinion
California Supreme Court opinion, depublication of. See **Review in California Supreme Court**
Rehearing in court of appeal, counsel seeking request for depublication in petition for, 25.20
Requesting depublication of published court of appeal opinion, 11.36
Finality of court of appeal's decision, effect of order certifying unpublished decision for publication, 25.6, 25.10

Public Employment Relations Board, Petition for Writ of Review of Decisions by
Generally, 16.29
Deadline for filing writ petition for review, 16.30
Mandamus in court of appeal or superior court, Board seeking enforcement of final decision or order by filing writ for petition of, 16.32
Standard of review if writ petition accepted, 16.31

Public Entities and Officials
See also **State and Local Agencies**
Administrative agency's officials and employees. See **Administrative Agencies' Acts and Decisions, Traditional Mandate to Compel**
Discretion of public functionaries defined, 2.7
Government Claims Act, demurrer to complaint failing to plead facts demonstrating or excusing compliance with claim presentation requirement of, 16.108
Legislative actions, effect of traditional writ of mandate on
Exception, implementation of legislation, 2.25
Exception, legislative action depriving agency of funds to perform mandatory duty, 2.26
Exception, legislative and quasi-legislative action in excess of authority, 2.24
General rule, legislative actions not subject to writ of mandate, 2.23
Ministerial duty, traditional writ of mandate to compel performance of
Generally, 2.5, 2.17-2.18
Administrative agencies. See **Administrative Agencies' Acts and Decisions, Traditional Mandate to Compel**
Definition of ministerial duty, 2.6, 2.19, 15.7
Distinguishing ministerial duty from discretionary action, 2.7
Extra-record evidence in traditional mandamus action challenging or seeking to compel ministerial actions, appropriateness of, 7.10
Implementation of legislation as ministerial duty, 2.25

Judgment or discretion, ministerial duty not requiring exercise of, 2.20
Mandate to compel performance of duty, appellate court's issuance of writ. See **Mandate in Courts of Appeal**
Prohibition, ministerial acts performed by court or officers not qualifying as judicial acts for purposes of, 15.17
Unconstitutionality of statute, effect on writ petition to compel performance of duty, 2.21
Prohibition, writ of
Applicability of writ to public officials, 4.8
Ministerial acts performed by court or officers not qualifying as judicial acts for purposes of writ of prohibition, 15.17
Traditional writ of mandate
Elections. See **Election Processes, Traditional Mandate Challenging**
Exercise of discretion, petition for writ to compel, 2.22
Legislative actions (see Legislative actions, effect of traditional writ of mandate on, above)
Ministerial duty (see Ministerial duty, traditional writ of mandate to compel performance of, above)
Negotiations with union, mandate compelling governmental entities to enter into, 2.50
Taxes. See **Taxes, Traditional Writ of Mandate Concerning**
Title to public office, determination of, 2.49
Undertaking requirement for stay of proceedings, exemption of public agencies and officers from, 6.20
Verification of pleadings
Extraordinary relief, public entities' exemption from verification requirements, 5.65
Official capacity, verification of appellate court writ petition by public officer acting in, 18.47
Return to alternative writ in appellate court, public entities and officials exempt from requirement of verifying answer, 23.32

Public Records Act
Extraordinary writ, petition under Govt C §6259(c) for
Deadline to file writ petition, 16.16
Discretion of court to deny writ petition, limits on, 16.15
Exclusive means of obtaining appellate review of trial court order under California Public Records Act, writ petition as, 16.14
Standard of review if writ petition accepted, 16.17
Stay, standard for granting, 16.16
Traditional mandate to compel disclosure of records under
Denial of disclosure, mandate for review of, 2.68
Inadequate remedy at law, no requirement of, 2.69

Public Utilities Commission (PUC)
Petition for writ of review of PUC's decisions
Generally, 16.33, 27.5
Deadline to file petition for writ of review, 16.37
Rehearing (see Rehearing, below)
Standard of review (see Standard of review if writ petition accepted, below)
Rehearing
Application for rehearing as prerequisite to filing petition for writ of review, 16.34
Application for rehearing deemed denied, 16.36
Decision on rehearing, no petition for rehearing required after, 16.35
Res judicata
Legislative power, no res judicata effect of PUC's exercise of, 16.45
Summary denial of petition for writ of review constituting decision on merits, 16.44
Standard of review if writ petition accepted
Generally, 16.39
Cases in which Pub Util C §1757 not applicable, limits on judicial review in, 16.41
Complaint or enforcement proceedings, ratemaking or licensing proceedings, limits on judicial review of, 16.40
Constitutional questions, reviewing court's exercise of independent judgment in reviewing, 16.43A
New or additional evidence, prohibition against presenting in writ proceeding, 16.43
Water corporations, limits on judicial review cases pertaining to, 16.42
Standing to seek writ review, 16.38
Venue for petition for writ review, 16.38

Quash, Motion to
Mandate to overturn order denying motion to quash. See **Mandate in Courts of Appeal**
Service of writ petition, motion to quash, 8.52

Quasi-Judicial Agency Decisions, Review of. See **Administrative Agencies' Acts and Decisions, Traditional Mandate to Compel**

Questionnaires. See **Charts, Checklists, Questionnaires, and Tables**

Questions of Law and Fact
Administrative body's failure to act as required by law as question of law, 3.13
Answer to writ petition in superior court raising issues of fact and law, 8.46
Controlling question of law, request that trial court certify existence of, 17.28
Fair hearing for administrative complainant, determination of as question of law, 3.11
Findings by administrative fact finder, adequacy to support administrative decision as question of law, 3.14
Return to writ petition for alternative writ of mandate or prohibition, hearing on questions of law raised in, 9.26
Special referee, court of appeal appointing to resolve disputed questions of fact, 24.14

Quo Warranto
Historical background and abolishment of writ, 4.27, 15.50

Real Property
Enforcing judgment for. See **Judgments**
Unlawful detainer. See **Unlawful Detainer Action, Writ Petition to Review Denial of Stay in**

Reclassification of Action or Proceeding, Review of Order Concerning. See **Mandate in Courts of Appeal**

Reconsideration, Motion for
Statutory time limits for filing writ petition in court of appeal, effect of filing motion for reconsideration on, 17.2
Summary judgment order, filing motion for consideration not extending time to file writ petition for review of, 16.76
Superior court's final decision on writ
Final judgment, unavailability of motion for reconsideration of, 11.5
Order not determining all issues, motion for reconsideration if, 11.6

Record in Appellate Court Writ Proceeding
Generally, 20.1
Agricultural Labor Relations Board filing certified record of proceeding in court of appeal, time limit for, 16.19
Appendix containing record, attachment to writ petition, 18.57
Confidentiality of appellate court records
Generally, 20.23
Sealing appellate court records. See **Sealing Appellate Court Records**
Contents of record
Additional facts, 20.8
All documents considered by trial court, 20.6
Judicial notice, inclusion of matters presented to trial court for, 20.18
Opposing party's papers, 20.4, 20.7
Reporter's transcript, 20.9
Ruling by trial court, inclusion of, 20.6
Supersedeas petition, required contents if record on appeal not filed. See **Supersedeas**
Denial of writ petition, lack of sufficient record as grounds for, 20.4
Filing record, 18.82, 20.16
Format of record
Binding of documents, 20.11
CD-ROM format, filing briefs and records in, 20.11
Citation to record, 20.14
Exhibits, separate volume for, 20.11
Indexing, pagination, and order of documents, 20.12
Legible and unmarked documents, requirement of, 20.13
Maximum page length, 20.11
Table of contents, 20.12
Judicial notice. See **Judicial Notice**
Preparation of record
Contents of record (see Contents of record, above)
Petitioner's responsibility for, 20.5
Petition for writ of review (certiorari), record requirement for, 20.10
Requirements affecting record
Generally, 20.2
Rules of Court, requirement that adequate record accompany writ petition, 20.3
Sufficient record, necessity of, 20.4
Review (certiorari), effect of granting petition for, 22.30
Service of petition and supporting documents, 20.15

Record in Superior Court Writ Proceeding

Generally, 7.1
Burden on petitioner to submit information for superior court to decide issues presented in writ petition, 7.2
Confidential documents, protection of
Generally, 7.26
Sealing documents. See **Sealing Documents in Superior Court**
Contents of record
Extra-record evidence (see Extra-record evidence, inclusion of, below)
Opposing party's evidence presented during underlying proceeding, inclusion of, 7.8
Relevant evidence presented during underlying proceeding, inclusion of, 7.7
Type of petition and nature of underlying proceeding, record dependent on, 7.6
Decision-making body in underlying proceeding, obtaining record from
Generally, 7.14
Method of requesting underlying record, 7.16
Paying for preparation of underlying record, 7.17
Timing of request for underlying record, 7.15
Declarations
Filing with court, 7.25
Separate supporting documentation, submission by declaration, 7.20
Denial of writ, lack of adequate record as grounds for, 7.3, 12.8
Evidence (see Contents of record, above)
Exhibits
Filing exhibits with court, 7.25
Format of record (see Format of record presented to superior court, below)
Extra-record evidence, inclusion of
Generally, 7.9
Quasi-legislative actions, exclusion of extra-record evidence in action challenging, 7.11
Traditional mandamus action challenging adjudicatory decisions, 7.12
Traditional mandamus actions challenging or seeking to compel ministerial actions, extra-record evidence in, 7.10
Format of record presented to superior court
Administrative record versus documentation submitted by exhibits, 7.18
Appending supporting documentation to petition, 7.19
Citation to record, 5.47, 7.23
Indexing, pagination, and order of supporting documentation, 7.21
Separate supporting documentation, submission by declaration or exhibits, 7.20
Visual quality of documents, 7.22
Lodging administrative record with superior court, 7.25
Necessity of sufficient record, 7.3
Noticed motion for writ in superior court, lodging administrative record with court, 5.102
Pre-merits hearing, record in, 7.13
Preparation of record
Contents of record (see Contents of record, above)
Petitioner's responsibility for preparing record, 7.5
Purpose of record, 7.2
Serving copy of record on opposing party, 7.24
Statutory guidelines for handling record, 7.4
Traditional mandate (see Extra-record evidence, inclusion of, above)

Records and Reports
Administrative record defined, 3.7
Appellate court writ proceeding, record in. See **Record in Appellate Court Writ Proceeding**
Discovery of. See **Discovery**
Inspection of records. See **Inspection of Records**
Preliminary opposition to writ petition, supporting factual statements by citation to record, 21.11
Public Records Act. See **Public Records Act**
Superior court writ proceeding, record in. See **Record in Superior Court Writ Proceeding**
Traditional mandate. See **Traditional Mandate in Superior Court**
Transcripts. See **Transcripts**

Referendums. See **Election Processes, Traditional Mandate Challenging**

Rehearing in Court of Appeal
Generally, 11.34, 25.16
Answer to petition for rehearing, 25.22
Chart, 25.23
Contents of petition for rehearing, 25.20

Denial of petition and denial by operation of law, 25.24
Format of petition for rehearing, 25.21
Granting rehearing
Generally, 25.25
Finality of court's decision, effect of granting rehearing on, 25.6
Grounds for, 25.17
Service and filing of petition for rehearing, 25.19
Standing to seek rehearing, 25.18

Rehearing, Petitioning PUC for. See **Public Utilities Commission (PUC)**

Remittitur
Generally, 11.33
Court clerk, duty of, 24.35
Defined, 24.31
Issuance of
Discretion of court to order immediate issuance of remittitur on parties' stipulation or dismissal of proceeding, 24.34
Summary denial of writ petition, remittitur not required after, 24.32
Time for issuing, 24.33
Stay or recall of remittitur, 24.36

Replication (Petitioner's Reply) in Superior Court
Generally, 8.57
Alternative writ, time limit for reply in court of appeal, 22.25
Contents of replication, 8.59
Defined, 8.2
Evidence presented at hearing, requirement of advance notice if replication made by, 8.60
Filing and service of
Generally, 8.61
Reply memorandum (see Reply memorandum filed by petitioner, below)
Time for filing (see Time, below)
Limited jurisdiction civil case, petitioner's reply in. See **Limited Jurisdiction Civil Case**
Reply memorandum filed by petitioner
Alternative writ procedure used, filing reply memorandum if, 8.63
Defined, 8.2
Noticed motion procedure used, filing reply memorandum if, 8.62
Review in California Supreme Court, reply to answer to petition for. See **Review in California Supreme Court**
Time
Filing reply, deadline for, 8.58
Reply memorandum, time for filing, 8.62

Replication to Return in Appellate Court Proceedings. See **Return to Alternative Writ in Appellate Court Proceedings**

Reply. See **Replication (Petitioner's Reply) in Superior Court; Return to Alternative Writ in Appellate Court Proceedings**

Reply to *Palma* Opposition. See **Opposition to Writ Petition Filed in Court of Appeal**

Reporter's Transcript. See **Transcripts**

Reports. See **Records and Reports**

Res Judicata
Public Utilities Commission. See **Public Utilities Commission (PUC)**
Summary denial of writ petition by California Supreme Court, res judicata effect of, 27.3
Superior court judgments, res judicata effect of
Alternative writ, inapplicability of res judicata to denial of, 9.55
Final judgment in writ proceeding, preclusive effect of, 9.54

Responsive Motions
Generally, 8.50
Answer, filing in conjunction with motion, 8.56
Change of venue, motion for, 8.55
Discovery motion, 8.55
Dismiss, motion to, 8.51
Judgment on the pleadings, motion for, 8.53

Noticed motion, filing responsive pleading or motion in response to. See **Noticed Motion in Superior Court**
Quash service of writ petition, motion to, 8.52
Strike, motion to, 8.55
Summary judgment, motion for, 8.54

Responsive Pleadings
See also **Pleadings**
Generally, 8.1
Alternative writ for mandate or prohibition. See **Alternative Writs of Mandate or Prohibition in Superior Court**
Answers
Court of appeal, answers in. See **Answers in Courts of Appeal**
Superior court, answers in. See **Answers in Superior Court**
Appellate briefs. See **Briefs**
Definitions, 8.2
Demurrer. See **Demurrer**
Fees
Alternative writ, fee for filing opposition to application for issuance of, 8.29
Noticed motion by respondent, fee for filing responsive pleading or motion in response to, 8.12
Joint response by respondent and real party in action, 8.5
Mandate, effect of filing writ petition on time limit for filing responsive pleadings in superior court, 16.57
Manner in which petitioner proceeds, response controlled by, 8.3
Noticed motion, filing responsive pleading or motion in response to. See **Noticed Motion in Superior Court**
Opposition memorandum. See **Memorandum in Support or Opposition**
Reply. See **Replication (Petitioner's Reply) in Superior Court**
Stay of challenged action or decision, petitioner seeking, 8.4

Return in Appellate Writ Review Proceedings
Mandate or prohibition. See **Enforcement of Writs of Mandate or Prohibition in Courts of Appeal**
Review. See **Review (Certiorari) in Courts of Appeal**

Return to Alternative Writ in Appellate Court Proceedings
Generally, 23.19
Affirmative defenses
Answer, raising affirmative defenses in, 23.31
Demurrer, raising affirmative answers in prohibited, 23.36
Answer as formal return
Generally, 23.28
Affirmative defenses, answer raising, 23.31
Demurrer, filing with answer, 23.34
Material facts, answer alleging additional, 23.30
Responding to verified allegations in petition, 23.29
Verification of answer, 23.32
Certificate of Interested Entities or Persons, service and filing of, 23.26A
Consequences of not filing proper return, 23.44
Contents of return, 23.26
Defenses (see Affirmative defenses, above)
Definitions
Formal return, 23.27
Return, 23.20
Demurrer, return by way of
Generally, 23.33
Affirmative defenses, raising in demurrer prohibited, 23.36
Answer, filing demurrer with, 23.34
Grounds for demurrer, 23.35
Exhibits supporting return, 23.38
Formal return
Generally, 23.27
Answer (see Answer as formal return, above)
Demurrer (see Demurrer, return by way of, above)
Format of return
Generally, 23.25
Reply (traverse) to return, format of, 23.49
Memorandum in support of, 22.29, 23.37
Preliminary opposition, court treating as return, 23.44
Replication to return (see Reply (traverse) to return, petitioner filing, below)

Reply (traverse) to return, petitioner filing
Generally, 23.48
Amicus curiae briefs. See **Amicus Curiae**
Chart, deadlines for filing reply, 23.51
Defined, 23.2
Filing and service of reply, 23.50
Format and content of reply, 23.49
New issues in reply, petitioner prohibited from raising, 23.49
Purpose of, 23.49
Sample form, 28.12
Responsibility for filing return
Joint return, respondent and real party in interest filing, 23.24
Real party in interest, return filed by, 23.21
Respondent other than lower court, return filed by, 23.23
Respondent trial court's standing to file return, 23.22
Sample form, return to petition for writ of mandate, prohibition, or other alternative relief, 28.11
Service of return
Manner of serving, 23.43
Petitioner and parties appearing in proceeding, serving return on, 23.42
Reply (traverse) to return, service of, 23.50
Standing to file return (see Responsibility for filing return, above)
Time limit for filing return, 22.25
Timing of return
Chart, deadlines for filing return, 23.51
Extension of time for filing return, 23.41
Filing date for return, court of appeal setting deadline for, 23.39
30 days for filing return if court of appeal fails to set deadline, 23.40
Traverse to return (see Reply (traverse) to return, petitioner filing, above)
Verification (see Answer as formal return, above)

Return to Writ in Superior Court Proceedings
Alternative writ for mandate or prohibition in superior court. See **Alternative Writs of Mandate or Prohibition in Superior Court**
Defined, 8.2
Enforcement of peremptory writ. See **Enforcement of Writs of Mandate or Prohibition in Superior Court**
Limited jurisdiction civil cases. See **Limited Jurisdiction Civil Cases**
Review (certiorari), court ordering further return, 9.51

Review (Certiorari) in Courts of Appeal
Generally, 15.27
Alternatively requesting review or habeas relief, 15.37
Appeal from challenged action, lack of as prerequisite for writ
Generally, 15.32
Final judgment, effect of availability of appeal from, 15.33
Loss of right to appeal through no fault of petitioner, exception affecting right to writ of review, 15.36
Plain, speedy, or adequate remedy, effect of appeal failing to provide, 15.34
Related ruling or order, effect on availability of writ of appeal from, 15.35
Waiver of appeal by party's neglect, effect on right to writ, 15.33
Challenging court of appeal decision by seeking certiorari by U.S. Supreme Court, 25.31
Completed judicial actions, applicability of writ to, 15.18
Enforcing decision in writ of review proceeding, 24.53
Examples of completed judicial action subject to writ review
Contempt proceedings, rulings in, 15.37, 16.133, 16.135
Other judicial actions subject to review, 15.38
Issuance of, 22.30
Opinion by appellate court. See **Opinion by Appellate Court Granting or Denying Writ Petition**
Petition for writ of habeas corpus or certiorari (filed by attorney), 28.21
Post-decision documents not required for writ of review, 24.42
Prayer for relief seeking, 18.40
Probate orders, petition for review of, 16.143
Purpose of writ, 15.27
Raising issue in trial court as prerequisite for, 15.68
Record of proceeding from lower court, writ of review ordering lower court to certify or return to reviewing court, 15.28
Record requirement for petition for writ, 20.10
Return in writ review proceedings

Generally, 23.45
Definition of return, 23.46
Demurrer to petition for review, 23.47
Review in California Supreme Court, petition for as prerequisite to petitioning U.S. Supreme Court for certiorari, 25.29
Stay of trial court proceeding, effect of issuing writ of review on, 19.5
Substantive requirements for
Appeal (see Appeal from challenged action, lack of as prerequisite for writ, above)
Completed judicial acts, writ review limited to, 15.30
Excess of court's jurisdiction, requirement that judicial act be in, 15.31
Limiting writ to review of judicial action, 15.29
Trial court's completion of challenged act before appellate court's ruling on petition for prohibition, treatment of proceeding as petition for writ of review, 15.21

Review (Certiorari) in Superior Court
Generally, 4.10, 9.1
Adjudicatory decisions of constitutional statewide agencies, availability of writ to review, 4.15
Appeal from order granting or denying writ. See **Appeals**
Appellate division of superior court granting or denying petition for writ of review, appealability to court of appeal, 12.20
Applicability of writ (see State and local agencies, applicability of writ to, below)
Distinguishing writ of prohibition from writ of review (certiorari), 4.4
Drafting writ petition. See **Drafting Writ Petition for Superior Court**
Enforcement of writ
Filing new writ of mandate or prohibition petition to enforce judgment in writ of review proceedings, necessity of, 10.21
Remedies for failure to comply with writ, 10.20
Further return, court ordering, 9.51
Hearing after issuance of certiorari, requirement of, 4.12
Hearing and decision on merits, 9.51
Issuance of writ, 9.50
Judgments
Filing new writ of mandate or prohibition petition to enforce judgment on merits issued after issuance of writ of review, 10.21
Ruling and judgment by superior court on petition for review, 9.52
Limited jurisdiction civil cases, appellate division of superior court granting writ of review in. See **Limited Jurisdiction Civil Cases**
Order to show cause why writ should not be allowed, court's issuance of, 9.49
Purpose of, 4.10
Requirements for writ, 4.16
Scope of review by superior court, 4.11
State and local agencies, applicability of writ to
Adjudicatory decisions of statutorily-created state agencies, unavailability of writ for review of, 4.13
Local agencies not subject to review (certiorari), 4.14
Statutory authority for, 5.3
Stay, discretion of court granting certiorari to omit, 6.4

Review in California Supreme Court
See also **California Supreme Court**
Generally, 11.35, 25.1
Answer to petition for review
Contents of, 27.26
Cover for, 27.23
Maximum length of, 27.21
Number of copies, 27.24
Reply to answer (see Reply to answer, below)
Time limit for filing, 27.18
Depublication of opinion
Request for depublication, attaching to petition for review prohibited, 27.25
Separate petition for, 11.36
Disposition of petition
Generally, 27.29
Denial of petition, 27.30
Granting review on all or some issues, 27.31
Multiple parties seeking review, time limit for supreme court to grant or deny review, 27.33
Transfer of matter to court of appeal, 27.32
Energy Resources Conservation and Development Commission, review of decisions by
Generally, 16.26
Deadline to file petition for writ review, lack of, 16.27

Original writ jurisdiction of supreme court for reviewing decisions by, 27.4
Standard of review if writ petition accepted, 16.28
Extension of time
Disposition of petition, supreme court extending time for, 27.30
Holiday or weekend, no extension of time if final date for filing falls on, 27.16
Multiple parties seeking review, supreme court extending time limit to grant or deny review, 27.33
Factors in party's decision to seek review, 27.14
Filing petition, procedures for
Chart, filing requirements for petition for review, 27.28
Number of copies, 27.24
Timing (see Timing for filing review petition, below)
Format of petition
Generally, 27.20
Attachments, 27.22
Cover of petition, 27.23
Length of petition, 27.21
Grant and hold, effect of, 25.28
Grounds for petition review, 25.27, 27.13
Opinion of Supreme Court
Depublication of opinion (see Depublication of opinion, above)
Distinction between seeking petition for review challenging court of appeal's opinion from petition invoking supreme court's original jurisdiction seeking issuance of prerogative writ of mandate, prohibition, or review, 11.35
Petitions for review
Generally, 25.26, 27.12
Answer (see Answer to petition for review, above)
Certiorari, seeking review in California Supreme Court as prerequisite to petitioning U.S. Supreme Court for, 25.29
Contents of petition, 27.22, 27.25
Disposition of petition (see Disposition of petition, above)
Exhausting state remedies, seeking review for purposes of, 25.29
Filing petition (see Filing petition, procedures for, above)
Format of petition (see Format of petition, above)
Same or similar issue in pending case before court as grounds for seeking review, 25.28
Sample form, petition for review, 28.16
Summary denial of petition for review, 25.27
Rehearing in court of appeal before seeking review in California Supreme Court, 11.34
Reply to answer
Contents of, 27.27
Cover for, 27.23
Number of copies, 27.24
Time limit for filing, 27.19
Summary denial of writ petition, review of, 25.11, 25.30
Timing for filing review petition
Generally, 27.15
Answer to petition, time limit for filing, 27.18
Energy Resources Conservation and Development Commission, lack of deadline for filing petition for review of decisions by, 16.27
Extension of time (see Extension of time, above)
Relief for failure to timely file petition for review, 27.17
Reply by petitioner to answer, 27.19

Rules of Court
See also **Local Rules of Court**
Case cover sheet, rules of court requiring, 5.78
Court of appeal
Opposition to writ petition filed in court of appeal, rules of court specifying format requirements for, 23.4
Record accompanying writ petition in court of appeal, Rules of Court requiring, 20.3
Supersedeas petition demonstrating substantial issues on appeal, rules requiring, 26.5
Superior court
Generally, 1.3
Applicability of California Rules of Court to superior court writ proceedings, 5.5
Local rules of court. See **Local Rules of Court**

Sacramento County
Procedures for prosecuting petitions for prerogative writs in Sacramento Superior Court, App B

Sale
Superior court issuing writ of, 4.32

Sanctions. See **Penalties**

Saturdays, Sundays, and Holidays
Calculating time limit for filing writ petition in court of appeal, exclusion of last day if falling on judicial holiday, 18.74
Finality of appellate court's decision, effect of 30-day period falling on weekend or holiday, 25.8
Review in California Supreme Court, no extension of time to file petition if final date for filing falls on holiday or weekend, 27.16

Schools
Students, traditional mandate to review decisions and actions concerning, 2.43
Teachers, traditional mandate to review decisions and actions concerning, 2.42, 2.56

Sealing Appellate Court Records
Generally, 20.24
Lodging record with court
Generally, 20.27
Defined, 20.26
Request that appellate court seal records, 20.26
Trial court, records sealed by, 20.25
Unsealing records, motion or petition for, 20.28

Sealing Documents in Superior Court
Criteria for, 7.27
Joint motion for sealing document, 7.27
Lodging document with court
Generally, 7.30
Conditionally sealing document (record), 7.31
Court's handling of conditionally sealed document (record), 7.32
Slip pages for sealed documents, petitioner including in record, 7.33
Procedure for sealing documents
Generally, 7.28
Motion or application for order sealing documents, 7.29
Stipulation of parties for sealing documents prohibited, 7.27

Service of Process and Papers
Alcoholic Beverage Control Appeals Board's final order, deadline to serve writ petition for review of, 16.23
Certificate of Interested Entities or Persons, service of. See **Certificates and Certification**
Court of appeal
Alternative writ in court of appeal, service of, 22.26
Amicus brief, service of, 23.54
Manner of serving writ petition, 18.78
Opinion by appellate court granting or denying writ petition, service on lower court and parties, 24.29
Opposition to writ petition, service of. See **Opposition to Writ Petition Filed in Court of Appeal**
Peremptory writ of mandate or prohibition, petitioner's service of, 24.41
Preliminary opposition to writ petition, service of, 21.18
Proof of service, 18.80
Rehearing in court of appeal, service of petition for, 25.19
Reply (traverse) to return in appellate court, service of, 23.50
Respondent and real party in interest, petitioner serving, 18.79
Return to alternative writ. See **Return to Alternative Writ in Appellate Court Proceedings**
Stay request. See **Stay of Proceedings by Appellate Court**
Supersedeas petition, service of. See **Supersedeas**
Supporting documents and petition, service of, 20.15
Time for serving writ petition in court of appeal, 18.77
Time period to file writ petition in court of appeal, service of notice of entry of order triggering, 18.71
Unsealing of record by appellate court, parties serving opposition to, 20.28
Proof of service
Court of appeal, 18.80
Noticed motion. See **Noticed Motion in Superior Court**
Superior court
Generally, 5.71
Alternative writ of mandate or prohibition, service of. See **Alternative Writs of Mandate or Prohibition in Superior Court**

Enforcement of peremptory writ by superior court, personal service of writ on petitioner as prerequisite for, 10.12
Limited jurisdiction civil cases, service of writ petition and supporting record, 12.10
Noticed motion. See **Noticed Motion in Superior Court**
Quash service of writ petition, motion to, 8.52
Record of superior court writ proceedings, service on opposing party, 7.24
Replication (petitioner's reply), service of, 8.61
Responsive pleading and motion in response to noticed motion, service of. See **Noticed Motion in Superior Court**
Stay order, service of, 6.25
Time (see Court of appeal, above)

Setting Aside. See **Vacating and Setting Aside**

Settlement
Appeal, settlement of writ proceeding on, 11.19
Good faith settlement determination, grant or denial of motion for
Deadline to file writ petition, 16.50
Prerequisite to obtaining appellate review, writ proceeding as, 16.49
Standard of review if writ petition accepted, 16.51

Shield Law. See **Newspersons' Shield Law**

Shortening of Time. See **Extension and Shortening of Time**

Slander. See **Defamation**

Small Claims Court
Generally, 12.1
Challenging small claims court judgment, unavailability of writ review for, 12.26
Superior court's judgment on appeal, writ petition for review of, 12.27

Speaking Alternative Writ. See **Alternative Writs in Courts of Appeal**

Standing
Appellate court, standing to seek writ in. See **Courts of Appeal**
Public Utilities Commission's decision, standing to seek writ review of, 16.38
Return to alternative writ. See **Return to Alternative Writ in Appellate Court Proceedings**
Traditional mandate, petitioner's standing to seek writ of. See **Traditional Mandate in Superior Court**

State and Local Agencies
See also **Public Entities and Officials**
Administrative mandamus. See **Administrative Mandamus in Superior Court**
Constitutional statewide agencies. See **Constitutional Law**
Prohibition, applicability to state agencies. See **Prohibition in Superior Court**
Record in underlying proceedings, petitioner proceeding in forma pauperis not required to pay agency's preparation costs, 7.17
Review in superior court. See **Review (Certiorari) in Superior Court**
Undertaking requirement for stay of proceedings, exemption of public agencies and officers from, 6.20

State Bar
Disciplinary action by State Bar Court, disciplined attorney or chief trial counsel for State Bar filing petition with California Supreme Court for review of, 27.6

Statement of Decision. See **Alternative Writs of Mandate or Prohibition in Superior Court**

Statutes of Limitations
See also **Time**
Administrative mandamus in superior court, statute of limitations for filing petition for, 3.19
Malicious prosecution complaint, statute of limitations for, 16.108
Superior court, statute of limitations for filing writ petition in, 5.73

Statutes Specifying Use of Writ Petition to Obtain Appellate Review
Generally, 17.23
Administrative proceedings. See **Administrative Proceedings, Writ Review of**
Exclusive means of appellate review, writ petition as
Generally, 16.2
Agricultural Labor Relations Board's final order, writ petition as exclusive means of obtaining appellate review of, 16.18

Alcoholic Beverage Control Appeals Board's adjudicatory order, petition for writ as exclusive means of obtaining review of, 16.22
Mandate, statutes authorizing exclusive review by. See **Mandate in Courts of Appeal**
Public Records Act, writ petition as exclusive means of obtaining appellate review of trial court order under, 16.14
WCAB's decisions, special statutory writ of review as exclusive means of obtaining review of, 16.46, 27.7
Miscellaneous statutes authorizing writ review
Generally, 16.53
Change of venue order, review under CCP §400. See **Venue**
Monetary sanction judgment of $5000 or less, review under CCP §904.1(a)(11)-(12). See **Penalties**
Quash service of summons, dismissal for inconvenient forum or for delay in prosecution, petition for mandate to overturn order. See **Mandate in Courts of Appeal**
Reclassify action or proceeding, grant or denial of superior court motion to. See **Mandate in Courts of Appeal**
Summary judgment order, review under CCP §437c. See **Summary Judgment**
Unlawful detainer action, writ petition for review of denial of stay in (CCP §1176). See **Unlawful Detainer Action, Writ Petition to Review Denial of Stay in**
Nonstatutory writ relief. See **Discretion of Court**
Prerequisite for post-judgment review on appeal, writ petition as, 17.25
Prerequisite to appeal, writ petition as
Good faith settlement determination, grant or denial of motion for. See **Settlement**
Juvenile dependency proceedings, writ challenging order setting termination hearing or post-termination placement order, 16.52
Public Records Act. See **Public Records Act**
Sole means of appellate review, statute providing for writ as, 17.24, 17.29

Stay of Proceedings by Appellate Court
Generally, 11.26, 19.1
Action by appellate court on stay request, 19.20
Alternative writs
Mandate or order to show cause, no automatic stay as result of issuance of alternative writ of, 19.3
Order to show cause re writ of review (certiorari), trial court proceedings not stayed by issuance of, 19.5
Prohibition or order to show cause, automatic stay of challenged proceeding as result of issuing alternative writ of, 19.4
Temporary stay order, alternative writ containing, 22.25
Application for stay
Drafting request for stay (see Drafting request for stay, below)
Separate document or part of writ petition, stay application as, 19.9
Service of stay request (see Service of stay request, below)
Undertaking, court's discretion to require, 19.10
Automatic stay, generally (see Alternative writs, above)
Automatic stay of execution of writ
Exceptions to automatic-stay rule, 11.25
Mandate but not prohibition, appeal resulting in stay of, 11.24
Contents of, 11.26
Cover of document seeking stay, requirements for
Generally, 19.11
Notice of request for stay, 18.19, 19.9, 19.12
Trial court identifying information, inclusion of, 19.13
Decision of appellate court on petition, appellant obtaining temporary stay pending, 26.25
Discovery order requiring disclosure of private or privileged information, requesting stay in connection with filing writ petition for review of, 16.118
Drafting request for stay
Generally, 18.58
Allegations in support of stay, 18.59, 19.15
Cover (see Cover of document seeking stay, requirements for, above)
Declaration in support of stay request, 19.16
Documents in support of stay, 18.60, 19.16
Statement of urgency, 19.14, 19.16
Issuance of stay order by appellate court
Generally, 22.10
Actions on temporary stay, 22.11
Contents of temporary stay order, 22.12
Notice of temporary stay order, 22.13
Judgment, stay of
Money judgment, bond required for stay of, 26.3
Supersedeas. See **Supersedeas**
Notice

Cover of document seeking stay, notice of request for stay on, 18.19, 19.9, 19.12
Temporary stay order, notice of, 22.13
Opposition to stay request, 19.19
Oral argument on request for, 26.28
Prayer for relief in writ petition requesting immediate stay, 18.37
Preliminary opposition. See **Preliminary Opposition to Writ Petition Filed in Appellate Courts**
Preparation of documents (see Drafting request for stay, above)
Public Records Act, standard for granting stay under, 16.16
Purpose of stay, 19.2
Remittitur, stay of, 24.36
Requirements for stay request
Cover of document seeking stay (see Cover of document seeking stay, requirements for, above)
Imminent injury to party seeking relief as prerequisite for stay, 19.7
Unsuccessful attempt to obtain stay from trial court, 19.8
Review (certiorari), effect of granting petition for, 22.30
Scope of stay request, 19.6
Service of stay request
Separate application for stay, service of, 19.18
Writ petition requesting stay, service of, 18.78, 19.17
Unlawful detainer. See **Unlawful Detainer Action, Writ Petition to Review Denial of Stay in**

Stay of Proceedings Pending Writ Petition in Superior Court
Generally, 6.1, 8.4
Alternative writ of mandate or prohibition, service of stay order in conjunction with, 9.14
Appeal, stay of writ by, 10.8
Application for stay
Alleging basis for stay, 5.39, 5.58
Grant or denial of application (see Grant or denial of stay application, below)
Hearing (see Hearing on stay request, below)
Length of stay, 6.8
Opening paragraph of writ petition, noting request for stay in, 5.39
Opposing stay application (see Opposing stay application, below)
Petition for writ or separate document, stay application as part of, 6.7
Preparation of documents (see Preparation of documents, below)
Automatic stay, vacating trial court proceedings conducted in violation of, 26.6
Bond (see Undertaking if stay granted, respondent's request for, below)
Declarations
Contents of petitioner's declaration supporting stay application, 6.15
Opposition to stay application, declaration supporting, 6.19
Denial of application (see Grant or denial of stay application, below)
Determining necessity or appropriateness of stay or preliminary injunction
Generally, 6.3
Factors to consider when choosing between stay or preliminary injunction, 6.6
Merits of petition, court's preliminary decision on, 6.5
Type of writ relief sought as determinative of need for stay, 6.4
Discretion of court
Grant or denial of stay application, court's discretion concerning, 6.24
Temporary restraining order, court's discretion to require bond or undertaking for, 6.33
Undertaking (see Undertaking if stay granted, respondent's request for, below)
Ex parte proceeding
Generally, 6.23
Declaration in support of stay, statement concerning notice of ex parte hearing, 6.15
Scheduling ex parte applications with court clerk, 6.17
Temporary restraining order, issuance of, 6.31
Title of ex parte stay application, 6.11
Grant or denial of stay application
Appealability of order granting or denying stay, 6.27
Denial of stay application, 6.26
Discretion of court to grant or deny stay application, 6.24
Grant of stay application, 6.25
Hearing on stay request
Ex parte hearing (see Ex parte proceeding, above)
Noticed motion procedure, 6.22
Preliminary injunction, time limit for setting hearing on, 6.35
Respondent appearing at, 6.19

Injunction (see Preliminary injunction, seeking stay through, below)
Limited jurisdiction civil case, request for stay in, 12.9
Mandate to overturn order denying stay for inconvenient forum or dismiss for delay in prosecution. See **Mandate in Courts of Appeal**
Memorandum
Opposing stay application, 6.19
Supporting stay application, 6.12
Methods for staying challenged action or decision
Generally, 6.2, 8.4
Application for stay (see Application for stay, above)
Preliminary injunction (see Preliminary injunction, seeking stay through, below)
Temporary restraining order (see Temporary restraining order (TRO), seeking stay through, below)
Modification or dissolution of stay, 6.28
Opposing stay application
Stipulation by parties in event of no opposition to stay, 6.18
Undertaking (see Undertaking if stay granted, respondent's request for, below)
Written opposition, respondent filing, 6.19, 8.4
Order for stay
Application for stay pending superior court's decision on merits of writ petition, submission of proposed order with, 6.16
Checklist for obtaining stay order, 6.39
Grant or denial of stay application, appealability of order for, 6.27
Service of stay order, 6.25
Preliminary injunction, seeking stay through
Generally, 6.29
Bond, amount of, 6.38
Bond, requirement of, 6.31, 6.37
Criteria for issuance of, 6.36
Determining necessity for injunction (see Determining necessity or appropriateness of stay or preliminary injunction, above)
Factors considered by superior court, 6.30
Hearing on preliminary injunction, time limit for setting after granting temporary restraining order, 6.35
Temporary restraining order (TRO), preliminary injunction superseding, 6.31
Preparation of documents
Part of writ petition, stay application as, 6.9
Separate document (see Separate document, stay application as, below)
Separate document, stay application as
Generally, 6.7, 6.10
Criteria governing stays in writ proceedings, 6.13
Declaration by petitioner explaining necessity for stay, contents of, 6.15
Memorandum supporting stay application, 6.12
Proposed order, submission of, 6.16
Title of stay application, 6.11
Verified allegations in writ petition, 6.14
Temporary restraining order (TRO), seeking stay through
Generally, 6.29
Denial of TRO application, 6.34
Description and purpose of TRO, 6.31
Discretion of court to require bond or undertaking, 6.33
Factors considered by superior court, 6.30
Grant of TRO application, 6.35
Lack of requirement for bond or undertaking, 6.31
Preliminary injunction hearing, time limit for setting after granting TRO application, 6.35
Verified copy of writ petition, inclusion with application for TRO, 6.32
Undertaking if stay granted, respondent's request for
Amount of undertaking, court's discretion to set, 6.21
Preliminary injunction (see Preliminary injunction, seeking stay through, above)
Requirement of undertaking, court's discretion concerning, 6.20
TRO, undertaking for (see Temporary restraining order (TRO), seeking stay through, above)
Unlawful detainer. See **Unlawful Detainer Action, Writ Petition to Review Denial of Stay in**
Verification
Allegations in writ petition, verification of, 6.14
TRO, inclusion of verified copy of writ petition with application for, 6.32

Stipulations
Opposition to writ petition filed in court of appeal, parties prohibited from stipulating to extension of time to file, 23.13
Remittitur, discretion of court to order immediate issuance on parties' stipulation, 24.34

Responsive pleading, stipulation for extension of time to file, 8.10
Sealing records, inability of parties to stipulate to, 7.27, 20.26
Stay pending superior court's decision on merits of writ petition, stipulation by parties in event of no opposition to, 6.18

Strike, Motion to
Response to writ petition, motion to strike as, 8.55
Sanctions for frivolous writ petition, court striking opposing party's petition or pleading as, 24.63

Subpoenas
Mandate directing trial court to quash deposition subpoenas for records protected by physician-patient privilege, 16.121
Traditional mandate challenging issuance or failure to issue, 2.65

Summary Denial of Writ. See **Denial of Writ by Appellate Court**

Summary Judgment
Appealability of order granting motion for summary judgment, 16.66
Basis for writ petition for review of summary judgment order
Denial of motion, court's error in, 16.69
Oral argument on summary judgment motion, court's error in denying, 16.74
Right to file motion, court's error in depriving party of, 16.73
Shortening notice period, court's error in, 16.72
Specify issues and evidence relied on, court's failure to, 16.70
Summary adjudication in alternative, court's error by refusing to consider, 16.75
Taking motion off calendar, court's error in, 16.71
Motion for summary judgment in response to writ petition, 8.54
Petition for writ review of order denying summary judgment under CCP §437c
Generally, 16.66
Basis for writ petition (see Basis for writ petition for review of summary judgment order, above)
Deadline to file writ petition for review, 16.76
Denial of motion for summary judgment, 16.67
Standard of review if writ petition accepted, 16.77
Summary adjudication, grant or denial of, 16.68

Superior Court
See also **Courts of Appeal**
Generally, 1.1, 1.4, 5.1-5.2
Appellate division of superior court. See **Limited Jurisdiction Civil Cases**
Attachment, requirements for writ of, 4.29
Attorney fees. See **Attorneys' Fees**
Certiorari. See **Review (Certiorari) in Superior Court**
Challenging superior court's final decision on writ
Generally, 11.1-11.2
Appeal. See **Appeals**
New trial, motion for, 11.3
Reconsideration, motion for. See **Reconsideration, Motion for**
Vacate judgment, motion to, 11.4
Charts and checklists. See **Charts, Checklists, Questionnaires and Tables**
Combining writ petition with complaint for damages, 5.119
Coram nobis. See **Coram Nobis and Coram Vobis**
Costs. See **Costs**
Court clerk. See **Court Clerk**
Declarations. See **Affidavits and Declarations**
Denial of writ. See **Denial of Writ in Superior Court**
Discretion of court. See **Discretion of Court**
Distinguishing appellate and superior court writ proceedings, 14.1
Drafting writ petition. See **Drafting Writ Petition for Superior Court**
Execution, writ of, 4.30
Exhibits. See **Exhibits**
Ex parte proceedings. See **Ex Parte Proceedings**
Filing writ petition in
Generally, 5.71
Administrative mandamus petition, filing deadline for, 3.19
Alternative writ. See **Alternative Writs of Mandate or Prohibition in Superior Court**
Noticed motion. See **Noticed Motion in Superior Court**
Replication. See **Replication (Petitioner's Reply) in Superior Court**

Stay application and writ petition, filing of, 6.17
Time for filing. See **Time**
Venue in writ proceedings, 5.75
Final decision on writ (see Challenging superior court's final decision on writ, above)
Format of petitions. See **Format of Petitions and Other Documents**
Habeas corpus. See **Habeas Corpus in Superior Court**
Issuance of peremptory writ in first instance, 5.19
Judicial notice. See **Judicial Notice**
Jurisdiction of. See **Jurisdiction**
Jury trial. See **Jury Trial**
Limited jurisdiction civil cases. See **Limited Jurisdiction Civil Cases**
Mandate, writ of
Generally. See **Mandate in Superior Court**
Alternative writs. See **Alternative Writs of Mandate or Prohibition in Superior Court**
Traditional mandate. See **Traditional Mandate in Superior Court**
Memorandum. See **Memorandum in Support or Opposition**
Motions, superior court's authority to hear, 9.53
Noticed motion. See **Noticed Motion in Superior Court**
Orders. See **Orders**
Pleadings. See **Pleadings**
Possession, superior court issuing writ of, 4.31
Prevent trial, use of prohibition to, 16.113
Procedures for prosecuting superior court writ actions
Generally, 1.3
Alternative writs. See **Alternative Writs of Mandate or Prohibition in Superior Court**
Noticed motion. See **Noticed Motion in Superior Court**
Sacramento Superior Court guide to procedures for prosecuting petitions for prerogative writs, App B
Prohibition, writ of. See **Prohibition in Superior Court**
Question of law, request that trial court certifying existence of, 17.28
Record in superior court writ proceeding. See **Record in Superior Court Writ Proceeding**
Record of trial court proceedings. See **Record in Appellate Court Writ Proceeding**
Relief from superior court's final decision on writ (see Challenging superior court's final decision on writ, above)
Res judicata effect of superior court judgment granting or denying peremptory writ. See **Res Judicata**
Responsive pleadings in superior court. See **Responsive Pleadings**
Return to writ. See **Return to Writ in Superior Court Proceedings**
Review. See **Review (Certiorari) in Superior Court**
Rules of court. See **Rules of Court**
Sale, superior court issuing writ of, 4.32
Sealing documents. See **Sealing Documents in Superior Court**
Sealing of records by trial court, 20.25
Service of writ. See **Service of Process and Papers**
Statutory authorities
Generally, 5.3
Other statutes, applicability to writ proceedings, 5.4
Rules of Court, applicability to writ proceedings. See **Local Rules of Court; Rules of Court**
Stay of proceedings pending writ petition in superior court. See **Stay of Proceedings Pending Writ Petition in Superior Court**
Supersedeas, trial court's violation of statutory stay provision. See **Supersedeas**
Time. See **Time**
Trial Court Delay Reduction Act, effect on writ petitions, 5.120
Types of writs available, 1.2
Verification. See **Verification**

Supersedeas
Generally, 15.49, 26.1
Ancillary matters (see Collateral or ancillary matters, filing appeal not resulting in stay of, below)
Appeal, filing writ of supersedeas with, 26.3
Automatic stay on filing of appeal
Generally, 26.6
Determining if matter "embraced" or "affected" by judgment or order, 26.7
Examples of matters "embraced" or "affected" by judgment or order, 26.8
Mandamus, filing appeal staying judgment issuing writ of, 26.10
Mandatory injunction stayed by filing appeal, 26.9
Vacating trial court proceedings conducted in violation of automatic stay, 26.6
Bonds and undertakings
Discretion of appellate court to grant supersedeas relief if appellant unable to furnish appeal bond, 26.19

Matters not stayed by filing notice of appeal (see Matters not stayed by filing notice of appeal, below)
Collateral or ancillary matters, filing appeal not resulting in stay of
Generally, 26.14
Definition of collateral and ancillary matters, 26.15
Examples of collateral or ancillary matters on appeal, 26.16
Contents of writ petition
Generally, 26.22
Documents filed with petition if record on appeal not filed, 26.24
Statement of case, inclusion if record on appeal not filed, 26.23
Definitions
Collateral and ancillary matters, 26.15
Writ of supersedeas, 26.2
Discretion of appellate court, supersedeas relief within
Grounds for relief, appellant's burden of showing, 26.18
Inherent power of appellate court to grant supersedeas relief, 26.17
Prohibitory injunction, court's discretion to stay, 26.21
Statutory conditions for stay, effect of appellant's inability to comply with, 26.20
Unbonded money judgment, appellate court's discretion to grant supersedeas relief in actions involving, 26.19
Limited jurisdiction civil case, superior court issuing writ of supersedeas in, 12.28
Matters not stayed by filing notice of appeal
Chart, judgments and orders subject to CCP §917.1-917.9, 26.11
Money judgment, posting bond or undertaking for, 26.12
Other judgments and orders stayed on filing undertaking or bond, 26.13
Memorandum in support or opposition to petition for, 26.22, 26.28
Notice of appeal (see Matters not stayed by filing notice of appeal, above)
Opposing petition for supersedeas
Contents of opposition, 26.28
Filing and service of opposition to petition, 26.30
Format of opposition, 26.26, 26.29
Memorandum in opposition to petition for, 26.28
Order granting petition for writ of supersedeas, 28.19
Petition for writ of supersedeas
Contents of petition (see Contents of writ petition, above)
Filing and service of petition, 26.27
Format of petition, 26.26
Opposing petition (see Opposing petition for supersedeas, above)
Sample form, 28.18
Temporary stay, appellant obtaining pending appellate court's decision on petition, 26.25
Record on appeal (see Contents of writ petition, above)
Relief, likelihood of, 26.4
Service of papers
Opposition to petition, service of, 26.30
Petition for supersedeas, service of, 26.27
Undertakings (see Bonds and undertakings, above)
Violation of statutory stay provision by trial court or opponent
Generally, 26.5
Automatic stay (see Automatic stay on filing of appeal, above)
Collateral matters (see Collateral or ancillary matters, filing appeal not resulting in stay of, above)
Matters not stayed by filing notice of appeal (see Matters not stayed by filing notice of appeal, above)

Supreme Court
California Supreme Court. See **California Supreme Court**
Certiorari in U.S. Supreme Court. See **Certiorari in U.S. Supreme Court**

Tables. See **Charts, Checklists, Questionnaires, and Tables**

Taxes, Traditional Writ of Mandate Concerning
Generally, 2.57
Appeal challenging assessment, mandate to compel Board of Equalization to hear, 2.60
Compliance with tax laws requiring levying of taxes and assessments, use of writ to compel, 2.58
County assessment practices, traditional mandate challenging, 2.61
Exceptions to use of writ
Challenging assessment, unavailability of mandate for, 2.62
Property taxes, unavailability of mandate to prevent collection of, 2.63

Tax refund action testing legality of action, effect on availability of writ, 2.57
Recordkeeping and handling duties, mandate to compel, 2.59
Retroactive payment of taxes due to agency, mandate compel, 2.64

Telephone, Appearance by
Oral argument on writ petition for, permissibility of telephonic appearance, 24.9

Temporary Restraining Order (TRO)
See also **Injunctions**
Ex parte application for temporary restraining order and order to show cause, 13.8
Ex parte proceeding for TRO, 4.33
Proposed temporary restraining order and order to show cause, 13.9
Stay of superior court proceedings through use of TRO. See **Stay of Proceedings Pending Writ Petition in Superior Court**

Temporary Stay Order. See **Stay of Proceedings by Appellate Court**

Third Parties
Payment for legal services by third party, client consenting to, 17.13

Time
See also **Statutes of Limitations**
Administrative mandamus, statutory deadlines for filing, 3.19
Agricultural Labor Relations Board's final order, deadline for filing writ petition to review, 16.19
Alcoholic Beverage Control Appeals Board's final order, deadline to file writ petition for review of, 16.23
Alternative writs in courts of appeal. See **Alternative Writs in Courts of Appeal**
Amicus curiae brief, time limit for filing in appellate court writ proceeding, 23.53
Appeals. See **Appeals**
California Supreme Court, time for filing original writ petition in, 27.10
Computing deadline for filing writ petition in court of appeal
Generally, 18.61
Events triggering time period for filing writ petition (see Events triggering time period for filing writ petition in court of appeal, below)
Maximum number of days (see Maximum number of days to file writ petition in court of appeal, below)
Court of appeal
Calculating deadline for filing writ petition, 17.26
Chart, time for filing petitions, 18.76
Computing deadline for filing writ petition (see Computing deadline for filing writ petition in court of appeal, above)
Contempt order, time for filing writ petition to review, 16.141
Discovery order, time to file writ petition for review of, 16.128
Events triggering time period for filing petition (see Events triggering time period for filing writ petition in court of appeal, above)
Extension of statutory time limit for filing writ petition. See **Extension and Shortening of Time**
Factual allegation showing petition's timeliness, 18.33
Finality of court's decision. See **Finality of Court of Appeal's Decision**
Good faith settlement determination, deadline for filing writ petition to review grant or denial of motion for, 16.50
Mandate. See **Mandate in Courts of Appeal**
Nonstatutory writ petition, time to file, 16.87, 16.129C
Opinion granting or denying petition. See **Opinion by Appellate Court Granting or Denying Writ Petition**
Opposition to writ petition, timing of. See **Opposition to Writ Petition Filed in Court of Appeal**
Oral argument in appellate court, time restrictions on, 24.12
Peremptory writ of prohibition, time for issuance of, 24.38
Preliminary opposition, time to file. See **Preliminary Opposition to Writ Petition Filed in Appellate Courts**
Receipt of writ petition by appellate court, filing effective on, 18.75
Rehearing in court of appeal, time limit for filing answer to petition for, 25.22
Return. See **Return to Alternative Writ in Appellate Court Proceedings**
Service of process. See **Service of Process and Papers**
Statutory time limits for filing writ petition, 17.2, 17.26, 18.62-18.65
Summary denial of writ petition, time limit for petitioning for review by California Supreme Court, 25.30
Summary judgment order, deadline to file writ petition for review of, 16.76
Superior court's final decision on writ petition, time as factor in deciding on appeal of, 11.17
Transfer of case from court of appeal to California Supreme Court before decision, timing of, 24.58
Unlawful detainer action, deadline to file writ petition to review denial of stay in, 16.79
Events triggering time period for filing writ petition in court of appeal
Entry of order triggering time period for filing writ petition, 18.70
Exclusion of day of triggering event and last day if falling on judicial holiday, 18.74

Minute order, mailing of, 18.72
Open court, notice in, 18.73
Service of notice of entry of order, 18.71
Extension of time. See **Extension and Shortening of Time**
In limine ruling, time to file writ petition challenging, 16.146
Judicial notice, timing of request for. See **Judicial Notice**
Limited jurisdiction civil cases. See **Limited Jurisdiction Civil Cases**
Maximum number of days to file writ petition in court of appeal
Discretion of appellate court to consider petitions filed after 60 days, 18.68
Extensions of time under CCP §1013, inapplicability to filing writ petition, 18.65
Jurisdictional, statutory deadlines treated as, 18.64
Laches, applicability to petitions filed after 60 days after issuance of challenged ruling, 18.67
No statutory time limits for filing petition, effect of, 16.87, 16.129C, 18.66-18.68
Order of trial court specifying due date for performance of specific act, effect on filing writ petition, 18.69
Short deadlines, statutes specifying, 18.63
60-day period for filing petition, 16.87, 16.129C, 18.66
Statutes specifying deadline for filing writ petition, 18.62-18.65
Monetary sanction judgment or order of $5000 or less, lack of statutory deadline for filing petition for writ of review, 16.83
Notice triggering time period for filing writ petition (see Events triggering time period for filing writ petition in court of appeal, above)
Public Employment Relations Board's decisions, deadline for filing writ petition for review of, 16.30
Public Records Act, deadline to file extraordinary writ to review trial court order under, 16.16
Public Utilities Commission's decision, deadline for filing petition for writ of review, 16.37
Remittitur, time for issuing, 24.33
Superior court
Absence of special statutory deadline, statute of limitations for filing petition in, 5.73
Alternative writ of mandate or prohibition. See **Alternative Writs of Mandate or Prohibition in Superior Court**
Answer in superior court, time limit for filing after demurrer overruled, 8.43
Attorney fees, time for filing motion, 5.125
Extension of time. See **Extension and Shortening of Time**
Laches, effect on filing of writ petition, 5.74
Lodging record of underlying proceedings with superior court before hearing, time limit for, 7.25
Memorandum of costs, time limit for filing, 5.123
Noticed motion for writ in superior court, time for filing. See **Noticed Motion in Superior Court**
Record of underlying proceedings, timing of request for, 7.15
Replication to answer, time for filing. See **Replication (Petitioner's Reply) in Superior Court**
Special statutory deadline, filing writ petition before expiration of, 5.72
Stay granted by superior court, length of, 6.8
Temporary restraining order (TRO), duration of, 6.31
Traditional mandamus proceedings, statutory deadlines for filing, 3.19
Unlawful detainer action, deadline to file writ petition to review denial of stay in, 16.78
Workers' Compensation Appeals Board's decision, deadline to file petition for writ review of, 16.47

Tort Claims Act. See **Government Claims Act**

Traditional Mandate in Superior Court
See also **Administrative Mandamus in Superior Court**
Generally, 2.1-2.2
Adequate remedy at law (see Remedy at law, lack of plain, speedy, or adequate, below)
Administrative agencies. See **Administrative Agencies' Acts and Decisions, Traditional Mandate to Compel**
Availability of, 3.18
Checklist for choosing between traditional and administrative mandamus, 3.20
Civil rights, enforcement of, 2.56
Consideration of claim by agency, mandate to compel, 2.66
Constitutional law
Joining traditional writ of mandate with claim involving constitutional right, 2.56
Statutory duty, effect of statute's unconstitutionality on petition for mandate to compel, 2.21
Corporations, associations, and officers, traditional mandate to compel performance by, 2.38, 2.54
Deferential substantial evidence standard, court of appeal reviewing superior court's factual findings under, 11.16
Differences between traditional and administrative mandamus. See **Administrative Mandamus in Superior Court**
Elections. See **Election Processes, Traditional Mandate Challenging**
Extra-record evidence, admissibility of. See **Record in Superior Court Writ Proceeding**
Hearings
Expelled union member filing petition to obtain fair hearing, 2.52
Legally required hearings, compelling agency to hold, 2.31

Inspection of records. See **Inspection of Records**
Licenses. See **Licenses and Permits**
Ministerial duty of public officials. See **Public Entities and Officials**
Notice, mandate to compel publication of, 2.67
Pleading traditional and administrative mandamus in the alternative, 3.21
Private organizations and associations, challenging or compelling actions by, 2.55
Professional certificate decisions, challenging of, 2.39
Public entities and officials. See **Public Entities and Officials**
Records
Extra-record evidence. See **Record in Superior Court Writ Proceeding**
Inspection of records. See **Inspection of Records**
Public Records Act. See **Public Records Act**
Tax records, mandate to compel compliance with statutory duties in connection with, 2.59
Remedy at law, lack of plain, speedy, or adequate
Generally, 2.15
Other administrative remedies, effect of availability of, 2.16
Public Records Act, no requirement of inadequate remedy at law to compel disclosure of records under, 2.69
Requirements for issuance of writ
Generally, 2.3, 2.11
Remedy at law (see Remedy at law, lack of plain, speedy, or adequate, above)
Statutorily available relief (see Statutorily available relief, requirement of, below)
Substantial beneficial interest (see Substantial beneficial interest in respondent's performance of duty, requirement that petitioner have, below)
Schools. See **Schools**
Standing to seek writ (see Substantial beneficial interest in respondent's performance of duty, requirement that petitioner have, below)
Statutorily available relief, requirement of
Generally, 2.4
Abuse of discretion, petition for writ of mandate to correct, 2.9
Exercise of discretion by nonjudicial body, entity, official, or employee, mandate to compel, 2.8
Ministerial duty, writ of mandate to compel. See **Public Entities and Officials**
Office, mandate to compel government or private entity to admit individual to legally entitled, 2.10
Statutory authority for, 5.3
Statutory deadlines for filing, 3.19
Statutory payment obligation, mandate to compel, 2.64
Subpoenas, mandate challenging issuance or failure to issue, 2.65
Substantial beneficial interest in respondent's performance of duty, requirement that petitioner have
Generally, 2.12
Losing beneficial interest during mandate proceeding, effect of, 2.14
Public right at stake, relaxation of beneficial interest requirement if, 2.13
Taxes. See **Taxes, Traditional Writ of Mandate Concerning**
Unions. See **Unions, Traditional Mandate to Compel Action by**
Variances, challenging issuance or denial of, 2.41

Transcripts
Petition for writ in appellate court, necessity of transcript for. See **Courts of Appeal**
Record in appellate court writ proceeding, reporter's transcript and opponent's papers as part of, 20.4, 20.9

Transfer of Case from Court of Appeal to California Supreme Court. See **California Supreme Court**

Translations
Exhibits written in foreign language, requirement of English translation for, 5.29

Traverse to Return. See **Return to Alternative Writ in Appellate Court Proceedings**

Trial Court Delay Reduction Act
Effect on superior court writ petitions, 5.120

Trial Court. See **Jury Trial; Superior Court**

Unclean Hands
Defense to writ petition, 7.8

Undertakings. See **Bonds and Undertakings**

Unions, Traditional Mandate to Compel Action by
Arbitration, petition to compel, 2.51
Hearing, expelled union member filing writ to obtain, 2.52
Inspection of records by union member, 2.53
Negotiations with union, mandate compelling governmental entities to enter into, 2.50

United States Supreme Court. See **Certiorari in U.S. Supreme Court**

Unlawful Detainer Action, Writ Petition to Review Denial of Stay in
Generally, 16.78
Deadline to file writ petition, 16.79
Standard of review if writ petition accepted, 16.80

Vacating and Setting Aside
See also **Coram Nobis and Coram Vobis**
Automatic stay, vacating trial court proceedings conducted in violation of, 26.6
Case management order, issuance of mandate to compel trial court to vacate, 16.106
Rehearing, order granting petition vacating court's opinion, 25.25
Superior court's final decision on writ, motion to vacate judgment, 11.4

Variances
Traditional mandate challenging issuance or denial of, 2.41

Venue
Change of venue
Mandate (see Mandate in court of appeal to review grant or denial of motion to change venue (CCP §400), below)
Motion for change of, 8.55
Mandate in court of appeal to review grant or denial of motion to change venue (CCP §400)
Generally, 16.62
Appealability of venue order in limited civil cases, 16.63
Deadline to file petition under CCP §400, 16.64
Standard of review if writ petition accepted, 16.65
Public Utilities Commission's decision, venue for petition for writ review of, 16.38
Superior court, venue for filing writ petition in, 5.75

Verification
Attorney's verification of writ petition, 5.67, 18.44
Court of appeal, writ petition in
Generally, 18.42
Beneficially interested party, verification of petition by, 18.44
Costs in writ petition proceeding, party submitting verified memorandum of, 24.27
Denial of petition based on omission or improper verification. See **Denial of Writ by Appellate Court**
Factual allegations in writ petition in appellate court, verification of, 18.30
Form, verification, 18.48
Maximum length limitations for writ petition in court of appeal, verification excluded from, 18.8
Personal knowledge, verification based on, 18.43
Return to alternative writ. See **Return to Alternative Writ in Appellate Court Proceedings**
State or public officials, verification by. See **Public Entities and Officials**
Supplemental evidence, verification of, 18.46
Supporting documents, verification of, 18.45
Superior court
Generally. See **Drafting Writ Petition for Superior Court**
Alternative writ of mandate and verified compliant for declaratory relief, verified writ petition for, 13.1
Answer to writ petition in superior court, verification of, 8.49
Stay of proceedings. See **Stay of Proceedings Pending Writ Petition in Superior Court**

Waiver
Affirmative defenses, failure to raise in answer resulting in waiver of, 8.48
Notice of court ruling, effect of waiving, 18.73
Oral argument in appellate court, waiver of. See **Oral Argument in Appellate Court**
Review (certiorari) in court of appeal, effect of waiving appeal through neglect on party's right to writ of, 15.33

Websites
Courts of appeal, 18.87

Weekends. See **Saturdays, Sundays, and Holidays**

Witnesses
Alternative writ of mandate or prohibition in superior court, court's discretion to allow oral testimony at hearing on petition for, 9.30

Workers' Compensation Appeals Board (WCAB), Petition for Review of Decisions by
Deadline to file petition for writ of review, 16.47
Exclusive means of obtaining review of WCAB's decisions, special statutory writ of review as, 16.46, 27.7
Standard of review if writ petition accepted, 16.48

Work Product
Discovery order affecting work product, writ review of, 16.122

Zoning and Land Use
Traditional mandate challenging land use decisions, 2.41

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Contents

Volume 1

Preface
Foreword
Acknowledgments
About the Consulting Editor
About the Authors
About the Judicial Consultants
About the Consultants
Contributors to Prior Editions
Selected Developments
Cutoff Dates and CEB Citation

Part I: Superior Court Writ Practice

1 Overview of Superior Court Writ Practice
The Hon. Kathleen M. Banke

2 Traditional Mandate
The Hon. Kathleen M. Banke

3 Administrative Mandamus
Mitchell E. Abbott
Ginetta L. Giovinco

4 Other Superior Court Writs
Mark Fogelman

5 Initiating a Superior Court Writ Proceeding
Mitchell E. Abbott
T. Peter Pierce
Brian D. Mabee

6 Requesting a Stay in a Superior Court Writ Proceeding
Jeffrey Chine
Jennifer La Fond Chavez

7 The Record in Superior Court Writ Proceedings
David de Jesus

8 Responsive Pleadings and Petitioner's Reply
Kelly J. Savage

9 Action by Superior Court

The Hon. Kathleen M. Banke
Maureen M. Home

10 Enforcing Writs Issued by Superior Court
Judy L. McKelvey

11 Challenging the Superior Court's Decision
The Hon. Margaret M. Grignon (Ret.)
Judith E. Posner

12 Writ Petitions in Limited Civil and Small Claims Cases
Efrat M. Cogan

13 Superior Court Forms

Part II: Appellate and Supreme Court Writ Practice

14 Overview of Appellate Court Writ Practice
The Hon. Kathleen M. Banke

15 Common Writs and Basic Requirements
Grace K. Won
David K. Ismay

16 Availability of Writ Relief
Paul D. Fogel

Volume 2

Part II: Appellate and Supreme Court Writ Practice (continued)

17 Determining Whether to File an Appellate Court Writ Petition
Robert H. Wright

18 Initiating a Writ Proceeding in the Court of Appeal
Terry P. Anastassiou
Susan H. Handelman

19 Requesting a Stay in an Appellate Court Writ Proceeding
Christina J. Imre
Douglas J. Collodel

20 The Record in Appellate Court Writ Proceedings
David de Jesus

21 Preliminary Opposition Authorized by Rules of Court
M.C. Sungaila

22 Initial Action by Court of Appeal
Mitchell E. Abbott

James C. Nielsen

23 Opposition and Reply
M.C. Sungaila

24 Action by Court of Appeal After Issuance of *Palma* Notice, Alternative Writ, or Order to Show Cause
Mitchell E. Abbott
James C. Nielsen

25 Review of Court of Appeal's Action on Writ Petition
H. Thomas Watson

26 Petition for Writ of Supersedeas
Jeremy B. Rosen

27 Petitions in the California Supreme Court
Robert M. Dato

28 Court of Appeal and Supreme Court Forms

Appendix A: Chart: Review Method for Superior Court Orders
Appendix B: Sacramento Superior Court Guide to the Procedures for Prosecuting Petitions for Prerogative Writs
Table of Statutes, Regulations, and Rules
Table of Cases
Table of References
Table of Forms
Index

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Preface

CEB published its one-volume first edition of California Civil Writ Practice in 1970 as one of the only books on writ practice in California. In the intervening years, the frequency with which judicial and nonjudicial decisions have been subject to writ review has increased dramatically. This two-volume, fourth edition of California Civil Writ Practice reflects the expansion of writ practice in California and provides a practical, nuts-and-bolts guide for attorneys handling writ proceedings in the trial courts, the courts of appeal, and the California Supreme Court. Parts I and II, on superior court and appellate court writ practice, respectively, each begin with a chapter that discusses the general nature of writ practice, quickly enabling counsel to understand and to conceptualize writ issues specific to those courts. Subsequent chapters address all facets of writ practice and are organized to track the manner in which a civil writ proceeding generally unfolds in either a superior or an appellate court. For more details, see the Foreword.

The format of the book provides ready access to practical information. Comprehensive chapter outlines and a thorough index help practitioners find topics quickly. Practice Tips, Notes, Cautions, and Judicial Perspectives call attention to significant points in civil writ practice.

A companion CD includes forms from the final chapters of Part I (superior court exemplars) and Part II (appellate and supreme court exemplars), which are derived from actual writ documents drafted by the authors and other practicing attorneys.

This publication is also available on OnLAW, CEB's web-based practice library, allowing practitioners to conduct word searches and to view the exact language of citations through online links.

CEB gratefully acknowledges the Honorable Kathleen M. Banke, currently an Associate Justice of the California Court of Appeal, First District, for working with CEB attorneys to develop the concept of the new edition and each of its chapter outlines, for writing several chapters, for reviewing the manuscript for the entire book, and for assisting with the editing of every chapter. Bringing to this project the perspective of both a jurist and an experienced appellate practitioner who has handled writs in the superior and appellate courts, Justice Banke contributed generously to the creation of a new edition that fully reflects current civil writ practice in California. See About the Consulting Editor.

The authors who wrote chapters for this book are all experienced jurists, or trial court or appellate court practitioners, who have regularly handled sophisticated writ proceedings. Without exception, CEB admires both their depth of knowledge and their extraordinary generosity in sharing that knowledge in the pages of this new text. Their names appear on the contents page and, with biographical information, in the About the Authors section.

CEB Attorney Editors Karen Frasier-Kolligs (Managing Editor), Norma Piatt, and Francesca Bannerman, and Legal Editors Julie Brook, Matthew Mandelbaum, Enrique De Anda, Andrew Rosner, and Carolyn Valley contributed to this title. Roberta Klein, Nancy Lawlor, and Claire Morel-Setoux provided additional legal editing support. Administrative support was provided by Cynthia Kimberlin, Debby Harrison, and Nila Kanzaria. The book was designed by Grier Thornburg. Dorie Riepe and Joseph Curran were responsible for copy editing and production. Robert Burke wrote the index. Composition was performed by CEB's Electronic Publishing staff.

April 2010 Update

CEB wishes to thank the Honorable Kathleen M. Banke, Associate Justice of the Court of Appeal, First District, for her contributions as the author of this 2010 update.

CEB Attorney Editor Jon Heywood and Legal Editors Julie Hammel Brook, Enrique De Anda, Karen Nutter, and Dorothy M. Robins contributed to this update. Administrative support was provided by Kenya Denman and Nila Kanzaria. Laura Linden handled copyediting and production. Kathryn Te Selle updated the index. Composition was performed by CEB's Electronic Publishing staff.

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Foreword

Scarcely another area of civil practice contains more arcane terminology than civil writ practice, *e.g.,* "mandamus," "prohibition," "corum vobis," "corum nobis," "alternative writ," "peremptory writ," "return," "replication," "*Palma* notice," "postcard denial." And what exactly is it that one is supposed to do after determining that one needs to file a writ petition to challenge a nonjudicial action in the superior court or a judicial action in the court of appeal, or after one has been served with a writ petition in either venue? Relatively few procedural rules exist, and local rules and practice still play a particularly important role in how the superior courts manage writ proceedings. This two-part text demystifies writ practice and serves as a practical nuts-and-bolts guide to handling writ proceedings in the trial and appellate courts, including the California Supreme Court.

Trial and appellate courts are empowered to issue the same panoply of civil writs, *e.g.,* mandate, prohibition, habeas corpus. But the nature of writ proceedings and the way in which they unfold in these courts differ significantly. Accordingly, Part I covers writ practice in the superior courts. Part II focuses on writ practice in the courts of appeal and the supreme court.

The chapters in each part track the usual progression of a writ proceeding. Thus, the initial chapters in Part I discuss when a party should file a writ petition in the superior court rather than, or in conjunction with, a civil complaint. See chaps 2-4. Later chapters discuss drafting a superior court writ petition and the supporting memorandum (see chap 5), seeking a stay of the challenged action (see chap 6), compiling and lodging the record or filing supporting documentation (see chap 7), opposing a writ petition (see chap 8), filing a reply (see chap 8), the scope and nature of superior court hearings on writ petitions (see chap 9), the ruling options available to the court (see chap 9), enforcing a writ (see chap 10), and challenging a superior court's judgment in a writ proceeding (see chap 11). The final substantive chapter in Part I covers writ petitions filed in the appellate division of the superior court, a discrete and relatively rare procedure. See chap 12. The concluding chapter of Part I contains exemplar pleadings and documents commonly filed in superior court writ proceedings. See chap 13.

The initial chapters in Part II discuss when a party should consider filing, or in some cases must file, a writ petition in the court of appeal to obtain immediate appellate review of an interlocutory ruling by a trial court in an ongoing civil lawsuit and, in rare cases, review of nonjudicial action. See chaps 15-17. Subsequent chapters discuss drafting an appellate court writ petition and supporting memorandum (see chap 18), seeking a stay of the challenged action (see chap 19), compiling and filing the record (see chap 20), filing opposition (including preliminary opposition permitted by the Rules of Court, opposition after the court of appeal issues a "*Palma*" notice, and formal opposition after the appellate court issues an alternative writ or order to show cause) (see chaps 21, 23), filing a replication or reply (see chap 23), the various procedural options available to the court of appeal (ranging from summary denial before any opposition is filed, to deciding the writ petition on the merits after full briefing and oral argument) (see chaps 22, 24), and challenging the court of appeal's decision (see chap 25). Part II also includes chapters on petitions for writs of supersedeas (which seek a stay of a superior court judgment on appeal) (see chap 26) and petitions for review by the California Supreme Court. See chap 27. The final chapter of Part II includes exemplar pleadings and documents commonly filed in appellate court writ proceedings. See chap 28.

Although writ lexicon retains some of the archaic terminology and conventions of tradition-bound English common law practice, modern trial and appellate court writ proceedings follow a logical progression. This comprehensive practice guide will help practitioners and courts alike to more quickly and successfully navigate this specialized, but increasingly common, area of civil practice.

Kathleen M. Banke
Associate Justice,
California Court of
Appeal, First District

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Acknowledgments

CEB wishes to acknowledge the generosity of the members of the California appellate and superior court bench who reviewed and commented on one or more chapters and added their perspectives to this book: Justice Arthur Gilbert, Justice James R. Lambden, Justice Ronald B. Robie, Justice Miriam A. Vogel, Judge Steven A. Brick, Judge Dzintra Janavs (Ret.), Judge Richard A. Kramer, and Judge Socrates Peter Manoukian. For biographical notes about these jurists, see About the Judicial Consultants.

Many practicing attorneys and court attorneys reviewed and commented on one or more chapters of the book. Their contributions have made the book more reflective of current civil writ practice in California. See About the Consultants.

CEB would particularly like to thank Nancy Fleischer, an attorney at the Sacramento Superior Court, who reviewed several chapters on superior court writ practice and who assisted CEB with its request for permission to reprint the Sacramento Superior Court Guide to the Procedures for Prosecuting Petitions for Prerogative Writs (see App B).

The following judges and attorneys helped develop the outline for the new fourth edition, ensuring that it covers all important aspects of both superior court and appellate court writ practice: Justice Arthur Gilbert, Second District Court of Appeal; Justice Miriam A. Vogel, Second District Court of Appeal; Judge Dzintra Janavs (Ret.), Los Angeles County Superior Court; Judge Socrates Peter Manoukian, Santa Clara County Superior Court; Mitchell E. Abbott, Richards, Watson & Gershon; Elliot Bien, Bien & Summers, LLP; Robert M. Dato, Buchalter Nemer; Paul D. Fogel, Reed Smith LLP; Christina J. Imre, Sedgwick, Detert, Moran & Arnold; James C. Martin, Reed Smith LLP; Gregory Orland, Office of the City Attorney of Los Angeles; T. Peter Pierce, Richards, Watson & Gershon; Susan M. Popik, Chapman, Popik & White, LLP; Michael S. Sorgen, San Francisco; and the law firm of Horvitz & Levy, Encino (coordinated by Julie Woods).

The fourth edition includes many new exemplar forms for both superior court and appellate court writ practice. The following attorneys provided the forms on which CEB based the exemplars provided in chapters 13 and 28: Mitchell E. Abbott and T. Peter Pierce, Richards, Watson & Gershon; Jennifer La Fond Chavez and Jeffrey Chine, Luce, Forward, Hamilton & Scripps LLP, San Diego; Vince Chhabria, Office of the City Attorney of San Francisco; Paul D. Fogel and David de Jesus, Reed Smith LLP; and the law firm of Horvitz & Levy, Encino (coordinated by Julie Woods).

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Selected Developments

April 2010 Update

Summarized below are some of the more important developments since the 2009 update of this publication:

For cases on abuse of discretion in granting a writ petition, see *Golden Drugs Co. v Maxwell-Jolly* (2009) 179 CA4th 1455, 102 CR3d 446 (Department of Health Care Services did not abuse its discretion in terminating pharmacy's Medi-Cal provider status for violation of regulations in way that threatens public welfare), and *Munroe v Los Angeles County Civil Serv. Comm'n* (2009) 173 CA4th 1295, 1300, 93 CR3d 716 (superior court erred in granting writ petition because Commission did not abuse discretion in not extending time to request appeal hearing), in §2.9.

On the use of mandate to compel performance of a ministerial duty, as opposed to a discretionary act, the court in *Daily Journal Corp. v County of Los Angeles* (2009) 172 CA4th 1550, 1558, 92 CR3d 219 found that the governmental entity's decision not to pursue a legal claim involves discretion that cannot be enjoined by mandate. See §2.20.

For recent cases in which mandate issued to invalidate legislative acts in excess of a governing body's authority, see *Citizens for Planning Responsibly v County of San Luis Obispo* (2009) 176 CA4th 357, 364, 97 CR3d 636 (writ issued invalidating initiative measure amending county's general plan and zoning regulations; reversed on appeal); *California Sch. Bds. Ass'n v State of California* (2009) 171 CA4th 1183, 1193, 90 CR3d 501 (writ issued directing Commission to set aside and reconsider certain decisions); *Rental Hous. Ass'n v City of Oakland* (2009) 171 CA4th 741, 90 CR3d 181 (writ issued to invalidate certain provisions of initiative measure that placed limits and requirements on evictions), in §2.24.

In *Y.K.A. Indus., Inc. v Redevelopment Agency* (2009) 174 CA4th 339, 94 CR3d 424, the court of appeal held that, because there is no evidence of administrative proceedings that possessed judicial character and yielded a result that could have been subject of review in mandate, a trial court erred in concluding that plaintiff had failed to exhaust mandatory judicial remedies—in the form of petition for writ of mandate—before filing a legal action. See §2.31.

On the necessity of exhausting administrative remedies, see *Thomas v Shewry* (2009) 170 CA4th 1480, 1480, 89 CR3d 105, in which a traditional mandamus action was barred because petitioner failed to exhaust administrative remedies. See §2.34.

On the due process requirement that an administrative hearing be "fair," the supreme court in *Morongo Band of Mission Indians v State Water Resources Control Bd.* (2009) 45 C4th 731, 737, 88 CR3d 610 found no violation of a licensee's due process rights for the attorney prosecuting its license revocation matter before a board to be simultaneously serving as an advisor to the board on an unrelated matter. See §3.11.

In *The Termo Co. v Luther* (2008) 169 CA4th 394, 399, 86 CR3d 687, the court held that an administrative order directing the plugging and abandonment of oil wells that were in operation or in idle status for many years implicates a fundamental, vested right and is thus reviewed under the independent judgment standard. See §3.17.

On laches as a defense to a writ petition, see *Schellinger Bros. v City of Sebastopol* (2009) 179 CA4th 1245, 102 CR3d 394 (court found "abundant support" for determination that petitioner acted with unreasonable delay and acquiesced in City taking more than 1 year to certify environmental impact report), in §§3.19, 5.74.

For a case denying admission of extra-record evidence in a traditional mandamus action challenging adjudicatory decisions, see *Golden Drugs Co. v Maxwell-Jolly* (2009) 179 CA4th 1455, 102 CR3d 446, in §7.12.

In an application of the rule that a superior court's order on a writ petition must be *final* to be appealable, the court in *Canandaigua Wine Co. v County of Madera* (2009) 177 CA4th 298, 302, 99 CR3d 264 held that, because only one out of three causes of action in a writ petition was disposed of, the writ order granting partial summary adjudication was not appealable. See §11.9.

In *Silverbrand v County of Los Angeles* (2009) 46 C4th 106, 92 CR3d 595, the California Supreme Court reiterated that timely filing a notice of appeal is mandatory and jurisdictional, and held that the "prison-delivery rule," governing filing of notice of appeal by self-represented prisoners, applies to civil cases. See §§11.22-11.23.

For recent cases in which the California Supreme Court has granted petitions for review and exercised its discretionary review authority, see *Ste. Marie v Riverside County Reg'l Park & Open-Space Dist.* (2009) 46 C4th 282,

93 CR3d 369 and *Spielbauer v County of Santa Clara* (2009) 45 C4th 704, 88 CR3d 590, in §11.35.

The availability of habeas corpus relief to challenge aspects of constructive restraint was reiterated in *People v Villa* (2009) 45 C4th 1063, 1069, 90 CR3d 344. See §15.39.

In *County of Sonoma v Superior Court* (2009) 173 CA4th 322, 336 n6, 93 CR3d 39, the court found writ review appropriate because the case involved a novel and significant constitutional question that had generated conflicting trial court decisions, and the petitioner lacked an adequate remedy at law and would suffer irreparable harm absent writ review. See §§15.56, 15.61, 15.70.

The California Supreme Court has noted that irreparable injury, necessitating writ review, is often found in discovery cases when a trial court's order granting discovery allegedly violates a privilege of the party against whom discovery is granted. See *Costco Wholesale Corp. v Superior Court* (2009) 47 C4th 725, 101 CR3d 758, in §15.62.

For another case illustrating the availability of mandate to review judicial challenge orders, see *Swift v Superior Court* (2009) 172 CA4th 878, 91 CR3d 504 (involving writ of mandate compelling trial court to vacate order striking CCP §170.6 peremptory challenge), in §16.5.

For another case in which a litigant sought a writ of mandate to overturn an order denying a motion to quash, see *Ameriloan v Superior Court* (2008) 169 CA4th 81, 88, 86 CR3d 572, in §16.54.

In *Burlage v Superior Court* (2009) 178 CA4th 524, 100 CR3d 531, the court of appeal denied a writ petition and upheld a trial court's order vacating an arbitrator's award based on the arbitrator's wrongful refusal to consider material evidence. See §16.99.

In *Cable Connection, Inc. v DIRECTV, Inc.* (2008) 44 C4th 1334, 1340, 82 CR3d 229, the supreme court held that the general rule of limited review of private arbitration awards (*Moncharsh v Heily & Blase* (1992) 3 C4th 1, 12, 10 CR2d 183) may be displaced by the parties' agreement. See §16.99.

Another court has issued a writ to overturn an order concerning attorney disqualification. See *Baker Manock & Jensen v Superior Court* (2009) 175 CA4th 1414, 96 CR3d 785 (writ of mandate issued directing trial court to vacate order disqualifying law firm; trial court erred in finding that circumstances of case constituted conflict of interest), in §16.102.

The court in *Crab Addison, Inc. v Superior Court* (2008) 169 CA4th 958, 965, 87 CR3d 400 reiterated that interlocutory review of discovery orders by writ of mandate is the only adequate remedy when a court orders production of documents that may be subject to a privilege. See §16.120.

The California Supreme Court, in a case that was not final as this update went to press, has upheld the use of "suggestive *Palma* notices" in *Brown, Winfield & Canzoneri, Inc. v Superior Court* (Feb. 1, 2010, S156598), 2010 Cal Lexis 588, discussed in §22.22.

For an example of the use of a writ of supersedeas seeking to reduce the amount of the appeal bond under CCP §917.1, see *Leung v Verdugo Hills Hosp.* (2008) 168 CA4th 205, 212, 85 CR3d 203, cited in §§26.3, 26.12.

In *Hollywood Park Land Co. v Golden State Transp. Fin. Corp.* (2009) 178 CA4th 924, 928, 100 CR3d 752, the court held unconstitutional a statute dictating that an original writ in the supreme court is the exclusive means for direct review of a reverse validation action concerning contracts and bonds authorized by amended Indian gaming compacts because it abridges the jurisdiction of appellate courts. See §27.3.

The California Supreme Court exercised its original writ jurisdiction in *Strauss v Horton* (2009) 46 C4th 364, 398, 93 CR3d 591, regarding an initiative to add a new section to the California Constitution providing: "Only marriage between a man and a woman is valid or recognized in California." See §27.8.

On the method of review for Government Claims Act claims, see *Sparks v Kern County Bd. of Supervisors* (2009) 173 CA4th 794, 798, 93 CR3d 173 (public employee seeking reimbursement for defense costs must satisfy claims statutes before filing petition for writ of mandate), in App A.

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1

Overview of Superior Court Writ Practice

The Hon. Kathleen M. Banke

I. INTRODUCTION §1.1

II. TYPES OF WRITS AVAILABLE §1.2

III. RULES AND PROCEDURES §1.3

IV. COVERAGE OF SUPERIOR COURT WRIT PRACTICE AND PROCEDURE §1.4

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§1.1 I. INTRODUCTION

Nearly all writ petitions filed in the superior courts challenge an action or decision by a *nonjudicial* body, such as a governing board or a private body, an administrative agency, or a public official.

It is helpful to think of a writ petition as analogous to a civil complaint; it is the operative pleading in a writ action. Thus, a petition must set forth all the allegations necessary to support the relief sought. The allegations must identify the parties, spell out how and why the challenged action or decision is wrong or an abuse of discretion, state why the petitioner is entitled to writ relief, and specify the relief sought.

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§1.2 II. TYPES OF WRITS AVAILABLE

Most writ petitions filed in the superior courts seek a writ of mandate under CCP §1085 (traditional or ordinary mandate) (see chap 2) or CCP §1094.5 (administrative mandamus) (see chap 3). The requirements for these types of mandate differ, as do some of the court procedures. However, the fundamental character of mandate, whether traditional or administrative, is the same—the writ compels the respondent to take a specified action.

The superior courts also have jurisdiction over other kinds of writ proceedings, including habeas corpus, prohibition, and review (certiorari) (see chap 4). Civil habeas corpus proceedings usually arise in the context of civil commitment proceedings. Prohibition is similar to mandate, except the writ prohibits rather than compels action by the respondent. However, prohibition as well as review apply only to judicial action, which is exercised by only a couple of constitutionally created state agencies. Thus, prohibition and review are rarely sought in the superior courts.

Occasionally there may be a question about which writ applies in a given situation or whether a writ alone will provide complete relief. For example, it may be unclear whether the petitioner should pursue traditional or administrative mandamus, or should seek declaratory relief as well as writ relief. Thus, it is not unusual to seek alternative forms of writ relief or to file a combined writ petition and complaint. Even when a petitioner prays for the "wrong" writ, many superior courts will not consider this fatal and will issue the appropriate writ if the petitioner otherwise demonstrates entitlement to relief. Similarly, many superior courts will grant leave to amend to add causes of action for declaratory relief or damages if necessary to provide complete relief.

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§1.3 III. RULES AND PROCEDURES

There are very few statutes and rules of court that spell out the procedures for writ proceedings in the superior courts, so a number of courts have filled the gap with local rules or published guidelines. In some courts, local writ practice may be dictated by historical convention, by the presiding judge, or by a dedicated writ department. Thus, more so than in other contexts, litigants in superior court writ proceedings must check local rules and often must consult with the court clerk regarding basic writ procedure.

Over the years, two basic procedures have developed for prosecuting superior court writ actions: the noticed motion procedure and the alternative writ procedure (see chap 5). Some superior courts have a clear preference, usually for the noticed motion procedure. In these courts, the petitioner commences the writ proceeding by filing and serving only the writ petition (see chap 5). The respondent and any real party in interest file a responsive pleading (usually a demurrer or an answer) (see chap 8). After the pleadings are settled, the petitioner files a notice of motion for issuance of a peremptory writ and supporting documentation, which usually consists of an administrative record or other evidentiary showing by way of declarations and exhibits and a memorandum of points and authorities (see chaps 5, 7). The respondent files an opposing memorandum and in some cases opposing evidence (see chap 8). The nature of the hearing on the motion depends on the type of writ that is sought and the character of the challenged action or decision. Usually, the hearing is akin to a law-and-motion hearing (see chap 9). After the hearing, the superior court issues a ruling granting or denying the motion and subsequently enters judgment; and, if applicable, it issues a writ. Even under the noticed motion procedure, specific writ procedures vary from county to county, so it is important to check local rules and also to check with the court clerk.

The alternative writ procedure is somewhat more cumbersome and generally involves more paperwork, which is why some courts prefer the noticed motion procedure. Under the alternative writ procedure, the petitioner not only files and serves the writ petition at the outset of the writ proceeding, but also files an application for issuance of an alternative writ and some supporting documentation (usually heard through ex parte procedures). Thus, the petitioner must show and the court must determine at the outset of the proceeding that the writ petition has some colorable merit. However, a number of courts treat alternative writ applications as little more than requests for hearing dates (see chap 5). These courts routinely grant such applications and specify when the respondent and any real party in interest must file a "return" (which may be by demurrer or answer or both) and when the writ petition will be heard on the merits (see chap 8). The parties subsequently brief the matter and either provide the complete administrative record or make a full evidentiary showing, and the superior court rules de novo on the merits of the writ petition (see chap 9). The nature of the hearing on the petition and the superior court's possible actions are the same as in the noticed motion procedure described above.

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§1.4 IV. COVERAGE OF SUPERIOR COURT WRIT PRACTICE AND PROCEDURE

Part I of this book focuses on writ practice in the superior court and provides a pragmatic, nuts-and-bolts discussion of all facets of superior court writ proceedings, *i.e.*:

- The basic requirements for writ relief (see chaps 2-4);
- The kinds of writs superior courts are empowered to issue (see chaps 2-4);
- How to prepare a writ petition (see chap 5);
- The two basic approaches to prosecuting a superior court writ proceeding (the noticed motion and alternative writ approaches) (see chap 5);
- Requesting a stay in a superior court writ proceeding (see chap 6);
- Preparing the documentation supporting a writ petition (see chaps 5, 7);
- Preparing the documentation in opposition to a writ petition (see chap 8); and
- The scope and nature of superior court writ hearings (see chap 9).

The final chapters of Part I discuss how to enforce a writ issued by a superior court (see chap 10), appellate review of a superior court's judgment in a writ action (see chap 11), and the relatively rare circumstance of writ review by a superior court appellate division of judicial action in a limited jurisdiction civil matter (see chap 12). Part I concludes with a collection of exemplar superior court writ forms (see chap 13). The Sacramento Superior Court Guide to the Procedures for Prosecuting Petitions for Prerogative Writs is reprinted in App B.

Part II of this book focuses on writ proceedings in the courts of appeal and the California Supreme Court (see chaps 14-28).

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2

Traditional Mandate

The Hon. Kathleen M. Banke

I. NATURE OF TRADITIONAL MANDATE PROCEEDINGS IN THE SUPERIOR COURTS
- A. Overview §2.1
- B. Scope of Chapter §2.2

II. REQUIREMENTS FOR ISSUANCE OF TRADITIONAL MANDATE §2.3
- A. Statutorily Available Relief §2.4
  - 1. Clear and Present Ministerial Duty §2.5
    - a. Ministerial Duty Defined §2.6
    - b. Ministerial Duty Distinguished From Discretionary Action §2.7
  - 2. Duty to Exercise Discretion §2.8
  - 3. Abuse of Discretion §2.9
  - 4. Entitlement to Office §2.10
- B. Prerequisites for Mandate Relief §2.11
  - 1. Substantial Beneficial Interest §2.12
    - a. Beneficial Interest Requirement Relaxed When Public Right Is at Stake §2.13
    - b. Loss of Beneficial Interest While Proceeding Is Pending §2.14
  - 2. No Plain, Speedy, or Adequate Remedy at Law
    - a. Action at Law Available §2.15
    - b. Other Administrative Remedies Available §2.16

III. ACTS AND DECISIONS SUBJECT TO CHALLENGE THROUGH TRADITIONAL MANDATE PROCEEDINGS IN THE SUPERIOR COURTS
- A. Acts and Decisions of Governmental Bodies and Public Officials and Employees §2.17
  - 1. To Compel Performance of Ministerial Duty §2.18
    - a. Governmental Body or Public Official or Employee Required to Act §2.19
    - b. No Judgment or Discretion Exercised §2.20
    - c. Statutory Act Believed to Be Unconstitutional §2.21
  - 2. To Compel Exercise of Discretion, But Not Manner in Which Discretion Is Exercised §2.22
  - 3. Legislative Actions Generally Not Subject to Mandate §2.23
    - a. Exception: Legislative and Quasi-Legislative Action in Excess of Authority §2.24
    - b. Exception: Implementation of Legislation §2.25
    - c. Exception: Legislative Action Depriving Agency of Funds to Perform Mandatory Duty §2.26
- B. Actions and Decisions of Administrative Agencies §2.27
  - 1. To Compel Agency, Official, or Employee to Perform Mandatory Duty
    - a. Legally Required Ministerial Duties §2.28
    - b. Statutory Duty to Issue Regulations §2.29
    - c. Duty to Exercise Discretion §2.30
    - d. Duty to Hold Administrative Hearing or Otherwise Comply With Administrative Review Requirements §2.31
  - 2. To Review Quasi-Judicial Agency Decisions §2.32
    - a. Traditional Mandate Applies When Statutory Requirements of CCP §1094.5 Not Met §2.33
    - b. Exhaustion of Administrative Remedies §2.34
    - c. Other Statutory Forms of Writ Review of Agency Decisions §2.35
  - 3. To Compel Agency to Comply With Administrative Decision §2.36
  - 4. To Review Quasi-Legislative Acts §2.37
- C. Decisions of Nongovernmental Corporations, Associations, and Officers §2.38

IV. EXAMPLES OF SPECIFIC CONTEXTS IN WHICH NONJUDICIAL ACTIONS REVIEWED BY TRADITIONAL MANDATE
- A. Issuance of Professional Licenses and Certificates §2.39
- B. DMV Suspension or Revocation §2.40
- C. Land Use Decisions and Issuance of Permits or Variances §2.41
- D. Assignment, Classification, and Discipline of Teachers and Students

1. Teachers §2.42
2. Students §2.43
E. Election Issues
1. Reapportionment and Redistricting Issues §2.44
2. Election Processes §2.45
3. Certification of Initiative or Referendum Petition
a. Challenging Placement on Ballot §2.46
b. Compelling Processing of Initiative Petition §2.47
c. Pre- or Post-Election Review of Initiative §2.48
F. Admission or Restoration of Right to Office §2.49
G. Unions and Employee Organizations
1. Compelling Negotiation §2.50
2. Compelling Arbitration §2.51
3. Holding Hearings §2.52
4. Inspecting Records §2.53
H. Corporations and Corporate Officers §2.54
I. Private Organizations and Associations §2.55
J. Enforcement of Civil Rights §2.56
K. Taxes §2.57
1. Compelling Taxation or Assessment §2.58
2. Compelling Record-Keeping and Handling Duties §2.59
3. Compelling Tax Authority to Review Claim or Hear Appeal §2.60
4. Reviewing Assessment Practices §2.61
5. Exception: Mandate Will Not Lie to Challenge Assessment §2.62
6. Exception: Mandate Will Not Lie to Prevent Collection of Property Taxes §2.63
L. Statutory Payment Obligations §2.64
M. Issuance of Subpoenas §2.65
N. Consideration of Claim §2.66
O. Publication of Notice §2.67
P. Public Records Act
1. Mandate for Denial of Disclosure §2.68
2. No Requirement of Inadequate Remedy at Law §2.69

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I. NATURE OF TRADITIONAL MANDATE PROCEEDINGS IN THE SUPERIOR COURTS

§2.1 A. Overview

Mandate is "the principal extraordinary writ surviving under California law." *City of King City v Community Bank* (2005) 131 CA4th 913, 925, 32 CR3d 384. The writ statutes provide for two types of mandate: traditional (CCP §1085, also called ordinary) and administrative (CCP §1094.5). *Bunnett v Regents of Univ. of Cal.* (1995) 35 CA4th 843, 848, 41 CR2d 567. The terms "mandate" and "mandamus" are used interchangeably in practice and are synonymous. CCP §1084. This text uses the terminology "traditional mandamus," "traditional mandate," and "mandate" to refer to writ proceedings under CCP §1085 and "administrative mandamus" to refer to writ proceedings under CCP §1094.5.

Determining which writ to seek in a superior court writ action depends on the nature of the challenged action or decision: traditional mandate generally applies to ministerial and quasi-legislative acts (see §§2.17-2.26), and administrative mandamus generally applies to quasi-judicial (or adjudicatory) acts (see §§2.27-2.36). *Katosh v Sonoma County Employees' Retirement Ass'n* (2008) 163 CA4th 56, 62 n4, 77 CR3d 324; *California Water Impact Network v Newhall County Water Dist.* (2008) 161 CA4th 1464, 1482, 75 CR3d 393; *Ohton v Board of Trustees of Cal. State Univ.* (2007) 148 CA4th 749, 766, 56 CR3d 111; *McGill v Regents of the Univ. of Cal.* (1996) 44 CA4th 1776, 1785, 52 CR2d 466. On administrative mandamus, see chap 3.

NOTE: A party may be entitled to both types of mandate. See, *e.g.*, *Mileikowsky v Tenet Healthsystem* (2005) 128 CA4th 531, 554, 27 CR3d 171 (traditional mandate to review whether hearing officer had authority to terminate peer review hearing, and administrative mandamus to review whether hearing officer's sanction for doctor's misconduct during hearing was abuse of discretion), disapproved in part on other grounds in *Mileikowsky v West Hills Hosp. & Med. Ctr.* (2009) 45 C4th 1259, 1273, 91 CR3d 516; *Conlan v Bonta* (2002) 102 CA4th 745, 751, 125 CR2d 788 (traditional mandate to compel DHS to reimburse Medi-Cal recipients as required by law, and administrative mandamus to challenge decision denying reimbursement to petitioner).

In nearly all instances, a writ of mandate issued by a superior court compels action by a *nonjudicial* body, *i.e.,* a governmental body, administrative agency, private corporation, or association, or by an official or employee of a governmental body or private entity. See, *e.g.*, *Santa Clara County Counsel Attorneys Ass'n v Woodside* (1994) 7 C4th 525, 541, 28 CR2d 617 (writ issued to compel public employer to meet and confer with county counsel attorneys as required by statute); *Mission Hosp. Reg'l Med. Ctr. v Shewry* (2008) 168 CA4th 460, 469, 85 CR3d 639 (court of appeal directed trial court to issue writ compelling Department of Health Care Services to comply with federal law); *SN Sands Corp. v City & County of San Francisco* (2008) 167 CA4th 185, 190, 83 CR3d 885 (writ issued to compel city's public utilities commission to execute contract); *Adair v Stockton Unified Sch. Dist.* (2008) 162 CA4th 1436, 77 CR3d 62 (writ issued to invalidate school district's salary schedule); *Fiscal v City & County of San Francisco* (2008) 158 CA4th 895, 902, 70 CR3d 324 (writ issued to invalidate local proposition); *Corrales v Bradstreet* (2007) 153 CA4th 33, 47, 62 CR3d 440 (writ issued to compel Labor Commissioner to process wage and hour claims in timely manner as specified by statute); *Morris v Harper* (2001) 94 CA4th 52, 58, 114 CR2d 62 (writ issued to compel acting director of California Youth Authority to obtain licensing for its correctional treatment centers). See also §§2.39-2.69.

The superior court appellate division may issue a writ of mandate to a superior court acting in a limited jurisdiction civil or small claims case. See chap 12.

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§2.2 B. Scope of Chapter

This chapter discusses traditional mandate proceedings under CCP §§1085-1094 to challenge actions and decisions of nonjudicial public and private entities, and of public and private officials and employees. It first discusses the basic requirements for mandate (see §§2.3-2.16), including the threshold requirements that a petitioner must meet to seek writ relief. See §2.3. The chapter concludes with two case overview sections: The first includes case exemplars of mandate actions against (a) governmental bodies, officials, and employees; (b) administrative agencies, officials, and employees; and (c) private bodies, officers, and employees. See §§2.17-2.38. The second includes case exemplars of traditional mandate actions in a variety of substantive contexts. See §§2.39-2.69.

Chapter 3 provides an overview of administrative mandamus. For a full discussion of this topic, see California Administrative Mandamus (3d ed Cal CEB 2003). Chapter 12 discusses the instances in which a superior court, generally the court's appellate panel, may issue a writ of mandate to compel judicial action in a limited jurisdiction civil case.

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§2.3 II. REQUIREMENTS FOR ISSUANCE OF TRADITIONAL MANDATE

The basic requirements for traditional mandate are threefold:

- Traditional mandate will issue to compel only certain kinds of action. Thus, a petitioner must ensure that he or she is seeking statutorily available relief. CCP §1085(a); see §§2.4-2.10.
- To seek relief, a petitioner must have a beneficial interest in the outcome of the proceedings. CCP §1086; see §2.11.
- To obtain writ relief, a petitioner must not have any other plain, speedy, or adequate remedy at law. CCP §1086; see §§2.15-2.16.

NOTE: Although these requirements must all be met, appellate court opinions in writ cases originating in the trial courts seldom discuss them at length unless the issue on appeal involves the petitioner's beneficial interest or inadequacy of other relief. See *Mission Hosp. Reg'l Med. Ctr. v Shewry* (2008) 168 CA4th 460, 478, 85 CR3d 639 (respondent argued petitioners lacked "standing" to seek writ relief). Usually, appellate opinions address the substantive merits of the trial court's judgment in a writ proceeding. Nevertheless, some of the more recent appellate decisions have discussed them. See, *e.g.*, *Munroe v Los Angeles County Civil Serv. Comm'n* (2009) 173 CA4th 1295, 1300, 93 CR3d 716 (reciting basic requirements); *Mednik v State Dep't of Health Care Servs.* (2009) 175 CA4th 631, 639, 96 CR3d 112 (same); *V.S. v Allenby* (2008) 169 CA4th 665, 670, 87 CR3d 143 (same); *County of San Diego v State* (2008) 164 CA4th 580, 593, 79 CR3d 489 (same). On appellate review see §§11.7-11.36.

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Source: Civil Litigation/California Civil Writ Practice/2 Traditional Mandate/§2.4 A. Statutorily Available Relief

§2.4 A. Statutorily Available Relief

A writ of mandate will issue "to any inferior tribunal, corporation, board, or person" to compel (CCP §1085(a)):

- "[T]he performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station" (see §§2.5-2.9); or
- "[T]he admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by such inferior tribunal, corporation, board, or person" (see §2.10).

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§2.5 1. Clear and Present Ministerial Duty

A writ of traditional mandate is most often sought to compel a clear, present and usually ministerial duty on the part of the respondent. *Munroe v Los Angeles County Civil Serv. Comm'n* (2009) 173 CA4th 1295, 1300, 93 CR3d 716 quoting *American Fed'n of State, County & Mun. Employees v Metropolitan Water Dist.* (2005) 126 CA4th 247, 261, 24 CR3d 285 (traditional writ of mandate under CCP §1085 is "'a method for compelling a public entity to perform a legal and usually ministerial duty'"); *V.S. v Allenby* (2008) 169 CA4th 665, 670, 87 CR3d 143 (mandate to compel director of Department of Social Services to direct DSS's agents to take action within specified time so federal foster case funding would not be lost). See, *e.g., City of Dinuba v County of Tulare* (2007) 41 C4th 859, 868, 62 CR3d 614 (mandate to compel duty to correctly calculate and distribute tax revenue); *Kavanaugh v West Sonoma County Union High Sch. Dist.* (2003) 29 C4th 911, 916, 129 CR2d 811 (mandate to compel school district to notify teacher of job classification in timely manner); *Mission Hosp. Reg'l Med. Ctr. v Shewry* (2008) 168 CA4th 460, 469, 85 CR3d 639 (mandate to compel Department of Health Care Services to comply with federal law); *Sustainability of Parks, Recycling & Wildlife Legal Defense Fund v County of Solano Dep't of Resource Mgmt.* (2008) 167 CA4th 1350, 84 CR3d 889 (mandate to compel county department to hold hearing); *SN Sands Corp. v City & County of San Francisco* (2008) 167 CA4th 185, 190, 83 CR3d 885 (mandate to compel ministerial duty to award contract); *California Ass'n for Health Servs. at Home v State Dep't of Health Servs.* (2007) 148 CA4th 696, 704, 56 CR3d 102 (mandate to compel DHS to conduct annual rate reviews as required by statute); *Corrales v Bradstreet* (2007) 153 CA4th 33, 47, 62 CR3d 440 (mandate to compel Labor Commissioner to process wage and hour claims in timely manner); *American Fed'n of State, County & Mun. Employees v Metropolitan Water Dist.* (2005) 126 CA4th 247, 260, 24 CR3d 285 (mandate to compel water district to select hearing officer and conduct hearing on grievance); *Morris v Harper* (2001) 94 CA4th 52, 58, 114 CR2d 62 (mandate to compel acting director of California Youth Authority to obtain licensing for correctional treatment centers).

For examples of cases in which traditional mandate has been sought, see §§2.39-2.69.

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§2.6 a. Ministerial Duty Defined

A ministerial duty is imposed on a person in public office who, by virtue of that position, is obligated to perform in a legally prescribed manner when a given state of facts exists. *City of King City v Community Bank* (2005) 131 CA4th 913, 926, 32 CR3d 384. It is a duty that a governmental or private body, by or through a public or private board, agency, official, or employee, is required to perform without the exercise of independent judgment or opinion. *County of San Diego v State* (2008) 164 CA4th 580, 593, 79 CR3d 489. Compare *Kavanaugh v West Sonoma County Union High Sch. Dist.* (2003) 29 C4th 911, 916, 129 CR2d 811 (school district had duty to notify teacher of her job classification in timely manner, enforceable by mandate), with *US Ecology, Inc. v State* (2001) 92 CA4th 113, 137, 111 CR2d 689 (whether to designate site as low-level radioactive waste disposal site was discretionary decision, not reviewable by mandate). Ministerial actions "'are essentially automatic based on whether certain fixed standards and objective measurements have been met.'" *Sustainability of Parks, Recycling & Wildlife Legal Defense Fund v County of Solano Dep't of Resource Mgmt.* (2008) 167 CA4th 1350, 84 CR3d 889 quoting *Calvert v County of Yuba* (2006) 145 CA4th 613, 623, 51 CR3d 797.

When "a statute requires an officer to do a prescribed act upon a prescribed contingency, his functions are ministerial, and upon the happening of the contingency the writ may be issued." *Drummey v State Bd. of Funeral Dirs. & Embalmers* (1939) 13 C2d 75, 83, 87 P2d 848. In general, a ministerial act does not entail the exercise of judgment or discretion. See, *e.g., Jenkins v Knight* (1956) 46 C2d 220, 223, 293 P2d 6 (governor's constitutional duty to call special election to fill legislative vacancies was ministerial and subject to mandate). A ministerial act is one "that a public officer is required to perform in a prescribed manner in obedience to the mandate of a legal authority" and without regard to his or her own judgment or opinion as to the act's propriety or impropriety. *Ridgecrest Charter Sch. v Sierra Sands Unified Sch. Dist.* (2005) 130 CA4th 986, 1002, 30 CR3d 648, quoting *Morris v Harper* (2001) 94 CA4th 52, 62, 114 CR2d 62.

For examples of cases in which traditional mandate has been sought, see §§2.39-2.69.

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§2.7 b. Ministerial Duty Distinguished From Discretionary Action

Unlike a ministerial duty, which is an act that the law compels under a given set of facts, an exercise of discretion involves the use of judgment in deciding what action to take. See, *e.g., Ridgecrest Charter Sch. v Sierra Sands Unified Sch. Dist.* (2005) 130 CA4th 986, 1003, 30 CR3d 648, quoting *Morris v Harper* (2001) 94 CA4th 52, 62, 114 CR2d 62 ("discretion is the power conferred on public functionaries to act officially according to the dictates of their own judgment"); *Carrancho v California Air Resources Bd.* (2003) 111 CA4th 1255, 1266, 4 CR3d 536 (agency action in preparing diversion plan and progress report involved exercise of discretion in quasi-legislative capacity). The exercise of discretion in reaching a decision is not susceptible to mandate except for a refusal to exercise it or an abuse of discretion. See §§2.8-2.9.

EXAMPLE: A county ordinance requires the county to negotiate in good faith with an employee union. The county must thus meet and confer. The county's performance of its meet and confer obligation can be compelled by mandate. However, mandate will not lie to compel the county to agree to specific terms, because that is matter as to which the county exercises discretion. See, *e.g.*, *Los Angeles County Employees Ass'n, Local 660 v County of Los Angeles* (1973) 33 CA3d 1, 8, 108 CR 625.

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§2.8 2. Duty to Exercise Discretion

If a nonjudicial body or entity, or an official or employee, has a clear duty to exercise discretion but refuses to do so, mandate will lie to compel the exercise of that discretion. However, the court will not "'compel the exercise of that discretion in a particular manner or to reach a particular result.'" *Daily Journal Corp. v County of Los Angeles* (2009) 172 CA4th 1550, 1555, 92 CR3d 219, quoting *Building Indus. Ass'n v Marin Mun. Water Dist.* (1991) 235 CA3d 1641, 1646, 1 CR2d 625. See, *e.g., California Ass'n for Health Servs. at Home v State Dep't of Health Servs.* (2007) 148 CA4th 696, 708, 56 CR3d 102 (mandate issued to compel DHS to conduct annual rate reviews but not to compel DHS to set specific rates in absence of rate review); *Shamsian v Department of Conserv.* (2006) 136 CA4th 621, 639, 39 CR3d 62 (mandate would not issue to control department's discretion in establishing recycling centers); *Los Angeles County Employees Ass'n, Local 660 v County of Los Angeles* (1973) 33 CA3d 1, 8, 108 CR 625 (mandate issued to compel county to negotiate in good faith but not to agree to specific terms).

For examples of cases in which traditional mandate has been sought, see §§2.39-2.69.

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§2.9 3. Abuse of Discretion

Although mandate will not lie to control the exercise of discretion in a particular way, it will issue to correct an abuse of discretion. *Saleeby v State Bar* (1985) 39 C3d 547, 562, 216 CR 367 ("mandamus will lie to correct an *abuse* of discretion or the actions of an administrative agency which exceed the agency's legal powers") (emphasis in original); *Neighbors in Support of Appropriate Land Use v County of Tuolumne* (2007) 157 CA4th 997, 1004, 68 CR3d 882 ("trial court may not substitute its judgment for that of a public agency or force the agency to exercise its discretion in a particular manner, but may correct abuses of discretion"). See *e.g., Munroe v Los Angeles County Civil Serv. Comm'n* (2009) 173 CA4th 1295, 1300, 93 CR3d 716 (superior court erred in granting writ petition because commission did not abuse discretion in not extending time to request appeal hearing); *Ridgecrest Charter Sch. v Sierra Sands Unified Sch. Dist.* (2005) 130 CA4th 986, 1006, 30 CR3d 648 (superior court found that school district abused its discretion by failing to show that it could not accommodate charter school at single school site).

The superior court's inquiry regarding abuse of discretion in a traditional mandate proceeding is limited to whether the agency's action was "arbitrary, capricious or entirely without evidentiary support," and whether it conformed to legally required procedures. *Neighbors in Support of Appropriate Land Use v County of Tuolumne, supra*. See, *e.g., SN Sands Corp. v City & County of San Francisco* (2008) 167 CA4th 185, 192, 83 CR3d 885 (writ sought on ground that board abused its discretion by interfering with award of contract); *State Bldg. & Constr. Trades Council v Duncan* (2008) 162 CA4th 289, 300, 76 CR3d 507 (writ sought on grounds director had abused his discretion by misinterpreting and misapplying law).

The appropriate degree of judicial scrutiny in any particular case lies along a continuum with nonreviewability at one end and independent judgment at the other; because "the ultimate question is whether the agency has abused its discretion, the answer is one of degree." *Shapell Indus., Inc. v Governing Bd.* (1991) 1 CA4th 218, 233, 1 CR2d 818. See *Golden Drugs Co. v Maxwell-Jolly* (2009) 179 CA4th 1455, 102 CR3d 446 (applying *Shapell* and holding that Department of Health Care Services did not abuse discretion in terminating pharmacy's Medi-Cal provider status for violation of regulations in way that threatens public welfare).

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§2.10 4. Entitlement to Office

Mandate will lie to compel a governmental or private entity to admit an individual to an office or position to which the individual is legally entitled. See, *e.g., Woodmansee v Lowery* (1959) 167 CA2d 645, 648, 334 P2d 991 (petitions for mandate for payment of salary filed by two parties, each of whom claimed to hold same municipal court judgeship; court determined which party was de facto officeholder by examining, but not deciding, legal title to office). This is essentially another instance in which an entity can be compelled by mandate to comply with a clear legal duty.

An action to test title or right to office, formerly known as quo warranto, is governed by CCP §§803-811; mandate cannot be used to decide title to an office. On quo warranto, see §4.27. See, *e.g.*, *Hallinan v Mellon* (1963) 218 CA2d 342, 347, 32 CR 446 (taxpayer suit to compel repayment of salary by officeholder who was allegedly appointed illegally; writ denied because remedy to try title to office is quo warranto action). Although mandate cannot be used to decide title to an office, it can be used to determine which party has the best claim to legal title and, thus, is the de facto officer. See *Woodmansee v Lowery, supra*; *Klose v Superior Court* (1950) 96 CA2d 913, 920, 217 P2d 97 (prohibition action filed by officeholder to restrain mandate action filed by taxpayer to compel city council to fill officeholder's seat because of alleged vacancy).

For examples of cases in which traditional mandate has been sought, see §§2.39-2.69.

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Source: Civil Litigation/California Civil Writ Practice/2 Traditional Mandate/§2.11 B. Prerequisites for Mandate Relief

§2.11 B. Prerequisites for Mandate Relief

In addition to ensuring that the challenged action or decision is the kind reviewable by traditional mandate (see §§2.3-2.10), a petitioner also must satisfy two threshold requirements for writ relief (see CCP §1086):

- A beneficial interest in the outcome of the proceeding, concomitant to the duty to be performed (see §2.12); and
- No plain, speedy, or adequate legal remedy. See §§2.15-2.16.

NOTE: Although these two requirements must be specifically alleged in a petition seeking writ relief (on contents of petition, see §§5.38-5.62), court of appeal opinions in writ cases originating in the trial courts seldom discuss them in detail unless the issue on appeal involves the petitioner's beneficial interest or inadequacy of other relief. See *Mission Hosp. Reg'l Med. Ctr. v Shewry* (2008) 168 CA4th 460, 480, 85 CR3d 639 (ruling that petitioners had beneficial interest and could seek writ relief). Appellate opinions more often address the substantive merits of a trial court's judgment in a writ proceeding. Some courts, however, have addressed requirements in more detail, as discussed in §2.3. See also §§11.7-11.36 on appellate review of a trial court judgment.

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§2.12 1. Substantial Beneficial Interest

The petitioner must have "a clear, present and beneficial right" to the performance of the duty allegedly owed by the respondent. *Mission Hosp. Reg'l Med. Ctr. v Shewry* (2008) 168 CA4th 460, 478, 85 CR3d 639; *County of San Diego v State* (2008) 164 CA4th 580, 593, 79 CR3d 489; *California Ass'n for Health Servs. at Home v State Dep't of Health Servs.* (2007) 148 CA4th 696, 704, 56 CR3d 102. See CCP §1086 (writ "must be issued upon the verified petition of the party beneficially interested"). This is in the nature of a "standing" requirement, ensuring that the party seeking relief has a direct interest in the outcome of the writ proceeding. See *Syngenta Crop Protection, Inc. v Helliker* (2006) 138 CA4th 1135, 1181, 42 CR3d 191 (pesticide manufacturers had standing to seek writ challenging agency's nonpermissive use of their data to evaluate registrations of other companies); *City of Gilroy v State Bd. of Equalization* (1989) 212 CA3d 589, 604, 260 CR 723 (city had standing to collaterally challenge tax board's refund decision that precipitated board's demand that city return tax revenues).

"A beneficial interest means the petitioner has a special interest over and above the interest of the public at large." *People ex rel. Dept. of Conserv. v El Dorado County* (2005) 36 C4th 971, 986, 32 CR3d 109 (director of department had beneficial interest in seeing that the Surface Mining and Reclamation Act was adequately enforced). See, *e.g., Mission Hosp. Reg'l Med. Ctr. v Shewry* (2008) 168 CA4th 460, 469, 85 CR3d 639 (hospitals had beneficial interest in Department of Health Services' compliance with federal law); *Associated Builders & Contractors, Inc. v San Francisco Airports Comm'n* (1999) 21 C4th 352, 362, 87 CR2d 654 (association members had beneficial interest in validity of project stabilization agreement); *California Ass'n for Health Servs. at Home v State Dep't of Health Servs.,* 148 CA4th at 706 (association members had beneficial interest in forcing DHS to carry out ministerial duty to conduct annual rate reviews); *Savient Pharms., Inc. v Department of Health Servs.* (2007) 146 CA4th 1457, 1468, 53 CR3d 689 (drug company lacked standing to attack contract).

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§2.13 a. Beneficial Interest Requirement Relaxed When Public Right Is at Stake

The beneficial interest requirement is relaxed somewhat when a public right is at stake. See, *e.g., Green v Obledo* (1981) 29 C3d 126, 144, 172 CR 206 (mandate to challenge AFDC travel reimbursement regulation that allegedly violated federal law). In *Green*, the supreme court held that a citizen's interest in having laws executed and public duties enforced was sufficient to meet the beneficial interest requirement. This exception to the general rule that a petitioner must have more than a general interest in the outcome (see §2.12) promotes the public policy of citizens ensuring that a governmental entity does not impair or defeat a legislatively created public right. See *Hogar Dulce Hogar v Community Dev. Comm'n* (2003) 110 CA4th 1288, 1294, 2 CR3d 497 (nonprofit agency created after governmental agency began disregarding law had sufficient interest to enforce statutory obligations); *Timmons v McMahon* (1991) 235 CA3d 512, 518, 286 CR 620 (sufficient interest to compel county to properly determine eligibility requirements for AFDC-FC benefits).

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§2.14 b. Loss of Beneficial Interest While Proceeding Is Pending

If circumstances change during the pendency of a mandate proceeding such that the petitioner no longer has a beneficial interest in the outcome, the superior court will deny writ relief. See, *e.g.*, *County of San Luis Obispo v Superior Court* (2001) 90 CA4th 288, 292, 108 CR2d 753 (petitioner suffered foreclosure before court ruled on challenge to adverse administrative decision and consequently lost "standing" to obtain writ and declaratory relief).

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2. No Plain, Speedy, or Adequate Remedy at Law

§2.15 a. Action at Law Available

Mandate will issue only when the petitioner has no plain, speedy, or adequate remedy at law. CCP §1086. See, *e.g., Barratt Am., Inc. v City of Rancho Cucamonga* (2005) 37 C4th 685, 704, 37 C3d 149 (validation action was adequate remedy to challenge city's failure to conduct fee review and set future fee rates to avoid excessive surplus); *Little v Los Angeles County Assessment Appeals Bds.* (2007) 155 CA4th 915, 922, 66 CR3d 401 (tax refund action was adequate remedy); *Canova v Trustees of Imperial Irrig. Dist. Employee Pension Plan* (2007) 150 CA4th 1487, 1494, 59 CR3d 587 (claim for breach of contract was adequate remedy).

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§2.16 b. Other Administrative Remedies Available

It is not only a legal action in court that will provide an adequate remedy foreclosing writ relief. Other administrative remedies may foreclose writ relief. See, *e.g.*, *American Employers Group, Inc. v Employment Dev. Dep't* (2007) 154 CA4th 836, 843, 65 CR3d 233 (petition for tax reassessment by California Unemployment Insurance Appeals Board provided adequate remedy); *Imagistics Int'l, Inc. v Department of Gen. Servs.* (2007) 150 CA4th 581, 590, 59 CR3d 18 (bid protest procedures provided adequate remedy). When the petitioner is pursuing traditional mandate, "the exhaustion requirement speaks to whether there exists an adequate legal remedy. If an administrative remedy is available and has not yet been exhausted, an adequate remedy exists and the petitioner is not entitled to extraordinary relief." *Eight Unnamed Physicians v Medical Exec. Comm. of the Med. Staff of Washington Township Hosp.* (2007) 150 CA4th 503, 510, 59 CR3d 100, quoting *Unnamed Physician v Board of Trustees of St. Agnes Med. Ctr.* (2001) 93 CA4th 607, 620, 113 CR2d 309. See *California Water Impact Network v Newhall County Water Dist.* (2008) 161 CA4th 1464, 1484, 75 CR3d 393 (regardless of whether writ petition was for administrative or traditional mandamus review, it failed because petitioner did not exhaust administrative remedies). But see *O.W.L. Found. v City of Rohnert Park* (2008) 168 CA4th 568, 583, 86 CR3d 1 (explaining that exhaustion requirement does not implicate subject matter jurisdiction; under unique circumstances of case, failure to exhaust administrative remedies did not preclude review).

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III. ACTS AND DECISIONS SUBJECT TO CHALLENGE THROUGH TRADITIONAL MANDATE PROCEEDINGS IN THE SUPERIOR COURTS

§2.17 A. Acts and Decisions of Governmental Bodies and Public Officials and Employees

Traditional mandate will issue to compel action by a governmental body or public official or employee when:

- The action is a ministerial duty (see §§2.18-2.21);
- The governmental body or public official or employee is required to exercise discretion but has refused to do so (see §2.22); or
- A legislative or quasi-legislative act is unlawful or an abuse of discretion (see §§2.23-2.26).

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§2.18 1. To Compel Performance of Ministerial Duty

Mandate will issue to compel a governmental body or public official or employee to perform a ministerial duty. See §§2.19-2.21.

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§2.19 a. Governmental Body or Public Official or Employee Required to Act

A ministerial duty is one that a public agency, board, official, or employee is *required* to perform. See, *e.g., City of Dinuba v County of Tulare* (2007) 41 C4th 859, 868, 62 CR3d 614 (county may be compelled to correctly allocate and distribute tax revenues); *Santa Clara County Counsel Attorneys Ass'n v Woodside* (1994) 7 C4th 525, 541, 28 CR2d 617 (public employer compelled to comply with statutory obligation to meet and confer with county counsel attorneys); *Mission Hosp. Reg'l Med. Ctr. v Shewry* (2008) 168 CA4th 460, 469, 85 CR3d 639 (mandate to compel Department of Health Care Services to comply with federal law); *SN Sands Corp. v City & County of San Francisco* (2008) 167 CA4th 185, 190, 83 CR3d 885 (city had no authority to reject contract and public utilities commission had ministerial duty, and could be compelled, to approve contract); *Norton v San Bernardino City Unified Sch. Dist.* (2008) 158 CA4th 749, 756, 69 CR3d 917 (school district compelled to comply with administrative decision to reinstate employee); *Alliance for a Better Downtown Millbrae v Wade* (2003) 108 CA4th 123, 128, 133 CR2d 249 (city clerk compelled to certify initiative petition based on compliance with submission requirements, and without regard to extrinsic evidence); *Stationary Eng'rs Local 39 v County of Sacramento* (1997) 59 CA4th 1177, 69 CR2d 598 (county compelled to comply with civil service employment rules); *Terminal Plaza Corp. v City & County of San Francisco* (1986) 186 CA3d 814, 836, 230 CR 875 (zoning administrator compelled to enforce planning commission resolution requiring developer to build pedestrian way as condition of development permit). See also *Defend Bayview Hunters Point Comm. v City & County of San Francisco* (2008) 167 CA4th 846, 858, 84 CR3d 486 (writ denied because clerk had ministerial duty to reject petition to force referendum); *Vasquez v Happy Valley Union Sch. Dist.* (2008) 159 CA4th 969, 981, 72 CR3d 15 (writ denied because district complied with statutory classification requirements; affirmed on other grounds); *Capo for Better Representation v Kelley* (2008) 158 CA4th 1455, 1462, 71 CR3d 354 (writ denied because registrar met statutory duty); *Friends of Bay Meadows v City of San Mateo* (2007) 157 CA4th 1175, 1192, 68 CR3d 916 (writ denied because registrar met statutory duty in invalidating signatures); *Women Organized for Employment v Stein* (1980) 114 CA3d 133, 139, 170 CR 176 (writ denied when no statute required officials to collect data petitioners sought). See also §§2.5-2.7.

For additional examples of cases in which traditional mandate has been sought, see §§2.39-2.69.

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§2.20 b. No Judgment or Discretion Exercised

A ministerial duty does not require the exercise of judgment and discretion. Rather, it is an act that must be performed under a certain set of circumstances and in a specific manner. Compare *South Dakota v Brown* (1978) 20 C3d 765, 779, 144 CR 758 (writ denied because governor's refusal to extradite was discretionary), with *California Correctional Peace Officers Ass'n v State Personnel Bd.* (1995) 10 C4th 1133, 1148, 43 CR2d 693 (State Personnel Board had ministerial duty to hear and decide case by date certain). See also, *e.g., Kavanaugh v West Sonoma County Union High Sch. Dist.* (2003) 29 C4th 911, 916, 129 CR2d 811 (school district had duty to notify teacher of job classification in timely manner); *Daily Journal Corp. v County of Los Angeles* (2009) 172 CA4th 1550, 1558, 92 CR3d 219 (governmental entity's decision not to pursue legal claim involves discretion that cannot be enjoined by mandate); *Alliance for a Better Downtown Millbrae v Wade* (2003) 108 CA4th 123, 128, 133 CR2d 249 (city election official had duty to certify initiative petition based on its compliance with submission requirements, and without regard to extrinsic evidence). See also §§2.5-2.7.

For additional examples of cases in which traditional mandate has been sought, see §§2.19, 2.39-2.69.

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§2.21 c. Statutory Act Believed to Be Unconstitutional

Even if a governmental body or public official believes that a statutorily required duty is unconstitutional, mandate will lie to compel performance of that duty if no court has declared the statute unconstitutional. See, *e.g.*, *Lockyer v City & County of San Francisco* (2004) 33 C4th 1055, 1068, 17 CR3d 225 (mayor's belief that state constitution prohibited discrimination against gay men and lesbians with respect to marriage did not allow county clerk to disregard statutory marriage licensing requirements; writ issued compelling city officials to cease issuing marriage licenses to same-sex couples).

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§2.22 2. To Compel Exercise of Discretion, But Not Manner in Which Discretion Is Exercised

If a governmental body or public official or employee has a duty to exercise discretion but refuses to do so, mandate will issue to compel the exercise of that discretion. See, *e.g., California Water Impact Network v Newhall County Water Dist.* (2008) 161 CA4th 1464, 1483, 75 CR3d 393 (mandate will lie to require exercise of discretion but not particular manner in which discretion is exercised); *Sego v Santa Monica Rent Control Bd.* (1997) 57 CA4th 250, 255, 67 CR2d 68 (mandate to compel rent control board to issue certificates of rent levels). See also §2.8.

Mandate will not lie, however, to compel a governmental body or public official to exercise discretion in a particular way. See, *e.g., People v Karriker* (2007) 149 CA4th 763, 774, 57 CR3d 412 (mandate to compel public conservator to investigate defendant for possible conservatorship, but not to select particular conservatorship); *Ridgecrest Charter Sch. v Sierra Sands Unified Sch. Dist.* (2005) 130 CA4th 986, 1002, 30 CR3d 648 (mandate to compel school district to provide reasonably equivalent and contiguous facilities to charter school, but district had discretion to decide how to comply with that duty); *Los Angeles County Employees Ass'n, Local 660 v County of Los Angeles* (1973) 33 CA3d 1, 8, 108 CR 625 (mandate to compel county to negotiate in good faith, but not to agree to specific terms). See also §2.8.

When discretion is exercised in the context of making a quasi-adjudicatory decision (usually made by an agency), courts sometimes characterize the standard of judicial review as "abuse of discretion." *O.W.L. Found. v City of Rohnert Park* (2008) 168 CA4th 568, 585, 86 CR3d 1 (comparing and contrasting standard of review in traditional and administrative mandamus cases). Generally, this means judicial review is limited to determining whether the decision was "arbitrary, capricious, or entirely lacking in evidentiary support." *American Bd. of Cosmetic Surgery v Medical Bd.* (2008) 162 CA4th 534, 547, 75 CR3d 574. As to legal issues, however, the courts apply de novo review. See §2.19.

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§2.23 3. Legislative Actions Generally Not Subject to Mandate

Legislative action is the formulation of a rule to be applied in future cases. *McGill v Regents of the Univ. of Cal.* (1996) 44 CA4th 1776, 1785, 52 CR2d 466, citing *Strumsky v San Diego County Employees Retirement Ass'n* (1974) 11 C3d 28, 35 n2, 112 CR 805. Such action is usually not subject to control by mandate. The courts will not interfere with legislative (or budgeting) processes unless the action exceeds the scope of the governmental body's authority or is so unreasonable as to be an abuse of discretion as a matter of law. See, *e.g., Carmel Valley Fire Protection Dist. v State* (2001) 25 C4th 287, 300, 105 CR2d 636 (denying writ to compel Commission on State Mandates to grant fire district's claim for reimbursement; legislature statutorily empowered to suspend operation of statutes and executive orders that mandate local programs and to withdraw funding); *Carrancho v California Air Resources Bd.* (2003) 111 CA4th 1255, 1266, 4 CR3d 536 (denying writ to compel agency's preparation of diversion plan and progress report; acts involved exercise of discretion in quasi-legislative capacity); *Sklar v Franchise Tax Bd.* (1986) 185 CA3d 616, 622, 230 CR 42 (denying writ to compel legislative action by Franchise Tax Board); *Gilliland v County of Los Angeles* (1981) 126 CA3d 610, 614, 179 CR 73 (denying writ to compel zoning change because zoning is legislative act).

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§2.24 a. Exception: Legislative and Quasi-Legislative Action in Excess of Authority

Mandate will issue to invalidate legislative acts in excess of a governing body's authority. This is a significant use of traditional mandamus. See, *e.g.*, *Tobe v City of Santa Ana* (1995) 9 C4th 1069, 1084, 40 CR2d 402 (challenge to constitutionality of city ordinance); *Saleeby v State Bar* (1985) 39 C3d 547, 562, 216 CR 367 (challenge to "quasi-legislative" action of adopting rules; writ issued compelling State Bar to reformulate rules); *Walker v County of Los Angeles* (1961) 55 C2d 626, 639, 12 CR 671 (writ issued compelling board to fix workers' wages on basis of those prevailing); *American Distilling Co. v City Council* (1950) 34 C2d 660, 667, 213 P2d 704 (writ issued ordering city to terminate proceedings to annex contiguous territory); *Citizens for Planning Responsibly v County of San Luis Obispo* (2009) 176 CA4th 357, 364, 97 CR3d 636 (writ issued invalidating initiative measure amending county's general plan and zoning regulations; reversed on appeal); *California Sch. Bds. Ass'n v State* (2009) 171 CA4th 1183, 1193, 90 CR3d 501 (writ issued directing commission to set aside and reconsider certain decisions); *Rental Hous. Ass'n v City of Oakland* (2009) 171 CA4th 741, 90 CR3d 181 (writ issued to invalidate certain provisions of initiative measure that placed limits and requirements on evictions); *Mission Hosp. Reg'l Med. Ctr. v Shewry* (2008) 168 CA4th 460, 469, 85 CR3d 639 (writ will issue to require Legislature to comply with laws); *SN Sands Corp. v City & County of San Francisco* (2008) 167 CA4th 185, 191, 83 CR3d 885 (challenge to city's refusal to award contract; acts leading up to award and award of contract are legislative in character); *Hernandez v County of Los Angeles* (2008) 167 CA4th 12, 84 CR3d 10 (post-election challenge to local ballot measure); *County of San Diego v State* (2008) 164 CA4th 580, 593, 79 CR3d 489 (writ issued invalidating Secretary of State's rules not adopted in accordance with APA); *Adair v Stockton Unified Sch. Dist.* (2008) 162 CA4th 1436, 77 CR3d 62 (writ issued to invalidate school district's salary schedule); *San Joaquin County Local Agency Formation Comm'n v Superior Court* (2008) 162 CA4th 159, 166, 76 CR3d 93 (writ issued preventing depositions of commissioners; commission's actions are quasi-legislative in nature and reviewed by ordinary mandamus, rather than administrative mandamus); *California Water Impact Network v Newhall County Water Dist.* (2008) 161 CA4th 1464, 1483, 75 CR3d 393 (quasi-legislative actions must be challenged by traditional mandate); *Fiscal v City & County of San Francisco* (2008) 158 CA4th 895, 902, 70 CR3d 324 (writ declaring local ordinance invalid).

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§2.25 b. Exception: Implementation of Legislation

Implementation of legislation, once passed, is a ministerial duty that can be compelled by mandate. See, *e.g., Woodland Hills Residents Ass'n, Inc. v City Council* (1980) 26 C3d 938, 944, 164 CR 255 (writ compelling city to hold public discussions and follow proper procedures required by California Environmental Quality Act); *Stationary Eng'rs Local 39 v County of Sacramento* (1997) 59 CA4th 1177, 69 CR2d 598 (writ compelling civil service commission to grant exam preference points in accordance with civil service rules); *Glendale City Employees Ass'n v City of Glendale* (1975) 15 C3d 328, 343, 124 CR 513 (writ compelling city to increase employee pay); *Environmental Council v Board of Supervisors* (1982) 135 CA3d 428, 440, 185 CR 363 (writ compelling supervisors to make statutorily required findings on mitigation factors); *Rivera v Division of Indus. Welfare* (1968) 265 CA2d 576, 605, 71 CR 739 (writ compelling enforcement of wage, hour, and working condition regulations). But see *Mendoza v State* (2007) 149 CA4th 1034, 1049, 57 CR3d 505 (writ prohibiting implementation or enforcement of statute deemed unconstitutional).

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§2.26 c. Exception: Legislative Action Depriving Agency of Funds to Perform Mandatory Duty

If local legislative action deprives a local agency of the resources it needs to carry out its functions, mandate may lie. In *Scott v Common Council* (1996) 44 CA4th 684, 689, 52 CR2d 161, a writ issued compelling the city council to reinstate and fund two investigator positions, the functions of which were mandated by the city charter. *Scott* held that judicial intervention in the budgeting process is appropriate when the superior court makes the factual finding that budget cuts prevented an official from carrying out mandated duties.

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Source: Civil Litigation/California Civil Writ Practice/2 Traditional Mandate/§2.27 B. Actions and Decisions of Administrative Agencies

§2.27 B. Actions and Decisions of Administrative Agencies

Traditional mandate will issue in connection with administrative actions to:

- Compel an administrative agency, official, or employee to perform a mandatory duty (see §§2.28-2.30);
- Compel an administrative agency to hold a required administrative hearing (see §2.31);
- Review an adjudicatory decision when CCP §1094.5 requirements are not met (§§2.32-2.33);
- Compel an administrative agency to comply with a final administrative decision (see §2.36); and
- Compel an administrative agency to take required quasi-legislative action or to review such action for abuse of discretion (see §2.37).

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1. To Compel Agency, Official, or Employee to Perform Mandatory Duty

§2.28 a. Legally Required Ministerial Duties

Traditional mandate will issue to compel administrative agencies and their officials and employees to perform legally required ministerial duties. On ministerial duties, see §§2.5-2.7, 2.18-2.21. See, *e.g.*, *Mission Hosp. Reg'l Med. Ctr. v Shewry* (2008) 168 CA4th 460, 469, 85 CR3d 639 (mandate compelling Department of Health Care Services to comply with federal law); *Sustainability of Parks, Recycling & Wildlife Legal Defense Fund v County of Solano Dep't of Resource Mgmt.* (2008) 167 CA4th 1350, 84 CR3d 889 (mandate compelling county department to hold hearing); *Fonseca v Fong* (2008) 167 CA4th 922, 84 CR3d 567 (petition to compel police department to comply with state law); *California Ass'n for Health Servs. at Home v State Dep't of Health Servs.* (2007) 148 CA4th 696, 704, 56 CR3d 102 (mandate compelling DHS to comply with federal Medicaid and state Medi-Cal laws); *Benjamin G. v California Special Educ. Hearing Office* (2005) 131 CA4th 875, 883, 32 CR3d 366 (mandate compelling agency to allow parents' expert to observe district's proposed placement of child before placement hearing); *Jackson v Gourley* (2003) 105 CA4th 966, 970, 130 CR2d 72 (mandate compelling DMV to accept certificates of completion from students who took private school driver education correspondence course); *Lomeli v Department of Corrections* (2003) 108 CA4th 788, 797, 134 CR2d 179 (mandate compelling agency to provide reinstatement and payment of back pay and benefits); *Conlan v Bonta* (2002) 102 CA4th 745, 751, 125 CR2d 788 (mandate compelling DHS to establish and implement reasonable procedures as required by law for Medi-Cal beneficiaries to obtain reimbursement for covered services incurred during retroactivity period).

For examples of cases in which traditional mandate has been sought, see §§2.39-2.69.

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§2.29 b. Statutory Duty to Issue Regulations

Traditional mandate will issue to compel administrative agencies to adopt statutorily required regulations. See, *e.g., Newland v Kizer* (1989) 209 CA3d 647, 652, 257 CR 450 (mandate compelling DHS to adopt regulations). However, mandate will not issue to dictate the specific content of regulations or to otherwise compel a governmental agency to exercise its administrative discretion in a particular manner. See, *e.g.*, *Sklar v Franchise Tax Bd.* (1986) 185 CA3d 616, 622, 230 CR 42 (denying writ to compel Franchise Tax Board to adopt specific procedures to control use of alcohol entertainment expense as business deduction).

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§2.30 c. Duty to Exercise Discretion

Traditional mandate will lie to compel administrative agencies or their officials or employees to exercise discretion when they are required, but have refused, to do so. See, *e.g.*, *Belridge Farms v ALRB* (1978) 21 C3d 551, 559, 147 CR 165 (mandate can compel official to exercise discretion when refusal to do so is based on erroneous view of powers vested in official). See also §§2.8, 2.19-2.20.

However, mandate will not issue to compel the exercise of discretion in a particular way or to reach a particular result. *Daily Journal Corp. v County of Los Angeles* (2009) 172 CA4th 1550, 1555, 92 CR3d 219. See, *e.g.*, *California Water Impact Network v Newhall County Water Dist.* (2008) 161 CA4th 1464, 1483, 75 CR3d 393 (mandate lies to require exercise of discretion but not manner in which discretion exercised); *Shamsian v Department of Conserv*. (2006) 136 CA4th 621, 39 CR3d 62 (mandate denied when department's decision to establish recycling centers within certain areas was discretionary); *Sklar v Franchise Tax Bd.* (1986) 185 CA3d 616, 230 CR 42 (mandate denied to compel Franchise Tax Board to adopt specific procedures to control use of alcohol entertainment expense as business deduction). See also §§2.8, 2.22.

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§2.31 d. Duty to Hold Administrative Hearing or Otherwise Comply With Administrative Review Requirements

Traditional mandate will issue to compel administrative agencies to hold legally required hearings or otherwise to comply with required administrative procedures (even if the agency's final decision is reviewable by way of administrative, rather than traditional, mandamus). See, *e.g.*, *Sustainability of Parks, Recycling & Wildlife Legal Defense Fund v County of Solano Dep't of Resource Mgmt.* (2008) 167 CA4th 1350, 84 CR3d 889 (county department compelled to hold hearing); *State Personnel Bd. v Department of Personnel Admin.* (2005) 37 C4th 512, 523, 36 CR3d 142 (mandate compelling compliance with existing disciplinary provisions); *California Correctional Peace Officers Ass'n v State Personnel Bd.* (1995) 10 C4th 1133, 1148, 43 CR2d 693 (mandate compelling State Personnel Board to hold hearing or render decision by date certain); *Forrest v Trustees of Cal. State Univ. & Colleges* (1984) 160 CA3d 357, 360, 206 CR 595 (mandate compelling hearing on grievance). See also *Saleeby v State Bar* (1985) 39 C3d 547, 561, 216 CR 367 (mandate compelling State Bar to provide hearings in which findings would be sufficient to allow judicial review); *Y.K.A. Indus., Inc. v Redevelopment Agency* (2009) 174 CA4th 339, 94 CR3d 424 (lacking evidence there were administrative proceedings of judicial character, with outcome subject to review in mandate, court erred in finding that plaintiff failed to exhaust mandatory judicial remedies—in form of petition for writ of mandate—before filing legal action).

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§2.32 2. To Review Quasi-Judicial Agency Decisions

Adjudicatory administrative decisions (*i.e.*, quasi-judicial decisions) are usually reviewed by way of administrative mandamus under CCP §1094.5. *Western States Petroleum Ass'n v Superior Court* (1995) 9 C4th 559, 566, 38 CR2d 139; *Katosh v Sonoma County Employees' Retirement Ass'n* (2008) 163 CA4th 56, 62 n4, 77 CR3d 324; *California Water Impact Network v Newhall County Water Dist.* (2008) 161 CA4th 1464, 1482, 75 CR3d 393. Administrative mandamus requires that the challenged decision result from a proceeding in which (1) a hearing is required to be held; (2) evidence is required to be taken; and (3) discretion in the determination of the facts is vested in the agency. CCP §1094.5(a). See §§3.3-3.6. See *McGill v Regents of the Univ. of Cal.* (1996) 44 CA4th 1776, 1785, 52 CR2d 466 (appeal of writ directing university to set aside decision denying tenure; court found no legal requirement that tenure decision result from evidentiary hearing, thus, traditional mandate applied). See also *Ohton v Board of Trustees of Cal. State Univ.* (2007) 148 CA4th 749, 766, 56 CR3d 111 (discussing administrative mandamus requirements in reversing summary judgment in civil action with directions to (1) permit motion for leave to amend complaint to add claim for writ of mandate, and (2) decide issues arising from that motion). Courts characterize the standard of review of quasi-adjudicatory decisions (usually made by agencies) as "abuse of discretion." *O.W.L. Found. v City of Rohnert Park* (2008) 168 CA4th 568, 585, 86 CR3d 1 (comparing and contrasting standard of review in traditional and administrative mandamus cases). Generally, this means review is limited to determining whether the decision was "arbitrary, capricious, or entirely lacking in evidentiary support." *American Bd. of Cosmetic Surgery v Medical Bd.* (2008) 162 CA4th 534, 547, 75 CR3d 574. As to legal issues, however, the courts apply de novo review. See §2.19.

For examples of cases in which traditional mandate has been sought, see §§2.39-2.69.

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§2.33 a. Traditional Mandate Applies When Statutory Requirements of CCP §1094.5 Not Met

If any of the three statutory criteria of CCP §1094.5 are not met (see §2.32), administrative adjudicatory decisions are reviewed by way of traditional mandate under CCP §1085. See, *e.g.*, *O.W.L. Found. v City of Rohnert Park* (2008) 168 CA4th 568, 585, 86 CR3d 1; *McGill v Regents of the Univ. of Cal.* (1996) 44 CA4th 1776, 1785, 52 CR2d 466.

The requirement that is most often not met is a "legally required" hearing. See *Keeler v Superior Court* (1956) 46 C2d 596, 600, 297 P2d 967 (hearing only as "deemed necessary"; thus review by traditional mandate); *Blue Cross v Department of Health Care Servs.* (2007) 153 CA4th 322, 329, 62 CR3d 772 (although informal oral presentation allowed, review procedures did not require hearing; thus review by traditional mandate); *Excelsior College v Board of Registered Nursing* (2006) 136 CA4th 1218, 1236, 39 CR3d 618 (no right to evidentiary hearing and thus no right to administrative mandamus; board's action was discretionary and not an abuse of discretion; thus no right to traditional mandate); *McGill v Regents of the Univ. of Cal.* (1996) 44 CA4th 1776, 1785, 52 CR2d 466 (hearing not required in connection with decision denying tenure; thus review by traditional mandate); *Bunnett v Regents of Univ. of Cal.* (1995) 35 CA4th 843, 848, 41 CR2d 567 (no provision in pension plan for evidentiary hearing if application for benefits was denied; thus review by traditional mandate); *Motors Ins. Corp. v Division of Fair Employment Practices* (1981) 118 CA3d 209, 215, 173 CR 332 (no provision for hearing or taking of evidence in connection with issuance of accusation by California Division of Fair Employment Practices; thus review by traditional mandate).

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§2.34 b. Exhaustion of Administrative Remedies

To obtain writ relief, a petitioner must have no other plain, speedy, or adequate remedy. See §§2.15-2.16. Thus, generally, administrative remedies must be exhausted before an administrative decision can be challenged through a mandate proceeding. See, *e.g.*, *Thomas v Shewry* (2009) 170 CA4th 1480, 1480, 89 CR3d 105 (traditional mandamus action barred because petitioner failed to exhaust administrative remedies); *California Water Impact Network v Newhall County Water Dist.* (2008) 161 CA4th 1464, 1484, 75 CR3d 393 (court did not need to decide whether traditional or administrative mandate applied because petitioner failed to exhaust administrative remedies); *Eight Unnamed Physicians v Medical Exec. Comm. of the Med. Staff of Washington Township Hosp.* (2007) 150 CA4th 503, 510, 59 CR3d 100 (petitioners should have appealed to board from decision denying request to consolidate disciplinary hearings); *Imagistics Int'l, Inc. v Department of Gen. Servs.* (2007) 150 CA4th 581, 590, 59 CR3d 18 (petitioner failed to exhaust administrative bid protest remedy). But see *O.W.L. Found. v City of Rohnert Park* (2008) 168 CA4th 568, 583, 86 CR3d 1 (explaining that exhaustion requirement does not implicate subject matter jurisdiction; under unique circumstances of case, failure to exhaust administrative remedies did not preclude review).

NOTE: In the class action context, a court may deem exhaustion of remedies by some of the putative class members as sufficient to satisfy the exhaustion requirement. *Tarkington v California Unemployment Ins. Appeals Bd.* (2009) 172 CA4th 1494, 92 CR3d 131, quoting *Friends of Mammoth v Board of Supervisors* (1972) 8 C3d 247, 268, 104 CR 761 ("requiring all putative class members [in administrative mandamus proceeding] to exhaust their remedies 'would serve no additional useful purpose'"). Although *Tarkington* arose in the administrative mandamus context it also would apply in the traditional mandamus context.

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§2.35 c. Other Statutory Forms of Writ Review of Agency Decisions

Special writ proceedings (*e.g.,* through a "writ of review") apply to some administrative agencies, such as the Public Utilities Commission, the Alcoholic Beverage Control Appeals Board, and the Workers' Compensation Appeals Board. On these proceedings and the agencies to which they apply, see §§4.28, 16.18-16.48.

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§2.36 3. To Compel Agency to Comply With Administrative Decision

Traditional mandate will issue to compel an agency to comply with a final administrative decision. See, *e.g.*, *Lomeli v Department of Corrections* (2003) 108 CA4th 788, 794, 134 CR2d 179 (mandate issued to compel agency to abide by State Personnel Board decision to reinstate employee with back pay).

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§2.37 4. To Review Quasi-Legislative Acts

Mandate generally will not lie to control legislative action unless such action is invalid (*i.e.,* exceeds the scope of the agency's authority) or is an abuse of discretion as a matter of law. See, *e.g.*, *Saleeby v State Bar* (1985) 39 C3d 547, 561, 216 CR 367 (challenge to reimbursement decision from State Bar's client security fund reviewed under traditional mandate because (1) no requirement that hearing be held or record made and (2) claim was fundamentally challenge to bar's promulgation of rules, which was quasi-legislative act); *Pacific Legal Found. v California Coastal Comm'n* (1982) 33 C3d 158, 168, 188 CR 104 (challenge to quasi-legislative act of adopting guidelines interpreting Coastal Act's access provisions); *Woods v Superior Court* (1981) 28 C3d 668, 678, 170 CR 484 (challenge to regulation's validity in adjudicatory hearing on relocation benefits); *Mission Hosp. Reg'l Med. Ctr. v Shewry* (2008) 168 CA4th 460, 85 CR3d 639, (writ issued invalidating rate freeze on health care reimbursements); *County of San Diego v Bowen* (2008) 166 CA4th 501, 82 CR3d 818 (writ issued invalidating Secretary of State's rules not adopted in accordance with Administrative Procedure Act); *State Bldg. & Constr. Trades Council v Duncan* (2008) 162 CA4th 289, 300, 76 CR3d 507 (writ sought on grounds director had misinterpreted and misapplied law); *California Water Impact Network v Newhall County Water Dist.* (2008) 161 CA4th 1464, 1483, 75 CR3d 393 (quasi-legislative actions must be challenged by traditional mandate); *County Sanitation Dist. No. 2 v County of Kern* (2005) 127 CA4th 1544, 1578, 27 CR3d 28 (CEQA petition challenging agency action that is legislative or quasi-legislative reviewed by traditional mandate); *Wilson v Hidden Valley Mun. Water Dist.* (1967) 256 CA2d 271, 276, 63 CR 889 (challenge to board's quasi-legislative decision to deny petitions to exclude land from water district). See also *20th Century Ins. Co. v Garamendi* (1994) 8 C4th 216, 275, 32 CR2d 807 (discussing what makes administrative action quasi-legislative as opposed to quasi-judicial in context of challenges to insurance regulations promulgated for implementation of Proposition 103).

For examples of cases in which traditional mandate has been sought, see §§2.39-2.69.

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§2.38 C. Decisions of Nongovernmental Corporations, Associations, and Officers

Traditional mandate lies to compel a nongovernmental entity ("corporation, board, or person") to perform a legal duty or to admit or reinstate a party to a right or office. CCP §1085. See, *e.g., Lee v Blue Shield* (2007) 154 CA4th 1369, 1378, 65 CR3d 612 (declaratory relief complaint should have been treated as mandate petition, and mandate issued compelling health care insurer to reinstate provider contract and conduct peer review hearing before terminating provider's contract); *Mileikowsky v Tenet Healthsystem* (2005) 128 CA4th 531, 554, 27 CR3d 171, disapproved in part on other grounds in *Mileikowsky v West Hills Hosp. & Med. Ctr.* (2009) 45 C4th 1259, 1273, 91 CR3d 516 (mandate sought to review conduct of hospital disciplinary hearing); *Unnamed Physician v Board of Trustees of St. Agnes Med. Ctr.* (2001) 93 CA4th 607, 619, 113 CR2d 309 (mandate sought to review hearing officer's prehearing rulings).

For examples of cases in which traditional mandate has been sought, see §§2.39-2.69.

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IV. EXAMPLES OF SPECIFIC CONTEXTS IN WHICH NONJUDICIAL ACTIONS REVIEWED BY TRADITIONAL MANDATE

§2.39 A. Issuance of Professional Licenses and Certificates

Traditional mandate will lie to challenge licensing and certificating decisions when the statutory requirements for administrative mandamus are not met. For example:

- California licensing board stopped evaluating out-of-state programs prospectively. See *Excelsior College v Board of Registered Nursing* (2006) 136 CA4th 1218, 1236, 39 CR3d 618 (no hearing required).
- Agency required to issue permit to operate hospital pharmacy. See *Warrack Med. Ctr. Hosp. v California State Bd. of Pharmacy* (1967) 249 CA2d 118, 122, 57 CR 85 (individual licensees barred from operating pharmacy, but no prohibition against corporate applicants comprised of licensees).
- Agency compelled to issue branch office licenses to optometrists. See *Rich v State Bd. of Optometry* (1965) 235 CA2d 591, 604, 45 CR 512 (no hearing required).

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§2.40 B. DMV Suspension or Revocation

Ordinarily, Department of Motor Vehicles (DMV) decisions to suspend or revoke a driver's license are reviewed under CCP §1094.5. See, *e.g.*, *Coombs v Pierce* (1991) 1 CA4th 568, 574, 2 CR2d 249 (driving under influence (DUI) suspension or revocation order reviewed under CCP §1094.5 unless Veh C §13559 specifies otherwise).

The DMV has a mandatory duty to impose suspensions or revocations in some DUI cases. It has no authority to review the underlying conviction precipitating the suspension or revocation. Accordingly, administrative mandamus will not lie to challenge the DMV's reliance on an underlying criminal conviction, including out-of-state convictions. If a driver wants to challenge the validity of that underlying conviction, the driver must do so: (1) in the court in which that decision was rendered; (2) in a mandate proceeding directed to the court that rendered that decision; or (3) in a criminal proceeding in which that conviction is used as a prior offense. *Thomas v DMV* (1970) 3 C3d 335, 337, 90 CR 586. See *Larsen v DMV* (1995) 12 C4th 278, 285, 48 CR2d 151 (same rule applies if conviction obtained in another state).

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Source: Civil Litigation/California Civil Writ Practice/2 Traditional Mandate/§2.41 C. Land Use Decisions and Issuance of Permits or Variances

§2.41 C. Land Use Decisions and Issuance of Permits or Variances

Traditional mandate is frequently used to challenge various land use decisions, including issuance or denial of permits or variances. For example:

- Regional park's acquisition of land did not constitute "dedication" of land for park or open space triggering statutory restrictions on disposition. *Ste. Marie v Riverside County Reg'l Park & Open-Space Dist.* (2009) 46 C4th 282, 93 CR3d 369.
- City prepared sufficient new water supply assessment during environmental review process. *O.W.L. Found. v City of Rohnert Park* (2008) 168 CA4th 568, 586, 86 CR3d 1.
- Coastal Commission properly denied development permit. *Charles A. Pratt Constr. Co. v California Coastal Comm'n* (2008) 162 CA4th 1068, 1072, 76 CR3d 466.
- City lacked authority to issue use exemption contrary to zoning. *Neighbors in Support of Appropriate Land Use v County of Tuolumne* (2007) 157 CA4th 997, 1004, 68 CR3d 882.
- Caltrans lacked authority to require compliance with local zoning ordinance as requirement for issuing state billboard permit. *Traverso v Department of Transp.* (1996) 46 CA4th 1197, 1204, 54 CR2d 434.
- City had ministerial duty to issue building permit in the absence of any discretionary provision in ordinance or law. *Prentiss v City of S. Pasadena* (1993) 15 CA4th 85, 89, 18 CR2d 641.
- City required to withhold building permits until it fixed amount of and imposed fees on developers. *Fontana Unified Sch. Dist. v City of Rialto* (1985) 173 CA3d 725, 734, 219 CR 254.

NOTE: Mandate cannot compel a zoning change, because zoning is a legislative act. *Gilliland v County of Los Angeles* (1981) 126 CA3d 610, 614, 179 CR 73.

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D. Assignment, Classification, and Discipline of Teachers and Students

§2.42 1. Teachers

Traditional mandate will lie to review decisions and actions concerning teachers when the statutory requirements of administrative mandamus are not met. For example:

- Professor's demotion was improper because collective bargaining agreement did not authorize dean to require a tenured professor to engage in any activity; agreement authorized dean only to make suggestions for improvement. *Moosa v State Personnel Bd.* (2002) 102 CA4th 1379, 1384, 126 CR2d 321.
- "Compressed" salary schedule violated state statute. *Adair v Stockton Unified Sch. Dist.* (2008) 162 CA4th 1436, 77 CR3d 62.
- Teacher entitled to be reclassified as regular employee. *Stryker v Antelope Valley Community College Dist*. (2002) 100 CA4th 324, 329, 122 CR2d 489.
- Transfer of teacher cannot violate teacher's constitutional rights. *Finot v Pasadena City Bd. of Educ.* (1967) 250 CA2d 189, 202, 58 CR 520.

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Source: Civil Litigation/California Civil Writ Practice/2 Traditional Mandate/§2.43 2. Students

§2.43 2. Students

Traditional mandate may also be appropriate to challenge decisions involving students. For example:

- Challenge to high school's refusal to allow student to play sports. *Zuehlsdorf v Simi Valley Unified Sch. Dist.* (2007) 148 CA4th 249, 251, 55 CR3d 467.
- Challenge to school district's policy of assigning late-enrolling students to alternative schools until space became available at student's school of residence. *Helena F. v West Contra Costa Unified Sch. Dist.* (1996) 49 CA4th 1793, 1796, 57 CR2d 605.
- Challenge to school board's student grooming requirements. *Akin v Board of Educ. of Riverside Unified Sch. Dist.* (1968) 262 CA2d 161, 163, 68 CR 557.

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E. Election Issues

§2.44 1. Reapportionment and Redistricting Issues

Traditional mandate can be appropriate to challenge a reapportionment plan. For example:

- Alternative writ of mandate issued and appointment of special masters to hear evidence at public hearings on proposed reapportionment plans and draft recommendations. Court retained jurisdiction and invited an application to dismiss if the reapportionment plans were enacted. Court subsequently accepted plans prepared by special masters, discharged the alternative writ of mandate, and denied the writ petition on ground there was no reason to believe parties would not accept the court's holding. *Wilson v Eu* (1991) 54 C3d 471, 286 CR 280.
- Mandate sought to resolve impasse created by legislature's failure to pass legislative and congressional reapportionment bills acceptable to governor in time for 1972 election; court retained jurisdiction to draft plans for 1974 and 1980 elections if legislature failed to act by end of 1972 legislative session. *Legislature v Reinecke* (1972) 6 C3d 595, 603, 99 CR 481; see also *Silver v Brown* (1965) 63 C2d 270, 282, 46 CR 308 (writ petition denied without prejudice to seek similar relief if legislature did not enact new congressional districting measure by close of regular 1967 session).
- Mandate sought to compel redistricting of supervisor districts. Writ denied but jurisdiction retained for further hearing and to enter further orders as necessary if board failed to act within 90 days. *Wiltsie v Board of Supervisors* (1966) 65 C2d 314, 317, 54 CR 320.

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§2.45 2. Election Processes

Traditional mandate can be appropriate to challenge election processes. For example:

- To compel an officer to conduct an election. *Hoffman v State Bar* (2003) 113 CA4th 630, 634, 6 CR3d 592.
- To compel the county registrar to accept a municipal judge candidate's designation of her occupation on the ballot as an administrative law judge. *Andrews v Valdez* (1995) 40 CA4th 492, 493, 46 CR2d 744.
- To compel the registrar of voters to accept a ballot argument and include it in voter information pamphlets. *Barnes v Wong* (1995) 33 CA4th 390, 394, 39 CR2d 417 (mandate denied because ballot argument was submitted after filing deadline).
- To prevent an election limited to members of a proposed district. *Fullerton Joint Union High Sch. Dist. v State Bd. of Educ.* (1982) 32 C3d 779, 787, 187 CR 398.
- To compel the governor to call a special election. *Jenkins v Knight* (1956) 46 C2d 220, 224, 293 P2d 6 (duty to call special election ministerial; mandate denied on facts).

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3. Certification of Initiative or Referendum Petition

§2.46 a. Challenging Placement on Ballot

Traditional mandate will lie to challenge the placement of initiatives or referendums on the ballot. For example:

- To compel the county clerk to certify that a referendum has the requisite number of signatures. *Wheelwright v County of Marin* (1970) 2 C3d 448, 451, 85 CR 809 (mandate denied); *Friends of Bay Meadows v City of San Mateo* (2007) 157 CA4th 1175, 1181, 68 CR3d 916 (mandate denied).
- To compel the city council to submit an initiative ordinance on firefighter's compensation to voters. *Kugler v Yocum* (1968) 69 C2d 371, 373, 71 CR 687.
- To compel the registrar of voters and county clerk to determine the sufficiency of a petition's signatures and, if sufficient, to place the initiative on the local ballot. *Farley v Healey* (1967) 67 C2d 325, 326, 62 CR 26; *Friends of Bay Meadows v City of San Mateo* (2007) 157 CA4th 1175, 1186, 68 CR3d 916.
- To direct the Secretary of State to refrain from verifying signatures gathered on an initiative petition, and from certifying and placing the initiative on the ballot, because the initiative violated the single-subject requirement. *California Trial Lawyers Ass'n, Inc. v Eu* (1988) 200 CA3d 351, 357 n2, 245 CR 916.
- To direct city clerk to refrain from certifying referendum petition based on failure to comply with statutory "text" requirement. *Lin v City of Pleasanton* (2009) 176 CA4th 408, 96 CR3d 730.

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§2.47 b. Compelling Processing of Initiative Petition

Traditional mandate can be used to compel election officials to process initiative and referendum petitions. For example:

- To direct city elections official to certify an initiative for the ballot unless the initiative's noncompliance with election requirements is manifest on the face of the petition. *Alliance for a Better Downtown Millbrae v Wade* (2003) 108 CA4th 123, 129, 133 CR2d 249 (mandate issued; election official exceeded scope of ministerial duties by using evidence extrinsic to initiative petition to justify refusal to certify initiative).
- To compel the city clerk to accept and process an initiative petition. *Friends of Bay Meadows v City of San Mateo* (2007) 157 CA4th 1175, 1186, 68 CR3d 916 (mandate denied because initiative petition did not contain enough valid signatures); *Duran v Cassidy* (1972) 28 CA3d 574, 579, 104 CR 793 (mandate issued compelling city clerk to accept and process initiative petition).
- To compel the acceptance of a referendum petition. *Defend Bayview Hunters Point Comm. v City & County of San Francisco* (2008) 167 CA4th 846, 858, 84 CR3d 486 (mandate denied; clerk had ministerial duty to reject petition to force referendum that failed to include copy of redevelopment plan); *Billig v Voges* (1990) 223 CA3d 962, 963, 273 CR 91 (mandate denied; referendum petition rejected for failure to comply with election statute that required text of ordinance to be printed in referendum petition).

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§2.48 c. Pre- or Post-Election Review of Initiative

Traditional mandate generally will not lie to challenge the legality of an initiative measure before an election unless the measure clearly is invalid on its face. *Brosnahan v Eu* (1982) 31 C3d 1, 4, 181 CR 100 (petitions for writ of mandate and prohibition to prevent Secretary of State from certifying initiative and taking other steps to submit initiative denied). In *Independent Energy Producers Ass'n v McPherson* (2006) 38 C4th 1020, 1024, 44 CR3d 644, the court held that the *Brosnahan* presumption against pre-election review did not apply when the challenge to a measure was based on the grounds that the conferral of additional regulatory authority could not be enacted by initiative. The supreme court noted that this type of challenge is one that can be raised post election—when there is more time for briefing and deliberation—and that deferring a challenge often will be the wiser course.

Pre-election review is warranted for challenges based on the failure to comply with essential procedural requirements necessary to qualify an initiative for the ballot. See, *e.g., Costa v Superior Court* (2006) 37 C4th 986, 1005, 39 CR3d 470 (challenge to petition circulation process). A challenge to an initiative based on a violation of the single-subject rule may be heard before the election because of the constitutional prohibition against submitting an initiative that addresses more than one subject to the electorate. *Senate v Jones* (1999) 21 C4th 1142, 1154, 90 CR2d 810 (mandate issued restraining Secretary of State and county registrars from placing initiative on ballot because it violated single-subject rule contained in Cal Const art II, §8(d)). Compare *Hernandez v County of Los Angeles* (2008) 167 CA4th 12, 84 CR3d 10 (appellate court refused pre-election challenge to local ballot measure and considered merits on appeal from denial of writ petition). For examples of writ actions challenging validity of legislative actions, see §2.24.

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§2.49 F. Admission or Restoration of Right to Office

Traditional mandate may be appropriate to determine who holds a particular office. See, *e.g., Woodmansee v Lowery* (1959) 167 CA2d 645, 648, 334 P2d 991 (mandate proper to determine which claimant to judgeship was de facto officer; legal title was not adjudicated, but court examined question of legal title). However, mandate is not ordinarily the proper remedy to determine title to public office. See §2.10.

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G. Unions and Employee Organizations

§2.50 1. Compelling Negotiation

Other than some statutory exceptions (see, *e.g.*, Govt C §3542 (writ review allowed only under specified circumstances) and Cal Rules of Ct 8.495-8.498), traditional mandate may lie to compel governmental entities to negotiate with unions and other employee organizations. See, *e.g.*, *Santa Clara County Counsel Attorneys Ass'n v Woodside* (1994) 7 C4th 525, 541, 28 CR2d 617 (mandate issued compelling county to meet and confer with county counsel's union); *Huntington Beach Police Officers Ass'n v City of Huntington Beach* (1976) 58 CA3d 492, 495, 129 CR 893 (mandate issued directing city to reinstate 4-day workweek); *Los Angeles County Employees Ass'n, Local 660 v County of Los Angeles* (1973) 33 CA3d 1, 8, 108 CR 625 (mandate issued compelling county to negotiate with unions as to size of worker caseloads).

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§2.51 2. Compelling Arbitration

Arbitration can be compelled by petition. See, *e.g., Butchers' Union Local 229 v Cudahy Packing Co.* (1967) 66 C2d 925, 927, 59 CR 713 (compelling arbitration of grievance under terms of collective bargaining agreement); *American Fed'n of State, County & Mun. Employees, Local 1902, AFL-CIO v Metropolitan Water Dist.* (2005) 126 CA4th 247, 261, 24 CR3d 285 (mandate denied because grievance was untimely and memorandum of understanding did not contain agreement to arbitrate).

NOTE: As the current update to this publication was going to press, the California Supreme Court accepted review of *United Teachers Los Angeles v Los Angeles Unified Sch. Dist.* (review granted Dec. 23, 2009, S177403; superseded opinion at 177 CA4th 863, 99 CR3d 524). In a now-superseded opinion, the court of appeal reversed an order denying a petition to compel arbitration. On review, the supreme court will consider the following issue: Can a school district be required to arbitrate disputes over the granting of a charter school petition under the terms of a collective bargaining agreement, or does Ed C §47611.5(e) preclude referring such a dispute to arbitration? The outcome of this case will be included in a future update.

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§2.52 3. Holding Hearings

In certain circumstances, an expelled union member may use mandate to obtain a fair hearing on the charges against him or her. See, *e.g., Cason v Glass Bottle Blowers Ass'n* (1951) 37 C2d 134, 140, 231 P2d 6 (mandate issued ordering labor union to afford member full and fair hearing or to reinstate member in union).

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§2.53 4. Inspecting Records

Mandate may lie to compel a labor union to permit a member to inspect certain union financial records when the member has a substantial private interest to protect. *Deacon v International Union of Operating Eng'rs, Local No. 12* (1965) 236 CA2d 302, 46 CR 11.

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§2.54 H. Corporations and Corporate Officers

Traditional mandate may lie to:

- Compel a corporation to call an annual shareholders' meeting to elect a board of directors. *Dedrick v California Whaling Co.* (1936) 16 CA2d 284, 288, 60 P2d 551.
- Compel a corporation to file amended articles of incorporation. *Pratt-Low Preserving Co. v Jordan* (1933) 217 C 292, 295, 18 P2d 676.
- Compel a former officer to return corporate records (*Potomac Oil Co. v Dye* (1909) 10 CA 534, 537, 102 P 677) and other personal property (*Liberal Catholic Church v Rogers* (1944) 65 CA2d 196, 198, 150 P2d 486) to the corporation.
- Compel the examination of corporate property. *Hobbs v Tom Reed Gold Mining Co.* (1913) 164 C 497, 502, 129 P 781.
- Compel the inspection of corporate books. *Johnson v Langdon* (1902) 135 C 624, 625, 67 P 1050; *Most v First Nat'l Bank* (1966) 246 CA2d 425, 426, 54 CR 669. See *Hartman v Hollingsworth* (1967) 255 CA2d 579, 582, 63 CR 563 (reversing issuance of writ ordering inspection of dissolved corporation's books and records because petitioner had no statutory right to inspect books and records).

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§2.55 I. Private Organizations and Associations

Traditional mandate will lie to:

- Challenge hearing procedures and dismissal from medical staff. *Mileikowsky v Tenet Healthsystem* (2005) 128 CA4th 531, 554, 27 CR3d 171, disapproved in part on other grounds in *Mileikowsky v West Hills Hosp. & Med. Ctr.* (2009) 45 C4th 1259, 1273, 91 CR3d 516 (traditional mandate to review whether hearing officer has authority to terminate peer review hearing).
- Compel a health care insurer to reinstate a provider contract and hold peer review hearing process before terminating provider's contract. *Lee v Blue Shield* (2007) 154 CA4th 1369, 1378, 65 CR3d 612.
- Challenge prehearing rulings by hearing officer. *Unnamed Physician v Board of Trustees of St. Agnes Med. Ctr.* (2001) 93 CA4th 607, 619, 113 CR2d 309.
- Challenge more lenient member discipline imposed by parent organization, which reversed state organization's expulsion. *California Dental Ass'n v American Dental Ass'n* (1979) 23 C3d 346, 350, 152 CR 546 (mandate issued to vacate discipline decision imposed by parent organization and to rehear matter in light of ethical rules of state organization).
- Challenge a hospital's refusal to consolidate disciplinary hearings for individual doctors who, as a group, decided to move their practice from one hospital to another. *Eight Unnamed Physicians v Medical Exec. Comm. of the Med. Staff of Washington Township Hosp.* (2007) 150 CA4th 503, 510, 59 CR3d 100.

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§2.56 J. Enforcement of Civil Rights

A claim involving federal constitutional rights may be joined with a mandate action. *Lockyer v County of Santa Cruz* (2006) 416 F Supp 2d 797, 799 (mandate sought to compel county to comply with accessibility requirements for individuals with physical disabilities and injunction sought for compliance with Americans with Disabilities Act). Traditional mandate may lie to enforce a civil right. See, *e.g.*, *City & County of San Francisco v State* (2008) 43 C4th 757, 857, 76 CR3d 683 (mandate issued to compel state officials to ensure that local officials perform their duty to enforce marriage statutes without making distinction between opposite-sex and same-sex couples); *League of Women Voters v McPherson* (2006) 145 CA4th 1469, 1473, 52 CR3d 585 (mandate issued to compel Secretary of State to issue memorandum to county clerks and election officials informing them that only persons convicted of felony and on parole after felony conviction, but not persons on felony probation, were disenfranchised by Cal Const art II, §4); *Stone v Board of Dirs.* (1941) 47 CA2d 749, 754, 118 P2d 866 (mandate issued to compel board and city officials to admit black petitioners to privileges and facilities of municipal bath houses and swimming pool).

Mandate also may be appropriate to challenge governmental practices that are discriminatory or prior restraints on the exercise of First Amendment rights, including restraints on political activities of students, teachers, and other public employees. See, *e.g.*, *Adcock v Board of Educ.* (1973) 10 C3d 60, 65, 109 CR 676 (mandate used to invalidate teacher's transfer to different school, based on teacher's exercise of free speech); *Los Angeles Teachers Union, Local 1021 v Los Angeles City Bd. of Educ.* (1969) 71 C2d 551, 553, 78 CR 723 (mandate used to restrain board and other school administrators from interfering with teachers' right to circulate petition during non-work time); *Hegwer v Board of Civil Serv. Comm'rs* (1992) 5 CA4th 1011, 1015, 7 CR2d 389 (mandate used to challenge weight requirements for paramedics as sex discrimination; denied); *Hardy v Stumpf* (1974) 37 CA3d 958, 960, 112 CR 739 (mandate used to challenge height and weight requirements for police officers as impermissible sex discrimination; granted).

PRACTICE TIP: In most civil rights cases and many cases involving constitutional rights, the court will deny writ review because there is likely an adequate legal remedy by way of a complaint for damages or injunctive relief. See §2.15.

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§2.57 K. Taxes

Mandate can be used by one governmental entity to compel another entity or its taxing officials to perform duties required by tax laws, *e.g.*, to release funds for use as required by statute. See, *e.g.*, *City of Dinuba v County of Tulare* (2007) 41 C4th 859, 868, 62 CR3d 614 (redevelopment agency sought mandate to compel county to pay retroactively taxes due to agency after audit corrected tax rate codes assigned to parcels within redevelopment project); *Redevelopment Agency of the City of San Bernardino v County of San Bernardino* (1978) 21 C3d 255, 262, 145 CR 886 (redevelopment agency sought mandate to compel county to reassess taxes on property acquired by city and to reallocate tax revenues based on reassessment).

Mandate is not available when a tax refund action can test the legality of an action. See, *e.g.*, *Malibu W. Swimming Club v Flournoy* (1976) 60 CA3d 161, 164, 131 CR 279 (review of additional tax rate hike could be had by paying extra tax, then filing tax refund suit).

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§2.58 1. Compelling Taxation or Assessment

Traditional mandate will lie to compel taxing authorities to comply with tax laws, including levying taxes and making assessments as required by law. See, *e.g.*, *Huntington Park Redev. Agency v Martin* (1985) 38 C3d 100, 103, 211 CR 133 (mandate issued compelling redevelopment agency administrator to publish sales and use tax ordinance adopted by agency); *City & County of San Francisco v Farrell* (1982) 32 C3d 47, 51, 184 CR 713 (city sought writ compelling controller to certify availability of funds generated from proceeds of tax increase); *County of Sacramento v Hickman* (1967) 66 C2d 841, 845, 59 CR 609 (mandate issued compelling county assessor to comply with statute requiring assessment of all taxable property at announced fraction of its full cash value); *May v Board of Dirs. of El Camino Irrigation Dist.* (1949) 34 C2d 125, 130, 208 P2d 661 (mandate issued compelling directors of irrigation district to levy assessments to pay bonds and interest). See also *City of Dinuba v County of Tulare* (2007) 41 C4th 859, 868, 62 CR3d 614 (city and redevelopment agency could seek writ of mandate to compel county to comply with statutory duty to calculate and distribute tax revenue correctly, and to recover tax revenue mistakenly distributed to wrong agencies); *Santa Clara County Local Transp. Auth. v Guardino* (1995) 11 C4th 220, 228, 45 CR2d 207 (original writ proceeding initiated in appellate court by local transportation agency to validate sales tax that passed with less than 60-percent vote; writ denied because tax was invalid).

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§2.59 2. Compelling Record-Keeping and Handling Duties

Traditional mandate will lie to compel compliance with statutory duties in connection with documents and records. See, *e.g.*, *State Bd. of Equalization v Watson* (1968) 68 C2d 307, 312, 66 CR 377 (mandate issued compelling assessor to comply with statutory duty to make available to board records pertaining to assessing commercial airlines). When tax is duly and fully paid, mandate will lie to compel collector to issue official receipt. See, *e.g., Consolidated Title Sec. Co. v Hopkins* (1934) 1 C2d 414, 416, 35 P2d 320 (writ denied because amount tendered was insufficient).

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§2.60 3. Compelling Tax Authority to Review Claim or Hear Appeal

Traditional mandate will lie to compel a board of equalization that has unlawfully refused to hear an appeal challenging an assessment to hear the merits of the appeal. See, *e.g., Sunset Retirement Villa v Dear* (1997) 58 CA4th 948, 955, 68 CR2d 416 (mandate issued compelling local tax assessment board to hear taxpayer's appeal on merits). See also *Little v Los Angeles County Assessment Appeals Bds.* (2007) 155 CA4th 915, 922, 66 CR3d 401 (discussing *Sunset*'s limited application; suit for refund of taxes adequate remedy, thus no need for writ of mandate).

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§2.61 4. Reviewing Assessment Practices

Some county assessment practices can be challenged through traditional mandate. See, *e.g.*, *Smith v Anderson* (1967) 67 C2d 635, 637, 63 CR 391 (reversing dismissal of writ proceeding to compel county tax collector to request separate valuations from county assessor for undivided interests in property owned by state as payment for delinquent taxes); *County of Sacramento v Hickman* (1967) 66 C2d 841, 845, 59 CR 609 (mandate issued compelling county assessor to comply with statute requiring assessment of all taxable property at announced fraction of its full cash value); *Board of Educ. v Watson* (1966) 63 C2d 829, 831, 48 CR 481 (writ proceeding to compel county assessor to supply school boards within county with written estimated total assessed valuation of taxable property in their districts; writ denied, but assessor directed to supply such information on future requests).

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§2.62 5. Exception: Mandate Will Not Lie to Challenge Assessment

Mandate will not lie to challenge an assessment. A taxpayer must avail itself of the equalization appeals process, and if that process is unsuccessful, pay the tax owed and file a refund action. See, *e.g.*, *PG&E v State Bd. of Equalization* (1980) 27 C3d 277, 281, 165 CR 122 (writ denied because adequate remedy for error in assessment process existed at law); *Little v Los Angeles County Assessment Appeals Bds.* (2007) 155 CA4th 915, 922, 66 CR3d 401 (suit for refund of taxes adequate remedy, thus no need for writ of mandate). The assessment decision is an exercise of the taxing agency's discretion, and the agency cannot be compelled to exercise its discretion in a particular way. See, *e.g.*, *Stevens v Fox Realty Corp.* (1972) 23 CA3d 199, 206, 100 CR 63 (mandate will not lie to compel different result after lawful exercise of discretion in setting assessment amount).

If, however, a statute provides for a method of property assessment in the event a taxing agency fails to assess property as required, then mandate may lie to compel the assessor to accept an assessment using that method. See, *e.g.*, *Bunker v County of Orange* (2002) 103 CA4th 542, 550, 126 CR2d 825 (mandate available to force county to accept taxpayer's assessment of property value if (as per statute) county failed to respond to request for reassessment for 2 years).

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§2.63 6. Exception: Mandate Will Not Lie to Prevent Collection of Property Taxes

Mandate will not lie to prevent the collection of property taxes. Rev & T C §4807. See, *e.g.*, *Connolly v County of Orange* (1992) 1 C4th 1105, 1113, 4 CR2d 857 (mandate did not lie, for additional reasons that no timely claim was filed and neither county nor assessor had duty to grant claimed property tax exemption); *Community Facilities Dist. v Harvill* (1999) 74 CA4th 876, 882, 88 CR2d 405 (policy underlying statute prohibiting prepayment use of mandate is to permit revenue collection during pendency of litigation). A tax refund action is an adequate remedy at law to challenge an overpayment, thus mandate is not available. See §2.15. See also *Merced County Taxpayers Ass'n v Cardella* (1990) 218 CA3d 396, 400, 267 CR 62 (mandate denied because taxpayers sought assessment adjustment to avoid payment of future taxes; taxpayers' disclaimer of refund for past taxes did not change nature of claim).

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§2.64 L. Statutory Payment Obligations

Traditional mandate will lie to enforce a statutory payment obligation, if the law fixes the amount of the obligation and if payment involves the performance of a ministerial duty. See 8 Witkin, California Procedure, *Extraordinary Writs* §§90-91 (5th ed 2008). For example, mandate is proper to compel:

- Retroactive payment of taxes due to an agency after an audit corrected the tax rate codes assigned to parcels within a redevelopment project. *City of Dinuba v County of Tulare* (2007) 41 C4th 859, 867, 62 CR3d 614.
- Payment of a salary when a dispute concerns the construction of legislation giving rise to the duty to pay it. *Coan v California* (1974) 11 C3d 286, 291, 113 CR 187; *Veguez v Governing Bd. of Long Beach Unified Sch. Dist.* (2005) 127 CA4th 406, 413, 25 CR3d 526 (mandate challenging school district's denial of differential-pay sick leave).
- A controller and other officials to certify the availability of funds for payment on a public improvements contract as set forth in the city charter. *Flora Crane Serv., Inc. v Ross* (1964) 61 C2d 199, 201, 37 CR 425.
- City officials to certify and approve payrolls showing that petitioners were entitled to vacation pay for services provided before discharge. *Tevis v City & County of San Francisco* (1954) 43 C2d 190, 200, 272 P2d 757.

Mandate generally will not lie, however, to enforce a contractual obligation against, or to compel payment of money by, a public entity. In such situations, an action at law for damages is usually adequate and thus mandate is unavailable. See, *e.g., Wenzler v Municipal Court* (1965) 235 CA2d 128, 132, 45 CR 54.

PRACTICE TIP: Although a mandate action against a public entity may result in the entity's payment or release of money, the action is not one for money and the judgment is not "damages" as contemplated by the Government Claims Act. Understanding the nature of the requested action that may result in the payment of money by the public agency will eliminate any misconceptions as to the judgment. See *City of Dinuba v County of Tulare* (2007) 41 C4th 859, 867, 62 CR3d 614 (city redevelopment agency sought mandate to compel county to pay retroactively taxes due to agency after audit corrected tax rate codes assigned to parcels within redevelopment project).

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Source: Civil Litigation/California Civil Writ Practice/2 Traditional Mandate/§2.65 M. Issuance of Subpoenas

§2.65 M. Issuance of Subpoenas

Traditional mandate will lie to challenge the issuance of or failure to issue subpoenas:

- In administrative proceedings. *Mosk v Superior Court* (1979) 25 C3d 474, 479, 159 CR 494 (mandate issued to order superior court to quash subpoena issued to associate supreme court justice by Commission on Judicial Performance to compel testimony at public hearing); *Shively v Stewart* (1966) 65 C2d 475, 481, 55 CR 217 (mandate issued to enforce prehearing discovery rights in administrative proceedings before State Board of Medical Examiners; traditional mandate proper because subpoena issuance is mandatory before, though not during, hearing under Administrative Procedure Act). See California Administrative Mandamus §5.28 (3d ed Cal CEB 2003).
- By county clerk. *Patterson v Sharp* (1967) 253 CA2d 838, 61 CR 517 (mandate issued compelling clerk to issue subpoenas to city police officers without payment of witness fees; officers were participants in (*i.e.*, defendants) and eyewitnesses to accident that formed basis of underlying action).

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§2.66 N. Consideration of Claim

Traditional mandate will issue to compel consideration of a claim. See, *e.g., Hobbs v Northeast Sacramento County Sanitation Dist.* (1966) 240 CA2d 552, 49 CR 606 (mandate issued to compel agency to consider petitioner's wrongful death claim).

Mandate will not lie to enforce a claim or judgment against the state, state officers, or state employees, by attachment, garnishment, execution, or mandate to reach state funds or property. Govt C §§965.5-965.6.

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§2.67 O. Publication of Notice

Traditional mandate will lie to compel publication of required public notices. See, *e.g.*, *City of Santa Clara v Von Raesfeld* (1970) 3 C3d 239, 243, 90 CR 8 (mandate issued compelling city manager to mail notice of sale of bonds under city resolution); *City of Santa Monica v Grubb* (1966) 245 CA2d 718, 720, 54 CR 210 (mandate issued compelling city clerk to publish notice inviting sealed bids for purchase of water revenue bonds).

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P. Public Records Act

§2.68 1. Mandate for Denial of Disclosure

If a public entity denies a request for disclosure of public records under the California Public Records Act (PRA) (Govt C §§6250-6276.48), the requesting party can seek review of that action by filing an action for injunctive or declaratory relief, or by way of mandate. Govt C §6258. See, *e.g.*, *BRV, Inc. v Superior Court* (2006) 143 CA4th 742, 758, 49 CR3d 519 (mandate issued compelling disclosure of private investigator's report on school superintendent's alleged misconduct and school board's alleged "sweetheart deal" with superintendent to keep report confidential); *Bakersfield City Sch. Dist. v Superior Court* (2004) 118 CA4th 1041, 1046, 13 CR3d 517 (mandate issued compelling disclosure of disciplinary records of school district employee when complaints against employee were "of a substantial nature" and reasonable cause existed to believe complaints were well founded).

The superior court's order in such an action is reviewable solely by writ of mandate. Govt C §6259.

A public entity is not entitled to initiate proceedings under the PRA to determine its disclosure obligations. See, *e.g. Filarsky v Superior Court* (2002) 28 C4th 419, 434, 121 CR2d 844.

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§2.69 2. No Requirement of Inadequate Remedy at Law

In *Wilder v Superior Court* (1998) 66 CA4th 77, 77 CR2d 629, the court of appeal held that a petitioner does not need to establish lack of an adequate remedy at law to obtain public documents under Govt C §6258. The court noted that the legislature had expressly made legal proceedings and mandate available to review a denial of a disclosure request, holding that the statutory enforcement provision is not the equivalent of ordinary mandate. The court of appeal issued a writ compelling the superior court to set aside its dismissal order and reconsider the merits of the writ petition. 66 CA4th at 82.

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3

Administrative Mandamus

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I. SCOPE OF CHAPTER §3.1

II. NATURE OF ADMINISTRATIVE MANDAMUS §3.2
- A. Requirements for Administrative Mandamus §3.3
  - 1. Hearing Required by Law §3.4
  - 2. Evidence Required to Be Taken §3.5
  - 3. Discretion Vested in Hearing Officer or Decision-Maker §3.6
- B. Review Generally Limited to Administrative Record §3.7
- C. Scope of Judicial Review in Administrative Mandamus Proceedings §3.8
  - 1. Did the Administrative Body Proceed Without or in Excess of Jurisdiction?
    - a. Jurisdiction Limited by Statute or Constitution §3.9
    - b. Administrative Reconsideration or Modification of Decision §3.10
  - 2. Was the Petitioner Provided a Fair Hearing? §3.11
  - 3. Did the Administrative Body Prejudicially Abuse Its Discretion? §3.12
    - a. Administrative Body Did Not Proceed as Required by Law §3.13
    - b. Agency's Decision Not Supported by the Findings §3.14
    - c. Agency's Findings Not Supported by Evidence §3.15
      - (1) Substantial Evidence Standard §3.16
      - (2) Independent Judgment Standard §3.17

III. DIFFERENCES BETWEEN TRADITIONAL AND ADMINISTRATIVE MANDAMUS PROCEEDINGS
- A. Nature and Fundamental Requisites of the Writs §3.18
- B. Filing Deadlines §3.19

IV. CHOOSING BETWEEN WRIT OF TRADITIONAL AND ADMINISTRATIVE MANDAMUS
- A. Checklist: Determining Appropriate Writ §3.20
- B. Pleading in the Alternative §3.21

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§3.1 I. SCOPE OF CHAPTER

This chapter compares traditional and administrative mandamus and provides analytical tools for determining which writ a petitioner should seek in a particular case. In doing so, the chapter provides only a summary overview of administrative mandamus, describing the requirements for and limitations of its use. A detailed discussion of administrative mandamus appears in California Administrative Mandamus (3d ed Cal CEB 2003). On traditional mandamus (mandate), see chap 2 of this book.

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§3.2 II. NATURE OF ADMINISTRATIVE MANDAMUS

Administrative mandamus is a statutorily created species of mandamus used to review certain administrative decisions. Administrative mandamus is authorized and governed by CCP §1094.5, not the traditional mandamus statute, CCP §1085. However, many of the procedural rules applicable to traditional mandamus also apply to administrative mandamus. On traditional mandamus, see chap 2.

NOTE: The terms "mandamus" and "mandate" are used interchangeably in practice and are synonymous. CCP §1084. This text uses the terminology "administrative mandamus" to refer to writ proceedings under CCP §1094.5, and "traditional mandamus," "traditional mandate," or "mandate" to refer to writ proceedings under CCP §1085.

Administrative mandamus is akin to an appeal in a civil case. In seeking writ review under §1094.5, a petitioner is essentially "appealing" from an administrative adjudicatory decision to the superior court. There are three requirements, set out in §1094.5, that must be met for writ review to be proper by way of administrative mandamus, rather than traditional mandamus. See §3.3.

On the nature of administrative mandamus proceedings, see California Administrative Mandamus, chap 1 (3d ed Cal CEB 2003).

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§3.3 A. Requirements for Administrative Mandamus

An administrative decision is reviewable by way of administrative mandamus under CCP §1094.5, rather than traditional mandamus under CCP §1085, when:

- A hearing in the underlying administrative proceeding is required by law (see §3.4);
- Evidence is required to be taken at the hearing (see §3.5); and
- Discretion in the determination of contested factual issues is vested in the administrative decision-maker. See §3.6.

Broadly speaking, the type of administrative decision reviewable by administrative mandamus is called an adjudicatory or quasi-judicial decision. Other types of actions and decisions by governmental and private bodies, such as quasi-legislative actions and ministerial actions, are reviewed by way of traditional mandamus under CCP §1085. See *Katosh v Sonoma County Employees' Retirement Ass'n* (2008) 163 CA4th 56, 62 n4, 77 CR3d 324. Traditional mandamus also applies to administrative adjudicatory decisions when §1094.5's three statutory requirements for administrative mandamus are not met, *e.g.*, when a hearing is not required by law. See §3.18. On traditional mandamus, see chap 2.

PRACTICE TIP: Some statutory schemes specifically require review of administrative decisions under CCP §1094.5. See, *e.g.*, Welf & I C §14171(j) (review of director's decision on social service benefits audit); *Phelps v State Water Resources Control Bd.* (2007) 157 CA4th 89, 98, 68 CR3d 350 (under Water C §1126, orders of SWRCB are reviewed via CCP §1094.5); *County of Sonoma v Commission on State Mandates* (2000) 84 CA4th 1264, 1278, 101 CR2d 784 (under Govt C §17559, decisions of Commission on State Mandates reviewed via CCP §1094.5). When seeking writ review of an administrative decision, check applicable statutes, operating procedures, and organizational documents to determine whether they specify a particular method of judicial review. See §3.20 and chaps 2, 4.

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§3.4 1. Hearing Required by Law

The first requirement for writ review under CCP §1094.5 is that a hearing in the underlying administrative proceeding is required by law. See CCP §1094.5(a). If a hearing is not legally required, review by administrative mandamus is unavailable. See, *e.g., Keeler v Superior Court* (1956) 46 C2d 596, 599, 297 P2d 967 (CCP §1094.5 inapplicable because hearing not required by statute or agency's own rules); *O.W.L. Found. v City of Rohnert Park* (2008) 168 CA4th 568, 585, 86 CR3d 1 (although city chose to hold public hearing, no hearing was required to be held as matter of law; thus, case was properly pursued as traditional mandamus action); *Blue Cross v State Dep't of Health Servs.* (2007) 153 CA4th 322, 329, 62 CR3d 772 (traditional mandamus applied to hearing officer's decision because hearing was not required); *Bunnett v Regents of Univ. of Cal.* (1995) 35 CA4th 843, 848, 41 CR2d 567 (when hearing is not required, administrative adjudicatory decision is reviewed by way of traditional mandamus, not administrative mandamus).

The "required" administrative hearing need not be a formal, trial-type proceeding, but may be comparatively casual, sometimes conducted in the hearing officer's office or a conference room. See, *e.g., Topanga Ass'n for a Scenic Community v City & County of Los Angeles* (1974) 11 C3d 506, 518, 113 CR 836 (noting that land-use decisions often arise out of quasi-judicial proceedings that may be characterized as "casual"). In fact, a required hearing can be on documents only. *Friends of the Old Trees v Department of Forestry & Fire Protection* (1997) 52 CA4th 1383, 1391, 61 CR2d 297 (hearing requirement satisfied by purely documentary proceedings). But see *State Bd. of Chiropractic Exam'rs v Superior Court* (2009) 45 C4th 963, 978 n3, 89 CR3d 576 (noting court of appeal relied on *Friends of Trees* and one earlier case to conclude that CCP §1094.5 applied and expressing "no view as to the validity of these decisions").

A hearing is required if mandated by statute or administrative regulations and procedures. Compare, *e.g., Pomona College v Superior Court* (1996) 45 CA4th 1716, 1729, 53 CR2d 662 (hearing requirement in faculty handbook for review of tenure decisions sufficient for §1094.5), with *Bunnett v Regents of Univ. of Cal.* (1995) 35 CA4th 843, 848, 41 CR2d 567 (optional hearing not sufficient for §1094.5).

The hearing need not have taken place for §1094.5 to apply, as long as it was legally required. See, *e.g., Helene Curtis, Inc. v Los Angeles County Assessment Appeals Bds.* (2004) 121 CA4th 29, 37, 16 CR3d 658 (CCP §1094.5 applicable even if hearing not held).

On the legally required hearing requirement, see §2.33; California Administrative Mandamus §§5.8-5.9 (3d ed Cal CEB 2003).

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§3.5 2. Evidence Required to Be Taken

The second requirement for writ review under CCP §1094.5 is that it is legally required that evidence be taken at the administrative hearing. See CCP §1094.5(a). If the presentation of evidence is not legally required, review must be by traditional mandamus rather than administrative mandamus. See, *e.g., Burt v County of Orange* (2004) 120 CA4th 273, 282, 15 CR3d 373 (CCP §1094.5 review not applicable when there was no clear requirement that evidence be taken); *Taylor v State Personnel Bd.* (1980) 101 CA3d 498, 502, 161 CR 677 (CCP §1094.5 not applicable when disciplinary procedures did not require that evidence be taken).

JUDICIAL PERSPECTIVE: In "real life" this issue rarely arises because most administrative schemes provide for the taking of evidence, both oral and documentary.

On the presentation of evidence requirement, see California Administrative Mandamus §§1.14, 5.8 (3d ed Cal CEB 2003).

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§3.6 3. Discretion Vested in Hearing Officer or Decision-Maker

The third requirement for writ review under CCP §1094.5 is that discretion in the determination of contested factual issues is vested in the administrative decision-maker. See CCP §1094.5(a). Indeed, the essence of administrative mandamus is judicial review of a discretionary, adjudicatory *decision* by an administrative decision-maker. See, *e.g., Ocean Park Assoc. v Santa Monica Rent Control Bd.* (2004) 114 CA4th 1050, 1061, 8 CR3d 421. If the administrative decision-maker has no discretion in the determination of the facts, *i.e.*, if the decision-maker's action is ministerial, writ review must be by way of traditional mandamus under CCP §1085 rather than by way of administrative mandamus under §1094.5. On ministerial decisions and traditional mandate, see §§2.5-2.7. On ministerial decisions requiring no exercise of discretion, see California Administrative Mandamus §§5.23-5.24 (3d ed Cal CEB 2003).

There are many types of adjudicatory decisions in which discretion in the determination of contested factual issues is vested in the administrative decision-maker. Examples can include: whether a professional's license should be revoked, whether a public employee or school teacher should be disciplined or terminated, and whether a local governing body should approve or deny a conditional use permit. On the types of adjudicatory decisions subject to review by administrative mandamus, see California Administrative Mandamus §§5.2-5.18 (administrative mandamus), 5.19-5.29 (traditional mandamus) (3d ed Cal CEB 2003).

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§3.7 B. Review Generally Limited to Administrative Record

The hearing on a superior court writ petition is often called a "trial." However, in an administrative mandamus proceeding, there are no live witnesses or proffered exhibits. Instead, there is an administrative record, consisting of the documentary and testimonial evidence presented during the administrative proceedings, which is lodged in the superior court and provides the evidentiary universe considered by the court. Thus, like an appeal, in which the appellate court's review is limited to the record on appeal, a superior court's review of an administrative adjudicatory decision under CCP §1094.5 usually is confined to the record in the administrative proceedings. CCP §1094.5(a). See *Moore v City of Los Angeles* (2007) 156 CA4th 373, 382, 67 CR3d 218 (trial court properly ruled that statute of limitations defense was forfeited by failure to raise it before Board because review of administrative proceedings under §1094.5 is confined to issues appearing in record of that body). On the record in administrative mandamus proceedings, see California Administrative Mandamus, chap 4 (3d ed Cal CEB 2003). On the record in traditional mandamus proceedings, see chap 7 of this book.

In exceptional circumstances, evidence outside the administrative record may be introduced in an administrative mandamus proceeding. See CCP §1094.5(e) (evidence must be relevant and "in the exercise of reasonable diligence, could not have been produced or… was improperly excluded at the hearing"). This is an exceedingly narrow exception, and courts usually deny requests to submit evidence outside the administrative record. See, *e.g., Eureka Citizens for Responsible Gov't v City of Eureka* (2007) 147 CA4th 357, 367, 54 CR3d 485 (extra-record evidence allowed only if unavailable at trial or improperly excluded). See also *Voices of Wetlands v California State Water Resources Control Bd.* (review granted Mar. 19, 2008 superseded opinion at 157 CA4th 1268, 69 CR3d 487) (court may not consider extra-record evidence not presented to agency, but court has authority to remand decision to administrative agency to obtain additional evidence)). As a practical matter, if something does not appear in the administrative record, it does not exist for purposes of administrative mandamus. On using extra-record evidence in administrative mandamus proceedings, see California Administrative Mandamus §4.2 (3d ed Cal CEB 2003). On using extra-record evidence in traditional mandamus proceedings, see §§7.9-7.12.

PRACTICE TIP: Because parties may not retain counsel in connection with administrative proceedings, the administrative record may not be fully developed, which limits issues the superior court can consider on writ review. Counsel retained after an initial administrative hearing but before a final decision should check agency rules and procedures for ways to augment the record before the decision becomes final (*e.g.,* some agencies permit additional evidence in connection with a request for reconsideration or during an appeal at the agency level). On augmenting the administrative record, see California Administrative Mandamus §14.18 (3d ed Cal CEB 2003).

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§3.8 C. Scope of Judicial Review in Administrative Mandamus Proceedings

The scope of judicial review in an administrative mandamus proceeding is delineated by statute. CCP §1094.5(b). A superior court can determine only whether the administrative body has done one of the following:

- Proceeded without or in excess of its jurisdiction (see §§3.9-3.10);
- Afforded the petitioner a fair hearing (see §3.11); or
- Prejudicially abused its discretion (see §3.12).

On the superior court's scope of judicial review under CCP §1094.5, see California Administrative Mandamus, chap 6 (3d ed Cal CEB 2003). See also *Manufactured Home Communities, Inc. v County of San Luis Obispo* (2008) 167 CA4th 705, 84 CR3d 367 (proceeding violated standards of due process because administrative agency's findings rested on testimony of individuals who were not subject to cross-examination); *Antelope Valley Press v Poizner* (2008) 162 CA4th 839, 849, 75 CR3d 887 (discussing scope of review under §1094.5).

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1. Did the Administrative Body Proceed Without or in Excess of Jurisdiction?

§3.9 a. Jurisdiction Limited by Statute or Constitution

Administrative bodies can exercise adjudicatory authority only to the extent they are authorized to do so. See, *e.g., Brooks v State Personnel Bd.* (1990) 222 CA3d 1068, 1075, 272 CR 292 (university not authorized to amend notice of dismissal). Thus, jurisdictional issues arise when an administrative body acts outside the scope of its constitutional, statutory, or regulatory authority. See, *e.g., California Correctional Peace Officers Ass'n v State Personnel Bd.* (1995) 10 C4th 1133, 1151, 43 CR2d 693 (when constitutional due process or statute requires hearing, agency's action without hearing may be in excess of its jurisdiction); *Horner v Board of Trustees* (1964) 61 C2d 79, 86, 37 CR 185 (failure to hold required hearing within reasonable period of time may deprive agency of jurisdiction to act); *Zuniga v Los Angeles County Civil Serv. Comm'n* (2006) 137 CA4th 1255, 1259, 40 CR3d 863 (commission had no jurisdiction to adjudicate claims of former employee). An agency can also act in excess of its jurisdiction by failing to follow procedural rules and regulations it has established. See, *e.g., Langan v City of El Monte* (2000) 79 CA4th 608, 617, 94 CR2d 254.

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§3.10 b. Administrative Reconsideration or Modification of Decision

Absent express authorization, an administrative body cannot reconsider or modify a decision that has become final under applicable procedural rules. See, *e.g., Hollywood Circle, Inc. v Department of Alcoholic Beverage Control* (1961) 55 C2d 728, 732, 13 CR 104. This restriction on further administrative action is intended to protect a party's rights to a decision based solely on the evidence and to prevent a redetermination of its rights or privileges without due process. Further administrative action that consists merely of reducing or mitigating the punishment imposed is permissible, because it does not implicate due process rights. See, *e.g., Guilbert v Regents of Univ. of Cal.* (1979) 93 CA3d 233, 243, 155 CR 583.

NOTE: Most agencies operating under the Administrative Procedure Act (Govt C §§11340-11529) are expressly permitted to reconsider a decision or to grant a rehearing. Govt C §11521(a).

On administrative jurisdictional issues challenged in administrative mandamus proceedings, see California Administrative Mandamus §§6.16-6.35 (3d ed Cal CEB 2003).

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Source: Civil Litigation/California Civil Writ Practice/3 Administrative Mandamus/§3.11 2. Was the Petitioner Provided a Fair Hearing?

§3.11 2. Was the Petitioner Provided a Fair Hearing?

Due process principles determine whether an administrative hearing was "fair." *Morongo Band of Mission Indians v State Water Resources Control Bd.* (2009) 45 C4th 731, 737, 88 CR3d 610. State statutes may impose additional procedural protections, but they cannot constrict or limit constitutionally mandated due process protections. See *Cleveland Bd. of Educ. v Loudermill* (1985) 470 US 532, 541, 84 L Ed 2d 494, 105 S Ct 1487 (constitutional guarantee of due process operates independently of state statutes granting substantive rights).

What constitutes a fair hearing under due process varies with the factual circumstances. See *Gilbert v Homar* (1997) 520 US 924, 930, 138 L Ed 2d 120, 117 S Ct 1807 ("due process is flexible and calls for such procedural protections as the particular situation demands").

NOTE: Whether an administrative complainant has received a fair hearing is generally a legal issue for the superior court to decide. See *Manufactured Home Communities, Inc. v County of San Luis Obispo* (2008) 167 CA4th 705, 84 CR3d 367 (court found that party was denied fair hearing). The question of whether there was a fair hearing may include issues related to prehearing and posthearing proceedings, as well as issues arising during the administrative hearing itself.

A fair hearing was *not* held when:

- The accusation in a license revocation hearing did not give fair notice of the charges. *Smith v California State Bd. of Pharmacy* (1995) 37 CA4th 229, 241, 43 CR2d 532 (agency counsel switched theory during hearing from personal wrongful conduct to negligence for conduct of others).
- The hearing officer refused to grant a short continuance despite good cause. *Wood v City Civil Serv. Comm'n* (1975) 45 CA3d 105, 110, 119 CR 175 (complainant's attorney was engaged in criminal trial; denial of short continuance deprived claimant of fair hearing).
- Party to administrative proceeding was not allowed to cross-examine witnesses. *Manufactured Home Communities, Inc. v County of San Luis Obispo* (2008) 167 CA4th 705, 84 CR3d 367.
- The hearing officer had a financial interest in the outcome or other bias for or against one of the parties. *Haas v County of San Bernardino* (2002) 27 C4th 1017, 1024, 119 CR2d 341 (temporary hearing officer whose selection for future work depended entirely on goodwill of county had pecuniary interest that required disqualification); *Nasha, LLC v City of Los Angeles* (2004) 125 CA4th 470, 483, 22 CR3d 772 (complainant's authorship of article opposing project by member of hearing panel established unacceptable probability of bias).
- Persons involved in the investigation or prosecution of the administrative proceeding also were involved in the adjudicatory process. *Department of Alcoholic Beverage Control v Alcoholic Beverage Control Appeals Bd.* (2006) 40 C4th 1, 9, 50 CR3d 585 (ex parte contacts between agency's prosecutor and ultimate decision-maker before decision was rendered created bias problem); *Quintero v City of Santa Ana* (2003) 114 CA4th 810, 812, 7 CR3d 896 (city failed to show that attorney who acted as advisor to board in past and who was acting as prosecutor in instant administrative proceeding was not biased); *Nightlife Partners, Ltd. v City of Beverly Hills* (2003) 108 CA4th 81, 87, 133 CR2d 234 (hearing officer's announcement that city's attorney would be advising him was sufficient to show bias); *Department of Alcoholic Beverage Control v Alcoholic Beverage Control Appeals Bd.* (2002) 99 CA4th 880, 885, 121 CR2d 729 (administrative law judge's employment by agency, alone, was insufficient to establish actual bias). Compare *Morongo Band of Mission Indians v State Water Resources Control Bd.* (2009) 45 C4th 731, 737, 88 CR3d 610 (no violation of licensee's due process rights when attorney prosecuting its license revocation matter before board simultaneously served as advisor to board on unrelated matter); *Witt Home Ranch, Inc. v County of Sonoma* (2008) 165 CA4th 543, 568, 81 CR3d 123 (no evidence that deputy county counsel acted as advocate in connection with plaintiff's proceedings; fact that she reached conclusions and provided advice to board before hearing did not convert her from adviser to advocate, and did not demonstrate bias).

On the fair hearing requirement, see California Administrative Mandamus §§6.36-6.54 (3d ed Cal CEB 2003).

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Source: Civil Litigation/California Civil Writ Practice/3 Administrative Mandamus/§3.12 3. Did the Administrative Body Prejudicially Abuse Its Discretion?

§3.12 3. Did the Administrative Body Prejudicially Abuse Its Discretion?

The most frequent challenge to an administrative adjudicatory decision is that the administrative body prejudicially "abused its discretion." An abuse of discretion is established if (CCP §1094.5(b)):

- The agency did not proceed as required by law (see §3.13);
- The administrative decision is not supported by the findings (see §3.14); or
- The findings are not supported by the evidence (§§3.15-3.17).

Establishing an abuse of discretion, alone, is not enough. A petitioner also must demonstrate that the abuse of discretion was prejudicial, *i.e.,* that it resulted in a miscarriage of justice. See, *e.g., Leal v Gourley* (2002) 100 CA4th 963, 968, 123 CR2d 220 (court found no evidence of prejudice stemming from Department of Motor Vehicles' violation of rule requiring that it give notification of right to have translator at hearings).

On the abuse of discretion standard, see California Administrative Mandamus §§6.55-6.175 (3d ed Cal CEB 2003).

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§3.13 a. Administrative Body Did Not Proceed as Required by Law

Under this prong of the statutory abuse of discretion standard, a petitioner can challenge the legality of the adjudicatory decision (*i.e.,* Did the tribunal follow the applicable law?) or attack the validity of the administrative body's procedural rules and regulations applicable to that decision. See, *e.g., Young v Gannon* (2002) 97 CA4th 209, 221, 118 CR2d 187 (petitioner unsuccessfully argued WCAB abused its discretion by failing to proceed in manner required by law); *Usher v County of Monterey* (1998) 65 CA4th 210, 220, 76 CR2d 274 (agency did not proceed in manner required by law when it delegated its decision-making authority to hearing officer).

Determining whether an administrative body failed to proceed in the manner required by law requires identification of the procedural and substantive law governing the administrative body's action. The location of such law depends on the context and circumstances. Constitutional or statutory provisions, case law, or regulatory provisions may apply. On some of the laws and regulations applicable to administrative agency practice, see California Administrative Hearing Practice §§1.18-1.34 (2d ed Cal CEB 1997).

NOTE: Regardless of the "abuse of discretion" nomenclature, whether an administrative body failed to act as required by law is a legal issue for the superior court to decide. See *Katosh v Sonoma County Employees' Retirement Ass'n* (2008) 163 CA4th 56, 62 n4, 77 CR3d 324 (interpretation and application of statute to undisputed facts presented legal question); *Moss v County of Humboldt* (2008) 162 CA4th 1041, 1053, 76 CR3d 428 (when issue in California Environmental Quality Act case is one of law, de novo standard applies).

On the failed-to-act-in-accordance-with-law prong of the statutory abuse of discretion standard, see California Administrative Mandamus §§6.55-6.105 (3d ed Cal CEB 2003).

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§3.14 b. Agency's Decision Not Supported by the Findings

Under this prong of the statutory abuse of discretion standard, a petitioner can challenge an adjudicatory decision as not supported by the administrative fact-finder's findings. A petitioner's ability to make such a challenge depends on the particular issue in the administrative proceeding, the evidence presented, and the administrative decision-maker's findings.

The Administrative Procedure Act (APA) traditionally has required that the finder of fact make written findings. See Govt C §11425.50. Whether written findings were also required in non-APA cases was unclear until the supreme court's landmark decision in *Topanga Ass'n for a Scenic Community v City & County of Los Angeles* (1974) 11 C3d 506, 515, 113 CR 836. In *Topanga*, the court held that CCP §1094.5 implicitly requires an agency rendering a decision to "set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order." See, *e.g., Saad v City of Berkeley* (1994) 24 CA4th 1206, 1212, 30 CR2d 95 (agency findings sufficient under *Topanga*). The written findings need not be extensive or detailed. *Environmental Protection & Info. Ctr. v California Dep't of Forestry & Fire Protection* (2008) 44 C4th 459, 515, 80 CR3d 28, citing *Topanga, supra* (although agency's findings should have referred more specifically to those portions of report that support its conclusion, there was no trouble discerning "the analytic route [it] traveled from evidence to action").

Findings that fail to bridge the analytic gap between the evidence and the final decision are insufficient. See, *e.g.*, *Glendale Mem. Hosp. & Health Ctr. v State Dep't of Mental Health* (2001) 91 CA4th 129, 110 CR2d 101 (findings that were terse boilerplate statements did not provide sufficient detail to bridge analytic gap between evidence presented and agency's ultimate decision).

NOTE: Regardless of the "abuse of discretion" nomenclature, whether the findings are adequate to support the administrative decision is a legal issue for the superior court to decide.

On the decision-not-supported-by-the-findings prong of the statutory abuse of discretion standard, see California Administrative Hearing Practice §§8.52-8.67 (2d ed Cal CEB 1997).

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§3.15 c. Agency's Findings Not Supported by Evidence

Under this prong of the statutory abuse of discretion standard, a petitioner can challenge the administrative fact-finder's findings as not being supported by the evidence.

Depending on the circumstances, the courts use one of two standards to determine whether administrative findings are supported by the evidence in the administrative record:

- The substantial evidence standard (see §3.16); or
- The independent judgment standard (see §3.17).

On determining whether a superior court applies the substantial evidence or independent judgment standard, see California Administrative Mandamus §§6.129-6.155 (3d ed Cal CEB 2003).

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§3.16 (1) Substantial Evidence Standard

The court applies the substantial evidence standard in all cases in which the law does not require use of the independent judgment standard. See *Strumsky v San Diego County Employees Retirement Ass'n* (1974) 11 C3d 28, 32, 112 CR 805 (court's inquiry is limited to determination of whether findings are supported by substantial evidence unless agency's order or decision substantially affects fundamental vested right, in which case court uses independent judgment standard); *Auerbach v Los Angeles County Assessment Appeals Bd. No. 2* (2008) 167 CA4th 1415, 1420, 85 CR3d 118 (same); *Antelope Valley Press v Poizner* (2008) 162 CA4th 839, 850, 75 CR3d 887 (same). On the independent judgment standard, see §3.17.

In assessing whether substantial evidence supports administrative findings, the court accords significant deference to the administrative fact-finder. See, *e.g., Committee to Save the Hollywoodland Specific Plan v City of Los Angeles* (2008) 161 CA4th 1168, 1182, 74 CR3d 665 (court gives deference to administrative findings and will uphold decision supported by substantial evidence); *Patterson Flying Serv. v Department of Pesticide Regulation* (2008) 161 CA4th 411, 419, 74 CR3d 290 (under deferential substantial evidence standard, court must presume correctness of administrative ruling); *Young v Gannon* (2002) 97 CA4th 209, 221, 225, 118 CR2d 187 (court views evidence in light most favorable to administrative findings). The court neither reassesses the credibility of witnesses and other evidence nor weighs the supporting and contrary evidence. The testimony of even a single witness believed by the fact-finder can be sufficient to support a finding. See, *e.g., Duncan v Department of Personnel Admin.* (2000) 77 CA4th 1166, 1174 n6, 92 CR2d 257.

Substantial evidence is not synonymous with *any* evidence; rather it is defined as evidence of "ponderable legal significance… reasonable in nature, credible, and of solid value [, and] relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Young v Gannon, supra*.

Administrative decisions reviewed under the substantial evidence standard can include: establishment of employment practices and procedures, including for employee discipline (see, *e.g., County of Los Angeles v Civil Serv. Comm'n* (1995) 39 CA4th 620, 633, 46 CR2d 256), the denial of a variance or use permit (see, *e.g., BreakZone Billiards v City of Torrance* (2000) 81 CA4th 1205, 1244, 97 CR2d 467), compliance with the California Environmental Quality Act (CEQA) (see, *e.g., San Franciscans Upholding the Downtown Plan v City & County of San Francisco* (2002) 102 CA4th 656, 673, 125 CR2d 745). But see *Moss v County of Humboldt* (2008) 162 CA4th 1041, 1053, 76 CR3d 428 (when issue in CEQA case is one of law, de novo standard applies).

On the substantial evidence standard, see California Administrative Mandamus §6.141 (3d ed Cal CEB 2003).

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§3.17 (2) Independent Judgment Standard

In some contexts, the court must employ the independent judgment standard and reweigh the evidence, affording no deference to the factual assessments of the administrative fact-finder. *Auerbach v Los Angeles County Assessment Appeals Bd. No. 2* (2008) 167 CA4th 1415, 1420, 85 CR3d 118; *Antelope Valley Press v Poizner* (2008) 162 CA4th 839, 850, 75 CR3d 887. In *Strumsky v San Diego County Employees Retirement Ass'n* (1974) 11 C3d 28, 34, 112 CR 805, quoting *Bixby v Pierno* (1971) 4 C3d 130, 144, 93 CR 234, the supreme court held that

> [w]hen an administrative decision affects a right which has been legitimately acquired or is otherwise "vested," and when that right is of a fundamental nature from the standpoint of its economic aspect or its "effect… in human terms and the importance… to the individual in the life situation," then a full and independent judicial review of that decision is indicated because "[the] abrogation of the right is too important to the individual to relegate it to exclusive administrative extinction."

Administrative decisions reviewed under the independent judgment standard can include:

- The revocation or suspension of a professional license (see, *e.g., Griffiths v Superior Court* (2002) 96 CA4th 757, 767, 117 CR2d 445);
- The suspension or revocation of a driver's license (see, *e.g., Elizabeth D. v Zolin* (1993) 21 CA4th 347, 353, 25 CR2d 852); and
- Discipline or termination of a public employee for failing to comply with employment rules or conditions (see, *e.g., Barber v Long Beach Civil Serv. Comm'n* (1996) 45 CA4th 652, 658, 53 CR2d 4; see also *The Termo Co. v Luther* (2008) 169 CA4th 394, 399, 86 CR3d 687 (administrative order directing plugging and abandonment of oil wells that were in operational or idle status for many years implicates fundamental, vested right and is reviewed under "independent judgment" standard)).

On the independent judgment standard, see California Administrative Mandamus §6.134 (3d ed Cal CEB 2003).

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III. DIFFERENCES BETWEEN TRADITIONAL AND ADMINISTRATIVE MANDAMUS PROCEEDINGS

§3.18 A. Nature and Fundamental Requisites of the Writs

Traditional mandamus under CCP §1085 is available when:

- The respondent has a clear, present, and usually ministerial duty to perform; and
- The petitioner has a clear, present, and beneficial right to performance.

See, *e.g., Conlan v Bonta* (2002) 102 CA4th 745, 752, 125 CR2d 788. On traditional mandamus and case examples, see §§2.3-2.16, 2.39-2.69. Thus, traditional mandamus may be used to challenge an administrative body's failure to perform an act required by law (*Conlan v Bonta, supra*) as well as to review an adjudicatory decision when the administrative body is not legally required to hold an evidentiary hearing. See, *e.g., O.W.L. Found. v City of Rohnert Park* (2008) 168 CA4th 568, 586, 86 CR3d 1; *DeCuir v County of Los Angeles* (1998) 64 CA4th 75, 81, 75 CR2d 102; *Bunnett v Regents of Univ. of Cal.* (1995) 35 CA4th 843, 848, 41 CR2d 567. On requirements for and uses of traditional mandamus, see §§2.3-2.38.

In contrast, administrative mandamus under CCP §1094.5 is available only to challenge a final adjudicatory decision resulting from an administrative proceeding in which by law:

- A hearing is required to be given;
- Evidence is required to be taken; and
- Discretion in the determination of facts is vested in the inferior tribunal.

Conlan, 102 CA4th at 752. See §§3.3-3.6.

PRACTICE TIP: If an administrative agency's action could potentially be challenged by traditional mandate or administrative mandate, or if it is unclear which writ is applicable, a petitioner should request both writs as alternative remedies in the same petition. See §3.21.

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§3.19 B. Filing Deadlines

There are few specific statutory deadlines for traditional mandamus proceedings. On traditional mandamus, see chaps 2 and 5. In contrast, there are numerous statutory deadlines for filing administrative mandamus proceedings, depending on the type of administrative decision involved. All the deadlines tend to be relatively short. See CCP §1094.6. See also, *e.g., FEHC v Superior Court (Las Brisas Apartment, Ltd.)* (2004) 115 CA4th 629, 9 CR3d 409 (30-day statute of limitations under Govt C §11523 to challenge Fair Employment and Housing Commission decisions); Govt C §65009(c)(1) (challenge to land-use decisions generally must be filed within 90 days of notice of decision). On the sometimes complex limitation periods applicable to administrative mandamus proceedings, see California Administrative Mandamus, chap 9 (3d ed Cal CEB 2003).

There is some uncertainty as to whether the statutory periods within which mandamus proceedings must be brought are jurisdictional in nature or are statutes of limitations that can be waived. Compare *Ginns v Savage* (1964) 61 C2d 520, 524, 39 CR 377 (holding statutory periods not jurisdictional and waived if not raised as affirmative defense), with *Donnellan v City of Novato* (2001) 86 CA4th 1097, 1103, 103 CR2d 882 (CCP §1094.6 is procedural limitations period and consequently jurisdictional). Thus, it is important to know the applicable deadline and comply with it to avoid any risk that a writ petition is jurisdictionally defective.

PRACTICE TIP: Because laches or unreasonable delay can be a defense to a writ petition, even if filed within the statutory period, a petitioner should seek writ relief without undue delay. See, *e.g., Schellinger Bros. v City of Sebastopol* (2009) 179 CA4th 1245, 102 CR3d 394 (court found "abundant support" for determination that petitioner acted with unreasonable delay and acquiesced in city taking over 1 year to certify environmental impact report); *Vernon Fire Fighters Ass'n v City of Vernon* (1986) 178 CA3d 710, 727, 223 CR 871 (delay of over 5 years between petitioner's discharge from employment and writ proceeding was unreasonable and trial court was justified in finding prejudice had resulted to public employer and laches barred action).

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IV. CHOOSING BETWEEN WRIT OF TRADITIONAL AND ADMINISTRATIVE MANDAMUS

§3.20 A. Checklist: Determining Appropriate Writ

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The following checklist may be used to analyze the facts and procedural context of a case to determine whether traditional or administrative mandamus is the appropriate remedy.

- Is there statutory or regulatory law that governs the substantive area?
- Review governing law for provisions that specify what procedure should be used to obtain judicial review.
- Research cases decided under the governing statutes or regulations to determine which method of writ review is appropriate.
- When preparing a challenge to a decision of an agency or organization:
- Review relevant procedures and policy statements for information about challenging decision.
- Contact agency counsel, decision-making body, or other agency contact to find out how decisions are reviewed, but verify information received to avoid possibility of accidental misinformation.

PRACTICE TIP: Counsel must be careful not to engage in improper ex parte communications concerning the specifics of the case.

- Research case law for precedent on method of review.
- Analyze the administrative decision to determine if it is:
- *Legislative* in nature (*e.g.*, a formulation of a rule to be applied in future cases). If the decision is a legislative action, then it is reviewed by traditional mandate. See *Strumsky v San Diego County Employees Retirement Ass'n* (1974) 11 C3d 28, 35 n2, 112 CR 805; *Mike Moore's 24-Hour Towing v City of San Diego* (1996) 45 CA4th 1294, 1303, 53 CR2d 355; §§2.17-2.38.
- A *policy* decision (*e.g.*, one that affects all similarly situated persons). Decisions about statements of policy or procedures that affect all similarly situated persons are usually reviewed by traditional mandate. See §2.13.
- *Ministerial* in nature (*e.g.*, is the decision limited to the agency's application of its rules or regulations to the petitioner?). If so, then traditional mandate probably applies. See §2.5.
- *Adjudicatory* in nature (*e.g.*, does the decision purport to evaluate or adjudicate the complaint or claim of just the petitioner?). Decisions that evaluate and adjudicate an individual's situation are usually reviewed by administrative mandate if the requirements of CCP §1094.5 have been met. See item 4, below.
- If the decision is *adjudicatory* in nature, then ascertain whether (CCP §1094.5(a)):
- A hearing was required by law.
- If a hearing is not required by law, even if one was held, the decision must be reviewed by traditional mandate. See, *e.g., Coelho v State Personnel Bd.* (1989) 209 CA3d 968, 257 CR 557 (traditional mandate must be used if agency not required by law to hold hearing). See §3.4. On traditional mandate, see chap 2.
- If a hearing was required but no hearing was held, then administrative mandate applies. See, *e.g., Helene Curtis, Inc. v Los Angeles County Assessment Appeals Bds.* (2004) 121 CA4th 29, 37, 16 CR3d 658. See §3.4.
- The taking of evidence was required by law. If there is no requirement that evidence be taken, then the decision must be reviewed by traditional mandate. See, *e.g., DeCuir v County of Los Angeles* (1998) 64 CA4th 75, 81, 75 CR2d 102 (traditional mandate appropriate when agency not required to hold evidentiary

hearing). See §3.5.

- The administrative agency or decision-maker has discretion in determination of contested factual issues. If the decision-maker, whether the agency board itself or a hearing officer designated to hear the matter on behalf of the agency or organization, does not have discretion to make determinations of contested factual issues, then the decision must be reviewed by traditional mandate. See §3.6.

- If administrative mandamus is not available (see item 4 above), have the requirements of traditional mandate been met? including (CCP §1085-1086; §§2.3-2.16):

- The respondent must be an inferior tribunal, corporation, board, or person.
- The respondent must have failed to perform a clear, present duty, having had the legal authority and ability to do so.
- The duty involved must entail ministerial action, the assumption of, or refusal to assume, jurisdiction, or the refusal to exercise, or the abuse of, discretion.
- The petitioner must have a clear, present right to, and a beneficial interest in, the performance of the real party in interest's or the respondent's duty.
- Either the petitioner must have no other remedy at law or the other remedy must be inadequate.

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Source: Civil Litigation/California Civil Writ Practice/3 Administrative Mandamus/§3.21 B. Pleading in the Alternative

§3.21 B. Pleading in the Alternative

When in doubt about whether traditional mandamus (CCP §1085) or administrative mandamus (CCP §1094.5) is the proper remedy, a petitioner should request both. Pleading for relief in the alternative ensures that the court has jurisdiction over the controversy and can issue the appropriate form of relief. Thus, when in doubt, a petitioner should:

- Title the pleading to alert the court and opposing counsel that relief is being sought under either statute, *e.g.*:

Petition for Writ of Mandate (CCP §1085 or CCP §1094.5);

- Include essential allegations for *each* form of relief requested; and
- Meet the earliest filing deadline if different ones are proscribed under CCP §§1085 and 1094.5.

If a petition seeks an inapplicable form of mandate without pleading in the alternative, the petition may be denied (see, *e.g.*, *Tielsch v City of Anaheim* (1984) 160 CA3d 570, 574, 206 CR 738 (grounds for denying relief included that petitioner requested CCP §1085 relief when he should have proceeded under §1094.5)) or the court may decide the case using incorrect standards (see, *e.g.*, *Eureka Teachers Ass'n v Board of Educ. of the Eureka City Schs.* (1988) 199 CA3d 353, 361, 244 CR 240 (trial court applied wrong standard of review (under CCP §1085) and did not consider appropriate evidence (under CCP §1094.5)).

JUDICIAL PERSPECTIVE: In many cases, courts will overlook a request for the "wrong" writ and issue the appropriate writ if the record supports relief, but it is not worth the risk of being wrong: If there is any doubt as to the appropriate writ, the better practice is to ask for traditional and administrative mandamus in the alternative.

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4

Other Superior Court Writs

Mark Fogelman

I. SCOPE OF CHAPTER §4.1

II. WRIT OF PROHIBITION
- A. Description and Purpose §4.2
- B. Limited Scope of Review §4.3
- C. How Prohibition Differs From Other Primary Common Law Writs §4.4
- D. Applicability of Prohibition
  - 1. Most Administrative Bodies Not Subject to Prohibition §4.5
  - 2. Prohibition Available to Review Adjudicatory Decisions of Constitutional Statewide Agencies §4.6
  - 3. Applicability of Prohibition to Corporations §4.7
  - 4. Applicability of Prohibition to Persons §4.8
- E. Specific Requirements for Prohibition §4.9

III. WRIT OF REVIEW (CERTIORARI)
- A. Description and Purpose §4.10
- B. Scope of Review §4.11
- C. Hearing Required §4.12
- D. Applicability of Writ of Review (Certiorari)
  - 1. Most Administrative Bodies Not Subject to Review (Certiorari) §4.13
  - 2. Most Local Agencies Not Subject to Review (Certiorari) §4.14
  - 3. Writ of Review (Certiorari) Available to Review Adjudicatory Decisions of Constitutional Statewide Agencies §4.15
- E. Specific Requirements for Writ of Review (Certiorari) §4.16

IV. WRIT OF HABEAS CORPUS
- A. Description and Purpose §4.17
- B. Habeas Corpus in Civil Cases
  - 1. Habeas Corpus in Proceedings Involving Children
    - a. Habeas Corpus in Child Custody Context §4.18
    - b. Habeas Corpus in Juvenile Dependency Proceedings §4.19
    - c. Habeas Corpus for Ineffective Assistance of Counsel in Proceedings Involving Children §4.20
  - 2. Civil Commitment Proceedings §4.21
    - a. Commitment Under Lanterman-Petris-Short Act §4.22
    - b. Parental Commitment of Minor to State Hospital §4.23
    - c. Commitment to State Hospital for Mentally Disordered §4.24
    - d. Commitment to State Hospital for Developmentally Disabled §4.25
- C. Specific Requirements for Habeas Corpus §4.26

V. QUO WARRANTO PROCEEDINGS §4.27

VI. ENFORCEMENT OF ORDERS IN AGRICULTURAL LABOR RELATIONS BOARD PROCEEDINGS §4.28

VII. OTHER SUPERIOR COURT WRITS
- A. Attachment §4.29
- B. Execution, Possession, and Sale
  - 1. Writ of Execution §4.30
  - 2. Writ of Possession §4.31
  - 3. Writ of Sale §4.32
- C. Injunction §4.33

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§4.1 I. SCOPE OF CHAPTER

This chapter provides an overview of writs other than mandamus that may be sought in the superior court, specifically:

- Prohibition. See §§4.2-4.9.
- Review (certiorari). See §§4.10-4.16.
- Habeas Corpus. See §§4.17-4.26.
- Quo Warranto. See §4.27.
- Enforcement of Orders in Agricultural Labor Relations Board Proceedings. See §4.28.
- Attachment. See §4.29.
- Execution, Possession, and Sale. See §§4.30-4.32.
- Injunction. See §4.33.

On traditional mandamus, see chap 2. On administrative mandamus, see chap 3. On writs in limited jurisdiction civil cases, see chap 12.

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II. WRIT OF PROHIBITION

§4.2 A. Description and Purpose

A writ of prohibition issues to an inferior tribunal, body, or person (*i.e.,* a governmental or private body or official) that exercises quasi-judicial functions (see Cal Const art VI, §11). The primary purpose of prohibition is to prevent or restrain the inferior tribunal, body, or person from erroneously assuming jurisdiction or acting in excess of its jurisdiction. See CCP §1102 (writ of prohibition "arrests the proceedings of any tribunal, corporation, board, or person exercising judicial functions, when such proceedings are without or in excess of [its] jurisdiction"). A writ of prohibition generally preserves the status quo because it addresses jurisdictional error that is threatened but not completed. See *Union Pac. R.R. v State Bd. of Equalization* (1989) 49 C3d 138, 158, 260 CR 565.

The appellate division of the superior court may issue a writ of prohibition directed to the superior court in a limited jurisdiction civil case, a misdemeanor case, or an infraction case. In such cases, the superior court is deemed an inferior tribunal to the superior court appellate division. CCP §1103(b). On writ petitions in limited jurisdiction civil cases, see chap 12.

On writs of prohibition issued by the appellate courts, see §§15.14-15.26.

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§4.3 B. Limited Scope of Review

The writ of prohibition addresses only "jurisdictional error," *i.e.,* threatened actions that are without or in excess of jurisdiction. The concept of jurisdictional error is quite broad in this context and allows a court to prevent or restrain the exercise of unauthorized power even when an inferior tribunal, body, or person has jurisdiction over the subject matter and the parties. Any act exceeding the defined power of the inferior tribunal, body, or person—whether defined by a constitutional provision, statute, rule, or by the courts and followed under the doctrine of stare decisis—is in excess of jurisdiction for purposes of a writ of prohibition. See *Abelleira v District Court of Appeal* (1941) 17 C2d 280, 291, 109 P2d 942.

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§4.4 C. How Prohibition Differs From Other Primary Common Law Writs

A writ of prohibition differs from a writ of review (certiorari) in that prohibition lies to restrain or prevent a threatened judicial act without or in excess of jurisdiction, while review lies to correct a completed judicial act without or in excess of jurisdiction. Compare CCP §1068 with CCP §1102. See §4.3. A writ of mandate, in contrast, compels the performance of a ministerial duty or corrects an abuse of discretion. CCP §1085. On traditional mandamus, see chap 2. On administrative mandamus, see chap 3.

PRACTICE TIP: Although the distinctions between the common law writs have been codified and a petitioner should seek the writ that applies to the particular circumstances, many courts will grant writ relief if it is warranted even if the petitioner has sought the "wrong" writ. See, *e.g.*, *Babb v Superior Court* (1971) 3 C3d 841, 850, 92 CR 179 (although petition sought writ of prohibition, court decided mandate was more appropriate remedy and treated petition as one for mandate). However, a petitioner should not rely on such indulgent treatment from the court. When in doubt as to the appropriate writ, it is better practice to seek alternative forms of writ relief and "all other appropriate relief." On seeking alternative relief, see §§5.36-5.37.

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D. Applicability of Prohibition

§4.5 1. Most Administrative Bodies Not Subject to Prohibition

A tribunal, body, or person is subject to prohibition only if exercising a judicial function. CCP §1102; see §§15.15-15.17. The legislature is powerless, however, to grant judicial power to state agencies. Thus, prohibition does not lie to restrain state agencies of legislative origin. See, *e.g., Whitten v California State Bd. of Optometry* (1937) 8 C2d 444, 445, 65 P2d 1296. The legislature likewise lacks power to invest local agencies with judicial functions. Thus, prohibition also does not lie to restrain the actions of local agencies. See, *e.g., Strumsky v San Diego County Employees Retirement Ass'n* (1974) 11 C3d 28, 42, 112 CR 805. See also California Administrative Mandamus §1.17 (3d ed Cal CEB 2003).

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§4.6 2. Prohibition Available to Review Adjudicatory Decisions of Constitutional Statewide Agencies

Certain statewide *constitutional* agencies are subject to prohibition if they have constitutionally invested adjudicatory power. See *O'Brien v Olson* (1941) 42 CA2d 449, 109 P2d 8 (writ of prohibition used to restrain governor from investigating charges or removing state prison board directors from office). On this same point developed in the context of writs of review (certiorari), see §4.15. Even as to those few state agencies subject to prohibition, petitioners generally seek review of their decisions by way of administrative mandamus, if it is available, because the scope of judicial review is broader. On the scope of judicial review in administrative mandamus, see §§3.8-3.17.

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§4.7 3. Applicability of Prohibition to Corporations

Although CCP §§1102-1103 indicate prohibition is applicable to "corporations," the writ is used rarely, if ever, in this context. This is probably because corporations do not engage in judicial acts, and a person dissatisfied with corporate action normally has an adequate legal remedy, *e.g.*, action for injunctive relief, action on contract, or the various statutory remedies available to stockholders.

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§4.8 4. Applicability of Prohibition to Persons

The reference in CCP §§1102-1103 to "persons" is likely a reference to public officials or individual members of inferior tribunals or boards imbued with adjudicatory power and threatening to act without or in excess of jurisdiction.

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§4.9 E. Specific Requirements for Prohibition

In addition to meeting the basic requirements for extraordinary relief, *e.g.*, a beneficially interested petitioner and the absence of a plain, speedy, and adequate remedy (see §§2.2-2.16), the petitioner seeking a writ of prohibition must show that (CCP §§1102-1103):

- The act at issue is judicial in nature;
- The act is actually threatened but not completed;
- The adjudicatory tribunal lacked or acted in excess of its jurisdiction.

The requirements for prohibition are the same in superior court as in the court of appeal. On writs of prohibition in the court of appeal, see §§15.14-15.26.

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III. WRIT OF REVIEW (CERTIORARI)

§4.10 A. Description and Purpose

A writ of review is also called a writ of certiorari. CCP §1067. As originally enacted, §1067 mandated use of the term writ of review. Thus, many statutes continue to refer to the writ of certiorari as the writ of review. However, Cal Const art VI, §10 uses the terminology writ of certiorari.

The purpose of the writ of review is to review completed adjudicatory action taken without or in excess of jurisdiction when there is no appeal and no other adequate remedy. CCP §§1068(a), 1074. Thus, a writ of review, like prohibition (and unlike mandate), is a jurisdictional writ. A writ of review sought from the superior court issues to a tribunal of inferior jurisdiction or to a nonjudicial body or officer that exercises judicial functions. CCP §1068(a). The writ orders the party to whom the writ is directed to certify or return to the court a record of the underlying proceedings and to desist from further proceedings pending judicial review. CCP §§1070-1071.

The appellate division of the superior court may grant a writ of review directed to the superior court in a limited jurisdiction civil matter, a misdemeanor case, or an infraction case. In such cases, the superior court is an inferior tribunal to the superior court appellate division for purposes of the writ of review. CCP §1068(b). On writ petitions in limited civil cases, see chap 12.

On writs of review issued by the appellate courts, see §§15.27-15.38.

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§4.11 B. Scope of Review

The superior court's scope of review of the inferior tribunal's action is limited to whether the tribunal, board, or officer "regularly pursued" its authority. CCP §1074. This entails determining whether the tribunal, board, or officer exceeded its jurisdiction. See CCP §1068 (authorizing writ when tribunal, board, or officer "has exceeded the jurisdiction of such tribunal, board or officer").

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§4.12 C. Hearing Required

After the superior court issues a writ of review (certiorari), the court holds a hearing and enters judgment affirming, annulling, or modifying the challenged action. CCP §1075. The judgment, rather than the writ, is the ultimate relief sought. On the superior court's action on a petition for writ of review, see §§9.49-9.52

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D. Applicability of Writ of Review (Certiorari)

§4.13 1. Most Administrative Bodies Not Subject to Review (Certiorari)

Although the writ of review (certiorari) historically was used to review adjudicatory actions of legislatively created statewide administrative agencies (see *State Bd. of Chiropractic Exam'rs v Superior Court* (1927) 201 C 108, 255 P 749), the California Supreme Court held in 1936 that the legislature cannot confer judicial power on a state agency. *Standard Oil Co. v State Bd. of Equalization* (1936) 6 C2d 557, 559, 59 P2d 119. Because a writ of review lies only as to judicial actions, the writ is not available to review adjudicatory decisions of statutorily created state agencies.

PRACTICE TIP: In practice, administrative adjudicatory decisions are generally reviewed by way of administrative mandamus under CCP §1094.5. On administrative mandamus, see chap 3; California Administrative Mandamus §1.7 (3d ed Cal CEB 2003).

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§4.14 2. Most Local Agencies Not Subject to Review (Certiorari)

Even after *Standard Oil Co. v State Bd. of Equalization* (1936) 6 C2d 557, 559, 59 P2d 119, courts assumed local agencies could exercise judicial functions (see *Irvine v Citrus Pest Dist. No. 2* (1944) 62 CA2d 378, 385, 144 P2d 857) and their adjudicatory determinations could thus be reviewed either on writ of review (certiorari) or by way of administrative mandamus. See, *e.g., La Prade v Department of Water & Power* (1945) 27 C2d 47, 53, 162 P2d 13; *DeLucia v County of Merced* (1968) 257 CA2d 620, 622, 65 CR 177.

In *Strumsky v San Diego County Employees Retirement Ass'n* (1974) 11 C3d 28, 44, 112 CR 805, however, the California Supreme Court held local agencies cannot exercise judicial power. *Strumsky* concerned the scope of review of adjudicatory determinations of local agencies under CCP §1094.5. See also *McHugh v Santa Monica Rent Control Bd.* (1989) 49 C3d 348, 372, 261 CR 318 (rent control board lacked judicial authority to impose punitive damages). The supreme court in *Strumsky* did not specifically address whether a writ of review will lie against a local agency. However, it necessarily follows that if local agencies cannot exercise judicial functions, their adjudicatory determinations are no more reviewable by a writ of review than those legislatively created state agencies.

PRACTICE TIP: In practice, local agency adjudicatory decisions generally are reviewed by way of administrative mandamus under §1094.5. On administrative mandamus, see chap 3.

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§4.15 3. Writ of Review (Certiorari) Available to Review Adjudicatory Decisions of Constitutional Statewide Agencies

A writ of review (certiorari) is available to review adjudicatory actions of statewide agencies of constitutional origin. *Boren v State Personnel Bd.* (1951) 37 C2d 634, 637, 234 P2d 981. Constitutional agencies derive their adjudicatory power directly from the California Constitution, and thus are not subject to the rule of *Standard Oil Co. v State Bd. of Equalization* (1936) 6 C2d 557, 559, 59 P2d 119. See, *e.g., Strumsky v San Diego County Employees Retirement Ass'n* (1974) 11 C3d 28, 35, 112 CR 805; *Koehn v State Bd. of Equalization* (1958) 166 CA2d 109, 117, 333 P2d 125; §4.13. Examples of constitutional statewide agencies include the Public Utilities Commission, the Workers' Compensation Appeals Board, the Agricultural Labor Relations Board, the Public Employment Relations Board, and the State Water Resources Control Board.

In practice, however, adjudicatory decisions of constitutional statewide agencies are usually reviewed by way of administrative mandamus because the scope of review is broader. On the scope of judicial review on a writ of review, see §4.11; on the scope of judicial review under administrative mandamus, see §3.8.

PRACTICE TIP: Specific statutory provisions establish exclusive procedures for review of the orders and decisions of certain statewide constitutional agencies. For example, California Public Utilities Commission (PUC) orders and decisions are reviewable only by the court of appeal and supreme court under the procedures established by the Public Utilities Code. See Pub Util C §§1756-1768. On statutes authorizing writ review of the decisions of particular administrative agencies, see §§16.18-16.48.

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§4.16 E. Specific Requirements for Writ of Review (Certiorari)

Besides meeting the basic requirements for extraordinary relief, *i.e.,* a beneficially interested petitioner and the absence of a plain, speedy, and adequate remedy (see §§2.3-2.16), the petitioner seeking a writ of review (certiorari) must demonstrate that:

- The act at issue is judicial in nature;
- The act has been completed;
- The lower tribunal lacked or acted in excess of its jurisdiction; and
- There is no right to appeal.

The requirements for writs of review are the same in superior court as in the court of appeal. On writs of review in the court of appeal, see §§15.27-15.38.

PRACTICE TIP: If the challenged act is incomplete, *e.g.,* if the inferior tribunal has reached a decision but has not yet acted on it, prohibition may be available to restrain the threatened act. On writs of prohibition, see §§4.2-4.9.

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IV. WRIT OF HABEAS CORPUS

§4.17 A. Description and Purpose

The writ of habeas corpus permits a person who is unlawfully imprisoned or restrained to challenge the lawfulness of the confinement or restraint. Pen C §1473(a). All California courts have original jurisdiction in habeas corpus proceedings. Cal Const art VI, §10.

The writ of habeas corpus originally was used to secure the petitioner's release from actual imprisonment or other illegal confinement. In modern practice, the petitioner need not be physically confined; a petitioner released on bail or on his or her own recognizance may seek habeas corpus relief because such restraints are sufficient to constitute constructive custody. See, *e.g., In re Catalano* (1981) 29 C3d 1, 9, 171 CR 667 (defendants were under sufficient restraint to permit habeas corpus when judgment required them to pay fine or face incarceration); *In re Smiley* (1967) 66 C2d 606, 612, 58 CR 579 (habeas corpus was available to defendant released on his own recognizance). See also *Gray v Superior Court* (2005) 125 CA4th 629, 636 n3, 23 CR3d 50 (court of appeal chose to treat petition challenging bail condition as one for writ of mandate instead of writ of habeas corpus because trial court allegedly exceeded its jurisdiction, issue was purely legal, and there was no need for evidentiary hearing); Appeals and Writs in Criminal Cases §§9.3-9.6 (3d ed Cal CEB 2007).

Although habeas corpus is not itself a criminal proceeding (Part 2, Title 12 of the Penal Code classifies habeas corpus as a "special proceeding of a criminal nature"), it is most commonly used by those charged with, or convicted of, criminal offenses. The following sections summarize use of the writ in civil proceedings only. On habeas corpus in criminal proceedings, see Appeals & Writs, chap 9.

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B. Habeas Corpus in Civil Cases

1. Habeas Corpus in Proceedings Involving Children

§4.18 a. Habeas Corpus in Child Custody Context

Habeas corpus may be used when a person entitled to custody of a minor child is denied possession. See, *e.g., In re Barr* (1952) 39 C2d 25, 27, 243 P2d 787; *In re Paul W.* (2007) 151 CA4th 37, 53, 60 CR3d 329. In child custody and adoption-related matters, however, just as in all other matters, "habeas corpus cannot serve as a substitute for an appeal, and, in the absence of special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment." *Adoption of Alexander S.* (1988) 44 C3d 857, 865, 245 CR 1, quoting *In re Dixon* (1953) 41 C2d 756, 759, 264 P2d 513.

PRACTICE TIP: Under Welf & I C §366.26, an order permanently terminating parental rights is conclusive and once final the court cannot modify it. Some authorities hold this means the order cannot be modified even on habeas corpus (see, *e.g., In re Meranda P.* (1997) 56 CA4th 1143, 1161, 65 CR2d 913), but other decisions have held that it is a restriction only on the ordering court and not on the habeas power of appellate courts. See, *e.g., In re Darlice C.* (2003) 105 CA4th 459, 464, 129 CR2d 472.

In *Adoption of Alexander S.* (1988) 44 C3d 857, 866, 245 CR 1, the California Supreme Court listed six grounds for using habeas corpus in child custody matters. These include: (1) enforcement of an existing right to physical custody established by prior order, (2) determination of physical custody when no previous custody order has issued, (3) modification of a modifiable order, (4) protecting a child from imminent danger, (5) allowing a natural parent lacking physical custody to bring an original action in habeas corpus when his or her consent to an adoption was required but not obtained, and (6) a collateral attack on a prior order issued by a court without jurisdiction. See also *In re Meranda P.* (1997) 56 CA4th 1143, 1164 n15, 65 CR2d 913.

PRACTICE TIP: Family law courts rarely hear habeas corpus proceedings. Before initiating a habeas proceeding, a complainant should consider more common remedies, such as an order modifying custody or an order for return of the child.

On challenging child custody rulings, see California Child Custody Litigation and Practice, chap 19 (Cal CEB 2006).

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§4.19 b. Habeas Corpus in Juvenile Dependency Proceedings

Habeas corpus is the proper vehicle for challenging a dependency order. See, *e.g., In re Paul W.* (2007) 151 CA4th 37, 53, 60 CR3d 329. See also *In re Emilye A.* (1992) 9 CA4th 1695, 1707 n9, 12 CR2d 294 ("reversal of an order in a dependency proceeding does not necessarily mean that the status quo is reinstated and that the child can no longer be protected").

On habeas corpus in juvenile dependency proceedings, see California Juvenile Dependency Practice §§10.109-10.117 (Cal CEB 2002).

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§4.20 c. Habeas Corpus for Ineffective Assistance of Counsel in Proceedings Involving Children

Often in habeas cases focusing on jurisdiction over children, the challenged custody order or order terminating parental rights is final, and the habeas petition is based on a claim of ineffective assistance of counsel. See, *e.g., In re O. S.* (2002) 102 CA4th 1402, 1409, 126 CR2d 571; *In re Carrie M.* (2001) 90 CA4th 530, 533, 108 CR2d 856. This is an appropriate use of habeas corpus because the issues in an ineffective assistance claim go beyond the trial record. See, *e.g., In re Emilye A.* (1992) 9 CA4th 1695, 1707 n9, 12 CR2d 294 (reversal because ineffective assistance of counsel does not preclude further dependency proceedings in juvenile court; it simply requires that proceedings be reconducted because parents were not properly represented).

An indigent parent has a liberty interest in the care, custody, and management of his or her child. Thus, in some parental right termination cases, the parent may have a due process right to appointment of competent counsel. See, *e.g., In re Kristin H*. (1996) 46 CA4th 1635, 1642, 54 CR2d 722. See also *In re Darlice C.* (2003) 105 CA4th 459, 462, 129 CR2d 472; Welf & I C §§317, 317.5. The parent may, by inaction, waive the rights to appointed counsel and to contest a determination for ineffective assistance of counsel. See, *e.g., In re Meranda P.* (1997) 56 CA4th 1143, 1157, 65 CR2d 913. The right to counsel, cognizable on habeas corpus, may also implicate other due process rights, such as the right to notice. See, *e.g., In re O. S.* (2002) 102 CA4th 1402, 1407, 126 CR2d 571.

On habeas relief based on ineffective assistance of counsel, see California Juvenile Dependency Practice §10.111 (Cal CEB 2002).

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§4.21 2. Civil Commitment Proceedings

Habeas corpus is available in a variety of proceedings involving the commitment of mentally disordered or other developmentally disabled persons.

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§4.22 a. Commitment Under Lanterman-Petris-Short Act

The Lanterman-Petris-Short Act (Welf & I C §§5000-5550) establishes procedures for the involuntary commitment of persons who, as the result of mental disorders, are dangerous to themselves or others, or who are gravely disabled. Any person certified for an additional 14 days of intensive treatment beyond the initial 72-hour treatment and evaluation period of Welf & I C §5150 automatically receives a certification review proceeding (Welf & I C §§5254, 5256-5256.8) unless the person elects to seek judicial review by a writ of habeas corpus. Welf & I C §§5254.1, 5275-5277.

The detained person, or anyone acting on his or her behalf, obtains habeas review by requesting release from the person delivering the copy of the notice of certification or from any other member of the facility's treatment staff. Welf & I C §5275.

Judicial review takes place in the superior court in the county in which the detaining facility is located. Welf & I C §5276. The detained person is entitled to counsel (appointed, if necessary) to prepare the petition and provide representation at the hearing. Welf & I C §5276. The court must release the detained person or order that an evidentiary hearing be held within 2 court days after the petition is filed. Welf & I C §5276.

On civil commitment proceedings under the Lanterman-Petris-Short Act, see California Conservatorship Practice, chap 23 (Cal CEB 2005) and California Guardianship Practice §11.20 (Cal CEB Annual).

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§4.23 b. Parental Commitment of Minor to State Hospital

A minor committed to a state hospital by a parent can challenge his or her commitment by a writ of habeas corpus. See, *e.g., In re Roger S.* (1977) 19 C3d 921, 937, 141 CR 298 (holding 14-year-old could challenge commitment to state mental hospital by parents under Welf & I C §6000(b) through writ of habeas corpus in superior court).

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§4.24 c. Commitment to State Hospital for Mentally Disordered

Anyone committed to a state hospital for the mentally disordered may apply for a writ of habeas corpus to the superior court in the county in which the hospital is located. Welf & I C §7250. The patient, anyone acting on his or her behalf, the State Department of Mental Health, or the State Department of Developmental Services may apply for the writ. The court inquires into and determines "the truth of the allegations under which he or she was committed." Welf & I C §7250.

On judicial review of commitment to a state hospital, see California Conservatorship Practice §23.97 (Cal CEB 2005).

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§4.25 d. Commitment to State Hospital for Developmentally Disabled

A developmentally disabled adult committed to a state hospital may apply for a writ of habeas corpus to the superior court to challenge the lawfulness of the commitment. Welf & I C §4800(a). See, *e.g., In re Hop* (1981) 29 C3d 82, 94, 171 CR 721 (holding that adult could challenge commitment to state hospital by filing habeas corpus petition in superior court of county in which she was confined); *In re Violet C.* (1989) 213 CA3d 86, 261 CR 470. In addition, a petition for habeas corpus, filed in the superior court of the county of confinement, is "an appropriate vehicle to inquire into the conditions of an institution which would endanger the health and safety of a conservatee… or which deprive a conservatee of fundamental rights." *In re Gandolfo* (1984) 36 C3d 889, 898 n7, 206 CR 149.

On judicial review of commitment to a state hospital, see California Conservatorship Practice §23.97 (Cal CEB 2005).

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§4.26 C. Specific Requirements for Habeas Corpus

The procedures in habeas corpus proceedings in superior court generally are governed by Pen C §§1473-1508 and Cal Rules of Ct 4.550-4.552. There are also special procedures concerning civil commitment established by Welf & I C §5276, discussed in §4.22. On procedures for obtaining a writ of habeas corpus, see Appeals and Writs in Criminal Cases, chap 10 (3d ed Cal CEB 2007).

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§4.27 V. QUO WARRANTO PROCEEDINGS

At common law, the writ of quo warranto issued to bring a defendant before the court to show by what authority he or she claimed an office, franchise, or liberty of the Crown. See, *e.g., People v Dashaway Ass'n* (1890) 84 C 114, 118, 24 P 277; *International Ass'n of Fire Fighters v City of Oakland* (1985) 174 CA3d 687, 695, 220 CR 256.

In California, the writ of quo warranto no longer exists. See 8 Witkin, California Procedure, *Extraordinary Writs* §27 (5th ed 2008). A statutory action, identical in purpose and effect to quo warranto, was established in 1872. CCP §§803-811. Under CCP §803, the statutory action may be brought against "any person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise, or against any corporation, either de jure or de facto, which usurps, intrudes into, or unlawfully holds or exercises any franchise, within this state."

PRACTICE TIP: Courts continue to refer to the remedy provided by the statutory action as "quo warranto." (The official chapter title of the statute is "Actions for Usurpation of an Office or a Franchise," which, as B. E. Witkin points out, is rather unwieldy. See 8 Witkin, California Procedure, *Extraordinary Writs* §7).

For examples of recent uses of proceedings in the nature of quo warranto, see:

- Quo warranto proceeding proper method to challenge consolidation of county's correctional and peace officers. *People ex rel Deputy Sheriffs' Ass'n v County of Santa Clara* (1996) 49 CA4th 1471, 1476, 57 CR2d 322.
- Quo warranto proceeding proper method to challenge validity of a judicial assignment. *People v Kwolek* (1995) 40 CA4th 1521, 1531, 48 CR2d 325.
- Quo warranto the exclusive remedy to challenge a city charter amendment that unilaterally altered wages and working conditions in violation of the Meyers-Milias-Brown Act (Govt C §§3500-3508.5). *International Ass'n of Fire Fighters v City of Oakland* (1985) 174 CA3d 687, 698, 220 CR 256.

On the overlap between quo warranto and mandate proceedings, see 8 Witkin, California Procedure, *Extraordinary Writs* §27.

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§4.28 VI. ENFORCEMENT OF ORDERS IN AGRICULTURAL LABOR RELATIONS BOARD PROCEEDINGS

If no timely petition for review of an Agricultural Labor Relations Board (ALRB) order is filed in the court of appeal, or if review is denied, the ALRB may petition the superior court for enforcement of its order. Lab C §1160.8. On writ review of ALRB interim and final orders in the court of appeal, see §§16.18-16.21.

In an enforcement proceeding, the superior court may not review the merits of the administrative decision. The court must enforce the decision by writ of injunction or other process if, after the hearing, the court determines that (1) the order was issued under procedures established by the ALRB and (2) the person to whom the order is directed refuses to comply. *ALRB v Tex-Cal Land Mgmt., Inc.* (1987) 43 C3d 696, 701, 238 CR 780.

A superior court judgment enforcing a final ALRB order is appealable. 43 C3d at 705. The points that can be raised on appeal are limited to procedural irregularity and refusal to comply with the order. 43 C3d at 706.

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VII. OTHER SUPERIOR COURT WRITS

§4.29 A. Attachment

A writ of attachment permits a plaintiff in a civil action to have a defendant's property levied as security for the satisfaction of any judgment the plaintiff may recover, unless the defendant gives other security to cover the judgment. See CCP §§481.010-492.090.

Under CCP §483.010(a), attachment is available only if all of the following exist:

- There is an action on a claim or claims for money;
- That action is based on an express or implied contract; and
- The total amount of the claim(s) is a fixed or readily ascertainable amount of at least $500, exclusive of costs, interest, and attorney fees.

PRACTICE TIP: A party must strictly follow the statutory provisions on attachment.

On attachment, including forms, see Debt Collection Practice in California, chap 6 (2d ed Cal CEB 1999).

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B. Execution, Possession, and Sale

§4.30 1. Writ of Execution

A writ of execution authorizes seizure and appropriation of a defendant's property to satisfy an existing money judgment against the defendant. See generally the Enforcement of Judgments Act (CCP §§680.010-724.260). On property subject to execution, see CCP §§695.010-695.070. Procedures for obtaining a writ of execution and levying on property subject to execution are set out in CCP §§699.010-701.830.

On writs of execution, including forms, see Debt Collection Practice in California §§9.2-9.36 (2d ed Cal CEB 1999).

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§4.31 2. Writ of Possession

A writ of possession is used to enforce a judgment for possession of real or personal property. CCP §§712.010-712.070, 714.010-714.030, 715.010-715.050.

On writs of possession, including forms, see Debt Collection Practice in California §§6.111-6.166 (2d ed Cal CEB 1999).

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§4.32 3. Writ of Sale

A writ of sale is used to enforce a judgment for sale of real or personal property. CCP §§712.010-712.070, 716.010-716.030.

On writs of sale, including forms, see Debt Collection Practice in California §§9.37-9.49G (2d ed Cal CEB 1999).

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§4.33 C. Injunction

An injunction is a "writ or order requiring a person to refrain from a particular act." CCP §525. Injunctive relief, which may be temporary or permanent, is governed by CCP §§525-534. Normally, a party must seek injunctive relief in the superior court. CCP §86(a)(8).

There are three forms of injunctive relief (see CCP §§526-527):

- A temporary restraining order, which may be issued ex parte for a limited time, usually pending the court's ruling on the complainant's application for a preliminary injunction;
- A preliminary injunction, which binds a party during the pendency of an action; and
- A permanent injunction, which issues on final judgment.

A stay is a form of injunctive relief. On stays, see chap 6.

On injunctions, see California Civil Procedure Before Trial, chap 32 (4th ed Cal CEB 2004). See also 5 Witkin, California Procedure, *Pleading* §§822-832 (5th ed 2008); 6 Witkin, Procedure, *Provisional Remedies* §§363-418.

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5

Initiating a Superior Court Writ Proceeding

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I. SCOPE OF CHAPTER §5.1

II. OVERVIEW OF SUPERIOR COURT WRIT PROCEDURES §5.2
- A. Applicable Statutory Authorities
  - 1. Statutes Pertaining Specifically to Writs §5.3
  - 2. Other Statutes Made Applicable to Writ Proceedings §5.4
  - 3. Rules of Court §5.5
- B. Local Rules and Procedures §5.6
  - 1. Local Rules §5.7
  - 2. Unwritten Procedures §5.8
- C. Procedural Options: Noticed Motion or Alternative Writ §5.9
  - 1. Noticed Motion Procedure
    - a. Chronology of Noticed Motion Procedure §5.10
    - b. Advantages and Disadvantages of Noticed Motion Procedure
      - (1) No Need for Ex Parte Appearance §5.11
      - (2) Time Savings for Court §5.12
      - (3) Hearing on Merits Likely §5.13
      - (4) Control Over Timing of Hearing on Merits §5.14
  - 2. Alternative Writ Procedure
    - a. Chronology of Alternative Writ Procedure §5.15
    - b. Advantages and Disadvantages of Alternative Writ Procedure
      - (1) Immediate Relief Possible §5.16
      - (2) Early Hearing §5.17
      - (3) Court Can Deny Alternative Writ and Dismiss Petition §5.18
  - 3. Issuance of Peremptory Writ in First Instance Unusual §5.19

III. DRAFTING THE WRIT PETITION §5.20
- A. Format Requirements §5.21
  - 1. In General
    - a. Typewritten or Printed §5.22
    - b. Type and Size of Paper §5.23
    - c. Margins §5.24
    - d. Line Numbers §5.25
    - e. Page Numbers §5.26
    - f. Binding §5.27
    - g. Hole Punching §5.28
    - h. Exhibits §5.29
    - i. Footer §5.30
  - 2. First (Caption) Page §5.31
- B. Designation of Parties
  - 1. Petitioner §5.32
  - 2. Respondent §5.33
  - 3. Real Party in Interest
    - a. Determining Existence §5.34
    - b. Right to Notice and Hearing §5.35
- C. Requesting Alternative Forms of Writ Relief
  - 1. Selecting Wrong Writ Usually Not Fatal §5.36
  - 2. Pleading and Praying for Different Forms of Writ Relief §5.37
- D. Contents of Petition
  - 1. Opening Paragraph §5.38
  - 2. Request for Stay §5.39

3. Enumerated Allegations §5.40
a. Identity of Parties
(1) Form: Petitioner §5.41
(2) Form: Respondent §5.42
(3) Form: Real Party in Interest §5.43
(4) Particular Contexts
(a) Form: When Petition Challenges Nonjudicial Action §5.44
(b) Form: When Petitioner Is Party to Ongoing Administrative Proceeding §5.45
b. Describing Challenged Action and Factual Background
(1) Style for Statement of Facts §5.46
(2) Using Supporting Citations §5.47
(3) Relating to Legal Basis for Relief §5.48
c. Describing Basis for Challenging Action §5.49
(1) Specific Allegations Required for Mandate §5.50
(2) Specific Allegations Required for Prohibition §5.51
(3) Specific Allegations Required for Review (Certiorari) §5.52
d. Absence of Adequate Legal Remedy
(1) Requirement for Mandate and Prohibition §5.53
(2) Form: Absence or Inadequacy of Other Remedies §5.54
e. Exhaustion of Administrative Remedies
(1) Aspect of No-Adequate-Legal-Remedy Requirement §5.55
(2) Form: Exhaustion of Administrative Remedies §5.56
f. Alleging Damages if Appropriate §5.57
g. Alleging Basis for Stay if Requested §5.58
h. Prayer for Relief §5.59
(1) Form: Types of Relief §5.60
(2) Form: Costs and Attorney Fees §5.61
(3) Form: Other Appropriate Relief §5.62
4. Form: Signature Block §5.63
5. Verification Required §5.64
a. Public Entities Exempt §5.65
b. Verification Must Be Based on Personal Knowledge §5.66
c. Petitioner Must Verify Petition §5.67
d. Defects in Verification May Be Challenged §5.68
e. Form: Verification §5.69
6. Exhibits §5.70

IV. FILING AND SERVING THE PETITION §5.71
A. Time for Filing
1. When Special Statutory Deadline §5.72
2. When No Special Statutory Deadline §5.73
3. Laches §5.74
B. Venue §5.75
C. When Using Noticed Motion Procedure
1. Filing and Serving Writ Petition Only at Outset of Proceeding §5.76
a. Filing Procedures
(1) Place of Filing §5.77
(2) Civil Case Cover Sheet §5.78
(3) Filing Fee §5.79
(4) Copies §5.80
b. Serving Procedures
(1) When to Serve §5.81
(2) Whom to Serve §5.82
(3) Manner of Service §5.83
(4) Proof of Service
(a) Time of Filing §5.84
(b) Format §5.85
2. Bringing Petition on for Hearing
a. Preparing Motion for Issuance of Requested Writ §5.86
b. Format of Motion §5.87
c. Required Papers §5.88
(1) Notice of Motion §5.89
(2) Motion §5.90
(3) Combining Notice of Motion and Motion §5.91
(4) Supporting Memorandum

(a) Purpose of Supporting Memorandum §5.92
(b) Required Contents of Supporting Memorandum §5.93
(c) Format of Supporting Memorandum §5.94
(d) Page Limits §5.95
(e) Style of Supporting Memorandum §5.96
(i) Supporting Memorandum Should Be Persuasive §5.97
(ii) Supporting Memorandum Should Clearly State Basis for Issuance of Writ §5.98
(iii) Citations to Evidence §5.99
(iv) Use of Quotations §5.100
d. Additional Papers
(1) Declarations §5.101
(2) Administrative Record §5.102
(3) Proposed Order/Judgment §5.103
e. Service and Filing of Motion and Supporting Documents §5.104
(1) Whom to Serve §5.105
(2) When to Serve §5.106
(3) Where and When to File Papers §5.107
D. When Using Alternative Writ Procedure §5.108
1. Preparing the Papers
a. Writ Petition §5.109
b. Supporting Memorandum §5.110
c. Exhibits/Declarations §5.111
d. Proposed Alternative Writ §5.112
2. Filing and Service Procedures
a. Use of Ex Parte Application §5.113
(1) Contents of Ex Parte Application §5.114
(2) Service of Ex Parte Application §5.115
(3) Personal Appearance §5.116
(4) Following Local Procedures §5.117
b. Court Action on Ex Parte Application §5.118

V. COMBINING WRIT PETITION AND COMPLAINT §5.119

VI. CONSIDERING RESTRICTIONS OF TRIAL COURT DELAY REDUCTION ACT §5.120

VII. COSTS AND ATTORNEY FEES
A. Recovery of Costs
1. By Prevailing Party §5.121
2. Costs Allowed §5.122
3. Procedure for Claiming Costs §5.123
B. Award of Attorney Fees
1. When Fees Are Recoverable §5.124
2. Procedure for Recovering Attorney Fees
a. When to File §5.125
b. What to File §5.126
C. Interplay Between Motion for Fees and Costs Bill §5.127

VIII. CHECKLIST: PITFALLS TO AVOID §5.128

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§5.1 I. SCOPE OF CHAPTER

This chapter discusses how to initiate a writ proceeding in the superior court. It begins with an overview of superior court writ procedures, including discussions of the statutes and court rules governing writ proceedings (see §§5.2-5.5), the significance of local rules and unwritten procedures (see §§5.6-5.8), and the procedural options available to the petitioner in initiating a writ proceeding (see §§5.9-5.19). The chapter next discusses the particulars of drafting a writ petition (see §§5.20-5.70), including filing and serving procedures (see §§5.71-5.118) and when a writ petition should be combined with a complaint (see §5.119). The chapter discusses the impact of the Trial Court Delay Reduction Act on writ proceedings. See §5.120. It also discusses the recovery of costs and attorney fees. See §§5.121-5.127. The chapter concludes with a checklist of pitfalls that the petitioner should avoid. See §5.128.

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§5.2 II. OVERVIEW OF SUPERIOR COURT WRIT PROCEDURES

Handling a writ proceeding in the superior court can be bewildering. The applicable statutes are not models of clarity, and they include anachronistic terms such as "alternative writ" and "return." Some rules of court apply but do not provide much illumination as to the manner in which writ proceedings unfold. To fill the void and provide better direction, a number of superior courts have adopted local rules providing specific procedures for writ proceedings. A petitioner should always check for these rules before going forward.

Unlike ordinary civil actions, writ proceedings often do not involve discovery. Usually, extensive memoranda are filed in advance of the "trial," which in most cases is more akin to a law and motion hearing. The judge reviews the memoranda and any permissible documentary evidence, hears argument at a hearing that may last as little as 30 minutes, and then enters a judgment granting or denying the writ petition.

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A. Applicable Statutory Authorities

§5.3 1. Statutes Pertaining Specifically to Writs

Only a few statutes deal specifically with writ proceedings:

- Traditional mandate is addressed by CCP §§1084-1097 (except for CCP §1094.5, which deals with administrative mandamus, a statutorily created species of mandamus used to review most administrative adjudicatory decisions. For discussion of administrative mandamus, see chap 3 and California Administrative Mandamus (3d ed Cal CEB 2003)).
- Prohibition is addressed by CCP §§1102-1105.
- Review (certiorari) is addressed by CCP §§1067-1077.
- Preliminary provisions appear in CCP §§1063-1064.
- General rules pertaining to mandate, prohibition, and review appear in CCP §§1107-1110b.

NOTE: Writs of prohibition and review challenge judicial action, which generally only courts can take. Thus, these writs are rarely sought in the superior court. On the use of prohibition and review in superior court proceedings, see §§4.5-4.8 (prohibition), 4.13-4.15 (review).

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§5.4 2. Other Statutes Made Applicable to Writ Proceedings

Code of Civil Procedure §1109 makes the provisions of part two of the Code of Civil Procedure applicable to mandate, prohibition, and review (certiorari) proceedings. Accordingly, the code sections governing pleading and practice in ordinary civil cases (see CCP §§307-1062.20) apply to mandate, prohibition, and review proceedings except as otherwise provided in CCP §§1067-1110b. For example, although CCP §412.20 allows a defendant 30 days to file a responsive pleading in an ordinary civil case, CCP §1089.5 provides specific time periods for filing a responsive pleading in a mandate proceeding when no alternative writ has issued. See also CCP §§23, 363 (construing "action" as used in Title 2 of Code of Civil Procedure as including special proceedings of civil nature (*e.g.,* writ proceedings)).

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§5.5 3. Rules of Court

Some California Rules of Court apply to writ proceedings:

- Rule 2.2 provides that the trial court rules (Cal Rules of Ct 2.1-2.1100) "apply to all cases in the superior courts unless otherwise specified by a rule or statute."
- Rules 3.1100 and 3.1103(a)(2) expressly make the general law and motion rules (Cal Rules of Ct 3.1100-3.1370) applicable to superior court writ proceedings.

See also Cal Rules of Ct 1.6 (defining "action" to include "special proceedings" (*e.g.,* writ proceedings); and defining "civil case" to mean any case prosecuted "for the declaration, enforcement, or protection of a right or the redress or prevention of a wrong" and including "all cases except criminal cases and petitions for habeas corpus").

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§5.6 B. Local Rules and Procedures

Given the relatively few statutes and rules of court that specifically address writ proceedings, and the resulting lack of clear procedural directions, a number of superior courts have adopted local rules governing writ proceedings. Even when a superior court has not adopted local rules, there may be local practices that the court expects parties to follow. Thus, before initiating a writ proceeding, a petitioner must check for applicable local rules and contact the court clerk to determine whether the court has specific or preferred procedural practices for writ proceedings.

PRACTICE TIP: When contacting a court clerk, parties must remember that clerks cannot provide substantive legal advice.

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§5.7 1. Local Rules

Some superior courts have adopted local court rules or published guidelines for writ proceedings. See Amador Ct R 11.18 (noticed motion procedure should be used for bringing petition on for hearing "whenever possible"); Contra Costa Ct R 7(G)(1)(a) (specifying procedure for setting hearing on petition for writ of mandate); Imperial Ct R 3.4.0(a) (noticed motion procedure should be used "whenever possible"); Los Angeles Ct R 9.5(d)(1) (noticed motion procedure preferred); Sacramento County Superior Court Guide to the Procedures for Prosecuting Petitions for Prerogative Writs, p. 7 (same) (see copy in App B); San Diego Ct R 2.4.8(A) (same); San Francisco Ct R 8.1(A)(3)(a) (writs heard in civil law and motion department).

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§5.8 2. Unwritten Procedures

Even when a court has not adopted local rules or published guidelines on writ proceedings, it still may have established or preferred practices. For example, in some counties, the presiding judge determines the procedures applicable to writ proceedings. In other counties, designated writ departments may have their own unwritten procedural conventions. As a result, these unwritten procedures may change as judges rotate in and out of assignments. In still other counties, unwritten procedures may have remained constant for a number of years. Thus, if there are no published local rules or guidelines, parties to a writ proceeding should contact the court clerk (or research attorney, if appropriate) to determine whether the court has preferred procedures for handling writ petitions. Court clerks and research attorneys, however, can provide information only as to general court procedures; they cannot provide any substantive legal advice.

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§5.9 C. Procedural Options: Noticed Motion or Alternative Writ

Over the years, two procedural options have become the standard methods for prosecuting writ proceedings in the superior courts: (1) the noticed motion procedure and (2) the alternative writ procedure (order to show cause procedure in the context of writs of review (certiorari)). A writ petition will make its way through the court in a slightly different way depending on which procedure is used, and each procedure has its particular advantages and disadvantages. But ultimately, these procedures are simply two different routes to the same goal—obtaining a hearing on the merits of the writ petition.

Some superior courts have an expressed preference as to which procedure should be used. See Amador Ct R 11.18 (noticed motion procedure should be used "whenever possible"); Imperial Ct R 3.4.0(a) (same); Los Angeles Ct R 9.5(d)(1) (same); Sacramento County Superior Court Guide to the Procedures for Prosecuting Petitions for Prerogative Writs, p. 7 (same) (see copy in App B); San Diego Ct R 2.4.8(A) (same). Local rules also may set out a wholly unique procedure for handling writ petitions. See Contra Costa Ct R 7(G)(1)(a) (in mandate proceedings, petitioner appears ex parte to schedule status conference at which hearing date and briefing schedule will be set). If there are no local rules, the court may have unwritten practices as to how it handles writ proceedings.

PRACTICE TIP: The noticed motion procedure is the more common method used to prosecute superior court writ petitions, particularly in larger jurisdictions, although there may be times when the alternative writ procedure is preferable. See §§5.16-5.18.

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1. Noticed Motion Procedure

§5.10 a. Chronology of Noticed Motion Procedure

If the petitioner uses the noticed motion procedure:

- The petitioner files the writ petition and obtains a summons. The petition is the operative pleading that initiates the proceeding, just as a complaint initiates a civil action. See §§5.20-5.70.
- The petitioner serves the petition and summons but does not make any application for or serve any motion seeking issuance of a peremptory writ at that time. See §§5.76-5.85.
- If necessary to prevent irreparable injury pending disposition of the petition, the petitioner may seek a stay. See chap 6.
- The respondent or real party in interest files a responsive pleading or motion, *e.g.,* a demurrer or answer. See §§8.6-8.15.
- If permissible in the particular writ proceeding, the parties may conduct discovery, or, if the writ proceeding is based on an administrative record and the record has not already been requested or prepared and lodged with the court, the parties will request or prepare the record. See chap 7.
- When ready to proceed with the hearing on the merits of the petition, the petitioner files and serves a motion for issuance of the requested writ. See §§5.86-5.107.
- The respondent or real party in interest files opposition to the motion. See §§8.16-8.20.
- The petitioner may, and should, file a reply. See §§8.62-8.63.
- The court holds a hearing on the motion and either grants or denies the writ petition. See §§9.25-9.48.

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b. Advantages and Disadvantages of Noticed Motion Procedure

§5.11 (1) No Need for Ex Parte Appearance

At the time the writ petition is filed, a petitioner does not need to appear ex parte to obtain issuance of an alternative writ or file any other documentation in support of the petition (*e.g.,* supporting memorandum, declarations).

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§5.12 (2) Time Savings for Court

The use of the noticed motion procedure means that the superior court usually spends no time on the writ proceeding until shortly before the noticed hearing on the merits. In courts with a high number of writ proceedings or a dedicated writ department, not having to review and act on alternative writ applications can add up to a significant savings of time and judicial resources.

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§5.13 (3) Hearing on Merits Likely

The court can deny an application for an alternative writ and dismiss the writ petition. See §§9.17-9.19. If the petitioner uses the noticed motion procedure, however, the first time the court considers the matter is usually at the hearing on the merits of the petition, unless the respondent or real party in interest files a demurrer or other motion aimed at dismissing the petition. See §§8.40-8.44, 8.50-8.56. The noticed motion procedure often ensures a hearing on the merits. See §§5.86-5.107.

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§5.14 (4) Control Over Timing of Hearing on Merits

The noticed motion procedure allows the petitioner to control the timing of the hearing on the merits, which may be important if the writ proceeding is complex or involves a large record, or if counsel for the petitioner has special time constraints. The petitioner wants to ensure ample time to brief the merits of the petition.

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2. Alternative Writ Procedure

§5.15 a. Chronology of Alternative Writ Procedure

If the petitioner uses the alternative writ procedure:

- The petitioner prepares the writ petition, an application for an alternative writ, a supporting memorandum, and any supporting declarations and exhibits, and submits these to the court on an ex parte basis. See §§5.108-5.118. On the notice and service required for an ex parte hearing on an application for an alternative writ, see §5.115.
- The respondent or real party in interest may, but is not required to, oppose an ex parte application for an alternative writ. Many superior courts view alternative writs simply as a means of giving notice of the date of the hearing on the merits of the writ petition and therefore routinely issue them, absent some glaring deficiency in the petition. Even so, the respondent or real party in interest still may want to appear at the ex parte hearing to weigh in on the return date, briefing schedule, and hearing date. See §§8.21-8.31.
- If the court issues the alternative writ, the writ will set forth the date for the return (*i.e.,* the date by which the respondent or real party in interest must file a responsive pleading) and also a date for the hearing on the merits of the writ petition, which may be (but usually is not) the same as the return date. See §§9.6-9.10.
- If the court denies the application for an alternative writ, the court might also dismiss the petition if it is procedurally defective or meritless on its face. See §§9.17-9.19. If the court merely denies the application for an alternative writ but leaves the writ petition pending (an unlikely, but possible scenario), the petitioner can proceed by way of the noticed motion procedure to obtain a hearing on the merits. See §9.19.
- After the court issues an alternative writ and if it is permissible in the particular writ proceeding, the parties may conduct discovery, or, if the writ proceeding is based on an administrative record and the record has not already been requested or prepared and lodged with the court, the parties request or prepare the record. See chap 7.
- The respondent and any real party in interest may (and should) file a return supported by a memorandum opposing issuance of a writ. See §§8.35-8.38.
- The petitioner may (and should) file a reply. See §§8.57-8.63.
- The court holds a hearing and either grants or denies the writ petition. See §§9.25-9.48.

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b. Advantages and Disadvantages of Alternative Writ Procedure

§5.16 (1) Immediate Relief Possible

If the court issues an alternative writ, the respondent may comply (*e.g.,* by setting aside its decision or changing its action) rather than show cause why it should not be compelled to do so, thus sparing the petitioner further time and expense in proceeding with challenging the decision or action. (If the respondent does comply with the alternative writ, the petitioner should notify the court immediately.) On compliance, see §§10.3-10.10.

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§5.17 (2) Early Hearing

If the court issues an alternative writ, the writ will set dates for the return and the hearing on the merits of the writ petition, which may be sooner than if the noticed motion procedure were used. For example, an alternative writ might impose a shorter deadline for filing a responsive pleading than the 30 days that the respondent or real party in interest would otherwise have if the noticed motion procedure were used. Compare CCP §1089 (responsive pleading when alternative writ issued) and §1089.5 (responsive pleading when no alternative writ sought). On responsive pleadings, see §§8.35-8.56. Similarly, an alternative writ might set a tight briefing schedule and a hearing date soon after the date for the return. Although a compressed timetable will not be feasible or appropriate in many cases, shorter time periods might be appropriate if there is a small record and the petition raises a straightforward legal question.

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§5.18 (3) Court Can Deny Alternative Writ and Dismiss Petition

Unlike the noticed motion procedure, in which the petitioner largely controls the timing of the hearing on the merits, there is a risk that the court might deny the application for an alternative writ and dismiss the writ petition (*e.g.,* if the court determines that the petition is procedurally defective or meritless on its face). See §§9.17-9.19.

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§5.19 3. Issuance of Peremptory Writ in First Instance Unusual

The writ statutes permit a superior court to grant a peremptory writ in the first instance if the petitioner gives 10 days' notice of the application for a writ. See CCP §1088. However, this is not a procedure commonly used in the superior courts, no doubt because it does not provide a reasonable time for the respondent or real party in interest to respond or for busy courts to review the merits of the petition. If immediate action is required, the courts prefer to consider a stay request. See chap 6. On the issuance of a preemptory writ in the first instance in appellate court writ proceedings, see §§22.18-22.22.

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§5.20 III. DRAFTING THE WRIT PETITION

Regardless of whether the petitioner proceeds by way of the noticed motion procedure (see §§5.10-5.14) or the alternative writ procedure (see §§5.15-5.18), the initiating document is the writ petition.

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§5.21 A. Format Requirements

All papers filed in a superior court writ proceeding must comply with the rules of court generally governing the format of papers presented for filing (see Cal Rules of Ct 2.100-2.119) as well as the rules specifically governing the format of motion papers (see Cal Rules of Ct 3.1110-3.1370).

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1. In General

§5.22 a. Typewritten or Printed

Papers must be typewritten, printed, or prepared by a photocopying process that produces clear and permanent copies equally as legible as printing in type not smaller than 12 points. Cal Rules of Ct 2.104. The type face must be the equivalent of Courier, Times New Roman, or Arial, and the print color must be blue-black or black. Cal Rules of Ct 2.105-2.106. Lines must be 1½-spaced or double-spaced, on consecutively numbered lines. Cal Rules of Ct 2.108(1). The paper should be printed on one side only. Cal Rules of Ct 2.102.

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Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/§5.23 b. Type and Size of Paper

§5.23 b. Type and Size of Paper

The paper must be (Cal Rules of Ct 2.103):

- White or unbleached;
- Opaque;
- Unglazed;
- Of standard quality not less than 20-pound weight; and
- 8½ by 11 inches.

In addition, the paper used in all original papers filed with the court and in all copies, documents, and exhibits, whether filed or served on other parties, must be recycled. Cal Rules of Ct 2.101(a).

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§5.24 c. Margins

The left margin must be at least 1 inch wide and the right margin at least ½ inch wide. Cal Rules of Ct 2.107.

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§5.25 d. Line Numbers

Lines on each page must be consecutively numbered starting with the number 1, placed at the left margin, and separated from the text by a vertical column of space at least one-fifth (1/5) inch wide or a single or double vertical line. Each line number must be aligned with a line of type, or the line numbers must be evenly spaced vertically on the page. There must be at least three line numbers for every vertical inch on the page. Cal Rules of Ct 2.108(4).

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§5.26 e. Page Numbers

Unless a rule provides otherwise for a particular type of document, each page must be numbered consecutively at the bottom. Cal Rules of Ct 2.109, 3.1110(c).

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§5.27 f. Binding

The pages must be firmly bound together at the top and consist entirely of original pages without riders. Cal Rules of Ct 2.113, 3.1110(e). If the circumstances warrant it, the petition can be bound with a supporting memorandum and paginated consecutively. Cal Rules of Ct 3.1112(c).

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§5.28 g. Hole Punching

Each paper presented for filing must be prepunched with two holes centered 2½ inches apart and ⅝ inches from the top of the paper. Cal Rules of Ct 2.115.

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§5.29 h. Exhibits

Exhibits may be fastened to 8½ by 11-inch pages, but must be as legible and permanent as typewritten material. Cal Rules of Ct 2.114. In addition, each exhibit must be separated by a hard 8½ by 11-inch sheet with hard paper or plastic tabs extending below the bottom of the page, bearing the exhibit designation. There must be an exhibit index. Pages from a single deposition and associated exhibits must be designated as a single exhibit. Exhibits written in a foreign language must be accompanied by an English translation certified under oath by a qualified interpreter. Cal Rules of Ct 3.1110(f)-(g). On exhibits generally, see chap 7.

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§5.30 i. Footer

All papers filed with the court must have a footer in the bottom margin of each page that contains the title of the document or some clear, concise abbreviation of the title. The footer must be in at least 10-point type. This requirement does not apply to exhibits (Cal Rules of Ct 2.110) or to an administrative record lodged with the court (see §7.21).

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§5.31 2. First (Caption) Page

The first page of a writ petition filed in the superior court (sometimes called the caption page) must set forth (CCP §422.30; Cal Rules of Ct 2.111):

- The name, State Bar membership number, address, telephone number, fax number, and e-mail address (if available) of the attorney or unrepresented party who is filing the petition.
- The title of the court and county in which the action is brought, and a space for the number of the case, which will be stamped by the clerk when the petition is filed.
- The title of the case, which should include the names of all the parties, including every real party in interest. See CCP §422.40. Omitting a necessary party could render a writ ineffective by failing to bring that party before the court.
- The title of the document, indicating the nature of the proceeding (*e.g.*, "PETITION FOR WRIT OF MANDATE (CCP §1085)"). The given title is not determinative of the nature of the proceeding and does not limit the relief that can be granted; the petition's allegations control. *Jaffe v Carroll* (1973) 35 CA3d 53, 57, 110 CR 435; *Coffelt v Coffelt* (1964) 229 CA2d 659, 665, 40 CR 513. See *Lee v Blue Shield* (2007) 154 CA4th 1369, 1378, 65 CR3d 612 (court should have treated complaint for declaratory relief as petition for writ of mandate).
- In a limited jurisdiction civil case, the phrase "Limited Civil Case." On writ petitions in limited jurisdiction civil cases, see chap 12.

For a sample caption page, see form in §13.1.

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B. Designation of Parties

§5.32 1. Petitioner

The party instituting a civil writ proceeding typically is called the petitioner. The writ statutes allow use of the terms "plaintiff" and "defendant." CCP §1063. However, that terminology is not commonly used in writ proceedings.

PRACTICE TIP: Occasionally, a clerk's office will improperly refuse to file documents that use a nonstandard term for the parties. The safer approach, therefore, is to use the more common terms "petitioner," "respondent," and "real party in interest."

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§5.33 2. Respondent

The entity (*e.g.,* a governmental body or agency, or private corporation or association), official, or employee whose action or decision is being challenged in the writ proceeding is the respondent. See *Sustainability of Parks, Recycling & Wildlife Legal Defense Fund v County of Solano Dep't of Resource Mgmt.* (2008) 167 CA4th 1350, 1358, 84 CR3d 889 (holding landfill operator was not "indispensable party" to writ proceeding because petition sought to enforce ministerial duty of county department).

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3. Real Party in Interest

§5.34 a. Determining Existence

A real party in interest is any entity or person whose interest will be directly affected by the outcome of the writ proceeding. See *Tracy Press, Inc. v Superior Court* (2008) 164 CA4th 1290, 1297-1302, 80 CR3d 464 (writ petition filed in superior court properly named real party in interest, but writ petition filed in court of appeal did not and therefore was dismissed). Usually the real party in interest has been a participant in the underlying proceedings giving rise to the writ proceeding. *Sonoma County Nuclear Free Zone '86 v Superior Court* (1987) 189 CA3d 167, 173, 234 CR 357. In cases challenging or reviewing the actions of the state, a county, city, agency, board, school district, corporation, or charitable organization, or of an official of any of these entities, there often is no real party in interest. This is often the case in superior court writ proceedings. The petitioner and respondent (*e.g.*, a local school district) are the only parties. See *Vasquez v Happy Valley Union Sch. Dist.* (2008) 159 CA4th 969, 978, 72 CR3d 15 (only parties were petitioner (terminated teacher) and respondent (school district)); *Building Material & Constr. Teamsters Union, Local 216 v Farrell* (1986) 41 C3d 651, 656, 224 CR 688 (only parties were petitioner (union) and respondent (city agency)).

However, this is not always the case. See *California Correctional Peace Officers Ass'n v State Personnel Bd.* (1995) 10 C4th 1133, 1140, 43 CR2d 693 (parties were petitioner (union), respondents (State Personnel Board), and real parties in interest (Department of Corrections and Department of Youth Authority)); *Imagistics Int'l, Inc. v Department of Gen. Servs.* (2007) 150 CA4th 581, 585, 59 CR3d 18 (parties were petitioner (Imagistics International), respondent (Department of General Services), and real party in interest (Sharp Electronics)); *Savient Pharms., Inc. v Department of Health Servs.* (2007) 146 CA4th 1457, 1461, 53 CR3d 689 (parties were petitioner (Savient Pharmaceuticals), respondent (Department of Health Services), and real party in interest (Ramsell Corporation)). See also *Fonseca v Fong* (2008) 167 CA4th 922, 927 n6, 84 CR3d 567 (sheriff, not police department, administered jail; real party in interest problem "solved" by assuming sheriff had "self interest" in complying with court's ruling).

PRACTICE TIP: In determining whether a real party in interest exists, it may be helpful to consider the concept of indispensable parties in ordinary civil actions. A person is an indispensable party if the party's absence will prevent the court from granting a complete determination of the matter, or will seriously prejudice any party before the court, or if a judgment rendered will inequitably affect or jeopardize the party's interest. See CCP §389; *Hebbard v Colgrove* (1972) 28 CA3d 1017, 1026, 105 CR 172. See also California Civil Procedure Before Trial §§14.8-14.12 (4th ed Cal CEB 2004).

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§5.35 b. Right to Notice and Hearing

Any real party in interest *must* be named in the petition, is entitled to notice, and has a right to be heard. CCP §389; *Sonoma County Nuclear Free Zone '86 v Superior Court* (1987) 189 CA3d 167, 173, 234 CR 357; 8 Witkin, California Procedure, *Extraordinary Writs* §§166-168 (5th ed 2008). This requirement flows from due process principles and the fact that issuance of a peremptory writ will overturn a decision favoring the real party in interest, thus directly affecting a party who would presumably want the action or decision upheld.

PRACTICE TIP: The petitioner must make every effort to identify and name all real parties in interest. Failure to do so may result in delay or dismissal of the petition. See *Tracy Press, Inc. v Superior Court* (2008) 164 CA4th 1290, 1297-1302, 80 CR3d 464 (writ petition filed in superior court properly named real party in interest, but writ petition filed in court of appeal did not and therefore was dismissed); *Inland Counties Reg'l Ctr. v Office of Admin. Hearings* (1987) 193 CA3d 700, 704, 238 CR 422 (affirming trial court's order setting aside judgment granting writ of mandate because petition failed to name minor as real party in interest).

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C. Requesting Alternative Forms of Writ Relief

§5.36 1. Selecting Wrong Writ Usually Not Fatal

Most courts will not refuse relief just because the petitioner has asked for the wrong type of writ as long as the petition adequately alleges, and the petitioner proves, entitlement to writ relief. See *Coelho v State Personnel Bd.* (1989) 209 CA3d 968, 971, 257 CR 557 (petitioner incorrectly requested administrative mandamus but alleged an abuse of discretion; court should have considered petition as one for traditional mandate); *Eureka Teachers Ass'n v Board of Educ. of the Eureka City Schs.* (1988) 199 CA3d 353, 366, 244 CR 240 (when parties seek wrong writ, superior court must review petition under standard of review of proper writ). See also *Lee v Blue Shield* (2007) 154 CA4th 1369, 1378, 65 CR3d 612 (court should have treated complaint for declaratory relief as petition for writ of mandate); Chernoff & Watson, *Writ Lore*, 56 Cal SBJ 12 (1981).

PRACTICE TIP: Although courts may not deny relief because the petitioner asks for the wrong writ, a sloppy and inartful pleading does not make a favorable first impression, particularly if review is sought under a statute specifying a particular writ. For examples of writs authorized by statute, see chaps 2-4; §§16.2-16.85.

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§5.37 2. Pleading and Praying for Different Forms of Writ Relief

The requirements for various writs are not jurisdictional straitjackets limiting the petitioner's choice of relief, and it may be unclear in some cases which writ is appropriate. Thus, it is not uncommon to seek alternative forms of relief —*e.g.*, a peremptory writ of mandate under CCP §1085 or §1094.5, or a peremptory writ of mandate or prohibition. See *Eder v California Dep't of Fish & Game* (2009) 170 CA4th 216, 87 CR3d 788 (seeking relief under §1085 and §1094.5); *Young v Gannon* (2002) 97 CA4th 209, 219, 118 CR2d 187 (same). See also *Neighbors in Support of Appropriate Land Use v County of Tuolumne* (2007) 157 CA4th 997, 1004, 68 CR3d 882 (considering issue under both §1085 and §1094.5, with same result). The petition can be entitled as follows: "PETITION FOR WRIT OF MANDATE (CCP §1085) OR ADMINISTRATIVE MANDAMUS (CCP §1094.5)." Another option would be: "PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER EXTRAORDINARY RELIEF."

JUDICIAL PERSPECTIVE: If there is a wrong to be corrected, many judges will fashion an appropriate remedy despite a writ petition that asks for the incorrect type of relief.

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D. Contents of Petition

§5.38 1. Opening Paragraph

The opening paragraph of the petition should succinctly state the type of writ being sought and why writ relief is proper (*e.g.,* no other adequate legal remedy) and necessary (*e.g.,* the respondent has failed to perform an act required by law).

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§5.39 2. Request for Stay

Any stay request should be noted in the opening paragraph, *e.g.,* "In addition to a writ of mandate, the petitioner also seeks issuance of an immediate stay." In addition, the facts supporting a stay must be alleged in the subsequent enumerated paragraphs of the petition, and the prayer for relief should include a request for a stay. The request should also appear on the caption page of the petition.

PRACTICE TIP: A petitioner should not rely on a stay request in the petition to bring the request to the attention of the court. Rather, the petitioner should prepare a separate stay application or seek preliminary injunctive relief. On requesting a stay or preliminary injunctive relief, see chap 6.

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§5.40 3. Enumerated Allegations

The heart of the petition consists of a series of enumerated factual allegations that tell the court all the information it needs to make a decision in the case, *e.g.*, who the parties are, the factual background and procedural history, the challenged action or decision, and the basis for challenging it.

PRACTICE TIP: The allegations in the following section are only examples. Their language and the order in which they appear should not be slavishly followed. The allegations must be case specific. On the proper style for the statement of facts, see §5.46.

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a. Identity of Parties

§5.41 (1) Form: Petitioner

To download **Word** version, right click and choose *Save Target As*

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5.41-1 Allegation concerning petitioner

[1.] Petitioner(s) _ _[*specify name(s)*]_ _ _ _[*is/are*]_ _ **now and at all times mentioned in this petition** _ _[*explain role and beneficial interest of petitioner(s) in the proceeding, e.g., individual who was denied building permit, agency entitled to retroactive payment of taxes*]_ _**.**

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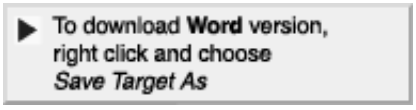
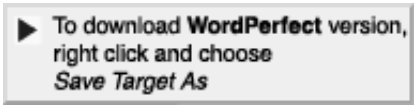
Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/§5.42 (2) Form: Respondent

§5.42 (2) Form: Respondent





5.42-1 Allegation concerning respondent

[2.] Respondent(s) _ _[*specify name(s)*]_ _ _ _[*is/are*]_ _ **now and at all times mentioned in this petition** _ _[*has/have*]_ _ **been** _ _[*a/an/the*]_ _ _ _[*designate type of inferior tribunal or officer, e.g., board, agency, or commissioner*]_ _**, responsible for administering the** _ _[*statute/ordinance/regulation*]_ _ **and** _ _[*obligated to perform the ministerial duty of* _ _[*specify duty*]_ _*/exercising adjudicatory functions in connection with* _ _[*specify proceeding*]_ _]_ _**.**

5.42-2 Optional addition to 5.42-1: Individual respondent

[3.] Respondent _ _[*name of public official or other individual respondent*]_ _ **is now, and at all times mentioned in this petition has been,** _ _[*a/an*]_ _ _ _[*specify position, e.g., Director of the Department of General Services*]_ _**, and in that capacity at all times relevant to these proceedings has** _ _[*failed to perform the ministerial duty of*_ _[*specify duty and manner in which respondent has failed to perform*]_ _*/abused* _ _[*his/her*]_ _*discretion by* _ _[*specify manner in which respondent has abused discretion*]_ _*/exercised powers in excess of* _ _[*his/her*]_ _*jurisdiction in that*_ _[*specify in what manner respondent has acted in excess of jurisdiction*]_ _]**.**

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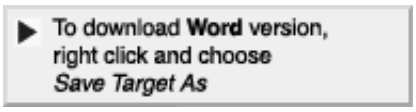
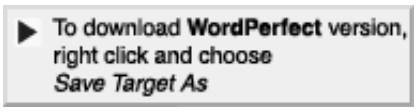
Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/§5.43 (3) Form: Real Party in Interest

§5.43 (3) Form: Real Party in Interest





5.43-1 Allegation concerning real party in interest

[3.] Real Party(ies) in Interest _ _[*specify name(s)*]_ _ _ _[*is/are*]_ _ **now and at all times mentioned in this petition** _ _[*specify role in the proceeding*]_ _**.**

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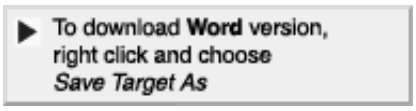
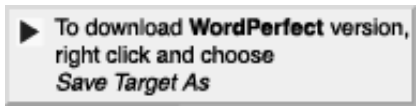
(4) Particular Contexts

§5.44 (a) Form: When Petition Challenges Nonjudicial Action





5.44-1 Allegations when nonjudicial action involved

[*Example 1: Petitioner seeks to compel action by California State Labor Commissioner*]

[1.] Petitioner(s), _ _[*name(s)*]_ _, _ _[*is/are*]_ _ _ _[*give status, e.g., an employee who seeks unpaid wages in three consolidated claims filed with the Labor Commissioner, entitled Able, Baker, and Cooper v William P. Bennett and Alicia Lopez, dba The Open Door, No. 12-12345 (1, 2, 3)*]_ _**.**

[2.] Respondent(s), _ _[*name(s)*]_ _,_ _[*specify connection to matter, e.g., is charged by California State Labor Code §98 with investigating employee complaints and with adjudicating them according to Labor Code guidelines*]_ _**.**

[3.] Real _ _[*party/parties*]_ _ **in Interest** _ _[*is/are*]_ _ _ _[*name(s)*]_ _**.** _ _[*Specify interest in the outcome, e.g.: The order sought by this petition directly affects real parties because they would be obliged to pay all unpaid wages that the California State Labor Commissioner found owing to petitioner employees*.]_ _

[*Example 2: Petitioner seeks to compel county controller to issue retirement check*]

[1.] Petitioner(s) _ _[*is/are*]_ _ **former employee(s) of the County of** _ __ __ _**, having been employed by the County from** _ _[*date*]_ _**, to** _ _[*date*]_ _**, and having retired from such service on** _ _[*date*]_ _**.**

[2.] Respondent(s), _ _[*name(s)*]_ _**,** _ _[*specify connection to matter*]_ _**.**

[*Example 3: Petitioner seeks to compel registrar of voters to delete from ballot the name of an ineligible incumbent, and to add that of petitioner-candidate*]

[1.] Petitioner is, and at all times mentioned in this petition was, a citizen and taxpayer and the candidate receiving the _ _[*e.g., second highest number of votes in the primary election held November 7, 2007, for the office of Judge of the Superior Court for the County of Buena Vista*]_ _**.**

[2.] Respondent(s), _ _[*name(s)*]_ _**,** _ _[*specify connection to matter*]_ _**.**

[*Example 4: Petitioner seeks to compel action by a corporation or association, e.g., when director or stockholder seeks inspection of corporate records*]

[1.] Petitioner(s) _ _[*is/are*]_ _**, and at all times mentioned in this petition** _ _[*was/were*]_ _**,** _ _[*director(s)/stockholder(s) and owner(s) of* _ _[*number*]_ _ *shares of the capital stock*]_ _ **of XYZ Company, Inc., a corporation organized and existing under the laws of**

[*Option 1: Domestic corporation*]

the State of California.

[*Option 2: Foreign corporation*]

the State of _ _[*name*]_ _ **and authorized to do business in California.**

[*Continue*]

[2.] Respondent(s), _ _[*name(s)*]_ _, _ _[*specify connection to matter*]_ _.

Comment: These are examples of challenges to nonadjudicatory action.

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Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/§5.45 (b) Form: When Petitioner Is Party to Ongoing Administrative Proceeding

§5.45 (b) Form: When Petitioner Is Party to Ongoing Administrative Proceeding

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5.45-1 Allegation when petitioner is party to ongoing administrative proceeding

[1.] Petitioner(s), _ _[*name(s)*]_ _**,** _ _[*is/are*]_ _ _ _[*one of*]_ _ **the** _ _[*plaintiff(s)/defendant(s)*]_ _ **in a proceeding** _ _[*now pending/ commenced*]_ _ **in** _ _[*name of, e.g., administrative agency's forum*]_ _**, entitled** _ _[*title of action*]_ _**, No.** _ _**. The** _ _[*plaintiff(s)/defendant(s)*]_ _ **in that proceeding** _ _[*is/are*]_ _ **named in this petition as real** _ _[*party/parties*]_ _ **in interest.**

Comment: This allegation covers the situation in which the petitioner is a party to an ongoing proceeding and wishes to challenge an action that has occurred in that proceeding. The use of this type of allegation in a superior court writ proceeding is rare, however, because the petitioner is usually challenging the *final* decision or action of a governmental or private entity. The petitioner may want to add a more specific allegation concerning the agency, *e.g.,* when a challenge to the hearing officer is involved.

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b. Describing Challenged Action and Factual Background

§5.46 (1) Style for Statement of Facts

The factual story should be told simply and directly, in whatever sequence provides the maximum force and continuity. The petitioner should avoid excessive formalism and try to be clear and straightforward. The factual allegations in the petition should be made in the ultimate-fact style characteristic of a complaint. For an example, see form in §13.1.

JUDICIAL PERSPECTIVE: Unless there is good reason not to, it usually is best to tell the court the factual story in chronological order. The petitioner should keep in mind that the judge will not be familiar with the case. If the factual allegations are lengthy, they can be separated into different sections under descriptive headings.

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§5.47 (2) Using Supporting Citations

If the writ proceeding arises from a proceeding that generated a record and that record will be part of the evidentiary basis for the writ proceeding, all factual allegations should cite to the record (if already prepared). Alternatively, if declarations or affidavits have been prepared and will be submitted to the court when the writ petition is filed, the factual allegations should refer to those documents. If the noticed motion procedure is used, supporting declarations and exhibits may be filed later in support of the motion for issuance of a peremptory writ. On the noticed motion procedure, see §§5.10-5.14, 5.76-5.107. On citing to the record, see §7.23.

PRACTICE TIP: It is important for the petitioner to be candid with the court in the factual recitation. Failure to tell the whole story, or to tell it fairly, can be extremely prejudicial to the petitioner's case both because the judge may form a negative opinion of the petitioner's case and because of the risk of creating an unclean hands defense.

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§5.48 (3) Relating to Legal Basis for Relief

The factual allegations must set forth all facts necessary to support the ground urged for issuance of the writ, *e.g.,* acting contrary to the law or an abuse of discretion. On the legal bases for writ relief, see chaps 2-4.

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Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/§5.49 c. Describing Basis for Challenging Action

§5.49 c. Describing Basis for Challenging Action

The allegations identifying the basis for relief are the crux of the writ petition. These allegations cannot be reduced to a formula; rather, they depend on the facts of the particular case. If the allegations in the petition flow chronologically, as recommended (see Judicial Perspective in §5.46), the allegations setting forth the basis for relief will follow the factual and procedural recitation. For an example, see form in §13.1.

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§5.50 (1) Specific Allegations Required for Mandate

To obtain a writ of mandate, the petition must allege, in addition to or in conjunction with the allegations discussed above, the following:

- The petitioner's beneficial interest in the outcome of the proceedings.
- The petitioner's clear, present, and legal right to the respondent's performance.
- The respondent's present legal duty and present ability to perform.
- The respondent's failure and refusal to perform, or the respondent's abuse of discretion.
- The lack of any plain, speedy, and adequate legal remedy.

On mandate generally, see chap 2.

PRACTICE TIP: An alternative writ of mandate, in and of itself, does not stay the challenged action or decision. To obtain temporary relief, the writ petition can include a request for and allegations supporting a stay. See §§5.39, 5.58. On stays in the superior court, see chap 6.

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§5.51 (2) Specific Allegations Required for Prohibition

To obtain prohibitory relief restraining a quasi-judicial tribunal or officer from acting without or in excess of jurisdiction (rarely applicable in superior court writ proceedings), the petition must allege, in addition to or in conjunction with the allegations discussed above, the following:

- Pendency of the action or proceeding over which the respondent exercises or is threatening to exercise judicial functions.
- The respondent's exercise of judicial functions.
- The respondent's intent, unless prohibited, to act or to continue to act without or in excess of jurisdiction (*e.g.*, to proceed to hear and determine the action or proceeding or to make or render a certain invalid order, judgment, or decision).
- The lack of any plain, speedy, and adequate legal remedy.

On prohibition generally, see §§4.2-4.9.

PRACTICE TIP: Although an alternative writ of prohibition in theory effects a stay by its own terms (see CCP §1104), to ensure immediate temporary relief, the writ petition can include a request for and allegations supporting a stay. See §§5.39, 5.58. On stays in the superior court, see chap 6.

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§5.52 (3) Specific Allegations Required for Review (Certiorari)

To obtain a writ of review (certiorari) of completed quasi-judicial action (rarely applicable in superior court writ proceedings), the petition must allege, in addition to or in conjunction with the allegations discussed above, the following:

- The respondent's exercise of judicial functions.
- A description of the completed judicial act sought to be reviewed for excess of jurisdiction.
- The reason or reasons for the invalidity of the respondent's action.
- The lack of a right of appeal, and the lack of any plain, speedy, and adequate legal remedy.

On writs of review generally, see §§4.10-4.16.

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d. Absence of Adequate Legal Remedy

§5.53 (1) Requirement for Mandate and Prohibition

Mandate and prohibition will issue only when the petitioner has no plain, speedy, and adequate remedy at law. CCP §§1086, 1103(a). For discussion, see §§2.15-2.16, 4.9.

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§5.54 (2) Form: Absence or Inadequacy of Other Remedies

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5.54-1 Allegation concerning absence or inadequacy of other remedies

[11.] Petitioner(s) _ _[*has/have*]_ _ **no plain, speedy, or adequate remedy** _ _[*at law*]_ _ **to challenge respondent's(s')** _ _[*order/judgment/decision of* _ _[*date*]_ _]_ _ **(Exhibit** _ _**) other than the relief sought in this petition.** _ _[*Detail factual basis supporting why petitioner(s) has/have no plain, speedy, and adequate remedy and what specific harm will result if writ relief is denied*.]_ _

Comment: This allegation is usually one of the last allegations in the petition and is numbered sequentially. Petitioners must be specific in explaining why there is no adequate remedy at law and what specific harm will result if writ relief is denied. *Phelan v Superior Court* (1950) 35 C2d 363, 370, 217 P2d 951. In a writ of review (certiorari) proceeding, the petitioner must allege not only the absence or inadequacy of other remedies but also that there is no right of appeal. CCP §1068(a). For discussion, see §4.16.

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e. Exhaustion of Administrative Remedies

§5.55 (1) Aspect of No-Adequate-Legal-Remedy Requirement

An aspect of the requirement that the petitioner have no adequate legal remedy is that the petitioner must exhaust all available administrative remedies before an administrative decision can be challenged through a writ proceeding. For further discussion, see §2.34.

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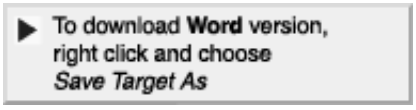
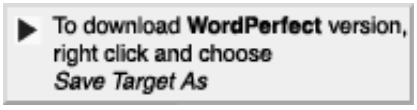
Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/§5.56 (2) Form: Exhaustion of Administrative Remedies

§5.56 (2) Form: Exhaustion of Administrative Remedies





5.56-1 Alternative: Allegation concerning exhaustion of all available remedies (administrative or other nonjudicial remedies)

[10.] Petitioner(s) _ _[*has/have*]_ _ **exhausted all available** _ _[*administrative*]_ _ **remedies required to be pursued by** _ _[*him/her/it/them*]_ _**,** _ _[*as set forth in Paragraph* _ _ *above/as follows:*]_ _ _ _[*Specify*]_ _**.**

5.56-2 Alternative: Allegation concerning failure to exhaust remedies (administrative or other nonjudicial remedies)

[10.] Petitioner(s) _ _[*has/have*]_ _ **not exhausted all available** _ _[*administrative*]_ _ _ _[*remedy/remedies*]_ _ **provided by** _ _[*e.g., statute/bylaws/contract*]_ _ **because** _ _[*e.g., the remedy is inadequate/to do so would cause irreparable injury*]_ _ **in that** _ _[*state in sufficient detail why available remedies have not been exhausted*]_ _**.**

Comment: When using this allegation, the petitioner should state clearly and concisely the steps taken, if any, otherwise required by law, administrative regulations, organizational rules, or contract provisions, and the specific reasons why any additional steps were not taken.

5.56-3 Alternative: Allegation concerning futility of exhausting administrative or other nonjudicial remedies

[10.] Petitioner(s) _ _[*has/have*]_ _ **not exhausted all available** _ _[*administrative*]_ _ _ _[*remedy/remedies*]_ _ **provided by** _ _[*e.g., statute/bylaws/contract*]_ _ **because it would be futile to do so in that** _ _[*state in sufficient detail why it would be futile to exhaust administrative remedies*]**.**

Comment: Futility is a narrow exception and will not suffice unless the petitioner "can positively state that [the respondent] has declared what its ruling will be in a particular case." *Sea & Sage Audubon Soc'y v Planning Comm'n* (1983) 34 C3d 412, 418, 194 CR 357. For further discussion of the futility exception, see California Administrative Mandamus §3.43 (3d ed Cal CEB 2003).

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§5.57 f. Alleging Damages if Appropriate

In mandate and prohibition proceedings, the petitioner can recover damages resulting from the challenged action or decision. CCP §1095. Damages may be enforced in the manner provided for money judgments generally. CCP §1095. In cases in which the respondent is an officer or employee of a public entity, any damages are recoverable against the entity, not the official or employee, provided the court finds that the official or employee appeared and defended in good faith. CCP §1095.

PRACTICE TIP: Claim filing requirements and various governmental immunities may affect the petitioner's ability to recover damages against a public entity. See California Government Tort Liability Practice, chaps 5, 10 (4th ed Cal CEB 1999).

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§5.58 g. Alleging Basis for Stay if Requested

If a stay is requested by application or request for temporary restraining order, the allegations must detail the facts and circumstances establishing that a stay is appropriate. On requesting a stay, see chap 6. If the stay would cause some apparent harm to the respondent or real party in interest, the petitioner may offer, if possible, to alleviate or diminish the harm in some way or provide clear evidence that the relative harm to the petitioner if the court denies the stay is greater.

PRACTICE TIP: A petitioner who intends to seek a stay of the challenged action or decision should do so at the earliest opportunity. Delay undercuts any alleged need for a stay and may result in the court denying a stay request.

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§5.59 h. Prayer for Relief

The prayer for relief follows the allegations and precedes the verification. The prayer should specify all types of relief sought by the petitioner, including any damages. When a stay is requested (see chap 6), it should be mentioned first. In addition, many courts will accept a request for both an alternative writ followed by issuance of a peremptory writ and a request for peremptory writ issued pursuant to noticed motion.

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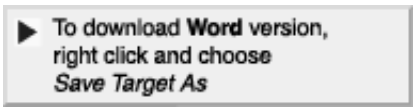
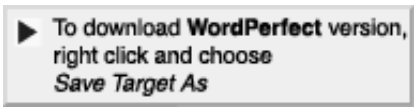
§5.60 (1) Form: Types of Relief





5.60-1 Opening language of prayer

WHEREFORE, petitioner respectfully prays that:

5.60-2 Optional: Stay

[1.] This Court immediately stay _ _[*specify what is to be stayed and, if administrative action is involved, give case number*]_ _**.**

5.60-3 Alternative: Petitioner seeks alternative writ of mandate

[2.] An alternative writ of mandate issue under seal of this Court commanding _ _[*respondent(s)/real* _ _[*party/parties*]_ _ *in interest*]_ _ _ _[*specify names of those to whom order is directed*]_ _ **to** _ _[*set out acts or duties required to be performed*]_ _**, or to show cause before this Court, at a time and place then or thereafter specified by Court order, why** _ _[*it/they*]_ _ _ _[*has/have*]_ _ **not done so and why a peremptory writ should not issue.**

[3.] On the return of the alternative writ and hearing on the order to show cause, a peremptory writ of mandate issue under seal of this Court compelling respondent(s) to _ _[*set out acts or duties to be performed*]_ _**.**

5.60-4 Alternative: Petitioner seeks alternative writ of prohibition

[2.] An alternative writ of prohibition issue under seal of this Court commanding _ _[*respondent(s)/real* _ _[*party/parties*]_ _ *in interest*]_ _ _ _[*specify names of those to whom order is directed*]_ _ **to desist and refrain from taking any further action or proceedings** _ _[*including, e.g., trial/continuance/enforcement of earlier proceedings*]_ _ **in the above described** _ _[*action/matter*]_ _ **until further order of this Court, and directing and requiring respondent(s)** _ _[*and real* _ _[*party/parties*]_ _ *in interest*]_ _ **to show cause before this Court, at a time and place then or thereafter specified by Court order, why it should not be absolutely and forever restrained from any further proceedings in the** _ _[*action/matter*]_ _**; or to show cause before this Court, at a time and place then or thereafter specified by Court order, why** _ _[*it/they*]_ _ _ _[*has/have*]_ _ **not done so and why a peremptory writ should not issue.**

[3.] On the return of the alternative writ and hearing on the order to show cause, a peremptory writ of prohibition issue under seal of this Court restraining respondent(s) absolutely and forever from taking any further proceedings in this _ _[*action/matter*]_ _**.**

5.60-5 Alternative: Petitioner seeks peremptory writ after briefing and a hearing

[2.] A peremptory writ of _ _[*prohibition/mandate*]_ _ **issue under seal of this Court commanding** _ _[*respondent(s)/real* _ _[*party/parties*]_ _ *in interest*]_ _ _ _[*specify names of those to whom order is directed*]_ _ _ _[*to desist and refrain from taking any further action or proceedings* _ _[*including, e.g., trial/continuance/enforcement of earlier proceedings*]_ _ **to** _ _[*set out acts or duties required to be performed*]_ _]_ _**.**

5.60-6 Alternative: Petitioner seeks writ of review (certiorari)

[2.] A writ of review (certiorari) issue under seal of this Court commanding respondent _ _[*state name of court or agency*]_ _ **to certify to this Court, at a time and place specified by Court order, a transcript of the record and proceedings of the above described** _ _[*action/cause/matter/hearing*]_ _**.**

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§5.61 (2) Form: Costs and Attorney Fees

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5.61-1 Request costs and attorney fees (when appropriate)

[4.] This Court award petitioner(s) the costs of this action.

[5.] This Court award petitioner(s) reasonable attorney fees under _ _[*cite applicable authority*]**_ _.**

Comment: On the recovery of costs and attorney fees, see §§5.121-5.127.

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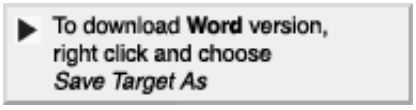
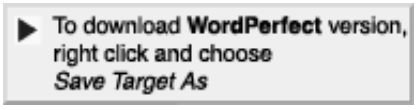
§5.62 (3) Form: Other Appropriate Relief





5.62-1 Request other appropriate relief

[6.] This Court grant such other relief as may be just and proper.

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§5.63 4. Form: Signature Block

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5.63-1 Signature block

Date: _ _ _ _ _ _

Respectfully submitted,
__[*Signature of attorney(s)*]__
_ _[*Typed name(s)*]_ _
Attorney(s) for Petitioner(s)

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§5.64 5. Verification Required

A petition for extraordinary relief must be verified (CCP §§1069, 1086, 1103(a)) in the same manner in which an ordinary civil complaint is verified (CCP §§446, 1109). Either a declaration under penalty of perjury or an affidavit may be used. CCP §§2009, 2015.5. Courts will decline to consider a petition on the merits for lack of, or for an inadequate, verification. See *Krueger v Superior Court* (1979) 89 CA3d 934, 939, 152 CR 870 (appellate court writ petition fatally defective because verification was dated December 3, but body of petition was dated December 22). For a form of verification, see §5.69.

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§5.65 a. Public Entities Exempt

In general, when the petitioner is a governmental body or public officer acting in his or her official capacity, the petition need not be verified. CCP §446(a); see, *e.g.*, *Fremont Union High Sch. Dist. v Santa Clara County Bd. of Educ.* (1991) 235 CA3d 1182, 1188, 286 CR 915 (petitioner school district exempt from verification requirement); *Murrieta Valley Unified Sch. Dist. v County of Riverside* (1991) 228 CA3d 1212, 1223, 279 CR 421 (same); *Elliott v Contractors' State License Bd.* (1990) 224 CA3d 1048, 1054, 274 CR 286 (answer of Contractors' State License Board exempt from verification requirement). But see *People v Superior Court (Alvarado)* (1989) 207 CA3d 464, 469, 255 CR 46 (People's petition must be verified when used as evidence of facts); *Municipal Court v Superior Court* (1988) 199 CA3d 19, 25 n1, 244 CR 591 (writ provisions requiring verification of petitions prevail over §446). The better practice is for the governmental body or official to verify the petition because it is often used as evidence of the facts alleged.

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§5.66 b. Verification Must Be Based on Personal Knowledge

To the extent the petition alleges facts that are intended to be relied on as evidence, the verification must be based on personal knowledge, not information and belief. *Star Motor Imports, Inc. v Superior Court* (1979) 88 CA3d 201, 204, 151 CR 721. When there are no disputed facts, the petition may be based on information and belief. *League of Women Voters v Eu* (1992) 7 CA4th 649, 9 CR2d 416. See also *Soltani-Rastegar v Superior Court* (1989) 208 CA3d 424, 428, 256 CR 255.

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§5.67 c. Petitioner Must Verify Petition

The petitioner must verify the writ petition. CCP §§1069, 1086, 1103(a). Under CCP §446, only in extenuating circumstances may a pleading be verified by the attorney rather than the party litigant. *Perlman v Municipal Court* (1979) 99 CA3d 568, 573, 160 CR 567 (verification by attorney merely for sake of convenience invalid). Extenuating circumstances might include the party's absence from the county in which the attorney's office is located, the party litigant's inability to verify, or the existence of facts that are within the exclusive knowledge of the attorney (*e.g.,* proceedings that occurred in court). See *Suzanne J. v Superior Court* (1996) 46 CA4th 785, 788, 54 CR2d 25 (court dismissed petition in dependency proceeding because mother's attorney had verified petition without explaining why mother had failed to do so or to execute declaration indicating her consent to attorney's doing so).

PRACTICE TIP: Every effort should be made to have the petitioner verify the petition. An attorney who verifies the petition must be careful not to verify facts that constitute a waiver of the attorney-client privilege, thus subjecting the attorney to deposition inquiries concerning the factual basis for the verification. See *Alpha Beta Co. v Superior Court* (1984) 157 CA3d 818, 825, 203 CR 752.

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§5.68 d. Defects in Verification May Be Challenged

The respondent or real party in interest must be sure to challenge improper verification or lack of verification because these errors are not jurisdictional and even minor defects may be sufficient to defeat a petition. If the respondent fails to object to the absence of verification, he or she waives the defect, and the court may allow the verification to be added by amendment even though the limitation period has expired since the date the petition was filed. See *Ware v Stafford* (1962) 206 CA2d 232, 237, 24 CR 153.

For further discussion of verifications, see §§18.42-18.48.

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Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/§5.69 e. Form: Verification

§5.69 e. Form: Verification

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5.69-1 Alternative: Affidavit with notary acknowledgment

State of _ _ _ _ _ _, County of _ _ _ _ _ _:

I, the undersigned, being sworn, say:

I am _ _[_ _[*one of***]_ _*/the attorney(s) for*]_ _ the petitioner(s) in this action. _ _[***All facts alleged in the above document are true of my own personal knowledge/I have read the above Petition for Writ of _ _[***Mandate/Prohibition/Review (Certiorari)***]_ _ and know its contents. All facts alleged in the petition are true of my own personal knowledge***.]_ _**

I declare under penalty of perjury that the foregoing is true and correct and that this affidavit was executed on _ _[*date***]_ _, at _ _[***city***]_ _, California.**

__[*Signature of petitioner/petitioner's attorney*]__
_ _[*Typed name*]_ _
_ _[*Petitioner/Attorney for petitioner*]_ _

State of California

County of _ _[*name of county***]_ _**

On _ _[*date***]_ _, before me, _ _[***name and title of notary***]_ _, personally appeared _ _[***name of affiant***]_ _, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) _ _[***is/are***]_ _ subscribed to the within instrument and acknowledged to me that _ _[***he/she/they***]_ _ executed the same in _ _[***his/her/their***]_ _ authorized capacity(ies), and that by _ _[***his/her/their***]_ _ signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.**

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____ (Seal)

5.69-2 Alternative: Declaration

I, the undersigned, declare:

I am _ _[_ _[*one of***]_ _*/the attorney(s) for*]_ _ the petitioner(s) in this action. _ _[***All facts alleged in the above document are true of my own personal knowledge/I have read the above Petition for Writ of _ _[***Mandate/Prohibition/Review (Certiorari)***]_ _ and know its contents. All facts alleged in the petition are true of my own personal knowledge***.]_ _**

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on _ _[*date***]_ _, at _ _[***city***]_ _, California.**

__[*Signature of petitioner/petitioner's attorney*]__
_ _[*Typed name*]_ _
_ _[*Petitioner/Petitioner's attorney*]_ _

Comment: The verification can be in the form of an affidavit or a declaration under penalty of perjury. CCP §2015.5. Verifications signed outside California must add the language "under the laws of the State of California" but need not recite the place of verification. CCP §2015.5.

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§5.70 6. Exhibits

If the record supporting the writ petition is only a few pages in length, it may be attached to the writ petition as an exhibit. In most cases, however, an administrative record (if there is one) will be lodged separately, as will any supporting declarations and exhibits. On the record in a superior court writ proceeding, see §§7.24-7.25.

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§5.71 IV. FILING AND SERVING THE PETITION

Some of the procedures for filing and serving a writ petition differ depending on whether the petitioner prosecutes the writ petition using the noticed motion procedure or the alternative writ procedure. For a description and comparison of these two procedures, see §§5.9-5.19. The procedures for filing and serving the petition when using the noticed motion procedure are discussed in §§5.76-5.85. The procedures for filing and serving when using the alternative writ procedure are discussed in §§5.108-5.118.

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A. Time for Filing

§5.72 1. When Special Statutory Deadline

A writ petition must be filed before any statutory deadline applicable to the specific context. For example:

- A proceeding challenging the adoption and application of an ordinance that restricts property development would be governed by the 90-day limitation periods of either Govt C §66499.37 (applied challenges) or Govt C §65009(c) (facial challenges).
- A mandate petition brought under the California Environmental Quality Act (CEQA) (Pub Res C §§21000-21177) must be brought within the time periods set forth in Pub Res C §21167.

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§5.73 2. When No Special Statutory Deadline

In the absence of a special statutory deadline (see §5.72), the statute of limitations applicable to the right or obligation sought to be enforced fixes the outside time limit for filing a writ petition. CCP §1109. For example, CCP §338(a), the 3-year statute of limitations, applies to enforce a statutory liability, and CCP §337(1), the 4-year statute of limitations, applies to enforce rights under a written contract or other instrument. See *Peralta Fed'n of Teachers v Peralta Community College Dist.* (1979) 24 C3d 369, 386, 155 CR 679 (3-year statute of limitations of CCP §338 applied to mandate proceeding in which teachers sought proper classification and salary); 8 Witkin, California Procedure, *Extraordinary Writs* §179 (5th ed 2008).

PRACTICE TIP: In appellate court writ proceedings, the courts of appeal have adopted the view that writ petitions should be filed within the 60-day time period applicable to filing a notice of appeal. See *Cal W. Nurseries, Inc. v Superior Court* (2005) 129 CA4th 1170, 1173, 29 CR3d 170. This view is grounded in the fact that appellate court writ petitions usually seek immediate interlocutory appellate review of a trial court ruling in an ongoing proceeding. See §§18.66-18.68. By contrast, many superior court writ proceedings are not in the nature of an appeal (*e.g.,* a challenge to the validity of a statute or regulation, or an action to compel the adoption or implementation of regulations or the performance of a ministerial duty). Thus, while it is good practice to file a superior court writ proceeding within 60 days of the challenged action or decision, this is by no means a jurisdictional deadline.

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§5.74 3. Laches

Because writ proceedings are equitable in nature, the doctrine of laches may be invoked against a dilatory petitioner. *El Dorado Palm Springs, Ltd. v Rent Review Comm'n* (1991) 230 CA3d 335, 346, 281 CR 327 ("mandamus is a type of action in which equitable principles, such as the doctrine of laches, apply"). See, *e.g., Schellinger Bros. v City of Sebastopol* (2009) 179 CA4th 1245, 102 CR3d 394 (finding "abundant support" for determination that petitioner unreasonably delayed and acquiesced in city taking over 1 year to certify environmental impact report).

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§5.75 B. Venue

The rules governing ordinary civil actions govern the selection of the proper venue in writ proceedings. See CCP §1109; *Harris v Alcoholic Beverage Control Appeals Bd.* (1961) 197 CA2d 759, 761, 18 CR 151. For example, in actions against a public officer or board, CCP §393(b) has been held to apply, *i.e.,* the petition must be filed in the county in which the cause arose. *Sutter Union High Sch. Dist. v Superior Court* (1983) 140 CA3d 795, 798, 190 CR 182.

See also California Administrative Mandamus §10.20 (3d ed Cal CEB 2003), which discusses venue in both traditional mandate and administrative mandamus. On venue generally, see California Civil Procedure Before Trial, chap 8 (4th ed Cal CEB 2004); 3 Witkin, California Procedure, *Actions* §§779-958 (5th ed 2008).

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C. When Using Noticed Motion Procedure

§5.76 1. Filing and Serving Writ Petition Only at Outset of Proceeding

When the petitioner prosecutes a writ proceeding using the noticed motion procedure, the case proceeds in much the same way as a regular civil action. Accordingly, no additional action need be taken at the outset other than filing and serving the writ petition. See §5.10 for a chronology.

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a. Filing Procedures

§5.77 (1) Place of Filing

Because practice varies from county to county, counsel must check local court rules or with the clerk's office to find out where to file the petition. Some courts consider writ petitions to be specialized proceedings and require that they be filed and heard in a specific department or branch of the court.

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§5.78 (2) Civil Case Cover Sheet

California Rule of Court 3.220 requires that the first paper filed in an "action or proceeding" be accompanied by a case cover sheet. See CCP §363 (construing "action" to include special proceedings of civil nature (*e.g.,* writ proceedings)); Cal Rules of Ct 1.6 (defining "action" to include "special proceedings"). The Judicial Council has mandated the use of Civil Case Cover Sheet (Form CM-010). Cal Rules of Ct 3.220(b).

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§5.79 (3) Filing Fee

The filing fee for a writ petition is the same as for any other civil action (*i.e.*, $355). Govt C §70611 (filing fee for first paper in civil action or proceeding in superior court).

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§5.80 (4) Copies

Usually only the original writ petition and any attachments must be filed. However, counsel should check local rules to see whether the court requires additional copies. Counsel should prepare and have file-stamped sufficient copies for his or her own records.

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b. Serving Procedures

§5.81 (1) When to Serve

When no alternative writ is sought (*i.e.*, the noticed motion procedure is used), the petition can be served on the respondent and real party in interest either before or after the petition is filed, although the court cannot issue a peremptory writ until it is served. CCP §§1088, 1088.5, 1105, 1107.

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§5.82 (2) Whom to Serve

Each respondent and real party in interest named in the petition must be served with a copy of the petition and all accompanying documents. CCP §§1088, 1088.5, 1105, 1107. When the respondent or real party in interest is a board or a commission, service is made on the presiding officer, the secretary, or a majority of the members of the board or commission. CCP §1107. See also Los Angeles Ct R 9.5(c).

For a detailed discussion of service, see California Civil Procedure Before Trial, chaps 17-18 (4th ed Cal CEB 2004).

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Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/§5.83 (3) Manner of Service

§5.83 (3) Manner of Service

The writ statutes are somewhat ambiguous on the issue of the manner of service of the petition. See CCP §1107. However, because the petition is the initiating pleading, due process demands that it be served in the same manner as a regular civil summons and complaint. See CCP §§413.10-417.40.

For further discussion of service of summons, see California Civil Procedure Before Trial §§17.14-17.46 (4th ed Cal CEB 2004).

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(4) Proof of Service

§5.84 (a) Time of Filing

When a writ of mandate is sought under CCP §1088.5 (*i.e.*, no alternative writ is requested and the noticed motion procedure is used), the petition need not be accompanied by a proof of service at the time of filing, although one must be filed before any court hearing or action on the petition. CCP §§1088.5, 1107.

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§5.85 (b) Format

Proof of service should be made on a Judicial Council form whenever possible. CCP §417.10(f). It should include all of the information required by CCP §417.10(a). See the sample proof of service forms in California Civil Litigation Forms Manual §9.2 (Cal CEB 1980) and in California Civil Procedure Before Trial §§18.21-18.23 (4th ed Cal CEB 2004).

PRACTICE TIP: Although adverse parties may be referred to and served as defendants (see CCP §1063), this is not done in practice and it is preferable to designate the parties being served as respondents or real parties in interest.

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Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/ 2. Bringing Petition on for Hearing/§5.86 a. Preparing Motion for Issuance of Requested Writ

2. Bringing Petition on for Hearing

§5.86 a. Preparing Motion for Issuance of Requested Writ

After the petitioner has filed and served the writ petition and when ready to proceed on the merits, the petitioner must file and serve a notice of motion and motion for issuance of the requested writ.

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§5.87 b. Format of Motion

A motion for issuance of a writ must comply with the general rules of court governing the format of papers presented for filing (see Cal Rules of Ct 2.100-2.119) as well as with the civil law and motion rules (see Cal Rules of Ct 3.1110-3.1370). Cal Rules of Ct 2.2, 2.100, 3.1100, 3.1103(a)(2). On the general rules governing the format of papers presented for filing, see §5.21. In addition to the specific formatting requirements described below for the moving papers, the first page of each document must specify the following information immediately below the case number (Cal Rules of Ct 3.1110(b)):

- The date, time, and location of the scheduled hearing, and the judge, if ascertainable;
- The date of filing of the writ proceeding; and
- The nature of any attached paper other than an exhibit (*e.g.,* a declaration).

PRACTICE TIP: Rather than file several separate documents, many petitioners file the petition and any accompanying declarations and documents bound together, unless doing so would make the filing too unwieldy to be presented as a single filing.

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Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/§5.88 c. Required Papers

§5.88 c. Required Papers

A motion for issuance of a writ must be supported by at least the following documents (Cal Rules of Ct 3.1112(a)):

- A notice of hearing on the motion;
- The motion; and
- A supporting memorandum.

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§5.89 (1) Notice of Motion

The notice of motion is a very short formal statement that identifies the time, date, and place of the hearing, the nature of the order being sought, the grounds for the motion, and the documents and other items that support the motion. See Cal Rules of Ct 3.1110(a). See also the standard notice of motion form in California Civil Procedure Before Trial §12.140 (4th ed Cal CEB 2004).

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§5.90 (2) Motion

The motion must identify the party making the motion, name the parties to whom it is addressed, briefly state the basis for the motion and the relief sought, and if a pleading is being challenged, identify the portion being challenged. Cal Rules of Ct 3.1112(d).

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§5.91 (3) Combining Notice of Motion and Motion

Under Cal Rules of Ct 3.1112, a "motion" that is largely duplicative of the notice of motion must be filed in addition to the notice of motion, even though CCP §1005.5 provides that a motion is deemed made on serving and filing of the notice of motion. Accordingly, the usual practice is to combine the notice of motion and the motion into a single document entitled "Notice of Motion and Motion."

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(4) Supporting Memorandum

§5.92 (a) Purpose of Supporting Memorandum

The supporting memorandum is of critical importance. It identifies and focuses the legal issues presented, makes the petitioner's case for relief, and anticipates and rebuts arguments or defenses likely to be raised by the respondent or real party in interest. Thus, the memorandum must be as complete and persuasive as possible. On the similar memorandum supporting writ petitions filed in the appellate courts, see §§18.49-18.56.

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Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/§5.93 (b) Required Contents of Supporting Memorandum

§5.93 (b) Required Contents of Supporting Memorandum

A memorandum must contain (Cal Rules of Ct 3.1113):

- A statement of facts supported by references to the supporting evidence, *e.g.,* verified allegations of the petition or other evidentiary documents, such as exhibits attached to the petition, declarations and their attachments, or an administrative record.
- A concise statement of the standard of review to be applied by the superior court, supported by statutory or case authority or both.
- Arguments supporting issuance of a writ, referencing the pertinent facts and supported by statutory or case authority.
- A table of contents and table of authorities if the memorandum is longer than ten pages, and an opening summary of argument if it is longer than 15 pages.
- Copies of any non-California authority tabbed in accordance with Cal Rules of Ct 3.1110(f). Alternatively, a separate compendium of non-California authorities, tabbed as required by the rules, can be submitted as part of the moving papers.

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§5.94 (c) Format of Supporting Memorandum

It is good practice to use the basic structure of a memorandum filed in an appellate writ proceeding, *i.e.,* separate sections for the introduction, facts and procedural history, argument, and conclusion. In the argument section, each point should be made separately under an appropriate heading, which should be a concise description of the point being made. See Cal Rules of Ct 8.204(a)(1)(B) (appellate rules on headings). If absolutely necessary, a point heading may be as long as three to four lines. It should be a specific application of a rule of law to the facts of the case and not a bare legal conclusion or statement of an abstract principle.

The caption page of the memorandum should not be numbered, but the pages of the tables must be numbered consecutively, using lowercase Roman numerals starting on the first page of the tables. The pages of the text must be numbered consecutively using Arabic numerals starting on the first page of the text. Cal Rules of Ct 3.1113(h).

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§5.95 (d) Page Limits

A supporting memorandum may not exceed 15 pages, excluding exhibits, declarations, attachments, the tables of contents and authorities (if required), and the proof of service. Cal Rules of Ct 3.1113(d). A party may apply to the court for permission to file a longer memorandum. See Cal Rules of Ct 3.1113(e).

PRACTICE TIP: Counsel should not expect courts to be very generous in granting such requests, although a stipulation signed by all parties may be helpful in securing permission for additional pages.

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Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/§5.96 (e) Style of Supporting Memorandum

§5.96 (e) Style of Supporting Memorandum

Some attorneys rely primarily on the petition to convey the facts and persuade the court; others feel that the judge may go directly to the supporting memorandum. Although the facts in the petition should be alleged in the ultimate-fact style characteristic of a complaint, they should be restated in the memorandum in a more persuasive manner, with citation to the operative allegations in the writ petition or to other supporting evidence (*e.g.,* the administrative record or declarations and attached exhibits).

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§5.97 (i) Supporting Memorandum Should Be Persuasive

The point of the supporting memorandum is to persuade the court to issue a writ. Often, the most persuasive elements are the factual story and the reasons why writ relief is proper. A formalistic approach can be a handicap in telling the story. One effective approach is a simple narrative style, in which the facts are told in chronological order. Other approaches include trying to capture the reader's attention by using a dramatic arrangement of the facts or organizing the facts around one or two major points of argument, if that is interesting and does not confuse the reader.

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Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/§5.98 (ii) Supporting Memorandum Should Clearly State Basis for Issuance of Writ

§5.98 (ii) Supporting Memorandum Should Clearly State Basis for Issuance of Writ

Merely stating the alleged basis for a writ with citations to legal authorities is meaningless. In the memorandum, the petitioner must explain why the applicable law applies to the facts at hand and requires relief.

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§5.99 (iii) Citations to Evidence

All factual assertions in the memorandum should be supported by a citation to evidence, such as the verified writ petition (*e.g.,* Pet. p. 10, ¶20), an administrative record (*e.g.,* Rec. at 5), hearing transcript (*e.g.,* 9-1-07 Hrg. Tr. at 5:3-10), or a supporting declaration (*e.g.,* Smith Decl., p. 7, ¶5; Smith Decl., Exh. A at 5). If support exists in multiple places in the record, then citations should be made to all pieces of supporting evidence.

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Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/§5.100 (iv) Use of Quotations

§5.100 (iv) Use of Quotations

Quotations can be appropriate on crucial points and, if carefully used, may be preferable to summarization. Lengthy quotations should be avoided, however, and quoted material must be supported by a specific citation to the source document and any supporting evidence.

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d. Additional Papers

§5.101 (1) Declarations

Depending on the nature of the writ proceeding, the petitioner may submit evidence in support of the petition by way of declaration and exhibits. Any such declaration must be based on personal knowledge and meet other evidentiary rules. See *Star Motor Imports, Inc. v Superior Court* (1979) 88 CA3d 201, 204, 151 CR 721 (declaration made on information and belief is hearsay and does not establish evidentiary facts in petition). Exhibits should be authenticated.

On preparing the record in a superior court writ proceeding, see chap 7.

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§5.102 (2) Administrative Record

Many writ cases arise from proceedings that generate a record. The record may consist entirely of documents, or it also may include a transcript of an administrative hearing. See §§7.6-7.13. If there is such a record, it almost always must be lodged with the superior court before the hearing on the merits. See §7.25.

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Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/§5.103 (3) Proposed Order/Judgment

§5.103 (3) Proposed Order/Judgment

Court rules require the moving party to submit a proposed order and judgment. Cal Rules of Ct 3.1113(m).

PRACTICE TIP: The proposed order and judgment can aid the judge by showing exactly what the court is being asked to order and by requiring only a signature, without the need for further drafting time or delay. The judge also can sign the proposed order and judgment with confidence that adversaries served in advance had the chance to raise any arguments about form and content. The petitioner must make certain that there is no substantive variance between the relief requested in the petition and that in the proposed order and judgment. Preparing a proposed order and judgment at the outset also is useful for counsel as a means of focusing the motion papers on precisely what is being requested.

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Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/§5.104 e. Service and Filing of Motion and Supporting Documents

§5.104 e. Service and Filing of Motion and Supporting Documents

Because the writ petition has already been filed and served, and the respondent and any real party in interest have already appeared, the notice of motion and other moving papers are served and filed according to CCP §§1003-1020.

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Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/§5.105 (1) Whom to Serve

§5.105 (1) Whom to Serve

All parties to the action must be served with a copy of the moving papers. See CCP §§1010-1020.

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§5.106 (2) When to Serve

The petitioner must give at least 16 court days' notice of the motion for issuance of a writ, plus additional time if the notice is mailed, unless the time has been shortened for good cause by the court. CCP §1005(b). See California Civil Procedure Before Trial §12.65 (4th ed Cal CEB 2004) for the procedures for applying for an order shortening time. The parties may want, however, to agree on a briefing schedule that allows more time than otherwise is provided by the rules of court. This is frequently the case in writ proceedings of any complexity or in those involving a significant evidentiary showing or a sizeable record. The court likely will approve a stipulated briefing schedule, particularly if it allows ample time for the court to prepare for the hearing after the reply memorandum is filed.

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§5.107 (3) Where and When to File Papers

The originals of the motion papers, with appropriate proofs of service, are filed either in the court clerk's office (see Cal Rules of Ct 3.1302(a)) or in a particular department specified by the court's local rules. Counsel also should submit copies for file endorsement to ensure that the petitioner has an accurate record of the document filing dates.

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§5.108 D. When Using Alternative Writ Procedure

When the petitioner prosecutes a writ proceeding using the alternative writ procedure, the petitioner must, at the outset of the proceeding, file not only the writ petition but several other documents as well. For a chronology of a writ proceeding using the alternative writ procedure, see §5.15.

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1. Preparing the Papers

§5.109 a. Writ Petition

As with the noticed motion procedure (see §5.76), the writ proceeding begins with the filing of the writ petition. On drafting the writ petition, see §§5.20-5.70. When the alternative writ procedure is used, the petition must include allegations supporting and requesting issuance of an alternative writ.

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§5.110 b. Supporting Memorandum

In addition to filing the writ petition, a petitioner using the alternative writ procedure also should file a memorandum in support of the petition and application for an alternative writ. No statute or rule expressly requires a supporting memorandum. This is conventional practice, however, and it is expected by the courts, for good reason:

- In substance, the petition is a complaint and does not contain legal arguments and authorities. It therefore is important to include a supporting memorandum setting forth the legal arguments and authorities that support the requested writ relief.
- Frequently, the memorandum submitted in conjunction with the writ petition (when the petitioner uses the alternative writ procedure) is considered the opening brief on the merits of the petition. If, as is likely, the court issues an alternative writ and sets a hearing date, the court also may set a briefing schedule, with the respondent and any real party in interest filing both a return and an opposing memorandum and the petitioner closing with a reply memorandum. See §§9.6-9.10.
- Although there is no specific statutory requirement that the petition be accompanied by a supporting memorandum, there is a specific rule that a notice of motion *must* be accompanied by a memorandum. See Cal Rules of Ct 3.1113(a). Because petitions for writs are covered by the law and motion superior court rules (see Cal Rules of Ct 3.1103(a)(2)), the court will expect a supporting memorandum.
- A writ petition filed in the court of appeal or supreme court must be accompanied by a supporting memorandum (see Cal Rules of Ct 8.486(a)(5)), so by analogy a writ petition in superior court should be supported by a memorandum.
- Local rules may require a supporting memorandum.

For an example of a memorandum in support of an application for an alternative writ, see form in §13.3.

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§5.111 c. Exhibits/Declarations

Exhibits may be attached to the writ petition. However, in most cases, any supporting evidentiary material (*e.g.,* an administrative record or supporting declarations and exhibits) should be filed separately. See §§5.101-5.102.

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Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/§5.112 d. Proposed Alternative Writ

§5.112 d. Proposed Alternative Writ

The petitioner also should submit a proposed alternative writ compelling the respondent to do the act required to be performed (mandate) or ordering the respondent to desist or refrain from performing a specified act (prohibition) immediately or by a specified date, or to appear before the court on a specified date to show cause why the respondent should not be so ordered. CCP §§1087, 1104.

JUDICIAL PERSPECTIVE: Sometimes lawyers submit proposed alternative writs with the writ petition; other times they submit an order to show cause. The mandate and prohibition statutes specifically provide only for issuance of an alternative writ, although they do include order-to-show-cause language. Most judges will sign either one. If the respondent's or real party in interest's counsel is concerned that the petitioner will use an order to show cause to suggest to third persons or to the public that the court has made a preliminary determination against his or her client, counsel should consider asking the court to modify the language or to use an alternative writ.

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2. Filing and Service Procedures

§5.113 a. Use of Ex Parte Application

In nearly all instances in which the alternative writ procedure is used, the petitioner begins the writ proceeding by filing an ex parte application for issuance of an alternative writ. See CCP §1088 (application for writ may be made without notice, but in such case court can issue only alternative writ). In fact, many courts mandate compliance with ex parte procedures (see Cal Rules of Ct 3.1200-3.1207) before issuing an alternative writ. See, *e.g.*, Los Angeles Ct R 9.5(e)(2). On ex parte applications generally, see California Civil Procedure Before Trial, chap 13 (4th ed Cal CEB 2004).

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§5.114 (1) Contents of Ex Parte Application

An ex parte application for issuance of an alternative writ must (Cal Rules of Ct 3.1200-3.1207):

- Notify all parties of the application at least by 10 a.m. on the court day before the appearance, absent exceptional circumstances (Cal Rules of Ct 3.1203(a));
- Be in writing and include (Cal Rules of Ct 3.1201):
- The case caption;
- The relief requested;
- A declaration in support of the application making an affirmative factual showing by competent testimony based on personal knowledge of irreparable harm, immediate danger, or any other statutory basis for granting relief ex parte (see Cal Rules of Ct 3.1202(c));
- A declaration based on personal knowledge as to the giving of notice (see Cal Rules of Ct 3.1204);
- A supporting memorandum; and
- A proposed order;
- State (Cal Rules of Ct 3.1202):
- The name, address, and telephone number of each party or the party's attorney; and
- Whether a previous application has been made of the same character or for the same relief, and the court's disposition of that previous application.

PRACTICE TIP: The petitioner should check local rules to see whether the court has more specific requirements for ex parte applications.

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§5.115 (2) Service of Ex Parte Application

The petitioner must serve the ex parte application and any other papers (*e.g.*, the petition, the supporting memorandum, or the proposed alternative writ) on all opposing parties at the first reasonable opportunity, *i.e.,* before the hearing begins. Cal Rules of Ct 3.1206; see also CCP §1107. Absent exceptional circumstances, the hearing will not be held unless such service has been made. Cal Rules of Ct 3.1206. Check local rules to see whether the court has more specific notification and service requirements for ex parte applications.

NOTE: Because Cal Rules of Ct 3.1206 requires that, in most cases, the petitioner give reasonable notice, each county may impose its own definition of "reasonable." For example, in Los Angeles County, the petitioner must serve the application at least 5 days before the ex parte hearing, unless good cause is shown. Los Angeles Ct R 9.5(e)(1).

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Source: Civil Litigation/California Civil Writ Practice/5 Initiating a Superior Court Writ Proceeding/§5.116 (3) Personal Appearance

§5.116 (3) Personal Appearance

The petitioner, or counsel for the petitioner, must appear at the ex parte hearing except in the case of (Cal Rules of Ct 3.1207):

- Applications to file memorandum in excess of the page limit;
- Applications for extensions of time to serve pleadings;
- Setting hearing dates on alternative writs and orders to show cause; or
- Stipulations by the parties or other court orders.

The respondent and any real party in interest may want to appear, if only to urge the court to establish reasonable dates for the return, briefing schedule, and hearing on the merits of the petition.

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§5.117 (4) Following Local Procedures

Check local rules and policies concerning ex parte procedures, as they vary in each county. For example, a county might allow counsel to file the ex parte application with the clerk and then present it to the presiding judge in chambers with the proposed alternative writ. If the alternative writ issues, the petitioner serves a copy of the writ, along with the petition and any other supporting documents, on the respondent and any real party in interest. In some cases, the respondent and any real party in interest may appear at the ex parte hearing. They may oppose issuance of the alternative writ, or more likely, may urge the court to establish reasonable dates for the return and hearing on the merits as well as a briefing schedule.

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§5.118 b. Court Action on Ex Parte Application

When presented with an ex parte application for issuance of an alternative writ, the court has several options. It can:

- Issue the alternative writ;
- Deny the application; or
- Deny the application and also dismiss the petition, with or without leave to amend.

On the respondent's and any real party in interest's responsive pleadings and papers, see §§8.21-8.38. On the petitioner's reply papers, see §§8.57-8.63. On the hearing and the court's action on the merits of a petition, see §§9.21-9.48.

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§5.119 V. COMBINING WRIT PETITION AND COMPLAINT

In some situations, a writ may not provide full and complete relief. In such case, the petitioner can file a combined initial pleading—a petition *and* a complaint for damages, declaratory relief, or injunctive relief, as may be appropriate. See *Morehart v County of Santa Barbara* (1994) 7 C4th 725, 735, 29 CR2d 804; *California Sch. Bds. Ass'n v State* (2009) 171 CA4th 1183, 90 CR3d 501 (combined complaint for declaratory relief and writ petition); *County of San Diego v State* (2008) 164 CA4th 580, 79 CR3d 489 (same). The combined pleading can be entitled, *e.g.,* "PETITION FOR WRIT OF MANDATE (CCP §1085) AND COMPLAINT FOR DAMAGES." On declaratory and injunctive relief, see California Civil Procedure Before Trial, chaps 32 (injunctions), 35 (declaratory relief) (4th ed Cal CEB 2004).

PRACTICE TIP: Combining a writ petition with a complaint may have the effect of prolonging the proceedings, *e.g.,* because of additional discovery prompted by the claims in the complaint or because those claims take longer to resolve by summary judgment or trial.

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§5.120 VI. CONSIDERING RESTRICTIONS OF TRIAL COURT DELAY REDUCTION ACT

The Trial Court Delay Reduction Act (Govt C §§68600-68620) applies to all actions and proceedings in the superior courts filed on and after July 1, 1992, except for juvenile, probate, and domestic relations cases. Govt C §68605.5. The Judicial Council has established standards for timely disposition to reduce delay in the superior courts (Govt C §68603), and these standards generally require a case to be resolved within 1 year (see Cal Rules of Ct 3.710-3.715). As a practical matter, these provisions have few consequences for writ proceedings because writ petitions often seek immediate or expedited relief, and it would be an extremely rare case in which the merits of a petition were not considered within 1 year. In addition, some provisions appear to conflict with the writ statutes. Compare Govt C §68616(b) (delay reduction rules may not shorten 30-day time period in which to file responsive pleading) with CCP §1089 (court sets date for return to alternative writ of mandate). The more specific writ statutes should govern writ proceedings, particularly because the flexibility given the courts by these statutes reflects the often urgent nature of writ proceedings.

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VII. COSTS AND ATTORNEY FEES

A. Recovery of Costs

§5.121 1. By Prevailing Party

As in other civil actions, the prevailing party in a superior court writ proceeding is entitled to allowable costs. See CCP §§1095, 1105, 1109 (making CCP §§1032, 1033, and 1033.5 applicable to writ proceedings). See also Cal Rules of Ct 8.493 (prevailing party in appellate court writ proceeding may be awarded costs); *Vasquez v Happy Valley Union Sch. Dist.* (2008) 159 CA4th 969, 987, 72 CR3d 15 (awarding costs to prevailing respondent in petitioner's appeal from denial of writ petition); *Little v Los Angeles County Assessment Appeals Bds.* (2007) 155 CA4th 915, 928, 66 CR3d 401 (same).

On the prevailing party concept, see California Attorney Fee Awards, chap 2 (2d ed Cal CEB 1994). On the prevailing party's entitlement to costs, see California Trial Practice: Civil Procedure During Trial §§27.8-27.18 (3d ed Cal CEB 1995).

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§5.122 2. Costs Allowed

The items of recoverable costs are specified in CCP §1033.5. The most common costs in a writ proceeding are filing fees and fees paid to have documents served. Other allowable costs include copying costs, those incurred during the trial, *e.g.,* jury fees and expenses (if a jury is used), and witness fees (if any are called).

On allowable cost items, see California Trial Practice: Civil Procedure During Trial §§27.67-27.81 (3d ed Cal CEB 1995).

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§5.123 3. Procedure for Claiming Costs

A prevailing party who claims costs must serve and file a verified memorandum of costs within (Cal Rules of Ct 3.1700(a)(1)):

- 15 days after the date of mailing notice of entry of judgment or dismissal by the clerk under CCP §664.5;
- 15 days after the date of serving the written notice of entry of judgment or dismissal; or
- 180 days after entry of judgment, whichever occurs first.

If the cost memorandum is served by mail, the time period for the losing party to seek to strike or tax costs is extended as provided in CCP §1013 (5 calendar days if mailed to and from California, 10 calendar days if mailed to or from outside California, and 20 calendar days if mailed to or from outside United States).

NOTE: The time for filing a cost memorandum may be extended by the parties' agreement, which must be in writing, specify the extended date for service, and be filed with the clerk. In the absence of an agreement, the court may extend the time for serving the cost memorandum for no more than 30 days. Cal Rules of Ct 3.1700(b)(3).

If cost items are expressly authorized by CCP §1033.5 and appear proper on their face, a verified memorandum of costs is prima facie evidence that they were necessarily incurred. *Nelson v Anderson* (1999) 72 CA4th 111, 131, 84 CR2d 753.

For a sample memorandum of costs, see California Trial Practice: Civil Procedure During Trial §27.129 (3d ed Cal CEB 1995).

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B. Award of Attorney Fees

§5.124 1. When Fees Are Recoverable

Attorney fees may be recoverable in a writ proceeding under a statute or contractual attorney fees provision. See *Mejia v City of Los Angeles* (2007) 156 CA4th 151, 157, 67 CR3d 228 (fees awarded to successful petitioner under CEQA statutes); *Zuehlsdorf v Simi Valley Unified Sch. Dist.* (2007) 148 CA4th 249, 255, 55 CR3d 467 (fees awarded under Govt C §800 (authorizing fees for successful challenge to decision by administrative agency if agency acted in arbitrary and capricious manner)).

For further discussion of recoverable attorney fees, see California Trial Practice: Civil Procedure During Trial §§27.96-27.102 (3d ed Cal CEB 1995). On fees recoverable under the private attorney general statute, see California Attorney Fee Awards, chap 4 (2d ed Cal CEB 1994). On attorney fee awards based on contract, see Attorney Fee Awards, chap 6. On attorney fees awarded for administrative proceedings, see Attorney Fee Awards, chap 10.

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2. Procedure for Recovering Attorney Fees

§5.125 a. When to File

A notice of motion to claim attorney fees for services up to and including the rendition of judgment in the superior court must be served and filed within the time for filing a notice of appeal under Cal Rules of Ct 8.104 and 8.108. Cal Rules of Ct 3.1702(b)(1). The parties may extend the time for filing the motion by stipulation or by the court on good cause. Cal Rules of Ct 3.1702(b)(2), (d).

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§5.126 b. What to File

Motions for attorney fees follow the same procedure as other motions. See Cal Rules of Ct 3.1100-3.1370. The prevailing party generally files and serves the fee motion, and the opponent files and serves opposition, with an opportunity for the moving party to file and serve a reply. See Cal Rules of Ct 3.1300(a).

The fee motion should include:

- A notice of motion, including the date, time, place of motion, summary of the grounds for entitlement to fees, and the documents on which the claim is based (see California Attorney Fee Awards, Appendix C (2d ed Cal CEB 1994) for sample form);
- A supporting memorandum discussing the background of the litigation, the grounds for entitlement, and the justification for the amount requested (see Attorney Fee Awards, App D for sample form);
- Declarations from attorneys claiming the fees, including, if appropriate, declarations from other attorneys or experts supporting the fee application (see Attorney Fee Awards, App E for sample form);
- A declaration explaining why the fees claimed are reasonable (see Attorney Fee Awards, App F for sample form); and
- A proposed order awarding reasonable attorney fees, including specific findings on the fee calculation (see Attorney Fee Awards, App I for sample form).

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§5.127 C. Interplay Between Motion for Fees and Costs Bill

When attorney fees are awardable, the party normally will want to claim both attorney fees under the applicable statute, contract, or equitable doctrine, and statutory costs under CCP §1033.5. The prevailing party must file separate documents: (1) a memorandum of costs to claim recoverable costs (see §5.123) and (2) a motion to recover attorney fees (see §§5.125-5.126). The prevailing party must pay attention to the timing and requirements for each type of filing.

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§5.128 VIII. CHECKLIST: PITFALLS TO AVOID

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The petitioner should make sure to:

- Determine whether there is a statutory deadline for filing a petition. See §§5.71-5.74.
- Determine whether there is a real party in interest that must be named and served. See §§5.34-5.35.
- Determine whether there are local rules or unwritten practices governing writ proceedings. See §§5.6-5.8.
- Allege all the essential facts in the petition, including the petitioner's beneficial interest in the proceedings. See §§5.40-5.58.
- Allege why writ relief should be granted, *i.e.,* the legal ground on which writ relief is sought and can be granted. See §§5.49-5.52.
- Identify why there is no other adequate legal remedy. See §§5.53-5.54.
- Include a clear and complete prayer for relief. See §§5.59-5.62.
- Properly verify the writ petition. See §§5.64-5.69.
- Request preparation of an administrative record if the writ petition arises from a proceeding that generated a record. Failure to request the administrative record can be fatal to a petitioner's case. Even a delayed request for preparation of the record may have consequences because in some writ proceedings the respondent is not required to file an answer until 30 days after the record is prepared and served. See CCP §1089.5. On record preparation, see chap 7.
- Prepare an adequate supporting memorandum. See §§5.92-5.100.
- Properly cite to the verified writ petition, administrative record, or other documentary evidence in the supporting memorandum. When confronted with inadequate citations, the court probably will not sift through the evidentiary materials to determine whether support exists for the position asserted. See §5.99.
- Seek a stay if one is necessary. See chap 6.
- Factually justify a stay request. See §5.58; chap 6.

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6

Requesting a Stay in a Superior Court Writ Proceeding

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I. SCOPE OF CHAPTER §6.1

II. GENERAL CONSIDERATIONS
- A. Two Methods for Staying Challenged Action or Decision §6.2
- B. Determining When Stay or Injunction Is Necessary or Appropriate §6.3
  - 1. Type of Writ Relief Sought May Be Determinative of Need for Stay §6.4
  - 2. Court Makes Preliminary Decision on Merits of Petition §6.5
- C. Factors to Consider When Deciding Between Stay or Preliminary Injunction §6.6

III. STAY APPLICATION
- A. Applying for Stay
  - 1. Application Can Be Part of Writ Petition or Separate Document §6.7
  - 2. Length of Stay §6.8
  - 3. Preparation of Documents
    - a. When Stay Application Is Part of Writ Petition §6.9
    - b. When Stay Application Is Separate Document §6.10
      - (1) Application §6.11
      - (2) Supporting Memorandum
        - (a) Contents §6.12
        - (b) Standard of Review §6.13
      - (3) Record §6.14
      - (4) Supporting Declarations §6.15
      - (5) Proposed Order §6.16
  - 4. Filing Documents §6.17
- B. Opposing Stay Application
  - 1. Entering Stipulation if No Opposition §6.18
  - 2. Filing Written Opposition if Time Permits §6.19
  - 3. Requesting Undertaking
    - a. Court Has Discretion to Require Undertaking §6.20
    - b. Court Has Discretion to Set Amount of Undertaking §6.21
- C. Superior Court Action on Stay Application
  - 1. Stay Hearing
    - a. Noticed Motion Procedure §6.22
    - b. Ex Parte Procedure §6.23
  - 2. Grant or Denial of Stay Request
    - a. Decision Is Within Court's Discretion §6.24
    - b. When Stay Application Is Granted §6.25
    - c. When Stay Application Is Denied §6.26
- D. Appellate Relief §6.27
- E. Modifying or Dissolving a Stay §6.28

IV. TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION
- A. Seeking Stay Through Preliminary Injunctive Relief §6.29
- B. Required Showing §6.30
- C. Temporary Restraining Order
  - 1. Description and Purpose §6.31
  - 2. Motion Papers Must Include Copy of Verified Writ Petition §6.32
  - 3. Court Has Discretion to Require Bond or Undertaking §6.33
  - 4. If Temporary Restraining Order Application Is Denied §6.34
  - 5. If Temporary Restraining Order Application Is Granted §6.35
- D. Motion for Preliminary Injunction

1. Criteria for Issuance §6.36
2. Undertaking (Bond) Requirement
    a. When Required §6.37
    b. Amount of Undertaking (Bond) §6.38

V. CHECKLIST: OBTAINING STAY ORDER §6.39

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Source: Civil Litigation/California Civil Writ Practice/6 Requesting a Stay in a Superior Court Writ Proceeding/§6.1 I. SCOPE OF CHAPTER

§6.1 I. SCOPE OF CHAPTER

This chapter discusses staying a challenged action or decision while a writ petition is pending in the superior court.

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II. GENERAL CONSIDERATIONS

§6.2 A. Two Methods for Staying Challenged Action or Decision

Neither the writ statutes nor the rules of court address the procedures for staying a challenged action or decision during the pendency of a superior court writ proceeding. As a result, and like other areas of superior court writ practice, the courts vary in how they handle stay requests. There are generally two accepted ways to seek a stay, by:

- Filing an application for a stay (see §§6.7-6.17); or
- Seeking a temporary restraining order or preliminary injunction (see §§6.29-6.38).

NOTE: This chapter does not address stays in administrative mandamus proceedings under CCP §1094.5(g)-(h). On staying an administrative adjudicatory decision, see California Administrative Mandamus §§11.3-11.27 (3d ed Cal CEB 2003). On administrative mandamus, see chap 3.

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Source: Civil Litigation/California Civil Writ Practice/6 Requesting a Stay in a Superior Court Writ Proceeding/§6.3 B. Determining When Stay or Injunction Is Necessary or Appropriate

§6.3 B. Determining When Stay or Injunction Is Necessary or Appropriate

A petitioner should seek a stay (by application or injunctive procedures) whenever the petitioner's interests are likely to be adversely and irreparably affected before the superior court can act on the writ petition.

PRACTICE TIP: A petitioner may avoid having to seek a stay from the superior court by first discussing the issue with the respondent and/or real party in interest. The respondent or real party may voluntarily agree to refrain from acting or enforcing a decision before the superior court rules on the writ petition, particularly if the petitioner agrees to bring the writ petition on for hearing within a relatively short time period.

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§6.4 1. Type of Writ Relief Sought May Be Determinative of Need for Stay

The need for a stay will be determined in part by the type of writ sought:

- **Alternative writ of mandate.** An alternative writ of mandate by its nature does not act as a stay. Accordingly, a petitioner will need a stay to halt the challenged action or decision. CCP §§1085, 1087. On alternative writs, see §§5.15-5.18.
- **Alternative writ of prohibition.** An alternative writ of prohibition, in contrast, does act as a stay. CCP §1104; see §4.2. In rare cases, however, a petitioner may need to seek a stay to clarify the action the respondent or real party in interest must stop.
- **Peremptory writ.** When a petitioner seeks only a peremptory writ (which is usually done through the noticed motion procedure; see §5.19), the petitioner may need a stay until the court acts on the merits of the writ petition.
- **Writ of review (certiorari).** A writ of review (certiorari) ordinarily provides for a stay (CCP §1071), although the court has discretion to omit it (CCP §1072).

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§6.5 2. Court Makes Preliminary Decision on Merits of Petition

When a superior court considers a stay request, it makes a preliminary, albeit nonbinding, decision on the merits of the writ petition. Thus, before seeking a stay (by way of application or injunctive procedures), a petitioner must consider the likelihood of success and make certain the moving papers are well prepared and amply supported. The court's first take on the case will be based on these papers and that impression could affect the court's later view of the case when it rules on the merits of the writ petition.

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§6.6 C. Factors to Consider When Deciding Between Stay or Preliminary Injunction

The principal factor in deciding whether to seek a stay by way of application or injunctive procedures is the particular preference of the superior court. Compare, *e.g.*, Sacramento County Superior Court Guide to the Procedures for Prosecuting Petitions for Prerogative Writs, p. 5 (instructing petitioners to follow temporary restraining order (TRO)/preliminary injunction procedures when seeking stay in traditional mandate proceedings) (see copy in App B) and Los Angeles Superior Court Local Rules 9.5(d) (indicating "stay or other temporary order" in writ proceedings may be obtained by ex parte procedures). If the superior court in which the petition will be filed does not have any published rules or guidelines on seeking stays in writ proceedings, the petitioner should check with the court clerk to determine whether the court has a procedural preference or there is a conventional practice.

If there is no required or standard practice for seeking a stay in a writ proceeding, the urgency of the situation may weigh in favor of using injunctive procedures (TRO followed by preliminary injunction). However, if the superior court will entertain a stay application on its ex parte calendar, there is no difference in the utility of application or injunctive procedures.

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III. STAY APPLICATION

A. Applying for Stay

§6.7 1. Application Can Be Part of Writ Petition or Separate Document

In some courts, a petitioner can seek a stay of the challenged action or decision by way of application. A stay application can be made in the writ petition itself or separately. The petitioner should check local rules and with the court clerk to determine if the court has a preference. However, in the absence of either a separate stay application or an application for an alternative writ bringing the petition to the attention of the court, the courts will simply file the writ petition.

PRACTICE TIP: A separate stay application is also helpful to the court because it focuses specifically and succinctly on why a stay is appropriate and necessary in the particular case.

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§6.8 2. Length of Stay

The courts generally dislike granting extended stays, especially if there is a risk of harm to the respondent or real party in interest. Thus, when seeking a stay, the petitioner should also urge the court to set a briefing schedule and hearing date on the petition that is reasonable under the circumstances, taking into consideration the size of the record, the date it will be prepared, and the amount of time the parties will need to review it, and then prepare the briefing in support of and in opposition to the petition. In addition, once a stay is in place, the court may be reluctant to grant a continuance of the hearing date, particularly if the respondent or real party in interest objects.

PRACTICE TIP: Depending on the circumstances, the petitioner may be able to negotiate terms for a stay that protect the petitioner while permitting certain activities to occur in the intervening period before a decision on the writ. The respondent or real party in interest may stipulate to a stay in exchange for specific protections or accommodations from the petitioner.

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3. Preparation of Documents

§6.9 a. When Stay Application Is Part of Writ Petition

When a stay is requested in the petition, the petition should:

- So state on the caption page (*e.g.*, "Petition for Writ of Mandate and Application for Stay");
- Contain all the necessary factual allegations for a stay in the body of the petition (*i.e.*, allege why a stay is necessary and appropriate); and
- Include a stay request in the prayer for relief.

Simply including the stay request in the writ petition, however, will not bring it before the court unless the petitioner is making the request in conjunction with an application for issuance of an alternative writ. See §§5.15-5.18. The petitioner should file a supporting memorandum and any necessary declarations supporting a stay as part of the application for an alternative writ. See §§6.12, 6.15. The petitioner should also lodge two orders, one pertaining to the request for an alternative writ and the other pertaining to the request for a stay, because:

- The court may grant the alternative writ but deny the request for a stay; and
- Speed is of the essence in ruling on a stay application, and the court may grant the stay immediately but wait for preliminary opposition before deciding whether to issue an alternative writ (although in most cases an alternative writ is sought ex parte). On opposition to application for issuance of alternative writ, see §§8.21-8.31.

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§6.10 b. When Stay Application Is Separate Document

A stay application filed as a separate document is in essence a motion. See Cal Rules of Ct 3.1103(a)(1) (motion includes "application before trial for an order"). Thus, the California Rules of Court relating to law and motion proceedings (Cal Rules of Ct 3.1100-3.1370) apply to stay applications. Because stay requests are generally time sensitive, they are usually heard on the court's ex parte calendar. See §6.23. A petitioner that cannot establish the grounds necessary to justify an ex parte stay order may seek a stay as a regularly noticed motion. However, it is likely that if the petitioner cannot demonstrate the urgency necessary to place the matter on the court's ex parte calendar, the petitioner will be unable to make the showing necessary to support a stay.

PRACTICE TIP: A petitioner should file a stay request promptly because the passage of time weakens the argument that harm will result without a stay.

On applying for an order ex parte, see California Civil Procedure Before Trial, chap 13 (4th ed Cal CEB 2004).

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§6.11 (1) Application

The stay application should be entitled "Request [or Application] for Stay of [*e.g.*, Name of Respondent]'s Decision." The application is similar to a notice of motion and motion: It identifies the parties and the nature, extent, and duration of the relief requested; sets out the reasons for the stay; and concludes with a prayer asking for the stay.

If the petitioner requests the stay ex parte, then "Ex Parte" should appear in the title, and the application must explain the urgency for the stay. California Rules of Court 3.1200-3.1207 detail the documents and information that must be included in an ex parte application (*e.g.*, a declaration describing the notice given to the other party or the reason for the lack of notice). In most cases, the petitioner should seek an ex parte order shortening time to hear the stay request.

PRACTICE TIP: Before filing an ex parte stay application, counsel should be sure to check the court's local rules for any additional requirements.

On applying for an order ex parte, see California Civil Procedure Before Trial, chap 13 (4th ed Cal CEB 2004).

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(2) Supporting Memorandum

§6.12 (a) Contents

The memorandum supporting a stay application must establish the necessity for the stay. It should include discussion of the facts, the action or decision being challenged, why that action or decision is invalid or an abuse of discretion, and most importantly, why a stay should issue. See Cal Rules of Ct 3.1113 (requirements for memorandum). The memorandum should refer to specific portions of the record, if available.

On the preparation of a memorandum generally, see California Civil Procedure Before Trial §§12.30-12.42 (4th ed Cal CEB 2004).

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§6.13 (b) Standard of Review

The only specific criteria governing stays in writ proceedings are set out in CCP §1094.5(g)-(h), governing stays in administrative mandamus proceedings. Compare CCP §1072 (specifying stay is included in writ of review unless court in its sound discretion orders otherwise). See also CCP §1072 (if appeal is taken from judgment granting writ relief, superior court may order that judgment is not stayed on showing that petitioner will suffer irreparable injury in business or reputation if execution is stayed).

Some adjudicatory administrative decisions are reviewed by way of traditional mandamus under CCP §1085, rather than administrative mandamus under CCP §1094.5, *e.g.,* when a hearing is not "required by law" (even if a hearing was held). See §2.33. In such cases, there is a good argument that the superior courts should be guided by the stay criteria in CCP §1094.5(g)-(h), because that criteria was specifically designed to address adjudicatory, administrative decisions and the policy reasons underlying those criteria apply whether the adjudicatory administrative decision is challenged in a §1085 or §1094.5 writ proceeding.

In other contexts, the superior courts will, as a practical matter, apply the weighing approach employed in deciding whether to issue a temporary restraining order and preliminary injunction. Thus, the court will weigh the extent to which there has been a colorable showing on the merits of the petition and the claimed injury if a stay does not issue. See §6.30.

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§6.14 (3) Record

The verified allegations in the writ petition will be essential to apprising the superior court of the operative facts. In addition, the petitioner should submit critical portions of the record, such as the challenged decision, any findings, key portions of hearing transcripts, and any other significant documents as attachments to counsel's declaration. (If the writ proceeding is based on an administrative record, the record often will not yet be prepared when the writ petition is filed and a stay is sought).

PRACTICE TIP: The petitioner should keep in mind that the objective is to make at least a colorable showing that the writ petition has merit.

On preparing the record, see §§7.5-7.17.

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Source: Civil Litigation/California Civil Writ Practice/6 Requesting a Stay in a Superior Court Writ Proceeding/§6.15 (4) Supporting Declarations

§6.15 (4) Supporting Declarations

Because the superior court will weigh the likelihood and extent of harm in deciding whether to grant a stay request, the petitioner (or other appropriate individual) must submit a declaration explaining the necessity for a stay pending the court's decision on the merits of the writ petition. The declaration should be based on personal knowledge (as opposed to information and belief) and should include:

- Specific facts describing the situation and the need to maintain the status quo;
- The reason a stay is required to maintain that status quo; and
- The harm the petitioner will suffer if the court denies the stay request.

If the petitioner can offer any accommodations to minimize harm from the stay on the respondent or real party in interest, the declaration should include an explanation of these points as well.

PRACTICE TIP: If the application requests the stay ex parte, the declaration should show that the petitioner gave proper notice of an ex parte hearing as required by Cal Rules of Ct 3.1204(b).

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§6.16 (5) Proposed Order

The petitioner should submit a proposed order granting the stay request and staying the challenged decision or action either for a specific time or until the court disposes of the writ petition on the merits. It should describe the evidence considered by the court, the basis for issuance of the stay, the specific actions being stayed, who is subject to the stay, and its duration.

PRACTICE TIP: Some courts prefer that orders be prepared without the party's name in the upper left-hand corner. The petitioner should check with the clerk to determine the court's preference.

On preparing a proposed order, see California Civil Procedure Before Trial §12.107 (4th ed Cal CEB 2004).

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§6.17 4. Filing Documents

In most counties, the petitioner files the writ petition and stay application in the clerk's office and then takes them to the assigned department for a ruling on the stay application by the judge. In other counties, the petition is filed in the clerk's office, but ex parte papers (such as an ex parte application for a stay) are filed directly in the assigned department. Some counties require ex parte applications to be scheduled with the clerk (see San Francisco Ct R 9.0(B) (ex parte hearing must be scheduled with clerk at least 24 hours before proposed hearing date)) while others require ex parte applications to be submitted to the clerk before the hearing. Counsel should consult any applicable local rules and, if there are none, call the court clerk.

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B. Opposing Stay Application

§6.18 1. Entering Stipulation if No Opposition

In some cases, the respondent or real party in interest may not oppose a stay, particularly if the petitioner agrees to prosecute the writ petition expeditiously. In such cases, the parties can enter into a written stipulation, eliminating the need to seek a stay from the court. Such a stipulation should usually be filed with the court and transformed into an order of the court by including "IT IS SO ORDERED" at the end, with date and signature lines for the judge. Enforcement of the stipulated order is easier and quicker than enforcement of a simple stipulation, as the latter may be enforceable only in a separate action for breach of contract.

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§6.19 2. Filing Written Opposition if Time Permits

If the respondent or real party in interest opposes a stay of the challenged action or decision, the respondent or real party in interest should file written opposition, if time permits, and appear at the hearing on the stay request. The hearing on the stay request may take place in conjunction with an application for issuance of an alternative writ.

If the writ petition is plainly frivolous or suffers from an obvious procedural defect, the opposition should point that out to the court. Otherwise, the opposition should focus on why there is no compelling reason for a stay, *e.g.*, the petitioner will not suffer any irreparable harm in the absence of a stay.

PRACTICE TIP: Opposition to a stay request is not the vehicle for making a full-blown attack on the merits of the writ petition, although respondent or real party in interest should say enough about the merits to let the court know that there will be serious opposition to the petition.

The opposition should include a supporting memorandum, competent declarations establishing the prejudice that the respondent or real party in interest will suffer if the court grants a stay, and, if the record has not been prepared, copies of any relevant documents that the petitioner failed to include in the application.

On opposing motions, see California Civil Procedure Before Trial §§12.78-12.94 (motions in general), 32.57-32.58, 32.66-32.74 (requests for temporary restraining order or preliminary injunction) (4th ed Cal CEB 2004).

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3. Requesting Undertaking

§6.20 a. Court Has Discretion to Require Undertaking

In addition to opposing a stay request (see §6.19), a respondent or real party in interest can and typically should ask the superior court to require an undertaking if the stay is granted. The request should be accompanied by competent evidence of the degree of potential harm the stay may cause.

There is no statutory requirement for an undertaking (also called a bond; see CCP §995.210) as a condition for issuance of a stay, but the court may in its discretion apply the statutory provisions concerning bonds (CCP §§995.010-996.560) to writ proceedings. See CCP §1109 (applying Part 2 of Code of Civil Procedure (CCP §§307-1062.20) to writ proceedings).

NOTE: Specified public agencies and officers are exempt from any undertaking requirement. See CCP §995.220.

On the requirements for undertakings, see California Civil Appellate Practice §§6.21-6.62 (3d ed Cal CEB 1996).

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§6.21 b. Court Has Discretion to Set Amount of Undertaking

The court has discretion to set the amount of any undertaking, but the amount should be sufficient to protect the respondent or real party in interest from the economic consequences of a stay if the court upholds the challenged decision. For example, the court may stay a city's decision to approve a development project on the condition the petitioner post an undertaking sufficient to cover the costs of lost contracts, land carry, and any other costs caused by the stay in development activities. If the court ultimately upholds the decision, this undertaking is available to compensate the respondent or real party in interest for the costs incurred because of the stay.

PRACTICE TIP: When economically appropriate, a party opposing a stay application should ask that any stay be conditioned on the petitioner's posting an undertaking. Petitioner should support the request with a competent declaration specifying the likely costs of staying the decision. The anticipated costs should include attorney fees.

If the potential harm of the stay is great and the bond is commensurately high, the petitioner may be unable to post the bond. This reality should motivate the opponent to make a complete showing in support of a bond. The possibility that recovery may be limited to the amount of the bond, even if actual damages from the stay are higher, is another reason to seek to obtain as high a bond as possible.

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C. Superior Court Action on Stay Application

1. Stay Hearing

§6.22 a. Noticed Motion Procedure

Because stay requests are generally time sensitive, they do not usually proceed via the regular noticed motion procedure. See Cal Rules of Ct 3.1100-3.1370. However, if the noticed motion procedure is used, the parties must submit their moving, opposition, and reply papers in advance of the hearing, which will be held in open court, with an opportunity for oral argument and a court reporter present to transcribe the hearing.

On noticed motion hearing procedures, see California Civil Procedure Before Trial, chap 12 (4th ed Cal CEB 2004).

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§6.23 b. Ex Parte Procedure

Stay applications usually proceed via the court's ex parte procedures, either as a stand-alone application or in conjunction with an application for issuance of an alternative writ. See §5.39.

PRACTICE TIP: Courts set ex parte hours at different times and days, so counsel should check the local rules and with the court clerk. See, *e.g.*, Los Angeles Ct R 9.9(a) (8:30 a.m., Monday through Friday); San Francisco Ct R 9.0(A) (11 a.m., Monday through Friday). To appear telephonically, counsel must either place the phrase "Telephone Appearance" below the title of the moving or opposing papers or notify the court and all other parties of counsel's intent to appear telephonically at least 3 court days before the hearing. Cal Rules of Ct 3.670(g)(1). Note that local rules may require that counsel use a particular vendor for telephone appearances. Cal Rules of Ct 3.670(*l*). In addition, the vendor may require a minimum amount of notice to set up the conference call.

Superior courts differ in how they handle ex parte applications. Some judges consider and rule on ex parte applications in chambers without counsel present, in which case the clerk will advise the parties of the court's decision. Some judges hear argument from the parties and rule on the application in chambers. Still others review the ex parte papers in chambers and then hold a hearing in open court with or without a court reporter present. Counsel should consult any applicable local rules and, if there are none, call the court clerk to determine the court's practice.

PRACTICE TIP: If a party wants a record of the stay proceeding, counsel should notify the court clerk before the hearing to make certain that a court reporter is available. See, *e.g.*, San Luis Obispo Ct R 7.17(b) (party should request court reporter no earlier than 48 hours and no later than 24 hours before hearing; court reporting fees to be paid before hearing as well). If the court's practice is to rule in chambers, counsel can request that a court reporter be present or that the ruling be given from the bench so there is at least a record of the court's action. Counsel should think carefully before making this request because it is highly unusual for appellate courts to reverse a superior court's decision on a stay request. See §6.27.

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2. Grant or Denial of Stay Request

§6.24 a. Decision Is Within Court's Discretion

The grant or denial of a stay application is within the sound discretion of the court. See *Medical Bd. v Superior Court* (1991) 227 CA3d 1458, 1462, 278 CR 247; *Venice Canals Resident Home Owners Ass'n v Superior Court* (1977) 72 CA3d 675, 679, 140 CR 361; *Ciro's of San Francisco, Inc. v State Bd. of Equalization* (1956) 143 CA2d 99, 299 P2d 985. The court will weigh the extent to which there has been a colorable showing on the merits of the petition and the claimed injury if a stay does not issue. See §6.13.

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§6.25 b. When Stay Application Is Granted

When the court grants a stay application, the petitioner should personally serve the stay order on the respondent and any real party in interest. Some administrative agencies authorize their counsel to accept service on their behalf. In such case, the petitioner can serve the order on counsel at the proceeding. This is also true if the court issues the stay with an alternative writ. In conjunction with granting the stay application, some courts will also set a briefing schedule and a hearing date on the return to the writ (if an alternative writ is issued) or on the merits of the writ petition (if the petitioner intends to proceed by noticed motion for issuance of a peremptory writ).

On issuance of an alternative writ, see §§5.15-5.18. On use of the noticed motion procedure for issuance of a peremptory writ, see §§5.10-5.14.

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§6.26 c. When Stay Application Is Denied

When the court denies a stay application, the court will issue a minute order or ask the respondent to prepare an order. At the end of the stay hearing, many courts will set a briefing schedule and a hearing date on the merits of the writ petition. Sometimes the court will request that the parties confer and submit a stipulated briefing schedule. On issuance of an alternative writ setting return and hearing dates, see §5.15. On use of the noticed motion procedure for issuance of a peremptory writ, see §5.19.

PRACTICE TIP: The denial of a stay request is not a ruling on the merits of the writ petition, and the petitioner may still ultimately prevail.

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§6.27 D. Appellate Relief

The grant or denial of a stay is not an appealable order. CCP §904.1. Rather, appellate relief must be sought by filing a petition for a writ of mandate under CCP §1085 in the court of appeal. However, because the discretion accorded a superior court in granting or denying a stay application is very broad (see §6.24), a reviewing court only very rarely will overrule the lower court's ruling. *Medical Bd. v Superior Court* (1991) 227 CA3d 1458, 1462, 278 CR 247; *Board of Med. Quality Assur. v Superior Court* (1980) 114 CA3d 272, 275, 170 CR 468.

On filing a writ petition in the court of appeal, see chap 18.

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§6.28 E. Modifying or Dissolving a Stay

When a court has granted a stay, it may dissolve or modify the stay at any time on the motion of the respondent or real party in interest, or on its own motion. *Ciro's of San Francisco, Inc. v State Bd. of Equalization* (1956) 143 CA2d 99, 299 P2d 985; *Morton v Superior Court* (1953) 119 CA2d 665, 260 P2d 215. Possible grounds include the petitioner's failure to diligently prosecute the petition.

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IV. TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

§6.29 A. Seeking Stay Through Preliminary Injunctive Relief

Local rules may require or suggest that a petitioner seek a stay through injunctive procedures, *i.e.*, a temporary restraining order (TRO) and preliminary injunction, rather than through an application for a stay. See, *e.g.*, Sacramento County Superior Court Guide to the Procedures for Prosecuting Petitions for Prerogative Writs, p. 5 (instructing petitioners to follow TRO/preliminary injunction procedures when seeking stay in traditional mandate proceeding) (see copy in App B).

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§6.30 B. Required Showing

The superior court must balance two factors when considering a request for preliminary injunctive relief (either in the form of a temporary restraining order or a preliminary injunction): (1) the likelihood that the plaintiff will prevail on the petition; and (2) the interim harm that the petitioner will face if injunctive relief is denied as compared to the harm that the respondent or real party in interest will face if it is granted. *IT Corp. v County of Imperial* (1983) 35 C3d 63, 69, 196 CR 715. The court uses a sliding scale, so the greater the petitioner's showing on one factor, the less need be shown on the other. *Butt v State* (1992) 4 C4th 668, 678, 15 CR2d 480. Regardless of the balance of harm, however, there always must be some possibility that the petitioner will prevail on the petition to justify preliminary injunctive relief. *Butt v State, supra*.

On equitable considerations and injunctive relief, see California Civil Procedure Before Trial §§32.29-32.35 (4th ed Cal CEB 2004).

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C. Temporary Restraining Order

§6.31 1. Description and Purpose

A temporary restraining order (TRO) is an interim order issued to preserve the status quo pending a hearing on a motion for a preliminary injunction. See CCP §527. A TRO is technically not an injunction, although it has the same force and effect, because it may issue ex parte (see CCP §527(c)-(d)) without requiring a bond or undertaking (except in an action for a claim and delivery of personal property; see CCP §515.010(a)). Generally, a TRO:

- Expires automatically at the end of 15 days or, if good cause is shown, 22 days after its issuance (see CCP §527(d)(1));
- Terminates if the court denies a motion for a preliminary injunction (*International Union of Operating Eng'rs v Superior Court* (1989) 207 CA3d 340, 355, 254 CR 782); or
- Is superseded by issuance of a preliminary injunction (*International Union of Operating Eng'rs v Superior Court, supra*; *Houser v Superior Court* (1932) 121 CA 31, 33, 8 P2d 483).

Whether an order is a TRO or a preliminary injunction is determined by its effect, not its title. *Yellen v Fidelity & Cas. Co.* (1931) 115 CA 434, 436, 1 P2d 1019. If the order states that it is effective "until further order of the court" or "until final judgment on the merits," it is a preliminary injunction and a bond is required regardless of what the order is called. *San Diego Water Co. v Pacific Coast S.S. Co.* (1894) 101 C 216, 218, 35 P 651; *McManus v KPAL Broad. Corp.* (1960) 182 CA2d 558, 562, 6 CR 441.

On the procedures for moving for a temporary restraining order, see California Civil Procedure Before Trial §§32.36-32.59 (4th ed Cal CEB 2004).

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§6.32 2. Motion Papers Must Include Copy of Verified Writ Petition

The judge who will hear the application for a temporary restraining order (TRO) must have a copy of the verified writ petition. If the petitioner files the petition on the same day as the TRO application, he or she must file the petition first, and then present the judge with a file-stamped copy. If the petitioner seeks the TRO in an existing case, the applicant must request that the court make its file available to the judge. See Cal Rules of Ct 3.1150(b).

On the documents that must accompany a motion for a temporary restraining order, see California Civil Procedure Before Trial §§32.37-32.46 (4th ed Cal CEB 2004).

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§6.33 3. Court Has Discretion to Require Bond or Undertaking

Whether to require a bond or undertaking when issuing a temporary restraining order (TRO) is discretionary with the court. *Biasca v Superior Court* (1924) 194 C 366, 367, 228 P 861; *Allen v Pitchess* (1973) 36 CA3d 321, 329, 111 CR 658. If the court orders a bond or undertaking, the TRO does not become effective until the bond or undertaking is given. *Heyman & Co. v Landers* (1859) 12 C 107; *Armstrong v Superior Court* (1916) 173 C 341, 343, 159 P 1176.

NOTE: Courts often do not require a bond or undertaking in connection with the issuance of a TRO, because of its relatively short duration. If a judge orders a bond or undertaking, the judge will look to the amount of damages that may result from issuance of the TRO to determine the amount of the bond or undertaking.

On the bond or undertaking, see California Civil Procedure Before Trial §32.56 (4th ed Cal CEB 2004).

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§6.34 4. If Temporary Restraining Order Application Is Denied

If the court denies the application for a temporary restraining order (TRO), the moving party may still schedule a hearing for a preliminary injunction. In addition, even if it denies the TRO application, the court still may issue an order to show cause why a preliminary injunction should not issue, returnable within 15 days, or 22 days if there is good cause, of the date of the order.

On moving for a preliminary injunction, see §§6.36-6.38.

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§6.35 5. If Temporary Restraining Order Application Is Granted

If the court grants an application for a temporary restraining order (TRO), it must set the hearing on the preliminary injunction within 15 days, or 22 days if there is good cause, of the issuance of the TRO. CCP §527(d)(1). Additionally, within the earlier of 5 days after the court issues the TRO or 2 days before the date of the preliminary injunction hearing, the applicant must serve the opposing party with: a copy of the petition, if it has not previously done so; the order to show cause stating the date, time, and place of the hearing; and all supporting papers. CCP §527(d)(2). If the applicant does not serve these materials in a timely manner, the court must dissolve the TRO. CCP §527(d)(3).

On moving for a preliminary injunction, see §§6.36-6.38.

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D. Motion for Preliminary Injunction

§6.36 1. Criteria for Issuance

A petitioner seeking a preliminary injunction must establish that (1) the petitioner has a reasonable likelihood of success on the merits of the underlying controversy, and (2) the petitioner will suffer harm without preliminary injunctive relief as compared to the harm that the respondent or real party in interest will face if relief is granted. *Cohen v Board of Supervisors* (1985) 40 C3d 277, 286, 219 CR 467; *IT Corp. v County of Imperial* (1983) 35 C3d 63, 69, 196 CR 715. The greater the chance of petitioner's success on the merits, the less severe the harm must be for the injunction to issue, particularly when the requested injunction maintains the status quo. *Butt v State* (1992) 4 C4th 668, 678, 15 CR2d 480; *King v Meese* (1987) 43 C3d 1217, 1228, 240 CR 829. When a governmental agency is the respondent, the petitioner must make a "significant" showing of irreparable harm because "[t]here is a general rule against enjoining public officers or agencies from performing their duties." *Tahoe Keys Prop. Owners' Ass'n v State Water Resources Control Bd.* (1994) 23 CA4th 1459, 1471, 28 CR2d 734.

PRACTICE TIP: The petitioner can use the declarations and supporting memorandum prepared for a temporary restraining order (TRO) application in support of the preliminary injunction, as appropriate. The petitioner should consider, however, supplemental declarations addressing newly discovered facts and background information unavailable at the TRO hearing. A petitioner who wishes to file such supplemental declarations should request permission to do so at the TRO hearing so that the court can set the briefing schedule and hearing date accordingly.

On procedures for obtaining a preliminary injunction, see California Civil Procedure Before Trial §§32.19-32.35, 32.60-32.91 (4th ed Cal CEB 2004).

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2. Undertaking (Bond) Requirement

§6.37 a. When Required

If the court decides that a preliminary injunction should issue, it must require the moving party to file a written undertaking (or bond) to ensure that the applicant will pay any damages that the wrongfully enjoined party sustains because of the injunction, unless excused by CCP §529(b). CCP §529(a). Under certain circumstances, the court may exercise discretion whether it will require an undertaking, *e.g.*, when the moving party is indigent (CCP §995.240), in domestic violence cases (CCP §529(b)(2)), or when the moving party is a public entity or officer described in CCP §995.220 (CCP §529(b)(3)).

On undertaking requirements, see California Civil Procedure Before Trial §§32.92-32.94 (4th ed Cal CEB 2004).

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§6.38 b. Amount of Undertaking (Bond)

The undertaking (or bond) must be sufficient to secure any costs and damages that the respondent or real party in interest may incur as a result of the preliminary injunction if that injunction is later found to have been wrongfully imposed. CCP §529(a). The court may require that the undertaking cover the enjoined party's attorney fees. *Satinover v Dean* (1988) 202 CA3d 1298, 1300, 249 CR 277.

On amount of undertaking, see California Civil Procedure Before Trial §32.96 (4th ed Cal CEB 2004).

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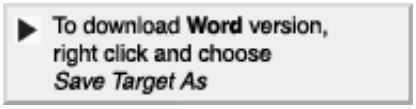
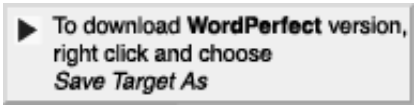
Source: Civil Litigation/California Civil Writ Practice/6 Requesting a Stay in a Superior Court Writ Proceeding/§6.39 V. CHECKLIST: OBTAINING STAY ORDER

§6.39 V. CHECKLIST: OBTAINING STAY ORDER





The following are tasks the petitioner should perform when seeking a stay of the challenged action or decision pending writ review in the superior court:

- Request preparation of the record; obtain estimated date of delivery. It might be necessary to seek a stay before the record can be compiled. If so, counsel should be sure to lodge copies of relevant documents with the stay application or motion for a temporary restraining order (TRO). See §6.14.
- Decide whether to prosecute writ proceeding by noticed motion procedure or alternative writ procedure (see §5.9); check local rules or call the court clerk to determine the court's preference.
- Decide whether to seek a stay by application (see §§6.7-6.17), or preliminary injunction procedures (see §§6.31-6.33 (TRO), §§6.36-6.38 (preliminary injunction)), by first checking local rules or guidelines, calling court clerk to determine any procedural preference or local practice, and then considering timing and other factors.
- Prepare application or request for TRO or preliminary injunction, supporting brief, necessary declarations, and proposed order.
- Check with court regarding filing practices and notice requirements.
- Give notice as required; prepare declaration of notice.
- Prepare copies of writ petition and, if filed separately, stay application; file original and required number of copies with court.
- If disqualification of the judge is desired, consider filing a CCP §170.6 challenge. See California Trial Practice: Civil Procedure During Trial §§6.26-6.78 (3d ed Cal CEB 1995).
- Be prepared to post bond or undertaking if required as a condition of stay or injunction.
- If court grants a stay, TRO, or preliminary injunction, serve order.

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7

The Record in Superior Court Writ Proceedings

David de Jesus

I. SCOPE OF CHAPTER §7.1

II. PURPOSE OF THE RECORD §7.2
- A. Necessity of Sufficient Record §7.3
- B. Statutory Guidance Limited §7.4

III. PREPARING THE RECORD FOR A SUPERIOR COURT WRIT PROCEEDING
- A. Who Prepares the Record §7.5
- B. What Record Includes
  - 1. Record Depends on Type of Petition and Nature of Underlying Proceeding §7.6
  - 2. Include All Relevant Evidence Presented During the Underlying Proceeding §7.7
  - 3. Include Opposing Party's Evidence Presented During Underlying Proceeding §7.8
  - 4. Evidence Not Presented During Underlying Proceeding (Extra-Record Evidence) §7.9
    - a. If Challenging Ministerial or Informal Actions §7.10
    - b. If Challenging Quasi-Legislative Actions §7.11
    - c. If Challenging Adjudicatory Decisions §7.12
  - 5. Record in Pre-Merits Hearings §7.13
- C. Obtaining Record From Decision-Making Body in Underlying Proceeding §7.14
  - 1. When to Request Underlying Record §7.15
  - 2. How to Request Underlying Record §7.16
  - 3. Paying for Preparation of Underlying Record §7.17

IV. FORMAT OF THE RECORD PRESENTED TO THE SUPERIOR COURT
- A. Administrative Record" Versus Documentation Submitted by Way of Exhibits §7.18
  - 1. Appending Supporting Documentation to Petition §7.19
  - 2. Separate Supporting Documentation §7.20
- B. Indexing, Pagination, and Order of Supporting Documentation §7.21
- C. Visual Quality of Documents §7.22
- D. Citation to the Record §7.23

V. SERVING AND LODGING/FILING THE RECORD DOCUMENTATION
- A. Serving the Record §7.24
- B. Lodging/Filing the Record §7.25

VI. PROTECTING CONFIDENTIAL DOCUMENTS §7.26
- A. Criteria for Sealing Documents §7.27
- B. Procedure for Sealing Documents §7.28
  - 1. Moving for Sealing Order §7.29
  - 2. Lodging Document (Record) With Court §7.30
    - a. Conditionally Sealing Document (Record) §7.31
    - b. Court's Handling of Conditionally Sealed Document (Record) §7.32
- C. Inserting Slip Pages for Sealed Documents §7.33

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§7.1 I. SCOPE OF CHAPTER

This chapter discusses the documentation submitted in support of a writ petition filed in the superior court (other than a petition for a writ of administrative mandamus under CCP §1094.5). The chapter begins with a discussion of the purpose of the supporting documentation, which can be in the form of:

- A true administrative record generated during an administrative adjudicatory proceeding;
- A record generated during underlying governmental or private proceedings that is both extensive and akin to (and often called) an administrative record; or
- Declarations and exhibits submitted in support of the petition.

Collectively and generally, this documentation is referred to in this chapter as the "record." See §§7.2-7.3.

The chapter next discusses how to compile the record (see §§7.5-7.17) and general formatting. See §§7.18-7.23. The chapter then discusses serving and lodging an administrative record, and serving and filing supporting declarations and exhibits. See §§7.24-7.25. The chapter concludes with a discussion of how to protect confidential documents by sealing portions of the record. See §§7.26-7.33.

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§7.2 II. PURPOSE OF THE RECORD

Many superior court writ actions arise from proceedings before a governmental or private body, in which the participants presented documents and/or testimony to the decision-maker. All administrative mandamus actions under CCP §1094.5 arise from such proceedings, as do many traditional mandamus actions under CCP §1085. See §§7.9-7.12. In such actions, the record generated during the underlying proceedings often provides the factual universe that the superior court considers in deciding the merits of the writ petition. Even when there is no underlying record, a petitioner usually must support a writ petition with sworn declarations setting out relevant facts and/or authenticating relevant exhibits. In any event, the petitioner has the burden of submitting all the information necessary for the superior court to decide the issues presented by the writ petition.

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§7.3 A. Necessity of Sufficient Record

The lack of an adequate record (*i.e.*, the documentation necessary for the superior court to fully consider the issues presented) is grounds to deny a writ petition. See *Darley v Ward* (1980) 28 C3d 257, 260, 168 CR 481 (superior court denied writ petition on ground petitioner failed to carry burden to provide adequate record; supreme court reversed, holding that superior court should have granted continuance to allow petitioner to obtain written transcription of hearing); *Pomona Valley Hosp. Med. Ctr. v Superior Court* (1997) 55 CA4th 93, 108 n8, 63 CR2d 743 (noting that superior court in administrative mandamus proceeding did not err in refusing to allow petitioner to file "statement of facts" and selective portions of record as substitute for complete administrative record). See also *Sherwood v Superior Court* (1979) 24 C3d 183, 186, 154 CR 917 (in appellate court writ proceeding, absence of transcripts of grand jury proceeding and trial court hearing rendered record insufficient and petition was denied); *Tyler v Superior Court* (1980) 102 CA3d 82, 86, 162 CR 82 (in appellate court writ proceeding, failure to include transcript of superior court hearing and superior court's order denying pretrial motion rendered record insufficient and petition was denied).

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§7.4 B. Statutory Guidance Limited

The writ statutes make limited reference to the record and primarily in the context of administrative adjudicatory decisions challenged under CCP §1094.5. See CCP §§1089.5 (timing of answer affected if administrative record has been requested and filed), 1094.5(a) (all or part of administrative record may be filed with petition, opposing memorandum, or otherwise as ordered by court), 1094.6(c) (respondent must prepare complete record when requested by petitioner), 1094.8(d)(1) (in First Amendment permit or entitlement decisions, record to be prepared within 5 court days of petitioner's request). However, a record can be generated in many kinds of governmental and private proceedings, and thus may be a necessary component of other kinds of writ proceedings as well. See §§7.2, 7.9, 7.11-7.12. Absent an underlying record, a petitioner will often need to support a petition for a writ of traditional mandate or other writ with declarations and/or exhibits. See §7.18.

The rules of court, in turn, expressly address the lodging of an administrative record in an administrative mandamus proceeding under CCP §1094.5. Cal Rules of Ct 3.1140. They also expressly address the preparation and filing of declarations and exhibits in the superior court (see Cal Rules of Ct 3.1110(c)-(g), 3.1113(k) (made applicable to writ proceedings by Cal Rules of Ct 3.1103(a)(2)) and the record in an appellate court writ proceeding (see Cal Rules of Ct 8.486(b)-(c); chap 20).

Thus, as with other aspects of superior court writ practice, the statutes and rules do not fully address the handling of records in traditional mandate and other kinds of writ actions. For example, there may be an extensive underlying record in a traditional mandate case that the parties will call and treat as an "administrative" record, but is not specifically covered by any statute or rule of court. The courts generally have no objection to the parties treating such an underlying record as an administrative record and lodging it with the court. See §7.18.

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III. PREPARING THE RECORD FOR A SUPERIOR COURT WRIT PROCEEDING

§7.5 A. Who Prepares the Record

It is the petitioner's responsibility to provide the superior court with the documentation necessary for the court to decide the issues presented by the writ petition. See §7.3. In some cases, the petitioner can fulfill its responsibility by giving notice to the entity whose action or decision is being challenged to prepare the record of the underlying proceedings. See Govt C §11523 (specifying that agency shall prepare record of adjudicatory proceedings).

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B. What Record Includes

§7.6 1. Record Depends on Type of Petition and Nature of Underlying Proceeding

The documentation submitted in support of a superior court writ petition depends on:

- The type of writ sought;
- The nature of the challenged action or decision;
- The character of the underlying proceeding; and
- The issues raised in the writ petition.

For example, if the statutory requirements for administrative mandamus (CCP §1094.5) are not all met, a petitioner may challenge an administrative adjudicatory decision by way of traditional mandamus (CCP §1085). See §§2.3-2.6, 3.3-3.6. In such a case, there will be a full administrative record. Similarly, the petitioner may challenge a land use decision reviewable under CCP §1085 in which a substantial record was generated during the underlying proceedings. See, *e.g., Bright Dev. v City of Tracy* (1993) 20 CA4th 783, 790, 24 CR2d 618.

On the other hand, a petitioner may challenge the validity of local legislative action by way of traditional mandate, in which case there will be a smaller record, which might include some history of the local enactment (*e.g.,* reports, analyses, testimony). In addition, the petitioner might rely on supporting declarations, or even a set of stipulated facts. See, *e.g., Friends of Bay Meadows v City of San Mateo* (2007) 157 CA4th 1175, 1181, 68 CR3d 916.

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§7.7 2. Include All Relevant Evidence Presented During the Underlying Proceeding

At a minimum, the documentation submitted to the superior court should include all documents and testimony presented to the decision-maker or decision-making body that are relevant to the petitioner's challenge to the underlying action or decision. The extent of this documentation will vary depending on the nature of the underlying proceedings and the issues presented in the writ petition. See §7.6. For example, an administrative hearing with multiple witnesses and numerous documents might generate a large record, but a license or permit denial might generate a relatively small one. In any case, the touchstone is relevance: The petitioner must ensure that the superior court has all documentation and testimony (if any) relevant to assessing the merits of the challenged action or decision. If the underlying proceeding did not involve documents (*e.g.,* if a party asked a governmental entity to perform a ministerial duty and no hearing was held), the supporting documentation will be in the form of declarations from individuals with personal knowledge of the underlying proceeding.

PRACTICE TIP: Statutes pertaining to administrative mandamus provide some guidance on the types of items that may be important to submit in a traditional mandamus action. See, *e.g.,* CCP §1094.6(c) (describing contents of record in administrative mandamus proceedings involving local agencies other than school districts); Govt C §11523 (describing contents of record in cases to be decided under administrative adjudication provisions of Administrative Procedure Act). On administrative mandamus, see chap 3. See also Cal Rules of Ct 8.486(b) (governing record in appellate court writ proceedings); §20.6.

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§7.8 3. Include Opposing Party's Evidence Presented During Underlying Proceeding

The record presented to the superior court must be complete, which means that the petitioner must include all relevant documents and testimony presented in the underlying proceedings by the respondent or any real party in interest as well by the petitioner. See, *e.g.,* CCP §1094.6(c) (in administrative mandamus proceedings, record includes "all pleadings" as well as all admitted exhibits and rejected exhibits in possession of local agency or its commission, board, officer, or agent); Govt C §11523 (in proceedings under Administrative Procedure Act, record includes "the pleadings" and "the exhibits admitted or rejected"). See also Cal Rules of Ct 8.486(b)(1)(B), (D) (in appellate court writ proceedings, record must include all documents submitted to trial court supporting and opposing challenged ruling and any other documents submitted to trial court necessary for complete understanding of case).

PRACTICE TIP: This does not mean that every document and all testimony presented (if any) during the underlying proceeding must be submitted to the superior court. Some of it may be irrelevant to the issues raised in the writ petition, and the court should not be burdened with such extraneous material. See CCP §1094.5(a) (in administrative mandamus proceeding, petitioner may submit all or part of administrative record).

A complete record is not simply a matter of the petitioner carrying its burden of proof (see §7.3), but also a matter of fundamental candor with the superior court. A petitioner will suffer a serious blow to credibility if the court discovers that the proffered "record" of the challenged action or decision is one-sided. Moreover, a party that prevails in the superior court based on an incomplete record (*i.e.*, one that does not support relief) risks later reversal on appeal.

PRACTICE TIP: "Unclean hands" can be interposed as a defense to a writ petition, and actions constituting unclean hands can occur before or during a superior court writ proceeding, including in connection with preparing a record. See generally *Allen v Los Angeles County Dist. Council of Carpenters* (1959) 51 C2d 805, 812, 337 P2d 457 (trial court did not abuse its discretion in denying writ of mandate given petitioner's unclean hands). On the unclean hands defense, see 5 Witkin, California Procedure, *Pleading* §1126 (5th ed 2008).

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§7.9 4. Evidence Not Presented During Underlying Proceeding (Extra-Record Evidence)

Extra-record evidence is evidence that was not presented during the underlying governmental or private proceedings. This evidence can include matters that are judicially noticeable, although judicial notice is most frequently requested in support of a legal argument (*e.g.*, the legislative history of a statute for a statutory construction argument), rather than to establish the operative facts. See, *e.g.*, *Preserve Shorecliff Homeowners v City of San Clemente* (2008) 158 CA4th 1427, 1444 n14, 71 CR3d 332 (judicial notice of legislative history); *Fiscal v City & County of San Francisco* (2008) 158 CA4th 895, 913, 70 CR3d 324 (same). See also *Tuolumne County Citizens for Responsible Growth, Inc. v City of Sonora* (2007) 155 CA4th 1214, 1220, 66 CR3d 645 (judicial notice of numerous items in CEQA writ proceeding).

PRACTICE TIP: If judicial notice is permissible, a petitioner must proceed in accordance with Cal Rules of Ct 3.1113(*l*) (made applicable to writ proceedings by Cal Rules of Ct 3.1103(a)(2)). On judicial notice requests in appellate court writ proceedings, see §§20.17-20.22.

The propriety of submitting extra-record evidence to the superior court in traditional mandamus proceedings under CCP §1085 depends on the type of action or decision being challenged. See §§7.10-7.11. See also *SN Sands Corp. v City & County of San Francisco* (2008) 167 CA4th 185, 195 n5, 83 CR3d 885. In contrast, in administrative mandamus proceedings under CCP §1094.5, the court can consider extra-record evidence only if (CCP §1094.5(e)):

- In the exercise of reasonable diligence the parties could not have produced it during the underlying proceedings; or
- The evidence was improperly excluded during the administrative proceedings.

This standard is also likely to be applied in a traditional mandate action challenging an administrative adjudicatory decision (*e.g.,* where the statutory requirements of CCP §1094.5 are not all met (see §§2.3-2.6, 3.3-3.6). See §7.12. On extra-record evidence in an administrative mandamus proceeding, see §3.7.

PRACTICE TIP: Under extremely limited circumstances, discovery is permissible in mandamus proceedings. In such circumstances, the superior court may necessarily be considering extra-record evidence. Any such review, however, still must be limited to relevant evidence. On discovery in superior court writ proceedings, see §§5.10, 5.16.

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§7.10 a. If Challenging Ministerial or Informal Actions

Extra-record evidence may be appropriate in traditional mandamus actions challenging or seeking to compel ministerial actions, particularly if the facts are in dispute. See *Western States Petroleum Ass'n v Superior Court* (1995) 9 C4th 559, 575, 38 CR2d 139 (extra-record evidence "is usually necessary only when the courts are asked to review ministerial or informal administrative actions, because there is often little or no record in such cases"). See also *SN Sands Corp. v City & County of San Francisco* (2008) 167 CA4th 185, 195 n5, 83 CR3d 885 (discussing *Western States*). See also CCP §1090 (allowing court to permit jury trial of disputed essential facts). For example, the petitioner may need to seek judicial notice of relevant rules, regulations, policies, charter provisions, ordinances, or other procedures with which the respondent allegedly is required to comply. See §7.9.

In addition, the petitioner will need to present to the superior court through exhibits—either attached to the petition or to an authenticating declaration—whatever documentation may have been generated in connection with the performance of or refusal to perform the action at issue. Although this is usually referred to as "extra-record" evidence, it is actually the documentary record, albeit minimal, of the underlying action or decision. See §7.18-7.20.

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§7.11 b. If Challenging Quasi-Legislative Actions

Extra-record evidence is generally not admissible in traditional mandamus proceedings challenging quasi-legislative actions if the issues presented are legal ones. See *Western States Petroleum Ass'n v Superior Court* (1995) 9 C4th 559, 575, 38 CR2d 139 (administrative record developed during quasi-legislative process is usually adequate for courts to review decision without recourse to extra-record evidence); *SN Sands Corp. v City & County of San Francisco* (2008) 167 CA4th 185, 195 n5, 83 CR3d 885 (extra-record declarations disregarded); *San Joaquin County Local Agency Formation Comm'n v Superior Court* (2008) 162 CA4th 159, 163, 76 CR3d 93 (trial court erred in ordering depositions of commissioners to learn what extra-record information they had when making decision on agency formation application because such extra-record evidence is inadmissible); *Shapell Indus., Inc. v Governing Bd.* (1991) 1 CA4th 218, 233, 1 CR2d 818 (court is not required to consider new evidence in mandamus proceeding presenting only legal question of whether agency acting in its quasi-legislative capacity has exceeded its authority). Limiting review to the administrative record is generally appropriate because of the limited scope of review applicable to quasi-legislative actions. *San Joaquin County Local Agency Formation Comm'n,* 162 CA4th at 167.

NOTE: There may be exceptional circumstances warranting consideration of extra-record evidence, such as issues concerning standing or capacity to sue, affirmative defenses, accuracy of the administrative record, procedural unfairness, or agency misconduct. *Western States Petroleum Ass'n v Superior Court* (1995) 9 C4th 559, 575 n5, 38 CR2d 139; *San Joaquin County Local Agency Formation Comm'n,* 162 CA4th at 167. However, extra-record evidence "can never be admitted merely to contradict the evidence the administrative agency relied on in making a quasi-legislative decision or to raise a question regarding the wisdom of that decision." *San Joaquin County Local Agency Formation Comm'n,* 162 CA4th at 169, quoting *Western States Petroleum Ass'n*, 9 C4th at 579.

When there are disputes as to essential facts, however, the superior courts may entertain extra-record evidence. See CCP §1090 (allowing court to permit jury trial of disputed essential facts); *Dare v Board of Med. Exam'rs* (1943) 21 C2d 790, 797, 136 P2d 304 (if there are disputed issues of fact, "any competent evidence may be introduced and received and the ordinary procedural rules apply"); *Shapell Indus., Inc. v Governing Bd., supra* (court may consider new evidence in mandamus proceeding in which factual questions are raised); *Bright Dev. v City of Tracy* (1993) 20 CA4th 783, 795, 24 CR2d 618 (in traditional mandamus proceeding, parties may present evidence outside administrative record).

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§7.12 c. If Challenging Adjudicatory Decisions

Extra-record evidence is generally not admissible in traditional mandamus actions challenging adjudicatory decisions. See *Bunnett v Regents of Univ. of Cal.* (1995) 35 CA4th 843, 853, 41 CR2d 567 (superior court cannot "accept evidence in addition to the administrative record in a mandate proceeding concerning an adjudicatory decision"), citing *Fascination, Inc. v Hoover* (1952) 39 C2d 260, 264, 246 P2d 656 (in mandamus proceeding challenging adjudicatory decision, trial court is limited to examination of matters that lower tribunal considered). See also *Golden Drugs Co. v Maxwell-Jolly* (2009) 179 CA4th 1455, 102 CR3d 446 (Department of Health Care Services reached adjudicatory decision that depended on particular facts of case, and petitioner failed to show why it should have been allowed to add extra-record evidence in trial court).

NOTE: Most administrative adjudicatory decisions are reviewed by way of administrative mandamus under CCP §1094.5, but if any of the three statutory requirements for administrative mandamus is not met (see §§3.3-3.7), an administrative adjudicatory decision is reviewed by way of traditional mandamus under CCP §1085. On traditional mandamus, see chap 2.

Extra-record evidence may be permissible, however, if the issue is whether the petitioner received a "fair" administrative hearing. See *Nasha v City of Los Angeles* (2004) 125 CA4th 470, 485, 22 CR3d 772 (in administrative mandamus proceeding, extra-record evidence permissible if petitioner claims that he or she was denied due process or fair hearing).

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§7.13 5. Record in Pre-Merits Hearings

There may be proceedings in a writ action before the superior court hears the petition on the merits (*e.g.*, on an application for alternative writ or application for stay or temporary restraining order). A party seeking preliminary relief must provide the court with sufficient information to decide the preliminary matter, generally by way of declaration and attached and authenticated exhibits.

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§7.14 C. Obtaining Record From Decision-Making Body in Underlying Proceeding

Because proceedings before a governmental or private body are often less formal than court proceedings, a petitioner may not have ready access to a copy of the full record generated during the underlying proceeding. The statutes may entitle the petitioner to request the record, in writing, from the lower agency or tribunal. See *e.g.,* Pub Res C §21167.6(a). This is most likely to be the case in connection with an administrative adjudicatory proceeding subject to review by way of administrative mandamus under CCP §1094.5.

If the decision-making body is not under any obligation to prepare a record of the underlying proceedings, the petitioner will need to assemble all relevant documents and hearing transcripts (if any).

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§7.15 1. When to Request Underlying Record

If applicable, a petitioner should promptly request the governmental or private body to prepare the record of the underlying proceedings.

PRACTICE TIP: A petitioner should not rely on a request for preparation of a record to stay the deadline for filing a writ petition. The best practice is to timely file the writ petition and include in the verified allegations when the record was requested, what was requested, and any known information as to when the record will be prepared.

The administrative mandamus statute requires a local agency to prepare a record within 190 days of the petitioner's request. CCP §1094.6(c). But see CCP §1094.8(d)(1) (administrative agency has only 5 court days to prepare record in cases involving denial, revocation, or suspension of permit for constitutionally protected expressive conduct). There is no similar deadline in the traditional mandamus statutes. A petitioner preparing a record in a traditional mandamus case is strongly recommended to comply with the administrative mandamus deadlines, particularly if it is unclear whether the traditional mandate or administrative mandate statutes apply. Indeed, the record preparation request is often made before the petitioner even files the petition and thus there will have not yet been a specific designation of the writ action as one for traditional or administrative mandamus, or both. On traditional mandamus, see chap 2. On administrative mandamus, see chap 3.

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§7.16 2. How to Request Underlying Record

There is no prescribed written form for requesting preparation of a record generated in an underlying governmental or private proceeding. Thus, a petitioner should inquire whether the body or agency has any special requirements for the written request. A letter is usually sufficient if it states the necessary information. If a state agency is the respondent, the petitioner should mail the request to the agency. See Govt C §11523 (specifying that agency shall prepare record). The request should identify (by number and title, if available) the following:

- The proceeding at issue;
- The parties to the proceeding and the parties to the pending or anticipated writ proceeding; and
- All desired items, including exhibits.

When requesting preparation of a record, the petitioner also should request a cost estimate for preparation. Once the estimated costs are ascertained, a check in that amount should be sent immediately, so as not to delay preparation of the record. Another option is to provide a "not to exceed" check when a rough estimate is available. The petitioner should not delay requesting the record while waiting for a cost estimate, however. On paying for the preparation of the record, see §7.17.

PRACTICE TIP: Although not required, petitioner should mail a courtesy copy of a request for a record to counsel for each party to the underlying proceeding and to the pending writ proceeding (if known). Petitioner may invite counsel for the other parties to supplement the request with additional material. This practice helps ensure that the record will be complete, thus avoiding delays in prosecuting the writ petition. It also encourages the parties to act with civility and professionalism.

On requesting the record in an administrative adjudicatory proceeding, see California Administrative Mandamus §§10.8-10.10 (3d ed Cal CEB 2003).

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§7.17 3. Paying for Preparation of Underlying Record

The governmental or private body preparing a record generally may recover its initial costs of doing so from the petitioner. See CCP §1094.5(a); Govt C §11523. A petitioner proceeding in forma pauperis, however, is not required to pay for the agency's record preparation costs. CCP §1094.5(a).

The prevailing party in a writ proceeding is entitled to recover costs for record preparation, compilation, and certification. See CCP §§1033.5, 1094.5(a); Govt C §11523. Accordingly, a petitioner that ultimately prevails in a writ proceeding may recover the costs it paid for record preparation.

On the cost of an administrative record, see California Administrative Mandamus §§10.14-10.16 (3d ed Cal CEB 2003).

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IV. FORMAT OF THE RECORD PRESENTED TO THE SUPERIOR COURT

§7.18 A. "Administrative Record" Versus Documentation Submitted by Way of Exhibits

Administrative record. In cases in which the petitioner requests that a governmental or private body prepare an underlying record (either a true administrative record generated during an administrative adjudicatory proceeding or an extensive record developed during other governmental or private proceedings), the governmental or private body will likely deliver the record to the petitioner as a bound document in one or more volumes. The petitioner need not reformat or recompile the record, but must ensure that it is timely lodged with the superior court. See Cal Rules of Ct 3.1140 (requiring administrative record in administrative mandamus action be lodged with court at least 5 days before hearing on writ petition); §7.25. As a result, the superior courts receive records of underlying proceedings in a variety of formats, *e.g.*, in three-ring binders, in vela-bound volumes, in tape-bound volumes, in boxes, and even in rubber-banded batches (not recommended).

Similarly, if the petitioner compiles the administrative record, it may be assembled in volumes, with an index and pages consecutively numbered.

PRACTICE TIP: The petitioner should check local rules or with the court clerk to determine whether the superior court has a specific preference on how to assemble the record in a writ proceeding.

Record in form of declarations and exhibits. In many traditional mandamus cases under CCP §1085, and in other types of writ cases, the record presented to the superior court is not the equivalent of an "administrative record," and instead will be in the form of declarations with attached and authenticated exhibits. See §§7.2, 7.6-7.7, 7.10, 7.19-7.20. The rules specify the format for exhibits. See Cal Rules of Ct 3.1110(c)-(g), 3.1113(j) (made applicable to writ proceedings by Cal Rules of Ct 3.1103(a)(2)).

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§7.19 1. Appending Supporting Documentation to Petition

If the supporting documentation consists of only a few pages (*i.e.,* it is not an administrative record or treated as such (see §7.18)), it can be attached as one or more exhibits to the writ petition with an index preceding the exhibits. See Cal Rules of Ct 3.1110(e)-(f), 3.1113(j) (made applicable to writ proceedings by Cal Rules of Ct 3.1103(a)(2)). See also Cal Rules of Ct 8.486(c)(1)(A) (specifying form of supporting documents for appellate court writ petitions). Exhibits can be authenticated by way of either a verified allegation in the petition or an authenticating declaration.

PRACTICE TIP: It is hard to quantify what constitutes a "few" pages. If the writ petition seems at all unwieldy, it is best to file supporting declarations and exhibits separately. See §7.20.

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§7.20 2. Separate Supporting Documentation

If the supporting documentation consists of more than a few pages, petitioner should submit it separately by attachment to sworn and authenticating declarations, or as an appendix of exhibits in support of the petition (the exhibits may be authenticated by verified allegation in the writ petition or an accompanying sworn declaration). See Cal Rules of Ct 3.1110(e)-(f), 3.1113(j) (made applicable to writ proceedings by Cal Rules of Ct 3.1103(a)(2)).

Any compendium of supporting exhibits exceeding 300 pages in length should be separated into volumes of no more than 300 pages each (with the caption page title noting, *e.g.,* Volume 1 of 3). For ease of reference, counsel should attach a complete index to the beginning of each volume. See Cal Rules of Ct 3.1110(f) (made applicable to writ proceedings by Cal Rules of Ct 3.1103(a)(2)). If the supporting documentation is of this length, however, it is likely to be the administrative record or its equivalent and, if so, the petitioner should treat it accordingly. See §7.18.

PRACTICE TIP: If a record or supporting exhibits include multiple copies of a document or if an irrelevant document is an exhibit to an otherwise relevant document, the petitioner can substitute a single page in place of the duplicate or irrelevant document that identifies the document and explains its omission or where its duplicate is located. The courts will appreciate efforts to minimize the size of a record or documentation submitted in support of a writ petition.

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§7.21 B. Indexing, Pagination, and Order of Supporting Documentation

Regardless of whether supporting documentation is appended to the writ petition (see §7.19) or submitted separately in the form of declarations and exhibits (see §7.20), it must conform with the following format requirements:

- **Index tab the documents.** Each exhibit must be separated by a hard 8½ × 11-inch sheet with tabs extending below the bottom of the page, bearing the exhibit designation. Counsel must designate pages from a single deposition and associated exhibits as a single exhibit. Cal Rules of Ct 3.1110(f) (made applicable to writ proceedings by Cal Rules of Ct 3.1103(a)(2)).

PRACTICE TIP: This requirement can lead to an unwieldy and confusing compendium if the exhibits themselves contain separately tabbed items, creating multiple layers of identification. One solution is to follow appellate court practice and, in a compendium of exhibits, in addition to the required tabs, use consecutive pagination for all exhibit pages. See Cal Rules of Ct 8.486(c)(1)(A); *Great Oaks Water Co. v Santa Clara Valley Water Dist.* (2009) 170 CA4th 956, 965 n7, 88 CR3d 506 (court complained that record was tabbed, but not consecutively or consistently numbered, and explained that "[e]ach page of the administrative record should be numbered so that reference can easily be made to specific pages within a specific document"). This allows for much more succinct citation to the record in the briefing (*e.g.,* "Vol. 1 of Exhs., Exh. 25 at 157") and helps the court turn quickly to referenced record material. See Cal Rules of Ct 3.1113(k) (made applicable to writ proceedings by Cal Rules of Ct 3.1103(a)(2)). On citation to the record, see §7.23.

- **Provide an index**. Counsel must provide an index to the exhibits. Cal Rules of Ct 3.1110(f) (made applicable to writ proceedings by Cal Rules of Ct 3.1103(a)(2)).

Additionally, counsel should:

- **Chronologically order the documents.** Place supporting documents in chronological order by date, with the earliest filed document appearing first.
- **Check local rules.** Check the court's local rules for any additional requirements.

PRACTICE TIP: The goal in preparing the supporting documentation is to provide the superior court with a user-friendly, easily understood, and manageable compendium that lends itself to a straightforward citation format in the writ petition and in the supporting and opposing memoranda.

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§7.22 C. Visual Quality of Documents

All copies of supporting documents should be readable and unmarked. If a copy of a document contains handwritten notations that counsel cannot "white out" to produce a clean copy, the petitioner should obtain a clean copy from the respondent or real party in interest. If available duplicating equipment will not produce a high-quality copy, counsel should use a professional copy service.

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§7.23 D. Citation to the Record

Citations should be short and easily understood. Citation to a record lodged with the court (see §7.18) can be very concise, *e.g*., "Rec. at 25," "Vol. 1 of Rec. at 5," "Rec., Vol. 1 at 5." Citation to declarations and exhibits should also be concise, *e.g.*, "Smith Dec., Exh. A at 5" or "Exhs., Exh. A at 5." See Cal Rules of Ct 3.1113(k) (made applicable to writ proceedings by Cal Rules of Ct 3.1103(a)(2)). See also Cal Rules of Ct 8.486(c).

Counsel should avoid cumbersome citations that recite the title of the document; not only are they difficult to decipher, they also add unnecessary length to documents and create problems with page limits.

PRACTICE TIP: To ensure that the court understands the citation format, the petitioner should drop a footnote immediately after the first record citation explaining the format, *e.g.,* "'Exh. 5' refers to page 5 of exhibit A attached to this writ petition" or "'Exh. 5' refers to page 5 of the compendium of exhibits submitted in conjunction with this petition" or "'Exh. 5' refers to page 5 of the record that will be lodged with the court within the time period provided by [*cite statute or rule*]."

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V. SERVING AND LODGING/FILING THE RECORD DOCUMENTATION

§7.24 A. Serving the Record

If a record of the underlying proceedings is prepared by a governmental or private body (see §7.18), the petitioner should serve a copy of the record shortly after receiving it, or at least when filing a notice of motion and motion for issuance of a writ. Similarly, if the petitioner prepares the administrative (or equivalent) record (see §7.18), it should be served when it is compiled, or at least when filing a notice of motion and motion for issuance of a writ.

PRACTICE TIP: Promptly serving a copy of the record allows the opposing party to work with the record in its final format, and ensures that record citations by all of the parties will follow a consistent format.

If the writ petition is supported by declarations and exhibits (see §§7.18-7.21), the time for service depends on whether the petitioner chooses to proceed by way of the noticed motion or alternative writ procedure, and also depends on any procedures specified by local rule of court. On noticed motion procedures, see §§5.76-5.107; on alternative writ procedure, see §§5.108-5.118.

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§7.25 B. Lodging/Filing the Record

Lodging an "administrative record." If a record of the underlying proceedings is prepared by a governmental or private body (see §7.18), or if the petitioner assembles such a record, the record should be lodged with the superior court at least 5 days before the hearing. See Cal Rules of Ct 3.1140.

PRACTICE TIP: Although Rule 3.1140 expressly applies to administrative mandamus proceedings, given its purpose and intent, it should also guide lodging of a record in a traditional mandamus proceeding.

If a writ action is an administrative mandamus action under CCP §1094.5, or a combined action under both CCP §1094.5 and §1085, there will be no uncertainty as to the procedures for assembling and lodging a record generated during the underlying proceedings. An administrative record must be "lodged" with the court, not filed. Cal Rules of Ct 3.1140. After the administrative mandamus action is over (*i.e.*, after the time to appeal has expired or, if there is an appeal, after the remittitur issues), the "lodged" record will probably be returned to the petitioner, thereby freeing up valuable shelf space at the court.

If the writ proceeding is solely one for traditional mandamus under CCP §1085, the court or its clerk may be uncertain about how to handle a proffered record of underlying governmental or private proceedings, because the rules only refer to a "record" in a traditional mandamus action. See §7.4. The cases make clear, however, that a record of underlying governmental or private proceedings (equivalent to an "administrative record" in an administrative adjudicatory proceeding) may exist in traditional mandamus actions. See §§7.11-7.12. Thus, if the clerk refuses such a proffered record, the petitioner may need to submit an application to the court (preferably accompanied by a stipulation signed by all parties) explaining that there is a record of the underlying proceedings, describing the record in some detail (*i.e.*, showing that it is the equivalent of an "administrative record"), and asking to lodge the record under Cal Rules of Ct 3.1140. The court should be receptive to lodging such a record because that allows the court to return the record to the petitioner (and thus recover shelf space) at the end of the writ action.

PRACTICE TIP: Counsel should view the 5-day deadline for lodging a record under Cal Rules of Ct 3.1140 as the statutory minimum. In practice, the court may require that petitioner prepare and lodge a record long before that time. For instance, in a large case, the court will normally set a briefing schedule and a date for lodging the record. Likewise, in cases in which the petitioner uses the noticed motion procedure, it is good practice to lodge a record in conjunction with the notice of motion and motion for issuance of the writ and serve it on the respondent and any real party in interest. In any event, a petitioner should check with the trial court for its preference, as practice varies widely.

Filing supporting declarations and exhibits. Documentation in support of a writ petition submitted by way of declarations and exhibits, as is often the case in traditional mandamus proceedings (see §§7.18-7.21), will be filed with the court (not lodged). The timing of this filing depends on whether the petitioner proceeds by way of the noticed motion or alternative writ procedure. On noticed motion procedures, see §§5.76-5.107; on alternative writ procedure, see §§5.108-5.118. As with other aspects of superior court writ practice, the petitioner should check local rules to determine whether the court has any special filing requirements. Because these documents are filed with the superior court and become part of the court's public record, they are not returned to the petitioner after the writ action is over.

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§7.26 VI. PROTECTING CONFIDENTIAL DOCUMENTS

Unless confidentiality of records is required by law, court records are presumed to be open to the public. Cal Rules of Ct 2.550(c). Thus, if a party to a writ proceeding believes that documents in the record submitted in a writ action (either as part of a formal record lodged with the court or as an exhibit filed in the court) should not be made public, that party must move for an order from the superior court sealing those documents or portions of them. Cal Rules of Ct 2.550-2.551. On moving to seal record, see §7.29.

On sealing documents generally, see California Civil Procedure Before Trial §§12.122-12.139 (4th ed Cal CEB 2004); Judge Kleinberg, *To Seal or Not to Seal: Protecting Confidential Records Under the Rules of Court*, 29 CEB Civ Litigation Rep 131 (Aug. 2007).

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§7.27 A. Criteria for Sealing Documents

To seal documents, the court must expressly find that (Cal Rules of Ct 2.550(d)):

- There is an overriding interest that overcomes the public's right to access the documents;
- The overriding interest supports sealing the record;
- A substantial probability exists that *not* sealing the record will prejudice the overriding interest;
- The proposed sealing is narrowly tailored; and
- No less restrictive means are available to achieve the overriding interest.

The parties cannot stipulate to sealing a document. The court must conduct an independent review and make the required findings to place a document under seal.

PRACTICE TIP: Although the parties cannot stipulate to filing a document under seal, a motion to file under seal has a better chance of success if it is unopposed or brought as a joint motion. Thus, counsel for a party seeking to seal a document should try to reach agreement with opposing counsel about the scope of the sealing order and stipulate when possible, particularly on documents or information that are indisputably confidential or private, such as Social Security numbers.

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Source: Civil Litigation/California Civil Writ Practice/7 The Record in Superior Court Writ Proceedings/§7.28 B. Procedure for Sealing Documents

§7.28 B. Procedure for Sealing Documents

When a party seeks to have a document or a portion of a document sealed, it must simultaneously:

- Move for an order sealing document(s) (called a "record" in the rules pertaining to sealing) (see §7.29); and
- Lodge the document(s) with the court under temporary seal (see §7.30).

On the procedures for sealing documents, see California Civil Procedure Before Trial §§12.126-12.133 (4th ed Cal CEB 2004).

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§7.29 1. Moving for Sealing Order

A party requesting that the court file documents (called "records" in the rules pertaining to sealing) under seal must file a motion or an application for an order sealing the record. The moving party must accompany this motion or application with a supporting memorandum and a declaration with facts sufficient to justify the sealing. Cal Rules of Ct 2.551(b)(1).

JUDICIAL PERSPECTIVE: The motion should state facts supporting each of the criteria for sealing documents. It is not sufficient to merely recite the criteria. On criteria for sealing documents, see §7.27.

The moving party must serve the motion or application to seal on all parties that have appeared in the case. Cal Rules of Ct 2.551(b)(2).

If necessary to prevent disclosure, any motion or application, opposition, and supporting documents "must be filed in a public redacted version and lodged in a complete version conditionally under seal." Cal Rules of Ct 2.551(b)(5).

PRACTICE TIP: Counsel should limit a motion to seal only to those documents, or portions of documents, that can legally be filed under seal. If a document contains confidential and non-confidential information, counsel should ask only that the confidential information be filed under seal. The rest of the document can remain in the public file in redacted form.

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§7.30 2. Lodging Document (Record) With Court

The party requesting that a document or portions of a document (called a "record" in the rules pertaining to sealing) be filed under seal must lodge those documents with the court under Cal Rules of Ct 2.551(d) when the motion or application is made, unless good cause exists for not lodging it or the document was previously lodged under Cal Rules of Ct 2.551(b)(3)(A)(i). Pending the determination of the motion or application, the court holds the lodged document or portions of the document conditionally under seal. Cal Rules of Ct 2.551(b)(4).

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§7.31 a. Conditionally Sealing Document (Record)

When counsel requests an order that a document or portions of a document (called a "record" in the rules pertaining to sealing) be filed under seal, counsel must lodge the record with the court in a sealed envelope or other appropriate container, labeled "CONDITIONALLY UNDER SEAL." Cal Rules of Ct 2.551(d)(1)-(2). Counsel must affix to the envelope or container a cover sheet that (Cal Rules of Ct 2.551(d)(3)(A)-(B)):

- Contains all the information required on a caption page under Cal Rules of Ct 2.111; and
- States that the enclosed record is subject to a motion or an application to file the record under seal.

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§7.32 b. Court's Handling of Conditionally Sealed Document (Record)

When the clerk receives a document (called a "record" in the rules pertaining to sealing) lodged under Cal Rules of Ct 2.551(d), it endorses the affixed cover sheet with the date of receipt and retains, but does not file, the document unless the court orders it filed. Cal Rules of Ct 2.551(d)(4).

PRACTICE TIP: Some superior courts scan filed documents into a publicly available database. If the proper procedures are followed, conditionally sealed documents will not be scanned; however, mistakes can and do occur. Accordingly, after lodging the confidential documents with the court, counsel should check the court's website to make certain those documents have not been scanned. If there is a mistake, counsel should apply ex parte as quickly as possible to remedy the situation.

If the documents placed under seal are voluminous and within a public agency's custody, the superior court may order the sealed records to remain with the agency "in a secure fashion" rather than with the clerk. Cal Rules of Ct 2.551(g).

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§7.33 C. Inserting Slip Pages for Sealed Documents

If the superior court orders sealed some documents in a record to be lodged with the court (see §7.18), those documents are before the court by virtue of the sealing order and do not need to be resubmitted to the court when the complete record is lodged. The petitioner should include slip pages in the record where the sealed documents otherwise would appear, stating that the document was filed under seal and providing the date of the sealing order. The same procedure can be used if sealed documents are part of exhibits submitted in support of a writ petition. See §§7.18-7.21.

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8

Responsive Pleadings and Petitioner's Reply

Kelly J. Savage

I. INTRODUCTION
- A. Scope of Chapter §8.1
- B. Terminology §8.2

II. PROCEDURAL ASPECTS OF RESPONDING TO A WRIT PETITION
- A. Response Controlled by Manner in Which Petitioner Chooses to Proceed §8.3
- B. When Petitioner Seeks Stay of Challenged Action or Decision §8.4
- C. Consider Joint Response §8.5
- D. When Petitioner Uses Noticed Motion Procedure
  - 1. File Responsive Pleading or Motion §8.6
    - a. Time to File §8.7
      - (1) When Record Has Been Filed or Is Unnecessary §8.8
      - (2) When Record Has Been Requested But Not Filed §8.9
      - (3) Time May Be Extended by Stipulation or Application §8.10
    - b. Filing, Fee, and Service
      - (1) File in Same Court as Petition §8.11
      - (2) Fee §8.12
      - (3) Serve All Parties §8.13
      - (4) How to Serve §8.14
    - c. Consequences of Not Filing Responsive Pleading §8.15
  - 2. File Opposition to Motion for Issuance of Writ §8.16
    - a. Time to File §8.17
    - b. Contents of Opposition Memorandum §8.18
    - c. Format of Opposition §8.19
    - d. Evidence in Opposition §8.20
- E. Alternative Writ Procedure
  - 1. Opposition to Application for Issuance of Alternative Writ
    - a. Optional if Petitioner Seeks Ex Parte Issuance of Alternative Writ §8.21
    - b. Strongly Recommended if Petitioner Gives 10 Days' Notice of Application for "a" Writ or for "Peremptory" Writ §8.22
    - c. Time to File §8.23
      - (1) When Alternative Writ Is Sought Ex Parte §8.24
      - (2) When Petitioner Has Given 10 Days' Notice of Application for "a" Writ or for "Peremptory" Writ §8.25
    - d. Content of Opposition
      - (1) When Alternative Writ Is Sought Ex Parte §8.26
      - (2) When Petitioner Has Given 10 Days' Notice of Application for "a" Writ or for "Peremptory" Writ §8.27
    - e. Filing, Fee, and Service
      - (1) Opposition Filed in Same Court as Petition §8.28
      - (2) Fee §8.29
      - (3) Serve All Parties §8.30
      - (4) How to Serve §8.31
  - 2. If Superior Court Issues Alternative Writ
    - a. Effect of Alternative Writ §8.32
      - (1) If Respondent Chooses to Comply §8.33
      - (2) If Respondent Chooses Not to Comply §8.34
    - b. Return After Issuance of Alternative Writ
      - (1) File Responsive Pleading or Motion §8.35
      - (2) Time to File §8.36
      - (3) Consequences of Filing Defective Return or No Return §8.37
      - (4) Memorandum Addressing Merits of Writ Petition §8.38
  - 3. "*Palma"* Notices Not Used in Superior Court Writ Proceedings §8.39

III. TYPES OF RESPONSIVE PLEADINGS AND MOTIONS
- A. Demurrer
  - 1. Tests Sufficiency of Petition §8.40
  - 2. Basis for Demurrer §8.41
  - 3. General Guidelines for Demurrers
    - a. If Demurrer Sustained §8.42
    - b. If Demurrer Overruled §8.43
  - 4. Answer in Conjunction With Demurrer §8.44
- B. Answer
  - 1. Function of Answer §8.45
  - 2. Content of Answer §8.46
    - a. Allegations Deemed Admitted if Not Denied §8.47
    - b. Affirmative Defenses Must Be Raised in Answer §8.48
  - 3. Verification Required §8.49
- C. Responsive Motions §8.50
  - 1. Motion to Dismiss §8.51
  - 2. Motion to Quash §8.52
  - 3. Motion for Judgment on the Pleadings §8.53
  - 4. Motion for Summary Judgment §8.54
  - 5. Other Miscellaneous Motions §8.55
  - 6. File Answer in Conjunction With Motion §8.56

IV. PETITIONER'S REPLY
- A. Replication (Reply) §8.57
  - 1. Deadline for Filing Replication (Reply) §8.58
  - 2. Contents of Replication (Reply) §8.59
  - 3. Advance Notice Required if Replication (Reply) Made by Evidence Presented at Hearing §8.60
  - 4. Filing and Service §8.61
- B. Petitioner's Reply Memorandum
  - 1. When Noticed Motion Procedure Is Used §8.62
  - 2. When Alternative Writ Procedure Is Used §8.63

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I. INTRODUCTION

§8.1 A. Scope of Chapter

This chapter discusses the ways in which the respondent or real party in interest may respond to a writ petition. It also discusses the petitioner's options in reply.

- The first part of the chapter summarizes the procedural differences in responding to a writ petition, depending on whether the petitioner proceeds by way of (a) noticed motion to bring the writ petition on for a hearing on the merits (see §§8.6-8.20), or (b) alternative writ (see §§8.21-8.38). This discussion includes responding to a stay application or request for preliminary injunctive relief. See §8.4.
- The second part of the chapter discusses the different kinds of responsive pleadings and motions a respondent or real party in interest can file, *e.g.,* a demurrer, answer, or motion to strike. See §§8.40-8.56.
- The third part of the chapter discusses the petitioner's reply to the respondent's or real party in interest's responsive pleadings. See §§8.57-8.63.

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§8.2 B. Terminology

In superior court writ practice, there are various terms of art used by statutes, rules, courts, and counsel. The following terms refer to the kinds of documents that may be filed in a superior court writ proceeding:

"Opposition to application for alternative writ": An optional, but strongly recommended, preliminary memorandum that can be filed, if time permits, in opposition to an application for an alternative writ. See §§8.21-8.31.

"Return": This term has multiple meanings. Most commonly, it refers to the class of documents the respondent or real party in interest may file in response to an alternative writ (if the alternative writ procedure is used to prosecute the writ petition). A return can be an answer, a demurrer, or both, or a responsive motion (*e.g.,* motion to strike). See §8.35. This term also refers to the respondent's report back to the court, after the court has issued a peremptory writ, regarding whether the respondent has complied with the writ. This return is required only if the court issuing the writ orders it. See §§10.3-10.10.

"Answer": A verified response to a writ petition containing paragraph-by-paragraph admissions and denials of the facts alleged in the petition as well as affirmative defenses. See §§8.45-8.49. The time for filing an answer depends on whether the petitioner proceeds by way of the noticed motion procedure or by way of an alternative writ. See §§5.10-5.18.

"Opposition memorandum": A memorandum filed by the respondent or real party in interest presenting legal arguments in opposition to the writ petition. See §§8.16-8.20 (if noticed motion procedure used), §8.38 (if alternative writ procedure used).

"Replication": A pleading filed by the petitioner in response to new affirmative allegations in the respondent's or real party in interest's answer. It is also called a "reply" (and sometimes a "traverse"). See §§8.57-8.61.

"Reply memorandum": A memorandum filed by the petitioner presenting legal arguments in reply to the arguments made in the respondent's or real party in interest's opposition memorandum. See §§8.62-8.63.

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II. PROCEDURAL ASPECTS OF RESPONDING TO A WRIT PETITION

§8.3 A. Response Controlled by Manner in Which Petitioner Chooses to Proceed

The manner in which the respondent or real party in interest responds to a writ petition largely depends on how the petitioner chooses to bring the petition on for a hearing on the merits. The petitioner may do so either (1) by noticed motion for issuance of the requested writ (see §§5.10-5.14) or (2) by seeking an alternative writ (see §§5.15-5.18).

The possible responses when the petitioner uses the noticed motion procedure are discussed below in §8.6. The possible responses when the petitioner seeks an alternative writ are discussed below in §§8.21-8.22.

PRACTICE TIP: There are few statutes and rules of court governing superior court writ practice. See §§5.2-5.8. Some superior courts have adopted local rules specifying required or preferred procedures. See, *e.g.,* Amador Ct R 11.18; Calaveras Ct R 1.4; Imperial Ct R 3.4.0; Los Angeles Ct R 9.5; San Diego Ct R 2.4.8; Sacramento County Superior Court Guide to the Procedures for Prosecuting Petitions for Prerogative Writs, p. 7 (copy located in App B). In other superior courts, writ procedures are a matter of historical practice in that particular court. Accordingly, it is important for the respondent and any real party in interest to check local rules and consult with the court clerk for procedures that may affect the nature and timing of any response to a writ petition.

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§8.4 B. When Petitioner Seeks Stay of Challenged Action or Decision

In conjunction with filing the writ petition, the petitioner can seek a stay of the challenged action or decision by filing a stay application seeking preliminary injunctive relief (*i.e.,* a temporary restraining order, preliminary injunction, or both). See §6.2. A respondent or real party in interest who opposes issuance of a stay must do so by promptly filing written opposition (if sufficient notice has been given) and appearing at the hearing on the stay request. On receiving notice of an ex parte application for issuance of an immediate stay or temporary restraining order (or for an order shortening time to hear such a request), counsel for the respondent or real party in interest should let the court know whether the application will be opposed and, if so, whether and when written opposition will be filed.

PRACTICE TIP: Because superior court writ procedures vary from one county to the next, the parties must check local rules or call the court clerk to determine how and when to file opposition to a stay request.

For further discussion of opposing a stay request, see §§6.18-6.21.

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§8.5 C. Consider Joint Response

If a writ proceeding is brought against both a respondent and a real party in interest, and their interests in defending the challenged action or decision are the same, they should consider responding jointly when appropriate, *e.g.,* filing a joint memorandum in opposition to a motion for issuance of a writ.

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D. When Petitioner Uses Noticed Motion Procedure

§8.6 1. File Responsive Pleading or Motion

When the petitioner uses the noticed motion procedure, typically only the writ petition is filed and served at the outset of the writ proceedings. See §§5.76-5.85. In response, the respondent or real party in interest files a responsive pleading or motion, *e.g.,* a demurrer, answer, or motion to strike. CCP §§1089.5, 1109. Demurrers and answers are by far the most common responses to a writ petition. If a demurrer or motion to strike is filed, the respondent or real party must comply with the rules of court and any local rules in bringing the demurrer or motion on for hearing.

PRACTICE TIP: The petitioner may notice a hearing on a motion for issuance of the requested writ concurrently with filing the writ petition. In that situation, even though the respondent or real party in interest will file memorandum opposing the motion for issuance of a writ, filing an answer or demurrer is still essential. Without a responsive *pleading* on file, *e.g.,* an answer or demurrer, the court likely will deem all factual allegations in the petition admitted. See CCP §§1088, 1094. If it will avoid unnecessary duplication, it may be appropriate to file one memorandum, in opposition to the motion for issuance of a writ and in support of the demurrer. However, counsel should check with the court or apply for permission to file a combined memorandum to avoid any risk that the motion for issuance of a writ is deemed unopposed or the responsive demurrer or motion is deemed unsupported.

On demurrers, see §§8.40-8.44. On answers, see §§8.45-8.49. On other responsive motions, see §§8.50-8.56.

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§8.7 a. Time to File

The time in which the respondent or real party in interest must file a responsive pleading or motion depends on whether an administrative record is necessary and, if so, whether it has been requested and filed. CCP §1089.5. On the record, see chap 7.

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§8.8 (1) When Record Has Been Filed or Is Unnecessary

If the administrative record has been filed with the writ petition, or if no record of the underlying proceeding is required, the responsive pleading or motion must be filed 30 days after service of the writ petition. CCP §1089.5.

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§8.9 (2) When Record Has Been Requested But Not Filed

If the petitioner has requested preparation of a record under Govt Code §11523 or some other statute, and the record has not been filed with the writ petition, the respondent or real party in interest need not respond until 30 days after receipt of a copy of the record. CCP §1089.5.

PRACTICE TIP: In this situation, it is good practice to confirm with the petitioner in writing the timing of the responsive pleading. In addition, the respondent or real party in interest should calendar reminders to check periodically on the status of the record preparation in case it takes an extended period of time.

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§8.10 (3) Time May Be Extended by Stipulation or Application

As in other civil actions, the time to file a responsive pleading can be extended by stipulation of the parties (see Cal Rules of Ct 3.110(d) (parties may stipulate to one 15-day extension (made applicable to writ proceedings by Cal Rules of Ct 3.10; rules apply to all civil cases in the superior courts unless otherwise provided); Govt C §68616(b) (under Trial Court Delay Reduction Act, parties may stipulate to one 15-day extension) or by application to the court.

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b. Filing, Fee, and Service

§8.11 (1) File in Same Court as Petition

The responsive pleading or motion is filed in the same court as the writ petition. The respondent and any real party in interest should check the court's local rules for specific filing requirements (*e.g.,* number of copies).

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§8.12 (2) Fee

When filing a responsive pleading or motion, the respondent or real party in interest must pay the normal first appearance fee of $355. Govt C §70612(a).

PRACTICE TIP: There may be surcharges in Riverside, San Bernardino, and San Francisco Counties. Govt C §70603(a)(3)-(5). Accordingly, parties involved in writ proceedings in those counties should check the court's local rules before filing a responsive pleading or motion.

If the court has designated an action as complex, an additional complex case fee will be added. See Govt C §70616(b).

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§8.13 (3) Serve All Parties

The respondent or real party in interest must serve a copy of the responsive pleading or motion on the petitioner and any other parties named in the petition. CCP §465 (made applicable to writ proceedings by CCP §1109).

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§8.14 (4) How to Serve

The method of service is governed by CCP §§1010-1020. CCP §§1107, 1109. For further discussion of service, see California Civil Procedure Before Trial, chap 18 (4th ed Cal CEB 2004).

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§8.15 c. Consequences of Not Filing Responsive Pleading

The superior court cannot grant a peremptory writ by default. CCP §§1088, 1094, 1105. Thus, even if the respondent or real party in interest fails to file a responsive pleading, the court must still decide whether writ relief is permissible and warranted. However, if no responsive pleading is filed, the factual allegations in the writ petition likely will be deemed uncontroverted. See *Titmas v Superior Court* (2001) 87 CA4th 738, 741, 104 CR2d 803 (real parties in interest failed to file return in appellate court writ proceeding, so facts alleged in petition accepted as true); *Shaffer v Superior Court* (1995) 33 CA4th 993, 996 n2, 39 CR2d 506 (same).

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§8.16 2. File Opposition to Motion for Issuance of Writ

When the petitioner brings the writ petition on for a hearing on the merits by filing a noticed motion for issuance of the requested peremptory writ, the respondent or real party in interest must file a memorandum in opposition to the motion. On the contents of an opposition memorandum, see §§8.18-8.20.

On bringing a writ petition on for a hearing on the merits, see §§5.86-5.107.

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§8.17 a. Time to File

Unless the parties agree to (and the court permits) a different briefing schedule, opposition papers must be filed at least 9 court days before the time set for hearing the motion. CCP §1005(b) (made applicable to writ proceedings by CCP §1109).

PRACTICE TIP: In writ proceedings in which there is any kind of lengthy or complicated record (either an administrative record or extensive exhibits), the standard law and motion deadlines might not afford the parties enough time to prepare adequate briefing (*i.e.,* opposition by the respondent or real party in interest, and reply by the petitioner). If possible, the parties should stipulate to a reasonable briefing schedule and hearing date and submit the stipulation to the court for approval. The court will probably approve such a stipulation, particularly if the schedule allows the court adequate time to review the matter after the last brief is filed. Once the court has approved the stipulation, however, it may be reluctant to grant additional time. Thus, in agreeing to a briefing schedule, counsel should take into account all foreseeable time contingencies.

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§8.18 b. Contents of Opposition Memorandum

The memorandum in opposition to a motion for issuance of a peremptory writ should fully address the merits of the writ petition and should contain the following (Cal Rules of Ct 3.1113(b) (made applicable to writ proceedings by Cal Rules of Ct 3.1103(a)(2))):

- A short introduction summarizing the nature of the writ proceeding and why writ relief is not warranted;
- A concise statement of the facts (important to balance the petitioner's factual statement or to tell the other side of the story) supported by references to the administrative record (if there is one) or to other evidence (*e.g.,* declarations and exhibits; see §8.20);
- A concise statement of the standard of review to be applied by the superior court, supported by relevant case authorities if the respondent or real party in interest disputes the standard stated by the petitioner or the petitioner has failed to set forth the applicable standard (see §§5.92-5.100);
- Arguments responding to those made by the petitioner, supported by relevant legal citations and references to the administrative record or other evidence before the court;
- Arguments in support of affirmative defenses not previously raised by demurrer; and
- A succinct conclusion.

PRACTICE TIP: Copies of any non-California authorities must be submitted in the format prescribed by the rules of court. See Cal Rules of Ct 3.1110(f), 3.1113(i) (made applicable to writ proceedings by Cal Rules of Ct 3.1103(a)(2)). In addition, if there are citations to regulations or other authorities that might not be readily accessible, copies of these should be provided as well.

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§8.19 c. Format of Opposition

The rules of court govern the format of all writ papers filed in the superior courts. Cal Rules of Ct 2.2, 3.1100, 3.1103(a)(2) (made applicable to writ proceedings by Cal Rules of Ct 3.1103(a)(2)). This includes rules concerning typeface, spacing, pagination, and binding. See Cal Rules of Ct 2.100-2.119. For example:

- **Maximum page length.** The opposition may not exceed 15 pages, excluding exhibits, declarations, attachments, the tables of contents and authorities, and the proof of service. Cal Rules of Ct 3.1113(d). A party may apply for permission to file a longer memorandum. Cal Rules of Ct 3.1113(e).

PRACTICE TIP: The page limits set by the rules of court may not be sufficient in complex writ proceedings. Thus, in addition to stipulating to a briefing schedule (see §8.17), counsel should also agree to reasonable page limitations, bearing in mind that the superior courts do not look kindly on long memoranda. Although the court may allow additional pages, it may allow fewer pages than counsel request. Alternatively, because the page limits do not apply to the answer, the respondent or real party in interest can elect to include a full factual recitation in the answer by allegation and a shorter statement of facts in the opposition memorandum.

- **Requirements based on page length.** An opposition memorandum exceeding 10 pages must include a table of contents, a table of authorities, and an opening summary of argument. Cal Rules of Ct 3.1113(f).
- **Binding, page numbering, and hole punching.** The pages must be bound together at the top and numbered consecutively at the bottom. Each page must be prepunched with two holes centered 2½ inches apart and ⅝ inch from the top of the paper. Cal Rules of Ct 2.113, 2.115, 3.1110(c).
- **Local rules and practice.** Although the rules of court are meant to preempt local rules on the form and format of papers filed in the superior courts (Cal Rules of Ct 2.100(a)), counsel should check local rules for any special requirements for pleadings and papers in writ proceedings.

For a complete list of format requirements, see §§5.21-5.31.

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§8.20 d. Evidence in Opposition

The evidence considered depends on the nature of the writ proceeding. Sometimes, the evidence is contained in a formal administrative record, requested by the petitioner and prepared by the administrative agency whose action or decision is at issue. The administrative record will be lodged with the superior court and served on all parties before the hearing on the motion for issuance of a writ. See §7.18. In such cases, the opposition memorandum should include clear and concise citations to that record to support all factual assertions (*e.g.,* "Rec. 100" or "App. 100"). When the record permits, counsel should provide the line numbers or identify the relevant paragraph. On citing to the record, see §7.23.

In other contexts, the evidence will be presented through declarations and exhibits, just as it would in a regular civil case. See §7.2. (In very rare instances, oral testimony may be presented at the hearing with leave of court under Cal Rules of Ct 3.1306. See §9.30.) The rules of evidence apply, so only relevant and properly authenticated evidence can be introduced. When relevant to a particular point, clear and concise reference to the evidence should be made in the opposing memorandum (*e.g.,* Baker Decl. at 5, ¶3; App. Exh. 5 at 13).

NOTE: Evidence may also be presented in the form of exhibits to a verified answer. See §§8.45-8.46.

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E. Alternative Writ Procedure

1. Opposition to Application for Issuance of Alternative Writ

§8.21 a. Optional if Petitioner Seeks Ex Parte Issuance of Alternative Writ

A petitioner who uses the alternative writ procedure files a writ petition and also seeks, at the outset of the proceedings, issuance of an alternative writ. CCP §§1087-1088. See §5.15. This is usually done through ex parte procedures or on shortened time. See §§5.15-5.18, 9.2-9.20. In contrast to appellate court writ procedures (see Cal Rules of Ct 8.487(a)(1)), there is no rule expressly allowing the respondent or real party in interest to file a preliminary opposition to an application for an alternative writ in superior court writ proceedings. Nevertheless, if time permits, a respondent or real party in interest can file a written opposition and appear at the hearing to oppose the issuance of an alternative writ. On preliminary oppositions in appellate court writ proceedings, see chap 21.

PRACTICE TIP: Many superior courts will readily issue an alternative writ, viewing the application simply as a notification device for the hearing on the merits of the return or writ petition. See §§5.15, 9.5. These courts hardly expect opposition on the merits, unless the respondent or real party in interest can point out a patent defect in the petition or establish that it is frivolous. Thus, a respondent or real party in interest may choose not to spend the time and effort opposing the issuance of an alternative writ, but nonetheless appear at the ex parte hearing to obtain a briefing schedule and hearing date that allows sufficient time to respond to the petition on the merits.

As long as the petitioner gives less than 10 days' notice (which will always be the case when the ex parte procedure is used), the court is limited to issuing an alternative writ and cannot issue a peremptory writ in the first instance. CCP §1088.

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§8.22 b. Strongly Recommended if Petitioner Gives 10 Days' Notice of Application for "a" Writ or for "Peremptory" Writ

If, instead of using ex parte procedures, a petitioner gives at least 10 days' notice of an application for issuance of "a" writ (meaning an application not limited to issuance of an alternative writ, but embracing a request for issuance of a peremptory writ) or a peremptory writ, the respondent or real party in interest must take action. If such notice is given, statutes allow issuance of a peremptory writ in the first instance. CCP §1088. See *Palma v U.S. Indus. Fasteners, Inc.* (1984) 36 C3d 171, 178, 203 CR 626 (court's authority to issue peremptory writ in first instance is limited to cases in which opposing party has received "due notice" at least 10 days beforehand).

However, case law makes it clear that a peremptory writ can be issued in the first instance (*i.e.,* in the absence of issuance of an alternative writ) only in the following limited circumstances:

- The court has received or solicited opposition from the parties adversely affected;
- The petition and opposition adequately address the issues raised by the petition;
- No factual dispute exists; and
- Additional briefing following the issuance of an alternative writ is unnecessary to the disposition of the petition.

Lewis v Superior Court (1999) 19 C4th 1232, 1240, 82 CR2d 85; *Palma,* 36 C3d at 178. The accelerated *Palma* procedure is reserved for "extremely narrow circumstances," primarily those cases in which a "compelling temporal urgency requires an immediate decision." *Lewis*, 19 C4th at 1261, citing *Ng v Superior Court* (1992) 4 C4th 29, 35, 13 CR2d 856. Thus, even an application for a peremptory writ on at least 10 days' notice rarely meets the requirements for issuance of the writ in the first instance.

PRACTICE TIP: As a practical matter, the expedited "*Palma*" notice procedure is rarely, if ever, used in superior court writ practice. Rather, it has become established superior court writ practice that petitioners either seek an alternative writ ex parte (see §§5.108-5.118) or use the noticed motion procedure (see §§5.76-5.107). The truncated "*Palma"* notice procedure under CCP §1088 is, instead, a feature of appellate court writ practice. See §§22.18-22.22.

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§8.23 c. Time to File

The time for filing opposition is driven by the manner in which the petitioner chooses to proceed.

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§8.24 (1) When Alternative Writ Is Sought Ex Parte

If the petitioner seeks an alternative writ ex parte or on shortened time, the respondent or real party in interest will have very little time to prepare and file an opposition memorandum. If time permits, counsel should prepare a short opposition identifying any glaring procedural or substantive defects in the petition. Counsel also should notify the court clerk that written opposition will be filed. If there is not enough time to prepare written opposition, the respondent or real party in interest should appear at the hearing to oppose the issuance of the alternative writ. Again, counsel should notify the clerk of any planned appearance at the hearing to oppose issuance of an alternative writ.

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§8.25 (2) When Petitioner Has Given 10 Days' Notice of Application for "a" Writ or for "Peremptory" Writ

If the petitioner has given at least 10 days' notice of an application for issuance of "a" writ (meaning an application not limited to issuance of an alternative writ, but embracing a request for issuance of a peremptory writ) or a peremptory writ, opposition must be filed within 5 days "after service and filing" of the application for issuance of the writ. CCP §§1088, 1107. If the respondent or real party in interest does not have sufficient time to prepare opposition, it should either work with the petitioner to reschedule the hearing date and establish a briefing schedule, or apply to the court for an extension of time and a new hearing date. If the time sought is reasonable under the circumstances, and the petitioner will not be prejudiced, the court in all likelihood will grant the continuance. Application for a writ on 10-days notice is rarely, if ever, made in a superior court writ proceeding. See §8.22.

PRACTICE TIP: A respondent or real party in interest that needs additional time but faces a credible showing of prejudice by the petitioner should propose options minimizing or avoiding the claimed prejudice, *e.g.,* agreeing to postpone a planned action. This will decrease the likelihood of strong opposition by the petitioner and increase the chances that the court will grant the extension.

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d. Content of Opposition

§8.26 (1) When Alternative Writ Is Sought Ex Parte

Because many superior courts typically view a request for issuance of an alternative writ simply as a request for a hearing date on the merits of the return or petition, they do not invest significant time on the merits of the writ petition in deciding whether to issue an alternative writ. In such cases, therefore, any written opposition should be succinct and focus on any readily apparent procedural problems or substantive deficiencies in the petition. In addition, the opposition should note the limited purpose of an alternative writ and remind the court that full briefing on the merits will follow.

PRACTICE TIP: If there is an easily explained and compelling reason why the writ petition lacks merit, previewing that point in the opposition to the application for issuance of an alternative writ might convince the court to deny the writ petition outright. See *Patterson v Board of Supervisors* (1947) 79 CA2d 670, 675, 180 P2d 945 (superior court not required to issue alternative writ before denying writ petition when record substantiated board's decision).

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§8.27 (2) When Petitioner Has Given 10 Days' Notice of Application for "a" Writ or for "Peremptory" Writ

When the petitioner has given at least 10 days' notice of an application for issuance of a writ (meaning an application not limited to issuance of an alternative writ, but embracing a request for issuance of a peremptory writ) or for a peremptory writ, the respondent or real party in interest must take into account that the court, by statute, can issue a peremptory writ in the first instance. CCP §1088. There are, however, significant limitations on the court's ability to do so. See §8.22. Further, this truncated procedure is rarely, if ever, used in superior court writ proceedings. See §8.22. If a respondent or real party receives such notice, written opposition should (a) urge the court to deny the writ petition outright—*i.e.,* attack the merits of the petition as best as can be done within the short period of time available—and (b) alternatively urge the court to issue only an alternative writ and establish a reasonable briefing schedule and set a hearing date on the merits of the petition.

NOTE: The statutory 10-day notice provision in CCP §1088 (*e.g.*, "*Palma*" notice (*Palma v U.S. Indus. Fasteners, Inc.* (1984) 36 C3d 171, 178, 203 CR 626)) is rarely, if ever, used in superior court writ practice. See §8.22.

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e. Filing, Fee, and Service

§8.28 (1) Opposition Filed in Same Court as Petition

Opposition to issuance of an alternative writ is filed in the same court as the writ petition. The respondent and any real party in interest should check local rules for specific filing requirements (*e.g.,* number of copies).

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§8.29 (2) Fee

The respondent or real party in interest must pay the normal first appearance fee of $355. Govt C §70612(a).

PRACTICE TIP: There may be surcharges in Riverside, San Bernardino, and San Francisco Counties. Govt C §70603(a)(3)-(5). Accordingly, parties involved in writ proceedings in those counties should check the court's local rules before filing an opposition.

If the court has designated an action as complex, an additional complex case fee will be added. See Govt C §70616(b).

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§8.30 (3) Serve All Parties

The respondent or real party in interest must serve a copy of any written opposition on the petitioner and on any other parties named in the petition. CCP §465 (made applicable to writ proceedings by CCP §1109).

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§8.31 (4) How to Serve

The method of service is governed by CCP §§1010-1020. CCP §§1107, 1109. See California Civil Procedure Before Trial, chaps 17-18 (4th ed Cal CEB 2004).

JUDICIAL PERSPECTIVE: Given the short timeframes involved, personal service is preferred. It not only reflects positively on the respondent or real party in interest, but also avoids the court's having to possibly continue the hearing if the petitioner argues that it has not had adequate time to consider the opposition.

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2. If Superior Court Issues Alternative Writ

§8.32 a. Effect of Alternative Writ

An alternative writ commands the respondent either to perform or cease to perform an act (as sought in the writ petition's prayer for relief) or to show cause why it should not be compelled to do so. CCP §§1087 (traditional mandate), 1104 (prohibition).

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§8.33 (1) If Respondent Chooses to Comply

If the respondent chooses to comply with the alternative writ, the court will dismiss the petition as moot after the respondent shows proof of compliance to the court. *Bruce v Gregory* (1967) 65 C2d 666, 671, 56 CR 265.

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§8.34 (2) If Respondent Chooses Not to Comply

If the respondent chooses not to comply with the alternative writ, the respondent or real party in interest must show cause why a peremptory writ should not issue by making a "return" to the alternative writ, which consists of filing a responsive pleading or motion (*e.g.,* a demurrer, answer, or motion to strike). CCP §§1089, 1105. If a demurrer or motion to strike is filed, the respondent or real party must comply with the rules of court and any local rules in bringing the demurrer or motion on for hearing.

On specific responsive pleadings and motions, see §§8.40-8.56.

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b. Return After Issuance of Alternative Writ

§8.35 (1) File Responsive Pleading or Motion

A respondent or real party in interest "makes a return" to an alternative writ by filing a responsive pleading or motion (*e.g.,* a demurrer, answer, or motion to strike). CCP §§1089, 1105. If a demurrer or motion to strike is filed, the respondent or real party must comply with the rules of court and any local rules in bringing the demurrer or motion on for hearing.

NOTE: This is the same responsive pleading or motion the respondent or real party in interest would initially file if the petitioner used the noticed motion procedure. See §8.6.

On demurrers, see §§8.40-8.44. On answers, see §§8.45-8.49. On other responsive motions, see §§8.50-8.56.

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§8.36 (2) Time to File

The responsive pleading or motion must be filed on the "date for return of the alternative writ" (CCP §§1089, 1105), which is set forth in the alternative writ. If the respondent or real party in interest needs additional time, counsel should first try to obtain a stipulation with opposing counsel, which likely will be approved by the court if the extension is for a reasonable period of time. If opposing counsel will not stipulate, the respondent or real party in interest should apply for an extension from the court. If good cause is shown, and the petitioner will not be prejudiced, the court will likely grant the extension.

PRACTICE TIP: The respondent or real party will often want to attend the ex parte hearing on the application for issuance of an alternative writ if for no other reason than to weigh in on both the date the return is due and the date for the hearing on the return or writ petition. The objective is to ensure that the respondent or real party in interest has enough time to prepare an adequate responsive pleading as well as enough time to prepare a thorough and persuasive memorandum in opposition to the petition. The petitioner, in turn, wants to have a reasonable period of time to prepare and file a reply. Thus, if the respondent or real party in interest proposes a reasonable return, briefing, and hearing schedule, the court likely will include those dates in the alternative writ.

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§8.37 (3) Consequences of Filing Defective Return or No Return

The superior court cannot grant a peremptory writ by default. CCP §§1088, 1094, 1105. Thus, a defective return or no return at all does not guarantee that the petitioner will succeed. Nonetheless, if no return is filed, the factual allegations in the writ petition will be deemed uncontroverted, greatly enhancing the chances that the petitioner will prevail if the dispute turns on those factual issues. See *Titmas v Superior Court* (2001) 87 CA4th 738, 741, 104 CR2d 803 (respondent failed to file return in appellate court writ proceeding, so facts alleged in petition accepted as true); *Shaffer v Superior Court* (1995) 33 CA4th 993, 996 n2, 39 CR2d 506 (same).

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§8.38 (4) Memorandum Addressing Merits of Writ Petition

Just as the application for an alternative writ is accompanied by a supporting memorandum (see §5.110), a return also should include a memorandum in opposition to the petition. No statute or rule expressly requires an opposing memorandum. However, the formal return (*i.e.,* the demurrer or answer) is simply a pleading. The legal arguments in support of that pleading and in opposition to the writ petition must be presented to the court in a memorandum.

When this memorandum should be filed often is fixed by stipulation, by the order issuing the alternative writ, or in the alternative writ itself. The respondent or real party in interest should check local rules and, if there are none, call the court clerk. Absent any other provision for filing a memorandum in support of the return and in opposition to the issuance of a writ, it should be filed at the same time the return is made, *i.e.,* when the responsive pleading is filed.

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§8.39 3. "*Palma*" Notices Not Used in Superior Court Writ Proceedings

The *Palma* notice procedure, as employed by the courts of appeal, is not a feature of superior court writ practice. See §§8.22, 8.25, 8.27. Under *Palma v U.S. Indus. Fasteners, Inc.* (1984) 36 C3d 171, 180, 203 CR 626, the courts of appeal sometimes issue a notice shortly after a writ petition is filed advising the parties that the court may issue a peremptory writ in the first instance (*i.e.,* without issuing an alternative writ, awaiting a formal return, holding oral argument, or preparing an opinion) and inviting opposition to be filed within a specified time, usually 20 days. Indeed, this procedure makes no sense in superior court writ proceedings given the routine practice of hearing applications for alternative writs on the ex parte calendar, as well as superior courts' common view that an alternative writ is basically notification of the hearing on the merits of the return or writ petition. On the use of *Palma* notices in appellate court writ proceedings, see §§22.18-22.22.

CAUTION: It is conceivable that a petitioner could give 10 days' notice of an application for issuance of a writ (*i.e.*, an application not limited to issuance of an alternative writ) for issuance of a peremptory writ. In such case, the respondent and real party in interest should be vigilant about appearing and opposing the application. See §8.22. However, the 10-day notice procedure (*e.g.*, "*Palma*" notice) is rarely, if ever, used in superior court writ practice. Rather, the established procedures are the alternative writ and noticed motion procedures. See §§5.108-5.118 (alternative writ procedure), 5.76-5.107 (noticed motion procedure).

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III. TYPES OF RESPONSIVE PLEADINGS AND MOTIONS

A. Demurrer

§8.40 1. Tests Sufficiency of Petition

A demurrer tests the legal sufficiency of a writ petition. See, *e.g., Sustainability of Parks, Recycling & Wildlife Legal Defense Fund v County of Solano Dep't of Resource Mgmt.* (2008) 167 CA4th 1350, 1356, 84 CR3d 889 (in light of amendments, trial court overruled demurrer); *Fonseca v Fong* (2008) 167 CA4th 922, 926, 84 CR3d 567 (trial court agreed with respondents that statute was per se preempted and sustained demurrer without leave to amend). *Larson v City of Redondo Beach* (1972) 27 CA3d 332, 337, 103 CR 592. See generally CCP §§430.10-430.80 (governing demurrers) (made applicable to writ practice by CCP §1109, making rules of practice governing civil actions applicable to writ proceedings). See also Cal Rules of Ct 3.1103(a)(2) (making law and motion rules applicable to writ proceedings).

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§8.41 2. Basis for Demurrer

A demurrer can raise any legal defect apparent on the face of the petition. This could include the lack of any beneficial interest, the existence of an adequate remedy at law, or the failure to state a claim for relief. See, *e.g.*, *Fonseca v Fong* (2008) 167 CA4th 922, 926, 84 CR3d 567 (demurrer to writ petition on preemption grounds should have been overruled); *Larson v City of Redondo Beach* (1972) 27 CA3d 332, 337, 103 CR 592 (demurrer sustained; city officials not legally required to administer boat slip rental rates because city's duties were discretionary, not mandatory). Additional grounds include untimeliness, the failure to exhaust available administrative remedies, mootness, unclean hands, a missing or defective verification, and improper venue.

For an example of a demurrer, see forms in §§13.10-13.11. See also discussion of demurrers and example in California Civil Procedure Before Trial, chap 23 (4th ed Cal CEB 2004).

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3. General Guidelines for Demurrers

§8.42 a. If Demurrer Sustained

If the superior court sustains the demurrer without leave to amend, the court will enter an order of dismissal, which, when filed, constitutes a judgment of dismissal. CCP §§581(f)(1), 581d, 1109. If the court sustains the demurrer with leave to amend, the petitioner may file an amended petition to rectify the pleading problems. Unless the court orders otherwise, the petitioner has 10 days to file an amended petition. Cal Rules of Ct 3.1320(g).

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§8.43 b. If Demurrer Overruled

If the court overrules the demurrer, and the respondent or real party in interest did not also file an answer, the court "may allow an answer to be filed within such time as it may designate." CCP §1089, see also CCP §§1069.1, 1105. Unless the court orders otherwise, the respondent or real party in interest has 10 days to file an answer. Cal Rules of Ct 3.1320(g) (made applicable to writ proceedings by Cal Rules of Ct 3.10 (rules apply to all civil cases in the superior courts unless otherwise provided)).

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§8.44 4. Answer in Conjunction With Demurrer

Case law indicates that a court has discretion under CCP §1089 to deny a respondent and/or real party leave to file an answer to a writ petition after overruling a demurrer. See *Florence W. Med. Clinic v Bontá* (2000) 77 CA4th 493, 505, 91 CR2d 609, citing *Ryne v Municipal Court* (1980) 113 CA3d 807, 819, 170 CR 312. However, a court's exercise of this discretion under §1089, like any exercise of discretion by a court, must be reasonable rather than arbitrary and can be challenged in an appropriate case as an abuse of discretion. See *Harris v Alcoholic Beverage Control Appeals Bd.* (1965) 62 C2d 589, 594, 43 CR 633, citing *Bailey v Taaffe* (1866) 29 C 422, 424. For example, were a court to deny leave to file an answer and to grant a peremptory writ when overruling a demurrer that addressed issues other than those necessary to the court's determination of the merits of the writ petition (such as the statute of limitations and exhaustion of administrative remedies), the denial of leave to file an answer would arguably constitute an abuse of discretion. The denial of leave to file an answer in those circumstances would effectively place the respondent and/or real party in default, require the court to decide the merits and rule on the petition under CCP §§1088 ("writ cannot be granted by default") and 1094 ("If no return be made, the case may be heard on the papers of the applicant"), and deprive the respondent and/or real party of a full and fair opportunity to defend themselves on the merits. *Florence W. Med. Clinic, supra*. But see Cal Rules of Ct 8.933(b)(4) (in limited civil cases, if return is by demurrer alone and court overrules demurrer, court may issue peremptory writ without granting respondent or real party in interest leave to answer).

Filing an answer in conjunction with a demurrer avoids any risk that the court might overrule the demurrer but deny leave to file an answer. See CCP §1089, see also CCP §§1069.1, 1105. It also avoids any argument by the petitioner that the failure to file an answer amounts to a waiver of the respondent's or real party in interest's right to do so following the court's overruling of a demurrer. It is far and away the best practice to file an answer in conjunction with any demurrer.

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B. Answer

§8.45 1. Function of Answer

An answer responds to the allegations of the writ petition, alleges any additional relevant facts, attaches and authenticates additional exhibits, and asserts any available affirmative defenses. See CCP §§431.10-431.30 (made applicable to writ practice by CCP §1109), 1069.1, 1089, 1089.5, 1105.

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§8.46 2. Content of Answer

The answer may consist of admissions, denials, and affirmative defenses. CCP §431.30 (made applicable to writ proceedings by CCP §1109). Counsel must also allege any relevant facts not contained in the petition supporting the answer. See, *e.g.*, *Coy v Superior Court* (1962) 58 C2d 210, 221, 23 CR 393 (answer in appellate court writ proceeding failed to include any supporting facts; peremptory writ issued). Additional documents may be attached as exhibits and authenticated in the answer.

The answer may raise issues of fact and law, both in its denial of the petition's facts and legal conclusions and in its affirmative defenses. See, *e.g.*, *McMahan's of Santa Monica v City of Santa Monica* (1983) 146 CA3d 683, 689, 194 CR 582 (issue of law: city's statutory immunity); *Lowell v Mother's Cake & Cookie Co.* (1978) 79 CA3d 13, 19, 144 CR 664 (issue of fact: justification).

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§8.47 a. Allegations Deemed Admitted if Not Denied

The respondent or real party in interest must deny all allegations that it disputes; otherwise, the allegations are deemed admitted. See, *e.g., Dulaney v Municipal Court* (1974) 11 C3d 77, 81 n3, 112 CR 777 (allegations not expressly denied in answer to writ petition were deemed admitted); *Baumgardner v City of Hawthorne* (1951) 104 CA2d 512, 517, 231 P2d 864 (same).

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§8.48 b. Affirmative Defenses Must Be Raised in Answer

The respondent or real party in interest must raise all affirmative defenses (*e.g.,* lack of capacity to sue, failure to exhaust administrative remedies, and laches) in the answer. CCP §430.80 (made applicable to writ proceedings by CCP §1109). See, *e.g., Parker v Bowron* (1953) 40 C2d 344, 349, 254 P2d 6 (in response to writ to raise workers' wages, city's answer alleged city wages on par with private wages, and existing ordinance for increased wage); See *Resource Defense Fund v County of Santa Cruz* (1982) 133 CA3d 800, 804, 184 CR 371 (answer to petition raised affirmative defenses of mootness, laches, and statute of limitations). Defenses not asserted are deemed waived, except lack of subject matter jurisdiction and the failure to state facts sufficient to constitute a cause of action. See CCP §430.80(a) (made applicable to writ proceedings by CCP §1109).

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§8.49 3. Verification Required

An answer to a writ petition must be verified. CCP §1089; see also CCP §446(a) (made applicable to writ proceedings by CCP §1109). To the extent the answer alleges facts to be relied on as evidence, the verification must be based on personal knowledge, not information and belief. See *Star Motor Imports, Inc. v Superior Court* (1979) 88 CA3d 201, 204, 151 CR 721 (verification of writ petition "on information and belief" ineffective; petition dismissed).

NOTE: Certain public entities and officials acting in their public capacities are exempt from the verification requirement. See CCP §446(a); *Crowl v Commission on Prof. Competence of the Governing Bd. of the San Juan Unified Sch. Dist.* (1990) 225 CA3d 334, 342, 275 CR 86 (school district); *Elliott v Contractors' State License Bd.* (1990) 224 CA3d 1048, 1054, 274 CR 286 (Contractors' State License Board). But see *People v Superior Court (Alvarado)* (1989) 207 CA3d 464, 255 CR 46 (division of authority in criminal cases regarding verification requirement for public entities and officials).

On verifications, see §§5.64-5.69; California Civil Procedure Before Trial §§25.9, 25.15-25.21 (4th ed Cal CEB 2004).

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§8.50 C. Responsive Motions

Although answers and demurrers are by far the most common responses to a writ petition filed in superior court (and the only ones expressly authorized by the writ statutes), courts have recognized the propriety of other motions to test the sufficiency of a writ petition. These motions are noticed in the same manner as are motions in a regular civil case, unless otherwise directed by the court. See generally CCP §§1003-1020; Cal Rules of Ct 3.1100-3.1370. Counsel should also check the court's local rules or call the clerk for specific procedures on filing a motion in a writ proceeding. For a full discussion of noticed motions, see California Civil Procedure Before Trial, chap 12 (4th ed Cal CEB 2004).

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§8.51 1. Motion to Dismiss

A respondent or real party in interest may file a motion to dismiss the petition. See, *e.g.*, *Swars v Council of the City of Vallejo* (1944) 64 CA2d 858, 861, 149 P2d 397 (noting that sufficiency of petition for writ of review should be raised by demurrer or motion to dismiss). It can be used, for example, to dismiss an inappropriate party or to dismiss the petition for failure to join an indispensable party or based on forum non conveniens. As a matter of current practice, however, motions to "dismiss" are directed at lack of prosecution—failure to serve summons within 3 years (mandatory dismissal under CCP §§583.210-583.250), failure to bring to trial within 5 years (mandatory dismissal under CCP §§583.310-583.360), or delay in prosecution (discretionary dismissal under CCP §§583.410-583.430). These dismissal motions are applicable to prerogative writs in the superior court through CCP §1109.

On motions to dismiss, see California Civil Procedure Before Trial, chap 39 (4th ed Cal CEB 2004).

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§8.52 2. Motion to Quash

A respondent or real party in interest may file a motion to quash service of the petition to challenge the court's jurisdiction over any of the parties or actions challenged. See, *e.g.*, *Hammond Lumber Co. v Board of Supervisors* (1948) 85 CA2d 568, 570, 193 P2d 503 (demurrer and motion to quash petition for writ of review (certiorari) sustained because act of school district was not judicial in character). On motions to quash, see California Civil Procedure Before Trial, chap 19 (4th ed Cal CEB 2004).

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§8.53 3. Motion for Judgment on the Pleadings

A motion for judgment on the pleadings is the equivalent of a demurrer, but can be made after an answer has been filed and the matter is at issue. CCP §438. A petitioner could make this motion instead of a demurrer to the answer. A respondent or real party in interest might make this motion after the petitioner has filed a replication (reply) to the answer. See *California Water Impact Network v Newhall County Water Dist.* (2008) 161 CA4th 1464, 1491, 75 CR3d 393 (trial court properly granted respondent's motion for judgment on pleadings). On filing a replication, see §§8.57-8.61. On the various technical requirements for and restrictions on making a motion for judgment on the pleadings, see California Civil Procedure Before Trial, chap 27 (4th ed Cal CEB 2004).

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§8.54 4. Motion for Summary Judgment

A motion for summary judgment is rarely appropriate in a writ proceeding. If the noticed motion procedure is used, the parties have a full opportunity to address all issues pertinent to the merits of the petition. If the alternative writ procedure is used, the merits hearing following issuance of an alternative writ is much the same. Nevertheless, the statutes do not preclude a summary judgment motion. See, *e.g.*, *Stanton v Dumke* (1966) 64 C2d 199, 207, 49 CR 380 (demurrer sustained and summary judgment granted; grievance moot). A summary judgment motion might be appropriate, for example, if based on a dispositive affirmative defense peripheral to the substantive merits of the petition when the material facts of the defense do not appear on the face of the petition, are not judicially noticeable, and thus could not be raised by demurrer.

PRACTICE TIP: In writ proceedings, the usefulness of a motion for summary judgment or adjudication to economically dispose of an unmeritorious case or claim is slight. See CCP §437c(a) (notice of motion for summary judgment must be served at least 75 days before hearing). The parties should consider whether a hearing on the merits of the writ petition will achieve the same purpose as a motion for summary judgment or adjudication, but at less cost. See Guide to the Procedures for Prosecuting Petitions for Prerogative Writs, Sacramento Superior Court, p. 6 (see App B).

For discussion of summary judgment motions, see California Civil Procedure Before Trial, chap 36 (4th ed Cal CEB 2004).

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§8.55 5. Other Miscellaneous Motions

Other pretrial matters applicable to civil proceedings, including discovery motions, motions for a change of venue, and motions to strike, also may be (but rarely are) brought in writ proceedings. CCP §1109; see also Guide to the Procedures for Prosecuting Petitions for Prerogative Writs, Sacramento Superior Court, p. 6 (see App B).

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§8.56 6. File Answer in Conjunction With Motion

As with a demurrer (see §8.44), it is prudent to file an answer in conjunction with the filing of a responsive motion. Although it is unlikely that the court, following disposition of a responsive motion, would deny leave to answer and proceed to decide the merits of the petition based solely on the allegations therein, filing an answer in conjunction with a responsive motion eliminates any such risk. See CCP §418.10(e)(1) (filing answer in conjunction with motion to quash does not constitute general appearance until order denying motion is entered). On answers, see §§8.45-8.49.

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IV. PETITIONER'S REPLY

§8.57 A. Replication (Reply)

If the answer to a writ petition alleges affirmative matters, the petitioner *must* deny or rebut them, as appropriate, or they will be deemed admitted. This is usually done by:

- A replication (also called a reply) to the answer; or
- Proof presented by the petitioner at the time of the trial. See CCP §1091 (petitioner is not "precluded by the return from any valid objection to its sufficiency, and may countervail it by proof either in direct denial or by way of avoidance"); see also CCP §1105.

Factual allegations in the answer that are not rebutted by a replication (reply) or proof at trial are taken as true. See, *e.g.*, *Elliott v Contractors' State License Bd.* (1990) 224 CA3d 1048, 1054, 274 CR 286.

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§8.58 1. Deadline for Filing Replication (Reply)

The writ statutes do not specify when a replication (reply) to an answer should be filed. However, because CCP §1109 makes Part 2 of the Code of Civil Procedure (CCP §§307-1062.20) applicable to writ proceedings, the deadlines to respond to an answer should apply. See CCP §§430.40(b) (10 days to demur to answer to complaint), 435(b)(1) (motion to strike answer must be filed within time to respond to a pleading). In any event, the replication should be filed as soon as possible and far enough in advance of the hearing to allow the court adequate time to review it.

PRACTICE TIP: When the petitioner uses the alternative writ procedure, the respondent or real party in interest has until the return date to file a responsive pleading, and the hearing on the petition also may be scheduled for that day. In such cases, the petitioner has no time to file a replication and thus may want to seek a continuance of the hearing date. Alternatively, the petitioner must make sure to challenge the responsive pleading at the hearing. CCP §1091. On continuance motions and forms, see California Civil Procedure Before Trial §§12.66-12.68, 12.146, 12.151 (4th ed Cal CEB 2004).

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§8.59 2. Contents of Replication (Reply)

The replication (reply) should contain admissions and denials in a pleading format similar to the answer. CCP §1091. See, *e.g.*, *English v City of Long Beach* (1952) 114 CA2d 311, 314, 250 P2d 298 (petitioner filed "what is denominated a traverse" to respondent's answer with detailed factual denials and allegations; entitled to court's consideration "with like effect as if originally set forth in her petition"). If the answer raises an affirmative defense (*e.g.,* the petition is barred by a statute of limitations), the replication may allege facts showing that the defense is inapplicable (*e.g.,* the respondent or real party in interest is estopped from asserting the defense).

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§8.60 3. Advance Notice Required if Replication (Reply) Made by Evidence Presented at Hearing

If the petitioner intends to contradict or challenge allegations in the answer by presenting oral testimony at the hearing, court rules require an advance request to the court and notice to opposing parties. Cal Rules of Ct 3.1306(b) (made applicable to writ proceedings by Cal Rules of Ct 3.1103(a)(2)). The notice should describe the nature of the evidence and the time that is likely to be required for its presentation.

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§8.61 4. Filing and Service

The petitioner must file the replication (reply) with the court and serve it on the respondent and any real party in interest or their attorneys. The method of service is governed by CCP §§1010-1020. CCP §§465, 1109. See California Civil Procedure Before Trial, chaps 17-18 (4th ed Cal CEB 2004).

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B. Petitioner's Reply Memorandum

§8.62 1. When Noticed Motion Procedure Is Used

Under standard motion practice, the petitioner is entitled to file a reply memorandum and additional evidence in rebuttal (if permissible and relevant) to any opposition filed by the respondent or real party in interest. CCP §§1005(b), 1109.

PRACTICE TIP: Although a reply memorandum is optional under the law and motion rules, the petitioner should always file one, because it is his or her last chance to communicate with the court on paper before the hearing and may be what tips the balance for a favorable tentative ruling.

Unless the parties have agreed on and the court has approved a specific briefing schedule, the petitioner's reply memorandum must be filed 5 court days before the scheduled hearing date. CCP §§1005(b), 1109.

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§8.63 2. When Alternative Writ Procedure Is Used

When the petitioner uses the alternative writ procedure, the respondent or real party in interest almost always will want to obtain a briefing schedule and hearing date that allows adequate time for briefing. Such a briefing schedule should specify when the petitioner's reply brief is due.

Otherwise, when seeking an alternative writ, the petitioner should ask for a hearing date on the merits sufficiently after the return date to ensure that there is adequate time to file a reply.

PRACTICE TIP: Although a reply memorandum is considered an optional pleading, a petitioner should always file one, because it is the petitioner's last chance to communicate with the court on paper before the hearing and may tip the balance for a favorable tentative ruling.

Unless the parties have agreed on and the court has approved a specific briefing schedule, the petitioner's reply memorandum should be filed in accordance with the standard law and motion rules, *i.e.,* 5 court days before the scheduled hearing date. CCP §1005(b).

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9

Action by Superior Court

The Hon. Kathleen M. Banke
Maureen M. Home

I. SCOPE OF CHAPTER §9.1

II. ACTION ON APPLICATION FOR ALTERNATIVE WRIT OF MANDATE OR PROHIBITION §9.2
- A. Court Usually Hears Application Ex Parte §9.3
- B. Hearing on Application §9.4
- C. Alternative Writ Usually Issues §9.5
- D. Effect of Issuance of Alternative Writ §9.6
- E. Content of Alternative Writ
  - 1. Writ of Mandate §9.7
  - 2. Writ of Prohibition §9.8
  - 3. Dates for Return and Hearings
    - a. Date for Return to Writ Petition §9.9
    - b. Date for Hearing Merits of Return and Petition §9.10
- F. Service of Alternative Writ
  - 1. By Petitioner §9.11
  - 2. What to Serve
    - a. Petition and Alternative Writ §9.12
    - b. Order Directing Issuance of Alternative Writ §9.13
    - c. Stay Order §9.14
  - 3. Whom to Serve §9.15
  - 4. When to Serve §9.16
- G. Denial of Alternative Writ and Petition if Facially Defective or Patently Meritless §9.17
  - 1. Leave to Amend §9.18
  - 2. Proceed by Way of Noticed Motion §9.19
- H. Peremptory Writ of Mandate or Prohibition May Issue in Limited Circumstances §9.20

III. ACTION ON MERITS OF PETITION FOR WRIT OF MANDATE OR PROHIBITION
- A. Hearing Date
  - 1. When Noticed Motion Procedure Is Used §9.21
    - a. Standard Law and Motion Rules Apply §9.22
    - b. If Petitioner Gives 10 Days' Notice §9.23
  - 2. When Alternative Writ Procedure Is Used §9.24
- B. Nature of Hearing
  - 1. If No Return Filed §9.25
  - 2. If Return Raises Only Questions of Law §9.26
  - 3. If Return Raises Factual Dispute
    - a. Petitioner Has Burden to Establish Disputed Facts §9.27
    - b. Parties Entitled to Present Evidence §9.28
      - (1) Evidence Presented by Declaration or Judicial Notice §9.29
      - (2) Oral Testimony §9.30
      - (3) Jury Trial Discretionary §9.31
- C. Rulings and Judgments
  - 1. Tentative Ruling Before Hearing §9.32
  - 2. Ruling at Conclusion of Hearing or After Submission §9.33
  - 3. Statement of Decision
    - a. Considerations in Requesting Statement of Decision §9.34
    - b. When to Request Statement of Decision §9.35
    - c. Content of Statement of Decision §9.36
  - 4. When Petitioner Prevails
    - a. Petitioner Prepares Judgment §9.37
      - (1) Purpose of Judgment §9.38
      - (2) Content of Judgment §9.39

(3) Conformed Copies for Parties §9.40
b. Petitioner Prepares Peremptory Writ
(1) Proposed Peremptory Writ §9.41
(2) Respondent's Return Date §9.42
(3) When to Prepare Writ §9.43
(4) Content of Writ §9.44
(5) Service of Writ §9.45
(6) Laying Foundation for Future Sanctions §9.46
5. When Respondent Prevails
a. Respondent Prepares Judgment Denying Issuance of Writ §9.47
b. Content of Judgment §9.48

IV. ACTION ON PETITION FOR WRIT OF REVIEW (CERTIORARI)
A. Issuance of Order to Show Cause §9.49
B. Issuance of Writ of Review (Certiorari) §9.50
C. Hearing and Decision on Merits §9.51
D. Ruling and Judgment §9.52

V. RULING ON MISCELLANEOUS MOTIONS §9.53

VI. RES JUDICATA EFFECT OF SUPERIOR COURT JUDGMENT
A. Final Judgment in Writ Proceeding Has Preclusive Effect §9.54
B. Denial of Alternative Writ Has No Preclusive Effect §9.55

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§9.1 I. SCOPE OF CHAPTER

This chapter discusses the actions that a superior court can take in a proceeding for a writ of mandate, prohibition, or review (certiorari). For a general discussion of the uses of these writs, see chaps 2, 4. This chapter discusses:

- Actions the superior court may take when the petitioner applies for an alternative writ of mandate or prohibition. See §§9.2-9.20. On the procedures for seeking an alternative writ, see §§5.108-5.118.
- Actions the superior court may take in considering and deciding the merits of a petition for a writ of mandate or prohibition. See §§9.21-9.31.
- Procedures following a ruling on the merits, *e.g.,* who needs to prepare the judgment and, if applicable, the peremptory writ. See §§9.32-9.48.
- Actions the superior court may take on a petition for a writ of review (certiorari). See §§9.49-9.52.
- Various motions the superior court may have to hear and determine before hearing the merits of the writ petition (*e.g.,* demurrer, motion for a change of venue). See §9.53.
- Res judicata effect of judgments in superior court writ proceedings. See §§9.54-9.55.

This chapter does *not* address actions the superior court can take on a petition for a writ of administrative mandamus under CCP §1094.5. For discussion of superior court actions in administrative mandamus proceedings, see California Administrative Mandamus, chaps 11, 14 (3d ed Cal CEB 2003). On the differences between traditional and administrative mandamus, including how to decide when to seek which writ, see §§3.18-3.21.

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§9.2 II. ACTION ON APPLICATION FOR ALTERNATIVE WRIT OF MANDATE OR PROHIBITION

A petitioner may initiate an action for a writ of mandate or prohibition by filing a writ petition and an application for issuance of an alternative writ. CCP §§1087-1088 (alternative writ of mandate), 1104 (alternative writ of prohibition). On the procedures for seeking an alternative writ of mandate or prohibition, see §§5.108-5.118.

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§9.3 A. Court Usually Hears Application Ex Parte

In most cases, a petitioner seeks an alternative writ ex parte. Although the writ statutes permit a court to issue an alternative writ of mandate or prohibition ex parte (*i.e.,* without notice or service of the petition; see CCP §§1088, 1105, 1107), the rules of court (and many local rules) require an ex parte applicant to provide at least some minimal notice to opposing parties of an ex parte appearance. See Cal Rules of Ct 3.1203(a) (absent exceptional circumstances, party seeking ex parte order must notify opposing parties no later than 10:00 a.m. one court day before appearance); Los Angeles Ct R 9.5(e)(1) (petitioner must serve application for alternative writ at least 5 days before ex parte hearing).

On the procedures for seeking an alternative writ, see §§5.108-5.118.

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Source: Civil Litigation/California Civil Writ Practice/9 Action by Superior Court/§9.4 B. Hearing on Application

§9.4 B. Hearing on Application

When a petitioner seeks an alternative writ ex parte, local rules and practice will govern the extent to which there is any hearing or argument by counsel. Often, the judge hearing the ex parte application will decide the matter in chambers based on the verified petition, the application for an alternative writ, and any opposition filed by the respondent or real party in interest. See CCP §166(a)(1) (superior court judge may grant ex parte application for alternative writ in chambers).

PRACTICE TIP: Because the superior court's decision on an ex parte application is often made solely on the papers filed, the form and quality of those papers is of the utmost importance. Even when the judge decides the application in chambers, counsel may get an opportunity to present argument to the judge's research attorney.

On rare occasions, the judge may hold a formal hearing (*i.e.,* both sides appear and present argument) before ruling on the application for an alternative writ of mandate or prohibition. See, *e.g.*, *Patterson v Board of Supervisors* (1947) 79 CA2d 670, 672, 180 P2d 945.

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§9.5 C. Alternative Writ Usually Issues

Many superior courts view an ex parte application for an alternative writ of mandate or prohibition as little more than a request for dates for (1) the return to the alternative writ; (2) a hearing on the return (if the respondent or real party in interest files a demurrer or other responsive motion); and (3) a hearing on the merits of the writ petition. See CCP §§1089 (mandate), 1105 (prohibition). On the return, see §§8.35-8.38. In such courts, absent a glaring deficiency in the writ petition (see §§9.17-9.19), the ex parte application is granted and the alternative writ issued.

JUDICIAL PERSPECTIVE: In some cases, the court will deny the application for an alternative writ and instead set a briefing schedule and hearing date on the merits of the petition.

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§9.6 D. Effect of Issuance of Alternative Writ

Once an alternative writ is issued, the superior court must hear the merits of the return, *i.e.,* rule on any demurrer or other responsive motion (*e.g.,* motion to strike) filed by the respondent or real party in interest. See CCP §§1090, 1105 (return may be by demurrer, answer, or both). See also §§8.40-8.44, 8.50-8.56. If the petition withstands a demurrer or other motion, then the respondent or real party in interest files an answer (or will already have filed an answer) (see §§8.45-8.49), and the court will hear the petition on the merits, including ruling on any affirmative defenses. See CCP §§1090 (discretionary jury trial of disputed facts), 1094 (court hears petition if return raises only questions of law or puts in issue only immaterial facts not affecting substantial rights of the parties), 1105 (mandate procedures also applicable to prohibition). See §§9.25-9.31.

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E. Content of Alternative Writ

§9.7 1. Writ of Mandate

If the superior court issues an alternative writ of mandate, it will "command" the respondent or real party in interest immediately or at some other specified time "to do the act required to be performed, or to show cause before the court at a time then or thereafter specified by court order why he has not done so." CCP §1087. For an example of an alternative writ of mandate, see form in §13.6.

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§9.8 2. Writ of Prohibition

If the superior court issues an alternative writ of prohibition, it will "command the party to whom it is directed to desist or refrain from further proceedings" until further order of the court and "to show cause before the court at a time and place then or thereafter specified by court order why such party should not be absolutely restrained from any further proceedings." CCP §1104.

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Source: Civil Litigation/California Civil Writ Practice/9 Action by Superior Court/ 3. Dates for Return and Hearings/§9.9 a. Date for Return to Writ Petition

3. Dates for Return and Hearings

§9.9 a. Date for Return to Writ Petition

The alternative writ will specify a date by which the respondent or real party in interest must make a return, *i.e.,* file a demurrer, verified answer, or other responsive motion. CCP §§1089, 1105. On preparing and filing a return, see §§8.35-8.56.

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§9.10 b. Date for Hearing Merits of Return and Petition

The alternative writ may specify either the return date or a later date as the date for the hearing on the merits of the return (when the respondent or real party in interest has filed a demurrer or other responsive motion). This date may also be the date for hearing the merits of the writ petition. See Los Angeles Ct R 9.5(e) ("Issuance of the alternative writ places the matter on the Court's calendar for hearing"); Sacramento County Superior Court Guide to the Procedures for Prosecuting Petitions for Prerogative Writs, p. 8 ("alternative writ is an order to show cause that calendars a writ petition for a hearing on the merits") (see App B).

Often the hearing date on the merits of the petition is later than the date for the return so the court has an opportunity to review the return and the petitioner has an opportunity to file a replication (reply). The court may also continue the hearing if, for example, the return raises a triable issue of fact and the court decides to exercise its discretion and hold a jury trial.

On replications (replies), see §§8.57-8.61. On jury trials, see §9.31.

PRACTICE TIP: To ensure adequate time for the petitioner to file a replication (reply) and for the court to adequately review the return and any replication, the parties should agree, whenever possible, on a briefing schedule and hearing date and ask the court to specify these dates in the alternative writ.

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F. Service of Alternative Writ

§9.11 1. By Petitioner

The petitioner is responsible for serving an alternative writ. An alternative writ must be served in the same manner as a summons in an ordinary civil action (see CCP §§417.10-417.40) unless waived by the respondent or otherwise ordered by the court. CCP §§1096 (mandate), 1105 (prohibition).

PRACTICE TIP: It is critical to ensure that the alternative writ is served properly. Improper service may mean the respondent is not required to comply with the writ or appear in court to justify noncompliance.

Any opposing party who is not served cannot be bound, because the court acquires jurisdiction over a party only when he or she is properly served or has made a general appearance. CCP §410.50(a).

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2. What to Serve

§9.12 a. Petition and Alternative Writ

Code of Civil Procedure §1088 requires that a copy of the petition be served with the alternative writ. If the respondent and any real party in interest were served with a copy of the petition in conjunction with the ex parte application for issuance of an alternative writ, it may not be necessary to serve them with another copy of the petition—but only if the respondent and real party in interest agree and confirm in writing that the petitioner need not serve them with a second copy of the petition.

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§9.13 b. Order Directing Issuance of Alternative Writ

The order directing the clerk to issue the alternative writ need not be served except when the order and alternative writ are a single document. The court can direct that any separate order be served. Moreover, it is always better practice to serve opposing parties with copies of any order made by the court.

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Source: Civil Litigation/California Civil Writ Practice/9 Action by Superior Court/§9.14 c. Stay Order

§9.14 c. Stay Order

If the superior court also issues a stay order, which is tantamount to a preliminary injunction, the stay order must be served in conjunction with the alternative writ. To ensure the ability to enforce compliance, the stay order should be personally served by a registered process server.

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§9.15 3. Whom to Serve

Service must be made on each respondent and real party in interest. Code of Civil Procedure §1096 states explicitly that service of the alternative writ on a board or a body may be made by serving a majority of its members, "whether at the time of the service the board or body was in session or not." Legal counsel for a particular respondent agency or officer is not generally the statutorily authorized person on whom service may be made. See CCP §§416.10-416.80. When time is of the essence, the petitioner might be able to effect service expeditiously by requesting the respondent agency to authorize its legal counsel to accept service, although it is doubtful an agency facing litigation would do so. See CCP §416.90.

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§9.16 4. When to Serve

The court may direct a minimum time within which the alternative writ must be served. If not, service must be made within a reasonable time before the return date. At a minimum, reasonable time is at least 10 calendar days before the return date (see CCP §1088), and it may well be longer depending on the nature and complexity of the case. The petitioner must bear in mind that an unclean hands objection might lie if it appears that the petitioner is trying to prevent the respondent and any real party in interest from having sufficient time to respond.

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§9.17 G. Denial of Alternative Writ and Petition if Facially Defective or Patently Meritless

Although many superior courts will routinely grant an application for an alternative writ (see §9.5), a petitioner is not entitled to its issuance. If the writ petition is procedurally defective or patently meritless, the court may deny the application and dismiss the petition. See, *e.g.*, *Dare v Board of Med. Exam'rs* (1943) 21 C2d 790, 797, 136 P2d 304 (courts may deny application for alternative writ "out of hand" when petition fails to allege prima facie case); *Kingston v Department of Motor Vehicles* (1969) 271 CA2d 549, 552, 76 CR 614 (courts may deny application for alternative writ when "it appears from the face of the petition that a peremptory writ will not be issued").

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§9.18 1. Leave to Amend

If it appears that the defects in the petition could be cured through amendment, the court may grant the petitioner leave to amend. CCP §472a(c) (made applicable to writ proceedings by CCP §1109). Unless otherwise ordered, the petitioner has 10 days to file and serve an amended petition. Cal Rules of Ct 3.1100, 3.1103(a)(2), 3.1320(g). If the petitioner fails to amend the petition, the matter ends with the denial of the application for an alternative writ and, if the court also orders it, dismissal of the petition.

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§9.19 2. Proceed by Way of Noticed Motion

If the superior court denies an application for an alternative writ and does not also dismiss the petition, the petitioner may file a noticed motion seeking issuance of a peremptory writ. See §§5.86-5.107. Whether it is worth the time to do so depends on the court's reason for denying the application for an alternative writ. If the court concluded that the petitioner's showing was insufficient to issue even an alternative writ, it is difficult to imagine that the court would conclude that the petition is meritorious and issue a peremptory writ. However, if the court denied the application on a nonsubstantive ground (*e.g.,* defective notice), proceeding by way of a noticed motion may be justified.

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Source: Civil Litigation/California Civil Writ Practice/9 Action by Superior Court/§9.20 H. Peremptory Writ of Mandate or Prohibition May Issue in Limited Circumstances

§9.20 H. Peremptory Writ of Mandate or Prohibition May Issue in Limited Circumstances

If the petitioner gives the respondent and real party in interest at least 10 days' notice of the application for issuance of "a writ" (meaning the request is not limited to an alternative writ), the superior court is empowered to issue a peremptory writ in the first instance. CCP §§1088, 1105. However, case law makes it clear that a peremptory writ can be issued in the first instance (*i.e.,* in the absence of issuance of an alternative writ) only in the following limited circumstances:

- The court has received or solicited opposition from the parties adversely affected;
- The petition and opposition adequately address the issues raised by the petition;
- No factual dispute exists; and
- Additional briefing following the issuance of an alternative writ is unnecessary to the disposition of the petition.

Lewis v Superior Court (1999) 19 C4th 1232, 1240, 82 CR2d 85; *Palma,* 36 C3d at 178. The accelerated *Palma* procedure is reserved for "extremely narrow circumstances," primarily those cases in which a "compelling temporal urgency requires an immediate decision." *Lewis*, 19 C4th at 1261, citing *Ng v Superior Court* (1992) 4 C4th 29, 35, 13 CR2d 856. Thus, even an application for a peremptory writ on at least 10 days' notice rarely meets the requirements for issuance of the writ in the first instance. See §8.22. Moreover, this procedure is virtually never followed in the superior courts (except, *e.g.,* in the unusual circumstance in which the respondent or real party in interest agrees to issuance of the peremptory writ). Petitioners either seek ex parte issuance of an alternative writ or proceed by way of noticed motion for issuance of a peremptory writ. See §§5.76-5.118.

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III. ACTION ON MERITS OF PETITION FOR WRIT OF MANDATE OR PROHIBITION

A. Hearing Date

§9.21 1. When Noticed Motion Procedure Is Used

When the petitioner proceeds by way of noticed motion (*i.e.,* moves for issuance of a peremptory writ of mandate or prohibition after the respondent or real party in interest has filed an answer; see §§5.86-5.107), the hearing date is set either (a) in the same manner as with other motions (see, *e.g.,* Los Angeles Ct R 9.5(d)(1) (hearing on petition "may be set by noticed motion in the manner generally governing motions")) or (b) according to local rules specifically governing writ proceedings (see, *e.g.,* Sacramento Ct R 2.01(E) (referring parties to court's guide for prosecuting writ petitions)).

PRACTICE TIP: The superior court's local rules may not only provide guidance on how to notice a hearing on a writ petition, but also indicate whether the court actually prefers the noticed motion procedure rather than the alternative writ procedure. See, *e.g.*, Los Angeles Ct R 9.5(d)(1) (motion procedure preferred); San Diego Ct R 2.4.8(A) (motion procedure should be used whenever possible).

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§9.22 a. Standard Law and Motion Rules Apply

When the noticed motion procedure is used, the standard law and motion rules apply (see Cal Rules of Ct 3.1100-3.1370), unless a writ statute or local rules specify a different procedure. CCP §1109; Cal Rules of Ct 3.1100, 3.1103(a)(2). See §9.21.

For a general discussion of motion and hearing procedures, see California Civil Procedure Before Trial, chap 12 (4th ed Cal CEB 2004).

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§9.23 b. If Petitioner Gives 10 Days' Notice

The writ statutes require a minimum of 10 days' notice before the superior court can issue a peremptory writ in the first instance. CCP §§1088, 1105. In such cases, the respondent or real party in interest may file a memorandum in opposition within 5 days of service of the application. CCP §1107. However, this procedure is rarely, if ever, used in superior court writ proceedings. See §8.22. The superior courts use either the standard noticed motion or alternative writ procedures, or a variation thereof set forth in the court's local rules. See §§5.9-5.19.

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§9.24 2. When Alternative Writ Procedure Is Used

If the superior court issues an alternative writ of mandate or prohibition, the alternative writ will set dates for hearings both on the merits of the return (if the return is by way of demurrer or other responsive motion) and on the writ petition (after the respondent or real party in interest has filed an answer). CCP §§1089-1090, 1094, 1105. See §§9.9-9.10.

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B. Nature of Hearing

§9.25 1. If No Return Filed

If the respondent or real party in interest does not file a responsive pleading (*i.e.*, does not file a return), the superior court assumes the truth of the petitioner's factual allegations. See, *e.g.*, *Block v Superior Court* (1998) 62 CA4th 363, 368 n2, 72 CR2d 610. Although the court cannot issue a writ by default (CCP §§1088, 1105), it can hear and decide the matter solely on the basis of the petitioner's papers. CCP §§1094, 1105; see, *e.g.*, *Rodriguez v Municipal Court* (1972) 25 CA3d 521, 526, 102 CR 45 (CCP §1088 requires court to hold hearing on remaining questions of law even though respondent failed to answer petition and factual allegations are deemed true); *Weisman v Board of Bldg. & Safety Comm'rs* (1927) 85 CA 493, 494, 259 P 768 (writ was not granted by default when superior court reviewed petition and heard and considered evidence).

JUDICIAL PERSPECTIVE: Even if the writ petition is unopposed and the factual allegations are deemed true, the court is always under an obligation to determine whether the petitioner is legally entitled to writ relief.

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§9.26 2. If Return Raises Only Questions of Law

If the return (*e.g.*, the answer) raises only questions of law, or puts in issue only immaterial factual allegations not affecting the substantial rights of the parties, the court must hold a hearing. CCP §§1094, 1105; see, *e.g.*, *California Standardbred Sires Stakes Comm., Inc. v California Horse Racing Bd.* (1991) 231 CA3d 751, 762, 282 CR 656; *English v City of Long Beach* (1952) 114 CA2d 311, 316, 250 P2d 298.

JUDICIAL PERSPECTIVE: Although the court determines whether the return raises only questions of law or puts in issue only immaterial allegations not affecting the substantial rights of the parties, the respondent or real party in interest should weigh in not only on that issue but also on whether writ relief legally can and should be granted.

Similarly, if a writ petition is based solely on an administrative record, the merits are heard by the court. CCP §1094.

PRACTICE TIP: Whether extra-record evidence is admissible depends on the nature of the challenged action or decision, and the nature of the writ sought. See §§7.9-7.12.

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3. If Return Raises Factual Dispute

§9.27 a. Petitioner Has Burden to Establish Disputed Facts

The petitioner has the burden of establishing those facts alleged in the petition that the respondent does not admit. See, *e.g.*, *California Standardbred Sires Stakes Comm., Inc. v California Horse Racing Bd.* (1991) 231 CA3d 751, 762, 282 CR 656.

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§9.28 b. Parties Entitled to Present Evidence

When the return raises a factual dispute essential to the determination of the petition and affecting the substantial rights of the parties, the superior court must hold a factual hearing at which the parties are entitled to present evidence on the merits of the petition. CCP §§1090-1091, 1105; see, *e.g.*, *Dare v Board of Med. Exam'rs* (1943) 21 C2d 790, 797, 136 P2d 304 (if there are disputed issues of fact, "any competent evidence may be introduced and received and the ordinary procedural rules apply"); *Bright Dev. v City of Tracy* (1993) 20 CA4th 783, 795, 24 CR2d 618 (in traditional mandamus proceeding, parties may present evidence outside administrative record); *English v City of Long Beach* (1952) 114 CA2d 311, 316, 250 P2d 298 ("[T]he pleadings having tendered a factual issue…, [petitioner] was entitled as of right to a trial thereon"). However, the type of writ sought, the nature of the challenged action or decision, and the issues raised most likely will limit the kind of evidence that may be presented to the trial court. See §§7.7-7.12.

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§9.29 (1) Evidence Presented by Declaration or Judicial Notice

Unless the superior court orders otherwise for good cause shown, the evidence presented at the hearing on a writ petition must be by declaration or judicial notice. See Cal Rules of Ct 3.1103(a)(2), 3.1306(a); *American Fed'n of State, County & Mun. Employees v Metropolitan Water Dist.* (2005) 126 CA4th 247, 263, 24 CR3d 285 (in writ of mandate hearing, trial court has broad discretion to decide case on basis of declarations and other documents rather than live, oral testimony).

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§9.30 (2) Oral Testimony

To present oral testimony, a party must seek permission from the court and comply with Cal Rules of Ct 3.1306(b). See also Los Angeles Ct R 9.5(g) ("evidence is presented by way of declarations, deposition testimony, etc., and not by oral testimony unless the court, in its discretion, permits it"); Sacramento County Superior Court Guide to the Procedures for Prosecuting Petitions for Prerogative Writs, p. 10 (directing parties who wish to present oral testimony to follow procedures in Cal Rules of Ct 3.1306) (copy located in App B). Counsel should also check the court's local rules for any additional procedures.

JUDICIAL PERSPECTIVE: The burden of justifying oral testimony at the hearing on the merits of a writ petition is a heavy one (*e.g.,* when there is extremely lengthy or technical testimony, a claim of bias by a decisionmaker, or the credibility of a party is in issue).

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§9.31 (3) Jury Trial Discretionary

The superior court may exercise its discretion and order factual disputes tried before a jury, postponing argument on the merits of the writ petition until after the trial and the verdict has been certified to the court. CCP §§1090, 1105; see, *e.g.*, *English v City of Long Beach* (1952) 114 CA2d 311, 316, 250 P2d 298. The court may also direct the jury to assess damages if it finds for the petitioner. CCP §1090.

JUDICIAL PERSPECTIVE: As a practical matter, juries are seldom used in writ proceedings because factual disputes are usually limited and most courts prefer to decide them without the aid of a jury. In addition, when the writ petition is combined with a complaint for damages, the court will try the writ petition first.

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C. Rulings and Judgments

§9.32 1. Tentative Ruling Before Hearing

Many superior courts (or certain departments within a particular superior court) offer a tentative ruling procedure that allows the court, before the hearing, to inform the parties of a tentative decision based on its review of the submitted papers. Cal Rules of Ct 3.1308 (made applicable to writ proceedings by Cal Rules of Ct 3.1103(a)(2)).

PRACTICE TIP: Counsel should be sure to check the court's local rules to determine not only whether the court has a tentative ruling procedure, but also the procedures by which counsel must contest the ruling (*e.g.*, through the court's website or by leaving a voicemail message with the department in which the hearing will take place after notice to all parties). Cal Rules of Ct 3.1308(c).

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Source: Civil Litigation/California Civil Writ Practice/9 Action by Superior Court/§9.33 2. Ruling at Conclusion of Hearing or After Submission

§9.33 2. Ruling at Conclusion of Hearing or After Submission

The court may announce its decision on the writ petition in open court at the end of the hearing, sometimes simply by adopting its previously announced tentative ruling as the statement of decision. However, in many cases, especially ones involving complicated factual or legal issues, the court will take the case under submission and notify the parties later of its decision. Cal Rules of Ct 3.1109 (made applicable to writ proceedings by Cal Rules of Ct 3.1103(a)(2)).

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3. Statement of Decision

§9.34 a. Considerations in Requesting Statement of Decision

If there are material factual disputes that the superior court must decide, counsel can request that the court prepare a statement of decision explaining the factual and legal bases for the court's decision on each material issue. CCP §632; Cal Rules of Ct 3.1590. A statement of decision provides a clear record of the court's findings and rulings if there is an appeal. In addition, a statement of decision occasionally reveals that the court has misunderstood a party's contentions or facts in the record, potentially justifying a motion for reconsideration. However, many writ petitions present only legal issues, in which case the parties are not entitled to a statement of decision. Nevertheless, some courts, if asked, will prepare a statement of decision that sets forth its analysis of the legal issues.

PRACTICE TIP: If no party requests a statement of decision, the court may issue a simple order stating that the petition is either granted or denied, without elaborating on the reasons. Accordingly, counsel should always request a statement of decision if there is any chance of appeal.

JUDICIAL PERSPECTIVE: Even if no party requests a statement of decision, many courts will nevertheless issue an order explaining the rationale for the decision.

For a general discussion of statements of decision, see California Trial Practice: Civil Procedure During Trial §§24.34-24.50 (3d ed Cal CEB 1995).

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§9.35 b. When to Request Statement of Decision

If the hearing will last less than 1 day, or less than 8 hours over more than 1 day, a request for a statement of decision must be made before the matter is submitted for decision. Otherwise, a request can be made within 10 days after the court announces its tentative decision. A request must specify the controverted issues counsel wishes the court to address in the statement. After a request is made, any party may make proposals concerning the statement's content. CCP §632.

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§9.36 c. Content of Statement of Decision

The statement of decision should discuss the contentions of the parties and the factual findings and legal conclusions needed to support the judgment. The procedures for preparing a proposed statement of decision and for making objections to one are set forth in Cal Rules of Ct 3.1590. On statements of decision, see California Trial Practice: Civil Procedure During Trial §§24.34-24.50 (3d ed Cal CEB 1995).

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4. When Petitioner Prevails

§9.37 a. Petitioner Prepares Judgment

When the superior court grants a writ petition, it will usually direct the petitioner to prepare the judgment, submit a proposed statement of decision (if the case involved disputed factual issues and a statement was timely requested under CCP §632 and Cal Rules of Ct 3.1590), and prepare the proposed peremptory writ of mandate or prohibition. See Cal Rules of Ct 3.1312.

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§9.38 (1) Purpose of Judgment

The principal function of the judgment in a mandate or prohibition proceeding is to order issuance of the peremptory writ. CCP §§1095 (mandate), 1104 (prohibition). The judgment will also address damages (if requested), interest (if any), costs, and attorney fees (if applicable).

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§9.39 (2) Content of Judgment

In mandate and prohibition, the judgment serves as the superior court's confirmation that the petition has been granted and as a directive to the court clerk to issue the writ, *e.g.,* "Let a peremptory writ of mandate issue, commanding…." The judgment should also contain reference to any award of costs and, when applicable, attorney fees.

JUDICIAL PERSPECTIVE: The petitioner should leave blank spaces for insertion of the amounts of any costs and attorney fees, because these will be determined in postjudgment proceedings. See §§5.121-5.127; California Trial Practice: Civil Procedure During Trial, chaps 26-27 (3d ed Cal CEB 1995).

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Source: Civil Litigation/California Civil Writ Practice/9 Action by Superior Court/§9.40 (3) Conformed Copies for Parties

§9.40 (3) Conformed Copies for Parties

To facilitate giving notice of entry of the judgment, counsel should submit to the superior court clerk an original and one copy for each party of the judgment so the clerk may send conformed copies. In some counties, the petitioner submits the judgment to the superior court clerk rather than to the clerk of the department that made the decision. Counsel should contact the court clerk for local practice.

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b. Petitioner Prepares Peremptory Writ

§9.41 (1) Proposed Peremptory Writ

When the petitioner prevails in a mandate or prohibition proceeding, the superior court will order the issuance of the peremptory writ. The petitioner must then prepare and submit a proposed peremptory writ (and a $25 fee; see Govt C §70626(a)(1)) and see that it is approved, issued, and served. The petitioner may, but is not required to, submit a proposed peremptory writ when filing the petition. This gives notice of the precise relief being sought. The writ is issued by the clerk, not the judge, and thus should be prepared for the clerk's signature. For an example of a peremptory writ, see form in §28.15.

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§9.42 (2) Respondent's Return Date

If requested in the petition and ordered by the superior court, the petitioner must include a return date in the peremptory writ. This is a different kind of "return" than that made after issuance of an alternative writ. See §9.6. In this context, the return date is the deadline for the respondent to report to the court that it has complied with the writ (or what it has done to comply). On respondent's compliance, see §§10.3-10.10.

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Source: Civil Litigation/California Civil Writ Practice/9 Action by Superior Court/§9.43 (3) When to Prepare Writ

§9.43 (3) When to Prepare Writ

The petitioner should submit a proposed peremptory writ concurrently with the proposed judgment and proposed statement of decision (if applicable).

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Source: Civil Litigation/California Civil Writ Practice/9 Action by Superior Court/§9.44 (4) Content of Writ

§9.44 (4) Content of Writ

In all cases, the peremptory writ must track the judgment granting the writ. It also must follow substantially the language set out in the appropriate code section. See CCP §§1087 (mandate), 1104 (prohibition). The peremptory writ is similar in form to the alternative writ except that the words requiring the party to show cause are omitted and a return date need not be included unless the judgment provided for one. For an example of a peremptory writ, see form in §28.15.

JUDICIAL PERSPECTIVE: The petitioner should pay careful attention to the wording of the writ, making sure that it is precise, easy to understand, and contains no extraneous matters.

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§9.45 (5) Service of Writ

A peremptory writ must be served in the same manner as the summons in an ordinary civil action unless the court expressly orders some other method of service. CCP §§1096, 1105.

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§9.46 (6) Laying Foundation for Future Sanctions

To lay the foundation to enforce the peremptory writ, the petitioner should effect personal service on the respondent and any real party in interest, and file the required proof of service with the court. CCP §§1097, 1105. On enforcing the writ, see §§10.11-10.19.

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Source: Civil Litigation/California Civil Writ Practice/9 Action by Superior Court/ 5. When Respondent Prevails/§9.47 a. Respondent Prepares Judgment Denying Issuance of Writ

5. When Respondent Prevails

§9.47 a. Respondent Prepares Judgment Denying Issuance of Writ

If the superior court rules against the petitioner, the court usually will direct the respondent (or real party in interest, if appropriate) to prepare and submit a proposed judgment and, if applicable, a proposed statement of decision. See Cal Rules of Ct 3.1312. On statements of decision, see §§9.34-9.36.

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§9.48 b. Content of Judgment

When the superior court rules in favor of the respondent, the judgment should not only state that the petition is denied, but also order any alternative writ discharged and, if a stay is in force, that the stay is dissolved. The judgment should also dispose of the matter of costs. CCP §1095. In mandate and prohibition, the judgment should state: "The petition for a peremptory writ is denied and the alternative writ is discharged."

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IV. ACTION ON PETITION FOR WRIT OF REVIEW (CERTIORARI)

§9.49 A. Issuance of Order to Show Cause

A petitioner may initiate a proceeding for a writ of review (certiorari) by filing a writ petition. The superior court may require that notice of this filing be given to the adverse party, or it may issue an order to show cause (OSC) why the writ should not be allowed. CCP §1069. If the petitioner seeks an OSC ex parte, the rules of court and any local ex parte rules will apply. See §9.3. The OSC will set out the date for the return by demurrer or answer (CCP §1069.1) and for hearing on the return and request for issuance of a writ. Theoretically, the petitioner could use the noticed motion procedure to obtain a writ of review, rather than obtaining an OSC. However, given the nature of the writ (*i.e.*, it simply commands the clerk of a lower tribunal to transmit the record of the lower proceedings to the superior court), the OSC procedure can be more efficient and result in a writ ordering transmission of the record to the court for review more speedily.

On the uses and requirements for a writ of review, see §§4.10-4.16, 15.27-15.38.

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Source: Civil Litigation/California Civil Writ Practice/9 Action by Superior Court/§9.50 B. Issuance of Writ of Review (Certiorari)

§9.50 B. Issuance of Writ of Review (Certiorari)

After the respondent and any real party files a return by way of demurrer or answer (CCP §1069.1), the superior court decides whether to issue a writ of review (certiorari). If the court refuses to issue a writ, that is the end of the action.

If the superior court orders issuance of a writ of review, the writ orders the party to whom it is directed to certify or return to the superior court the record of the judicial proceedings below and to desist from further proceedings in the matter under review. CCP §1071. The writ specifies the date for this return (different from the return specified in CCP §1069.1) and also usually provides the date for the hearing on the merits of the petition. CCP §1071; see also CCP §1074.

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§9.51 C. Hearing and Decision on Merits

After the respondent files the return to the writ of review (certiorari)—*i.e.,* after the respondent certifies the record below to the court issuing the writ—the superior court hears the case on the merits and issues a decision and judgment either affirming, annulling, or modifying the proceedings below. CCP §§1074-1075. If the return is defective (*e.g.,* improper service or incomplete record), the court may order that a further return be made. CCP §1075.

The superior court's review is based on the record of the proceedings below transmitted by the clerk of the lower tribunal (*e.g.,* any pleadings, transcripts of hearings, and briefs and evidence submitted by the parties). CCP §1074. Thus, the hearing in the superior court is usually confined to oral argument by counsel concerning the legal and factual issues raised by that record. The court's review cannot extend further than to determine whether the inferior tribunal, board, or officer has regularly pursued the authority of such tribunal, board, or officer, *i.e.,* acted beyond or in excess of its jurisdiction. CCP §1074. For discussion of the uses and requirements for a writ of review, see §§4.10-4.16.

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§9.52 D. Ruling and Judgment

In a writ of review (certiorari) proceeding, a prevailing petitioner only needs to prepare a proposed judgment and a proposed statement of decision (if the court decided material factual issues and a statement was timely requested). See CCP §1076.

If the petitioner prevails, the court either annuls or modifies the proceedings below and disposes of the writ, *e.g.,* "The order is annulled and the writ discharged." CCP §1075. If costs and attorney fees are awarded, the judgment should contain that information as well. If the respondent prevails, the judgment affirms the challenged proceeding, and because the writ of review has already issued, the judgment disposes of the writ, *e.g.,* "The order is affirmed and the writ discharged." CCP §1075.

A copy of the judgment signed by the clerk must be transmitted to the inferior tribunal, board, or officer having custody of the record or proceeding certified up. CCP §1076.

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Source: Civil Litigation/California Civil Writ Practice/9 Action by Superior Court/§9.53 V. RULING ON MISCELLANEOUS MOTIONS

§9.53 V. RULING ON MISCELLANEOUS MOTIONS

Because the ordinary rules of civil practice apply to writ proceedings (see CCP §1109), the superior court has authority to hear and decide the following motions:

- Motion to dismiss (see §8.51);
- Motion to quash (see §8.52);
- Motion for judgment on the pleadings (see §8.53);
- Motion for summary judgment (see §8.54);
- Motion for change of venue (see §8.55);
- Motion to strike (see §8.55); and
- Discovery motions (see §8.55).

These motions should be raised, briefed, and decided as any other motion in a civil action. For discussion of motions in civil actions, see California Civil Procedure Before Trial, chap 12 (4th ed Cal CEB 2004).

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VI. RES JUDICATA EFFECT OF SUPERIOR COURT JUDGMENT

§9.54 A. Final Judgment in Writ Proceeding Has Preclusive Effect

The superior court's judgment granting or denying issuance of a peremptory writ of mandate or prohibition has preclusive effect because it is a final determination of the rights of the litigants and therefore constitutes a final judgment within the meaning of CCP §1064. See, *e.g.*, *Overstreet v County of Butte* (1962) 57 C2d 504, 506, 20 CR 631; *Hollywood Circle, Inc. v Department of Alcoholic Beverage Control* (1961) 55 C2d 728, 733, 13 CR 104.

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§9.55 B. Denial of Alternative Writ Has No Preclusive Effect

Because an alternative writ may be denied for reasons that do not go to the ultimate merits of the petition (*e.g.,* a procedural defect in the petition), a denial of an application for an alternative writ generally has no preclusive effect in future proceedings. See *Kowis v Howard* (1992) 3 C4th 888, 893, 12 CR2d 728; *Palma v U.S. Indus. Fasteners, Inc.* (1984) 36 C3d 171, 182, 203 CR 626; *Bigbee v Pacific Tel. & Tel. Co.* (1983) 34 C3d 49, 57 n11, 192 CR 857.

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10

Enforcing Writs Issued by Superior Court

Judy L. McKelvey

I. SCOPE OF CHAPTER §10.1

II. OBLIGATION TO COMPLY WITH PEREMPTORY WRIT OF MANDATE OR PROHIBITION §10.2

III. PEREMPTORY WRIT COMPLIANCE
- A. Respondent or Real Party in Interest May File Return Regarding Compliance §10.3
  - 1. Contents of Return §10.4
    - a. Writ Satisfied in Full §10.5
    - b. Writ Satisfied in Part §10.6
    - c. Writ Not Satisfied §10.7
  - 2. Acceptable Reasons for Noncompliance With Writ §10.8
  - 3. Financial Burden Not Acceptable Reason for Noncompliance With Writ §10.9
- B. Challenging Return §10.10

IV. PEREMPTORY WRIT ENFORCEMENT
- A. Court Retains Jurisdiction to Enforce Writ §10.11
- B. Writ Must Be Personally Served §10.12
- C. Enforcement Methods
  - 1. Motion to Enforce Compliance §10.13
  - 2. Order to Show Cause re Contempt §10.14
  - 3. New or Supplemental Writ Petition §10.15
- D. Penalties for Noncompliance §10.16
  - 1. Enforcement Order §10.17
  - 2. Fine §10.18
  - 3. Imprisonment §10.19

V. ENFORCING WRITS OF REVIEW (CERTIORARI)
- A. Remedies for Failure to Comply With Writ of Review (Certiorari) §10.20
- B. New Writ Petition Necessary to Enforce Judgment in Writ of Review (Certiorari) Proceeding §10.21

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§10.1 I. SCOPE OF CHAPTER

This chapter discusses enforcing writs of mandate or prohibition, including:

- The obligation to comply with a writ of mandate or prohibition (see §10.2);
- The contents of a "return" showing the superior court the respondent or real party in interest has complied with the writ (see §§10.3-10.9);
- Challenging the return (see §10.10); and
- Enforcing the writ (see §§10.11-10.19).

This chapter also discusses enforcing writs of review (certiorari) (see §§10.20-10.21).

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§10.2 II. OBLIGATION TO COMPLY WITH PEREMPTORY WRIT OF MANDATE OR PROHIBITION

Once a final judgment has been entered and a peremptory writ of mandate or prohibition issued, the respondent (or real party in interest, depending on the terms of the peremptory writ) is legally obliged to comply with the writ. See CCP §1097.

NOTE: An appeal from the final judgment may affect the legal obligation to comply with a peremptory writ. On appeal staying compliance with a writ, see §10.8. On appellate review of a superior court's judgment in a writ action, see chap 11.

In addition to entering final judgment and issuing a writ, the superior court may order the respondent or real party in interest to file a "return," advising the court of all actions taken in response to the writ. CCP §1108. On filing a return, see §§10.3-10.9.

If the respondent or real party does not comply with the peremptory writ, the court may take enforcement action. On court enforcement, see §§10.11-10.15. The court may also order penalties for noncompliance with the writ. On penalties for noncompliance, see §§10.16-10.19.

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III. PEREMPTORY WRIT COMPLIANCE

§10.3 A. Respondent or Real Party in Interest May File Return Regarding Compliance

A superior court issuing a peremptory writ of mandate or prohibition may order the respondent or real party in interest to file a "return" within a specified period of time after entry of final judgment or issuance of the writ. By its return, the respondent or real party in interest advises the court of all actions it has taken in response to the peremptory writ. CCP §1108. On contents of return, see §10.4.

NOTE: The "return" filed after issuance of a peremptory writ is not the same as the "return" filed by a respondent and any real party after issuance of an alternative writ or order to show cause. The latter is a responsive pleading challenging the merits of the petition, *e.g.,* an answer, demurrer, or both. CCP §§1089, 1105. See §§8.35-8.38.

Filing a return after entry of final judgment is not mandatory unless the court issuing the peremptory writ specifically requires it. CCP §1108.

PRACTICE TIP: Even if the court does not expressly require a return, a respondent or real party in interest may want to file one. If a respondent or real party in interest has complied with all terms of the writ, filing a return will alert the court to the actions taken and may head off an enforcement action by the petitioner. If there are any unsatisfied terms of the writ, however, filing a return may alert an inattentive petitioner to grounds for an enforcement action.

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§10.4 1. Contents of Return

It is recommended practice that the return advise the court whether the respondent or real party in interest has satisfied the writ either in full or in part, or has not satisfied the writ.

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Source: Civil Litigation/California Civil Writ Practice/10 Enforcing Writs Issued by Superior Court/§10.5 a. Writ Satisfied in Full

§10.5 a. Writ Satisfied in Full

If the respondent or real party in interest has fully complied with the terms of the writ, the return should:

- State that the writ has been satisfied in full compliance with the final judgment and writ; and
- Set out the actions taken in compliance with the writ.

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§10.6 b. Writ Satisfied in Part

If the respondent or real party in interest has only partially complied with the writ, the return should:

- State that the writ has been partially satisfied;
- Set out the actions taken in compliance with the writ; and
- State why the filing party has been unable to satisfy fully the terms of the writ.

On acceptable reasons for noncompliance with a writ, see §10.8.

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§10.7 c. Writ Not Satisfied

If the respondent or real party in interest has not complied with the writ, the return should state the reasons why the writ has not been satisfied. On acceptable and unacceptable reasons for noncompliance, see §§10.8-10.9.

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§10.8 2. Acceptable Reasons for Noncompliance With Writ

An appeal may be an acceptable reason for not complying with a writ. If the writ requires affirmative conduct on the part of the respondent, as writs of mandate typically do, an appeal automatically stays the judgment and thus the operative force of the writ. See CCP §1110b. On appeal staying writ of mandate, see §11.24. However, the superior court may, on a showing by the petitioner that it will suffer irreparable damage in its business or profession, order that appeal does not stay the judgment and writ. CCP §1110b. An appeal does not automatically stay the judgment and operative effect of a writ of prohibition. On appeal not staying writ of prohibition, see §11.25.

Other acceptable reasons for not complying with a writ include:

- Change in the law rendering the writ moot;
- Object of writ has been lost, damaged, or destroyed;
- Death of the respondent or real party in interest;
- Action by another court with an inconsistent order; or
- Impossible, incomprehensible, or ambiguous writ.

The respondent or real party in interest may simply need more time to comply with a writ. In such instances, a return showing due diligence and good cause will probably stave off enforcement proceedings.

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§10.9 3. Financial Burden Not Acceptable Reason for Noncompliance With Writ

A respondent or real party in interest may not refuse to comply with a peremptory writ simply because compliance will impose a substantial financial burden. Although a showing of fiscal impossibility or practical difficulty in a particular case has sometimes been held to excuse nonperformance of an official duty (see, *e.g., Sutro Heights Land Co. v Merced Irrigation Dist.* (1931) 211 C 670, 704, 296 P 1088 (court found respondent discharged duty to extent that could be reasonably required with available money)), there is no generally applicable excuse from performance of a mandatory official duty due to fiscal difficulty. See *King v Martin* (1971) 21 CA3d 791, 796, 98 CR 711 (*Sutro Heights* does not establish generally applicable excuse for financial burden). See also *King v Woods* (1983) 144 CA3d 571, 579, 192 CR 724 (court recognized enormity of task required by writ, but did not find it to be impossible).

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§10.10 B. Challenging Return

If the petitioner believes the respondent's or real party in interest's return to the peremptory writ is invalid because of (a) failure to comply with some or all terms of the writ or (b) inaccurately reporting the basis for noncompliance, the petitioner can challenge the return by filing:

- An enforcement motion requesting a finding that the respondent has not in fact complied with the writ. See §10.13. See, *e.g.*, *City of Carmel-By-The-Sea v Board of Supervisors* (1982) 137 CA3d 964, 970, 187 CR 379 (petitioner successfully moved for order finding respondent had not complied with writ);
- A motion for and order to show cause re contempt (see §10.14); or
- A supplemental writ petition under the original action's case number or a new writ petition (see §10.15).

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IV. PEREMPTORY WRIT ENFORCEMENT

§10.11 A. Court Retains Jurisdiction to Enforce Writ

The court issuing a peremptory writ of mandate or prohibition retains complete jurisdiction and may take all steps necessary to enforce the writ until it is completely satisfied. CCP §§1097, 1105; *California Labor Fed'n AFL-CIO v Occupational Safety & Health Standards Bd.* (1992) 5 CA4th 985, 989 n1, 7 CR2d 399. Accordingly, if the respondent or real party in interest fails to comply with the peremptory writ, the issuing court may enforce it and impose penalties as appropriate. On compliance with writ, see §§10.3-10.9.

NOTE: All orders issued by the court to enforce compliance with the writ must be consistent with the terms of the original judgment. See, *e.g.*, *Carroll v Civil Serv. Comm'n* (1970) 11 CA3d 727, 734, 90 CR 128 (first order must be obeyed and second order must be reversed, because second order went far beyond first order and constituted major modification of that order).

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§10.12 B. Writ Must Be Personally Served

The court can enforce a peremptory writ of mandate or prohibition only if the petitioner has filed proof of personal service of the writ on the respondent or real party in interest. CCP §1096 (unless court orders otherwise, petitioner must serve peremptory writ in same manner as summons in civil action). See also CCP §§1097, 1105. On service requirements, see §§5.81-5.85.

PRACTICE TIP: The petitioner should effect personal service of the peremptory writ and file a proof of service with the issuing court as soon as possible. The service and filing will facilitate petitioner's efforts to enforce the writ if the respondent or real party in interest fails to comply with the terms and requirements set out in the peremptory writ. See CCP §§1097, 1105.

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C. Enforcement Methods

§10.13 1. Motion to Enforce Compliance

If the respondent or real party in interest fails to comply with the terms of the peremptory writ, the petitioner should file a motion for an order compelling compliance with the writ. CCP §§1097, 1105. Petitioner must support the motion with evidence (through declarations, affidavits, and documents, as appropriate) showing that:

- The petitioner personally served the responding party with the writ (see §10.12);
- The petitioner filed a proof of service; and
- The responding party failed to comply with all or part of the peremptory writ.

The court should grant the motion if it appears that the responding party has, without good cause, refused or neglected to comply with the writ. CCP §§1097, 1105.

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§10.14 2. Order to Show Cause re Contempt

Courts may treat a motion to compel enforcement brought under CCP §1097 as being "in the nature of sanctions for contempt." *Carroll v Civil Serv. Comm'n* (1970) 11 CA3d 727, 733, 90 CR 128. Thus, a respondent's or real party in interest's noncompliance with a peremptory writ can be brought before the court by means of a sworn declaration and an order to show cause re contempt. The petitioner may include an affidavit regarding the facts constituting the failure to comply with the writ (the "contempt"). CCP §1211(a). On contempt procedures, see California Trial Objections, chap 57 (Cal CEB Annual); California Trial Practice: Civil Procedure During Trial §§16.99-16.129 (3d ed Cal CEB 1995); California Criminal Law Procedure and Practice, chap 58 (Cal CEB Annual).

The court may elect to treat a contempt motion as a supplemental writ proceeding to issue a writ of enforcement. See, *e.g.*, *Professional Eng'rs in Cal. Gov't v State Personnel Bd.* (1980) 114 CA3d 101, 109, 170 CR 547 (superior court's characterization of action as "supplemental writ" indicated it was continuing to exercise its jurisdiction in attempting to enforce original writ). On supplemental writ petitions, see §10.15.

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§10.15 3. New or Supplemental Writ Petition

A petitioner may request enforcement of a peremptory writ by filing either a supplemental writ petition under the same case number as the original petition for peremptory writ, or by filing an entirely new writ petition under a new case number. *City of Carmel-By-The-Sea v Board of Supervisors* (1982) 137 CA3d 964, 971, 187 CR 379 (indicating that when return states that court's mandate has been carried out, petitioner may challenge validity of that claim by new petition or by supplemental petition). See also *Bakkebo v Municipal Court* (1981) 124 CA3d 229, 234, 177 CR 239 (when respondent court refused to comply with decision of appellate department, writ was proper remedy).

On contents and format of writ petition, see §§5.20-5.70.

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Source: Civil Litigation/California Civil Writ Practice/10 Enforcing Writs Issued by Superior Court/§10.16 D. Penalties for Noncompliance

§10.16 D. Penalties for Noncompliance

The superior court may order the following penalties for noncompliance with a peremptory writ (CCP §1097):

- Enforcement;
- A fine not exceeding $1000, if the court finds no good cause for the failure to comply; or
- Imprisonment, if the court finds persistent refusal to comply with the writ.

The court's determination of which of the three available penalties is appropriate depends on the severity of the circumstances. *King v Woods* (1983) 144 CA3d 571, 578, 192 CR 724.

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§10.17 1. Enforcement Order

The superior court may issue whatever orders are necessary and proper to enforce a writ of mandate or prohibition. CCP §§1097, 1105. The court's power to order compliance with a writ is inherent and the court may use it when there is any inadequacy in compliance; there is no requirement of a showing of willfulness or persistent refusal. *King v Woods* (1983) 144 CA3d 571, 578, 192 CR 724. To justify the issuance of an enforcement order, the petitioner need only show that it personally served the responding party or real party in interest and that party has not adequately complied with the peremptory writ. CCP §§1097, 1105.

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§10.18 2. Fine

The court may impose a fine of up to $1000 for noncompliance with a peremptory writ if (*King v Woods* (1983) 144 CA3d 571, 578, 192 CR 724):

- The party was personally served with the writ;
- The party refused or neglected to obey the writ; and
- The party's refusal or neglect was without just excuse.

On just excuses for a party's refusal or neglect to comply with a peremptory writ, see §10.8.

The court may impose a fine after finding that the respondent refused or neglected to obey the writ. CCP §§1097, 1105. The court need not find that the respondent deliberately intended to refuse to comply with the writ. 144 CA3d at 579 (fine valid given respondent's refusal or neglect to comply with writ).

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§10.19 3. Imprisonment

The court may order the respondent or real party in interest imprisoned for failure to comply with a peremptory writ if (*King v Woods* (1983) 144 CA3d 571, 578, 192 CR 724):

- The party was personally served with the writ;
- The party refused or neglected to obey the writ;
- The party's refusal or neglect was without just excuse; and
- The party's refusal to comply is persistent.

For the court to order imprisonment, it must find more than mere indifference. The court must find intentional refusal to obey the writ. 114 CA3d at 579. When appropriate, the court can order a willfully disobedient respondent jailed until the writ is fully satisfied. CCP §§1097, 1105.

JUDICIAL PERSPECTIVE: In practice, courts are (and should be) reluctant to order imprisonment. It is harsh and dangerous. Instead, courts try to fashion other ways of enforcing the writ. See §§10.17-10.18.

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V. ENFORCING WRITS OF REVIEW (CERTIORARI)

§10.20 A. Remedies for Failure to Comply With Writ of Review (Certiorari)

In contrast to the statutes applicable to mandamus and prohibition (CCP §§1097, 1105), the statutes dealing specifically with writs of review (certiorari) (CCP §§1067-1077) provide no express remedy or penalty for a respondent's failure to comply with the writ (which directs the clerk of the lower tribunal to certify the record of the proceedings therein to the court issuing the writ). On nature of writs of review, see §§4.10-4.16. On initiating a writ of review proceeding, see chap 5.

A court issuing a writ of review, however, has inherent power to enforce its orders through sanctions proceedings or the contempt process. On contempt procedures, see California Trial Objections, chap 57 (Cal CEB Annual); California Trial Practice: Civil Procedure During Trial §§16.99-16.129 (3d ed Cal CEB 1995); California Criminal Law Procedure and Practice, chap 58 (Cal CEB Annual).

If a return is made to a writ of review (certiorari) but it is defective, the superior court can order that a further return be made. CCP §§1076.

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§10.21 B. New Writ Petition Necessary to Enforce Judgment in Writ of Review (Certiorari) Proceeding

A petitioner seeking enforcement of the judgment on the merits entered after issuance of writ of review (certiorari) and the return thereto (see §§10.3-10.7) must file a new writ action, either for a peremptory writ of mandate or prohibition. On filing a writ petition, see §§5.71-5.75.

To compel a lower tribunal to comply with a reviewing court's judgment, the petitioner should file a petition for a writ of mandate. To prevent the tribunal from acting in excess of its authority, it is recommended practice that the petitioner file a petition for a writ of prohibition. Given the technicalities of these writs, the best practice may be to seek alternative relief. On initiating a writ proceeding, see chap 5. On seeking alternative writ relief, see §§5.36-5.37.

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11

Challenging the Superior Court's Decision

The Hon. Margaret M. Grignon (Ret.)
Judith E. Posner

I. SCOPE OF CHAPTER §11.1

II. SEEKING RELIEF IN SUPERIOR COURT §11.2
- A. Motion for New Trial §11.3
- B. Motion to Vacate §11.4
- C. Motion for Reconsideration
  - 1. Probably Not Permissible if Ruling on Petition Disposes of All Issues §11.5
  - 2. When Order Does Not Finally Determine All Issues §11.6

III. SEEKING RELIEF IN COURT OF APPEAL
- A. Filing Appeal Is Usual Remedy §11.7
  - 1. No Formal Judgment Necessary §11.8
  - 2. Decision Must Finally Determine Parties' Rights §11.9
    - a. Denial Without Prejudice §11.10
    - b. Multi-Party Cases §11.11
  - 3. Decision Final Despite Noncompliance With Writ §11.12
  - 4. Postjudgment Orders Appealable §11.13
  - 5. Interlocutory Rulings Not Appealable §11.14
- B. Deciding Whether to Appeal
  - 1. Factors to Consider §11.15
    - a. Standard of Review on Appeal §11.16
    - b. Time and Financial Costs §11.17
    - c. Gravity of Adverse Consequences of Judgment §11.18
  - 2. Prospect of Settlement on Appeal §11.19
- C. Summary Overview of Appellate Process
  - 1. Rules Applicable in Writ Proceedings §11.20
  - 2. Notice of Appeal §11.21
    - a. Time to File §11.22
    - b. Timely Filing Is Jurisdictional §11.23
  - 3. Stay on Appeal
    - a. Appeal Automatically Stays Execution of Writ of Mandate, But Not of Writ of Prohibition §11.24
    - b. Exceptions to Automatic-Stay Rule §11.25
  - 4. Record on Appeal §11.26
  - 5. Briefing on Appeal §11.27
    - a. Appellant's Opening Brief §11.28
    - b. Respondent's Brief §11.29
    - c. Appellant's Reply Brief §11.30
  - 6. Oral Argument §11.31
  - 7. Opinion of Court of Appeal §11.32
  - 8. Costs on Appeal §11.33
- D. Challenging Court of Appeal's Decision
  - 1. Rehearing in Court of Appeal §11.34
  - 2. Review by Supreme Court §11.35
- E. Requesting Depublication of Published Court of Appeal Opinion §11.36

IV. SEEKING WRIT RELIEF IN APPELLATE COURTS
- A. Petition Filed in Court of Appeal §11.37
- B. Petition Filed in Supreme Court §11.38

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§11.1 I. SCOPE OF CHAPTER

A party aggrieved by a superior court's final decision on a writ petition can challenge that decision by:

- Moving for relief in the superior court;
- Appealing to the court of appeal; or
- In very rare situations, filing a writ petition in the court of appeal instead of, or in addition to, an appeal.

This chapter first discusses the possibility of seeking relief in the superior court by way of a motion for a new trial, a motion to vacate, or a motion for reconsideration. See §§11.2-11.6. The chapter next discusses appealing from an adverse decision and provides a summary description of the appellate process. See §§11.7-11.36. The chapter concludes with a discussion of the rare circumstances in which an aggrieved party should consider filing a writ petition in the court of appeal instead of, or in conjunction with, an appeal. See §§11.37-11.38.

For a general discussion of appeals from superior court judgments, including from superior court writ proceedings, see California Civil Appellate Practice (3d ed Cal CEB 1996).

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§11.2 II. SEEKING RELIEF IN SUPERIOR COURT

The superior courts have only limited authority to revisit decisions in writ proceedings, as discussed below. On postjudgment motions in civil cases, see California Civil Appellate Practice, chap 2 (3d ed Cal CEB 1996).

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§11.3 A. Motion for New Trial

Any aggrieved party in a writ proceeding may file a motion for a new trial under CCP §§656-662.5. CCP §§1092, 1105, 1109-1110 (making post-trial statutes applicable to writ proceedings). See *Lippman v City of Los Angeles* (1991) 234 CA3d 1630, 1633, 286 CR 406 (new trial denied in mandate proceeding seeking to compel city to consult with citizens' committee in implementing redevelopment project); *City of Poway v City of San Diego* (1991) 229 CA3d 847, 855, 280 CR 368 (new trial denied in mandate proceeding challenging city's decision on roadway closure).

PRACTICE TIP: An aggrieved party must challenge the superior court's factual findings by filing a motion for a new trial, not a new or supplemental writ petition. *Pollak v State Personnel Bd.* (2001) 88 CA4th 1394, 1405, 107 CR2d 39 (petitioner improperly used supplemental petition to seek readjudication of factual issues instead of seeking new trial).

On the grounds and procedures for motions for a new trial, see California Civil Appellate Practice §§2.3-2.38 (3d ed Cal CEB 1996); California Trial Practice: Civil Procedure During Trial §§25.22-25.71 (3d ed Cal CEB 1995).

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§11.4 B. Motion to Vacate

An aggrieved party in a writ proceeding may move to vacate the judgment under CCP §663 when (1) there is an incorrect or erroneous legal basis for the decision or (2) the decision is not consistent with or not supported by the facts. CCP §§1109-1110 (making post-trial statutes applicable to writ proceedings). See *Hernandez v County of Los Angeles* (2008) 167 CA4th 12, 18, 84 CR3d 10 (petitioners moved to vacate judgment denying writ petition and then appealed from judgment and order denying motion to vacate); *Lippman v City of Los Angeles* (1991) 234 CA3d 1630, 1633, 286 CR 406 (parties seeking to intervene in mandate proceeding filed notice of intent to move for new trial and to vacate judgment); *Simac Design, Inc. v Alciati* (1979) 92 CA3d 146, 152, 154 CR 676 (motion to vacate properly made in mandate proceeding in which superior court rendered erroneous judgment based on uncontroverted findings of fact).

On the procedures for motions to vacate, see California Civil Appellate Practice §§2.52-2.60 (3d ed Cal CEB 1996); California Trial Practice: Civil Procedure During Trial §§25.72-25.77 (3d ed Cal CEB 1995).

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C. Motion for Reconsideration

§11.5 1. Probably Not Permissible if Ruling on Petition Disposes of All Issues

A party may move for reconsideration of an appealable *order* under CCP §1008, but not of a final *judgment*. See *Ramon v Aerospace Corp.* (1996) 50 CA4th 1233, 1237, 58 CR2d 217.

Code of Civil Procedure §1064 defines "judgment" for purposes of writ proceedings as the "final determination of the rights of the parties." CCP §1064. Section 1064 also states the definitions of a "motion" and an "order" in a civil action are applicable to "similar acts in a special proceeding." CCP §1064. Nevertheless, the courts have repeatedly held that an order granting or denying a writ petition that finally determines the rights of the parties is deemed a final judgment from which an appeal can be taken. See, *e.g.*, *Steen v Board of Civil Serv. Comm'rs* (1945) 26 C2d 716, 727, 160 P2d 816 (minute order denying petition for writ of mandate appealable when no further ruling contemplated); *Public Defenders' Org. v County of Riverside* (2003) 106 CA4th 1403, 1409, 132 CR2d 81 (order granting or denying writ petition constitutes final judgment for purposes of appeal); *Townsel v San Diego Metro. Transit Dev. Bd.* (1998) 65 CA4th 940, 944 n1, 77 CR2d 231 (order denying petition for writ of mandate treated as appealable judgment); *Manhattan Sepulveda, Ltd. v City of Manhattan Beach* (1994) 22 CA4th 865, 869 n6, 27 CR2d 565 (party properly appealed from minute order denying writ petition). See also §§11.8-11.9. Thus, these cases treating an order disposing of all issues in a writ proceeding as an appealable final judgment appear to foreclose a motion for reconsideration.

NOTE: In *Arnold v California Exposition & State Fair* (2004) 125 CA4th 498, 502 n1, 22 CR3d 790, the court of appeal noted that the petitioner had moved for reconsideration of the denial of his petition for a writ of mandate. The court simply observed that an order denying a motion for reconsideration is not appealable and did not discuss whether a motion for reconsideration may properly be made following the denial or grant of a writ petition. A case is not authority for a proposition it does not specifically address. *Zurich Am. Ins. Co. v Superior Court* (2007) 155 CA4th 1485, 1503, 66 CR3d 833.

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§11.6 2. When Order Does Not Finally Determine All Issues

An order that does not finally determine all of the issues between the parties is not a final judgment. Thus, if the petitioner has filed a combined writ petition and complaint (see §5.119), and the superior court has ruled only on the writ petition, the court's order does not dispose of all issues between the parties and is not a final judgment for purposes of appeal. *Griset v Fair Political Practices Comm'n* (2001) 25 C4th 688, 697, 107 CR2d 149 (order denying petition for writ of administrative mandamus not appealable because it did not resolve remaining three causes of action); *Nerhan v Stinson Beach County Water Dist.* (1994) 27 CA4th 536, 540, 33 CR2d 10 (denial of writ petition to compel action on variance not appealable because complaint for damages remained pending). In such cases, a motion for reconsideration under CCP §1008 may be appropriate.

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III. SEEKING RELIEF IN COURT OF APPEAL

§11.7 A. Filing Appeal Is Usual Remedy

Because a superior court's final decision on a writ petition disposing of all the issues between the parties is deemed a final judgment (see CCP §1064), an aggrieved party must seek review of the decision in the court of appeal by filing an appeal, *not* by filing a writ proceeding. CCP §904.1(a)(1) (appeal may be taken from "judgment"). See, *e.g.*, *Palos Verdes Faculty Ass'n v Palos Verdes Peninsula Unified Sch. Dist.* (1978) 21 C3d 650, 655, 147 CR 359 (appeal from ruling granting writ of mandate); *Mission Hosp. Reg'l Med. Ctr. v Shewry* (2008) 168 CA4th 460, 469, 85 CR3d 639 (both petitioners and respondent appealed from adverse portions of trial court's judgment in mandamus action); *Sustainability of Parks, Recycling & Wildlife Legal Defense Fund v County of Solano Dep't of Resource Mgmt.* (2008) 167 CA4th 1350, 84 CR3d 889 (appeal from order denying writ of mandate); *SN Sands Corp. v City & County of San Francisco* (2008) 167 CA4th 185, 191, 83 CR3d 885 (respondent appealed from grant of writ of mandate); *Vasquez v Happy Valley Union Sch. Dist.* (2008) 159 CA4th 969, 980, 72 CR3d 15 (appeal from ruling denying writ of mandate); *Capo for Better Representation v Kelley* (2008) 158 CA4th 1455, 1459, 71 CR3d 354 (appeal from ruling denying writ of mandate); *Little v Los Angeles County Assessment Appeals Bds.* (2007) 155 CA4th 915, 917, 66 CR3d 401 (appeal from ruling denying writ of mandate); *Sacramento County Alliance of Law Enforcement v County of Sacramento* (2007) 151 CA4th 1012, 1021, 60 CR3d 202 (appeal from ruling denying writ of mandate).

PRACTICE TIP: In exceedingly rare circumstances, an aggrieved party may want to seek appellate review by filing a writ petition, either alone or in addition to an appeal. See §§11.37-11.38.

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§11.8 1. No Formal Judgment Necessary

An order granting or denying a petition for a writ of mandate, prohibition, or review (certiorari) that finally determines the rights of the parties is a judgment under the writ statutes and thus reviewable on appeal even if it is in the form of a minute order instead of a formal judgment. CCP §1064; see, *e.g.*, *Steen v Board of Civil Serv. Comm'rs* (1945) 26 C2d 716, 727, 160 P2d 816 (minute order denying petition for writ of mandate appealable when no further order contemplated); *State Bldg. & Constr. Trades Council v Duncan* (2008) 162 CA4th 289, 301 n6, 76 CR3d 507 (appeals from order granting writ petition were proper, appeals from actual issuance of writ were not); *JKH Enters., Inc. v Department of Indus. Relations* (2006) 142 CA4th 1046, 1056, 48 CR3d 563 (order denying writ petition appealable despite lack of formal judgment because order appeared to have terminated case in superior court); *Public Defenders' Org. v County of Riverside* (2003) 106 CA4th 1403, 1409, 132 CR2d 81 (order granting or denying writ petition is final judgment for purposes of appeal even if there is no separate formal judgment); *Townsel v San Diego Metro. Transit Dev. Bd.* (1998) 65 CA4th 940, 944 n1, 77 CR2d 231 (order denying petition for writ of mandate treated as appealable judgment); *Manhattan Sepulveda, Ltd. v City of Manhattan Beach* (1994) 22 CA4th 865, 869 n6, 27 CR2d 565 (appeal from court's minute order denying writ petition proper despite court's failure to enter formal judgment). However, in *Hadley v Superior Court* (1972) 29 CA3d 389, 394, 105 CR 500, the court held that a minute order, entered after an alternative writ issued and an evidentiary hearing was held, was *not* appealable because entry of judgment was contemplated. This case has not been followed and seems to be an anomaly based on the court of appeal's determination that formal entry of judgment was contemplated.

CAUTION: Because no formal judgment is necessary to make an order granting or denying a writ petition appealable, an aggrieved party should appeal from both the order and any subsequent judgment to ensure that, if the order is appealable, he or she has timely appealed. See *MCM Constr. Inc. v City & County of San Francisco* (1998) 66 CA4th 359, 367 n3, 78 CR2d 44 (two appeals were filed "in an abundance of caution"—one from order denying petition for writ of mandate and one from subsequent judgment). On time to file appeal, see §11.22.

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§11.9 2. Decision Must Finally Determine Parties' Rights

To be appealable, a superior court's order on a writ petition must be final—*i.e.,* the order must completely dispose of all issues and causes of action between the parties. See, *e.g.*, *Griset v Fair Political Practices Comm'n* (2001) 25 C4th 688, 697, 107 CR2d 149 (order denying petition for writ of administrative mandamus not appealable because it did not resolve remaining three causes of action); *Morehart v County of Santa Barbara* (1994) 7 C4th 725, 743, 29 CR2d 804 (no appeal permitted from judgment that does not dispose of all causes of action even when causes of action disposed of are tried separately or can be characterized as "separate and independent" from those remaining); *Canandaigua Wine Co. v County of Madera* (2009) 177 CA4th 298, 302, 99 CR3d 264 (when only one of three causes of action in writ petition was disposed of, leaving two others pending, order granting summary adjudication was not appealable); *Haight v City of San Diego* (1991) 228 CA3d 413, 416, 278 CR 334 (petitioner able to appeal order denying petition for writ of mandate because he dismissed other claims).

NOTE: In *Griset*, the supreme court explicitly disapproved earlier cases holding that a superior court's decision on a writ petition was appealable even if other issues remained pending. 25 C4th at 698.

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§11.10 a. Denial Without Prejudice

An order denying a writ petition without prejudice (*i.e.,* the petitioner could initiate a new proceeding) is appealable unless the superior court's order states that the petition is not dismissed, thus neither terminating the proceeding nor finally determining the parties' rights. Compare *Unified Teachers—Los Angeles v Los Angeles Unified Sch. Dist.* (1994) 24 CA4th 1510, 1514 n3, 29 CR2d 897 (order denying writ petition without prejudice appealable because no further action or order on petition was necessary) with *Gibson v Savings & Loan Comm'r* (1970) 6 CA3d 269, 272, 85 CR 799 (order denying writ not appealable because superior court made it "quite clear" that it was not dismissing petition).

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§11.11 b. Multi-Party Cases

In multi-party cases, an order resolving all issues as to one party is final and appealable as to that party, and that "party need not wait [to appeal] until final judgment has been entered against the other parties." *Consumers Union, Inc. v California Milk Producers Advisory Bd.* (1978) 82 CA3d 433, 436, 147 CR 265. Indeed, that party cannot wait to appeal, because the time periods to file a notice of appeal begin when the order is entered and served on that party. Cal Rules of Ct 8.104.

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§11.12 3. Decision Final Despite Noncompliance With Writ

Whether there has been compliance with a writ issued by the superior court is irrelevant to whether the court's decision on the petition is appealable as a final judgment. *Public Defenders' Org. v County of Riverside* (2003) 106 CA4th 1403, 1410, 132 CR2d 81 (county's alleged failure to comply with writ irrelevant to appealability of court's decision). However, if subsequent events render the dispute moot, the court of appeal generally will not consider the matter. See generally *MHC Operating Ltd. Partnership v City of San Jose* (2003) 106 CA4th 204, 215, 130 CR2d 564.

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§11.13 4. Postjudgment Orders Appealable

An order made after a final decision granting or denying a writ petition is appealable. CCP §904.1(a)(2). See, *e.g.*, *Arnold v California Exposition & State Fair* (2004) 125 CA4th 498, 509, 22 CR3d 790 (appeal from order denying motion for attorney fees under CCP §1021.5 made after decision denying petition for writ of mandate).

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§11.14 5. Interlocutory Rulings Not Appealable

An interlocutory ruling in a superior court writ action, by definition, is not a final decision resolving all issues and claims between the parties. Accordingly, such rulings are not generally appealable. See, *e.g.*, *Sunseri v Board of Med. Exam'rs* (1964) 224 CA2d 309, 319, 36 CR 553 (order denying motion to amend writ petition not appealable and purported appeal dismissed); *McPheeters v Board of Med. Exam'rs* (1946) 74 CA2d 46, 47, 168 P2d 65 (order denying a motion to strike petition for writ of mandate not appealable).

PRACTICE TIP: By statute, a limited number of interlocutory rulings are appealable, *e.g.*, an order on a motion to disqualify opposing counsel. In fact, if a party fails to exercise a statutory right of appeal, he or she forfeits appellate review. See California Civil Appellate Practice §§3.25-3.47 (3d ed Cal CEB 1996).

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B. Deciding Whether to Appeal

§11.15 1. Factors to Consider

Deciding whether to appeal a superior court's decision in a writ proceeding is often difficult. The decision to appeal should be made only after a thorough evaluation of the record, the potential issues for appeal, the standard of review for each of those issues, whether any superior court error was prejudicial, and the overall equities of the case. Counsel should keep in mind that most appeals are not successful. See Cal Const art VI, §13 (reversal of superior court judgment permissible only if appellate court finds miscarriage of justice); CCP §475 (reversal permissible only if error was prejudicial); *Mathew Zaheri Corp. v New Motor Vehicle Bd.* (1997) 55 CA4th 1305, 1313, 64 CR2d 705 (all intendments are construed in favor of judgment, which is presumed correct). On these and other factors to consider in deciding whether to appeal, see California Civil Appellate Practice §§1.49-1.61 (3d ed Cal CEB 1996).

PRACTICE TIP: Because it may be difficult for the client and trial counsel to make a dispassionate assessment of the merits of an appeal, it may be helpful to hire or consult with an appellate lawyer, who will be thoroughly conversant with the standards of review and other issues bearing on the outcome of an appeal.

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§11.16 a. Standard of Review on Appeal

The standard of review on appeal—*i.e.,* how the court of appeal will review the action taken by the superior court—is one of the most important indicators of the chances of success on appeal. In a traditional mandate proceeding under CCP §1085, the appellate standard of review will vary depending on the nature of the writ proceeding and the issues presented on appeal. See, *e.g.*, *Mednik v State Dep't. of Health Care Servs.* (2009) 175 CA4th 631, 639, 96 CR3d 112 (substantial evidence review of foundational factual findings, but legal questions, including ultimate determination of whether administrative proceedings were fundamentally fair, reviewed de novo); *Munroe v Los Angeles County Civil Serv. Comm'n* (2009) 173 CA4th 1295, 1301, 93 CR3d 716 (in ordinary mandamus proceeding, appellate court applies substantial evidence test to review trial court's factual findings, but applies de novo standard to questions of law); *Sustainability of Parks, Recycling & Wildlife Legal Defense Fund v County of Solano Dep't of Resource Mgmt.* (2008) 167 CA4th 1350, 1357, 84 CR3d 889 (de novo review of purely legal question); *Fonseca v Fong* (2008) 167 CA4th 922, 929, 84 CR3d 567 (de novo review of dismissal following order sustaining demurrer); *Hernandez v County of Los Angeles* (2008) 167 CA4th 12, 18, 84 CR3d 10 (legal issues reviewed de novo); *SN Sands Corp. v City & County of San Francisco* (2008) 167 CA4th 185, 191, 83 CR3d 885 (appellate court applied same standard as trial court in reviewing agency's decision). See also *Committee for Responsible Sch. Expansion v Hermosa Beach City Sch. Dist.* (2006) 142 CA4th 1178, 1184, 48 CR3d 705 (de novo review of interpretation of California Constitution); *Branciforte Heights, LLC v City of Santa Cruz* (2006) 138 CA4th 914, 933, 42 CR3d 96 (de novo review of applicable statute). An appellant's chances of success are enhanced when the standard of review is de novo and no deference is given to the superior court. On these standards of review, see California Civil Appellate Practice §§1.50, 1.53 (3d ed Cal CEB 1996).

In a prohibition action under CCP §1102, the standard of review will generally be de novo since the writ is "jurisdictional," that is, it examines whether the respondent is engaged in judicial action without or in excess of its jurisdiction—generally questions of law. See, *e.g.*, *Jensen v Superior Court* (2008) 160 CA4th 266, 271, 72 CR3d 594 (legal analysis of whether trial court could proceed); *Good v Superior Court* (2008) 158 CA4th 1494, 1505, 71 CR3d 125 (same).

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§11.17 b. Time and Financial Costs

The appellate process is time-consuming and expensive, and these factors must be carefully weighed in light of the (usually small) chances of success on appeal. An appeal can be less stressful for clients than the superior court proceedings because the appellate process, until oral argument, takes place on a paper record. However, the appellate process is lengthy, and the ongoing uncertainty about the matter can be stressful.

PRACTICE TIP: In addition to the financial costs of the appellate process, an aggrieved party, and particularly public entity clients, should consider any long-term costs resulting from a published, adverse decision.

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§11.18 c. Gravity of Adverse Consequences of Judgment

In some cases, the consequences of an adverse judgment may be so great that filing an appeal is warranted regardless of limited chances of success. For example, if a professional license is involved, an adverse judgment may mean the irreversible loss of a professional career. In such cases, the time and costs associated with an appeal become reasonable, even if the chances of success are relatively low. The same could be true in a case involving the destruction of the environment or a law that impacts many people. Additionally, in cases in which the issues of law and equity are close, counsel may obtain a stay of the challenged action while the appeal is pending. This in itself may benefit the client, even if the appeal is not successful in the long run. On obtaining a stay in the court of appeal, see chap 19.

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§11.19 2. Prospect of Settlement on Appeal

Some courts of appeal have formal settlement and mediation programs, many of which have been remarkably successful. See, *e.g.,* 1st App Dist Local R 2(d) (requiring parties to submit Case Screening Form to mediation program administrator); 4th App Dist (Div 2) Local R 4 (parties must submit Settlement Conference Information Form after filing notice of appeal). A writ proceeding, like any civil proceeding, may be amenable to settlement on appeal.

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C. Summary Overview of Appellate Process

§11.20 1. Rules Applicable in Writ Proceedings

The rules governing appeals from ordinary civil judgments apply to writ proceedings unless inconsistent with the provisions specifically governing writs. CCP §1110.

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§11.21 2. Notice of Appeal

Filing a notice of appeal initiates the appellate process. The appellant must do all of the following:

- File with the clerk of the superior court that rendered the judgment the original, signed notice of appeal and the required filing fee. Cal Rules of Ct 8.100(a)(1), (b)(1).
- Identify in the notice of appeal the particular judgment or order being appealed. Cal Rules of Ct 8.100(a)(2).
- Serve and file the notice of appeal on all parties and file proof of service with the clerk of the superior court. Cal Rules of Ct 8.25(a), 8.100(a)(1).

On the requirements for filing of a notice of appeal, including a form Notice of Appeal, see California Civil Appellate Practice §§7.8-7.24 (3d ed Cal CEB 1996).

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§11.22 a. Time to File

The basic time for filing a notice of appeal from an appealable order or judgment is the earliest of the following (Cal Rules of Ct 8.104(a)):

- 60 days after the clerk serves the party filing the notice of appeal with a document entitled "Notice of Entry" of judgment or a file-stamped copy of the judgment (NOTE: The 60-day period is not extended under CCP §1013(a) when service is by mail);
- 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled "Notice of Entry" of judgment or a file-stamped copy of the judgment, accompanied by proof of service (NOTE: The 60-day period is not extended under CCP §1013(a) when service is by mail); or
- 180 days after entry of judgment.

CAUTION: The deadlines to file a notice of appeal are jurisdictional and cannot be extended by the court. See §11.23. However, timely filed postjudgment motions may extend the time to appeal as specified in Cal Rules of Ct 8.108.

NOTE: The "prison-delivery rule," which provides that a self-represented inmate's notice of appeal in a criminal case is deemed timely filed if, within the relevant time period, the notice is delivered to prison authorities, applies to civil cases. *Silverbrand v County of Los Angeles* (2009) 46 C4th 106, 92 CR3d 595.

On the time for filing a notice of appeal generally, see California Civil Appellate Practice §§7.25-7.43 (3d ed Cal CEB 1996). On extensions of the time for filing a notice of appeal, see Civ App Prac §§7.44-7.77.

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§11.23 b. Timely Filing Is Jurisdictional

Filing a timely notice of appeal is critical. If the notice is not timely filed with the superior court, the appellate court lacks jurisdiction and the appeal must be dismissed. *Silverbrand v County of Los Angeles* (2009) 46 C4th 106, 92 CR3d 595 (filing of timely notice of appeal is jurisdictional prerequisite); *Hollister Convalescent Hosp., Inc. v Rico* (1975) 15 C3d 660, 668, 125 CR 757 (untimely appeal dismissed because time to file is "mandatory and jurisdictional"). Courts may not extend the time to file a notice of appeal, except as provided in Cal Rules of Ct 8.104(b) (for public emergency).

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3. Stay on Appeal

§11.24 a. Appeal Automatically Stays Execution of Writ of Mandate, But Not of Writ of Prohibition

An order or judgment granting a writ of mandate is stayed on appeal unless the superior court or the court of appeal orders otherwise. CCP §1110b; see also CCP §916(a). This is consistent with the general rule that a mandatory injunction (*i.e.,* one that changes the status quo) is automatically stayed on appeal, but a prohibitory injunction is not. See, *e.g.*, *Union Pac. R.R. v State Bd. of Equalization* (1989) 49 C3d 138, 158, 260 CR 565 (party required to comply with writ of prohibition during appeal). Thus, a writ of mandate is automatically stayed on appeal, but a writ of prohibition is not. On writs of prohibition, see §§15.14-15.26.

PRACTICE TIP: If the superior court refuses to recognize or enforce a stay arising by virtue of the filing of an appeal, the appellant can seek a writ of supersedeas from the court of appeal directing the issuance of a stay. CCP §923. On petitions for writs of supersedeas, see chap 26; California Civil Appellate Practice §§6.68-6.85 (3d ed Cal CEB 1996).

In contrast, an order or judgment granting a writ of prohibition or review (certiorari) is not stayed by the filing of a notice of appeal. See, *e.g., Union Pac. R.R. Co. v State Bd. of Equalization* (1989) 49 C3d 138, 158, 260 CR 565 (party required to comply with writ of prohibition during appeal). This is consistent with the general rule that an appeal does not stay a prohibitory injunction. If the circumstances are unusual and a stay is warranted, the respondent or real party in interest should first seek a stay in the superior court and, if not successful, petition the court of appeal for a writ of supersedeas.

On stays on appeal, see chap 19; Civ App Prac, chap 6. On petition for writ of supersedeas, see chap 26.

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§11.25 b. Exceptions to Automatic-Stay Rule

If the petitioner shows that a stay of a writ of mandate will result in irreparable damage to his or her business or profession, the superior court or court of appeal can order that the filing of an appeal does not stay execution of a writ of mandate. CCP §1110b. There also is no stay on appeal from an order or judgment directing issuance of a writ of mandate involving delivery of water for irrigation. CCP §1110a.

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§11.26 4. Record on Appeal

In addition to filing a timely notice of appeal, an appellant must timely file a designation of the record on appeal. Cal Rules of Ct 8.121(a). Although the time to file a record designation is not jurisdictional, the failure to timely procure the record may, and likely will, result in dismissal of the appeal.

The record on appeal generally consists of:

- The reporter's transcript of the superior court proceedings (Cal Rules of Ct 8.120(b), 8.130); and
- The superior court pleadings in the form of (Cal Rules of Ct 8.120(a)):
- A clerk's transcript (Cal Rules of Ct 8.122);
- An appendix prepared by a party on appeal (Cal Rules of Ct 8.124);
- The original superior court file (Cal Rules of Ct 8.128);
- An agreed statement (Cal Rules of Ct 8.134(a)(2)); or
- A settled statement (Cal Rules of Ct 8.137).

On designating the record on appeal, see chap 20; California Civil Appellate Practice, chap 9 (3d ed Cal CEB 1996).

In a writ proceeding in which there is an administrative record, that record also is part of the record on appeal. See *Crawford v City of Los Angeles* (2009) 175 CA4th 249, 254, 95 CR3d 550 (discussing administrative record on appeal and importance of adequate record, but noting that failure to properly designate administrative record as part of appellate record—"a technical defalcation" in this case—is not "the equivalent of failing to provide [the] court with a complete record"). On the administrative record, see §§7.14-7.18; California Administrative Mandamus, chap 4 (3d ed Cal CEB 2003).

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Source: Civil Litigation/California Civil Writ Practice/11 Challenging the Superior Court's Decision/§11.27 5. Briefing on Appeal

§11.27 5. Briefing on Appeal

The most important part of an appeal is the briefing. Before oral argument, the courts of appeal fully work up a case along with a draft opinion.

JUDICIAL PERSPECTIVE: Courts rarely change a draft opinion as a result of oral argument. Accordingly, the parties must make every effort to win on the briefing.

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§11.28 a. Appellant's Opening Brief

The opening brief is generally the appellate court's first view of the case and thus should clearly, concisely, and persuasively present the appellant's case. An opening brief should include (Cal Rules of Ct 8.204):

- An introduction summarizing the case and identifying the issues on appeal;
- A statement of the facts and procedural background;
- An argument section broken down into subsections addressing the relevant legal issues and including a statement of the standard of review applicable to each issue; and
- A conclusion.

Briefing should be scrupulously faithful to the record. All factual statements should be supported by a citation to the record. Overstating or misstating the facts will hurt the party's credibility. Similarly, briefing should fairly and accurately cite legal authorities. Misciting cases or other legal authority also will seriously damage the party's credibility.

PRACTICE TIP: Although a brief can be as long as 14,000 words (Cal Rules of Ct 8.204(c)(1)), shorter, well-edited briefs often are much more effective.

On the format and content of opening briefs, see California Civil Appellate Practice §§12.1-12.52 (3d ed Cal CEB 1996). On the time for filing and the consequences of the failure to file, see Cal Rules of Ct 8.212, 8.220; Civ App Prac §§12.59-12.66.

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§11.29 b. Respondent's Brief

The respondent's brief should be complete and self-contained, enabling the court of appeal to fully understand the respondent's position without referring to the appellant's opening brief. The basic components of the respondent's brief are the same as those of an appellant's opening brief, *i.e.,* an introduction, a statement of the facts and procedural history, an argument section, and a conclusion. Cal Rules of Ct 8.204. See §11.28.

PRACTICE TIP: The legal discussion should not only refute the issues raised by the appellant, but should also affirmatively demonstrate the merits of the respondent's case and the correctness of the superior court's decision.

On the format and content of respondent's briefs, see California Civil Appellate Practice §§13.1-13.26 (3d ed Cal CEB 1996). On the time for filing, see Civ App Prac §13.27.

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§11.30 c. Appellant's Reply Brief

Unlike an opening brief, a reply brief is optional. Cal Rules of Ct 8.200(a)(3). Nevertheless, an appellant should file a reply brief, because it allows the appellant to:

- Refocus the court on the legal and factual issues supporting reversal of the superior court's decision; and
- Directly respond to the respondent's legal arguments.

CAUTION: Do not raise new issues for the first time in the reply brief. The courts of appeal almost always deem belatedly raised issues forfeited, absent compelling justification for not raising the issue in the opening brief. See *Save the Sunset Strip Coalition v City of W. Hollywood* (2001) 87 CA4th 1172, 1181 n3, 105 CR2d 172 (refusing to consider issue raised for first time in reply brief).

On the format and content of reply briefs, see California Civil Appellate Practice §§12.67-12.77 (3d ed Cal CEB 1996). On the time for filing, see Civ App Prac §12.78.

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§11.31 6. Oral Argument

Parties have a right to oral argument on appeal and to the presence at oral argument of each justice who will participate in deciding the appeal. *Moles v Regents of Univ. of Cal.* (1982) 32 C3d 867, 871, 187 CR 557. See also Cal Rules of Ct 8.256 (notice and conduct of oral argument). Although parties may waive oral argument, it is the one opportunity for counsel to determine whether the court understands the party's arguments as presented in the brief(s), and it is the only opportunity that a client has to observe the court that will be deciding his or her case.

The following are some practical tips for counsel in making their oral argument:

- **Make oral argument short, concise, and to the point.** The main purpose of oral argument is to answer questions posed by the court, and counsel should be prepared to take questions and answer them directly. Sometimes, however, the panel is silent, in which case counsel should also have prepared remarks.
- **Prepare for oral argument knowing that the justices have reviewed a draft opinion.** The justice assigned to author the opinion in the case circulates a draft opinion to the other two justices on the panel before oral argument. In many courts, the justices also conference before oral argument to discuss their tentative views on the case. Thus, simply repeating the arguments made in the briefs often is not helpful to the court. Instead, counsel should focus on one or two major points or recap the party's position in a different light.
- **Do not focus on any one justice.** The court notifies the parties as to which justices will hear the case shortly before or at oral argument. The court, however, does not identify which justice has been assigned to write the opinion. It might become clear at oral argument based on the questions asked which justice "has the case." But the writing assignment could change, and the justice who is most active at argument may be in the minority trying to persuade the panel majority to change their view. Therefore, counsel should pay attention to each justice on the panel.

The appellate court submits the case for decision when a waiver of oral argument has been noted on the record, at the conclusion of oral argument, or upon submission of any supplemental briefing requested by the court. Cal Rules of Ct 8.256(d)(1).

On oral argument, see California Civil Appellate Practice, chap 16 (3d ed Cal CEB 1996).

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§11.32 7. Opinion of Court of Appeal

The court of appeal generally issues its opinion within 90 calendar days of the submission date. Although not formally prescribed by statute, court of appeal justices respect the 90-day deadline because receipt of their salaries is contingent on having no cause undetermined for 90 days after submission. Cal Const art VI, §19; Govt C §68210 (to receive salary, justice must file affidavit stating that no cause remains undetermined for 90 days after submission for decision). On determining submission date, see §24.16.

NOTE: As a practical matter, because the justices file the affidavits only once a month, the court often has slightly more than 90 days (to the end of the month in which the 90th day falls) to issue an opinion.

Appellate courts publish their opinions only if a majority of the court certifies the opinion for publication before the decision is final. Cal Rules of Ct 8.1105(b). An opinion may be published if it (Cal Rules of Ct 8.1105(c)):

- Establishes a new rule of law;
- Applies an existing rule of law to a set of facts significantly different from those stated in published opinions;
- Modifies, explains, or criticizes with reasons given, an existing rule of law;
- Advances a new interpretation, clarification, criticism, or construction of a provision of a constitution, statute, ordinance, or court rule;
- Addresses or creates an apparent conflict in the law;
- Involves a legal issue of continuing public interest;
- Makes a significant contribution to the legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law;
- Invokes a previously overlooked rule of law or reaffirms a legal principle not applied in a recently reported decision; or
- Is accompanied by a separate concurring or dissenting opinion, and publication of the majority and separate opinions would significantly contribute to the development of the law.

On requesting depublication of a published court of appeal opinion, see §11.36. On publication of opinions, see California Civil Appellate Practice §§21.5-21.18 (3d ed Cal CEB 1996).

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§11.33 8. Costs on Appeal

The party prevailing in the court of appeal in a civil case is generally entitled to costs on appeal. See, *e.g., Vasquez v Happy Valley Union Sch. Dist.* (2008) 159 CA4th 969, 987, 72 CR3d 15 (costs awarded to respondent prevailing in petitioner's appeal from writ judgment); *Fiscal v City & County of San Francisco* (2008) 158 CA4th 895, 920, 70 CR3d 324 (costs awarded to petitioner prevailing in respondents' appeal from writ judgment). If the court of appeal affirms the superior court's decision, the respondent is the prevailing party; if the court reverses the superior court's decision in its entirety, the appellant is the prevailing party. Cal Rules of Ct 8.278(a)(1)-(2). If the court reverses the superior court's decision in part or modifies it, or if there is more than one notice of appeal, the opinion must specify the award or denial of costs. Cal Rules of Ct 8.278(a)(3). In the interests of justice, the court may award or deny costs as it deems proper. Cal Rules of Ct 8.278(a)(5). See, *e.g., Capo for Better Representation v Kelley* (2008) 158 CA4th 1455, 1466, 71 CR3d 354 (in "interest of justice" each side to bear costs on appeal from writ judgment).

The clerk of the court will indicate in the remittitur whether costs are awarded. Cal Rules of Ct 8.278(b)(1).

NOTE: The remittitur is a document issued by the clerk of the court of appeal to the superior court, notifying the superior court that the judgment of the appellate court is final and that the superior court has regained jurisdiction over the matter. See Cal Rules of Ct 8.272; *Schwartz v Schwartz* (1969) 268 CA2d 685, 690, 74 CR 192.

A party awarded costs must file a memorandum of costs in the superior court within 40 days after the appellate court clerk mails notice of the issuance of remittitur. Cal Rules of Ct 8.278(c)(1). Costs on appeal are usually relatively small. See Cal Rules of Ct 8.278(d)(1) (listing recoverable costs).

Unless the court of appeal orders otherwise, its award of costs neither includes attorney fees on appeal nor precludes a party from seeking them. Cal Rules of Ct 8.278(d)(2).

On costs on appeal, see California Civil Appellate Practice §§20.1-20.12 (3d ed Cal CEB 1996).

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D. Challenging Court of Appeal's Decision

§11.34 1. Rehearing in Court of Appeal

On petition of a party, or on its own motion, the court of appeal may order rehearing of any decision that is "not final in that court on filing." Cal Rules of Ct 8.268(a)(1). See also Cal Rules of Ct 8.264(b) (on finality of decision).

Petitions for rehearing are rarely granted. The vast majority of appeals are correctly decided, and, even when reasonable minds may differ on the correct outcome, it is difficult to persuade the court that its opinion is incorrect and should be revisited. Nevertheless, a petition for rehearing may be appropriate, and indeed necessary, in the following instances:

- If the court of appeal decided the case on an issue neither party raised or had opportunity to brief. Govt C §68081. See *People v Alice* (2007) 41 C4th 668, 674, 61 CR3d 648 (providing guidance on use of petition for rehearing based on new issue under §68081).
- If the aggrieved party intends to seek review by the California Supreme Court and believes that the court of appeal's opinion omits or misstates facts. Cal Rules of Ct 8.500(c)(2) (supreme court normally accepts court of appeal opinion's statement of issues and facts unless party has raised any alleged omission or misstatement of issue or fact in petition for rehearing).
- If the case is one of the exceedingly rare instances in which the appellate court determines that it wrongly decided the case. See, *e.g., Kaplan v Coldwell Banker Residential Affiliates, Inc.* (1997) 59 CA4th 741, 69 CR2d 640 (decision on rehearing reversing summary judgment vacates previously published opinion affirming summary judgment).
- If a party believes that the court of appeal needs to limit, modify, or clarify its decision to enable the superior court or parties to comply with it in the case at hand or in future cases.

On the filing deadline for petitions for rehearing and the timing for the court of appeal to act on the petition, see Cal Rules of Ct 8.264, 8.268. For further discussion of petitions for rehearing in the court of appeal, see §§25.16-25.25; California Civil Appellate Practice, chap 19 (3d ed Cal CEB 1996).

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§11.35 2. Review by Supreme Court

In almost all cases, an aggrieved party's last resort is to seek review by the California Supreme Court. Cal Rules of Ct 8.500(a)(1). A party does not appeal from an adverse decision by a court of appeal, but rather files a petition for review asking the supreme court to exercise its discretionary review authority. Cal Const art VI, §12(b). See, *e.g.*, *Ste. Marie v Riverside County Reg'l Park & Open-Space Dist.* (2009) 46 C4th 282, 93 CR3d 369 (granting review and reversing court of appeal's judgment, which had affirmed trial court judgment issuing writ to prevent sale of park district property); *Spielbauer v County of Santa Clara* (2009) 45 C4th 704, 88 CR3d 590 (granting review and reversing court of appeal's judgment, which had reversed trial court's judgment in mandate action challenging dismissal from public employment).

The California Supreme Court is not a court of error. Rather, its mission is to establish and clarify the law of the state. The supreme court grants review only in limited circumstances (*e.g.,* to decide important public issues or to resolve conflicts among the courts of appeal), and thus only a small fraction of petitions for review are granted.

On the grounds and procedures for petitioning for review and what occurs once review has been granted, see §§27.12-27.33; California Civil Appellate Practice, chap 22 (3d ed Cal CEB 1996).

PRACTICE TIP: A petition for review challenging a court of appeal's opinion is entirely different from a petition invoking the supreme court's original jurisdiction and seeking issuance of a prerogative writ of mandate, prohibition, or review (certiorari). Although the supreme court is empowered to issue prerogative writs, original proceedings in the high court are extremely rare. See §§27.2-27.11.

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§11.36 E. Requesting Depublication of Published Court of Appeal Opinion

In addition to, or in lieu of, a petition for review, a party or other interested person may request the supreme court to order that an opinion certified for publication not be published. This request cannot be part of a petition for review; rather, it must be made by a separate letter to the supreme court. See Cal Rules of Ct 8.1125(a) (rules on content and service of request). An order by the supreme court depublishing a court of appeal's opinion is not a statement as to the correctness of the decision or any of its legal analysis. Cal Rules of Ct 8.1125(d).

On requesting depublication, including practical considerations and procedure, see California Civil Appellate Practice §§21.15-21.18 (3d ed Cal CEB 1996).

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IV. SEEKING WRIT RELIEF IN APPELLATE COURTS

§11.37 A. Petition Filed in Court of Appeal

In exceedingly rare cases, a party aggrieved by a superior court's decision in a writ proceeding may file a writ petition in the court of appeal instead of, or in addition to, an appeal. Writ review is appropriate when an appeal does not provide an adequate remedy, *i.e.,* when time is of the essence. For example:

- When the superior court issued a writ of mandate invalidating the certification of a referendum petition and striking the referendum from the ballot, the court of appeal allowed the writ petition on the ground that an appeal was an inadequate remedy because it could not be heard before the election occurred. *Hayward Area Planning Ass'n v Superior Court* (1990) 218 CA3d 53, 55, 266 CR 745.
- The court of appeal acted on a petition for a writ of mandate filed as an original proceeding, instead of an appeal, because of the need for a speedy resolution of issues that were in the public interest. *San Gabriel Tribune v Superior Court* (1983) 143 CA3d 762, 770, 192 CR 415.

CAUTION: The filing of a writ petition in the court of appeal does not toll or extend the time to file a notice of appeal. If the court of appeal concludes that an appeal is an adequate remedy but the time to appeal has lapsed while the writ petition was pending, the party will have forfeited the right to appeal. Thus, it is always advisable to file both a notice of appeal *and* a writ petition to ensure that the right to appeal is not lost in the event the appellate court denies the writ petition.

On choosing between a direct appeal and an extraordinary writ, see California Civil Appellate Practice, chap 3A (3d ed Cal CEB 1996).

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§11.38 B. Petition Filed in Supreme Court

On even rarer occasions, a petitioner may file a writ petition in the California Supreme Court, skipping the court of appeal altogether. See *Brown v Superior Court* (1971) 5 C3d 509, 514, 96 CR 584 (original mandate proceeding filed in supreme court because public interest in constitutionality of finance disclosure laws required more rapid determination of issue than was possible in course of normal appeal); *Farley v Healey* (1967) 67 C2d 325, 326, 62 CR 26 (original mandate proceeding filed in supreme court because timing of issue made appeal from superior court order inadequate remedy). This procedure is strongly disfavored unless the petitioner feels that time constraints and the overriding public importance compel attention by the supreme court. On original writ petitions in the supreme court, see §§27.2-27.11.

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12

Writ Petitions in Limited Civil and Small Claims Cases

Efrat M. Cogan

I. SCOPE OF CHAPTER §12.1

II. LIMITED JURISDICTION CIVIL CASES
- A. Definition of Limited Jurisdiction Civil Case §12.2
- B. Writ Review of Superior Court's Interlocutory Action in Limited Jurisdiction Civil Case §12.3
- C. Initiating Writ Proceeding in Appellate Division
  - 1. Format and Contents of Petition §12.4
  - 2. Supporting Memorandum §12.5
  - 3. Supporting Record
    - a. Contents of Record §12.6
    - b. Format of Record §12.7
    - c. Inadequate or Nonconforming Record §12.8
  - 4. Requesting a Stay §12.9
  - 5. Filing and Service §12.10
- D. Initial Action by Appellate Division §12.11
- E. Opposition to Writ Petition
  - 1. Preliminary Opposition
    - a. Format and Contents of Preliminary Opposition §12.12
    - b. Time for Filing Preliminary Opposition §12.13
  - 2. Opposition When Appellate Division Considers Issuing Peremptory Writ in First Instance §12.14
  - 3. Opposition and Return When Appellate Division Issues Alternative Writ §12.15
- F. Petitioner's Reply
  - 1. Reply to Preliminary Opposition §12.16
  - 2. Reply to Opposition and Return §12.17
- G. Review of Appellate Division's Decision on Writ Petition
  - 1. Mandate and Prohibition
    - a. Filing New Petition in Court of Appeal §12.18
    - b. Court of Appeal May Treat Erroneous Appeal as Writ Petition §12.19
  - 2. Filing Appeal in Writ of Review (Certiorari) Cases §12.20
  - 3. Writ Petition to California Supreme Court May Be Appropriate in Rare Cases §12.21
- H. Review of Appellate Division's Judgment on Appeal
  - 1. By Writ Petition to Court of Appeal §12.22
  - 2. By Certification or Transfer to Court of Appeal
    - a. Certification to Court of Appeal §12.23
    - b. Transfer to Court of Appeal §12.24
- I. Costs §12.25

III. SMALL CLAIMS COURT CASES
- A. Writ Review Unavailable to Challenge Small Claims Court Judgment §12.26
- B. Writ Review May Be Available to Challenge Superior Court Judgment After Appeal §12.27

IV. WRITS OF SUPERSEDEAS §12.28

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§12.1 I. SCOPE OF CHAPTER

This chapter discusses writ proceedings in limited jurisdiction civil and small claims court cases.

- **Limited jurisdiction civil cases.** In a limited jurisdiction civil case, a party aggrieved by an interlocutory order or ruling can seek immediate appellate review by filing a writ petition in the appellate division of the superior court. See §12.3. This is analogous to a party in a general civil action seeking immediate appellate review of an interlocutory order or ruling by filing a writ petition in the court of appeal. The procedures for prosecuting writs in limited jurisdiction civil cases are discussed in §§12.4-12.17. A party aggrieved by the appellate division's decision on a petition for a writ of mandate or prohibition can seek further appellate review by filing a new writ petition in the court of appeal (which likely will be denied). See §§12.18-12.19. A party aggrieved by the appellate division's decision granting or denying a petition for a writ of review (also called a writ of certiorari) can seek review by way of appeal to the court of appeal. See §12.20. A party aggrieved by the judgment in a limited civil case must appeal to the appellate division. A party aggrieved by the appellate division's decision on appeal can seek writ review by the court of appeal or, more commonly, seek certification and transfer to the court of appeal. See §12.22-12.24.
- **Small claims court cases.** Writ review is generally unavailable to challenge a small claims court judgment. See §12.26. However, the superior court's appellate division may review a judgment rendered by the superior court in a small claims court appeal if there is a need to settle a significant issue of small claims law or procedure. See §§12.27-12.28.

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II. LIMITED JURISDICTION CIVIL CASES

§12.2 A. Definition of Limited Jurisdiction Civil Case

Limited jurisdiction civil cases consist of those actions or special proceedings in which (1) the amount in controversy, exclusive of attorney fees, interest, and costs, does not exceed $25,000, and (2) the relief sought is solely of the type that can be granted in limited civil cases. CCP §85. In addition, some proceedings have been designated by statute as limited civil cases. See CCP §86. For further discussion, see California Civil Procedure Before Trial §§6.15-6.17 (4th ed Cal CEB 2004).

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§12.3 B. Writ Review of Superior Court's Interlocutory Action in Limited Jurisdiction Civil Case

The superior court's appellate division has jurisdiction to grant writs of mandate, prohibition, or review (certiorari) directed to the superior court in limited jurisdiction civil cases. CCP §§1068(b), 1085(b), 1103(b); see *General Elec. Capital Auto Fin. Servs. v Appellate Div.* (2001) 88 CA4th 136, 144, 105 CR2d 552. Accordingly, a party aggrieved by an interlocutory order or ruling in a limited civil case can seek immediate appellate review by filing a writ petition in the appellate division of the superior court.

NOTE: For the purposes of CCP §§1068, 1085, and 1103, when the superior court acts in its limited jurisdiction capacity, it is an "inferior tribunal" to the superior court's appellate division. CCP §§1068(b), 1085(b), 1103(b).

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C. Initiating Writ Proceeding in Appellate Division

§12.4 1. Format and Contents of Petition

The superior court appellate division is the appellate tribunal for limited jurisdiction matters and therefore entertains, hears, and decides matters as an appellate body. See §12.2. A writ petition filed in the appellate division of the superior court should be prepared in accordance with the rules set out in Cal Rules of Ct 8.931, 8.932. See Cal Rules of Ct 8.930. Rule 8.931 governs petitions filed by parties unrepresented by counsel. Writ petitions filed by attorneys must follow Rule 8.931 unless otherwise required by Rule 8.932. As to matters not expressly addressed by the new rules on writs in limited jurisdiction matters, the rules addressing writs filed in the courts of appeal (Cal Rules of Ct 8.485-8.493) provide some guidance.

NOTE: The rules on the format and content of a writ petition filed in the appellate division mirror those for petitions filed in the courts of appeal, discussed in §§18.5-18.48. Given the often simpler nature of limited jurisdiction matters, writ petitions filed in the appellate division generally will be simpler and shorter than their counterparts filed in the court of appeal. On writ petitions in the court of appeal, see chap 18. On the possible bases for appellate writ relief, see chaps 15-17, App A. On the basic requirements a petitioner must meet for appellate writ relief, see chaps 15, 17. On the showing a petitioner must make for appellate writ relief, see chaps 15-17.

Appellate division writ petitions filed by counsel must comply with the form and content requirements of Cal Rules of Ct 8.932(b). These writ petitions must include supporting documents as provided for in Rule 8.931(b). Unrepresented parties must use an approved form—Petition for Writ (Misdemeanor, Infraction, or Limited Civil Case) (Judicial Council form APP-151)—to seek writ review (Cal Rules of Ct 8.931(a)), but are required to provide an adequate record to support their petition (Cal Rules of Ct 8.931(b)). See §13.16.

PRACTICE TIP: A petitioner initiating a writ petition in a limited jurisdiction civil case should consult the Judicial Council's pamphlet Information on Writ Proceedings in Misdemeanor, Infraction, and Limited Civil Cases (form APP-150-INFO). See §13.17. This pamphlet contains step-by-step instructions on filing writ petitions in the appellate division of the superior court.

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Source: Civil Litigation/California Civil Writ Practice/12 Writ Petitions in Limited Civil and Small Claims Cases/§12.5 2. Supporting Memorandum

§12.5 2. Supporting Memorandum

Every appellate division writ petition filed by counsel must include a supporting memorandum setting forth the legal arguments explaining why the superior court's order or ruling was in error and why the appellate division should grant writ relief. See Cal Rules of Ct 8.932(b)(5) (petition filed by counsel must be accompanied by memorandum, which need not repeat facts alleged in petition).

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3. Supporting Record

§12.6 a. Contents of Record

In addition to the writ petition, the petitioner must file supporting exhibits (the record), which should include all of the following (see Cal Rules of Ct 8.931(b)(1)):

- The order or ruling from which the petition seeks relief;
- All documents and exhibits submitted to the superior court that support and oppose the petitioner's position;
- Any other relevant documents necessary for a complete understanding of the issues under review; and
- A reporter's transcript or electronic recording of the oral proceedings that resulted in the order or ruling that is the subject of the petition, or if a transcript or recording is unavailable, a declaration by counsel (or, if the petitioner is unrepresented by counsel, by the petitioner) (1) explaining why it is unavailable and summarizing the proceedings or (2) stating that the transcript or recording has been ordered and the date it is expected to be filed.

PRACTICE TIP: If any of the above documents are unavailable, the petitioner should file a declaration explaining why the documents are unavailable and fairly summarizing their contents. Cal Rules of Ct 8.931(b)(2).

See Cal Rules of Ct 8.931(b) (requirements for contents of record for writ petitions filed by unrepresented petitioners in limited civil cases).

A petitioner seeking to have the appellate division consider original exhibits that were neither copied in the clerk's transcript nor included in the original file must serve and file a notice in the trial court designating such exhibits with a copy to the appellate division. Cal Rules of Ct 8.843(a). On transmittal of such exhibits, see Cal Rules of Ct 8.843(d).

For further discussion of the contents of the supporting record in the context of writ petitions filed in the courts of appeal, see §§20.6-20.9.

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§12.7 b. Format of Record

The documents that constitute the record should (see Cal Rules of Ct 8.931(c)(1) (applicable to both unrepresented and represented parties)):

- Be bound together at the end of the petition or in separate volumes not exceeding 300 pages each and consecutively numbered.
- Be index-tabbed by number or letter.
- 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.

For further discussion of the format of the record in the context of writ petitions filed in the courts of appeal, see §§20.11-20.14.

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§12.8 c. Inadequate or Nonconforming Record

If the petitioner does not provide an adequate record, or does not explain why an adequate record is not available, the court may summarily deny the writ petition. See, *e.g.*, *Lantz v Superior Court* (1994) 28 CA4th 1839, 1847 n8, 34 CR2d 358. The clerk must file any documents supporting a petition (or a petition itself) that do not comply with these requirements. However, the court may notify the petitioner that it will strike or summarily deny the petition unless petitioner brings the documents into compliance within a stated period of time of at least 5 days. See Cal Rules of Ct 8.931(c)(2).

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§12.9 4. Requesting a Stay

There is no automatic stay of superior court proceedings pending the disposition of writ proceedings in the appellate division of the superior court. However, issuance of an alternative writ of prohibition or a writ of review (certiorari) effectively acts as a stay unless the court orders otherwise. See §19.5. A petitioner is not first required to ask the superior court for a stay. However, it is expected as a matter of practice. See CCP §128(a)(3) ("Every court shall have the power… [t]o provide for the orderly conduct of proceedings before it, or its officers"). If the superior court refuses to stay the limited jurisdiction proceedings, the petitioner may seek a stay from the appellate division.

PRACTICE TIP: If a stay is requested from the appellate division, the front cover of the writ petition should conspicuously state that a stay is requested, and the petition itself should include a section that explains why there is good cause and urgency for the stay. See Cal Rules of Ct 8.932(b)(7). See also Cal Rules of Ct 8.116 (rule on cover information for petitions filed in court of appeal, discussed in §§18.19, 18.58, 18.60).

On stays during appellate writ review generally, see chap 19.

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Source: Civil Litigation/California Civil Writ Practice/12 Writ Petitions in Limited Civil and Small Claims Cases/§12.10 5. Filing and Service

§12.10 5. Filing and Service

Under Cal Rules of Ct 8.931(d)):

- The petition and one set of supporting documents must be served on any named real party in interest (*i.e.,* the opposing parties in the action), but only the petition need be served on the respondent (*i.e.,* the lower court that issued the challenged opinion);
- The proof of service must give the telephone number of each attorney or unrepresented party served;
- The petition must be served on a public officer or agency when required by statute or Cal Rules of Ct 8.29;
- The clerk must file the petition even if the proof of service is defective, but if the petitioner fails to correct the deficiency within 5 days after the clerk gives notice of the defect, the court may strike the petition or impose some other sanction; and
- The court may allow the petition to be filed without proof of service.

PRACTICE TIP: A writ petition should be filed as soon as possible and in any event no later than 30 days after the decision or action being challenged.

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§12.11 D. Initial Action by Appellate Division

The appellate division can take the following initial actions on a writ petition:

- Summarily deny it;
- Issue an alternative writ or order to show cause;
- Issue notice that the court may grant a peremptory writ in the first instance.

The most likely action is a summary denial. On the likelihood of and on the bases for appellate writ relief, see chaps 15, 17.

The appellate division may take any of these actions without waiting for opposition by the real party in interest (usually the opposing party in the underlying limited jurisdiction case). On real parties in interest, see §23.21. On the types of actions that an appellate court may take on the filing of a writ petition, see §§22.9-22.29; Cal Rules of Ct 8.933(a)(4); see also Information on Writ Proceedings in Misdemeanor, Infraction, and Limited Civil Cases (Form APP-150-INFO). See §13.17.

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E. Opposition to Writ Petition

1. Preliminary Opposition

§12.12 a. Format and Contents of Preliminary Opposition

When served with a writ petition, either the real party in interest or the respondent may file a preliminary opposition. Cal Rules of Ct 8.933(a). The purpose of preliminary opposition is to help the appellate division weed out writ petitions that are procedurally infirm or clearly without merit, thus summarily ending the proceedings without further expenditure of judicial resources and additional expense to the parties.

NOTE: Rule 8.933(a)(2) provides that the preliminary opposition must include a memorandum and any statement of material fact not included in the petition. In other words, it should alert the court to any patent procedural or substantive defect in the petition so the court can dispense with the petition summarily if that is appropriate. The format and contents of a preliminary opposition should resemble (albeit in shorter form) the format and contents of a preliminary opposition filed in a writ proceeding in the court of appeal. See Cal Rules of Ct 8.204, 8.487(a)(2), discussed in §§21.8-21.13.

In addition, the court may, without requesting preliminary opposition or waiting for a reply, grant or deny a request for a 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. Cal Rules of Ct 8.933(a)(4). On the similar types of actions the courts of appeal may take on a writ petition, see §§22.9-22.29.

PRACTICE TIP: The preliminary opposition can be used to point out any factual inaccuracies or omissions in the record filed by the petitioner. It also can be used to point out that there is neither irreparable harm to the petitioner nor any need for writ review. On the showing a petitioner must make for appellate court writ relief, see chaps 15, 17.

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Source: Civil Litigation/California Civil Writ Practice/12 Writ Petitions in Limited Civil and Small Claims Cases/§12.13 b. Time for Filing Preliminary Opposition

§12.13 b. Time for Filing Preliminary Opposition

Preliminary oppositions must be filed within 10 days after filing, not service, of a writ petition. Cal Rules of Ct 8.933(a)(1). It is not clear whether additional time is added to the 10 days to take into account the mailing of a writ petition. It likely is not since the "mail extension" provisions of CCP §1013(a) apply where action is triggered by "service," not by "filing" as specified in writ and appellate rules.

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§12.14 2. Opposition When Appellate Division Considers Issuing Peremptory Writ in First Instance

If the appellate division notifies the parties that it is considering issuing a peremptory writ in the first instance (*i.e.,* a *Palma* notice; see §§22.18-22.22), the respondent or real party in interest may, within 30 days after the court's notification, serve and file an opposition. See Cal Rules of Ct 8.933(b)(1)-(2).

The format and contents of the opposition should resemble the format and contents of an opposition filed in a writ proceeding in the court of appeal. See *e.g.,* Cal Rules of Ct 8.40, 8.204, 8.485-8.493, discussed in §§23.3-23.10.

A respondent or real party in interest cannot raise new issues for interlocutory appellate review in an opposition to a writ petition. See *Campbell v Superior Court* (2005) 132 CA4th 904, 922, 34 CR3d 68.

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§12.15 3. Opposition and Return When Appellate Division Issues Alternative Writ

If the appellate division issues an alternative writ or order to show cause (see §§22.23-22.29), the respondent or real party in interest may, within 30 days after the court issues the alternative writ or order to show cause, serve and file a return by demurrer, verified answer, or both. See Cal Rules of Ct 8.933(b)(1)-(2).

The format and contents of a demurrer or verified answer should resemble the format and contents of a demurrer or answer filed in a writ proceeding in the court of appeal. See Cal Rules of Ct 8.40, 8.204, 8.485-8.493, discussed in §§23.19-23.38.

CAUTION: If the return is by demurrer alone and the demurrer is not sustained, the court may issue a peremptory writ without granting the respondent or real party in interest leave to answer. Cal Rules of Ct 8.933(b)(4). Thus, a respondent or real party in interest should accompany a demurrer with an answer. See §23.34.

Just as the petition must be accompanied by a supporting memorandum (Cal Rules of Ct 8.932(b)(5)), a return also should include a memorandum making the legal arguments in support of the return and in opposition to the petition. On returns filed in the courts of appeal, see §23.37.

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F. Petitioner's Reply

§12.16 1. Reply to Preliminary Opposition

Within 10 days after a preliminary opposition is filed, the petitioner may file and serve a reply. See Cal Rules of Ct 8.933(a)(3).

PRACTICE TIP: A petitioner generally should take advantage of the opportunity to have the "last word" on the matter and respond to points made in the opposition.

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§12.17 2. Reply to Opposition and Return

Within 15 days after the filing of a return or opposition to the court's notification that it is considering issuing a peremptory writ in the first instance, the petitioner may serve and file a reply. See Cal Rules of Ct 8.933(b)(3). On the similar rules and practice for replies filed in the courts of appeal, see §§23.17-23.18, 23.48-23.50.

PRACTICE TIP: A petitioner generally should take advantage of the opportunity to have the "last word" on the matter and respond to points made in the opposition. This is especially true when the court has indicated enough interest in the petition to issue an alternative writ or notice indicating it may issue a peremptory writ in the first instance.

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G. Review of Appellate Division's Decision on Writ Petition

1. Mandate and Prohibition

§12.18 a. Filing New Petition in Court of Appeal

A decision (judgment) of the appellate division of the superior court granting or denying a petition for a writ of mandate or prohibition does not constitute an appealable order. CCP §904.3. The aggrieved party may, however, file a new writ petition in the court of appeal. In such cases, the appellate court may exercise its discretion to grant review. CCP §904.3. See *Chavez v Superior Court* (1984) 153 CA3d 130, 132, 200 CR 75 (court of appeal exercised its discretion to review superior court judgment in municipal court case); *Strand Prop. Corp. v Municipal Court* (1983) 148 CA3d 882, 886 n4, 200 CR 47 (noting that no appeal lies from order denying petition for writ of prohibition in pending municipal court case), disapproved on other grounds in *People v Superior Court* (1989) 49 C3d 14, 28 n10, 259 CR 740.

NOTE: Some statutes and many older cases refer to the municipal court, which used to hear limited jurisdiction civil cases. However, the municipal and superior courts in all counties are now "unified" as superior courts (see *General Elec. Capital Auto Fin. Servs. v Appellate Div.* (2001) 88 CA4th 136, 145, 105 CR2d 552).

On determining whether to file appellate court writ proceedings, see chap 17. On initiating a writ proceeding in the court of appeal, see chap 18.

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§12.19 b. Court of Appeal May Treat Erroneous Appeal as Writ Petition

If a party erroneously files an appeal from a nonappealable decision from the superior court's appellate division, the court of appeal may, in its discretion, treat the impermissible "appeal" as a petition for writ of mandate or prohibition (see CCP §904.3 (appellate division decision on writ petition not appealable)) or as a writ petition. See *Morehart v County of Santa Barbara* (1994) 7 C4th 725, 744, 29 CR2d 804; *Stonewall Ins. Co. v City of Palos Verdes Estates* (1996) 46 CA4th 1810, 1831, 54 CR2d 176. However, an aggrieved party should not rely on the court of appeal to "save" an invalid appeal by deeming it a writ petition. An appellate court will treat an invalid appeal as a writ only in unusual circumstances, *e.g.*:

- California Supreme Court treated an improper appeal as a petition for a writ of mandate because (1) the briefs and the record contained "all the [necessary] elements… for an original mandate proceeding"; (2) the case presented "unusual circumstances making it appropriate to ascertain from the record whether there are substantive errors that the Court of Appeal should, by writ, order the trial court to correct"; and (3) judicial economy would be served by resolving the issue that was the subject of the appeal, rather than waiting until final judgment on all of the plaintiff's claims. *Morehart*, 7 C4th at 745.
- Court of appeal treated improper appeal as a petition for extraordinary relief because case involved a novel interpretation of the dismissal statutes and there was no objection by the other party. *Nassif v Municipal Court* (1989) 214 CA3d 1294, 1297, 263 CR 195.
- Court of appeal treated improper appeal as writ petition because the issue presented was one of first impression, was fully briefed, and presented a pure question of law. *Rogers v Municipal Court* (1988) 197 CA3d 1314, 1317, 243 CR 530.
- Court of appeal treated improper appeal as writ petition because case "involve[d] a question of public importance appropriate for resolution," action was fully briefed, and the respondent did not object. *Heldt v Municipal Court* (1985) 163 CA3d 532, 534 n1, 209 CR 579.

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§12.20 2. Filing Appeal in Writ of Review (Certiorari) Cases

A decision (judgment) of the appellate division granting or denying a petition for a writ of review (certiorari) can be appealed to the court of appeal. CCP §904.3; see *Bermudez v Municipal Court* (1992) 1 C4th 855, 860, 4 CR2d 609 (amendments to CCP §904.1 only limited right of appeal for writs of mandate and prohibition, not certiorari).

NOTE: The right of appeal includes decisions on petitions for writs of review (certiorari) arising from contempt rulings, even though a contempt order is not appealable. See CCP §904.1(a); Bermudez, at 1 C4th 864. The legislative scheme thus effectively allows appeal in limited civil case contempt matters but not in superior court contempt matters. 1 C4th at 860.

On prosecuting an appeal, see California Civil Appellate Practice (3d ed Cal CEB 1996).

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§12.21 3. Writ Petition to California Supreme Court May Be Appropriate in Rare Cases

In extraordinary cases, a party may want to seek review of a superior court appellate division writ decision (judgment) by filing a new writ petition directly in the California Supreme Court. See *Serna v Superior Court* (1985) 40 C3d 239, 245, 219 CR 420 (supreme court granted alternative writ after superior court denied petition for writ of mandate to "review two novel and important questions of statewide application"). Such petitions, however, are very rarely granted. On original writ proceedings filed in the California Supreme Court, see chap 27.

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H. Review of Appellate Division's Judgment on Appeal

§12.22 1. By Writ Petition to Court of Appeal

A party aggrieved by the superior court's judgment in a limited jurisdiction civil matter must appeal to the appellate division. CCP §904.2.

A party aggrieved by the appellate division's decision (judgment) on appeal may seek writ review of that decision by the court of appeal. However, the court of appeal will grant writ relief only in exceptional circumstances. See, *e.g., Auto Equity Sales, Inc. v Superior Court* (1962) 57 C2d 450, 453-62, 20 CR 321 (review of appellate division's reversal of a new trial order by way of petition for writ of prohibition; petition granted and appellate division's judgment annulled); *Mahdavi v Superior Court* (2008) 166 CA4th 32, 82 CR3d 121 (review of appellate division's dismissal of notice of appeal from judgment in unlawful detainer case); *Greene v Municipal Court* (1975) 51 CA3d 446, 448, 124 CR 139 (review of appellate division's affirmance of unlawful detainer judgment and denial of motion to vacate by way of petition for writ of review (certiorari); petition granted and appellate division directed to reverse unlawful detainer judgment).

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2. By Certification or Transfer to Court of Appeal

§12.23 a. Certification to Court of Appeal

Rather than seeking writ relief from the court of appeal, parties more commonly request certification or transfer of the case to the court of appeal. See CCP §911 (authorizing transfer to court of appeal); Cal Rules of Ct 8.1000-1018 (setting forth procedures for certification and transfer). The requirements for certification and transfer are stringent, and limited jurisdiction cases are rarely certified or transferred to the court of appeal.

The appellate division may on its own motion certify a case for transfer to the court of appeal. Cal Rules of Ct 8.1005(a). Alternatively, a party may file an application for certification by the appellate division within 15 days after the appellate division pronounces its judgment (affirming or reversing the superior court's judgment in the limited jurisdiction matter). Cal Rules of Ct 8.1005(b). The application for certification can be included in a petition for rehearing by the appellate division. Cal Rules of Ct 8.1005(b)(1). The application must explain why a transfer is necessary either to secure uniformity of the law or to settle an important question of law. Cal Rules of Ct 8.1005(b)(2). Opposition must be filed within 5 days of the filing of the certification application. Cal Rules of Ct 8.1005(b)(3).

A case may be certified for transfer any time after the record on appeal has been filed in the appellate division until the appellate division's decision on the appeal (judgment) is final. Cal Rules of Ct 8.1005(d). Finality is determined by Rule 8.888. Cal Rules of Ct 8.1005(c). A certification order must: (1) briefly describe any conflict in the applicable law or any important question of law to be settled and (2) state whether there was a judgment on appeal from the appellate division and, if so, its date and disposition. Cal Rules of Ct 8.1005(e). Upon certification, further proceedings in the appellate division, except to prepare and transfer the record (Cal Rules of Ct 8.1010), are stayed. Cal Rules of Ct 8.1014.

If the appellate division orders certification, the clerk must promptly send a copy of the order to the parties, the court of appeal, and, in a criminal case, the Attorney General. Cal Rules of Ct 8.1005(f)(1). If the appellate division denies a certification request, the clerk must promptly send a copy to the parties. Cal Rules of Ct 8.1005(f)(2).

It is entirely within the court of appeal's discretion whether to accept a case certified to it by the appellate division. Cal Rules of Ct 8.1002. If the court of appeal accepts the certification, the case is transferred to the court and proceeds in accordance with the rules on transfer. See §12.24.

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§12.24 b. Transfer to Court of Appeal

The court of appeal may, on its own motion or on a party's petition, transfer to itself a case that is on appeal to the appellate division. Cal Rules of Ct 8.1008(a).

A party may petition for transfer if the appellate division declines to certify the case to the court of appeal. Cal Rules of Ct 8.1008(b). A petition for transfer must be filed and served (including on the appellate division) within 15 days of when the appellate division's decision on appeal is final. Cal Rules of Ct 8.1008(b)(2). The petition must explain why transfer is necessary either to secure uniformity of the law or to settle an important question of law. Cal Rules of Ct 8.1008(b)(3). No party may file an answer to the petition for transfer unless the court of appeal requests an answer. Cal Rules of Ct 8.1008(b)(4). Any answer must be filed within 10 days after the order asking for opposition is filed, unless the court of appeal orders otherwise. Cal Rules of Ct 8.1008(b)(4). The petition and any answer must comply as nearly as possible with Rule 8.504 (governing petitions for review by the supreme court). Cal Rules of Ct 8.1008(b)(5).

The court of appeal may order a transfer: (1) after certification by the appellate division or on its own motion within 20 days after the record on transfer is filed with the court of appeal; or (2) on petition for transfer within 20 days after the petition if filed (which time the court of appeal can extend by another 20 days). Cal Rules of Ct 8.1008(c)(1)-(2). If the court of appeal does not timely order a transfer the petition is deemed denied. Cal Rules of Ct 8.1008(c)(3). The court of appeal may limit the issues to be considered by the court. Cal Rules of Ct 8.1008(e).

The record on transfer is governed by Cal Rules of Ct 8.1010. Briefing by the parties is governed by Cal Rules of Ct 8.1012. The court of appeal may vacate the transfer order and retransfer to the appellate division (Cal Rules of Ct 8.1016(b)(1)), or decide fewer than all the issues raised by the parties (Cal Rules of Ct 8.1016(a)). The issuance of remittiturs by the appeal court and the appellate division is governed by Cal Rules of Ct 8.1018. On petitions for rehearing by the court of appeal, see §§25.16-25.25. On petitions for review by the supreme court, see §§27.12-27.33.

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§12.25 I. Costs

Unless the interests of justice dictate otherwise, the prevailing party in a writ proceeding in the appellate division of the superior court is entitled to costs if the court resolves the proceeding after issuing an alternative writ, an order to show cause, or a peremptory writ in the first instance. Cal Rules of Ct 8.936(a). On the procedure for claiming costs, see Cal Rules of Ct 8.891(c).

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III. SMALL CLAIMS COURT CASES

§12.26 A. Writ Review Unavailable to Challenge Small Claims Court Judgment

A party cannot challenge a small claims court judgment by filing a writ petition in the superior court. Other rules apply to the availability of further review in a small claims case:

- **Plaintiff.** A plaintiff is bound by the judgment in a small claims action and may not challenge it by filing an appeal in the superior court. CCP §116.710(a). The plaintiff cannot get around this statutory prohibition by filing a writ petition in the superior court. See *Parada v Small Claims Court* (1977) 70 CA3d 766, 769, 139 CR 87 (allowing plaintiff to challenge adverse judgment by filing writ petition "would emasculate the prohibition against appeals by plaintiffs from judgments rendered by a small claims court").
- **Defendant.** The defendant in a small claims court action may appeal an adverse judgment to the superior court in the county in which the action was heard. CCP §116.710(b). Thus, because there is an adequate remedy at law, writ relief is unavailable to the defendant to challenge an adverse small claims court judgment. See CCP §§1068(a), 1086, 1103(a). On the adequate remedy at law limitation, see §§15.56-15.60.

NOTE: In small claims court cases in which a defendant files a cross-complaint against the plaintiff, the parties' positions become reversed with respect to challenging the judgment on the cross-complaint. CCP §116.710(b); see *Upson Metal Fabricators v Superior Court* (1988) 203 CA3d 67, 69, 251 CR 304 ("as plaintiff has not selected the forum in which to litigate defendant's claim against him, he may not be deprived of his right to appeal an unfavorable decision"); *Davis v Superior Court* (1980) 102 CA3d 164, 170, 162 CR 167 (noting that defendant filing cross-complaint in small claims action "gives up his right to appeal on the cross-complaint").

On the jurisdiction of the small claims court, see California Civil Procedure Before Trial §6.19 (4th ed Cal CEB 2004). On the procedures for appealing from small claims court judgments, see California Civil Appellate Practice §§10.103-10.131 (3d ed Cal CEB 1996).

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§12.27 B. Writ Review May Be Available to Challenge Superior Court Judgment After Appeal

The decision (judgment) of the superior court in an appeal from a small claims court judgment is final and not appealable. CCP §116.780(a). However, in an unusual case, the superior court's judgment on appeal may be reviewed by means of a writ petition filed in the court of appeal. See *Houghtaling v Superior Court* (1993) 17 CA4th 1128, 1131, 21 CR2d 855 (due to informal nature of small claims court proceedings, precedential decisions cannot be made; thus, appellate courts must have jurisdiction to grant writ petitions to settle significant issues of small claims law or procedure); *Davis v Superior Court* (1980) 102 CA3d 164, 168, 162 CR 167 (writ review available in small claims cases to "secure uniformity in the operations of the small claims courts and uniform interpretation of the statutes governing them").

NOTE: The superior court appellate division has jurisdiction to issue writ relief regarding *postjudgment* enforcement orders of the small claims court. See *General Elec. Capital Auto Fin. Servs. v Appellate Div*. (2001) 88 CA4th 136, 144, 105 CR2d 552.

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§12.28 IV. WRITS OF SUPERSEDEAS

In some cases, filing a notice of appeal automatically stays enforcement of the challenged ruling. CCP §916. See §§26.5-26.9. If the superior court nevertheless allows further proceedings in a limited jurisdiction civil matter, a surprisingly common event often driven by a misunderstanding of the automatic-stay rule, the appealing party should petition the appellate division for a writ of supersedeas. On the format and contents of a petition for a writ of supersedeas filed in the court of appeal, see §§26.22-26.26.

California Rules of Court 8.824 governs petitions for writs of supersedeas filed in the appellate division. Under that rule, writ of supersedeas petitions must bear the same title as the appeal, explain the necessity for the writ, include a supporting memorandum, and be verified. Cal Rules of Ct 8.824(a). The petition may request a temporary stay pending the appellate division's ruling, although a separate application for a temporary stay must be filed and served on the respondent. Cal Rules of Ct 8.824(c).

If the record has not yet been filed in the appellate division, the petition must include a statement of the case showing that the petitioner will raise a substantial issue on appeal (*i.e.,* a summary of the material facts, the issues that are likely to be raised on appeal, and any oral statement by the court supporting its ruling related to these issues) as well as (Cal Rules of Ct 8.824(a)(4)):

- The judgment or order, showing its date of entry;
- The notice of appeal, showing its date of filing;
- Any application for a stay filed in the superior court and any opposition; and
- Any other document from the superior court proceeding that is necessary for consideration of the petition.

For the format of these documents, see Cal Rules of Ct 8.824(a)(4)(C).

Opposition must be served and filed within 15 days after the petition is filed. Cal Rules of Ct 8.824(b)(1). It must state any material facts not included in the petition and contain a memorandum. Cal Rules of Ct 8.824(b)(2). For discussion of the format and contents of an opposition filed in the court of appeal, see §§26.28-26.29.

The court may issue a writ of supersedeas in a limited civil case "on any conditions it deems just." Cal Rules of Ct 8.824(d)(1).

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13

Superior Court Forms

I. FORM: VERIFIED PETITION FOR ALTERNATIVE WRIT OF MANDATE AND VERIFIED COMPLAINT FOR DECLARATORY RELIEF §13.1

II. EX PARTE APPLICATION FOR ALTERNATIVE WRIT OF MANDATE AND ORDER TO SHOW CAUSE
- A. Form: Ex Parte Application for Alternative Writ of Mandate and Order to Show Cause §13.2
- B. Form: Memorandum in Support of Ex Parte Application for Alternative Writ of Mandate and Order to Show Cause §13.3
- C. Form: Declaration of Notice in Support of Ex Parte Application for Alternative Writ of Mandate and Order to Show Cause §13.4
- D. Form: Proposed Order Directing Issuance of Alternative Writ of Mandate §13.5
- E. Form: Alternative Writ of Mandate §13.6
- F. Form: Notice of Hearing on Petition for Writ of Mandate §13.7

III. APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE
- A. Form: Ex Parte Application for Temporary Restraining Order and Order to Show Cause §13.8
- B. Form: Proposed Temporary Restraining Order and Order to Show Cause §13.9

IV. DEMURRER TO PETITION FOR WRIT OF MANDATE
- A. Form: Demurrer to Petition for Writ of Mandate §13.10
- B. Form: Memorandum in Support of Demurrer to Petition for Writ of Mandate §13.11

V. OPPOSITION TO PETITION FOR WRIT OF MANDATE
- A. Form: Opposition to Petition for Writ of Mandate §13.12
- B. Form: Request for Judicial Notice in Opposition to Petition for Writ of Mandate §13.13
- C. Form: Declaration in Opposition to Petition for Writ of Mandate §13.14
- D. Form: Proposed Order Denying Petition for Writ of Mandate §13.15

VI. LIMITED CIVIL CASES
- A. Form: Information on Writ Proceedings in Misdemeanor, Infraction, and Limited Civil Cases (Judicial Council Form APP-150-INFO) §13.16
- B. Form: Petition for Writ (Misdemeanor, Infraction, or Limited Civil Case) (Judicial Council Form APP-151) §13.17

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Source: Civil Litigation/California Civil Writ Practice/13 Superior Court Forms/§13.1 I. FORM: VERIFIED PETITION FOR ALTERNATIVE WRIT OF MANDATE AND VERIFIED COMPLAINT FOR DECLARATORY RELIEF

NOTE: The following forms are illustrative only. When drafting papers in writ proceedings, counsel should use their own independent legal and professional judgment in light of the particular client and factual situation. As always, counsel should consult all applicable statutes, rules of court, and local rules before filing any papers with the court.

§13.1 I. FORM: VERIFIED PETITION FOR ALTERNATIVE WRIT OF MANDATE AND VERIFIED COMPLAINT FOR DECLARATORY RELIEF

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ABC CORPORATION

SUPERIOR COURT OF THE STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO—
UNLIMITED JURISDICTION

ABC CORPORATION, Plaintiff and Petitioner, vs. THE CITY & COUNTY OF SAN FRANCISCO, and DOES 1-30, Defendants and Respondents.	**CASE NO. _ _ _ _ _ _** **VERIFIED PETITION FOR WRIT OF MANDATE (CCP §1085); EX PARTE APPLICATION FOR ALTERNATIVE WRIT; AND VERIFIED COMPLAINT FOR DECLARATORY RELIEF (CCP §526(a))** **_____** **Date: February 7, 2008** **Time: 11:00 a.m.** **Dept.: 301 or 302** **Judge:** **Date of first filing: February 7, 2008** **Trial date:**

Plaintiff and Petitioner ABC Corporation ("ABC") hereby petitions this court for an alternative writ of mandate and a peremptory writ of mandate under Code of Civil Procedure section 1085, directed to Respondents and Defendants the City & County of San Francisco ("the City") and Does 1-30, and hereby complains against Respondents and Defendants as follows:

THE PARTIES

1. Plaintiff and Petitioner ABC is a California corporation with its principal places of business in San Francisco and Oakland, California. It is in the business of construction trucking and materials and is authorized, qualified, and licensed to perform this business in California.

2. Defendant and Respondent the City is a charter city, within the state of California, subject to the court's power to compel compliance with a legal duty under Code of Civil Procedure section 1085.

3. ABC is ignorant of the true names and capacities of Defendants and Respondents sued herein as Does 1-30, inclusive, and therefore sues these Defendants and Respondents by such fictitious names. ABC will amend this Complaint and Petition to allege their true capacities when ascertained. ABC is informed and believes and thereon alleges that each of the fictitiously named Defendants and Respondents is responsible in some manner for the occurrences herein alleged.

STATEMENT OF FACTS

4. The City has contracted for biosolids and grit hauling services with one contractor—We-Haul Company—under a sole source contract since the 1950s. In the past year, the City decided to end this practice and put these services out for competitive bidding for the first time in 50 years.

5. In February 2007, the City, by and through the San Francisco Office of Contract Administration ("SFOCA"), issued an Invitation For Bids ("IFB") for the San Francisco Public Utilities Commission ("SFPUC") for a contract to perform biosolids and grit hauling services for the SFPUC ("the Contract"). A true and correct copy of relevant excerpts from the IFB is attached as Exhibit A.

6. The IFB provided, among other things, that the Contract term would be 5 years. (Exhibit A, General Conditions, ¶28, Contract Term.) Bidders were required to provide a fixed price for that period. The IFB also provided that the parties could, by mutual agreement, extend the contract twice for up to 2 years for each extension. Any such extension would be on terms agreed to by the parties at the time. (*Id.,* ¶29.)

7. The IFB also provided that SFPUC would award the Contract to the low responsive and responsible bidder. (*Id.,* Special Conditions, ¶79.)

8. ABC timely submitted a bid in response to the IFB. See Exhibit B, which is a true and correct copy of the City's Budget Analyst recommendation that the Budget and Finance Committee approve the Contract, at p. 35.

9. ABC bid to perform the 5-year Contract for $3.32 per mile for biosolids hauling, and $3.14 for grit hauling, which equated to an estimated $8,577,092 for the 5-year term of the Contract. (*Id.*, p. 33.)

10. Under the existing sole source contract for the same services, the incumbent provider, We-Haul, was performing at an estimated cost to the City approximately 26 percent higher than ABC's bid price. (*Id.*, p. 37.)

11. Four bidders other than ABC, including We-Haul, submitted bids in response to the IFB. (*Id.*, p. 35.)

12. In May 2007, SFPUC held a bid opening. (*Id.*)

13. SFPUC determined that ABC was responsible and the second lowest priced bidder and that its bid was fully responsive to the IFB. (*Id.*)

14. SFPUC determined that the bids submitted by the other four bidders were materially nonresponsive to the IFB. (*Id.*)

15. Based on its determination that ABC was the lowest responsive and responsible bidder, SFOCA (SFPUC Purchasing Division) issued a Notice of Intent to Award the Contract to ABC on October 5, 2007. A true and correct copy of the Notice is attached as Exhibit C.

16. Two of the other bidders, We-Haul and American Hauling, protested SFPUC's intended award to ABC. American Hauling was the low bidder, but its bid was nonresponsive. We-Haul, the incumbent provider, not only submitted the highest-priced bid (at $4.74 per mile for biosolids hauling and $4.69 per mile for grit hauling) but also one that was nonresponsive. The City Attorney's office reviewed and denied both protests. (Exhibit B (City Budget Analyst Report), pp. 35-36.)

17. SFOCA (SFPUC Purchasing Division) issued a conditional award of the Contract to ABC and, on November 7, 2007, sent to ABC a Notice of Conditional Award, stating that the award was conditioned on ABC's timely submission of a performance bond, insurance certificates, and additional insured endorsements and on its confirmation that it would comply with applicable prevailing wage requirements. The Notice also stated that SFPUC would issue a Notice to Proceed to ABC upon SFPUC's receipt of the documents and confirmation required by SFPUC in its conditional award. A true and correct copy of the Notice is attached as Exhibit D.

18. ABC bought and paid for the performance bond and insurance coverage required by SFPUC in its conditional award, and it timely provided to SFPUC the documents and confirmation required by the conditional award. A true and correct copy of SFPUC and ABC e-mails confirming ABC's satisfaction of the conditions is attached as Exhibit E.

19. SFPUC did not then execute the Contract or issue a Notice to Proceed to ABC, and, to date, it still has done neither.

20. SFPUC informed ABC that the Contract term would begin on April 1, 2008, and ABC is prepared to begin service on that date.

21. On December 20, 2007, SFOCA submitted a proposed resolution to the City Board of Supervisors ("the Board") for approval of the Contract. A true and correct copy of the SFOCA submission is attached as Exhibit F.

22. On January 9, 2008, the City's Budget Analyst recommended to the Board's Budget & Finance Committee that the SFOCA's proposed resolution be approved. (Exhibit B.)

23. On January 16, 2008, the Board's Budget & Finance Committee heard arguments from the San Francisco Labor Council, Teamsters Union, and We-Haul's representatives. No ABC representatives were present at that meeting. The Committee recommended against Board approval of the Contract.

24. On January 28, 2008, the Board disapproved the Contract.

25. Based on the Board's disapproval of the Contract, SFPUC has refused to execute the Contract and to issue a Notice to Proceed to ABC.

26. SFPUC has informed ABC that SFPUC intends to extend its existing contract with We-Haul to perform the same work that ABC would perform under the Contract. The We-Haul contract is set to expire on February 29, 2008.

FIRST CAUSE OF ACTION
(WRIT OF MANDATE—Code Civ. Proc. §1085)

27. ABC refers to and realleges all of the above paragraphs and by this reference incorporates those paragraphs as though fully set forth at length.

28. Having properly awarded the Contract to ABC, the City, by and through SFPUC, had a legal ministerial duty to execute the Contract, to timely issue a Notice to Proceed allowing ABC to begin performance under the Contract, and not to interfere with ABC's rights and obligations under the Contract.

29. The City, by and through the Board, also had a legal duty not to interfere with SFPUC's award, execution, and procession of the Contract.

30. The City violated its legal duties in that the City, by and through SFPUC, has refused to execute the Contract and timely issue a Notice to Proceed allowing ABC to begin performance under the Contract. The City also intends to violate its legal duties further by extending its contract with We-Haul.

31. The City, by and through the Board, has interfered with SFPUC's award, execution, and procession of the Contract. The Board is not authorized, under the City Charter, to approve or disapprove SFPUC contracts having a term of 10 years or less and requiring anticipated expenditures of less than $10 million. Since the Contract term is 5 years and the anticipated expenditures under the Contract are less than $8.6 million, the Board's disapproval of the Contract was unauthorized interference with SFPUC's ability to contract.

32. ABC has a beneficial pecuniary interest in the issuance of a writ of mandate, apart from that of the public at large, in that if this petition is granted, ABC will be allowed to perform under the Contract and to enjoy the rights granted to it under the Contract, including the right to payments for services it will perform under the Contract.

33. ABC does not have a plain, speedy, and adequate remedy at law. ABC is informed and believes that there are no available legal procedures to redress the harm that ABC will suffer if its requested relief is denied.

34. If the Court allows the Board's disapproval of the Contract to stand and allows SFPUC to continue in its refusal to execute and proceed with the Contract and to extend its contract with We-Haul, ABC will be irreparably harmed because ABC will be denied the opportunity to perform any work completed by the incumbent contractor, We-Haul, before this matter can be tried, and there is no legal remedy that would allow ABC to recover damages from the City to compensate it for this loss.

SECOND CAUSE OF ACTION
(DECLARATORY RELIEF—Code Civ. Proc. §526(a))

35. ABC refers to and realleges all of the above paragraphs and by this reference incorporates those paragraphs as though fully set forth at length.

36. An actual controversy exists between ABC and the City as to whether the City, by and through the SFOCA and SFPUC, has awarded an enforceable contract to ABC and whether the City, by and through the Board, was authorized to disapprove the Contract.

37. ABC contends that SFOCA awarded the Contract to ABC, that the Contract became enforceable upon award, and that the Board had no authority to disapprove the Contract, because the Contract has a term of less than 10 years and requires anticipated expenditures of less than $10 million. ABC is informed and believes that the City disputes this contention.

38. ABC requests a judicial determination that SFOCA and SFPUC awarded an enforceable contract to ABC and that the Board lacked authority to disapprove the Contract and, as a result, the Board's resolution disapproving the Contract is null and void.

39. This determination is necessary and proper because the City, by and through SFPUC, is refusing to execute and proceed with the Contract based on its contention that SFOCA and SFPUC did not award an enforceable contract to ABC and based on the Board's unauthorized disapproval of the Contract.

PRAYER FOR RELIEF

WHEREFORE, ABC respectfully prays that the court enter judgment against Defendants and Respondents as follows:

1. For an Alternative Writ of Mandate to be issued under Code of Civil Procedure section 1085, ex parte under the seal of this court, ordering:

a. The City, by and through SFPUC, to execute and proceed with the Contract immediately and not to extend the City's contract with We-Haul for the same services or, if it has already extended that contract, to terminate that extension; and

b. The City, by and through the Board, to vacate immediately its resolution disapproving the Contract; or

c. The City to show cause before this court, by February 21, 2008, or as soon thereafter as possible, at a time and place specified by court order, why the City has not done so and why a peremptory writ should not issue;

2. On return of the alternative writ and hearing on the order to show cause, for a peremptory writ of mandate to be issued under the seal of this court ordering:

a. The City, by and through SFPUC, to execute and proceed with the Contract and not to extend the City's contract with We-Haul for the same services or, if it has already extended that contract, to terminate that extension; and

b.; The City, by and through the Board, to vacate its resolution disapproving the Contract;

5. For a declaration, under Code of Civil Procedure section 526(a), that the Board was not authorized to disapprove the Contract and that its resolution purporting to disapprove the Contract is null and void;

6. For ABC's cost in this action; and

7. For such other relief as the court considers just and proper.

Dated: February 7, 2008 **JONES & PETERS LLP**

By: _____
ROBERTA JONES

Attorneys for Plaintiff and Petitioner
ABC CORPORATION

VERIFICATION

I, John Doe, the undersigned, say:

I am the General Manager of Plaintiff and Petitioner ABC Corporation. I have read the above VERIFIED PETITION FOR WRIT OF MANDAMUS (Code Civ. Proc. §1085); EX PARTE APPLICATION FOR ALTERNATIVE WRIT; and VERIFIED COMPLAINT FOR DECLARATORY RELIEF (Code Civ. Proc. §526(a)), and I am familiar with its contents. I am informed and believe that the matters stated therein are true and on that basis verify that the matters stated therein are true.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this verification is executed on February 6, 2008, in Oakland, California.

_____

JOHN DOE

Note: This sample brief has not been updated for substantive legal accuracy. It is presented as an example of form, not content, and should not be presumed accurate with regard to the state of the law. The names of the parties and attorneys have been changed for publication.

Comment: The format of attorney-drafted court papers is generally governed by Cal Rules of Ct 2.100-2.119. See also Cal Rules of Ct 3.1110-3.1116 (format requirements for civil law and motion papers, made applicable to writ petitions by Cal Rules of Ct 3.1100 and 3.1103(a)(2)).

On drafting writ petitions, see §§5.20-5.70. On the procedures for bringing a petition for an alternative writ on hearing, see §§5.108-5.118.

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II. EX PARTE APPLICATION FOR ALTERNATIVE WRIT OF MANDATE AND ORDER TO SHOW CAUSE

§13.2 A. Form: Ex Parte Application for Alternative Writ of Mandate and Order to Show Cause

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Attorneys for Plaintiff and Petitioner

ABC CORPORATION

SUPERIOR COURT OF THE STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO—
UNLIMITED JURISDICTION

ABC CORPORATION, Plaintiff and Petitioner,	**CASE NO. _ _ _ _ _ _**
vs.	**PLAINTIFF AND PETITIONER ABC CORPORATION'S EX PARTE APPLICATION FOR ALTERNATIVE WRIT OF MANDATE AND ORDER TO SHOW CAUSE WHY PEREMPTORY WRIT SHOULD NOT ISSUE**
THE CITY & COUNTY OF SAN FRANCISCO, and DOES 1-30, Defendants and Respondents.	**Date: February 7, 2008** **Time: 11:00 a.m.** **Dept.: 301 or 302** **Judge:** **Date of first filing: February 7, 2008** **Trial date:**

Plaintiff and Petitioner ABC Corporation ("ABC") hereby applies ex parte for an alternative writ of mandate under the seal of this court and an order to show cause why a peremptory writ should not issue. Specifically, ABC seeks an alternative writ compelling Defendant and Respondent the City & County of San Francisco ("the City") either to execute the contract awarded by the San Francisco Office of Contract Administration to ABC under the Invitation For Bids for the San Francisco Public Utilities Commission ("SFPUC") for a contract to perform biosolids and grit hauling services for the SFPUC ("the Contract"), issue to ABC a Notice to Proceed under the Contract, and vacate the resolution by the Board of Supervisors disapproving the Contract, immediately after receipt of alternative writ of mandate or, in the alternative, to show cause before this court at a specified time and place why it has not done so.

This application will be based on ABC's verified petition and complaint, supporting memorandum, alternative writ, notice of writ hearing, proposed order, and the Declaration of Robert Jones, all filed herewith, and such oral argument as the court allows ABC to present to the court.

Dated: February 7, 2008 **JONES & PETERS LLP**

By: _____

ROBERTA JONES

Attorneys for Plaintiff and Petitioner ABC CORPORATION

Note: This sample application is presented as an example of form, not content. The names of the parties and attorneys have been changed for publication.

Comment: The format of attorney-drafted court papers is generally governed by Cal Rules of Ct 2.100-2.119. See also Cal Rules of Ct 3.1110-3.1116 (format requirements for civil law and motion papers, made applicable to writ petitions by Cal Rules of Ct 3.1100 and 3.1103(a)(2)); Cal Rules of Ct 3.1200-3.1207 (requirements for ex parte applications).

On drafting an ex parte application for an alternative writ, see §§5.113-5.117.

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§13.3 B. Form: Memorandum in Support of Ex Parte Application for Alternative Writ of Mandate and Order to Show Cause

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Attorneys for Plaintiff and Petitioner

ABC CORPORATION

SUPERIOR COURT OF THE STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO—
UNLIMITED JURISDICTION

ABC CORPORATION, Plaintiff and Petitioner, vs. THE CITY & COUNTY OF SAN FRANCISCO, and DOES 1-30, Defendants and Respondents.	**CASE NO. _ _ _ _ _ _** **MEMORANDUM IN SUPPORT OF PLAINTIFF AND PETITIONER ABC CORPORATION'S EX PARTE APPLICATION FOR ALTERNATIVE WRIT OF MANDATE AND ORDER TO SHOW CAUSE WHY PEREMPTORY WRIT SHOULD NOT ISSUE** **Date: February 7, 2008** **Time: 11:00 a.m.** **Dept.: 301 or 302** **Judge:** **Date of first filing: February 7, 2008** **Trial date:**

I. INTRODUCTION

ABC Corporation ("ABC") requires immediate court action to prevent the irreparable injury that it will suffer if the City & County of San Francisco ("the City") continues its refusal to execute and proceed with the contract it awarded to ABC for hauling services ("the Contract") and extends its existing contract with We-Haul Company ("We-Haul") to perform the same work.

In February 2007, the City determined that the contract for hauling biosolids and grit from the City's wastewater treatment facilities, performed sole source by We-Haul since the 1950s, should be put out to competitive bid. In its solicitation for the work, the City stated that it would award the Contract to the lowest responsive and responsible bidder.

After the City received bids and correctly determined that ABC was the lowest (and the only) responsive and responsible bidder, it conditionally awarded the Contract to ABC. ABC satisfied all of the conditions stated in the conditional award (by submitting the required documents and confirmation), the award became final, and the Contract became effective and enforceable. All that remained to be done was for the City to execute the Contract—a ministerial act.

Rather than executing the Contract as it was legally obligated to do, the City submitted the Contract to the City's Board of Supervisors for approval. The Board disapproved the award, and, based on that disapproval, the City has refused to execute the Contract and issue a Notice to Proceed allowing ABC to start performance and intends to extend its contract with We-Haul, set to expire February 29, 2008. The City's actions are illegal because the Board had no authority to disapprove the Contract. Under the City Charter, the Board's contract approval authority applies only to contracts for more than $10 million or longer than 10 years. The Contract between ABC and the City is neither.

Under these circumstances, the court should order the City to execute and proceed with the Contract. *Transdyn/Cresci JV v City & County of San Francisco* (1999) 72 CA4th 746, and the California Supreme Court cases on which it relies, are directly on point. Unless the court takes immediate action, the City will cause ABC irreparable harm by preventing ABC from performing under the Contract. Instead the City will have We-Haul continue to perform for an indefinite period under its existing, higher-priced contract, even though We-Haul submitted a non-responsive and higher-priced bid in this competition, and even though ABC was awarded the new Contract. As a result, the court should issue an alternative writ compelling the City to execute and proceed with the Contract with ABC and an order to show cause by February 21, 2008, or as soon thereafter as possible, why a peremptory writ of mandamus should not issue.

II. STATEMENT OF FACTS

The City has contracted for biosolids and grit hauling services with one contractor—We-Haul—under a sole source contract since the 1950s. (Verified Petition, Exh. B (City Budget Analyst Report).) In the past year, the City decided to end this practice and put these services out for competitive bidding for the first time in 50 years.

In February 2007, the City, by and through the San Francisco Office of Contract Administration ("SFOCA"), issued an Invitation For Bids ("IFB") for the San Francisco Public Utilities Commission ("SFPUC") for a contract to perform biosolids and grit hauling services for the SFPUC ("the Contract"). (Verified Petition, Exh. A (IFB).) The IFB provided, among other things, that the Contract term would be 5 years. (*Id.,* Exh. A, General Conditions, ¶28 (Contract Term).) Bidders were required to provide a fixed price for that period. The IFB also provided that the parties could, by mutual agreement, extend the contract twice for up to 2 years for each extension. Any such extension would be on terms agreed to by the parties at the time. (*Id.,* Exh. A, General Conditions, ¶29.) The IFB also stated that SFPUC would award the Contract to the low responsive and responsible bidder. (*Id.,* Exh. A, Special Conditions, ¶79.)

ABC timely submitted a bid in response to the IFE. ABC bid to perform the 5-year Contract for $3.32 per mile for biosolids hauling, and $3.14 for grit hauling, which equated to an estimated $8,577,092 for the 5-year term of the Contract. (Verified Petition, Exh. B (City Budget Analyst Report, pp. 33, 35).)

Under the existing sole source contract for the same services, the incumbent provider, We-Haul, was performing at an estimated cost to the City that was approximately 26 percent higher than ABC's bid price. (Verified Petition, Exh. B (City Budget Analyst Report, p. 37).)

[*Remainder of text of Statement of Facts omitted.*]

III. ARGUMENT

A. The Court Should Grant ABC's Ex Parte Application for an Alternative Writ.

1. This Court Is Responsible for Determining Whether the City's Actions Are Illegal or Prejudicial Abuses of Discretion.

A court may issue a writ of mandate "to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust or station." (Code Civ. Proc. §1085.) Mandate lies when (1) the respondent has a clear, present duty to act, and (2) the petitioner has a beneficial right to performance of that duty. *People ex. rel. Younger v County of El Dorado* (1971) 5 C3d 480, 491; *TransdynlCresci JV v City & County of San Francisco* (1999) 72 CA4th 746, 752. Code of Civil Procedure section 1086 provides that when a verified petition is submitted by a party "beneficially interested," a writ "must issue where there is not a plain, adequate speedy remedy in the ordinary course of law."

In this proceeding, the court must "determine whether [the City's] actions have been arbitrary or capricious, entirely lacking in evidentiary support, or whether it failed to follow the proper procedures." *Boydston v Napa Sanitation Dist.* (1990) 222 CA3d 1362, 1369. The refusal of a California public entity to execute a contract that it had already properly awarded based on competitive bidding is an abuse of discretion, properly remedied by issuance of a writ of mandate. (*Transdyn/Cresci JV v. City & County of San Francisco, supra,* 72 CA4th at p. 758.)

Here, the City, by and through SFPUC, abused its discretion and failed to follow its announced procedures by refusing to execute and proceed with the Contract after the City awarded it to ABC. In addition, the City, by and through the Board, acted illegally by disapproving the Contract even though both the amount and term of the Contract were below the minimums stated in the City Charter provision that authorizes Board review of SFPUC contracts. This proceeding is ABC's only recourse.

As explained below, SFPUC had a clear and present duty to execute and proceed with the Contract with ABC, and the Board had a clear and present duty not to interfere with the Contract. Enforcement of these criteria would benefit ABC because it would allow it to start performing the Contract and enjoying the benefit of its bargain with the City. Accordingly, the court should order the City to execute the Contract and to issue a Notice to Proceed to ABC or to show cause why a peremptory writ should not issue.

[*Remainder of text of Section 1 omitted.*]

2. ABC Is a Beneficially Interested Party and Has No Adequate Remedy at Law.

As the low responsive and responsible bidder for the Contract, ABC is clearly a "party beneficially interested" with standing to seek a writ. (See, *e.g., Transdyn/Cresci JV v City & County of San Francisco, supra,* 72 CA4th 746.) Because the Contract has been awarded to ABC but the City has allowed performance by We-Haul to continue, ABC has no adequate remedy at law. (*Id.*; see also *Pozar v Department of Transp. (*1983) 145 CA3d 269, 271 [pending contract award and performance established that losing bidder had no adequate remedy at law other than issuance of a writ of mandate].)

An illegal extension of the City's contract with We-Haul will cause ABC to suffer loss of potential profits. ABC will also lose the prestige, publicity, good will, and other potential business opportunities that might arise by virtue of performing the Contract. Moreover, even if ABC could establish its monetary damages with reasonable certainty, lost profits are not recoverable against the City. (*Kajima/Ray Wilson v L.A. County Metro.* (2000) 23 C4th 305, 315-21; *Swinerton & Walberg Co. v City of Inglewood-L.A. County Civic Ctr. Auth.* (1974) 40 CA3d 98, 103)

Therefore, as a matter of law, ABC will suffer irreparable injury because it will not be able to recover damages for the City's blatant violation of law. The City's refusal to execute the Contract and its threatened extension of the contract with We-Haul irreparably harm both ABC and the public. Unless restrained by the court, the City will undermine public confidence in the accountability of government and the integrity of its laws, and a nonresponsive higher-priced incumbent will have been allowed to continue hauling biosolids and grit for the City instead of ABC as the lowest responsible and responsive bidder.

IV. CONCLUSION

For the foregoing reasons, ABC respectfully requests that this court issue an alternative writ and an order to show cause why a peremptory writ should not issue. Because the City's contract with We-Haul will expire (unless extended) on February 29, 2008, and ABC will start incurring irreparable harm immediately thereafter, ABC requests that the court set the hearing on the order to show cause by February 21, 2008.

Dated: February 7, 2008 **JONES & PETERS LLP**

By:_____
ROBERTA JONES

Attorneys for Plaintiff and Petitioner
ABC CORPORATION

Note: This sample brief has not been updated for substantive legal accuracy. It is presented as an example of form, not content, and should not be presumed accurate with regard to the state of the law. The names of the parties and attorneys have been changed for publication.

Comment: The format of attorney-drafted court papers is generally governed by Cal Rules of Ct 2.100-2.119. See also Cal Rules of Ct 3.1110-3.1116 (format requirements for civil law and motion papers, made applicable to writ petitions by Cal Rules of Ct 3.1100 and 3.1103(a)(2)); Cal Rules of Ct 3.1200-3.1207 (requirements for ex parte applications).

On drafting an ex parte application for an alternative writ, see §§5.113-5.117.

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§13.4 C. Form: Declaration of Notice in Support of Ex Parte Application for Alternative Writ of Mandate and Order to Show Cause

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Attorneys for Plaintiff and Petitioner

ABC CORPORATION

SUPERIOR COURT OF THE STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO—
UNLIMITED JURISDICTION

ABC CORPORATION, Plaintiff and Petitioner,	**CASE NO. _ _ _ _ _ _**
vs.	**DECLARATION OF ROBERTA JONES IN SUPPORT OF PLAINTIFF AND PETITIONER'S EX PARTE APPLICATION FOR AN ALTERNATIVE WRIT OF MANDATE AND ORDER TO SHOW CAUSE WHY PEREMPORY WRIT SHOULD NOT ISSUE**
THE CITY & COUNTY OF SAN FRANCISCO, and DOES 1-30, Defendants and Respondents.	**Date: February 7, 2008** **Time: 11:00 a.m.** **Dept.: 301 or 302** **Judge:** **Date of first filing: February 7, 2008** **Trial date:**

I, ROBERTA JONES, declare:

1. I am an attorney at law duly licensed to practice before all courts of the State of California and am a shareholder in the law firm of Jones & Peters LLP, counsel of record for Plaintiff and Petitioner ABC Corporation ("ABC"). I make this declaration in support of ABC's ex parte application for an alternative writ of mandate. I have personal knowledge of the facts set forth herein, and if called as a witness, could and would testify competently hereto.

2. At approximately 9:20 a.m. on Wednesday, February 6, 2008, I notified the City Attorney's Office for the City & County of San Francisco that ABC would be appearing ex parte at 11:00 a.m. on February 7, 2008, in Department 301 or 302 of this court, as assigned, to apply for an alternative writ of mandate and an order to show cause why a peremptory writ of mandate should not issue. Specifically, I spoke to Rachel Smythe, whom I understand to be the City Attorney responsible for the contract awarded to ABC and the subject of ABC's application and petition.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge.

Executed this 6th day of February 2008, at San Francisco, California.

_____
ROBERTA JONES

Note: This sample declaration is presented as an example of form, not content. The names of the parties and attorneys have been changed for publication.

Comment: The format of attorney-drafted court papers is generally governed by Cal Rules of Ct 2.100-2.119. See also Cal Rules of Ct 3.1110-3.1116 (format requirements for civil law and motion papers, made applicable to writ petitions by Cal Rules of Ct 3.1100 and 3.1103(a)(2)); Cal Rules of Ct 3.1200-3.1207 (requirements for ex parte applications).

On drafting an ex parte application for an alternative writ, see §§5.113-5.117.

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§13.5 D. Form: Proposed Order Directing Issuance of Alternative Writ of Mandate

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Attorneys for Plaintiff and Petitioner

ABC CORPORATION

SUPERIOR COURT OF THE STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO—
UNLIMITED JURISDICTION

ABC CORPORATION, Plaintiff and Petitioner,	**CASE NO. _ _ _ _ _ _**
vs.	**[PROPOSED] ORDER DIRECTING ISSUANCE OF ALTERNATIVE WRIT OF MANDATE**
THE CITY & COUNTY OF SAN FRANCISCO, and DOES 1-30, Defendants and Respondents.	**_____ Date: February 7, 2008 Time: 11:00 a.m. Dept.: 301 or 302 Judge: Date of first filing: February 7, 2008 Trial date:**

Good cause appearing, the ex parte application for an alternative writ of mandate of Plaintiff and Petitioner ABC Corporation ("ABC") on file in this proceeding is GRANTED.

IT IS ORDERED that an alternative writ of mandate issue under the seal of this court compelling Defendant and Respondent the City & County of San Francisco ("the City") either to execute the contract awarded by the San Francisco Office of Contract Administration to ABC under the Invitation For Bids for the San Francisco Public Utilities Commission ("SFPUC") for a contract to perform biosolids and grit hauling services for the SFPUC ("the Contract"), issue to ABC a Notice to Proceed under the Contract, and vacate the resolution by the Board of Supervisors disapproving the Contract, immediately after receipt of alternative writ of mandate or, in the alternative, to show cause before this court in Department ____ on _____ at _____ o'clock why it has not done so.

IT IS SO ORDERED.

Dated: February 7, 2008 **By: _____**
Superior Court Judge

Note: This sample order is presented as an example of form, not content. The names of the parties and attorneys have been changed for publication.

Comment: The format of attorney-drafted court papers is generally governed by Cal Rules of Ct 2.100-2.119. See also Cal Rules of Ct 3.1110-3.1116 (format requirements for civil law and motion papers, made applicable to writ petitions by Cal Rules of Ct 3.1100 and 3.1103(a)(2)); Cal Rules of Ct 3.1200-3.1207 (requirements for ex parte applications).

In addition to the date for the return, counsel can include a proposed briefing schedule and date for the hearing on the merits of the petition. Counsel may also wish to confer beforehand on possible briefing schedules and hearing dates and propose them to the court.

On drafting an ex parte application for an alternative writ, see §§5.113-5.117.

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§13.6 E. Form: Alternative Writ of Mandate

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Attorneys for Plaintiff and Petitioner

ABC CORPORATION

SUPERIOR COURT OF THE STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO—
UNLIMITED JURISDICTION

ABC CORPORATION, Plaintiff and Petitioner, vs. THE CITY & COUNTY OF SAN FRANCISCO, and DOES 1-30, Defendants and Respondents.	**CASE NO. _ _ _ _ _ _** **ALTERNATIVE WRIT OF MANDATE** **_____** **Date: February 7, 2008** **Time: 11:00 a.m.** **Dept.: 301 or 302** **Judge:** **Date of first filing: February 7, 2008** **Trial date:**

TO THE CITY & COUNTY OF SAN FRANCISCO ("THE CITY"), RESPONDENTS:

Good cause appearing, the ex parte application of Plaintiff and Petitioner ABC Corporation ("ABC") for an alternative writ of mandate on file in this proceeding is GRANTED.

THE CITY IS HEREBY COMPELLED by order of this court made on February 8, 2008, either to execute the contract awarded by the San Francisco Office of Contract Administration to ABC under the Invitation For Bids for the San Francisco Public Utilities Commission ("SFPUC") for a contract to perform biosolids and grit hauling services for the SFPUC ("the Contract"), issue to ABC a Notice to Proceed under the Contract, and vacate the resolution by the Board of Supervisors disapproving the Contract, immediately after receipt of alternative writ of mandate or, in the alternative, to show cause before this court in Department ____ on _____ at _____ o'clock why it has not done so.

Dated: February 7, 2008 **By:_____**
Deputy Clerk

Note: This sample alternative writ is presented as an example of form, not content. The names of the parties and attorneys have been changed for publication.

Comment: The format of attorney-drafted court papers is generally governed by Cal Rules of Ct 2.100-2.119. See also Cal Rules of Ct 3.1110-3.1116 (format requirements for civil law and motion papers, made applicable to writ petitions by Cal Rules of Ct 3.1100 and 3.1103(a)(2)); Cal Rules of Ct 3.1200-3.1207 (requirements for ex parte applications).

In addition to the date for the return, the court may include a briefing schedule and date for the hearing on the

merits of the petition.

On drafting an ex parte application for an alternative writ, see §§5.113-5.117.

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§13.7 F. Form: Notice of Hearing on Petition for Writ of Mandate

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Attorneys for Plaintiff and Petitioner ABC CORPORATION

SUPERIOR COURT OF THE STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO—
UNLIMITED JURISDICTION

ABC CORPORATION, Plaintiff and Petitioner,	**CASE NO. _ _ _ _ _ _**
vs.	**NOTICE OF HEARING ON PLAINTIFF AND PETITIONER ABC CORPORATION'S PETITION FOR WRIT OF MANDATE (Code Civ. Proc. §1085)**
THE CITY & COUNTY OF SAN FRANCISCO, and DOES 1-30, Defendants and Respondents.	**_____**
	Date:
	Time:
	Dept.:
	Date of first filing: February 7, 2008
	Trial date:

TO ALL PARTIES AND THE COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on _____, at _____, in Department ____ of the above-named court located at 400 McAllister Street, San Francisco, CA 94102, Plaintiff and Petitioner ABC Corporation's petition for a writ of mandate under Code of Civil Procedure section 1085 will be heard by the Honorable Superior Court Judge _____.

Dated: February 7, 2008 **JONES & PETERS LLP**

By:_____
ROBERTA JONES

Attorneys for Plaintiff and Petitioner
ABC CORPORATION

Note: This sample notice is presented as an example of form, not content. The names of the parties and attorneys have been changed for publication.

Comment: The format of attorney-drafted court papers is generally governed by Cal Rules of Ct 2.100-2.119. See also Cal Rules of Ct 3.1110-3.1116 (format requirements for civil law and motion papers, made applicable to writ petitions by Cal Rules of Ct 3.1100 and 3.1103(a)(2)); Cal Rules of Ct 3.1200-3.1207 (requirements for ex parte applications).

Counsel can use this form following the issuance of an alternative writ to give notice to the opposing party of the hearing date on the merits of the petition. It can be completed when the court issues the alternative writ and served with it or served at a later date.

On drafting an ex parte application for an alternative writ, see §§5.113-5.117.

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III. APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE

§13.8 A. Form: Ex Parte Application for Temporary Restraining Order and Order to Show Cause

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Attorneys for Petitioner JANE DOE

SUPERIOR COURT OF THE STATE OF CALIFORNIA
CITY AND COUNTY OF SAN DIEGO, NORTH COUNTY DIVISION

JANE DOE,	)	**CASE NO. 123456**
	)	
Petitioner,	)	**PETITIONER'S EX PARTE**
	)	**APPLICATION FOR**
vs.	)	**TEMPORARY RESTRAINING**
	)	**ORDER AND ORDER TO**
CITY OF SAN DIEGO,	)	**SHOW CAUSE;**
	)	**MEMORANDUM IN SUPPORT**
Respondent;	)	**THEREOF**
	)	_____
	)	**Date: April 25, 2008**
	)	**Time: 8:30 a.m.**
	)	**Dept.: 00**
_____	)	**Judge: Honorable Robert Smith**
ABC Corporation,		
		Action filed: April 18, 2008
Real Party in Interest.		**Trial date: Not set**

Petitioner Jane Doe does hereby move ex parte for a temporary restraining order to rescind project approval and stop construction on the project at issue in this proceeding pending this Court's consideration of petitioner's motion for a preliminary injunction.

Petitioner has provided Respondent City of San Diego and Real Party in Interest ABC Corporation with notice of her intention to seek ex parte relief. (Declaration of Roberta Jones in Support of Petitioner's Ex Parte Application for Temporary Restraining Order and Order to Show Cause, ¶1.) Petitioner is informed and believes that respondent is represented by:

Brian Thomas, City Attorney
City of San Diego
15 Circle Drive, Suite 100
San Diego, CA 92101
619-123-4567
619-456-7891 (fax)

Real Party in Interest is represented by:

Lucy Adams
100 University Avenue
San Diego, CA 92101

619-987-6543
619-654-3219 (fax)

MEMORANDUM

This action challenges the failure of Respondent City of San Diego to comply with its own municipal code and building requirements by allowing Real Party in Interest ABC Corporation to build homes several feet higher than allowed. Respondent approved a Design Review and Coastal Development Permit for ABC that allows construction of nine single-family residences within the Coastal Zone on a 2.3-acre site at 100 Main Street in the City of San Diego ("the Project"). The Project approvals allow the homes to be built several feet higher than allowed by code—specifically, the pads for the homes are to be raised by several feet and the height of the homes will be measured from that raised elevation, in direct violation of code requirements.

Although the site remained inactive for many months, just 2 days after this proceeding was filed, substantial grading, surveying, and other construction work began occurring at the site. Petitioner seeks a temporary restraining order to halt the Project approvals and ensure that construction does not proceed in direct violation of City requirements.

STATEMENT OF FACTS

On October 22, 2007, the City's Planning Commission approved a tentative map, major use permit, and coastal development permit for development of nine homes on the approximately 2.3-acre site (Resolution No. 2007-00). (Jones Decl., Exh. 1.) The findings for this approval indicated, among other things, that "[f]uture construction of single-family residences must comply with all applicable development standards, including but not limited to *building height*." (Jones Decl., Exh. 1, p. 5 [emphasis added].) The approved Tentative Map did not establish the elevation from which the heights of the buildings would be measured. (Jones Decl., Exh. 2.)

[*Remainder of text of Statement of Facts omitted.*]

ARGUMENT

I. Legal Standards

This Court has "inherent power" to "exercise reasonable control over litigation before it." (*Venice Canals Resident Home Owners Ass'n v Superior Court* (1977) 72 CA3d 675, 679.) A court may issue a temporary restraining order when the relief consists of restraining the commission or continuance of an act; when money damage would be inadequate; or when it is extremely difficult to measure the full extent of damages suffered by the plaintiff. (Code Civ. Proc. §526(a)(1), (4)-(5).)

The granting of such relief involves the evaluation of two interrelated factors. First, the Court must evaluate the likelihood that the plaintiff will prevail on the merits at trial. Second, the Court must evaluate the interim harm that the plaintiff is likely to suffer if the injunction is denied, as compared to the harm that the defendant is likely to suffer if the injunction is issued. (*Butt v State of California* (1992) 4 C4th 668, 678.) In weighing the relative hardships, the Court must also balance the respective equities of the parties. (*Robbins v Superior Court* (1985) 38 C3d 199, 206.)

II. Petitioner Is Likely to Prevail on the Merits

San Diego Municipal Code section 30.04 defines the term "building height" to mean: "[t]he vertical distance of the *lower* of the natural or finished exterior grade adjacent to the structure, to the highest point of the structure immediately above." (Jones Decl., Exh. 6 [emphasis added].) Respondent approved the Project allowing for raised pad heights from which the 26-foot building heights would be measured. The pads will be raised by four or five feet (and possibly more), in effect resulting in even taller homes in the community. (Jones Decl., Exh. 4, pp. 1-4.) Respondent did not require ABC to measure the building heights from the natural grade, even though the natural grade is five feet or more below the planned finished grade. (Jones Decl, Exh. 5, p. A-2.)

[*Remainder of text of Section II omitted.*]

III. The Balance of Equities Tips Sharply in Favor of Granting a Restraining Order

A restraining order will ensure that work is not performed at the site that precludes an appropriate remedy. The building pads should not be raised and finished now, and construction begun, such that a remedy after a hearing on the merits would require the tearing down of buildings and removal of other structures to ensure compliance with the City's height limitations. Allowing the Project to proceed would jeopardize the ability of petitioner to obtain adequate relief after a hearing on the merits.

Allowing the Project would also impact the existing community by allowing homes that are substantially greater in height than the homes currently there. The area is known for its eclectic, even "funky," community character. (Declaration of John Doe in Support of Ex Parte Application for Temporary Restraining Order, ¶2-5; Jones Decl., Exh. 15, pp. 1-3 [October 2004 staff report stating: "The surrounding neighborhood maintains an eclectic mix of residential types and lot sizes, and a variety of old and new residences"].) Allowing large homes to be built several feet above the existing ground level would substantially impact the community's character. (Doe Decl., ¶5.) It would also impact views. (Doe Decl., ¶6.)

Furthermore, allowing the Project to proceed would reward illegal behavior by allowing the City to violate its own municipal code. Respondent and real party in interest have no good argument against a brief delay until petitioner's motion for a preliminary injunction can be heard. There is nothing a brief delay would prevent that needs to be accomplished in the short term.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the Court grant a temporary restraining order withdrawing the Project's approval and prohibiting respondent and real party in interest from taking any steps to further the Project.

Dated: April 24, 2008 **JONES & PETERS LLP**

By:_____
ROBERTA JONES

Attorneys for Petitioner
JANE DOE

Note: This sample application has not been updated for substantive legal accuracy. It is presented as an example of form, not content, and should not be presumed accurate with regard to the state of the law. The names of the parties and attorneys have been changed for publication.

Comment: The format of attorney-drafted court papers is generally governed by Cal Rules of Ct 2.100-2.119. See also Cal Rules of Ct 3.1110-3.1116 (format requirements for civil law and motion papers, made applicable to writ petitions by Cal Rules of Ct 3.1100 and 3.1103(a)(2)); Cal Rules of Ct 3.1200-3.1207 (requirements for ex parte applications).

On drafting an application for a temporary restraining order and order to show cause, see §§6.31-6.32.

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Source: Civil Litigation/California Civil Writ Practice/13 Superior Court Forms/§13.9 B. Form: Proposed Temporary Restraining Order and Order to Show Cause

§13.9 B. Form: Proposed Temporary Restraining Order and Order to Show Cause

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Attorneys for Petitioner JANE DOE

SUPERIOR COURT OF THE STATE OF CALIFORNIA
CITY AND COUNTY OF SAN DIEGO, NORTH COUNTY DIVISION

JANE DOE,	)	**CASE NO. 123456**
	)	
Petitioner,	)	**[PROPOSED] TEMPORARY**
	)	**RESTRAINING ORDER AND**
vs.	)	**ORDER TO SHOW CAUSE**
	)	_____
CITY OF SAN DIEGO,	)	**Date: April 25, 2008**
	)	**Time: 8:30 a.m.**
Respondent;	)	**Dept.: 00**
_____	)	**Judge: Honorable Robert Smith**
ABC Corporation,		**Action filed: April 18, 2008**
		Trial date: Not set
Real Party in Interest.		

RESPONDENT CITY OF SAN DIEGO AND REAL PARTY IN INTEREST ABC CORPORATION ARE HEREBY ORDERED TO SHOW CAUSE on _____, 2008, or as soon thereafter as counsel may be heard in Department 00 of this Court, why you, your agents, servants, assigns, and all those acting in concert with you should not be restrained and enjoined pending a hearing on the merits of the petition from issuing any permits, authorizations, or any other action to authorize any grading or soil disturbing or any construction of building pads or homes on the site and are further ordered to revoke the Design Review and Coastal Development Permit issued to real party in interest ABC Corporation, and any other steps that have been taken to date to allow grading or soil disturbing or any construction of building pads or homes on the site at 100 Main Street in San Diego, California.

PENDING HEARING on the above Order to Show Cause, RESPONDENT CITY OF SAN DIEGO AND REAL PARTY IN INTEREST ABC CORPORATION, any agents, servants, assigns, and anyone acting in concert with you, ARE HEREBY RESTRAINED AND ENJOINED from taking any action, including grading, demolition, or construction activities, that would disturb, destroy, or remove any existing feature on the site at 100 Main Street in San Diego, California, developing any building pads or homes on the site, or otherwise altering the status quo, except site maintenance for the control of stormwater runoff.

The following briefing schedule shall apply: Any opposition papers to the Order to Show Cause shall be filed and served on petitioner no later than _____. Any reply papers shall be filed and served on respondent and real party in interest no later than _____.

IT IS SO ORDERED.

Dated: _____ By: _____ Superior Court Judge

Note: This sample temporary restraining order and order to show cause is presented as an example of form, not content. The names of the parties and attorneys have been changed for publication.

Comment: The format of attorney-drafted court papers is generally governed by Cal Rules of Ct 2.100-2.119. See also Cal Rules of Ct 3.1110-3.1116 (format requirements for civil law and motion papers, made applicable to writ petitions by Cal Rules of Ct 3.1100 and 3.1103(a)(2)); Cal Rules of Ct 3.1200-3.1207 (requirements for ex parte applications).

On drafting an application for a temporary restraining order and order to show cause, see §§6.31-6.32.

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IV. DEMURRER TO PETITION FOR WRIT OF MANDATE

§13.10 A. Form: Demurrer to Petition for Writ of Mandate

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GINGER FRANKLIN
STATE LABOR COMMISSIONER
BY: OLIVER DENNIS, Senior Counsel [State Bar No. 8000000]
525 Golden Gate Avenue
San Francisco, California 94102
Telephone: 123-678-9012
Attorney for Respondent

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR SAN FRANCISCO COUNTY

Mary Jones, Frank Fuentes, and Angela Goetz, Petitioners,	**CASE NO. 123456**
vs.	**DEMURRER TO PETITION FOR WRIT OF MANDATE**
California State Labor Commissioner, Respondent.	**Date:** **Time:** **Dept:**
Hank Duval and Nancy Brower, Center Restaurant Association; Hotel and Restaurant Employees and Bartenders' Union, Local A, Real Parties in Interest.	

Ginger Franklin, Labor Commissioner and Chief, Division of Labor Standards Enforcement, Department of Industrial Relations, demurs to the Petition for a Writ of Mandate herein on the following grounds:

1. This Court is without jurisdiction to hear this matter because this Petition fails to state facts showing entitlement to relief in that the petitioners have failed to show that a writ of mandate is necessary to protect a substantial right.

2. This Court is without jurisdiction to hear this matter because this Petition fails to state facts showing entitlement to relief in that the petitioners have a plain, speedy, and adequate remedy in the ordinary course of law.

3. The Petition does not state facts sufficient to constitute a cause of action in that the order the petitioners seek cannot be granted because it would be contrary to law.

WHEREFORE, respondent prays that this demurrer be sustained without leave to amend, that the petition be dismissed, and that the Court grant all the relief it considers proper.

DIVISION OF LABOR STANDARDS ENFORCEMENT

Dated: _ _ _ _ _ _

_____
OLIVER DENNIS
Attorney for Respondent

Note: This sample demurrer is presented as an example of form, not content, and should not be presumed accurate with regard to the state of the law. The names of the parties and attorneys have been changed for publication.

Comment: The format of attorney-drafted court papers is generally governed by Cal Rules of Ct 2.100-2.119. See also Cal Rules of Ct 3.1110-3.1116 (format requirements for civil law and motion papers, made applicable to writ petitions and demurrers by Cal Rules of Ct 3.1100 and 3.1103(a)(2), (c)).

On drafting a demurrer to a writ petition, see §§8.40-8.44.

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§13.11 B. Form: Memorandum in Support of Demurrer to Petition for Writ of Mandate

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STATE LABOR COMMISSIONER
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Attorney for Respondent

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR SAN FRANCISCO COUNTY

Mary Jones, Frank Fuentes, and Angela Goetz, Petitioners,	**CASE NO. 123456**
vs.	**MEMORANDUM IN SUPPORT OF DEMURRER TO PETITION FOR WRIT OF MANDATE**
California State Labor Commissioner, Respondent.	**Date:** **Time:** **Dept:**
Hank Duval and Nancy Brower, Center Restaurant Association; Hotel and Restaurant Employees and Bartenders' Union, Local A, Real Parties in Interest.	

MANDATE WILL NOT LIE WHERE THERE IS A PLAIN, SPEEDY, AND ADEQUATE ALTERNATIVE REMEDY

Generally, a writ of mandate will lie only when there is no plain, speedy, and adequate alternative remedy, when the Respondent has a clearly defined duty to perform, and when the Petitioner has a clear and beneficial right to performance. (*Payne v Superior Court* (1976) 17 C3d 908, 925.)

It is the Petitioner's burden to establish the inadequacy of other relief. (*Phelan v Superior Court* (1950) 35 C2d 363, 366.) A remedy is not inadequate merely because more time would be consumed by pursuing it through the ordinary channels.

[*Text omitted.*]

A writ must be issued in all cases where there is no plain, speedy, and adequate remedy in the ordinary course of law. It must be issued upon the verified petition of the party beneficially interested.

The verification of the Petition herein is signed by an attorney who also represented one of the real parties in this matter.

The verification purports to be based upon the attorney's personal knowledge. The verification does not explain how the facts contained in paragraph 6 of the Petition can be based on the personal knowledge of the attorney. Nor does it explain how it can be within the personal knowledge of the attorney that petitioners first learned of the underpayment of the collectively bargained rate of pay in December of 1983 as alleged in paragraph 8 of the Petition.

The verification fails to comply with Code of Civil Procedure section 446 in that it does not explain why the attorney and not the beneficially interested Petitioners signed the verification.

CONCLUSION

For all the reasons outlined above, the demurrer of Respondent should be sustained without leave to amend.

Dated: _ _ _ _ _ _ **Respectfully submitted,**

_____
OLIVER DENNIS
Senior Counsel

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Comment: The format of attorney-drafted court papers is generally governed by Cal Rules of Ct 2.100-2.119. See also Cal Rules of Ct 3.1110-3.1116 (format requirements for civil law and motion papers, made applicable to writ petitions and demurrers by Cal Rules of Ct 3.1100 and 3.1103(a)(2), (c)).

On drafting a demurrer to a writ petition, see §§8.40-8.44.

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V. OPPOSITION TO PETITION FOR WRIT OF MANDATE

§13.12 A. Form: Opposition to Petition for Writ of Mandate

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Attorneys for Defendant and Respondent

CITY AND COUNTY OF SAN FRANCISCO

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO—
UNLIMITED JURISDICTION

ABC CORPORATION, Plaintiff and Petitioner, vs. THE CITY & COUNTY OF SAN FRANCISCO, and DOES 1-30, Defendants and Respondents.	**CASE NO. 123-456** **CITY AND COUNTY OF SAN FRANCISCO'S OPPOSITION TO PETITION FOR WRIT OF MANDATE** **Hearing date: March 10, 2008** **Time: 9:30 a.m.** **Place: 302** **Action filed: February 7, 2008** **Trial date: N/A**

INTRODUCTION

San Francisco Charter Section 9.118 requires City departments to submit for Board of Supervisors approval any contract involving anticipated expenditures of more than $10 million. Of course, in the real world, it is sometimes difficult to estimate precisely how much a contract will require the City to spend. The question presented by this case is as follows: When a City department cannot definitively predict the City's total expenditures under the contract, but believes there is a significant possibility that they will exceed $10 million, may the department submit that contract to the Board of Supervisors for approval?

The only sensible answer to this question is "yes." The San Francisco voters enacted Charter Section 9.118 with the singular purpose of imposing a measure of oversight and fiscal accountability in City contracting. They sought to ensure that if a contract requires the City to spend such a large amount of taxpayer dollars, the final decision would rest with the elected body responsible for the City's budget, not with an unelected departmental employee. A rule preventing departments from submitting contracts to the Board for approval unless those contracts are certain to exceed $10 million would run contrary to the voters' intent.

The contract at issue here was not readily subject to a cost projection. The bid submitted by ABC Corporation ("ABC") was based not on a specific dollar figure but rather on an amount to be charged per mile traveled over the next 5 years hauling biosolids and grit from the City's wastewater treatment plants to sites outside San Francisco. Although the Public Utilities Commission ("PUC") assigned a rough dollar value to the bid ($8.32 million), it made clear from the start that this estimate was unreliable, that the true amount that the City would ultimately be required to pay under the contract was likely to deviate greatly from the estimate, and that there was a significant possibility that the cost of the contract would exceed $10 million over the 5-year term. That is because, among other things, the number of miles to be traveled under the hauling contract was

subject to numerous variables. While the estimate provided a useful tool for the policymakers to compare one bid against the other, it was not very useful for projecting the total cost of the contract.

Having been made aware of the uncertainty of the estimate by the PUC, and having been made aware from the start that there was a significant possibility the contract would exceed $10 million, the Office of Contract Administration ("OCA") decided from the start of the process to submit the contract for Board approval. Moreover, OCA informed ABC of the need for Board approval months before the vote, and ABC never questioned the Board's jurisdiction to consider the contract until it became dissatisfied with the Board's decision. Now, ABC appears to seek a ruling that would effectively prevent a department from submitting a contract to the Board for approval if the department is not certain that the contract will exceed $10 million. Because this would be contrary to the purposes of Charter Section 9.118, the Court should deny the petition for a writ of mandate.

BACKGROUND

In this Section, the City will address three key misimpressions left by ABC's opening papers: (A) the misimpression that the Board of Supervisors jumped in at the eleventh hour to disapprove the contract, thereby "interfering" with the ability of OCA to make the award; (B) the misimpression that ABC was somehow blindsided by OCA's submission of the contract to the Board; and, most importantly (C) the misimpression that the 5-year contract could not require expenditures of more than $10 million by the City.

[*Remainder of text of Background omitted.*]

LEGAL STANDARD

The legal standard cited by ABC is accurate, and it is very important given the facts of this case. The Court must "determine whether [the City's] actions have been arbitrary or capricious, *entirely lacking in evidentiary support,* or whether it failed to follow the proper procedures." (*Boydston v Napa Sanitation Dist.* (1990) 222 CA3d 1362, 1369 [emphasis added].)

DISCUSSION

I. THE PURPOSE OF CHARTER SECTION 9.118(b) IS TO PREVENT DEPARTMENTS FROM COMMITTING THE CITY TO SPENDING LARGE SUMS OF CITY DOLLARS WITHOUT FISCAL OVERSIGHT FROM ACCOUNTABLE POLICYMAKERS.

In 1988, the San Francisco voters imposed on City departments a measure of fiscal accountability. Previously, departments could enter into contracts with private companies involving payment of unlimited amounts of taxpayer dollars, for unlimited periods of time, without any oversight from the City's elected policymakers. Indeed, the San Francisco Charter had completely excluded the Board from involvement in contracting decisions by stating: "Neither the Board of Supervisors, its committees, nor any of its members, shall have any power or authority, nor shall they dictate, suggest or interfere with respect to any… contract or requisition for purchase or other administrative actions or recommendations of the City Administrator or of department heads under the City Administrator…." (San Francisco Charter, at §2.114.)

[*Remainder of text of Section I omitted.*]

II. WHEN THERE IS A SIGNIFICANT POSSIBILITY THAT A CONTRACT WILL FALL WITHIN THE TERMS OF CHARTER SECTION 9.118, CITY DEPARTMENTS MAY SUBMIT THE CONTRACT TO THE BOARD OF SUPERVISORS FOR APPROVAL.

Although it is understandable that the voters wished to draw a line at contracts requiring the expenditure of $10 million, in the real world it is not always easy to draw such lines. In some cases, it may be clear from the outset that the City will spend more than $10 million (such as, for example, when a contract explicitly states that the City is required to pay the contractor an amount greater than $10 million). In other cases—indeed, in the great majority of cases—it will be equally clear that the City has no chance to spend such a large amount. But in some cases, as here, the amount the City will end up spending under the terms of a contract is not subject to precise measurement. This case presents the question of how the Charter should be applied in those situations.

[*Remainder of text of Section II omitted.*]

III. BECAUSE THE CONTRACT WAS SUBJECT TO BOARD APPROVAL, THE CITY WAS NOT UNDER A MINISTERIAL DUTY TO EXECUTE AND PROCEED WITH THE CONTRACT.

Under Code of Civil Procedure section 1085, a writ may issue to require the government to fulfill its ministerial duty. *American Fed. of State, County & Municipal Employees v Metropolitan Water Dist. of So. Cal.*

(2005) 126 CA4th 247, 261. It is true that once a contract has been awarded, "a public official's duty to execute such a contract is ministerial." *TransdynlCresci JV v City and County of San Francisco* (1999) 72 CA4th 746, 758. But ABC's argument that the City has a ministerial duty to execute the proposed contract is based entirely on the assumption that the Board lacked the jurisdiction to reject it. As discussed above, this assumption is incorrect as a matter of law—DCA properly submitted the contract to the Board for exercise of its authority under the Charter. Thus, there simply could be no contract until the Board approved it. Once the Board rejected the contract, the City was under no duty—ministerial or otherwise—to proceed. To the contrary, it would have been illegal for the City to proceed with a contract that was not formed in accordance with the Charter. (See, *e.g., San Francisco Int'l Yachting Ctr. Devel. Group v City & County of San Francisco* (1992) 9 CA4th 672, 693-94; *Dynamic Indus. Co. v City of Long Beach* (1958) 159 CA2d 294, 298-99.)

CONCLUSION

The Court should deny the petition for a writ of mandate.

Dated: February 29, 2008

BRIAN THOMAS
City Attorney
LUCY ADAMS
Deputy City Attorney

By_____
LUCY ADAMS

Attorneys for Defendant and Respondent
CITY AND COUNTY OF SAN FRANCISCO

Note: This sample brief has not been updated for substantive legal accuracy. It is presented as an example of form, not content, and should not be presumed accurate with regard to the state of the law. The names of the parties and attorneys have been changed for publication.

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On drafting an opposition to a writ petition, see §§8.16-8.20.

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§13.13 B. Form: Request for Judicial Notice in Opposition to Petition for Writ of Mandate

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Attorneys for Defendant and Respondent

CITY AND COUNTY OF SAN FRANCISCO

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO—
UNLIMITED JURISDICTION

ABC CORPORATION, Plaintiffs and Petitioner,	**CASE NO. 123-456**
vs.	**REQUEST FOR JUDICIAL NOTICE IN OPPOSITION TO PETITION FOR WRIT OF MANDATE**
THE CITY & COUNTY OF SAN FRANCISCO, and DOES 1-30, Defendants and Respondents.	**Hearing date: March 10, 2008** **Time: 9:30 a.m.** **Place: 302** **Action filed: February 7, 2008** **Trial date: N/A** **Attached documents: Exhibits A-D**

Pursuant to California Evidence Code sections 451 and 452, Defendant City and County of San Francisco respectfully requests that the Court take judicial notice of the following materials:

Exhibit A: Letter to the San Francisco Board of Supervisors from ABC Corporation, dated November 12, 2007 (taken from San Francisco Board of Supervisors Legislative File No. 00000).

Exhibit B: Appendix B and Appendix B-1 to the proposed Contract for Biosolids and Grit Hauling Services (taken from San Francisco Board of Supervisors Legislative File No. 01111).

Exhibit C: Budget Analyst Memorandum to the Budget and Finance Committee of the San Francisco Board of Supervisors (taken from San Francisco Board of Supervisors Legislative File No. 01111).

Exhibit D: Excerpts of Ballot Pamphlet from November 1998 election (downloaded from the San Francisco Department of Elections website at http://www.sfp14.sfpl.orgllibrarylocations/mainlgic/voterpamp/votepamp.htm).

Dated: February 29, 2008

BRIAN THOMAS
City Attorney
LUCY ADAMS
Deputy City Attorney

By_____

LUCY ADAMS

Attorneys for Defendant and Respondent
CITY AND COUNTY OF SAN FRANCISCO

Note: This sample request for judicial notice is presented as an example of form, not content. The names of the parties and attorneys have been changed for publication.

Comment: The format of attorney-drafted court papers is generally governed by Cal Rules of Ct 2.100-2.119. See also Cal Rules of Ct 3.1110-3.1116 (format requirements for civil law and motion papers, made applicable to writ petitions and demurrers by Cal Rules of Ct 3.1100 and 3.1103(a)(2), (c)).

On drafting an opposition to a writ petition, see §§8.16-8.20.

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§13.14 C. Form: Declaration in Opposition to Petition for Writ of Mandate

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CITY AND COUNTY OF SAN FRANCISCO

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO—
UNLIMITED JURISDICTION

ABC CORPORATION,	**CASE NO. 123-456**
Plaintiffs and Petitioner,	**DECLARATION OF JOHN SMITH IN OPPOSITION TO PETITION FOR WRIT OF MANDATE**
vs.	**_____**
THE CITY & COUNTY OF SAN FRANCISCO, and DOES 1-30, Defendants and Respondents.	**Hearing date: March 10, 2008** **Time: 9:30 a.m.** **Place: 302** **Action filed: February 7, 2008** **Trial date: N/A** **Attached documents: Exhibits A-B**

I, John Smith, declare as follows:

1. I have personal knowledge of the matters stated herein, except for those matters set forth on information and belief, which I believe to be true, and if called to testify, I can and will testify competently as to all matters set forth herein.

2. I am employed as a Supervising Purchaser in the Office of Contract Administration ("OCA") for the City & County of San Francisco. I have served in this capacity for 5 years. Overall, I have been employed with OCA since 1985.

3. During 2007, I was responsible for implementing and overseeing the bid process for the grit and biosolids hauling contract that is the subject of this litigation.

4. It has always been my understanding and assumption that OCA, before finally awarding the contract, would submit it to the Board of Supervisors for approval, because of the significant possibility that the contract would require the City to expend in excess of $10 million during the 5-year term.

5. Even after OCA conditionally awarded the contract to ABC Corporation, it was my understanding and assumption that the contract would require Board approval. Although Jane Doe of the Public Utilities Commission estimated that the price of the potential contract with ABC over the 5-year term to be $8.32 million, she made clear to me that this estimate was extremely rough and subject to so many variables as to make it an unreliable predictor of whether the cost would actually exceed $10 million. Accordingly, Ms. Doe's estimate did not change our belief that there was a significant possibility the contract would exceed $10 million over the 5-year term, and for this reason it did not change my belief that the contract required Board approval.

6. My understanding about the need for Board approval was in no way influenced by any interference by members of the Board of Supervisors or its staff. At no time did any member of the Board of Supervisors or its staff contact me to urge that DCA submit the contract to the Board. Nor am I aware of any member of the Board or its staff having contacted anyone at OCA or PUC in an attempt to ensure that the Board would have the opportunity to consider the contract.

7. Although I do not specifically recall the first time I told bidders that the contract was subject to Board approval, I do recall that I informed them of that fact.

8. Attached hereto as Exhibit A is a true and correct copy of an e-mail exchange between me and Joe Barnes of ABC, which I retrieved from my computer and printed on December 4, 2007. This e-mail reflects that I informed Mr. Barnes on August 10, 2007, of the need for Board approval. Mr. Barnes responded to this e-mail but did not question the need for Board approval. Nor did anyone at ABC ever inform me that it believed Board approval was not required.

9. I believe that I informed ABC and the other bidders of the need for Board approval before this date, but this is the earliest documentary evidence I can find that demonstrates that they were made aware of this requirement.

10. Attached hereto as Exhibit B is a true and correct copy of an e-mail I sent to Joe Barnes of ABC as well as to the subcontractors to ABC, which I retrieved from my computer and printed on December 4, 2007. This e-mail reflects my continued understanding that the contract required Board approval because of the significant possibility that it would involve expenditures of more than $10 million.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed in San Francisco, California on February 28, 2008.

By:_____
JOHN SMITH

INDEX TO EXHIBITS

Exhibit	Description
A	8/10/07 e-mail between John Smith and Joe Barnes
B	10/25/07 e-mail from John Smith to ABC Corporation

Note: This sample declaration is presented as an example of form, not content. The names of the parties and attorneys have been changed for publication.

Comment: The format of attorney-drafted court papers is generally governed by Cal Rules of Ct 2.100-2.119. See also Cal Rules of Ct 3.1110-3.1116 (format requirements for civil law and motion papers, made applicable to writ petitions and demurrers by Cal Rules of Ct 3.1100 and 3.1103(a)(2), (c)).

On drafting an opposition to a writ petition, see §§8.16-8.20.

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§13.15 D. Form: Proposed Order Denying Petition for Writ of Mandate

To download **Word** version, right click and choose *Save Target As*

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CITY AND COUNTY OF SAN FRANCISCO

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO—
UNLIMITED JURISDICTION

ABC CORPORATION,	**CASE NO. 123-456**
Plaintiffs and Petitioner,	**[PROPOSED] ORDER DENYING PETITION FOR WRIT OF MANDATE**
vs.	_____
THE CITY & COUNTY OF SAN FRANCISCO, and DOES 1-30, Defendants and Respondents.	**Hearing date: March 10, 2008** **Time: 9:30 a.m.** **Place: 302** **Action filed: February 7, 2008** **Trial date: N/A**

The Petition for a Writ of Mandate in the above-captioned matter came on for hearing at 9:30 a.m. on March 10, 2008, in Department 302 of this Court, located at 400 McAllister Street, San Francisco, before the Honorable Jane Doe. Roberta Jones appeared on behalf of Petitioner ABC CORPORATION. Lucy Adams appeared on behalf of Respondent CITY AND COUNTY OF SAN FRANCISCO.

Having considered the memorandum and supporting documents, and having heard oral argument of counsel, the Court orders that the Petition is DENIED. As a matter of law, a City department may submit a proposed contract to the Board of Supervisors for approval under San Francisco Charter Section 9.118 if there is a significant possibility that the cost of the contract will exceed $10 million. Because that possibility existed with respect to the contract at issue in this case, the Board acted within its jurisdiction in rejecting the contract, and the City was under no ministerial duty to proceed with it.

IT IS SO ORDERED.

Dated: _____

_____
JANE DOE
Judge of the Superior Court

Note: This sample order is presented as an example of form, not content. The names of the parties and attorneys have been changed for publication.

Comment: The format of attorney-drafted court papers is generally governed by Cal Rules of Ct 2.100-2.119. See also Cal Rules of Ct 3.1110-3.1116 (format requirements for civil law and motion papers, made applicable to writ petitions and demurrers by Cal Rules of Ct 3.1100 and 3.1103(a)(2), (c)).

On drafting an opposition to a writ petition, see §§8.16-8.20.

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Source: Civil Litigation/California Civil Writ Practice/13 Superior Court Forms/ VI. LIMITED CIVIL CASES/§13.16 A. Form: Information on Writ Proceedings in Misdemeanor, Infraction, and Limited Civil Cases (Judicial Council Form APP-150-INFO)

VI. LIMITED CIVIL CASES

§13.16 A. Form: Information on Writ Proceedings in Misdemeanor, Infraction, and Limited Civil Cases (Judicial Council Form APP-150-INFO)

APP-150-INFO Information on Writ Proceedings in Misdemeanor, Infraction, and Limited Civil Cases

GENERAL INFORMATION

1 What does this information sheet cover?

This information sheet tells you about **writ proceedings**—proceedings in which a person is asking for a writ of mandate, prohibition, or review—in misdemeanor, infraction, and limited civil cases. Please read this information sheet before you fill out *Petition for Writ (Misdemeanor, Infraction, or Limited Civil Case)* (form APP-151). This information sheet does not cover everything you may need to know about writ proceedings. It is only meant to give you a general idea of the writ process. To learn more, you should read rules 8.930–8.936 of the California Rules of Court, which set out the procedures for writ proceedings in the appellate division. You can get these rules at any courthouse or county law library or online at *www.courtinfo.ca.gov/rules*.

This information sheet does NOT provide information about appeals or proceedings for writs of supersedeas or habeas corpus.

- For information about appeals, please see the box on the top of this page.
- For information about writs of habeas corpus, please see rules 4.550–4.552 of the California Rules of Court and *Petition for Writ of Habeas Corpus* (form MC-275).
- For information about writs of supersedeas, please see rule 8.824 of the California Rules of Court.

You can get these rules and forms at any courthouse or county law library or online at *www.courtinfo.ca.gov/rules* for the rules or *www.courtinfo.ca.gov/forms* for the forms.

2 What is a writ?

A writ is an order from a higher court telling a lower court to do something the law says the lower court must do or not to do something the law says the lower court does not have the power to do. In writ proceedings in the appellate division, the lower court is the superior court that took the action or issued the order being challenged.

For information about appeal procedures, see:

- *Information on Appeal Procedures for Misdemeanors* (form CR-131-INFO)
- *Information on Appeal Procedures for Infractions* (form CR-141-INFO)
- *Information on Appeal Procedures for Limited Civil Cases* (form APP-101-INFO)

You can get these forms at any courthouse or county law library or online at *www.courtinfo.ca.gov/forms*.

In this information sheet, we call the lower court the "trial court."

3 Are there different kinds of writs?

Yes. There are three main kinds of writs:

- Writs of mandate (sometimes called "mandamus"), which are orders telling the trial court to do something.
- Writs of prohibition, which are orders telling the trial court not to do something.
- Writs of review (sometimes called "certiorari"), which are orders telling the trial court that the appellate division will review certain kinds of actions already taken by the trial court.

There are laws (statutes) that you should read concerning each type of writ: see California Code of Civil Procedure sections 1084–1097 about writs of mandate, sections 1102–1105 about writs of prohibition, and sections 1067–1077 about writs of review. You can get copies of these statutes at any county law library or online at *www.leginfo.ca.gov/calaw.html*.

4 Is a writ proceeding the same as an appeal?

No. In an **appeal,** the appellate division *must* consider the parties' arguments and decide whether the trial court made the legal error claimed by the appealing party and whether the trial court's decision should be overturned

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based on that error (this is called a "decision on the merits"). In a **writ proceeding,** the appellate division is *not* required to make a decision on the merits; even if the trial court made a legal error, the appellate division can decide not to consider that error now, but to wait and consider the error as part of any appeal from the final judgment. Most requests for writs are denied without a decision on the merits (this is called a "summary denial"). Because of this, appeals are the ordinary way that decisions made by a trial court are reviewed and writ proceedings are often called proceedings for "extraordinary" relief.

Appeals and writ proceedings are also used to review different kinds of decisions by the trial court. Appeals can be used only to review a trial court's final judgment and a few kinds of orders. Most rulings made by a trial court before it issues its final judgment cannot be appealed right away; they can only be appealed after the trial court case is over, as part of an appeal of the final judgment. Unlike appeals, writ proceedings can be used to ask for review of certain kinds of important rulings made by a trial court before it issues its final judgment.

5 Is a writ proceeding a new trial?

No. **A writ proceeding is NOT a new trial.** The appellate division will not consider new evidence, such as the testimony of new witnesses. Instead, if it does not summarily deny the request for a writ, the appellate division reviews a record of what happened in the trial court and the trial court's ruling to see if the trial court made the legal error claimed by the person asking for the writ. When it conducts its review, the appellate division presumes that the trial court's ruling is correct; the person who requests the writ must show the appellate division that the trial court made the legal error the person is claiming.

6 Can a writ be used to address *any* errors made by a trial court?

No.

Writs can only address certain legal errors: Writs can only address the following types of legal errors made by a trial court:

- The trial court has a legal duty to act but:
  - Refuses to act
  - Has not done what the law says it must do
  - Has acted in a way the law says it does not have the power to act
- The trial court has performed or says it is going to perform a judicial function (like deciding a person's rights under law in a particular case) in a way that the court does not have the legal power to do.

There must be no other adequate remedy: The trial court's error must also be something that can be fixed only with a writ. The person asking for the writ must show the appellate division that there is no adequate way to address the trial court's error other than with the writ (this is called having "no adequate remedy at law"). As mentioned above, appeals are the ordinary way that trial court decisions are reviewed. If the trial court's ruling can be appealed, the appellate division will generally consider an appeal to be good enough (an "adequate remedy") unless the person asking for the writ can show the appellate division that he or she will be harmed in a way that cannot be fixed by the appeal if the appellate division does not issue the writ (this is called "irreparable" injury or harm).

Statutory writs: There are laws (statutes) that provide that certain kinds of rulings can or must be challenged using a writ proceeding. These are called "statutory writs." Here is a list of some of the most common rulings that a statute says can or must be challenged using a writ:

- A ruling on a motion to disqualify a judge (see California Code of Civil Procedure section 170.3(d))
- Denial of a motion for summary judgment (see California Code of Civil Procedure section 437c(m)(l))
- A ruling on a motion for summary adjudication of issues (see California Code of Civil Procedure section 437c(m)(l))
- Denial of a stay in an unlawful detainer matter (see California Code of Civil Procedure section 1176)
- An order disqualifying the prosecuting attorney (see California Penal Code section 1424)

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You can get copies of these statutes at any county law library or online at *www.leginfo.ca.gov/calaw.html.* You will need to check whether there is a statute providing that the specific ruling you want to challenge can or must be reviewed using a writ proceeding. (Note that just because there is a statute requiring or allowing you to ask for a writ to challenge a ruling does not mean that the court must grant your request; the appellate division can still deny a request for a statutory writ.)

Common law writs: Even if there is not a statute specifically providing for a writ proceeding to challenge a particular ruling, most trial court rulings other than the final judgment can potentially be challenged using a writ proceeding if the trial court made the type of legal error described above and the petitioner has no other adequate remedy at law. These writs are called "common law" writs.

(7) Can the appellate division consider a request for a writ in *any* case?

No. Different courts have the power (called "jurisdiction") to consider requests for writs in different types of cases. The appellate division can only consider requests for writs in limited civil, misdemeanor, and infraction cases. A limited civil case is a civil case in which the amount claimed is $25,000 or less (see California Code of Civil Procedure sections 85 and 88). Misdemeanor cases are cases in which a person has been charged with or convicted of a crime for which the punishment can include jail time of up to one year but not time in state prison (see California Penal Code sections 17 and 19.2). (If the person was also charged with or convicted of a felony in the same case, it is considered a felony case, not a misdemeanor case.) Infraction cases are cases in which a person has been charged with or convicted of a crime for which the punishment can be a fine, traffic school, or some form of community service but cannot include any time in jail or prison (see California Penal Code sections 17 and 19.8). Examples of infractions include traffic tickets or citations for violations of some city or county ordinances. (If a person was also charged with or convicted of a misdemeanor in the same case, it is considered a misdemeanor case, not an infraction case.) You can get copies of these statutes at any county law library or online at *www.leginfo.ca.gov/calaw.html.*

The appellate division does NOT have jurisdiction to consider requests for writs in either unlimited civil cases (civil cases in which the amount claimed is more than $25,000) or felony cases (cases in which a person has been charged with or convicted of a crime for which the punishment can include time in state prison). Requests for writs in these cases can be made in the Court of Appeal. The appellate division also does NOT have the jurisdiction to consider requests for writs of habeas corpus; requests for these writs can be made in the superior court.

(8) Who are the parties in a writ proceeding?

If you are asking for the writ, you are called the PETITIONER. You should read "Information for the Petitioner," beginning on page 4.

The court the petitioner is asking to be ordered to do or not to do something is called the RESPONDENT. In appellate division writ proceedings, the trial court is the respondent.

Any other party in the trial court case who would be affected by a ruling regarding the request for a writ is a REAL PARTY IN INTEREST. If you are a real party in interest, you should read "Information for a Real Party in Interest," beginning on page 9.

(9) Do I need a lawyer to represent me in a writ proceeding?

You do not *have* to have a lawyer; you are allowed to represent yourself in a writ proceeding in the appellate division. But writ proceedings can be very complicated and you will have to follow the same rules that lawyers have to follow. If you have any questions about the writ procedures, you should talk to a lawyer. In limited civil cases and infraction cases, you must hire a lawyer at your own expense if you want one (the court cannot provide one). You can get information about finding a lawyer on the California Courts Online Self-Help Center at *www.courtinfo.ca.gov/selfhelp/lowcost.*

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INFORMATION FOR THE PETITIONER

This part of the information sheet is written for the petitioner—the party asking for the writ. It explains some of the rules and procedures relating to asking for a writ. The information may also be helpful to a real party in interest. There is more information for a real party in interest starting on page 9 of this information sheet.

(10) Who can ask for a writ?

Only a party in the trial court proceeding—the plaintiff or defendant in a civil case or the defendant or prosecuting agency in a misdemeanor or infraction case—can ask for a writ challenging a ruling on a motion to disqualify a judge (see California Code of Civil Procedure section 170.3(d)). Parties are also usually the only ones that ask for writs challenging other kinds of trial court rulings. However, in most cases, a person who was not a party does have the legal right to ask for a writ if that person has a "beneficial interest" in the trial court's ruling. A "beneficial interest" means that the person has a specific right or interest affected by the ruling that goes beyond the general rights or interests the public may have in the ruling.

(11) How do I ask for a writ?

To ask for a writ you must serve and file a petition for a writ (see below for an explanation of how to "serve and file" a petition). A petition is a formal request that the appellate division issue a writ. A petition for a writ explains to the appellate division what happened in the trial court, what legal error you (the petitioner) believe the trial court made, why you have no other adequate remedy at law, and what order you are requesting the appellate division to make.

(12) How do I prepare a writ petition?

If you are represented by a lawyer, your lawyer will prepare your petition for a writ. If you are not represented by a lawyer, you must use *Petition for Writ (Misdemeanor, Infraction, or Limited Civil Case)* (form APP-151) to prepare your petition. You can get form APP-151 at any courthouse or county law library or online at *www.courtinfo.ca.gov/forms*. This form asks you to fill in the information that needs to be in a writ petition.

a. Description of your interest in the trial court's ruling

Your petition needs to tell the appellate division why you have a right to ask for a writ in the case. As discussed above, usually only a person who was a party in the trial court case—the plaintiff or defendant in a civil case or the defendant or prosecuting agency in a misdemeanor or infraction case—asks for a writ challenging a ruling in that case. If you were a party in the trial court case, say that in your petition. If you were not a party, you will need to describe what "beneficial interest" you have in the trial court's ruling. A "beneficial interest" means that you have a specific right or interest affected by the ruling that goes beyond the general rights or interests the public may have in the ruling. To show the appellate division that you have a beneficial interest in the ruling you want to challenge, you must describe how the ruling will affect you in a direct and negative way.

b. Description of the legal error you believe the trial court made

Your petition will need to tell the appellate division what legal error you believe the trial court made. Not every mistake a trial court might make can be addressed by a writ. You must show that the trial court made one of the following types of legal errors:

- The trial court has a legal duty to act but:
  - Refuses to act
  - Has not done what the law says it must do
  - Has acted in a way the law says it does not have the power to act
- The trial court has performed or says it is going to perform a judicial function (like deciding a person's rights under law in a particular case) in a way that the court does not have the legal power to do.

To show the appellate division that the trial court made one of these legal errors, you will need to:

- Show that the trial court has the legal duty or the power to act or not act in a particular way. You will need to tell the appellate division what legal

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authority—what constitutional provision, statute, rule, or published court decision—establishes the trial court's legal duty or power to act or not act in that way.

- Show the appellate division that the trial court has not acted in the way that this legal authority says the court is required to act. You will need to tell the appellate division exactly where in the record of what happened in the trial court it shows that the trial court did not act in the way it was required to.

c. Description of why you need the writ

One of the most important parts of your petition is explaining to the appellate division why you need the writ you have requested. Remember, the appellate division does not have to grant your petition just because the trial court made an error. You must convince the appellate division that it is important for it to issue the writ.

Your petition needs to show that a writ is the only way to fix the trial court's error. To convince the court you need the writ, you will need to show the appellate division that you have no way to fix the trial court's error other than through a writ (this is called having "no adequate remedy at law").

This will be hard if the trial court's ruling can be appealed. If the ruling you are challenging can be appealed, either immediately or as part of an appeal of the final judgment in your case, the appellate division will generally consider this appeal to be a good enough way to fix the trial court's ruling (an "adequate remedy"). To be able to explain to the appellate division why you do not have an adequate remedy at law, you will need to find out if the ruling you want to challenge can be appealed, either immediately or as part of an appeal of the final judgment.

Here are some trial court rulings that can be appealed. There are laws (statutes) that say that certain kinds of trial court rulings ("orders") can be appealed immediately. In limited civil cases, California Code of Civil Procedure section 904.2 lists orders that can be appealed immediately, including orders:

- Changing or refusing to change the place of trial (venue)
- Granting a motion to quash service of summons
- Granting a motion to stay or dismiss the action on the ground of inconvenient forum
- Granting a new trial
- Denying a motion for judgment notwithstanding the verdict
- Granting or dissolving an injunction or refusing to grant or dissolve an injunction
- Appointing a receiver
- Made after final judgment in the case

In misdemeanor and infraction cases, orders made after the final judgment that affect the substantial rights of the defendant can be appealed immediately (California Penal Code section 1466).

In misdemeanor cases, orders granting or denying a motion to suppress evidence can also be appealed immediately (California Penal Code section 1538.5(j)).

You can get copies of these statutes at any county law library or online at *www.leginfo.ca.gov/calaw.html.* You should also check to see if there are published court decisions that indicate whether you can or must use an appeal or a writ petition to challenge the type of ruling you want to challenge in your case.

If the ruling can be appealed, you will need to show that an appeal will not fix the trial court's error. If the trial court ruling you want to challenge can be appealed, you will need to show the appellate division why that appeal is not good enough to fix the trial court's error. To do that, you will need to show the appellate division how you will be harmed by the trial court's error in a way that cannot be fixed by the appeal if the appellate division does not issue the writ (this is called "irreparable" injury or harm). For example, because of the time it takes for an appeal, the harm you want to prevent may happen before an appeal can be finished.

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d. Description of the order you want the appellate division to make

Your petition needs to describe what you are asking the appellate division to order the trial court to do or not do. Writ petitions usually ask that the trial court be ordered to cancel ("vacate") its ruling, issue a new ruling, or not take any steps to enforce its ruling.

If you want the appellate division to order the trial court not to do anything more until the appellate division decides whether to grant the writ you are requesting, you must ask for a "stay." If you want a stay, you should first ask the trial court for a stay. You should tell the appellate division whether you asked the trial court for a stay. If you did not ask the trial court for a stay, you should tell the appellate division why you did not do this.

If you ask the appellate division for a stay, make sure you also fill out the "Stay requested" box on the first page of the *Petition for Writ (Misdemeanor, Infraction, or Limited Civil Case)* (form APP-151).

e. Verifying the petition

Petitions for writs must be "verified." This means that either the petitioner or the petitioner's attorney must declare under penalty of perjury that the facts stated in the petition are true and correct, must sign the petition, and must indicate the date that the petition was signed. On the last page of the *Petition for Writ (Misdemeanor, Infraction, or Limited Civil Case)* (form APP-151), there is a place for you to verify your petition.

(13) Is there anything else that I need to serve and file with my petition?

Yes. Along with the petition, you must serve and file a record of what happened in the trial court (see below for an explanation of how to serve and file the petition). Since the appellate division judges were not there in the trial court, a record of what happened must be sent to the appellate division for its review. The materials that make up this record are called "supporting documents."

What needs to be in the supporting documents: The supporting documents must include:

- A record of what was said in the trial court about the ruling that you are challenging (this is called the "oral proceedings") and
- Copies of certain important documents from the trial court.

Read below for more information about these two parts of the supporting documents.

Record of the oral proceedings: There are several ways a record of what was said in the trial court may be provided to the appellate division:

- **A transcript**—A transcript is a written record (often called the "verbatim" record) of the oral proceedings in the trial court. If a court reporter was in the trial court and made a record of the oral proceedings, you can have the court reporter prepare a transcript of those oral proceedings, called a "reporter's transcript," for the appellate division. If a reporter was not there, but the oral proceedings were officially recorded on approved electronic recording equipment, you can have a transcript prepared for the appellate division from the official electronic recording of these proceedings. You (the petitioner) must pay for preparing a transcript, unless the court orders otherwise.
- **A copy of an electronic recording**—If the oral proceedings were officially recorded on approved electronic recording equipment, the court has a local rule for the appellate division permitting this recording to be used as the record of the oral proceedings, and all the parties agree ("stipulate"), a copy of the official electronic recording itself can be used as the record of the oral proceedings instead of a transcript. You (the petitioner) must pay for preparing a copy of the official electronic recording, unless the court orders otherwise.
- **A summary**—If a transcript or official electronic recording of what was said in the trial court is not available, your petition must include a declaration (a statement signed by the petitioner under penalty of perjury) either:
  - Explaining why the transcript or official electronic recording is not available and providing a fair summary of the proceedings,

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including the petitioner's arguments and any statement by the court supporting its ruling or
- Stating that the transcript or electronic recording has been ordered, the date it was ordered, and the date it is expected to be filed.

Copies of documents from the trial court: Copies of the following documents from the trial court must also be included in the supporting documents:

- The trial court ruling being challenged in the petition
- All documents and exhibits submitted to the trial court supporting and opposing the petitioner's position
- Any other documents or portions of documents submitted to the trial court that are necessary for a complete understanding of the case and of the ruling being challenged

What if I cannot get copies of the documents from the trial court because of an emergency? Rule 8.931 of the California Rules of Court provides that in extraordinary circumstances the petition may be filed without copies of the documents from the trial court. If the petition is filed without these documents, you must explain in your petition the urgency and the circumstances making the documents available.

Format of the supporting documents: Supporting documents must be put in the format required by rule 8.931 of the California Rules of Court. Among other things, there must be a tab for each document and an index listing the documents that are included. You should carefully read rule 8.931. You can get a copy of rule 8.931 at any courthouse or county law library or online at *www.courtinfo.ca.gov/rules*.

(14) Is there a deadline to ask for a writ?

Yes. For statutory writs, the statute usually sets the deadline for serving and filing the petition. Here is a list of the deadlines for filing petitions for some of the most common statutory writs (you can get copies of these statutes at any county law library or online at *www.leginfo.ca.gov/calaw.html*).

Statutory Writ	Filing Deadline
Writ challenging a ruling on a motion to disqualify a judge (see California Code of Civil Procedure section 170.3(d))	10 days after notice to the parties of the decision
Writ challenging the denial of a motion for summary judgment (see California Code of Civil Procedure section 437c(m)(l))	20 days after service of written notice of entry of the order
Writ challenging a ruling on a motion for summary adjudication of issues (see California Code of Civil Procedure section 437c(m)(l))	20 days after service of written notice of entry of the order

For common law writs or statutory writs where the statute does not set a deadline, you should file the petition as soon as possible and not later than 30 days after the court makes the ruling that you are challenging in the petition. While there is no absolute deadline for filing these petitions, writ petitions are usually used when it is urgent that the trial court's error be fixed. Remember, the court is not required to grant your petition even if the trial court made an error. If you delay in filing your petition, it may make the appellate division think that it is not really urgent that the trial court's error be fixed and the appellate division may deny your petition. If there are extraordinary circumstances that delayed the filing of your petition, you should explain these circumstances to the appellate division in your petition.

(15) How do I "serve" my petition?

Rule 8.931(d) requires that the petition and one set of supporting documents be served on any named real party in interest and that just the petition be served on the respondent trial court. "Serving" a petition on a party means that you must:

- Have somebody over 18 years old who is not a party to the case—so not you—mail or deliver ("serve") the petition to the real party in interest and the respondent court in the way required by law.

Print

- Make a record that the petition has been served. This record is called a "proof of service." *Proof of Service (Appellate Division)* (form APP-109) can be used to make this record. The proof of service must show who served the petition, who was served with the petition, how the petition was served (by mail or in person), and the date the petition was served.

You can get more information about how to serve court documents and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California Courts Online Self-Help Center at *www.courtinfo.ca.gov /selfhelp/lowcost/getready.htm#serving.*

(16) How do I file my petition?

To file a petition for a writ in the appellate division, you must bring or mail the original petition, including the supporting documents, and the proof of service to the clerk for the appellate division of the superior court that made the ruling you are challenging. If the superior court has more than one courthouse location, you should call the clerk at the courthouse where the ruling you are challenging was made to ask where to file your petition. You should make a copy of all the documents you are planning to file for your own records before you file them with the court. It is a good idea to bring or mail an extra copy of the petition to the clerk when you file your original and ask the clerk to stamp this copy to show that the original has been filed.

(17) Do I have to pay to file a petition?

There is no fee to file a petition for a writ in a misdemeanor or infraction case, but there is a fee to file a petition for a writ in a limited civil case. You should ask the clerk for the appellate division where you are filing the petition what this fee is. If you cannot afford to pay this filing fee, you can ask the court to waive this fee. To do this, you must fill out an *Application for Waiver of Court Fees and Costs* (form FW-001). You can get form FW-001 at any courthouse or county law library or online at *www.courtinfo.ca.gov/forms.* You can file this application either before you file your petition or with your petition. The court will review this application and decide whether to waive the filing fee.

(18) What happens after I file my petition?

Within 10 days after you serve and file your petition, the respondent or any real party in interest can serve and file preliminary opposition to the petition. Within 10 days after an opposition is filed, you may serve and file a reply to that opposition.

The appellate division does not have to wait for an opposition or reply before it can act on a petition for a writ, however. Without waiting, the appellate division can:

a. Issue a stay

b. Summarily deny the petition

c. Issue an alternative writ or order to show cause

d. Notify the parties that it is considering issuing a preemptory writ in the first instance

Read below for more information about these options.

a. Stay of trial court proceedings

A stay is an order from the appellate division telling the trial court not to do anything more until the appellate division decides whether to grant your petition. A stay puts the trial court proceedings on temporary hold.

b. Summary denial

A "summary denial" means that the appellate division denies the petition without deciding whether the trial court made the legal error claimed by the petitioner or whether the writ requested by the petitioner should be issued based on that error. Remember, even if the trial court made a legal error, the appellate division can decide not to consider that error now but to wait and consider the error as part of any appeal from the final judgment. No reasons need to be given for a summary denial. Most petitions for writs are denied in this way.

c. Alternative writ or order to show cause

An "alternative writ" is an order telling the trial court either to do what the petitioner has requested in the petition (or some modified form of what the petitioner

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requested) or to show the appellate division why the trial court should not be ordered to do what the petitioner requested. An "order to show cause" is similar; it is an order telling the trial court to show the appellate division why the trial court should not be ordered to do what the petitioner requested in the petition (or some modified form of what the petitioner requested). The appellate division will issue an alternative writ or an order to show cause only if the petitioner has shown that he or she has no adequate remedy at law and the appellate division has decided that the petitioner may have shown that the trial court made a legal error that needs to be fixed.

If the appellate division issues an alternative writ and the trial court does what the petitioner requested (or a modified form of what the petitioner requested as ordered by the appellate division), then no further action by the appellate division is needed and the appellate division may dismiss the petition.

If the trial court does not comply with an alternative writ, however, or if the appellate division issues an order to show cause, then the respondent court or a real party in interest can file a response to the appellate division's order (called a "return") that explains why the trial court should not be ordered to do what the petitioner requested. The return must be served and filed within the time specified by the appellate division or, if no time is specified, within 30 days from the date the alternative writ or order to show cause was issued. The petitioner will then have an opportunity to serve and file a reply within 15 days after the return is filed. The appellate division may set the matter for oral argument. When all the papers have been served and filed (or the time to serve and file them has passed) and oral argument is completed, the appellate division will decide the case.

d. Peremptory writ in the first instance

A "peremptory writ in the first instance" is an order telling the trial court to do what the petitioner has requested (or some modified form of what the petitioner requested) that is issued without the appellate division first issuing an alternative writ or order to show cause. It is very rare for the appellate division to issue a peremptory writ in the first instance, and it will not do so without first notifying the parties and giving the respondent court and any real party in interest a chance to file an opposition.

The respondent court or a real party in interest can file a response to the appellate division's notice (called an "opposition") that explains why the trial court should not be ordered to do what the petitioner has requested. The opposition must be served and filed within the time specified by the appellate division or, if no time is specified, within 30 days from the date the notice was issued. The petitioner will then have a chance to serve and file a reply within 15 days after the opposition is filed. The appellate division may then set the matter for oral argument. When all the papers have been served and filed (or the time to serve and file them has passed) and oral argument is completed, the appellate division will decide the case.

(19) What should I do if the court denies my petition?

If the court denies your petition, it may be helpful to talk to a lawyer. In a limited civil or infraction case, you must hire a lawyer at your own expense if you want one (the court cannot provide one). You can get information about finding an attorney on the California Courts Online Self-Help Center at *www.courtinfo.ca.gov /selfhelp/lowcost.*

INFORMATION FOR A REAL PARTY IN INTEREST

This part of the information sheet is written for a real party in interest—a party from the trial court case other than the petitioner who will be affected by a ruling on a petition for a writ. It explains some of the rules and procedures relating to responding to a petition for a writ. The information may also be helpful to the petitioner.

(20) I have received a copy of a petition for a writ in a case in which I am a party. Do I need to do anything?

You do not *have* to do anything. The California Rules of Court give you the right to file a preliminary opposition to a petition for a writ within 10 days after the petition is served and filed, but you are not required to do this. The appellate division can take certain actions without waiting for any opposition, including:

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- Summarily denying the petition
- Issuing an alternative writ or order to show cause
- Notifying the parties that it is considering issuing a peremptory writ in the first instance

Read the response to question (18) for more information about these options.

Most petitions for writs are summarily denied, often within a few days after they are filed. If you have not already received something from the appellate division saying what action it is taking on the petition, it is a good idea to call the appellate division to see if the petition has been denied before you decide whether and how to respond.

This would also be a good time to talk to a lawyer. You do not *have* to have a lawyer; you are allowed to represent yourself in a writ proceeding in the appellate division. But writ proceedings can be very complicated and you will have to follow the same rules that lawyers have to follow. If you have any questions about writ proceedings or about whether and how you should respond to a writ petition, you should talk to a lawyer. In a limited civil case or infraction case, you must hire a lawyer at your own expense if you want one (the court cannot provide one). You can get information about finding an attorney on the California Courts Online Self-Help Center at *www.courtinfo.ca.gov/selfhelp/lowcost.*

If the petition has not already been summarily denied, you may, but are not required to, serve and file a preliminary opposition to the petition within 10 days after the petition was served and filed. In general, it is a good idea to consider filing a preliminary opposition if the petition misstates the facts or if you think the petition shows that the trial court made a legal error that may need to be fixed. However, the appellate division will not grant a writ without first issuing an alternative writ, an order to show cause, or a notice that it is considering issuing a peremptory writ. In all these circumstances, you will get notice from the court and have a chance to file a response. A preliminary opposition is therefore typically used to explain to the appellate division why you believe it should not grant an alternative writ or order to show cause.

If you decide to file a preliminary opposition, you must serve that preliminary opposition on all the other parties to the writ proceeding. "Serving and filing" an opposition means that you must:

- Have somebody over 18 years old who is not a party to the case—so not you—mail or deliver ("serve") the preliminary opposition to the other parties in the way required by law.
- Make a record that the preliminary opposition has been served. This record is called a "proof of service." *Proof of Service (Appellate Division)* (form APP-109) can be used to make this record. The proof of service must show who served the preliminary opposition, who was served with the preliminary opposition, how the preliminary opposition was served (by mail or in person), and the date the preliminary opposition was served.
- File the original preliminary opposition and the proof of service with the appellate division. You should make a copy of the preliminary opposition you are planning to file for your own records before you file it with the court. It is a good idea to bring or mail an extra copy of the preliminary opposition to the clerk when you file your original and ask the clerk to stamp this copy to show that the original has been filed.

You can get more information about how to serve court documents and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California Courts Online Self-Help Center at *www.courtinfo.ca.gov /selfhelp/lowcost/getready.htm#serving.*

(21) I have received a copy of an alternative writ or an order to show cause issued by the appellate division. Do I need to do anything?

Yes. Unless the trial court has already done what the alternative writ told it to do, you should serve and file a response called a "return."

As explained above, the appellate division will issue an alternative writ or an order to show cause only if the appellate division has decided that the petitioner may have shown that the trial court made a legal error that

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needs to be fixed. An "alternative writ" is an order telling the trial court either to do what the petitioner has requested in the petition (or some modified form of what the petitioner requested) or to show the appellate division why the trial court should not be ordered to do what the petitioner requested. An "order to show cause" is similar; it is an order telling the trial court to show the appellate division why the trial court should not be ordered to do what the petitioner requested in the petition (or some modified form of what the petitioner requested).

If the appellate division issues an alternative writ and the trial court does what the petitioner requested (or a modified form of what the petitioner requested as ordered by the appellate division), then no further action by the appellate division is needed and the appellate division may dismiss the petition. If the trial court does not comply with an alternative writ, however, or if the appellate division issues an order to show cause, then the respondent court or the real party in interest may serve and file a response to the appellate division's order, called a "return."

A return is your argument to the appellate division about why the trial court should not be ordered to do what the petitioner has requested. If you are represented by a lawyer in the writ proceeding, your lawyer will prepare your return. If you are not represented by a lawyer, you will need to prepare your own return. A return is usually a legal response called an "answer." An answer is used to admit or deny the facts alleged in the petition, to add to or correct the facts, and to explain any legal defenses to the legal arguments made by the petitioner. You should read California Code of Civil Procedure sections 430.10–430.80 for more information about answers. You can get copies of these statutes at any county law library or online at *www.leginfo.ca.gov/calaw.html*. A return can also include additional supporting documents not already filed by the petitioner.

If you do not file a return when the appellate division issues an alternative writ or order to show cause, it does not mean that the appellate division is required to issue the writ requested by the petitioner. However, the appellate division will treat the facts stated by the petitioner in the petition as true, which makes it more likely the appellate division will issue the requested writ.

Unless the appellate division sets a different filing deadline in its alternative writ or order to show cause, you must serve and file your return within 30 days after the appellate division issues the alternative writ or order to show cause. The return must be served on all the other parties to the writ proceeding. "Serving and filing" the return means that you must:

- Have somebody over 18 years old who is not a party to the case—so not you—mail or deliver ("serve") the return to the other parties in the way required by law.
- Make a record that the return has been served. This record is called a "proof of service." *Proof of Service (Appellate Division)* (form APP-109) can be used to make this record. The proof of service must show who served the return, who was served with the return, how the return was served (by mail or in person), and the date the return was served.
- File the original return and the proof of service with the appellate division. You should make a copy of the return you are planning to file for your own records before you file it with the court. It is a good idea to bring or mail an extra copy of the return to the clerk when you file your original and ask the clerk to stamp this copy to show that the original has been filed.

You can get more information about how to serve court documents and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California Courts Online Self-Help Center at *www.courtinfo.ca.gov /selfhelp/lowcost/getready.htm#serving*.

(22) I have received a copy of a notice from the appellate division indicating it is considering issuing a peremptory writ in the first instance. Do I need to do anything?

Yes. You should serve and file a response called an "opposition."

As explained in the answer to question (18), a "peremptory writ in the first instance" is an order telling the trial court to do what the petitioner has requested (or

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some modified form of what the petitioner requested as ordered by the appellate division) that is issued without the appellate division first issuing an alternative writ or order to show cause. The appellate division will not issue a peremptory writ in the first instance without first giving the parties notice and a chance to file an opposition. However, when the appellate division issues such a notice, it means that the appellate division is strongly considering granting the writ requested by the petitioner.

An opposition is your argument to the appellate division about why the trial court should not be ordered to do what the petitioner has requested. If you are represented by a lawyer in the writ proceeding, your lawyer will prepare your opposition. If you are not represented by a lawyer, you will need to prepare your own opposition. Like a return discussed above, an opposition is usually a legal response called an "answer." An answer is used to admit or deny the facts alleged in the petition, to add to or correct the facts, and to explain any legal defenses to the legal arguments made by the petitioner. You should read California Code of Civil Procedure sections 430.10–430.80 for more information about answers. You can get copies of these statutes at any county law library or online at *www.leginfo.ca.gov/calaw.html.*

Unless the appellate division sets a different deadline in its notice that it is considering issuing a peremptory writ, you must serve and file your opposition within 30 days after the appellate division issues the notice. The opposition must be served on all the other parties to the writ proceeding. "Serving and filing" the opposition means that you must:

- Have somebody over 18 years old who is not a party to the case—so not you—mail or deliver ("serve") the opposition to the other parties in the way required by law.
- Make a record that the opposition has been served. This record is called a "proof of service." *Proof of Service (Appellate Division)* (form APP-109) can be used to make this record. The proof of service must show who served the opposition, who was served with the opposition, how the opposition was served (by mail or in person), and the date the opposition was served.
- File the original opposition and the proof of service with the appellate division. You should make a copy of the opposition you are planning to file for your own records before you file it with the court. It is a good idea to bring or mail an extra copy of the opposition to the clerk when you file your original, and ask the clerk to stamp this copy to show that the original has been filed.

You can get more information about how to serve court documents and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California Courts Online Self-Help Center at *www.courtinfo.ca.gov /selfhelp/lowcost/getready.htm#serving.*

(23) What happens after I serve and file my return or opposition?

After you file a return or opposition, the petitioner has 15 days to serve and file a reply. The appellate division may also set the matter for oral argument. When all the papers have been filed (or the time to file them has passed) and oral argument is completed, the appellate division will decide the case.

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Source: Civil Litigation/California Civil Writ Practice/13 Superior Court Forms/§13.17 B. Form: Petition for Writ (Misdemeanor, Infraction, or Limited Civil Case) (Judicial Council Form APP-151)

§13.17 B. Form: Petition for Writ (Misdemeanor, Infraction, or Limited Civil Case) (Judicial Council Form APP-151)

APP-151 Petition for Writ (Misdemeanor, Infraction, or Limited Civil Case)

_____
Petitioner
(fill in the name of the person asking for the writ)

v.

Superior Court of California, County of _____

_____
Respondent
(fill in the name of the court whose action or ruling you are challenging)

_____
Real Party in Interest
(fill in the name of any other parties in the trial court case)

Clerk stamps date here when form is filed.

Clerk will fill in the number below:

Appellate Division Case Number:

☐ **Stay requested**
(see item (12) c. on page 6)

Instructions

- This form is only for requesting a **writ** in a misdemeanor, infraction, or limited civil case. You can get forms for other writs and for appeals at any courthouse or county law library or online at *www.courtinfo.ca.gov/forms.*
- Before you fill out this form, read *Information on Writ Proceedings in Misdemeanor, Infraction, and Limited Civil Cases* (form APP-150-INFO) to know your rights and responsibilities. You can get form APP-150-INFO at any courthouse or county law library or online at *www.courtinfo.ca.gov/forms*.
- Unless a special statute sets an earlier deadline, you should file this form no later than **30 days** after the date the superior court took the action or issued the ruling you are challenging in this petition (see form APP-150-INFO, page 7, for more information about the deadline for filing a writ petition). It is your responsibility to find out if a special statute sets an earlier deadline. If your petition is filed late, the appellate division may deny it.
- Fill out this form and make a copy of the completed form for your records and for the respondent (the trial court whose action or ruling you are challenging) and each of the real parties in interest (the other party or parties in the trial court case).
- Serve a copy of the completed form on the respondent and on each real party in interest and keep proof of this service. *Proof of Service (Appellate Division)* (form APP-109) can be used to make this record. You can get information about how to serve court papers and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California Courts Online Self-Help Center at *www.courtinfo.ca.gov/selfhelp/lowcost/getready.htm#serving*.
- Take or mail the completed form and your proof of service on the respondent and each real party in interest to the clerk's office for the appellate division of the superior court that took the action or issued the ruling you are challenging.

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Appellate Division Case Name: _____

Appellate Division Case Number:

1 Your Information

a. Petitioner (the party who is asking for the writ):

Name: _____

Street address: _____
Street *City* *State* *Zip*

Mailing address *(if different)*: _____
Street *City* *State* *Zip*

Phone: ( ) _____ E-mail *(optional)*: _____

b. Petitioner's lawyer *(skip this if the petitioner does not have a lawyer for this petition)*:

Name: _____ State Bar number: _____

Street address: _____
Street *City* *State* *Zip*

Mailing address *(if different)*: _____
Street *City* *State* *Zip*

Phone: ( ) _____ E-mail *(optional)*: _____

Fax *(optional)*: ( ) _____

The Trial Court Action or Ruling You Are Challenging

2 I am/My client is filing this petition to challenge an action taken or ruling made by the trial court in the following case:

a. Case name *(fill in the trial court case name)*: _____

b. Case number *(fill in the trial court case number)*: _____

3 The trial court action or ruling I am/my client is challenging is *(describe the action taken or ruling made by the trial court)*: _____

4 The trial court took this action or made this ruling on the following date *(fill in the date)*: _____

5 *If you are filing this petition more than 60 days after the date that you listed in 4, explain the extraordinary circumstances that caused the delay in filing this petition:*

Print

Appellate Division Case Name:_____

Appellate Division Case Number:

The Parties in the Trial Court Case

6 I/My client *(check and fill in a or b):*

a. ☐ was a party in the case identified in 2.

b. ☐ was not a party in the case identified in 2 but will be directly and negatively affected in the following way by the action taken or ruling made by the trial court *(describe how you/your client will be directly and negatively affected by the trial court's action or ruling):*

_____

_____

_____

7 The other party or parties in the case identified in 2 was/were *(fill in the names of the parties):*

_____

Appeals or Other Petitions for Writs in This Case

8 Did you or anyone else file an appeal about the same trial court action or ruling you are challenging in this petition? *(Check and fill in a or b):*

a. ☐ No

b. ☐ Yes *(fill in the appellate division case number of the appeal):*_____

9 Have you filed a previous petition for a writ challenging this trial court action or ruling? *(Check and fill in a or b):*

a. ☐ No

b. ☐ Yes *(Please provide the following information about this previous petition).*

(1) Petition title *(fill in the title of the petition):*_____

(2) Date petition filed *(fill in the date you filed this petition):* _____

(3) Case number *(fill in the case number of the petition):* _____

If you/your client filed more than one previous petition, attach another page providing this information for each additional petition. At the top of each page, write "APP-151, item 9.")

Reasons for This Petition

10 The trial court made the following legal error or errors when it took the action or made the ruling described in 3 *(check and fill in at least one):*

a. ☐ The trial court has not done or has refused to do something that the law says it *must* do.

(1) *Describe what you believe the law says the trial court must do:*_____

_____

_____

_____

(2) *Identify the law (the section of the Constitution or statute, published court decision, or other legal authority) that says the trial court must do this:*_____

_____

_____

_____

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10 (continued)

(3) *Identify where in the supporting documents (the record of what was said in the trial court and the documents from the trial court) it shows that the court did not do or refused to do this:*

_____

_____

_____

☐ *Check here if you need more space to describe the reason for your petition and attach a separate page or pages describing it. At the top of each page, write "APP-151, item 10a."*

b. ☐ The trial court has done something that the law says the court *cannot or must not* do.

(1) *Describe what the trial court did:*_____

_____

_____

_____

(2) *Identify where in the supporting documents (the record of what was said in the trial court and the documents from the trial court) it shows that the court did this:* _____

_____

_____

_____

(3) *Identify the law (the section of the Constitution or statute, published court decision, or other legal authority) that says the trial court cannot or must not do this:* _____

_____

_____

_____

☐ *Check here if you need more space to describe the reason for your petition and attach a separate page or pages describing it. At the top of each page, write "APP-151, item 10b."*

c. ☐ The trial court has performed or said it is going to perform a judicial function (like deciding a person's rights under law in a particular situation) in a way the court does not have the legal power to do.

(1) *Describe what the trial court did or said it is going to do:* _____

_____

_____

_____

(2) *Identify where in the supporting documents (the record of what was said in the trial court and the documents from the trial court) it shows that the court did or said it was going to do this:*

_____

_____

_____

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10 (continued)

(3) *Identify the law (the section of the Constitution or statute, published court decision, or other legal authority) that says the trial court does not have the power to do this:*

_____

_____

_____

☐ *Check here if you need more space to describe this reason for your petition and attach a separate page or pages describing it. At the top of each page, write "APP-151, item 10c."*

☐ *Check here if there are more reasons for this petition and attach an additional page or pages describing these reasons. At the top of each page, write "APP-151, item 10d."*

11 This petition will be granted only if there is no other adequate way to address the trial court's action or ruling other than by issuing the requested writ.

a. *Explain why there is no way other than through this petition for a writ—through an appeal, for example—for your arguments to be adequately presented to the appellate division:*

_____

_____

_____

_____

b. *Explain how you/your client will be irreparably harmed if the appellate division does not issue the writ you are requesting:* _____

_____

_____

_____

_____

Order You Are Asking the Appellate Division to Make

12 I request that this court *(check and fill in all that apply):*

a. ☐ order the trial court to do the following *(describe what, if anything, you want the trial court to be ordered to do):* _____

_____

_____

_____

b. ☐ order the trial court not to do the following *(describe what, if anything, you want the trial court to be ordered NOT to do)*: _____

_____

_____

_____

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12 (continued)

c. ☐ issue a stay ordering the trial court not to take any further action in this case until this court decides whether to grant or deny this petition *(describe below why it is urgent that the trial court not take any further action and check the Stay requested box on page 1 of this form):*

_____

_____

_____

_____

I/My client:

(1) ☐ asked the trial court to stay these proceedings, but the trial court denied this request *(include in your supporting documents a copy of the trial court's order denying your request for a stay).*

(2) ☐ did not ask the trial court to stay these proceedings for the following reasons *(describe below why you did not ask the trial court to stay these proceedings):*

_____

_____

_____

_____

d. ☐ take other action *(describe):* _____

_____

_____

_____

_____

e. ☐ grant any additional relief that the appellate division decides is fair and appropriate.

Supporting Documents

13 Is a record of what was said in the trial court about the action or ruling you are challenging attached as required by rule 8.931(b)(1)(D) of the California Rules of Court?

a. ☐ Yes, a transcript or an official electronic recording of what was said in the trial court is attached.

b. ☐ No, a transcript or official electronic recording is not attached, but I have attached a declaration (a statement signed under penalty of perjury) *(Check (1) or (2):*

(1) ☐ stating the transcript or electronic recording has been ordered, the date it was ordered, and the date it is expected to be filed

(2) ☐ explaining why the transcript or official electronic recording is not available and providing a fair summary of what was said in the trial court, including the petitioner's arguments and any statement by the trial court supporting its ruling.

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14 Are the following documents attached as required by rule 8.931(b)(1)(A)–(C):

- The trial court ruling being challenged in this petition
- All documents and exhibits submitted to the trial court supporting and opposing the petitioner's position
- 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 being challenged? *(Check a or b):*

a. ☐ Yes, these documents are attached.

b. ☐ No, these documents are not attached for the following reasons *(explain why these documents are not attached and give a fair summary of the substance of these documents. Note that rule 8.931 provides that, in extraordinary circumstances, the petition may be filed without these documents, but the petitioner must explain the urgency and the circumstances making the documents unavailable):*

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

Verification

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _____

_____ ▶ _____

Type or print your name *Signature of petitioner or attorney*

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14

Overview of Appellate Court Writ Practice

The Hon. Kathleen M. Banke

I. INTRODUCTION §14.1

II. PROCEDURES FOR PROSECUTING APPELLATE COURT WRITS §14.2

III. COVERAGE OF APPELLATE COURT WRIT PRACTICE §14.3

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§14.1 I. INTRODUCTION

The courts of appeal and the California Supreme Court can issue the same kinds of civil writs as the superior courts. However, writ practice in the appellate courts is very different from writ practice in the superior courts. In contrast with superior court writ proceedings, which generally challenge actions by nonjudicial bodies or officials, most appellate court writ proceedings challenge *judicial* action taken by a superior court in an underlying civil lawsuit. Thus, writ review by the appellate courts is almost always in the nature of immediate interlocutory appellate review, bypassing the usual requirement that there be only one appeal at the end of a case following entry of final judgment.

Accordingly, writ review by the courts of appeal is almost always highly discretionary, and that discretion is rarely exercised. The vast majority of appellate court writ petitions are summarily denied in one- or two-sentence orders without any reasons stated. See chaps 15, 17. In the superior courts, in contrast, writ petitions generally are treated as another species of operative pleading and almost always heard on the merits, with the court issuing a final judgment (granting or denying the petition) that can be appealed to the court of appeal.

The staggering denial rate of appellate court writ petitions is not surprising. As the appellate courts see it, the petitioning party wants to cut in line ahead of hundreds of other parties who duly filed notices of appeal after entry of final judgment and are patiently waiting for the court to hear their cases. The appellate courts therefore agree to hear the merits of a writ petition only in exceptional circumstances, *e.g.*, if a writ proceeding is the designated and exclusive means of appellate review, if the petitioner is threatened with immediate and irreparable injury, or if the trial court plainly erred and further trial court proceedings would be a needless waste of the court's and parties' resources. See chaps 15, 17.

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§14.2 II. PROCEDURES FOR PROSECUTING APPELLATE COURT WRITS

As one would expect given the fundamentally different ways in which superior and appellate courts treat writ petitions, the writ procedures in these courts also differ significantly. The writ statutes provide little guidance as to procedures in the appellate courts. The rules of court, however, do provide considerable guidance, making writ practice in the courts of appeal much more uniform than writ practice in the superior courts. See chap 18.

An appellate court writ petition consists of a single bound document, the format of which is governed by the appellate rules of court. This document includes the formal petition (which can, and often does, include a request for an immediate stay of the lower court proceedings), verification, and a supporting memorandum. See chap 18. The petition must be supported by all relevant superior court documents and the reporter's transcript of the superior court hearing. This supporting documentation usually is bound in a separate volume of exhibits, the format of which is also governed by the rules of court. See chap 20.

The appellate courts also generally control the timing of writ proceedings. When an immediate stay is requested, the court usually acts on the request within a day or two and may grant or deny it, or issue an emergency stay and ask for opposition before granting or denying a stay pending the outcome of the writ proceeding. See chap 19. As for the writ petition, the rules of court allow, but do not require, a respondent or real party in interest to file preliminary opposition within 10 days. See chap 21. However, the appellate courts can deny a writ petition before any opposition is filed. Alternatively, either before or after preliminary opposition is filed, the appellate court can issue what is known as a *Palma* notice, asking for opposition and giving notice that the court may issue a peremptory writ without further briefing and without oral argument. See chap 22. Or, either before or after preliminary opposition is filed, the court can issue an alternative writ or order to show cause, setting a date for the "return" by the respondent and the real party in interest and a briefing schedule. If the court issues an alternative writ or order to show cause, this means the court has made the writ proceeding a full-fledged "cause" that it likely will decide on the merits after oral argument (the court might later decide that the alternative writ or order to show cause was improvidently granted and summarily dismiss the petition). See chap 24. Thus, in contrast to superior court writ proceedings, the vast majority of appellate court writ proceedings are handled and disposed of entirely on the papers and without oral argument.

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§14.3 III. COVERAGE OF APPELLATE COURT WRIT PRACTICE

Part II provides a practical guide to appellate court writ practice. The initial chapters of Part II discuss when a trial court ruling must be challenged by way of a writ proceeding either as the exclusive means of appellate review or as a prerequisite to seeking post-judgment appellate review, when discretionary writ review is authorized by statute, and other instances in which the appellate courts have exercised their discretion to grant writ review. See chaps 15-17. Subsequent chapters provide a detailed nuts-and-bolts discussion of appellate court writ procedures, including the content and format of papers filed by petitioners (see chaps 18-19), respondents, and real parties in interest (see chaps 21, 23), the timing and nature of actions that may be taken by the courts of appeal, and seeking further appellate review of a court of appeal's action on a writ petition (see chaps 22, 24-25).

Several chapters focus on specialized appellate writ proceedings, including petitions for writs of review challenging certain administrative actions (see chap 16), petitions for writs of supersedeas seeking to stay a superior court's judgment pending appeal (see chap 26), and petitions for review by the California Supreme Court (see chap 27).

Part II concludes with a collection of exemplar appellate court writ forms. See chap 28.

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15

Common Writs and Basic Requirements

Grace K. Won
David K. Ismay

I. SCOPE OF CHAPTER §15.1

II. WRIT OF MANDATE §15.2
- A. Description and Purpose §15.3
- B. Issuance Within Appellate Court's Discretion §15.4
- C. Substantive Requirements §15.5
- D. Function of Mandate
  - 1. To Compel Performance of Ministerial Duty §15.6
    - a. "Ministerial Duty" Defined §15.7
    - b. Examples of Ministerial Trial Court Actions §15.8
    - c. Examples of Nonjudicial Court Officer's Ministerial Duties §15.9
  - 2. To Compel Exercise of Discretion §15.10
  - 3. To Correct Abuse of Discretion §15.11
    - a. When Facts Dictate Particular Result §15.12
    - b. When Trial Court Has Made Error of Law §15.13

III. WRIT OF PROHIBITION
- A. Description and Purpose §15.14
- B. Substantive Requirements
  - 1. Challenged Action Must Be Judicial §15.15
    - a. Most Court Action Is Judicial §15.16
    - b. Ministerial Court Actions Do Not Qualify §15.17
  - 2. Challenged Action Must Be Threatened But Not Completed §15.18
    - a. Prohibition Does Not Restrain Merely Possible Action §15.19
    - b. Prohibition Can Restrain Continuing or Incomplete Judicial Action §15.20
    - c. When Trial Court Completes Act Before Appellate Court Rules on Petition §15.21
  - 3. Jurisdictional Defect Must Exist §15.22
    - a. Test for Determining Existence of Jurisdictional Defect §15.23
    - b. When Only Portion of Threatened Judicial Action Exceeds Court's Jurisdiction §15.24
- C. Seek Relief in Trial Court First §15.25
- D. Examples of Threatened Judicial Acts in Excess of Jurisdiction §15.26

IV. WRIT OF REVIEW (CERTIORARI)
- A. Description and Purpose §15.27
- B. Writ Brings Up Record From Lower Court §15.28
- C. Substantive Requirements for Writ of Review (Certiorari)
  - 1. Act to Be Reviewed Must Be Judicial §15.29
  - 2. Judicial Act Must Be Completed §15.30
  - 3. Act Must Be in Excess of Court's Jurisdiction §15.31
  - 4. No Right of Appeal §15.32
    - a. Requirement Strictly Applied §15.33
    - b. Requirement Applies Even if Appeal Is Not Speedy or Adequate Remedy §15.34
    - c. Remote Appeal May Justify Writ §15.35
    - d. Exception When Right to Appeal Lost Through No Fault of Petitioner §15.36
- D. Examples of Completed Judicial Action Subject to Writ of Review (Certiorari)
  - 1. Rulings in Contempt Proceedings §15.37
  - 2. Other Judicial Actions §15.38

V. OTHER WRITS
- A. Habeas Corpus
  - 1. Description and Purpose
    - a. Inquires Into Cause of Imprisonment or Restraint §15.39

b. Used Mostly in Criminal Context §15.40
2. Uses in Civil Proceedings
a. Civil Contempt §15.41
b. Child Custody §15.42
c. Civil Commitment §15.43
B. Coram Nobis and Coram Vobis
1. Description and Purpose
a. Correct Errors of Fact §15.44
b. Case Law Governs §15.45
c. Used Mostly in Criminal Cases §15.46
2. Requirements for Issuance §15.47
3. Availability in Civil Cases §15.48
C. Writ of Supersedeas §15.49
D. Quo Warranto §15.50

VI. BASIC REQUIREMENTS FOR WRIT RELIEF
A. Petitioner Must Have Beneficial Interest
1. "Beneficial Interest" Defined §15.51
2. Party Aggrieved by Trial Court Ruling Has Beneficial Interest §15.52
3. Petitioner Need Not Be Party to Underlying Action §15.53
4. When Petitioner Challenges Nonjudicial Action in Court of Appeal §15.54
5. Trial Court Usually Not Beneficially Interested §15.55
B. Petitioner Must Have No Other Adequate Remedy
1. Appeal Is Usually Adequate Remedy §15.56
a. Appealable Interlocutory Orders and Judgments §15.57
b. Appeal From Final Judgment §15.58
c. If Writ Proceeding Is Exclusive Means of Appellate Review §15.59
2. Petitioner's Burden to Show Inadequacy of Other Remedies §15.60
C. Petitioner Must Face Irreparable Injury §15.61
1. Specific and Immediate Harm §15.62
a. When Ruling Deprives Petitioner of Opportunity to Present Case §15.63
b. When Ruling Is Clearly Erroneous and Substantially Prejudicial §15.64
2. Petitioner's Burden to Show Irreparable Injury §15.65
D. Issue Must Not Be Moot
1. Writ Generally Will Not Issue When Case Is Moot §15.66
2. Public Interest May Override Mootness §15.67
E. Issue Usually Must Have Been Raised in Trial Court §15.68
F. Other Factors §15.69
1. Issue of Widespread Public Importance or First Impression §15.70
2. Trial Courts in Conflict §15.71

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§15.1 I. SCOPE OF CHAPTER

This chapter begins with an overview of the writs most frequently sought in the appellate courts: traditional mandate (see §§15.2-15.13), prohibition (see §§15.14-15.26), and review (certiorari) (see §§15.27-15.38). This is a general discussion of the basic character and uses of these writs. On specific contexts in which the appellate courts issue mandate, prohibition, and review, see chap 16 and App A. The chapter also discusses other writs that may be sought from the appellate courts, including habeas corpus (see §§15.39-15.43) and coram nobis and coram vobis (see §§15.44-15.48). Again, this is a general overview of the nature and general uses of these writs. On specific contexts in which the appellate courts issue these writs, see chap 16 and App A. On writs of supersedeas to obtain a stay during the pendency of an appeal, see chap 26.

The chapter next addresses the basic requirements for writ relief in the appellate courts, *i.e.*:

- The petitioner must have a beneficial interest in the outcome of the proceedings (see §§15.51-15.55);
- The petitioner must have no other adequate legal remedy (see §§15.56-15.60);
- The petitioner will sustain irreparable injury if writ relief is not granted (see §§15.61-15.65);
- The issue generally must not be moot (see §§15.66-15.67); and
- The issue usually must have been raised in the trial court (see §15.68).

This discussion also includes other factors that appellate courts consider in determining whether to hear a writ petition on the merits. See §§15.69-15.71. On drafting an appellate court writ petition and alleging the requirements for writ relief, see §§18.5-18.60.

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§15.2 II. WRIT OF MANDATE

A writ of mandate issued by an appellate court under CCP §1085 orders the respondent to take some specified action within a specified period of time. The vast majority of writ petitions filed in the appellate courts seek to compel action by a trial court in an ongoing civil action. In exceedingly rare circumstances, a party aggrieved by nonjudicial action (*e.g.,* by a governmental or private body) may file a mandate proceeding in an appellate court in the first instance, bypassing the superior court. In such cases, the nature of the appellate court writ proceeding is largely the same as a superior court writ proceeding, although the procedures for prosecuting a writ proceeding in the appellate court differ significantly from those applicable to prosecuting a writ proceeding in the superior court. Compare chap 5 (initiating superior court writ proceeding) with chap 18 (initiating appellate court writ proceeding).

NOTE: The terms "mandate" and "mandamus" are used interchangeably. CCP §1084. Mandate under CCP §1085 is sometimes referred to as traditional mandate to distinguish it from administrative mandamus under CCP §1094.5. Administrative mandamus is a statutorily created type of mandate used to review most administrative adjudicatory decisions. Accordingly, most administrative mandamus actions are commenced in the superior courts, and the courts of appeal usually consider such writ actions only on appeal from a superior court judgment. See chap 3; California Administrative Mandamus §§1.5-1.12 (3d ed Cal CEB 2003).

For discussion of superior court mandate proceedings challenging nonjudicial action, see chaps 2 (traditional mandate under CCP §1085) and 3 (administrative mandamus under CCP §1094.5).

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§15.3 A. Description and Purpose

The writ of mandate is "the principal extraordinary writ surviving under California law." *City of King City v Community Bank* (2005) 131 CA4th 913, 925, 32 CR3d 384. See Comment, *Appellate Review in California with the Extraordinary Writs*, 36 Cal L Rev 75, 79 (March 1948) (reviewing history of writ of mandate). A writ of mandate is a prerogative writ that (a) compels the performance of a mandatory ministerial duty on the part of a subordinate court, corporation, board, agency, or officer (see §§15.6-15.9), (b) compels a subordinate court, corporation, board, agency, or officer to exercise its discretion (see §15.10), or (c) corrects a clear abuse of discretion by a subordinate court, corporation, board, agency, or officer (see §§15.11-15.13). See CCP §1085(a).

On specific contexts in which the appellate courts have issued writs of mandate, see chap 16 and App A. On seeking a writ of mandate from the superior courts, see chap 2.

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§15.4 B. Issuance Within Appellate Court's Discretion

True to its historical roots as a prerogative of the English royal courts, there is no right to issuance of a writ of mandate. *Fisherman's Wharf Bay Cruise Corp. v Superior Court* (2003) 114 CA4th 309, 319, 7 CR3d 628. In appellate court writ practice in particular, the issuance of writs of mandate is highly discretionary, and in the vast majority of cases—about 90 percent—the appellate courts decline to exercise their original jurisdiction. See Judicial Council of California, Court Statistics Report, Courts of Appeal, Table 5 (2007), available at http://www.courtinfo.ca.gov/reference/documents/csr2007.pdf. On factors appellate courts consider in deciding whether to exercise their discretion to grant writ review, see §§15.51-15.71. On specific contexts in which appellate courts have issued writs of mandate, see chap 16 and App A.

In the rare instance in which a writ proceeding is the exclusive means of obtaining appellate review of an order or judgment (see §§16.2-16.48), the appellate court's discretion with respect to writ relief is limited. In such cases, the court may not deny a meritorious writ petition merely because it presents no important public issue or because the court considers the case less worthy of its attention than other pending cases. See *Powers v City of Richmond* (1995) 10 C4th 85, 114, 40 CR2d 839 (because writ relief is exclusive means of appellate review under Public Records Act, appellate court's refusal to entertain otherwise meritorious writ petition would likely constitute abuse of discretion).

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Source: Civil Litigation/California Civil Writ Practice/15 Common Writs and Basic Requirements/§15.5 C. Substantive Requirements

§15.5 C. Substantive Requirements

The substantive requirements for issuance of a writ of mandate are (CCP §1085(a)):

- A clear and present ministerial duty of the respondent to do an act that the law specially enjoins; and
- A clear, present, and beneficial right of the petitioner to the performance of that duty.

See *Moran v Department of Motor Vehicles* (2006) 139 CA4th 688, 691, 43 CR3d 116; *Fisherman's Wharf Bay Cruise Corp. v Superior Court* (2003) 114 CA4th 309, 319, 7 CR3d 628.

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D. Function of Mandate

§15.6 1. To Compel Performance of Ministerial Duty

The primary purpose of a writ of mandate issued by an appellate court is to compel the performance of a ministerial legal duty, whether before, during, or after trial, by a subordinate court. See CCP §1085(a) (mandate issues "to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station"); *Fisherman's Wharf Bay Cruise Corp. v Superior Court* (2003) 114 CA4th 309, 319, 7 CR3d 628 ("mandate will lie if the trial court has a clear, present and usually ministerial duty and the petitioner has a clear, present and beneficial right to performance of that duty").

NOTE: In writ proceedings challenging trial court actions, the courts of appeal rarely specifically discuss the concept of ministerial duty. Compare *Henry v Superior Court* (2008) 160 CA4th 440, 72 CR3d 808 (no discussion), *California Pub. Employees' Retirement Sys. v Superior Court* (2008) 160 CA4th 174, 72 CR3d 561 (same), *Zevnik v Superior Court* (2008) 159 CA4th 76, 70 CR3d 817 (same), and *Snyder v Superior Court* (2007) 157 CA4th 1530, 69 CR3d 600 (same), with *Fisherman's Wharf Bay Cruise Corp. v Superior Court* (2003) 114 CA4th 309, 319, 7 CR3d 628 (discussing requirements for writ relief). Rather, the appellate courts generally focus on whether the factors warranting immediate appellate review are present (*e.g.,* irreparable harm, issue of first impression or of widespread public importance; see §§15.51-15.71) and then decide whether the trial court erred as a matter of law or clearly abused its discretion.

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§15.7 a. "Ministerial Duty" Defined

A ministerial duty is one that does not require the exercise of judgment and discretion. *Jenkins v Knight* (1956) 46 C2d 220, 223, 293 P2d 6. See *Kavanaugh v West Sonoma County Union High Sch. Dist.* (2003) 29 C4th 911, 916, 129 CR2d 811 ("[A] ministerial act is an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning such act's propriety or impropriety, when a given state of facts exists"). See also §§2.5-2.7.

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§15.8 b. Examples of Ministerial Trial Court Actions

Mandate has issued to compel trial courts to:

- Give an unlawful detainer action pretrial calendar preference, as required by statute. *Cohen v Superior Court* (1967) 248 CA2d 551, 554, 56 CR 813.
- Grant a motion for preference according to mandatory statutory language. *Peters v Superior Court* (1989) 212 CA3d 218, 227, 260 CR 426.
- Permit an indigent plaintiff to proceed without prepayment of jury fees (*Isrin v Superior Court* (1965) 63 C2d 153, 154, 45 CR 320) or to hold a required evidentiary hearing before denying an in forma pauperis application (*Cruz v Superior Court* (2004) 120 CA4th 175, 180, 14 CR3d 917).
- Accept for filing a substitution-of-attorney document. *Hock v Superior Court* (1990) 221 CA3d 670, 671, 270 CR 579.
- Hear and determine a motion to bifurcate a trial. *Trickey v Superior Court* (1967) 252 CA2d 650, 655, 60 CR 761.

For further discussion of specific contexts in which appellate courts have issued writs of mandate, see chap 16 and App A.

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§15.9 c. Examples of Nonjudicial Court Officer's Ministerial Duties

In rare instances, a party to a trial court proceeding may be aggrieved by the action (or inaction) of a nonjudicial court officer. Mandate has issued to compel:

- The clerk and the court reporter to prepare, certify, and transmit transcripts. *Sullivan v Superior Court* (1954) 128 CA2d 476, 477, 275 P2d 595.
- The clerk to enter a default judgment. *W. A. Rose Co. v Municipal Court* (1959) 176 CA2d 67, 74, 1 CR 49.
- The clerk to issue subpoenas compelling witnesses to attend and testify. *Patterson v Sharp* (1967) 253 CA2d 838, 841, 61 CR 517.

For discussion of specific contexts in which appellate courts have issued writs of mandate, see chap 16 and App A.

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§15.10 2. To Compel Exercise of Discretion

Mandate can issue to compel a trial court to exercise its discretion if the court is required, but has refused, to do so. See, *e.g., Payne v Superior Court* (1976) 17 C3d 908, 925, 132 CR 405 (trial court erroneously refused to consider whether incarcerated defendant was indigent and entitled to counsel; writ issued to compel trial court to vacate default judgment and to exercise its discretion to ensure meaningful opportunity to be heard); *Thurmond v Superior Court* (1967) 66 C2d 836, 840, 59 CR 273 (trial court erroneously viewed continuance statute as mandatory; writ issued to compel trial court to reconsider motion to continue and to exercise its discretion in connection therewith).

The corollary to the rule that mandate issues to compel the performance of a ministerial duty (see §15.6) is that mandate generally will not issue to compel a trial court to exercise its discretion in a particular way. See, *e.g., Fisherman's Wharf Bay Cruise Corp. v Superior Court* (2003) 114 CA4th 309, 319, 7 CR3d 628.

For discussion of specific contexts in which appellate courts have issued writs of mandate, see chap 16 and App A.

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§15.11 3. To Correct Abuse of Discretion

Mandate also will issue to correct an abuse of discretion. See, *e.g., Bell v Superior Court* (2007) 158 CA4th 147, 164, 69 CR3d 328 (trial court abused its discretion in denying class certification; writ issued); *Biosense Webster, Inc. v Superior Court* (2006) 135 CA4th 827, 834, 37 CR3d 759 (trial court abused its discretion in issuing temporary restraining order; writ issued).

In writ proceedings, the appellate courts often use the phrase "abuse of discretion" to mean more than simply whether the trial court "exceeded the bounds of reason," which is the traditional formulation of the abuse of discretion standard on appeal. See, *e.g., Bell v Superior Court, supra* (review of class certification ruling for abuse of discretion included whether trial court used improper criteria or made erroneous legal assumptions); *Biosense Webster, Inc. v Superior Court, supra* (review of temporary restraining order included whether trial court "exceeded the bounds of reason" as well as whether under facts discretion could be exercised "in only one way"); *Fisherman's Wharf Bay Cruise Corp. v Superior Court* (2003) 114 CA4th 309, 319, 7 CR3d 628 (review of order granting summary adjudication included whether trial court made error of law, which "automatically" would constitute abuse of discretion).

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§15.12 a. When Facts Dictate Particular Result

If the issue in question is committed to the trial court's sound discretion but the facts are such that that discretion can be exercised in only one way and the trial court has ruled otherwise, the trial court has committed an abuse of discretion that may be corrected by writ. See, *e.g.*, *Robbins v Superior Court* (1985) 38 C3d 199, 205, 211 CR 398 ("If, on the basis of undisputed facts, it is clear that the trial court abused its discretion in failing to issue the preliminary injunction, a writ of mandamus to compel issuance of the injunction is appropriate"); *Ombudsman Servs. of N. Cal. v Superior Court* (2007) 154 CA4th 1233, 1239, 65 CR3d 456 (trial court abused discretion in ordering disclosure of confidential records); *TSI Seismic Tenant Space, Inc. v. Superior Court* (2007) 149 CA4th 159, 165, 56 CR3d 751 ("where the exercise of discretion on the basis of established criteria may yield but one conclusion, an abuse of discretion may be found"); *Pacific Indem. Co. v Superior Court* (1966) 246 CA2d 63, 72, 54 CR 470 ("[S]ince under the circumstances the discretion of the trial court could be legally exercised in only one way, it was an abuse of discretion for the court to deny a preliminary injunction").

For discussion of specific contexts in which appellate courts have issued writs of mandate, see chap 16 and App A.

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§15.13 b. When Trial Court Has Made Error of Law

The courts of appeal also sometimes characterize legal error by the trial court as an abuse of discretion. See, *e.g., Bell v Superior Court* (2007) 158 CA4th 147, 164, 69 CR3d 328 (review of class certification ruling for abuse of discretion included whether trial court used improper criteria or made erroneous legal assumptions); *Fisherman's Wharf Bay Cruise Corp. v Superior Court* (2003) 114 CA4th 309, 319, 7 CR3d 628 (on motion for summary adjudication, "the trial court has no discretion to exercise," *i.e.,* there either is or is not a triable issue of material fact; if trial court errs in ruling on motion, "it has made an error of law, which automatically constitutes an abuse of discretion"); *Mason v Superior Court* (1985) 163 CA3d 989, 993, 210 CR 63 (trial court abused its discretion because "the only proper way the trial court could exercise its discretion was to deny both the motion for summary judgment and the motion to expunge the lis pendens"). See also CCP §1094.5(b) (defining abuse of discretion for purposes of administrative mandamus to include not proceeding in manner required by law).

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III. WRIT OF PROHIBITION

§15.14 A. Description and Purpose

Prohibition is used to prevent or restrain an inferior tribunal from erroneously assuming jurisdiction or acting in excess of its jurisdiction. CCP §1102; *C. S. Smith Metro. Mkt. Co. v Superior Court* (1940) 16 C2d 226, 228, 105 P2d 587 (prohibition "provide[s] a remedy when rigidity of the ordinary procedure fails to protect a litigant from the wrongful exercise of jurisdiction by a court"). Because prohibition restrains only judicial action (see §§15.14-15.17), the writ has more vitality in the appellate courts than it does in the superior courts.

On the rare use of prohibition in the superior courts to restrain judicial action by a body other than a court, see §§4.5-4.8. For discussion of specific contexts in which appellate courts have issued writs of mandate and prohibition, see chap 16 and App A.

NOTE: The writ of prohibition is a preventive remedy, rather than a corrective or remedial one. *Evans v Superior Court* (1939) 14 C2d 563, 580, 96 P2d 107; *Schoenfeldt v Municipal Court* (1960) 187 CA2d 748, 750, 9 CR 912. Thus, it can only be used to challenge threatened, but not completed, judicial actions. See §§15.18-15.21. Completed judicial actions in excess of jurisdiction can be challenged by a writ of review (certiorari). See §§15.27-15.38.

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B. Substantive Requirements

§15.15 1. Challenged Action Must Be Judicial

A writ of prohibition will lie only as to judicial acts. CCP §1102 (prohibition "arrests the proceedings of any tribunal… exercising judicial functions").

PRACTICE TIP: Because the definition of judicial action is the same for writs of prohibition and writs of review (certiorari), prohibition and review cases can be cited interchangeably on this point. See *Auto Equity Sales, Inc. v Superior Court* (1962) 57 C2d 450, 454, 20 CR 321; 8 Witkin, California Procedure, *Extraordinary Writs* §52 (5th ed 2008). To show that such citations are purposeful and knowledgeable, and not the result of carelessness, a petition should make clear that review cases are being cited in a prohibition proceeding because the issue of judicial action is the same in both contexts.

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§15.16 a. Most Court Action Is Judicial

Most court action is judicial. Therefore, the trial courts and courts of appeal are generally subject to prohibition. See, *e.g., Housing Auth. of the City of Eureka v Superior Court* (1950) 35 C2d 550, 556, 219 P2d 457, superseded by statute on other grounds (trial court's issuance of alternative writ of mandate and order to show cause were judicial acts subject to prohibition).

On the rare use of prohibition in the superior courts to restrain judicial action by a body other than a court, see §§4.5-4.8.

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§15.17 b. Ministerial Court Actions Do Not Qualify

Ministerial acts performed by a court or its officers do not qualify as judicial acts for purposes of prohibition. *Duke v Justice's Court* (1940) 42 CA2d 178, 179, 108 P2d 707. The character of the act, not of the actor, determines whether the challenged act is judicial. For example, hearing and deciding a motion or rendering a decision on the merits of a case, are judicial actions. However, issuing a writ of execution after entry of judgment is a ministerial act that prohibition cannot reach. *Duke v Justice's Court, supra*. Court clerks usually perform ministerial functions and therefore are not subject to prohibition. Mandate, rather than prohibition, is the proper vehicle for challenging or enforcing a ministerial act. See §§15.6-15.9.

PRACTICE TIP: If there is any doubt whether a threatened act is judicial or ministerial, the petitioner should alternatively pray for both prohibition and mandate. See §18.3.

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§15.18 2. Challenged Action Must Be Threatened But Not Completed

A writ of prohibition "arrests the proceedings." CCP §1102. Accordingly, it issues to enjoin only a threatened, but not completed, exercise of judicial power. *Aronoff v Franchise Tax Bd.* (1963) 60 C2d 177, 181, 32 CR 1; see *Melancon v Superior Court* (1954) 42 C2d 698, 704, 268 P2d 1050 (prohibition not available to challenge trial court's order granting plaintiff's motion to furnish security); *City of Santa Barbara v Superior Court* (1966) 240 CA2d 612, 614, 49 CR 798 (prohibition issued to prevent new trial when motion for new trial was invalid and order directing new trial was void).

PRACTICE TIP: Completed judicial actions must be challenged by way of a petition for a writ of review (certiorari). See *Duke v Justice's Court* (1940) 42 CA2d 178, 179, 108 P2d 707 (writ of review, not prohibition, was proper vehicle to challenge order granting motion to enforce judgment); *Chase v Superior Court* (1962) 210 CA2d 872, 878, 27 CR 383 (petition for writ of prohibition deemed one for review because trial court had already issued challenged order); *Lambert v Municipal Court* (1960) 179 CA2d 682, 3 CR 894 (prohibition not available to annul trial court's entry of judgment). On writs of review challenging completed judicial actions, see §§15.27-15.38.

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§15.19 a. Prohibition Does Not Restrain Merely Possible Action

Prohibition will not restrain judicial action that is merely possible. The petitioner must affirmatively show that the lower court has actually decided or ruled that it will take the challenged action. Compare *Lee v Superior Court* (1961) 196 CA2d 161, 163, 16 CR 268 (prohibition issued to restrain trial court from proceeding with new trial after court gave notice of pretrial procedures for retrial), and *Blache v Superior Court* (1939) 35 CA2d 740, 741, 96 P2d 970 (prohibition issued to arrest proceedings to hold petitioner in contempt for refusal to give deposition because, during oral argument, respondents indicated that they contemplated further action), with *Chodos v Superior Court* (1964) 226 CA2d 703, 714, 38 CR 301 (prohibition not available because trial court had not threatened to act to reset case for new trial).

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§15.20 b. Prohibition Can Restrain Continuing or Incomplete Judicial Action

If the challenged judicial action is continuing, such as when the court has granted an injunction whose effect continues into the future, the court's act is viewed as incomplete and prohibition may issue. For example, prohibition issued to:

- Restrain the trial court from further proceedings after the court sanctioned nonparty attorneys for their refusal to make discovery, except to recall a writ of execution. *Lund v Superior Court* (1964) 61 C2d 698, 715, 39 CR 891.
- Restrain the trial court from further proceedings after the court issued a temporary restraining order that was in excess of its jurisdiction. *City & County of San Francisco v Superior Court* (1959) 53 C2d 236, 244, 1 CR 158.
- Restrain the trial court from enforcing a preliminary injunction. *Evans v Superior Court* (1939) 14 C2d 563, 581, 96 P2d 107.

For further discussion of specific contexts in which appellate courts have issued writs of prohibition, see chap 16 and App A.

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§15.21 c. When Trial Court Completes Act Before Appellate Court Rules on Petition

If prohibition is an appropriate remedy when the writ is sought, but the lower court completes the challenged act before the appellate court rules on the petition, the appellate court may treat the proceeding as one for a writ of review (certiorari). *Chase v Superior Court* (1962) 210 CA2d 872, 878, 27 CR 383; *Wallace v Superior Court* (1956) 141 CA2d 771, 298 P2d 69, disapproved on other grounds in *Knoll v Davidson* (1974) 12 C3d 335, 343, 116 CR 97. On writs of review, see §§15.27-15.38. The appellate court may also treat the petition as one for a writ of mandate. *Miller v Superior Court* (1968) 69 C2d 14, 17, 69 CR 583 (parties stipulated to changing requested relief from prohibition to mandate in vacated opinion; trial court had signed and filed challenged order by time oral argument occurred).

PRACTICE TIP: If there is any doubt as to the appropriate remedy, counsel should request more than one type of writ. *Dresser v Superior Court* (1964) 231 CA2d 68, 74, 41 CR 473 (either mandate to compel dismissal or prohibition to prevent further proceedings was appropriate). See §18.3.

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§15.22 3. Jurisdictional Defect Must Exist

Prohibition is called a "jurisdictional" writ because it is not available to correct mere error or abuse of discretion, but is limited to restraining proceedings that are "without or in excess of" the jurisdiction of an inferior tribunal when no other adequate remedy is available. CCP §§1102-1103; *Running Fence Corp. v Superior Court* (1975) 51 CA3d 400, 432, 124 CR 339. Although most jurisdictional errors and defects are reviewable on appeal, thus generally precluding writ relief (see §§15.56-15.60), a writ of prohibition may still issue if the petitioner can show that an appeal is not an adequate remedy. See §15.61.

PRACTICE TIP: Because the substantive basis for a writ of prohibition—action in excess of jurisdiction—is the same as that for a writ of review (certiorari), cases involving prohibition and review may be cited interchangeably on this point. See *Auto Equity Sales, Inc. v Superior Court* (1962) 57 C2d 450, 454, 20 CR 321; 8 Witkin, California Procedure, *Extraordinary Writs* §52 (5th ed 2008). To show that such citations are purposeful and knowledgeable, and not the result of carelessness, a petition should make clear that review cases are being cited in a prohibition proceeding because the jurisdictional principles are the same.

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§15.23 a. Test for Determining Existence of Jurisdictional Defect

In a series of cases starting with *Abelleira v District Court of Appeal* (1941) 17 C2d 280, 109 P2d 942, the California Supreme Court established that the phrase "without or in excess of jurisdiction," as used in the context of a petition for a writ of prohibition, includes any act exceeding the power or competency of a court, board, or tribunal as defined by constitutional provisions, statutes, or judicially developed rules under the doctrine of stare decisis (17 C2d at 288):

> For the purpose of determining the right to… restraint by prohibition,… a much broader meaning [of jurisdiction] is recognized. Here it may be applied to a case where, though the court has jurisdiction over the subject matter and the parties in the fundamental sense, it has no "jurisdiction" (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites.

See also *Corona Unified Hosp. Dist. v Superior Court* (1964) 61 C2d 846, 852, 40 CR 745; *Auto Equity Sales, Inc. v Superior Court* (1962) 57 C2d 450, 454, 20 CR 321; *City & County of San Francisco v Superior Court* (1959) 53 C2d 236, 243, 1 CR 158; *The Rescue Army v Municipal Court* (1946) 28 C2d 460, 464, 171 P2d 8; *Redlands High Sch. Dist. v Superior Court* (1942) 20 C2d 348, 358, 125 P2d 490.

PRACTICE TIP: If there is any doubt whether the challenged trial court action is an erroneous exercise of the court's discretion (subject to mandate) or an act in excess of its jurisdiction (subject to prohibition), counsel should request issuance of a writ of mandate or prohibition. *Dresser v Superior Court* (1964) 231 CA2d 68, 74, 41 CR 473 (either mandate to compel dismissal or prohibition to prevent further proceedings was appropriate). See §18.3.

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§15.24 b. When Only Portion of Threatened Judicial Action Exceeds Court's Jurisdiction

When only a portion of a threatened judicial act exceeds the court's jurisdiction, prohibition is the appropriate remedy to restrain that portion. See *Wong v Superior Court* (1966) 246 CA2d 541, 550, 54 CR 782 (in divorce proceeding, writ of prohibition issued to restrain enforcement of portion of judgment requiring payment of attorney fees from community property); *American Radio Ass'n v Superior Court* (1965) 237 CA2d 891, 898, 47 CR 419 (writ of prohibition issued solely against injunction banning picketing, not against all further proceedings).

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§15.25 C. Seek Relief in Trial Court First

An appellate court will not presume that a lower court would erroneously overrule a valid objection to its jurisdiction. Therefore, a party challenging a trial court's action as beyond its jurisdiction should always raise a jurisdictional challenge in the trial court before seeking writ relief from the court of appeal. See *Huson v Superior Court* (1963) 220 CA2d 140, 142, 33 CR 568 (prohibition not available because record did not show that trial court arbitrarily refused to comply with mandatory dismissal statute); *MacFarland v Superior Court* (1934) 3 CA2d 173, 176, 38 P2d 800 (prohibition not available because petitioner failed to first attempt to intervene in trial court action and object to lower court's jurisdiction).

On the general requirement that a petitioner seeking writ relief from an appellate court first raise the issue in the trial court, see §15.68.

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§15.26 D. Examples of Threatened Judicial Acts in Excess of Jurisdiction

A court may exceed its jurisdiction for purposes of a writ of prohibition (or a writ of review (certiorari); see §§15.27-15.38) if it attempts to:

- Proceed after the defendant fails to answer or demur and the plaintiff has requested a default judgment. *W. A. Rose Co. v Municipal Court* (1959) 176 CA2d 67, 73, 1 CR 49.
- Deny a trial by jury if a jury has been timely requested. *Turlock Golf & Country Club v Superior Court* (1966) 240 CA2d 693, 695, 50 CR 70.
- Enforce a judgment or order that is void (*De Luca v Superior Court* (1968) 262 CA2d 254, 255, 68 CR 535; *Maben v Superior Court* (1967) 255 CA2d 708, 712, 63 CR 439; *Cubalevic v Superior Court* (1966) 240 CA2d 557, 563, 49 CR 698) or partially void (*Wong v Superior Court* (1966) 246 CA2d 541, 550, 54 CR 782).
- Try an action or make an order that is barred by a jurisdictional time limit, such as an order for new trial (see CCP §660; *City of Santa Barbara v Superior Court* (1966) 240 CA2d 612, 615, 49 CR 798 (motion premature; thus, order granting new trial void)) or a mandatory dismissal statute (see CCP §§583.110-583.160; *Dresser v Superior Court* (1964) 231 CA2d 68, 74, 41 CR 473 (either mandate to compel dismissal or prohibition to prevent further proceedings appropriate); *Mass v Superior Court* (1961) 197 CA2d 430, 433, 17 CR 549)). But see *General Motors Corp. v Superior Court* (1966) 65 C2d 88, 96, 52 CR 460 (if judicially implied exception to time period exists, prohibition will be denied).
- Award costs not provided by statute, entertain an action without requiring the posting of security for costs when such security is prescribed by statute, or dismiss an action for failure to comply with a statutory security provision when the provision does not apply. *Hagan v Superior Court* (1960) 53 C2d 498, 502, 2 CR 288.
- Enjoin the enactment or enforcement of a valid public statute or ordinance (*Crittenden v Superior Court* (1964) 61 C2d 565, 567, 39 CR 380; *City of Los Angeles v Superior Court* (1959) 51 C2d 423, 430, 333 P2d 745; *City of Santa Monica v Superior Court* (1964) 231 CA2d 223, 227, 41 CR 824) or enjoin the functioning of another branch of government (*Santa Clara County v Superior Court* (1949) 33 C2d 552, 559, 203 P2d 1; *Alden v Superior Court* (1963) 212 CA2d 764, 768, 28 CR 387).
- Obviate court-developed law and the doctrine of stare decisis. *Auto Equity Sales, Inc. v Superior Court* (1962) 57 C2d 450, 455, 20 CR 321; *Abelleira v District Court of Appeal* (1941) 17 C2d 280, 288, 109 P2d 942.

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IV. WRIT OF REVIEW (CERTIORARI)

§15.27 A. Description and Purpose

A writ of review (also called a writ of certiorari; see CCP §1067) issues to review a completed judicial action allegedly taken without or in excess of jurisdiction, when there is no right of appeal and no other adequate remedy. CCP §§1068(a), 1074; *Auto Equity Sales, Inc. v Superior Court* (1962) 57 C2d 450, 454, 20 CR 321. On the rare use of writs of review in the superior courts to restrain judicial action by a body other than a court, see §§4.13-4.15.

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§15.28 B. Writ Brings Up Record From Lower Court

Unlike a writ of mandate or prohibition, a writ of review (certiorari) merely orders the tribunal to which the writ is directed (*e.g.,* the trial court) to certify or return to the reviewing court a record of the proceedings below and to desist from further proceedings in the matter under review. CCP §§1070-1071; *Rondon v Alcoholic Beverage Control Appeals Bd.* (2007) 151 CA4th 1274, 1286, 60 CR3d 295.

NOTE: When the superior court appellate division grants a writ of review in a limited civil case directed to the superior court, the superior court is an inferior tribunal for the purposes of review. CCP §1068(b). On writ petitions in limited civil cases, see chap 12.

After issuing the writ, the appellate court reviews the record and enters a judgment affirming, annulling, or modifying the proceedings below. CCP §1075. That judgment, rather than the writ, is the ultimate relief sought.

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C. Substantive Requirements for Writ of Review (Certiorari)

§15.29 1. Act to Be Reviewed Must Be Judicial

Like a writ of prohibition, a writ of review (certiorari) lies only as to judicial action. Whether an action is judicial depends on the "character of the act or determination sought to be reviewed, rather than of the tribunal or officer by which the act or determination is made." *Quinchard v Board of Trustees of Alameda* (1896) 113 C 664, 668, 45 P 856.

PRACTICE TIP: Because the definition of judicial action is the same for writs of review and prohibition, review and prohibition cases can be cited interchangeably on this point. See *Auto Equity Sales, Inc. v Superior Court* (1962) 57 C2d 450, 454, 20 CR 321; 8 Witkin, California Procedure, *Extraordinary Writs* §52 (5th ed 2008). To show that such citations are purposeful and knowledgeable, and not the result of carelessness, a petition should make clear that prohibition cases are being cited in a review case because the issue of judicial action is the same in both contexts.

For further discussion of what constitutes judicial action, see §§15.15-15.17.

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§15.30 2. Judicial Act Must Be Completed

Only completed judicial acts are subject to a writ of review (certiorari). See CCP §§1067-1068; Comment, *Appellate Review in California with the Extraordinary Writs*, 36 Cal L Rev 75, 79 (March 1948) (writ of review is historical predecessor to general appellate review, surviving with only limited function of jurisdictional review). This contrasts with writs of prohibition, which reach threatened judicial action. See 8 Witkin, California Procedure, *Extraordinary Writs* §40 (5th ed 2008). See also §§15.18-15.21.

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§15.31 3. Act Must Be in Excess of Court's Jurisdiction

Like a writ of prohibition, a writ of review (certiorari) is a "jurisdictional" writ and issues to restrain or correct completed judicial action in excess of the lower court's jurisdiction. CCP §§1068(a), 1074; see *Howard v Superior Court* (1944) 25 C2d 784, 788, 154 P2d 849 (writ of review was unavailable to challenge trial court's order vacating fee award; even if trial court acted without sufficient grounds, that was error in exercise of its jurisdiction, not action in excess of its jurisdiction); *Redlands High Sch. Dist. v Superior Court* (1942) 20 C2d 348, 360, 125 P2d 490 (writ of review was unavailable to challenge trial court's allowance of case to proceed when plaintiffs failed to file verified claim; action was legal error, but not in excess of court's jurisdiction).

The test for determining whether a lower court exceeded its jurisdiction for purposes of a writ of review is the same as the test for determining whether a lower court has threatened to act in excess of its jurisdiction for purposes of a writ of prohibition (CCP §1102). See §§15.22-15.24.

PRACTICE TIP: Because the basis for a writ of review—action in excess of jurisdiction—is the same as that for a writ of prohibition, cases involving review and prohibition may be cited interchangeably on this point. See *Auto Equity Sales, Inc. v Superior Court* (1962) 57 C2d 450, 454, 20 CR 321; 8 Witkin, California Procedure, *Extraordinary Writs* §52 (5th ed 2008). To show that such citations are purposeful and knowledgeable, and not the result of carelessness, a petition should make clear that prohibition cases are being cited in a review case because the jurisdictional principles are the same.

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§15.32 4. No Right of Appeal

A writ of review (certiorari) will issue only when there is no right of appeal from the challenged action of the lower tribunal, board, or officer. CCP §1068(a); *Ivory v Superior Court* (1938) 12 C2d 455, 459, 85 P2d 894; *Stoner v Superior Court* (1945) 67 CA2d 760, 762, 155 P2d 697.

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§15.33 a. Requirement Strictly Applied

The requirement that there be no right of appeal from the challenged action is not limited to a right of immediate appeal. If the complained-of judicial action can be challenged on appeal from a final judgment, a writ of review (certiorari) will not issue. See *Howard v Superior Court* (1944) 25 C2d 784, 787, 154 P2d 849 (writ of review would not issue to review trial court order vacating allowance of attorney fees because "the matter will be reviewable upon an appeal from a subsequent order"); *Bank of Am. Nat'l Trust & Sav. Ass'n v Superior Court* (1942) 20 C2d 697, 703, 128 P2d 357 (writ of review would not issue because order allowing plaintiffs to amend complaint was reviewable on appeal from the final judgment; review will not lie "if the effect of the order sought to be annulled can be reviewed and nullified on an appeal from the final judgment even though the order itself is not appealable").

Nor is a writ of review available when a right to appeal existed but was lost through the aggrieved party's neglect. *Simmons v Superior Court* (1959) 52 C2d 373, 375, 341 P2d 13; *Goble v Municipal Court* (1956) 138 CA2d 725, 726, 292 P2d 585.

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§15.34 b. Requirement Applies Even if Appeal Is Not Speedy or Adequate Remedy

If a right of appeal exists, a writ of review (certiorari) is not available even if an appeal fails to provide a plain, speedy, or adequate remedy. See *State Bd. of Equalization v Superior Court* (1937) 9 C2d 252, 255, 70 P2d 482; *Monterey Club v Superior Court* (1941) 44 CA2d 351, 355, 112 P2d 321; *Hughson v Superior Court* (1932) 120 CA 658, 659, 8 P2d 227.

NOTE: This is in contrast with writs of mandate and prohibition, both of which are available when an appeal is available but is not an adequate remedy. See CCP §§1086, 1103(a).

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§15.35 c. Remote Appeal May Justify Writ

That there is a right of appeal from a related ruling or order may not foreclose issuance of a writ of review (certiorari). In *Estate of Bodger* (1954) 128 CA2d 710, 276 P2d 83, the court of appeal held that the trial court exceeded its jurisdiction in appointing an unwanted attorney for the petitioner. The respondent argued that a writ of review was unavailable because the petitioner could appeal from the court's later order granting attorney fees. Dismissing this proposed remedy as "obscure" and "tenuous," the court of appeal annulled the appointment order. 128 CA2d at 715; see also *Howard v Superior Court* (1944) 25 C2d 784, 787, 154 P2d 849 ("there may be situations in which an appeal from a subsequent order or from the final judgment may not be an adequate remedy").

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§15.36 d. Exception When Right to Appeal Lost Through No Fault of Petitioner

The courts have created a very limited exception to the no-right-to-appeal requirement when the opportunity to appeal is lost through no fault of the aggrieved party because of lack of knowledge or notice of the proceedings or of the entry of judgment. See *Grinbaum v Superior Court* (1923) 192 C 528, 556, 221 P 635 (court of appeal annulled trial court order adjudging nonresident petitioner incompetent and appointing guardian of her estate on ground that she had no notice of proceedings).

PRACTICE TIP: This is an extremely limited exception and not one on which parties should rely. In *Simmons v Superior Court* (1959) 52 C2d 373, 377, 341 P2d 13, the petitioner sought to have an order dismissing his action annulled because he failed to file an amended complaint after the defendant's demurrer was sustained and the time to appeal from the subsequent dismissal had expired. The petitioner was present at the hearing, but did not receive notice of the court's ruling. The supreme court denied relief because the petitioner could easily have learned of the ruling; his lack of knowledge resulted solely from his failure to stay informed as to the status of the case. See also *Arens v Superior Court* (1955) 45 C2d 623, 625, 290 P2d 257 (relief denied to petitioner who claimed lack of notice of probate order because statute did not require actual notice).

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D. Examples of Completed Judicial Action Subject to Writ of Review (Certiorari)

§15.37 1. Rulings in Contempt Proceedings

Because most judgments are appealable and most orders can be challenged on appeal after entry of a final judgment, the major use of the writ of review (certiorari) in California today is to review contempt proceedings, because judgments and orders in those proceedings are not appealable. CCP §§904.1(a)(1)(B), 1222; *Moffat v Moffat* (1980) 27 C3d 645, 656, 165 CR 877; see also 8 Witkin, California Procedure, *Extraordinary Writs* §35 (5th ed 2008). For a detailed discussion of contempt, see California Trial Objections, chap 57 (Cal CEB Annual); California Trial Practice: Civil Procedure During Trial §§16.99-16.129 (3d ed Cal CEB 1995); California Criminal Law Procedure and Practice, chap 58 (Cal CEB Annual). See also §§16.130-16.142.

If the petitioner has been incarcerated for contempt, the proper procedure is a petition for writ of habeas corpus. See *In re Buckley* (1973) 10 C3d 237, 240 n1, 110 CR 121; see also *Fine v Superior Court* (2002) 97 CA4th 651, 661 n4, 119 CR2d 376 (because jail sentence for contempt was stayed pending writ review, court treated writ "as one for certiorari").

PRACTICE TIP: It is permissible to alternatively request review or habeas relief. "A writ of habeas corpus or in the alternative a writ of certiorari is properly invoked where… a petitioner seeks to annul an order adjudging him in direct contempt of court." *Fine*, 97 CA4th at 661 n4; *Davidson v Superior Court* (1999) 70 CA4th 514, 522, 82 CR2d 739.

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§15.38 2. Other Judicial Actions

There are very few judicial actions (besides rulings in contempt proceedings; see §15.37) subject to review by writ of review (certiorari):

- Certain nonappealable probate and guardianship orders. See §§16.143-16.144.
- Public Utility Commission (PUC) rulings. See *Hillsboro Props. v Public Utils. Comm'n* (2003) 108 CA4th 246, 254, 133 CR2d 343 (discussing scope of review); *Pacific Bell v Public Utils. Comm'n* (2000) 79 CA4th 269, 280, 93 CR2d 910. See §§16.33-16.45.
- Certain orders for immediate possession of disputed premises in a condemnation proceeding. *County of Marin v Superior Court* (1960) 53 C2d 633, 636, 2 CR 758.
- Orders extending time to plead beyond the period authorized by CCP §1054. *Thelander v Superior Court* (1962) 58 C2d 811, 813 n3, 26 CR 643; *Baker v Superior Court* (1887) 71 C 583, 12 P 685.
- Orders denying exceptions to a court reporter's charge for preparing a transcript on appeal. *Summers v Superior Court* (1959) 53 C2d 295, 297, 1 CR 324.

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V. OTHER WRITS

A. Habeas Corpus

1. Description and Purpose

§15.39 a. Inquires Into Cause of Imprisonment or Restraint

The writ of habeas corpus permits a person who is unlawfully imprisoned or restrained to challenge the lawfulness of the imprisonment or restraint. Pen C §1473(a). Habeas corpus is also available to challenge aspects of constructive restraint such as bail, parole, probation, and release on recognizance, because such restraints can lead to incarceration. *People v Villa* (2009) 45 C4th 1063, 1069, 90 CR3d 344; *In re Catalano* (1981) 29 C3d 1, 8, 171 CR 667; *In re Paul W.* (2007) 151 CA4th 37, 53, 60 CR3d 329.

For a comprehensive discussion of the procedures in habeas corpus proceedings in trial and reviewing courts, see Appeals and Writs in Criminal Cases, chap 10 (3d ed Cal CEB 2007).

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§15.40 b. Used Mostly in Criminal Context

Although habeas corpus is not itself a criminal proceeding (Part II, Title XII of the Penal Code classifies habeas corpus as a "special proceeding of a criminal nature"), it is most commonly used by those charged with, or convicted of, criminal offenses. If a person "is not in prison or on probation or parole or otherwise in constructive custody, the remedy of habeas corpus is not available to him—and it is immaterial that lingering noncustodial collateral consequences are still attached to his conviction." *Mendez v Superior Court* (2001) 87 CA4th 791, 796, 104 CR2d 839. See *In re Stier* (2007) 152 CA4th 63, 82, 61 CR3d 181 (habeas corpus not available to litigate requirement that petitioner register as sex offender, even though registration could lead to loss of medical license and failure to register could lead to imprisonment).

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2. Uses in Civil Proceedings

§15.41 a. Civil Contempt

A person wrongfully imprisoned for contempt may seek review of the contempt judgment or order by a writ of review (certiorari) or a writ of habeas corpus. *In re Buckley* (1973) 10 C3d 237, 240 n1, 110 CR 121. See *Fine v Superior Court* (2002) 97 CA4th 651, 661 n4, 119 CR2d 376 (writ of habeas corpus or, alternatively, writ of review (certiorari) "is properly invoked where… a petitioner seeks to annul an order adjudging him in direct contempt of court"). For further discussion of writ proceedings challenging contempt orders, see §§16.130-16.142.

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§15.42 b. Child Custody

Habeas corpus is available in certain child custody matters. *In re Paul W.* (2007) 151 CA4th 37, 53, 60 CR3d 329. For a detailed discussion, see §§4.18-4.20.

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§15.43 c. Civil Commitment

Habeas corpus can be used to challenge commitment to a psychiatric facility. *In re Lois M.* (1989) 214 CA3d 1036, 1038, 263 CR 100; *In re Azzarella* (1989) 207 CA3d 1240, 1244, 254 CR 922. For a detailed discussion, see §§4.21-4.25.

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B. Coram Nobis and Coram Vobis

1. Description and Purpose

§15.44 a. Correct Errors of Fact

Coram nobis and coram vobis are writs of error used to obtain relief from errors of fact that are unrecognized before final disposition of the action—*i.e.*, the errors are not reflected in the trial record and could not have been considered at trial or during appeal—but which point unerringly to the conclusion the judgment should be reversed. *People v Kim* (2009) 45 C4th 1078, 1091, 90 CR3d 355; *In re Derek W.* (1999) 73 CA4th 828, 831, 86 CR2d 742. These writs are not a means of revising or reversing findings based on known facts, or facts that should have been known by the exercise of ordinary and reasonable diligence. *In re Derek W., supra*.

The writs are essentially identical, except that a petition for writ of coram nobis is addressed to the trial court and a petition for writ of coram vobis is addressed to the appellate court. *Betz v Pankow* (1993) 16 CA4th 931, 941, 20 CR2d 841 (when evidence of extrinsic fraud is discovered during pendency of appeal, "an appellate court can issue a writ of error *coram vobis* commanding the trial court to reconsider its decision in light of the newly discovered evidence"). Once a notice of appeal has been filed, the superior court loses jurisdiction and an application for a writ of error (in the form of a petition for a writ of coram vobis) must be made to the appellate court. See *People v Brady* (1973) 30 CA3d 81, 83, 105 CR 280.

For a comprehensive discussion of coram nobis, see Prickett, *The Writ of Error Coram Nobis in California*, 30 Santa Clara L Rev 1 (1990). On coram nobis and coram vobis in criminal cases, see Appeals and Writs in Criminal Cases, chap 11 (3d ed Cal CEB 2007).

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§15.45 b. Case Law Governs

The only statutory recognition of these writs is a brief reference to the writ of error coram nobis in Pen C §1265, which provides that, once a judgment has been affirmed on appeal, a party can bring a petition for a writ of error coram nobis to vacate the judgment only in the court that affirmed it. Thus, case law governs most aspects of these writs.

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§15.46 c. Used Mostly in Criminal Cases

The writs of coram nobis and coram vobis are very rare in civil matters and are used almost exclusively in criminal cases. One civil use of coram vobis might be to obtain relief in a marital dissolution case in which a spouse concealed assets and effectively obtained a judgment by fraud. On the use of coram nobis and coram vobis in civil cases, see §15.48. On the use of coram nobis and coram vobis in criminal cases, see Appeals and Writs in Criminal Cases, chap 11 (3d ed Cal CEB 2007).

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§15.47 2. Requirements for Issuance

The court will issue a writ of error coram nobis or coram vobis only when the petitioner shows that (*Los Angeles Airways, Inc. v Hughes Tool Co.* (1979) 95 CA3d 1, 8, 156 CR 805):

- Some fact existed that, not owing to any fault or negligence by the petitioner, was not presented to the court at the trial on the merits, and that if the fact had been presented, it would have prevented rendition of the judgment;
- The newly discovered evidence does not go to the merits of the issues tried; and
- The newly discovered evidence was unknown to him or her and could not in the exercise of reasonable diligence have been discovered at any time substantially earlier than the time of making the writ petition.

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§15.48 3. Availability in Civil Cases

Even though coram nobis or coram vobis are available to vacate a judgment based on newly discovered evidence after the time to move for a new trial has expired, a court is unlikely to grant the writ unless the petitioner can make an exceptionally strong showing of injustice. See *People v Gallardo* (2000) 77 CA4th 971, 982, 92 CR2d 161 (noting that terms "motion to vacate" and "petition for writ of error coram nobis" are often used interchangeably, but courts have applied more precise rules to appeals from denials of coram nobis petitions). Some courts hold that the writ is available only if the omissions from the trial record were attributable to extrinsic fraud. See *Philippine Export & Foreign Loan Guarantee Corp. v Chuidian* (1990) 218 CA3d 1058, 1090, 267 CR 457; *Los Angeles Airways, Inc. v Hughes Tool Co.* (1979) 95 CA3d 1, 9, 156 CR 805.

The court considered coram nobis and coram vobis in the following civil cases:

- The court of appeal refused to treat as a petition for a writ of error coram vobis defendant's motion under CCP §909 to take new evidence of attorney fraud; under CCP §1008(b), defendant could renew, based on new facts, his earlier CCP §473 motion. *Monsan Homes, Inc. v Pogrebneak* (1989) 210 CA3d 826, 831, 258 CR 676.
- After entry of judgment for defendant, the trial court denied plaintiff's motion for a new trial; while plaintiff's appeal was pending, plaintiff discovered documents that had not been produced during discovery and asked the appellate court for an order directing the trial court to reconsider its denial of a new trial; the court of appeal denied the request, holding that an aggrieved party can obtain relief by coram vobis only if there has been extrinsic fraud, *i.e.,* if the party has been entirely prevented from obtaining hearing. *Los Angeles Airways, Inc. v Hughes Tool Co.* (1979) 95 CA3d 1, 8, 156 CR 805. But see *Rollins v City & County of San Francisco* (1974) 37 CA3d 145, 149, 112 CR 168 (court allowed introduction of addendum to autopsy report that had not been produced with decedent's medical records without requiring showing of extrinsic fraud because justice demanded relief; court treated motion as petition for writ of error coram vobis).
- The trial court granted respondent's petition for a writ of error coram nobis and vacated its judgment dismissing respondent's cause of action; the court of appeal reversed on the grounds that respondent had not exercised due diligence in discovering his new evidence and that he could not state a cause of action even with the new evidence. *Page v Insurance Co. of N. Am.* (1969) 3 CA3d 121, 128, 83 CR 44.
- The court of appeal stated that a writ of error coram nobis could be used following judgment in a civil proceeding, but affirmed the trial court's denial of relief in this case. *In re Dyer* (1948) 85 CA2d 394, 400, 193 P2d 69.

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§15.49 C. Writ of Supersedeas

A writ of supersedeas is a procedural tool that may be used to secure a stay on appeal. Thus, it is unlike the other writs discussed in this chapter, which are original proceedings. By its nature, supersedeas is always ancillary to a pending appeal and suspends the trial court's power to act on an appealed order or judgment until the appeal has run its course. CCP §923; Cal Rules of Ct 8.112(a)(1); *People ex rel San Francisco Bay Conserv. & Dev. Comm'n v Town of Emeryville* (1968) 69 C2d 533, 538, 72 CR 790 (courts have inherent power to preserve their own jurisdiction by issuing writs of supersedeas). For a detailed discussion of supersedeas, see chap 26; California Civil Appellate Practice §§6.68-6.85 (3d ed Cal CEB 1996).

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§15.50 D. Quo Warranto

In California, the writ of quo warranto no longer exists, although a statutory action, identical in purpose and effect to quo warranto, was established in 1872. CCP §§803-811. For a detailed discussion, see §4.27.

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VI. BASIC REQUIREMENTS FOR WRIT RELIEF

A. Petitioner Must Have Beneficial Interest

§15.51 1. "Beneficial Interest" Defined

A party seeking writ relief in an appellate court must have a beneficial interest in the outcome of the proceeding. CCP §§1069, 1086, 1103(a). The beneficial interest requirement is essentially a standing requirement—only a person who is affected both practically and legally by the challenged order or ruling has standing to seek extraordinary relief by way of prerogative writ. See *Sonoma County Nuclear Free Zone '86 v Superior Court* (1987) 189 CA3d 167, 175, 234 CR 357 (beneficially interested party is one who "has some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large").

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§15.52 2. Party Aggrieved by Trial Court Ruling Has Beneficial Interest

Most appellate court writ proceedings challenge trial court rulings in ongoing proceedings. Thus, the beneficial interest requirement is usually readily met because the party seeking writ relief is a party to the trial court proceedings and directly affected by the lower court's ruling. See *Ra v Superior Court* (2007) 154 CA4th 142, 147 n4, 64 CR3d 539 (ruling on one plaintiff's cause of action affected cause of action asserted by other plaintiff, so latter had beneficial interest in outcome and could seek writ relief); *Daro v Superior Court* (2007) 151 CA4th 1079, 1092, 61 CR3d 716 (ruling directed to co-defendant's property affected other defendants, so latter had beneficial interest in outcome and could seek writ relief).

NOTE: Because the beneficial interest requirement is so easily met, many courts of appeal never even mention the requirement in denying or granting a writ petition challenging an order or ruling by a trial court. See, *e.g.*, *Henry v Superior Court* (2008) 160 CA4th 440, 72 CR3d 808 (no discussion); *California Pub. Employees' Retirement Sys. v Superior Court* (2008) 160 CA4th 174, 72 CR3d 561 (same); *Zevnik v Superior Court* (2008) 159 CA4th 76, 70 CR3d 817 (same); *Snyder v Superior Court* (2007) 157 CA4th 1530, 69 CR3d 600 (same). This does not mean that the petition need not allege a beneficial interest in the challenged ruling; on the contrary, a petition must include this allegation. See §18.28.

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§15.53 3. Petitioner Need Not Be Party to Underlying Action

An individual or entity who is not a party to the trial court proceedings can have a beneficial interest in the outcome of those proceedings and seek writ relief in the court of appeal. A nonparty may seek writ relief if he or she is "directly and prejudicially affected" by the trial court's challenged order or ruling. *Burlingame v Justice's Court of the City of Berkeley* (1934) 1 C2d 71, 75, 33 P2d 669; see *Ombudsman Servs. of N. Cal. v Superior Court* (2007) 154 CA4th 1233, 1239, 65 CR3d 456 (nonparty successfully petitioned for writ of mandate compelling trial court to vacate order requiring production of records); *Seven Up Bottling Co. v Superior Court* (1951) 107 CA2d 75, 76, 236 P2d 623 (nonparty sought writ of prohibition following trial court's denial of nonparty's motion to quash service of subpoena and subpoena duces tecum); *Monterey Club v Superior Court* (1941) 48 CA2d 131, 143, 119 P2d 349 (nonparty obtained writ to prohibit trial court from enjoining alleged gambling operations; petitioner was private club where alleged gambling occurred, but was not party to trial court proceeding).

JUDICIAL PERSPECTIVE: A nonparty petitioner should explain in the petition why it did not first seek relief from the trial court.

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§15.54 4. When Petitioner Challenges Nonjudicial Action in Court of Appeal

In rare instances, an original writ proceeding challenging nonjudicial action (*e.g.,* action taken by a governmental body or private entity) may be filed in the court of appeal in the first instance, bypassing the superior court. See §§16.18-16.48. In such cases, whether the petitioner has a beneficial interest in the proceedings may be a more nuanced inquiry, analogous to the inquiry that would be made if the proceeding had been brought in the superior court. On the beneficial interest of a petitioner in a superior court writ proceeding, see §§2.12-2.14.

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§15.55 5. Trial Court Usually Not Beneficially Interested

The trial court, although named as the respondent, is usually a neutral party with no beneficial interest in the outcome of the case, even though its ruling is being challenged in the writ proceeding. *Solberg v Superior Court* (1977) 19 C3d 182, 189, 137 CR 460; see also *Curle v Superior Court* (2001) 24 C4th 1057, 1064, 103 CR2d 751 (trial judge does not have standing to initiate writ proceeding to challenge disqualification order). "This is true even where the subject matter of the [writ] proceeding is a ruling which significantly affects the operations of the petitioning court." *Municipal Court v Superior Court* (1993) 5 C4th 1126, 1129, 22 CR2d 504. See also *Municipal Court v Superior Court* (1988) 202 CA3d 957, 961, 249 CR 182 (municipal court could not seek writ challenging procedures employed for peremptory challenges). On the designation of parties, see §18.18.

NOTE: An individual trial judge might be a beneficially interested party if he or she was personally named as a party in the proceedings below.

JUDICIAL PERSPECTIVE: Whether or not deemed beneficially interested, the trial court can have county counsel file opposition if the petition attacks the court's procedure or if the court is otherwise interested in the outcome. See *People v Superior Court (Williams)* (1992) 8 CA4th 688, 695, 10 CR2d 873 (in writ proceeding challenging denial of peremptory challenge, court filed opposition to writ and response to supplemental briefing). But see *Ng v Superior Court* (1997) 52 CA4th 1010, 1019, 61 CR2d 49 (striking trial judge's return to writ petition; trial judge had no standing to defend ruling on criminal defendant's substitution of counsel because issue did not affect court's operating procedures or budget), overruled on other grounds in *Curle v Superior Court* (2001) 24 C4th 1057, 1069 n6, 103 CR2d 751.

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B. Petitioner Must Have No Other Adequate Remedy

§15.56 1. Appeal Is Usually Adequate Remedy

"To obtain writ review, a petitioner generally must show his or her remedy in the ordinary course of law is inadequate or that petitioner would suffer irreparable injury were the writ not granted." *Interinsurance Exch. of the Automobile Club v Superior Court* (2007) 148 CA4th 1218, 1225, 56 CR3d 421. See *County of Sonoma v Superior Court* (2009) 173 CA4th 322, 336 n6, 93 CR3d 39 (case involved novel, significant constitutional question that generated conflicting trial court decisions, and petitioner lacked adequate remedy at law and would suffer irreparable harm absent writ review). Generally the right of appeal is considered an adequate remedy. *Kawasaki Motors Corp. v Superior Court* (2000) 85 CA4th 200, 205, 101 CR2d 863. However, even when there is a right of appeal, there are considerations that may weigh in favor of immediate appellate review. See, *e.g.*, *CashCall, Inc. v Superior Court* (2008) 159 CA4th 273, 285 n6, 71 CR3d 441 (rejecting adequate remedy on appeal argument "because the petition raises a question of first impression"). On specific contexts in which the appellate courts have issued writs of mandate, see chap 16 and App A.

NOTE: When the other factors justifying writ review are present (see §§15.51-15.55, 15.61-15.71), the courts of appeal often do not specifically discuss whether the petitioner lacks an adequate legal remedy. See, *e.g.*, *Henry v Superior Court* (2008) 160 CA4th 440, 72 CR3d 808 (no discussion); *California Pub. Employees' Retirement Sys. v Superior Court* (2008) 160 CA4th 174, 72 CR3d 561 (same); *Zevnik v Superior Court* (2008) 159 CA4th 76, 70 CR3d 817 (same); *Heritage Provider Network, Inc. v Superior Court* (2008) 158 CA4th 1146, 70 CR3d 645 (same); *Bell v Superior Court* (2007) 158 CA4th 147, 69 CR3d 328 (same); *Snyder v Superior Court* (2007) 157 CA4th 1530, 69 CR3d 600 (same). This does not mean that the petition need not allege lack of an adequate legal remedy; on the contrary, this is a required allegation. See §18.34.

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§15.57 a. Appealable Interlocutory Orders and Judgments

Some interlocutory orders and judgments are immediately appealable. See CCP §§904.1-904.2. The right of immediate appeal will generally be deemed an adequate remedy, foreclosing mandate and prohibition absent extraordinary circumstances. See CCP §§1086, 1103(a); *Marriage of Skelley* (1976) 18 C3d 365, 369, 134 CR 197 (interlocutory order reducing temporary spousal support was immediately appealable, thus foreclosing writ review). There may be cases, however, in which even an immediate appeal from an interlocutory order may not be an adequate remedy. For example, although an order granting or denying a motion to disqualify an adversary's attorney is appealable, the reviewing court may deem an appeal to be an inadequate remedy, because it is not as expeditious as a writ proceeding and because the right to counsel is involved. See §16.102.

In the case of writs of review (certiorari), the existence of a right to appeal wholly forecloses writ relief because the absence of a right of appeal is a substantive requirement for issuance of the writ. CCP §1068(a). For discussion, see §§15.32-15.36.

On determining whether an interlocutory order or judgment is appealable, see California Civil Appellate Practice, chap 3 (3d ed Cal CEB 1996).

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§15.58 b. Appeal From Final Judgment

Most rulings made during trial court proceedings can be reviewed on appeal after entry of final judgment. See CCP §§904.1-904.2. Accordingly, this right of appeal will usually be deemed an adequate remedy, foreclosing mandamus and prohibition. See *Omaha Indem. Co. v Superior Court* (1989) 209 CA3d 1266, 1273, 258 CR 66.

In the case of writs of review (certiorari), the existence of a right to appeal wholly forecloses writ relief because the absence of a right of appeal is a substantive requirement for issuance of the writ. CCP §1068(a); see §§15.32-15.36.

CAUTION: Appeal does not become an inadequate remedy merely because a party fails to file a timely notice of appeal. *Phelan v Superior Court* (1950) 35 C2d 363, 370, 217 P2d 951; see *Annette F. v Sharon S.* (2005) 130 CA4th 1448, 1459, 30 CR3d 914 (untimely appeal not construed as petition for writ relief). Courts have permitted a party to seek relief by way of writ petition after the time to appeal has expired only in extremely limited circumstances, such as when the trial court has acted in excess of its jurisdiction or when fundamental constitutional rights have been violated. See *Mauro B. v Superior Court* (1991) 230 CA3d 949, 954, 281 CR 507 (listing cases in which exceptions have been permitted). But see *In re Meranda P.* (1997) 56 CA4th 1143, 1164, 65 CR2d 913 (disagreeing with *Mauro B.*'s approval of allowing party to seek writ relief after time to appeal has expired).

On determining when a judgment is final and appealable, see California Civil Appellate Practice, chap 3 (3d ed Cal CEB 1996).

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§15.59 c. If Writ Proceeding Is Exclusive Means of Appellate Review

In extremely limited circumstances, a writ proceeding is the exclusive means of obtaining appellate review of an order or judgment. See §§16.2-16.48. In such cases, the appellate court may not deny an apparently meritorious writ petition merely because the petition presents no important issue or because the reviewing court considers the case less worthy of its attention than other pending matters. *Powers v City of Richmond* (1995) 10 C4th 85, 114, 40 CR2d 839 (because writ relief is exclusive means of appellate review under Public Records Act, appellate court's refusal to entertain otherwise meritorious writ petition would likely constitute abuse of discretion); *PG&E Corp. v PUC* (2004) 118 CA4th 1174, 1193, 13 CR3d 630 (when petition for review "apparently" had merit, court could not summarily deny it merely because it presented no "important" issues).

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§15.60 2. Petitioner's Burden to Show Inadequacy of Other Remedies

The petitioner must allege and explain why no other remedy is available or, if another remedy is available, why it is inadequate. See *Phelan v Superior Court* (1950) 35 C2d 363, 366, 217 P2d 951; *Hogya v Superior Court* (1977) 75 CA3d 122, 128, 142 CR 325. On drafting the no-other-remedy allegations of an appellate court writ petition, see §18.34.

NOTE: Even though a petitioner must include these allegations in the writ petition, the courts of appeal often do not specifically address the no-other-adequate-relief requirement. See, *e.g.*, *Henry v Superior Court* (2008) 160 CA4th 440, 72 CR3d 808 (no discussion); *California Pub. Employees' Retirement Sys. v Superior Court* (2008) 160 CA4th 174, 72 CR3d 561 (same); *Snyder v Superior Court* (2007) 157 CA4th 1530, 69 CR3d 600 (same).

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§15.61 C. Petitioner Must Face Irreparable Injury

A petitioner must show that he or she will suffer irreparable injury if the appellate court fails to immediately intervene. See *County of Sonoma v Superior Court* (2009) 173 CA4th 322, 336 n6, 93 CR3d 39 (under circumstances of case, petitioner "lacks an adequate remedy at law and would suffer irreparable harm absent writ review"); *Interinsurance Exch. of the Automobile Club v Superior Court* (2007) 148 CA4th 1218, 1225, 56 CR3d 421 (to obtain writ review, "a petitioner generally must show his or her remedy in the ordinary course of law is inadequate or that petitioner would suffer irreparable injury were the writ not granted"). Irreparable injury can take a variety of forms, *e.g.,* the disclosure of privileged information, the loss of the ability to present substantial portions of a case, or the unnecessary expenditure of significant resources. See §§15.62-15.64. On specific contexts in which the appellate courts have issued writs of mandate, see chap 16 and App A.

NOTE: Like the no-adequate-remedy-at-law requirement (see §§15.56-15.60), the courts of appeal often do not specifically address the irreparable injury requirement. Instead, irreparable injury is merely implicit from the circumstances. See, *e.g.*, *Henry v Superior Court* (2008) 160 CA4th 440, 72 CR3d 808 (no discussion; injury implicit from potentially needless expenditure of significant time and resources); *California Pub. Employees' Retirement Sys. v Superior Court* (2008) 160 CA4th 174, 72 CR3d 561 (same from overruling demurrer); *Zevnik v Superior Court* (2008) 159 CA4th 76, 70 CR3d 817 (same from order denying motion to disqualify counsel); *Heritage Provider Network, Inc. v Superior Court* (2008) 158 CA4th 1146, 70 CR3d 645 (same from denial of statutory stay of trial court proceedings pending completion of arbitration); *Bell v Superior Court* (2007) 158 CA4th 147, 69 CR3d 328 (same from partial denial of class certification motion); *Snyder v Superior Court* (2007) 157 CA4th 1530, 69 CR3d 600 (same from dismissal without prejudice); *CenterPoint Energy, Inc. v Superior Court* (2007) 157 CA4th 1101, 69 CR3d 202 (same from order denying motion to quash service of summons).

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§15.62 1. Specific and Immediate Harm

The prospect of imminent, irreparable injury is one of the most common bases on which the appellate courts grant writ relief. See *Science Applications Int'l Corp. v Superior Court* (1995) 39 CA4th 1095, 1100, 46 CR2d 332 (writ relief available when "lower court's determination imposes unusually harsh and unfair results for which ordinary appellate review is inadequate").

Irreparable injury is often found, for example, in discovery cases when an order granting discovery allegedly violates a privilege of the party against whom discovery is granted. *Costco Wholesale Corp. v Superior Court* (2009) 47 C4th 725, 101 CR3d 758 (appellate court should have granted writ of mandate vacating order compelling discovery because it violated attorney-client privilege; petitioner not required to establish that its case would be harmed by disclosure of evidence), citing *Roberts v Superior Court* (1973) 9 C3d 330, 336, 107 CR 309.

For representative cases, see, *e.g.*:

- *Ombudsman Servs. of N. Cal. v Superior Court* (2007) 154 CA4th 1233, 1239, 65 CR3d 456 (writ review of order compelling nonparty to produce confidential records);
- *People ex rel Lockyer v Superior Court* (2004) 122 CA4th 1060, 1071, 19 CR3d 324 (writ review of order compelling production of potentially privileged documents); and
- *Davis v Superior Court* (1992) 7 CA4th 1008, 9 CR2d 331 (writ review of order denying motion to quash a subpoena requesting 10 years' worth of plaintiff's medical records "[t]o avoid the possibility of irreparable injury").

On specific contexts in which the appellate courts have issued writs of mandate, see chap 16 and App A.

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§15.63 a. When Ruling Deprives Petitioner of Opportunity to Present Case

An appellate court may grant writ relief when a trial court's ruling has deprived the petitioner of the opportunity to present a significant portion of its case. Immediate appellate review may save the trial court and parties substantial time and resources. See, *e.g.*, *Henry v Superior Court* (2008) 160 CA4th 440, 448, 72 CR3d 808 (pretrial evidentiary ruling precluded defendants from presenting evidence of contributory negligence); *Bell v Superior Court* (2007) 158 CA4th 147, 159, 69 CR3d 328 (partial denial of class certification motion); *Snyder v Superior Court* (2007) 157 CA4th 1530, 1535, 69 CR3d 600 (dismissal of complaint without prejudice); *Johnson v Superior Court* (2006) 143 CA4th 297, 304, 49 CR3d 52 (writ review of order granting summary judgment for some, but not all, defendants appropriate because immediate review preferable to obviating possible multiple trials). On specific contexts in which the appellate courts have issued writs of mandate, see chap 16 and App A.

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§15.64 b. When Ruling Is Clearly Erroneous and Substantially Prejudicial

An appellate court may grant writ relief when a trial court's ruling is clearly erroneous and substantially prejudices the petitioner's case. Immediate appellate review may save the trial court and parties substantial time and resources. See, *e.g., California Pub. Employees' Retirement Sys. v Superior Court* (2008) 160 CA4th 174, 187, 72 CR3d 561 (writ review of order overruling demurrer); *Wells Fargo Bank v Superior Court* (2008) 159 CA4th 381, 385, 71 CR3d 506 (writ review of order overruling demurrer); *CenterPoint Energy, Inc. v Superior Court* (2007) 157 CA4th 1101, 1106, 69 CR3d 202 (writ review of order denying motion to quash service of summons); *Fair Employment & Hous. Comm'n v Superior Court* (2004) 115 CA4th 629, 633, 9 CR3d 409 (writ review of order overruling demurrer). On specific contexts in which the appellate courts have issued writs of mandate, see chap 16 and App A.

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§15.65 2. Petitioner's Burden to Show Irreparable Injury

The petitioner must allege and explain why it faces irreparable injury if the court of appeal fails to immediately intervene and review the challenged trial court order or ruling. See *Phelan v Superior Court* (1950) 35 C2d 363, 370, 217 P2d 951. On drafting the irreparable injury allegations of an appellate court writ petition, see §18.34.

PRACTICE TIP: Counsel cannot assume that the court of appeal understands the ramifications of permitting an erroneous ruling to stand.

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D. Issue Must Not Be Moot

§15.66 1. Writ Generally Will Not Issue When Case Is Moot

A writ will not issue "to enforce an abstract or moot right …, and certainly the writ never should issue to compel an act which will tend to an unlawful purpose." *Slater v City Council of City of Los Angeles* (1965) 238 CA2d 864, 868, 47 CR 837. See, *e.g., Gridley v Gridley* (2008) 166 CA4th 1562, 83 CR3d 715 (writ relief denied because challenge to means by which petition was transferred to judge was moot); *Cooke v Superior Court* (1989) 213 CA3d 401, 417, 261 CR 706 (writ relief denied after county passed resolution making changes sought by writ petition), disapproved on other grounds by *County of San Diego v State* (1997) 15 C4th 68, 106 n30, 61 CR2d 134.

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§15.67 2. Public Interest May Override Mootness

If the petition raises an issue of public interest, particularly one likely to recur in future cases, an appellate court may decide the case, even though the issue is otherwise moot. See, *e.g.*, *Independent Energy Producers Ass'n v McPherson* (2006) 38 C4th 1020, 1024, 44 CR3d 644 (although challenge to initiative was rendered moot when the initiative was defeated, case raised important legal issues regarding preelection review of initiatives); *NBC Subsidiary (KNBC-TV), Inc. v Superior Court* (1999) 20 C4th 1178, 1190 n6, 86 CR2d 778 (although case technically moot, it presented important question affecting public's interest in access to courtroom proceedings); *Green v Superior Court* (1974) 10 C3d 616, 622 n6, 111 CR 704 (although case was moot, it presented important issues regarding the warranty of habitability that would frequently arise); *Jonathan L. v Superior Court* (2008) 165 CA4th 1074, 1088 n15, 81 CR3d 571 (even if dependency issues were moot, home schooling issues were of public interest and in need of clarification); *Ombudsman Servs. of N. Cal. v Superior Court* (2007) 154 CA4th 1233, 1239, 65 CR3d 456 (even if conditional settlement had made case moot, court would have decided petition because issue was important and of continuing public interest); *Corrales v Bradstreet* (2007) 153 CA4th 33, 46, 62 CR3d 440 (although supreme court opinion rendered case moot, case still presented important issues concerning agency practice of designating decisions as precedent); *TSI Seismic Tenant Space, Inc. v Superior Court* (2007) 149 CA4th 159, 168 n4, 56 CR3d 751 (despite stipulation to withdraw writ petitions, court decided issue "to resolve a matter of continuing public interest"); *Oaks Mgmt. Corp. v Superior Court* (2006) 145 CA4th 453, 458 n1, 51 CR3d 561 (although parties reached settlement, issue of the attorneys' disqualification was of general public interest and there was "dearth of published opinions" on issue); *Black Diamond Asphalt, Inc. v Superior Court* (2003) 114 CA4th 109, 115, 7 CR3d 466 (despite parties' settlement and request for dismissal, court decided issue in the interest of public policy and clarification of the law).

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§15.68 E. Issue Usually Must Have Been Raised in Trial Court

An appellate court will not issue a writ of mandate, prohibition, or review (certiorari) unless the petitioner has asked the trial court to act on the issue in question and the lower court has either refused to do so or ruled against the petitioner. *Phelan v Superior Court* (1950) 35 C2d 363, 372, 217 P2d 951; see also *Citizens Utils. Co. of Cal. v Superior Court* (1963) 59 C2d 805, 814, 31 CR 316 (requirement that petitioner raise issue in trial court is judicially created rule of practice adopted to prevent unnecessary litigation and as courtesy to trial courts); *Howell v Superior Court* (1962) 211 CA2d 487, 490, 27 CR 149 (prohibition denied for failure to seek relief in second of two superior courts having concurrent jurisdiction).

Typically, the issue in dispute is raised in the trial court in the moving or opposing papers. See also *Los Angeles Times v Superior Court* (2003) 114 CA4th 247, 254, 7 CR3d 524 (informal letters to superior court referee treated as motion sufficient to warrant writ consideration).

In rare circumstances, an appellate court may entertain a writ petition raising a new issue. See *Vannier v Superior Court* (1982) 32 C3d 163, 175, 185 CR 427 (court ruled on electronic surveillance issue despite lack of ruling by trial court; because trial judge had ruled on ultimate issue of petitioners' mandatory appearance as witnesses in Florida, petitioners were not required to demand separate ruling on what reviewing court viewed as evidentiary matter); *Civil Serv. Employees Ins. Co. v Superior Court* (1978) 22 C3d 362, 374 n6, 149 CR 360 (important constitutional issue); *Sheller v Superior Court* (2008) 158 CA4th 1697, 1709, 71 CR3d 207 (to avoid miscarriage of justice, appellate court reached "purely legal issue" of trial court's authority to formally reprimand attorney and order him to pay attorney fees, despite petitioner's failure to raise issue in trial court); *Monterey Club v Superior Court* (1941) 48 CA2d 131, 143, 119 P2d 349 (petitioner had no timely and appropriate opportunity to make the objection in the trial court).

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§15.69 F. Other Factors

In addition to the basic requirements discussed above (see §§15.51-15.68), the supreme court and courts of appeal have identified several other factors that they consider in determining whether to hear the merits of a writ petition. See *Omaha Indem. Co. v Superior Court* (1989) 209 CA3d 1266, 1270, 258 CR 66 (surveying decisions and listing factors, including basic requirements, that appellate courts weigh in deciding whether to consider merits of writ petition). The appellate courts and appellate practitioners sometimes collectively refer to the basic requirements and the other factors as the "*Omaha* factors." See, *e.g., Nguyen v Superior Court* (2007) 150 CA4th 1006, 1009, 58 CR3d 802; *Smith v Superior Court* (1996) 41 CA4th 1014, 1020, 49 CR2d 20.

The extent to which these factors apply depends on the facts and circumstances of the particular case. See, *e.g., Nguyen v Superior Court, supra* (noting that most *Omaha* factors were not applicable to case); *Roden v AmerisourceBergen Corp.* (2005) 130 CA4th 211, 218, 29 CR3d 810 (discussing applicable *Omaha* factors). On specific contexts in which the appellate courts have issued writs of mandate, see chap 16 and App A. Two of the most important of these factors are discussed below.

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§15.70 1. Issue of Widespread Public Importance or First Impression

In deciding whether to hear the merits of a writ petition, the appellate courts often give considerable weight to whether the petitioner raises an issue of public importance that should be resolved promptly. See, *e.g.*, *Yamaha Motor Co. v Superior Court* (2009) 174 CA4th 264, 94 CR3d 494 (court issued order to show cause because writ petition presented "an issue of some public importance that has not yet been squarely faced by a California state court); *County of Sonoma v Superior Court* (2009) 173 CA4th 322, 336 n6, 93 CR3d 39 (case "involves a novel and significant constitutional question which has generated conflicting trial court decisions"); *Southern Cal. Reg'l Rail Auth. v Superior Court* (2008) 163 CA4th 712, 717, 77 CR3d 765 (trial court certified pretrial preemption issue under CCP §166.1 as involving controlling question of law on which there were substantial grounds for difference of opinion and appellate resolution would materially advance conclusion of litigation); *Henry v Superior Court* (2008) 160 CA4th 440, 448, 72 CR3d 808 (interpreting Proposition 51's impact on evidence of nonparty's contributory negligence); *County of Los Angeles v Superior Court* (2008) 159 CA4th 353, 358, 71 CR3d 485 (deciding writ petition challenging class certification order "in order to decide the important legal question presented"); *Snyder v Superior Court* (2007) 157 CA4th 1530, 1533, 69 CR3d 600 (holding Los Angeles Superior Court General Order invalid); *CenterPoint Energy, Inc. v Superior Court* (2007) 157 CA4th 1101, 1120, 69 CR3d 202 (discussing jurisdiction on successor liability theory); *Interinsurance Exch. of the Automobile Club v Superior Court* (2007) 148 CA4th 1218, 1225, 56 CR3d 421 (meaning of statutory term "premium" was issue affecting all Californians).

Similarly, the appellate courts give weight to whether the petition raises an issue of first impression that should be decided immediately rather than after entry of a final judgment. See, *e.g., CashCall, Inc. v Superior Court* (2008) 159 CA4th 273, 285 n6, 71 CR3d 441 (precertification discovery issue was one of first impression); *Interinsurance Exch. of the Automobile Club,* 148 CA4th at 1226 (meaning of statutory term "premium" was issue of first impression); *California Highway Patrol v Superior Court* (2006) 135 CA4th 488, 496, 38 CR3d 16 (interlocutory writ review of summary adjudication order appropriate because issue was one of first impression); *Anderson v Superior Court* (1989) 213 CA3d 1321, 1328, 262 CR 405 (writ review appropriate because issue was one of first impression, and review was necessary to prevent multiplicity of appeals raising same issue). On specific contexts in which the appellate courts have issued writs of mandate, see chap 16 and App A.

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§15.71 2. Trial Courts in Conflict

In deciding whether to hear a writ petition, the appellate courts also give considerable weight to whether the petition raises an issue on which the trial courts have reached conflicting results, particularly if the trial courts are within the same appellate district. *Omaha Indem. Co. v Superior Court* (1989) 209 CA3d 1266, 1273, 258 CR 66. Immediate appellate review could result in a significant savings of time and judicial resources. See, *e.g., County of Sonoma v Superior Court* (2009) 173 CA4th 322, 336 n6, 93 CR3d 39 (case "involves a novel and significant constitutional question which has generated conflicting trial court decisions"); *Corbett v Superior Court* (2002) 101 CA4th 649, 657, 125 CR2d 46 (trial courts were in conflict on whether class actions could be brought under unfair competition law); *Smith v Superior Court* (1996) 41 CA4th 1014, 1020, 49 CR2d 20 (trial courts had issued conflicting rulings on effect of injunction entered in out-of-state wrongful termination case). On specific contexts in which the appellate courts have issued writs of mandate, see chap 16 and App A.

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16

Availability of Writ Relief

Paul D. Fogel

I. SCOPE OF CHAPTER §16.1

II. STATUTES SPECIFYING USE OF WRIT PETITION TO OBTAIN APPELLATE REVIEW
A. Writ Petition as Exclusive Means of Obtaining Appellate Review §16.2
1. CCP §170.3: Grant or Denial of Judicial Disqualification or Challenge
a. Writ Proceeding Exclusive Means of Obtaining Appellate Review §16.3
(1) Only Parties May File Writ Petition §16.4
(2) Request Mandate §16.5
b. Deadline to File Writ Petition Under CCP §170.3(d) §16.6
c. Standard of Review if Writ Petition Accepted §16.7
2. CCP §404.6: Order Concerning Coordination of Actions
a. Writ Proceeding Exclusive Means of Obtaining Appellate Review §16.8
b. Deadline to File Writ Petition §16.9
c. Standard on Review if Writ Petition Accepted §16.10
3. CCP §405.39: Grant or Denial of Motion to Expunge Lis Pendens
a. Writ Proceeding Exclusive Means of Obtaining Appellate Review §16.11
b. Deadline to File Writ Petition §16.12
c. Standard of Review if Writ Petition Accepted §16.13
4. Govt C §6259(c): Public Records Act
a. Writ Proceeding Exclusive Means of Obtaining Appellate Review §16.14
b. Court Has Limited Discretion to Deny Writ Petition §16.15
c. Deadline to File Writ Petition and Trial Court Stay §16.16
d. Standard of Review if Writ Petition Accepted §16.17
5. Special Provisions for Writ Review of Certain Administrative Proceedings
a. Petition for Review of Final Order of Agricultural Labor Relations Board
(1) Writ Proceeding Exclusive Means of Obtaining Appellate Review §16.18
(2) Deadline to File Writ Petition §16.19
(3) Discretion to Deny Petition §16.20
(4) Standard of Review if Writ Petition Accepted §16.21
b. Decisions of Alcoholic Beverage Control Appeals Board
(1) Petition for Writ of Review of Adjudicatory Order of Alcoholic Beverage Control Appeals Board §16.22
(2) Deadline to File Writ Petition §16.23
(3) Standard of Review if Writ Petition Accepted §16.24
(4) Petition for Writ of Mandate Challenging Nonadjudicatory Action §16.25
c. Petition for Writ of Review of Decisions of Energy Resources Conservation and Development Commission §16.26
(1) Deadline to File Writ Petition §16.27
(2) Standard on Review if Writ Petition Accepted §16.28
d. Petition for Writ of Review of Decisions of Public Employment Relations Board §16.29
(1) Deadline to File Writ Petition §16.30
(2) Standard of Review if Writ Petition Accepted §16.31
(3) Compare Board Petition to Enforce Decision §16.32
e. Petition for Writ of Review of Decisions of Public Utilities Commission
(1) Petition for Writ of Review §16.33
(a) Application for Rehearing Prerequisite to Judicial Review §16.34
(b) No Petition for Rehearing Required After Decision on Rehearing §16.35
(c) Application for Rehearing Deemed Denied §16.36
(2) Deadline to File Petition for Writ of Review §16.37
(3) Parties and Venue §16.38
(4) Standard of Review if Writ Petition Accepted §16.39
(a) In Complaint, Enforcement, Ratemaking, or Licensing Proceedings Under Pub Util C §1757 §16.40

(b) In Cases in Which Pub Util C §1757 Does Not Apply §16.41
(c) In Cases Pertaining to Water Corporations §16.42
(d) No New Evidence in Writ Proceeding §16.43
(e) In Cases Involving Constitutional Questions §16.43A
(5) Summary Denial of Writ Is on Merits §16.44
(6) PUC's Exercise of Legislative Power Not Res Judicata §16.45
f. Decisions of Workers' Compensation Appeals Board
(1) Writ of Review Exclusive Means of Obtaining Appellate Review §16.46
(2) Deadline to File Petition for Writ of Review §16.47
(3) Standard of Review if Writ Petition Accepted §16.48
B. Writ Petition as Prerequisite to Appeal
1. CCP §877.6(e): Grant or Denial of Motion for "Good Faith Settlement" Determination
a. Writ Proceeding May Be Prerequisite to Obtaining Appellate Review §16.49
b. Deadline to File Writ Petition §16.50
c. Standard of Review if Writ Petition Accepted §16.51
2. Challenge to Setting Termination Hearing Under Welf & I C §366.26(*l*) or Post-Termination Placement Order Under Welf & I C §366.28(b) §16.52

III. OTHER STATUTES AUTHORIZING WRIT REVIEW
A. Overview §16.53
B. CCP §418.10(c): Denial of Motion to Quash Service; to Stay or Dismiss for Inconvenient Forum; to Dismiss for Delay in Prosecution
1. Overview §16.54
2. Deadline to File Writ Petition Under CCP §418.10(c) §16.55
3. Standard of Review if Writ Petition Accepted §16.56
4. Filing Writ Petition Extends Time to File Responsive Pleading in Superior Court §16.57
C. CCP §403.080: Grant or Denial of Superior Court Motion to Reclassify Action or Proceeding
1. Overview §16.58
2. Deadline to File Writ Petition Under CCP §403.080 §16.59
3. Filing Requirements and Possible Stay §16.60
4. Standard of Review if Writ Petition Accepted §16.61
D. CCP §400: Grant or Denial of Superior Court Motion to Change Venue
1. Overview §16.62
2. Exception: Venue Order in Limited Civil Cases Directly Appealable §16.63
3. Deadline to File Writ Petition Under CCP §400 §16.64
4. Standard of Review if Writ Petition Accepted §16.65
E. CCP §437c: Denial of Motion for Summary Judgment; Violation of Summary Judgment Motion Procedures; Grant or Denial of Motion for Summary Adjudication
1. Overview §16.66
2. Denial of Motion for Summary Judgment §16.67
3. Grant or Denial of Summary Adjudication §16.68
4. Basis for Writ Petition
a. Court Erred in Denying Motion §16.69
b. Court Failed to Specify Issues and Evidence Relied on §16.70
c. Court Erred in Taking Motion Off Calendar §16.71
d. Court Erred by Shortening Notice Period §16.72
e. Court Erred by Depriving Party of Right to File Motion §16.73
f. Court Erred by Denying Oral Argument §16.74
g. Court Erred by Refusing to Consider Summary Adjudication in Alternative §16.75
5. Deadline to File Writ Petition §16.76
6. Standard of Review if Writ Petition Accepted §16.77
F. CCP §1176: Denial of Stay in Unlawful Detainer Action
1. Overview §16.78
2. Deadline to File Writ Petition §16.79
3. Standard of Review if Writ Petition Accepted §16.80
G. CCP §904.1(a)(11)-(12): Monetary Sanction Judgment or Order of $5000 or Less
1. Overview §16.81
2. Request Writ of Mandate or Prohibition in Alternative §16.82
3. No Statutory Deadline for Petition §16.83
4. Standard of Review if Writ Petition Accepted §16.84
5. Discovery Sanctions §16.85

IV. OTHER CONTEXTS IN WHICH WRIT RELIEF HAS BEEN GRANTED
A. Overview §16.86
B. Time to File Nonstatutory Writ Petition §16.87

C. To Challenge Jurisdiction of Superior Court on Basis of Invalidity of Statute or Ordinance
1. Overview §16.88
2. Use of Prohibition to Test Validity of Law §16.89
3. Use of Mandate to Test Validity of Law §16.90
4. Standard of Review if Writ Petition Accepted §16.91
D. In Cases of Exclusive, Conflicting, or Concurrent Jurisdiction
1. Exclusive Jurisdiction §16.92
2. Conflicting or Concurrent Jurisdiction
a. Trial Courts With Conflicting or Concurrent Jurisdiction §16.93
b. Determining Which Trial Court Has Jurisdiction §16.94
c. Determining Choice of Law §16.95
d. Other Tribunals With Conflicting or Concurrent Jurisdiction §16.96
3. Objecting Before Seeking Writ §16.97
4. Standard of Review if Writ Petition Accepted §16.98
E. To Review Arbitration Issues
1. Questions of First Impression §16.99
2. Orders Compelling Arbitration §16.100
3. Standard of Review if Writ Petition Accepted §16.101
F. To Remedy Orders Concerning Counsel
1. Disqualification Motions §16.102
2. Other Issues Involving Counsel §16.103
3. Standard of Review if Writ Petition Accepted §16.104
G. To Review Orders on Pleadings
1. When Issue Is Substantial or Resolution Would Result in Final Disposition of Case as to Party §16.105
2. When Ruling on Pleading Would Dramatically Affect Scope or Nature of Action §16.106
3. Standard of Review if Writ Petition Accepted §16.107
H. To Review Rulings on Demurrer
1. When Demurrer Is Overruled in Its Entirety §16.108
2. When Demurrer Is Partially Sustained §16.109
3. When Court Sustains Demurrer §16.110
4. Standard of Review if Writ Petition Accepted §16.111
I. When Court Denies Motion to Dismiss
1. Overview §16.112
2. Writ of Prohibition to Prevent Trial §16.113
3. Standard of Review if Writ Petition Accepted §16.114
J. To Correct Discovery Order
1. Overview §16.115
2. Significant Issues of First Impression Arising During Discovery §16.116
3. Constitutional Issues Arising During Discovery
a. Overview §16.117
b. Right to Privacy §16.118
4. Recurring Procedural Issues §16.119
5. Issues of Privilege
a. Overview §16.120
b. Examples of Writ Review of Privilege Issues §16.121
c. Attorney-Client Privilege and Work Product Doctrine §16.122
6. Issues Involving Denial of Discovery §16.123
7. Issues Involving Grant of Discovery §16.124
8. Issues Involving Orders Imposing Discovery Sanctions §16.125
a. Review of Discovery Sanctions of $5000 or Less §16.126
b. Review of Discovery Sanctions of More Than $5000 §16.127
9. Time to File Writ Petition §16.128
10. Standard of Review if Writ Petition Accepted §16.129
K. To Review Class Certification Orders §16.129A
1. Class Notification Issues §16.129B
2. Time to File Writ Petition §16.129C
3. Standard of Review if Writ Petition Accepted §16.129D
L. To Review Judgments and Orders in Contempt Cases §16.130
1. Review of Order Before Contempt Adjudication
a. Writ of Prohibition Before Contempt Adjudication §16.131
b. State Newspersons' Shield Law Does Not Provide Relief Before Contempt Adjudication §16.132
2. Writ Review of Contempt Judgment or Order
a. Overview §16.133
b. Scope of Review §16.134

c. Review by Writ of Review (Certiorari) §16.135
d. Review by Writ of Habeas Corpus §16.136
e. Review by Writ of Prohibition
(1) Writ of Prohibition Not Available After Fine Has Been Paid or Jail Sentence Has Been Served §16.137
(2) Writ of Prohibition Restrains Court That Failed to Comply With Prescribed Contempt Procedures §16.138
(3) Using Writ of Prohibition to Challenge Defective Affidavits §16.139
f. Review by Writ of Mandate §16.140
3. Time to File Writ Petition §16.141
4. Standard of Review if Writ Petition Accepted §16.142
M. To Review Probate Proceedings §16.143
N. To Review Family Law and Dependency Matters §16.143A
O. To Review Guardianship and Conservatorship Proceedings §16.144
P. To Review Orders on Motions in Limine §16.145
1. Time to File Writ Petition §16.146
2. Standard of Review if Writ Petition Accepted §16.147
Q. To Review Order Requiring Jury Trial
1. Overview §16.148
2. Standard of Review if Writ Petition Accepted §16.149
R. To Review Injunctions
1. Overview §16.150
2. Standard of Review if Writ Petition Accepted §16.151

V. EXTRAORDINARY CIRCUMSTANCES THAT REQUIRE FILING BOTH WRIT AND APPEAL §16.152

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§16.1 I. SCOPE OF CHAPTER

Most appellate court writ proceedings challenge trial court rulings in ongoing civil actions. See chap 15. This chapter discusses the kinds of interlocutory rulings that appellate courts have reviewed through writ proceedings. It also discusses the limited instances in which appellate courts have reviewed, in the first instance, decisions of certain state agencies by way of original writ proceedings.

In some contexts, a writ proceeding is the only means of obtaining appellate review of a superior court ruling (see §§16.3-16.48) or is a prerequisite to seeking postjudgment appellate review (see §§16.49-16.52). In other contexts, statutes authorize discretionary writ review. See §§16.54-16.86. In still other contexts, appellate courts exercise their discretion to issue a common law writ (*e.g.,* mandate, prohibition, or review (also called certiorari)). See §§16.87-16.152. The chapter concludes with a discussion of the rare instances in which a party aggrieved by an appealable order or final judgment should file both a writ petition and a notice of appeal. See §16.152.

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II. STATUTES SPECIFYING USE OF WRIT PETITION TO OBTAIN APPELLATE REVIEW

§16.2 A. Writ Petition as Exclusive Means of Obtaining Appellate Review

A number of statutes authorize writ review. These statutes often specify which type of writ the petitioner should seek (usually a writ of mandate). Some of these statutes specify that writ review is the sole means of obtaining appellate review. See §§16.2-16.48. Others make seeking writ review a prerequisite to later raising the issue on appeal from a final judgment. See §§16.49-16.52. Still other statutes provide for, but do not mandate, writ review. See §§16.53-16.85. On the requirements of the most common writs (*i.e.,* mandate, prohibition, and review (certiorari)), and how to select the proper writ, see chap 15.

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1. CCP §170.3: Grant or Denial of Judicial Disqualification or Challenge

§16.3 a. Writ Proceeding Exclusive Means of Obtaining Appellate Review

A party aggrieved by the grant or denial of a disqualification motion for cause (CCP §§170.1-170.5) or of a peremptory challenge to a judge (CCP §170.6) must seek appellate review by way of a petition for a writ of mandate under CCP §170.3(d). See, *e.g.*, *People v Hull* (1991) 1 C4th 266, 269, 2 CR2d 526 (CCP §170.3(d) applies equally to challenges for cause and peremptory challenges); *In re Sheila B.* (1993) 19 CA4th 187, 193, 23 CR2d 482 (CCP §170.3(d) is exclusive remedy for party aggrieved by grant of disqualification request). Such orders are not appealable. CCP §170.3(d); *Sheila B.*, *supra*. Even a party's waiver of a nonwaivable disqualification under CCP §170.3(b)(2)(B) can only be reviewed by writ. *People v Barrera* (1999) 70 CA4th 541, 551, 82 CR2d 755.

Review by writ promotes (1) judicial economy by eliminating the waste of time and money that would result if the matter proceeded to final judgment only to be reversed because proceedings after a wrongfully denied disqualification motion were void, and (2) fairness by preventing a party from obtaining a windfall by waiting until after there is an unfavorable outcome of the litigation before challenging a disqualification. See *Tri Counties Bank v Superior Court* (2008) 167 CA4th 1332, 1338, 84 CR3d 835 (objection under CCP §170.3(c) was untimely and properly stricken); *Sears, Roebuck & Co. v Nat'l Union Fire Ins. Co.* (2005) 131 CA4th 1342, 1348, 32 CR3d 717 (CCP §170.3 writ review is exclusive avenue of appellate review for rulings regarding disqualification of discovery referee).

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§16.4 (1) Only Parties May File Writ Petition

Only a party to the trial court proceeding, not the judge, may file a writ petition under CCP §170.3(d). In *Curle v Superior Court* (2001) 24 C4th 1057, 1067, 103 CR2d 751, the supreme court held that the court of appeal has authority to hear a petition under CCP §170.3(d) only if a party has filed the petition; because a superior court judge disqualified under former CCP §170.1(a)(6)(C) (now CCP §170.1(a)(6)(A)(iii)) is not a party to the proceeding under CCP §170.3(d), he or she cannot challenge the disqualification order by writ petition.

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§16.5 (2) Request Mandate

Because CCP §170.3(d) provides that a disqualification order may be reviewed "only by a writ of mandate," the petitioner must seek mandate rather than prohibition. See *People v Hull* (1991) 1 C4th 266, 269, 2 CR2d 526. Although a few courts have indicated that a writ of prohibition will lie to review an order denying a peremptory judicial challenge, most of these cases predate CCP §170.3(d) as well as the supreme court's decision in *Hull*. See, *e.g.*, *Calhoun v Superior Court* (1958) 51 C2d 257, 331 P2d 648; *Kohn v Superior Court* (1966) 239 CA2d 428, 48 CR 832. For cases illustrating the availability of mandate to review judicial challenge orders, see:

- *Swift v Superior Court* (2009) 172 CA4th 878, 91 CR3d 504 (writ of mandate compelling trial court to vacate order striking CCP §170.6 peremptory challenge);
- *C.C. v Superior Court* (2008) 166 CA4th 1019, 1023, 83 CR3d 225 (writ of mandate compelling trial court to vacate order accepting CCP §170.6 challenge);
- *Guardado v Superior Court* (2008) 163 CA4th 91, 77 CR3d 149 (petition challenging trial court's acceptance of CCP §170.6 challenge denied on merits);
- *First Fed. Bank. v Superior Court* (2006) 143 CA4th 310, 49 CR3d 296 (writ of mandate compelling trial court to honor CCP §170.6 challenge on remanded motion for attorney fees);
- *Jonathon M. v Superior Court* (2006) 141 CA4th 1093, 46 CR3d 798 (writ of mandate compelling trial court to accept peremptory challenge; juvenile court judge's refusal to follow earlier court of appeal decision on same issue and accept timely peremptory challenge was error);
- *Pfeiffer Venice Props. v Superior Court* (2003) 107 CA4th 761, 132 CR2d 400 (writ of mandate compelling trial court to honor challenge after remand to determine entitlement to attorney fees);
- *Pandazos v Superior Court* (1997) 60 CA4th 324, 70 CR2d 669 (writ of mandate compelling trial court to honor CCP §170.6 challenge to trial judge made after reversal of judgment on jury verdict);
- *La Seigneurie U.S. Holdings, Inc. v Superior Court* (1994) 29 CA4th 1500, 35 CR2d 175 (writ of mandate compelling trial court to grant peremptory challenge made more than 15 days after petitioner had made special appearance);
- *Farmers Ins. Exch. v Superior Court* (1992) 10 CA4th 1509, 13 CR2d 449 (writ of mandate compelling trial court to accept CCP §170.6 challenge to coordination judge that was properly made under former Cal Rules of Ct 1515 (now Cal Rules of Ct 3.516);
- *Stegs Invs. v Superior Court* (1991) 233 CA3d 572, 284 CR 495 (writ of mandate compelling trial court to accept post-appeal CCP §170.6 challenge on remand for partial trial).

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§16.6 b. Deadline to File Writ Petition Under CCP §170.3(d)

A party must file and serve a writ petition "within 10 days after service of written notice of entry of the court's order determining the question of disqualification." CCP §170.3(d); *Carl v Superior Court* (2007) 157 CA4th 73, 75, 68 CR3d 566 (summarily denying petition for writ of mandate filed almost 2 months after service of written notice of entry of order striking statement of disqualification). Section 170.3(d) does not provide for any extension of this deadline. Although CCP §170.3(d) is part of a code section concerning challenges for cause, the supreme court has held that it applies to peremptory challenges as well. See *People v Hull* (1991) 1 C4th 266, 270, 2 CR2d 526. On who qualifies as a party under CCP §170.3(d), see §16.4.

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§16.7 c. Standard of Review if Writ Petition Accepted

An appellate court reviews an order granting or denying a motion for judicial disqualification for abuse of discretion. See, *e.g.*, *Daniel V. v Superior Court* (2006) 139 CA4th 28, 39, 42 CR3d 471; *Hemingway v Superior Court* (2004) 122 CA4th 1148, 1153, 19 CR3d 363.

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2. CCP §404.6: Order Concerning Coordination of Actions

§16.8 a. Writ Proceeding Exclusive Means of Obtaining Appellate Review

A petition for a writ of mandate is the exclusive means of obtaining appellate review of an order concerning the coordination of previously unrelated actions. CCP §404.6; Cal Rules of Ct 3.505(b). Such orders are not appealable. *Lautrup, Inc. v Trans-West Discount Corp.* (1976) 64 CA3d 316, 134 CR 348.

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§16.9 b. Deadline to File Writ Petition

A party must file a writ petition within 20 days after service of a written notice of entry of the trial court's order. CCP §404.6. Before the 20-day period expires, the trial court may for "good cause" grant the petitioner up to 10 additional days within which to file the petition. CCP §404.6.

Subject to the rules concerning transfer of causes among the courts of appeal, a writ petition relating to an order granting or denying coordination may be filed in any reviewing court having jurisdiction under the rules applicable to civil actions generally. Cal Rules of Ct 3.505(b), 10.1000. If the actions to be coordinated are within the jurisdiction of more than one reviewing court, the order granting the petition for coordination must specify the court in which any petition for a writ relating to any subsequent order in the coordination proceeding must be filed. CCP §404.2; Cal Rules of Ct 3.505(a).

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§16.10 c. Standard on Review if Writ Petition Accepted

The standard of review of an order granting or denying coordination of previously unrelated actions depends on the nature of the determination under review. The trial court's application of law to undisputed facts is subject to de novo review. When the trial court's ruling is a mixed question of fact and law, the appellate court gives deference to the trial court's factual findings and reviews de novo the trial court's application of law to facts. See *McGhan Med. Corp. v Superior Court* (1992) 11 CA4th 804, 809, 14 CR2d 264.

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3. CCP §405.39: Grant or Denial of Motion to Expunge Lis Pendens

§16.11 a. Writ Proceeding Exclusive Means of Obtaining Appellate Review

A petition for a writ of mandate is the exclusive means of obtaining appellate review of an order granting or denying expungement of a lis pendens; such orders are not appealable. CCP §405.39. A writ petition is also the vehicle by which a party challenges an attorney fee order made under CCP §405.38. *Castro v Superior Court* (2004) 116 CA4th 1010, 1016 n10, 10 CR3d 865, citing CCP §405.39. See also *Shah v McMahon* (2007) 148 CA4th 526, 529, 55 CR3d 792 (dismissing purported appeal because challenge to fee order following order expunging lis pendens could be reviewed only by petition for writ of mandate).

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§16.12 b. Deadline to File Writ Petition

A writ petition must be filed and served within 20 days after service of written notice of the trial court's order by the court or any party. CCP §405.39. A petitioner may seek up to 10 additional days in which to file the petition if the extension is sought within the original 20-day period. CCP §405.39.

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§16.13 c. Standard of Review if Writ Petition Accepted

The standard of review is much like the abuse of discretion standard applicable to the review of an order granting or denying a preliminary injunction. *Howard S. Wright Constr. Co. v Superior Court* (2003) 106 CA4th 314, 320, 130 CR2d 641.

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4. Govt C §6259(c): Public Records Act

§16.14 a. Writ Proceeding Exclusive Means of Obtaining Appellate Review

A petition for an extraordinary writ, including a writ of mandate, is the exclusive means of obtaining appellate review of a trial court order under the California Public Records Act (Govt C §§6250-6276.48), either directing disclosure of a public record or supporting the decision of a public official refusing disclosure. Govt C §6259(c); *Filarsky v Superior Court* (2002) 28 C4th 419, 426, 121 CR2d 844; *Powers v City of Richmond* (1995) 10 C4th 85, 89, 40 CR2d 839; *County of Santa Clara v Superior Court* (2009) 170 CA4th 1301, 1311 n2, 89 CR3d 374; *Los Angeles Unified Sch. Dist. v Superior Court* (2007) 151 CA4th 759, 764 n2, 60 CR3d 445.

The limitation of judicial review in Govt C §6259(c) to review by extraordinary writ rather than by appeal does not violate the appellate jurisdiction clause of the California Constitution, Cal Const art VI, §11. *Powers*, 10 C4th at 93. The appellate jurisdiction vested in the courts by Cal Const art VI, §11, encompasses review by extraordinary writ as well as review by direct appeal. *Leone v Medical Bd.* (2000) 22 C4th 660, 667, 94 CR2d 61; *Powers v City of Richmond, supra*.

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§16.15 b. Court Has Limited Discretion to Deny Writ Petition

Because a writ petition under Govt C §6259(c) is the sole method of obtaining appellate review of a trial court order under the Public Records Act, a reviewing court does not have unfettered discretion to deny such a petition. A court "may not deny an apparently meritorious writ petition, timely presented in a formally and procedurally sufficient manner, merely because, for example, the petition presents no important issue of law or because the court considers the case less worthy of its attention than other matters." *Powers v City of Richmond* (1995) 10 C4th 85, 114, 40 CR2d 839. See, *e.g., Los Angeles Unified Sch. Dist. v Superior Court* (2007) 151 CA4th 759, 764, 60 CR3d 445 (writ denied on merits). This is in contrast to most other contexts in which appellate courts can, and usually do, summarily deny writ petitions for any number of reasons. See §§22.14-22.17.

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§16.16 c. Deadline to File Writ Petition and Trial Court Stay

A party must file a writ petition within 20 days after service of written notice of entry of an order under Govt C §6259. Govt C §6259(c). If the notice is served by mail, the period within which to file the petition is increased by 5 days. Govt C §6259(c). The trial court may, for good cause, grant the petitioner up to an additional 20 days within which to file the petition as long as the petitioner makes the request within 20 days after service of written notice of the entry of order. Govt C §6259(c).

A court will not stay an order under the Public Records Act unless the petitioner "demonstrates it will otherwise sustain irreparable damage and probable success on the merits." Govt C §6259(c). On requesting a stay in an appellate court writ proceeding, see chap 19.

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§16.17 d. Standard of Review if Writ Petition Accepted

The standard of review of an order under Govt C §6259 is "independent review." A trial court's interpretation of the Public Records Act and its application to undisputed facts present questions of law subject to de novo review, whereas a reviewing court will uphold the trial court's factual findings if based on substantial evidence. *County of Santa Clara v Superior Court* (2009) 170 CA4th 1301, 1311 n2, 89 CR3d 374 ("scope of review is the same as for direct appeals"); *Los Angeles Unified Sch. Dist. v Superior Court* (2007) 151 CA4th 759, 764, 60 CR3d 445.

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5. Special Provisions for Writ Review of Certain Administrative Proceedings

a. Petition for Review of Final Order of Agricultural Labor Relations Board

§16.18 (1) Writ Proceeding Exclusive Means of Obtaining Appellate Review

The court of appeal may review a final order of the Agricultural Labor Relations Board (ALRB) by way of a petition asking that the order be modified or set aside. *Artesia Dairy v ALRB* (2008) 168 CA4th 598, 86 CR3d 91 (because employer could not challenge union certification, it engaged in "technical" unfair labor practice to generate unfair labor practice decision reviewable under Lab C §1160.8). The petition must be filed in the court of appeal that has jurisdiction over the county in which the unfair labor practice allegedly occurred or in which the petitioner resides or transacts business. Lab C §1160.8. A writ petition is the exclusive means of appellate review of an ALRB final order. Lab C §1160.9.

On enforcement of ALRB orders in superior court, see §4.28.

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§16.19 (2) Deadline to File Writ Petition

A petition under Lab C §1160.8 must be filed within 30 days from the date of the issuance of the Agricultural Labor Relations Board's (ALRB) order. Lab C §1160.8. This time limit is jurisdictional. *United Farm Workers v Agricultural Labor Relations Bd.* (1977) 74 CA3d 347, 350, 141 CR 437. Code of Civil Procedure §1013(a) does not apply to extend the time within which to file a petition under Lab C §1160.8. *Mario Saikhon, Inc. v ALRB* (1983) 140 CA3d 581, 584, 189 CR 632.

The ALRB must file the certified record of the proceeding in the court of appeal within 10 days after it receives notice that the petition has been filed. Lab C §1160.8. Procedures are set forth in Cal Rules of Ct 8.498.

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§16.20 (3) Discretion to Deny Petition

The court of appeal has discretion to summarily deny the petition. *Tex-Cal Land Mgmt., Inc. v ALRB* (1979) 24 C3d 335, 350, 156 CR 1. However, the court will likely allow the petitioner a reasonable time to file points and authorities based on the record of the proceeding filed with the court by the Agricultural Labor Relations Board (ALRB). By placing the burden to furnish a sufficient record on the ALRB, Lab C §1160.8 "impliedly assures the petitioner an opportunity to present written arguments based on the board-certified record." 24 C3d at 351. See also *Powers v City of Richmond* (1995) 10 C4th 85, 113, 40 CR2d 839 ("reviewing court's discretion is quite restricted" when writ review is exclusive avenue of appellate review).

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§16.21 (4) Standard of Review if Writ Petition Accepted

On writ review, the ALRB's findings with respect to questions of fact are conclusive if supported by substantial evidence in the record. Lab C §1160.8. See *Tex-Cal Land Mgmt., Inc. v ALRB* (1979) 24 C3d 335, 342, 156 CR 1 (upholding constitutionality of substantial evidence standard prescribed by Lab C §1160.8); *Artesia Dairy v ALRB* (2008) 168 CA4th 598, 604, 86 CR3d 91 (as to ALRB's findings of fact, court applies substantial evidence standard and does not reweigh evidence, although evidence must be of "ponderable legal significance"; however, ALRB decisions that "rest on erroneous legal foundations will be set aside").

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b. Decisions of Alcoholic Beverage Control Appeals Board

§16.22 (1) Petition for Writ of Review of Adjudicatory Order of Alcoholic Beverage Control Appeals Board

The Alcoholic Beverage Control Appeals Board is an appellate agency within the Department of Alcoholic Beverage Control. Bus & P C §23077. The board reviews, among other things, the department's findings to determine whether they are supported by substantial evidence. See Bus & P C §23084.

The exclusive method of obtaining review of the board's adjudicatory orders is by a writ of review. The procedures are set forth in Bus & P C §§23090-23090.7. Bus & P C §§23089, 23090.5.

An aggrieved party may apply to the court of appeal for a writ of review of a final order of the board. Bus & P C §23090. Although Bus & P C §23090 also provides for application to the supreme court, applications filed there are routinely transferred to the courts of appeal without consideration of the merits. See, *e.g., Rondon v Alcoholic Beverage Control Appeals Bd.* (2007) 151 CA4th 1274, 1280, 60 CR3d 295. The procedures for seeking this statutory writ of review are those prescribed for a petition for a writ of review (certiorari) in CCP §§1067-1077. Bus & P C §23090.4. Procedures in the courts of appeal and the supreme court are discussed in chaps 18, 27.

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§16.23 (2) Deadline to File Writ Petition

The application for a writ of review must be filed and served "within 30 days after the filing of the final order of the board." Bus & P C §23090.

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§16.24 (3) Standard of Review if Writ Petition Accepted

The scope of review of the board's order is similar to review under CCP §1094.5. See Bus & P C §23090.2. Therefore, counsel can use the administrative mandamus format for the petition and responsive pleadings. The title of the petition, however, should be "Petition for Writ of Review." See the forms in California Administrative Mandamus (3d ed Cal CEB 2003). When reviewing the board's order, courts apply the same substantial evidence test that the board applies to the department's findings. Bus & P C §23090.2(d); *Kirby v Alcoholic Beverage Control Appeals Bd.* (1968) 261 CA2d 119, 121, 67 CR 628. See also *Rondon v Alcoholic Beverage Control Appeals Bd.* (2007) 151 CA4th 1274, 1283, 60 CR3d 295 (in absence of clear abuse of discretion, court will uphold decision to suspend license for violation of liquor laws; however, some situations call for de novo review, including whether administrative proceeding was fundamentally fair, which is question of law).

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§16.25 (4) Petition for Writ of Mandate Challenging Nonadjudicatory Action

A writ of mandate is available to review the Department of Alcoholic Beverage Control's nonadjudicatory actions; this writ also must be sought in the court of appeal or the supreme court. Bus & P C §23090.5; *Schenley Affiliated Brands Corp. v Kirby* (1971) 21 CA3d 177, 195, 98 CR 609 (review of department rule making); *Samson Mkt. Co. v Kirby* (1968) 261 CA2d 577, 580, 68 CR 130 (review of department order denying extension of time before cancellation of liquor license became effective). On writs of mandate, see §§15.2-15.13.

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§16.26 c. Petition for Writ of Review of Decisions of Energy Resources Conservation and Development Commission

Decisions of the Energy Resources Conservation and Development Commission on applications for the certification of sites and related facilities can be reviewed only through a petition for a writ of review in the California Supreme Court. Pub Res C §25531(a). See *County of Sonoma v State Energy Resources Conserv. & Dev. Comm'n* (1985) 40 C3d 361, 363, 220 CR 114 (upholding constitutionality of statutory restriction on method of review); *Santa Teresa Citizen Action Group v State Energy Resources Conserv. & Dev. Comm'n* (2003) 105 CA4th 1441, 1450, 130 CR2d 392 (supreme court had exclusive jurisdiction regarding judicial review of Energy Commission's decision on power plant).

Review is limited to whether the Commission acted under its statutory authority and in conformity with constitutional safeguards. The Commission's findings of fact are final and not subject to review. Pub Res C §25531(b).

For further discussion of the review of State Energy Resources Conservation and Development Commission decisions and for a sample form, see 20 California Forms of Pleading and Practice §247.279 (2007).

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§16.27 (1) Deadline to File Writ Petition

No statutory deadline exists for filing the petition for a writ of review.

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§16.28 (2) Standard on Review if Writ Petition Accepted

The supreme court may determine whether the commission acted under its statutory authority and in conformity with constitutional safeguards, but the commission's findings of fact are final and not subject to review, except as provided in Pub Res C §§25500-25543. Pub Res C §25531(b).

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§16.29 d. Petition for Writ of Review of Decisions of Public Employment Relations Board

Review of decisions by the Public Employment Relations Board (PERB) is through a "petition for a writ of extraordinary relief." Govt C §3542(b). The writ has also been referred to as a "writ of review." *Regents of Univ. of Cal. v PERB* (1986) 41 C3d 601, 606, 224 CR 631; *California Faculty Ass'n v PERB* (2008) 160 CA4th 609, 615, 72 CR3d 654. Procedures are set out in Cal Rules of Ct 8.498.

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§16.30 (1) Deadline to File Writ Petition

The petition must "be filed within 30 days after issuance of the board's final order, order denying reconsideration, or order joining in the request for judicial review, as applicable." Govt C §3542(c). The time limit for seeking judicial review prescribed by Govt C §3542(c) is jurisdictional and is not extended by CCP §1013(a) when the board's decision is served by mail. *San Mateo Fed'n of Teachers v Public Employment Relations Bd.* (1994) 28 CA4th 150, 155, 33 CR2d 387.

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§16.31 (2) Standard of Review if Writ Petition Accepted

The board's findings on "questions of fact, including ultimate facts, if supported by substantial evidence on the record considered as a whole, are conclusive." Govt C §3542(c). See *California Faculty Ass'n v PERB* (2008) 160 CA4th 609, 616, 72 CR3d 654 (appellate court defers to board's determination of whether matter is within scope of representation unless clearly erroneous).

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§16.32 (3) Compare Board Petition to Enforce Decision

If the time to petition for extraordinary relief has expired, the board may seek enforcement of its final decision or order, by writ of mandamus, in the court of appeal or the superior court. Govt C §3542(d).

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e. Petition for Writ of Review of Decisions of Public Utilities Commission

§16.33 (1) Petition for Writ of Review

The method for seeking judicial review of a decision of the Public Utilities Commission (PUC), an agency of state constitutional origin, is a petition for a writ of review filed in the court of appeal or the supreme court. Pub Util C §1756. In rare circumstances, however, a writ of mandate directed at the PUC may issue in the supreme court or the court of appeal as prescribed in CCP §1085. Pub Util C §1759(b).

No court, except the court of appeal or supreme court in review proceedings, may review, reverse, correct, or annul PUC orders or decisions. The superior court may not interfere with the PUC's regulation of public utilities. Pub Util C §1759(a); *Hartwell Corp. v Superior Court* (2002) 27 C4th 256, 275, 115 CR2d 874; *San Diego Gas & Elec. Co. v Superior Court* (1996) 13 C4th 893, 916, 55 CR2d 724; but see *People ex rel Orloff v Pacific Bell* (2003) 31 C4th 1132, 1138, 7 CR3d 315 (PUC does not have exclusive jurisdiction over all actions against public utilities; Pub Util C §1759(a) does not insulate public utilities from all civil actions brought in superior court).

A petition for a writ of review pertaining solely to water corporations may be filed only in the supreme court, which must grant expedited consideration to any petition alleging that the court of appeal has assumed jurisdiction over such a proceeding. Pub Util C §§1756(f), 1758(d). The supreme court may review decisions of the court of appeal on a petition for a writ of review in the manner provided for other civil actions. Pub Util C §1758(c).

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§16.34 (a) Application for Rehearing Prerequisite to Judicial Review

Filing an application for rehearing within 30 calendar days of the effective date of a PUC decision is a jurisdictional prerequisite to filing a petition for a writ of review. Pub Util C §1731; *Albin v Railroad Comm'n* (1932) 216 C 655, 15 P2d 860. The application for rehearing must set forth with specificity the grounds on which the applicant believes the PUC decision is unlawful; no ground may be urged in any court unless set forth in the application for rehearing. Pub Util C §1732. If an application for rehearing is filed 10 days or more before the effective date of the challenged order, the application must be granted or denied before the effective date, or the order will stand suspended until the application is granted or denied, up to a period of 60 days from the date the application is filed. Pub Util C §1733(a).

PRACTICE TIP: Except in very rare circumstances, the PUC makes its decisions effective on the date of issuance, mooting Pub Util C §1733(a).

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§16.35 (b) No Petition for Rehearing Required After Decision on Rehearing

An aggrieved party desiring judicial review is not obliged to seek rehearing of a decision on rehearing before petitioning for a writ of review. *Toward Util. Rate Normalization v PUC* (1978) 22 C3d 529, 536, 149 CR 692.

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Source: Civil Litigation/California Civil Writ Practice/16 Availability of Writ Relief/§16.36 (c) Application for Rehearing Deemed Denied

§16.36 (c) Application for Rehearing Deemed Denied

An application for rehearing not granted within 60 days may be deemed denied by the applicant, unless the PUC extends the effective date of the order for the period of the pendency of the application. Pub Util C §1733.

PRACTICE TIP: It is generally unwise to deem the application for rehearing denied and file a petition for a writ of review, because the PUC can simply inform the court that an order on the application for rehearing is imminent and include in its order a discussion addressing the points made in the petition for review.

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§16.37 (2) Deadline to File Petition for Writ of Review

A petition for a writ of review must be filed within 30 calendar days after the PUC issues its decision denying the application for rehearing or, if the application is granted, within 30 calendar days after issuance of the decision on rehearing. Pub Util C §1756(a). For decisions for which the rehearing application is granted but no decision on rehearing has been issued, the petition for a writ of review must be filed at least 120 days after the application for rehearing was granted. Pub Util C §1756(a).

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§16.38 (3) Parties and Venue

A petitioner seeking a writ of review must be "a party that is aggrieved" by the PUC's decision and must have filed a timely application for rehearing. Pub Util C §§1731(b), 1756(a). See §§16.33-16.37. The PUC is the respondent in the review proceeding and generally appears as a party. Pub Util C §§1756.2, 1758(a). Other parties to the PUC proceeding may appear and are often designated real parties in interest. Venue for a petition for a writ of review is in the judicial district in which the petitioner resides or, if the petitioner is a business, the judicial district in which the petitioner has its principal place of business in California. Pub Util C §1756(d).

PRACTICE TIP: When the petitioner has its principal place of business outside California, the petition should allege that fact and the reasons the particular venue was chosen, *e.g.,* the petitioner has business connections to the judicial district, counsel makes its office in the district, or the PUC's decision or the underlying transaction occurred in the district.

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§16.39 (4) Standard of Review if Writ Petition Accepted

As a general matter, the PUC's interpretation of the Public Utilities Code "should not be disturbed unless it fails to bear a reasonable relation to statutory purposes and language." *Greyhound Lines, Inc. v PUC* (1968) 68 C2d 406, 410, 67 CR 97. However, the PUC does not receive such deference on questions relating to the scope of its own jurisdiction.

To the extent not inconsistent with the Public Utilities Code, the provisions of the Code of Civil Procedure relating to writs of review (certiorari) (CCP §§1067-1077) apply to the review proceeding. Pub Util C §1758(b).

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Source: Civil Litigation/California Civil Writ Practice/16 Availability of Writ Relief/§16.40 (a) In Complaint, Enforcement, Ratemaking, or Licensing Proceedings Under Pub Util C §1757

§16.40 (a) In Complaint, Enforcement, Ratemaking, or Licensing Proceedings Under Pub Util C §1757

In complaint or enforcement proceedings, and in ratemaking or licensing proceedings addressed to particular parties, judicial review, based on the entire record certified by the PUC, is limited to whether any of the following occurred (Pub Util C §1757(a)):

- The PUC acted without, or in excess of, its powers or jurisdiction;
- The PUC did not proceed in the manner required by law;
- The PUC's decision was not supported by the findings;
- The findings in the decision were not supported by substantial evidence in light of the whole record;
- The order or decision of the PUC was procured by fraud or was an abuse of discretion; or
- The order or decision of the PUC violated any federal or state constitutional right of the petitioner.

See *Utility Reform Network v PUC* (2008) 166 CA4th 522, 533, 82 CR3d 791 (setting out court's standard of review of PUC decisions).

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Source: Civil Litigation/California Civil Writ Practice/16 Availability of Writ Relief/§16.41 (b) In Cases in Which Pub Util C §1757 Does Not Apply

§16.41 (b) In Cases in Which Pub Util C §1757 Does Not Apply

In cases in which Pub Util C §1757 does not apply, such as rulemaking cases or industrywide investigations, judicial review, based on the entire record certified by the PUC, is limited to whether any of the following occurred (Pub Util C §1757.1(a)):

- The order or decision of the PUC was an abuse of discretion;
- The PUC did not proceed in the manner required by law;
- The PUC acted without, or in excess of, its powers or jurisdiction;
- The decision of the PUC was not supported by the findings;
- The order or decision of the PUC was procured by fraud; or
- The order or decision of the PUC violated a federal or state constitutional right of the petitioner.

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Source: Civil Litigation/California Civil Writ Practice/16 Availability of Writ Relief/§16.42 (c) In Cases Pertaining to Water Corporations

§16.42 (c) In Cases Pertaining to Water Corporations

Review of PUC decisions pertaining solely to water corporations is limited to determining whether the PUC regularly pursued its authority, including whether the order or decision violates any state or federal constitutional right of the petitioner. Pub Util C §1757.1(b).

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§16.43 (d) No New Evidence in Writ Proceeding

No new or additional evidence may be presented in the writ proceeding. Apart from constitutional questions, the findings of the PUC, including its findings of ultimate fact and its findings and conclusions on reasonableness and discrimination, are final. Pub Util C §1757.1(c).

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§16.43A (e) In Cases Involving Constitutional Questions

When a PUC order or decision is challenged on the ground that it violates any state or federal constitutional right of the petitioner, the reviewing court exercises "independent judgment on the law and the facts, and the findings or conclusions of the [PUC] material to the determination of the constitutional question" are not final. Pub Util C §1760.

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§16.44 (5) Summary Denial of Writ Is on Merits

A summary denial of a petition for a writ of review is a decision on the merits as to the law and the facts presented in the review proceedings. *In re Rose* (2000) 22 C4th 430, 444, 93 CR2d 298, following the holding in *Consumers Lobby Against Monopolies v PUC* (1979) 25 C3d 891, 901, 160 CR 124. That is because a petition to the supreme court for a writ of review is the sole means provided by law for judicial review of a PUC decision and the petition serves the same function as an appeal. 25 C3d at 901. Thus, unlike a summary denial of a petition for mandate, prohibition, or other prerogative writ, the summary denial of a petition for a writ of review under Pub Util C §1756 is normally res judicata. 25 C3d at 901 n3. See chaps 22, 24 on summary denial and res judicata.

PRACTICE TIP: A summary denial of a petition for review by the court of appeal is immediately final. See Cal Rules of Ct 8.490(b)(1); *Pacific Bell v Public Utils. Comm'n* (2000) 79 CA4th 269, 284 n12, 93 CR2d 910. This gives the petitioner just 10 days to file a petition for review in the supreme court. Cal Rules of Ct 8.500(e)(1).

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§16.45 (6) PUC's Exercise of Legislative Power Not Res Judicata

In *Camp Meeker Water Sys. v PUC* (1990) 51 C3d 845, 274 CR 678, the PUC looked at the deeds of the parties to determine whether the petitioner, a private water system, was entitled to a rate increase. The supreme court ruled that the PUC did not attempt to adjudicate incidents of title or to enforce rights between parties. The PUC's rate increase decision was binding in all collateral actions or proceedings under Pub Util C §1709 but did not otherwise have res judicata effect. 51 C3d at 852 n3. It is well settled that when the PUC exercises its judicial power, its orders or decisions are res judicata as to the issues involved "in subsequent proceedings between the same parties." When the PUC fixes rates, however, it exercises its legislative, not its judicial, power. 21 C3d at 852 n3.

On review of PUC decisions and forms, see also 42 California Forms of Pleading and Practice, Public Utilities §§480.140-480.147, 480.200.

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f. Decisions of Workers' Compensation Appeals Board

§16.46 (1) Writ of Review Exclusive Means of Obtaining Appellate Review

The exclusive method for obtaining review of decisions of the Workers' Compensation Appeals Board (WCAB) is by a special statutory writ of review. Lab C §5950. See, *e.g., Gelson's Mkts., Inc. v WCAB* (2009) 179 CA4th 201, 208, 101 CR3d 548 (court of appeal granted writ of review and annulled WCAB's decision); *Bensen v WCAB* (2009) 170 CA4th 1535, 89 CR3d 166 (court of appeal granted writ of review and upheld WCAB's decision); *Department of Corrections & Rehabilitation v WCAB* (2008) 166 CA4th 911, 916, 82 CR3d 920 (treating petition for writ of mandate or prohibition as petition for writ of review). A petition for reconsideration by the WCAB is a necessary prerequisite for judicial review. Lab C §5901.

The petition for review should be filed in the court of appeal for the appellate district in which the petitioner resides. Lab C §5950. As with other writs, although the petition can be filed first in the supreme court (Lab C §5950), that court routinely transfers such petitions to the court of appeal without considering the merits.

The supreme court and the courts of appeal are also authorized by Lab C §5955 to issue mandate to the WCAB (*i.e.,* to compel a legal duty) in "all proper cases." *Loustalot v Superior Court* (1947) 30 C2d 905, 908, 186 P2d 673. Under Lab C §5955, mandate may be available to challenge the constitutionality of workers' compensation legislation if the petitioner can meet the criteria in CCP §1085. *Greener v WCAB* (1993) 6 C4th 1028, 1046, 25 CR2d 539 (trial court had personal jurisdiction over WCAB but lacked subject matter jurisdiction to declare Workers' Compensation Act provisions invalid and enjoin their enforcement; although challenge to validity of statute before its application in effect sought declaratory relief over which appellate courts do not have original jurisdiction, petitioner could petition appellate court for writ of mandate).

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§16.47 (2) Deadline to File Petition for Writ of Review

The petition must be filed within 45 calendar days after a petition for reconsideration is denied; or, if reconsideration is granted, within 45 calendar days after filing of the order, decision, or award following reconsideration. Lab C §5950. The prescribed time limit is jurisdictional. *Southwest Airlines v WCAB* (1991) 234 CA3d 1421, 1424, 286 CR 347 (when petition was not filed within time specified by Lab C §5950, appellate court lacked jurisdiction and petition was denied). Code of Civil Procedure §1013 does not extend the time within which a party must file a petition for a writ of review under Lab C §5950 if the Workers' Compensation Appeals Board's decision is served by mail. *Camper v WCAB* (1992) 3 C4th 679, 690, 12 CR2d 101, citing *Paneno v WCAB* (1992) 4 CA4th 136, 148, 5 CR2d 461.

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§16.48 (3) Standard of Review if Writ Petition Accepted

An appellate court reviews interpretation of governing statutes or application of the law to undisputed facts de novo, although "the WCAB's interpretation is entitled to great weight unless clearly erroneous." *Zenith Ins. Co. v WCAB* (2008) 159 CA4th 483, 490, 71 CR3d 724. See *Bensen v WCAB* (2009) 170 CA4th 1535, 1543, 89 CR3d 166; *Brodie v WCAB* (2007) 40 C4th 1313, 1331, 57 CR3d 644; *Medrano v WCAB* (2008) 167 CA4th 56, 64, 83 CR3d 802; *Tomlin v WCAB* (2008) 162 CA4th 1423, 1427, 76 CR3d 672. The WCAB's findings on questions of fact are conclusive when supported by substantial evidence, based on review of the entire record. Lab C §§5952-5953; *Braewood Convalescent Hosp. v WCAB* (1983) 34 C3d 159, 164, 193 CR 157; *Verga v WCAB* (2008) 159 CA4th 174, 183, 70 CR3d 871. See *Gelson's Mkts., Inc. v WCAB* (2009) 179 CA4th 201, 208, 101 CR3d 548 (court "defer[s] to the Board's determination of facts if supported by substantial evidence").

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B. Writ Petition as Prerequisite to Appeal

1. CCP §877.6(e): Grant or Denial of Motion for "Good Faith Settlement" Determination

§16.49 a. Writ Proceeding May Be Prerequisite to Obtaining Appellate Review

At least two courts have held that a petition for a writ of mandate is the proper method to seek *prejudgment* review of a trial court's determination that settlement by one of several joint tortfeasors or co-obligors on a contract was or was not in good faith. A party seeking *postjudgment* review of a good faith settlement determination may do so on appeal, at least if it has already unsuccessfully sought a writ prejudgment. See CCP §877.6(e); *Maryland Cas. Co. v Andreini & Co.* (2000) 81 CA4th 1413, 1425, 97 CR2d 752. See also *Wilshire Ins. Co. v Tuff Boy Holding, Inc.* (2001) 86 CA4th 627, 636, 103 CR2d 480.

In *Maryland Cas.*, an insured brought an action against his insurer and his broker. The insured settled with the broker, and the trial court found that the settlement was made in good faith. The insured's prejudgment petition for a writ of mandate was summarily denied, and the insurer again sought review, postjudgment, on appeal as a matter of right. The court of appeal held that mandate is the exclusive procedure for obtaining immediate review of a good faith determination, and any party wishing to challenge the merits of such an order must do so within the time prescribed in CCP §877.6(e). However, a summary denial of such a petition does not foreclose postjudgment review of the determination on appeal. *Wilshire Ins. Co. v Tuff Boy Holding, Inc, supra,* is to the same effect, except that the writ petition was brought by an insurer whose indemnity claim against the manufacturer was extinguished by the good faith settlement. The insurer later appealed from a stipulated judgment but was unable to change the outcome.

PRACTICE TIP: Counsel should seek the writ immediately, so as not to foreclose the ability to raise the issue on appeal from a final judgment.

The failure to seek immediate writ review of a good faith settlement determination possibly forecloses a party from later challenging the determination on appeal. In *Maryland Cas.*, for example, the court noted that the appellant had timely petitioned the court for writ review, which was summarily denied. *Maryland Cas. Co. v Andreini & Co.* (2000) 81 CA4th 1413, 1425 n13, 97 CR2d 752. The court thus did not decide whether an aggrieved party may choose to forgo writ review of a good faith settlement determination and raise the issue for the first time on appeal. In *Main Fiber Prods., Inc. v Morgan & Franz Ins. Agency* (1999) 73 CA4th 1130, 1135, 87 CR2d 108, the applicant did not seek writ review, and the appellate court held that the good faith settlement determination could not be challenged on appeal. See also *O'Hearn v Hillcrest Gym & Fitness Ctr., Inc.* (2004) 115 CA4th 491, 499, 9 CR3d 342 (same result due to strong policy of encouraging early finality).

NOTE: On the other hand, *Rohr Indus., Inc. v First State Ins. Co.* (1997) 59 CA4th 1480, 69 CR2d 872, considered the applicability of CCP §§877-877.6 to a third party (in *Rohr*, an insurer), concluding that the appropriate remedy in that case was an appeal: "[W]hen a party wishes to challenge the legality or appropriateness of extending the applicability of sections 877 and 877.6 to settlements not involving 'joint tortfeasors' or 'co-obligors on a contract debt,' as the terms are used in these statutes, they may do so by way of appeal." 59 CA4th at 1486.

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§16.50 b. Deadline to File Writ Petition

The writ petition must be filed within 20 days of service after written notice of the determination on the good faith hearing. CCP §877.6(e). The notice may be served by one of the parties or the clerk of the court. The trial court may grant up to an additional 20 days for filing the petition. CCP §877.6(e).

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§16.51 c. Standard of Review if Writ Petition Accepted

Ordinarily, the determination of whether a settlement is in good faith is reviewed for abuse of discretion. *Tech-Bilt, Inc. v Woodward-Clyde & Assoc.* (1985) 38 C3d 488, 502, 213 CR 256. See *Long Beach Mem. Med. Ctr. v Superior Court* (2009) 172 CA4th 865, 872, 91 CR3d 494 (reviewing factors in making good faith settlement determination under CCP §877.6 and concluding court abused discretion in approving doctors' settlement; writ issued directing trial court to vacate order finding settlement was in good faith); *TSI Seismic Tenant Space, Inc. v Superior Court* (2007) 149 CA4th 159, 165, 56 CR3d 751 (when exercise of discretion on basis of established criteria can yield only one conclusion, abuse of discretion will be found). However, an issue of statutory interpretation and application of the statute to undisputed facts is a question of law subject to de novo review. *Be v Western Truck Exch.* (1997) 55 CA4th 1139, 1143, 64 CR2d 527.

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§16.52 2. Challenge to Setting Termination Hearing Under Welf & I C §366.26(*l*) or Post-Termination Placement Order Under Welf & I C §366.28(b)

In juvenile dependency proceedings, the trial court may set a hearing to terminate parental rights under Welf & I C §366.26 or order post-termination placement of the child under Welf & I C §366.28. Writ review under Cal Rules of Ct 8.450-8.452 or 8.454-8.456 is the exclusive means to challenge an order setting a hearing to terminate parental rights or a post-termination placement order. Cal Rules of Ct 8.450(a), 8.454(a). See *Jennifer T. v Superior Court* (2007) 159 CA4th 254, 255 n2, 71 CR3d 293 (purported appeal of juvenile court order terminating family reunification services and setting permanent planning hearing treated as writ petition); *Wayne F. v Superior Court* (2006) 145 CA4th 1331, 1334, 1345, 52 CR3d 519 (petition for extraordinary relief granted to caretakers who qualified as prospective adoptive parents, affirming that they had standing to participate in removal hearing). These juvenile court orders are not appealable unless a petition for a writ of extraordinary relief, substantively addressing the specific issues and supported by the record, is timely filed but not resolved on the merits by the appellate court. Welf & I C §§366.26(*l*)(1)(A)-(C), 366.28(b)(1); Cal Rules of Ct 8.450-8.452, 8.454-8.456.

On writ review to challenge an order setting a hearing to terminate parental rights or a post-termination placement order, see California Juvenile Dependency Practice §§10.92-10.108 (Cal CEB Annual).

On further review of writs in juvenile proceedings, see Cal Rules of Ct 8.406, 8.470 (courts of appeal), and 8.472 (supreme court).

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III. OTHER STATUTES AUTHORIZING WRIT REVIEW

§16.53 A. Overview

This section discusses the various statutes authorizing writ review (sometimes referred to as "statutory writs"). In spite of such authorization, the appellate courts retain discretion to hear the merits or summarily deny the petition. On factors the courts of appeal consider in deciding whether to grant writ review, see chaps 15, 17. If the court chooses to decide the matter on the merits, its disposition will turn on the substantive law applicable to the issue presented and the record before it.

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B. CCP §418.10(c): Denial of Motion to Quash Service; to Stay or Dismiss for Inconvenient Forum; to Dismiss for Delay in Prosecution

§16.54 1. Overview

A litigant may seek a writ of mandate to overturn an order denying a motion to: (1) quash the service of summons; (2) stay or dismiss an action on the ground of inconvenient forum; or (3) dismiss the action "pursuant to the applicable provisions of Chapter 1.5 (commencing with Section 583.110) of Title 8." CCP §418.10(a), (c). See, *e.g., Agua Caliente Band of Cahuilla Indians v Superior Court* (2006) 40 C4th 239, 52 CR3d 659 (motion to quash); *Kumar v Superior Court* (1982) 32 C3d 689, 186 CR 772 (same); *Ameriloan v Superior Court* (2008) 169 CA4th 81, 88, 86 CR3d 572 (same); *Anglo Irish Bank Corp. v Superior Court* (2008) 165 CA4th 969, 977, 81 CR3d 535 (same). Expeditious review makes sense; if a trial court has erroneously denied such a motion, the remaining proceedings as to the defendant who made the motion are for naught and would waste judicial resources. See, *e.g.*, *Reid v Balter* (1993) 14 CA4th 1186, 1196, 18 CR2d 287 ("counterproductive" for defendants to wait until after trial and judgment to request review of denial of motion to dismiss for delay in prosecution; on appeal, court refused to disturb plaintiffs' victory on merits by considering issue of delay; case predates addition to CCP §418.10(a) of motion to dismiss for delay in prosecution); see discussion in §16.55.

NOTE: It is not clear that every motion to dismiss for delay in prosecution is included within "the applicable provisions of Chapter 1.5 (commencing with Section 583.110) of Title 8," as provided in CCP §418.10(c). It may be that only a motion to dismiss for failure to timely serve the summons and complaint (see CCP §§583.210-583.250) comes within CCP §418.10(a), (c); only this motion is a likely substitute for the defendant's pleading at the beginning of the case.

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§16.55 2. Deadline to File Writ Petition Under CCP §418.10(c)

A defendant must file the writ petition *before* filing a responsive pleading (see §16.57) and within 10 days after service of a written notice of entry of the order denying the motion. CCP §418.10(c). Service by mail extends the period within which the petition must be filed by 5 days under CCP §1013(a). *Shearer v Superior Court* (1977) 70 CA3d 424, 426, 138 CR 824. The trial court may extend the period within which the petition must be filed by a maximum of 20 days for "good cause." CCP §418.10(c). *Cornell Univ. Med. College v Superior Court* (1974) 38 CA3d 311, 313, 113 CR 291.

The defendant must serve the notice of the petition for a writ of mandate on the adverse party and file it with trial court. CCP §418.10(c).

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§16.56 3. Standard of Review if Writ Petition Accepted

The standard of review turns in part on the showing the defendant made in the trial court. When a nonresident defendant challenges personal jurisdiction, the plaintiff must prove, by a preponderance of the evidence, the factual basis justifying the exercise of jurisdiction. See, *e.g.*, *Pavlovich v Superior Court* (2002) 29 C4th 262, 273, 127 CR2d 329; *Anglo Irish Bank Corp. v Superior Court* (2008) 165 CA4th 969, 980, 81 CR3d 535; *Dorel Indus., Inc. v Superior Court* (2005) 134 CA4th 1267, 1273, 36 CR3d 742. If the plaintiff meets this burden, the defendant must then show "that the exercise of jurisdiction would be unreasonable." *Vons Cos. v Seabest Foods, Inc.* (1996) 14 C4th 434, 449, 58 CR2d 899.

On review, the question of jurisdiction is one of law. When the jurisdictional facts are conflicting, the reviewing court reviews the trial court's factual determinations for substantial evidence and then independently reviews the trial court's conclusions as to the legal significance of the facts. See, *e.g.*, *Vons Cos.*, 14 C4th at 449; *Dorel Indus., Inc.*, 134 CA4th at 1273. When the jurisdictional facts are not in dispute, the question of personal jurisdiction is purely one of law that the appellate court reviews de novo. See, *e.g.*, *Pavlovich*, 29 C4th at 273; *Anglo Irish Bank*, 165 CA4th at 977; *CenterPoint Energy, Inc. v Superior Court* (2007) 157 CA4th 1101, 1116, 69 CR3d 202 (legal question turning on rules of successor liability); *Dorel Indus., Inc. v Superior Court, supra*; *Sonora Diamond Corp. v Superior Court* (2000) 83 CA4th 523, 540, 99 CR2d 824.

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§16.57 4. Filing Writ Petition Extends Time to File Responsive Pleading in Superior Court

Serving and filing a petition for a writ of mandate extends the defendant's time to file a responsive pleading until 10 days after service of written notice of the final judgment in the mandate proceeding. CCP §418.10(c). See also Cal Rules of Ct 8.491 (time for filing responsive pleading extended until 10 days after supreme court files its order denying writ of review after court of appeal denies writ of mandate). The trial court may extend the time to plead for an additional period, not exceeding 20 days, on a showing of good cause. CCP §418.10(c).

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C. CCP §403.080: Grant or Denial of Superior Court Motion to Reclassify Action or Proceeding

§16.58 1. Overview

A party aggrieved by an order granting or denying a motion to reclassify an action or proceeding may obtain review of that order by a petition for a writ of mandate filed in the court of appeal. CCP §403.080. These orders are not directly appealable. *Garau v Torrance Unified Sch. Dist.* (2006) 137 CA4th 192, 199, 40 CR3d 108.

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§16.59 2. Deadline to File Writ Petition Under CCP §403.080

The petitioner must file the petition in the court of appeal within 20 days after service of written notice of the order granting or denying the motion to reclassify the case. CCP §403.080. The trial court may extend this deadline for an additional 10 days for good cause, provided that the petitioner seeks the extension before the 20-day period expires. CCP §403.080.

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§16.60 3. Filing Requirements and Possible Stay

The petitioner must also file a copy of the writ petition in the trial court immediately after the petition is filed in the court of appeal. CCP §403.080. The court of appeal may stay all proceedings in the case pending the finality of its decision on the writ petition. CCP §403.080. Immediately after the decision on the petition becomes final, the clerk of the court of appeal must file a copy of the final order or judgment with the clerk of the trial court. CCP §403.080.

On requesting a stay in an appellate court writ proceeding, see chap 19.

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§16.61 4. Standard of Review if Writ Petition Accepted

The appellate court reviews an order granting or denying a motion to reclassify for abuse of discretion. See, *e.g.*, *Ytuarte v Superior Court* (2005) 129 CA4th 266, 276, 28 CR3d 474.

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D. CCP §400: Grant or Denial of Superior Court Motion to Change Venue

§16.62 1. Overview

A petition for a writ of mandate is the proper method to obtain review of a superior court order granting *or* denying a motion to change venue. CCP §400. See, *e.g.*, *San Francisco Found. v Superior Court* (1984) 37 C3d 285, 208 CR 31 (denying); *Alexander v Superior Court* (2003) 114 CA4th 723, 8 CR3d 111 (denying); *Hamilton v Superior Court* (1974) 37 CA3d 418, 112 CR 450 (granting). Such orders are not directly appealable. See, *e.g.*, *Calhoun v Vallejo City Unified Sch. Dist.* (1993) 20 CA4th 39, 41, 24 CR2d 337; *Hennigan v Boren* (1966) 243 CA2d 810, 815, 52 CR 748. It is unclear whether an order granting or denying a change of venue can be reviewed on appeal from a final judgment. Compare *Hennigan v Boren, supra* (denial of motion to change venue not subject to review on appeal from final judgment) to *Calhoun v Vallejo City Unified Sch. Dist., supra* (appeal of denial of motion to change venue can occur after rendition of final judgment). As a practical matter, the statutory writ is the most useful method of review because it is doubtful that on appeal, the aggrieved party could show prejudice resulted from trial in the wrong court.

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Source: Civil Litigation/California Civil Writ Practice/16 Availability of Writ Relief/§16.63 2. Exception: Venue Order in Limited Civil Cases Directly Appealable

§16.63 2. Exception: Venue Order in Limited Civil Cases Directly Appealable

An order granting or denying a motion to change venue in a limited civil case is an appealable order. CCP §904.2(c).

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§16.64 3. Deadline to File Writ Petition Under CCP §400

The petitioner must file the writ petition in the court of appeal within 20 days after service of written notice of the order granting or denying the change of venue motion. CCP §400. Before the 20-day period expires, the trial court, for good cause, may extend the time within which to file the writ petition for up to an additional 10 days. CCP §400. The petitioner must file a copy of the writ petition in the trial court "immediately after the petition is filed in the court of appeal." CCP §400.

The court of appeal may stay all proceedings in the case pending finality of its judgment on the writ petition. CCP §400. On requesting a stay in an appellate court writ proceeding, see chap 19.

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§16.65 4. Standard of Review if Writ Petition Accepted

If the petitioner sought a change of venue as a matter of right (*e.g.,* the action was pending in the wrong court), the reviewing court will uphold the trial court's determination even if there were conflicting affidavits or testimony unless that determination was arbitrary. See, *e.g.*, *Swartz v California Olive Growers' Packing Corp.* (1942) 56 CA2d 168, 170, 133 P2d 20. If the petitioner sought a change of venue as a matter of discretion (*e.g.,* convenience of witnesses, impartial trial), the reviewing court will uphold the order unless the trial court clearly abused its discretion. See, *e.g.*, *Garrett v Superior Court* (1967) 248 CA2d 263, 268, 56 CR 418 (court found abuse of discretion). See 3 Witkin, California Procedure, *Actions* §948 (5th ed 2008).

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E. CCP §437c: Denial of Motion for Summary Judgment; Violation of Summary Judgment Motion Procedures; Grant or Denial of Motion for Summary Adjudication

§16.66 1. Overview

A party may appeal a judgment entered after an order granting a motion for summary judgment under CCP §437c. CCP §437c(m)(1). All other orders entered under CCP §437c are reviewable by writ. See CCP §437c(m)(1), which states: "Upon entry of any order pursuant to this section, except the entry of summary judgment, a party may… petition an appropriate reviewing court for a peremptory writ." That is, if the trial court did anything other than grant summary judgment, CCP §437c(m)(1) authorizes a party to petition for a peremptory writ (in practice, usually mandate) to review the court's order. Thus, a party may seek a writ to review an order denying summary judgment, an order granting summary judgment of a complaint that leaves a cross-complaint pending, an order granting or denying summary adjudication, or an order that violates the procedural provisions of CCP §437c.

NOTE: Although the Consumers Legal Remedies Act (CLRA) precludes a motion for summary judgment or adjudication under CCP §437c, CCP §1781(c)(3) empowers a court to determine if a CLRA action "is without merit or there is no defense to the action." In ruling on a CLRA "no merit" motion, the courts "[i]n practice," have applied the "standards applicable to motions for summary judgment and summary adjudication." *Princess Cruise Lines, Ltd. v Superior Court* (2009) 179 CA4th 36, 101 CR3d 323 (issuing writ requiring trial court to vacate order denying summary judgment).

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§16.67 2. Denial of Motion for Summary Judgment

Although one decision suggests that a reviewing court usually considers the merits of the summary judgment motion when deciding whether to grant writ relief from an order denying the motion (see *Leyva v Superior Court* (1985) 164 CA3d 462, 468, 210 CR 545), in practice, writ review on the merits is not easy to obtain when summary judgment has been denied. See, *e.g., Lompoc Unified Sch. Dist. v Superior Court* (1993) 20 CA4th 1688, 1692, 26 CR2d 122 (courts "reluctant" to review denials of summary judgment by writ); *Whitney's at the Beach v Superior Court* (1970) 3 CA3d 258, 265, 83 CR 237. But see *State Dep't of Health Servs. v Superior Court* (2003) 31 C4th 1026, 1037, 6 CR3d 441 (reversing appellate court's denial of writ of mandate to overturn order denying summary judgment, allowing defendant to raise defense to action under Fair Employment and Housing Act); *Kentucky Fried Chicken v Superior Court* (1997) 14 C4th 814, 828, 59 CR2d 756 (reversing appellate court's denial of writ of mandate to overturn order denying summary judgment because defendant owed no duty to plaintiff); *Greenberg v Superior Court* (2009) 172 CA4th 1339, 92 CR3d 96 (same); *California Highway Patrol v Superior Court* (2008) 162 CA4th 1144, 76 CR3d 578 (ruling CHP owed no statutory duty to plaintiff and issuing writ of mandate directing trial court to enter summary judgment for CHP); *City of San Diego v Superior Court* (2006) 137 CA4th 21, 28, 40 CR3d 26 (peremptory writ of mandate issued directing trial court to enter summary judgment for defendant; question of fact "can be decided as a matter of law if reasonable minds can come to only one conclusion concerning" issue); *Balloon v Superior Court* (1995) 39 CA4th 1116, 1119, 46 CR2d 161 (peremptory writ of mandate issued directing trial court to grant defendants' summary judgment motion for failure to exhaust administrative remedies), superseded by statute on other grounds as stated in *McDonald v Antelope Valley Community College Dist.* (2008) 45 C4th 88, 110, 84 CR3d 734.

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§16.68 3. Grant or Denial of Summary Adjudication

Under CCP §437c, a party may move for summary adjudication on one or more causes of action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty. CCP §437c(f)(1). The trial court must grant summary adjudication "only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." CCP §437c(f)(1). See *DeCastro West Chodorow & Burns, Inc. v Superior Court* (1996) 47 CA4th 410, 422, 54 CR2d 792 (petition for writ of mandate denied because CCP §437c(f)(1) does not allow summary adjudication of single component of compensatory damages that does not dispose of entire cause of action). Because CCP §437c provides for writ review of *any order* other than an order granting summary judgment, orders granting or denying summary adjudication are reviewable by writ. See, *e.g., The MEGA Life & Health Ins. Co. v Superior Court* (2009) 172 CA4th 1522, 1534, 92 CA4th 399 (granting writ petition challenging denial of summary adjudication on fraud cause of action); *Ra v Superior Court* (2007) 154 CA4th 142, 147, 64 CR3d 539 (denying on merits writ petition challenging summary adjudication as to one of several causes of action).

In *Fisherman's Wharf Bay Cruise Corp. v Superior Court* (2003) 114 CA4th 309, 7 CR3d 628, the court of appeal explained the reasons for considering the merits of a writ petition contesting an order granting summary adjudication: (1) an erroneous ruling created a likelihood of the necessity of two trials rather than one, allowing some causes of action to go forward while omitting significant legal issues that arose out of the same facts and that quite likely should be tried together; and (2) the issues raised in the petition were questions of law, making their immediate resolution on writ review appropriate. 114 CA4th at 319. Although mandate does not lie to control the exercise of trial court discretion, on a motion for summary adjudication, a trial court has no discretion to exercise. "If the trial court errs, it has made an error of law, which automatically constitutes an abuse of discretion." 114 CA4th at 320. See also *Marron v Superior Court* (2003) 108 CA4th 1049, 1056, 134 CR2d 358 (finding irreparable injury if second trial were required).

In *City of Oakland v Superior Court* (1996) 45 CA4th 740, 53 CR2d 120, the court issued a writ of mandate directing the trial court to grant summary adjudication on two of six causes of action. The court issued the writ because the case presented significant legal questions of constitutional and statutory interpretation, public interest supported a speedy resolution of the issues, and the issues presented were questions of law. 45 CA4th at 750.

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4. Basis for Writ Petition

§16.69 a. Court Erred in Denying Motion

If both sides have moved for summary judgment and no facts are disputed, a writ petition lies to require the trial court to grant the motion of one of the parties. *Burke Concrete Accessories, Inc. v Superior Court* (1970) 8 CA3d 773, 775, 87 CR 619. That is because the trial court is *required* to grant the motion under CCP §437c if there is no triable issue and the moving party is entitled to judgment as a matter of law. *B & E Convalescent Ctr. v State Compensation Ins. Fund* (1992) 8 CA4th 78, 88, 9 CR2d 894.

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§16.70 b. Court Failed to Specify Issues and Evidence Relied on

A writ petition lies to compel the trial court to comply with summary judgment motion procedures, *e.g.,* to specify the issues and evidence it relied on in ruling on the motion. See CCP §437c(g); *Vineyard Springs Estates, LLC v Superior Court* (2004) 120 CA4th 633, 642, 15 CR3d 587 (court of appeal vacated denial of summary judgment, ordered trial court to reconsider motion after discharging its duty to rule on evidentiary objections); *Continental Ins. Co. v Superior Court* (1985) 165 CA3d 1069, 1072, 212 CR 140 (court of appeal vacated denial of summary judgment on ground that trial court had not identified material conflicts in evidence by reference to evidence in support of and in opposition to particular asserted facts); *Greater Irvine Credit Union v Superior Court* (1986) 186 CA3d 1189, 1192, 231 CR 296 (same effect). The requirement that the trial court specify the issues and evidence it relied on in ruling on the motion is a task the court often shifts to counsel. See, *e.g.*, *Tera Pharms., Inc. v Superior Court* (1985) 170 CA3d 530, 532, 215 CR 923.

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§16.71 c. Court Erred in Taking Motion Off Calendar

A writ petition lies to challenge an order taking a motion for summary judgment off calendar that fails to comply with the timing requirements of local court rules. See, *e.g., Wells Fargo Bank v Superior Court* (1988) 206 CA3d 918, 922, 254 CR 68 (summary judgment motion was timely under CCP §437c, but local rule required that motion be specially set, preventing hearing no later than 30 days before trial as specified in CCP §437c(a); appellate court issued writ directing trial court to vacate order taking motion off calendar and to hear motion before trial date).

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§16.72 d. Court Erred by Shortening Notice Period

A writ petition lies to vacate a trial court order shortening the notice period for a summary judgment motion. In *McMahon v Superior Court* (2003) 106 CA4th 112, 130 CR2d 407, the court of appeal issued a writ directing the trial court to vacate an order shortening such period on the ground that, in enacting CCP §437c, the Legislature did not give trial courts such authority. 106 CA4th at 118. The court recognized that a motion for summary judgment is potentially case-dispositive and usually requires considerable time and effort to prepare and oppose.

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§16.73 e. Court Erred by Depriving Party of Right to File Motion

A writ petition lies to ensure that a party can exercise the statutory right to bring a summary judgment motion. In *Polibrid Coatings, Inc. v Superior Court* (2003) 112 CA4th 920, 923, 6 CR3d 7, the trial court cited fast-track rules when it denied a trial continuance that would have allowed a cross-defendant brought into the case 14 months after the complaint was filed sufficient time to file a summary judgment motion. The court of appeal issued a writ, agreeing with the petitioner that the fast-track rules must yield to the statutory right to bring a summary judgment motion.

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§16.74 f. Court Erred by Denying Oral Argument

A writ petition lies to ensure that a party has a right to oral argument on a motion for summary judgment. In *Brannon v Superior Court* (2004) 114 CA4th 1203, 8 CR3d 491, the trial court issued a telephonic order denying summary judgment and stating that it would not entertain oral argument. The defendants filed a writ petition. After examining the statutory language and the Legislature's view of the importance of the summary judgment process, the court of appeal concluded that a trial court may not refuse to hear oral argument on a summary judgment motion, although it has substantial discretion to impose reasonable limitations. It therefore issued a writ directing the trial court to hear the matter. 114 CA4th at 1211.

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§16.75 g. Court Erred by Refusing to Consider Summary Adjudication in Alternative

A writ petition lies to direct the trial court to consider a party's alternative motion for summary adjudication. In *Hope Int'l Univ. v Superior Court* (2004) 119 CA4th 719, 14 CR3d 643, the trial court denied the plaintiff's motion for summary judgment or summary adjudication. Because the plaintiff's memorandum of points and authorities was not organized by cause of action, and despite the absence of any rule or decision requiring the trial court's preferred organization, the trial court refused to consider summary adjudication. Petitioner sought a writ of mandate. The court of appeal concluded that the trial court erred in not considering the summary adjudication motion but denied the petition because triable issues of fact existed. 119 CA4th at 744.

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§16.76 5. Deadline to File Writ Petition

A party seeking writ review of an order denying summary judgment, granting or denying summary adjudication, or violating summary judgment motion procedures must file the petition within 20 days after service of "written notice of entry of the order." CCP §437c(m)(1). The deadline runs from the service date of the writing that makes petitioner aware of the trial court's ruling; that is, "written notice of entry of the order." As used in CCP §437c(m)(1), this can mean the date on which the court clerk mailed a copy of the order rather than the date on which the prevailing party mailed notice of its entry. *Eldridge v Superior Court* (1989) 208 CA3d 1350, 1353, 256 CR 724; *Schmidt v Superior Court* (1989) 207 CA3d 56, 60, 254 CR 827 (because petitioner became aware of trial court's ruling through minute order mailed by court, that order, not later notice of order, triggered filing period).

The initial 20-day period is extended if the notice of entry of order is served by mail. CCP §437c(m)(1). If the notice is served by fax, express mail, or another method providing for overnight delivery, the initial period is extended by 2 court days. CCP §437c(m)(1). Code of Civil Procedure §§1005 and 1013 (extending times within which to act) do *not* apply to extend the time within which to file the writ petition. CCP §437c(b)(6).

PRACTICE TIP: Unless the petitioner is certain of the date of mailing, fax, or express mail, it is safest to calendar the date to file the writ petition from the date of the order.

Filing a motion for reconsideration does not extend the period for seeking writ review. *Bensimon v Superior Court* (2003) 113 CA4th 1257, 1259, 7 CR3d 151 (time limits to file writ petition to review denial of motion for summary judgment are strictly construed; motion for reconsideration does not extend time to file writ petition); *Schmidt*, 207 CA3d at 61.

Before the 20-day period within which to file the petition expires, the trial court may for good cause extend the time for one additional period not to exceed 10 days. CCP §437c(m)(1).

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§16.77 6. Standard of Review if Writ Petition Accepted

On writ review, the court of appeal reviews de novo the trial court's decision to grant summary adjudication or deny summary judgment or summary adjudication. It is not bound by the trial court's stated reasons or rationales. See, *e.g.*, *Travelers Cas. & Sur. Co. v Superior Court* (1998) 63 CA4th 1440, 1450, 75 CR2d 54 (denial of summary adjudication); *Scripps Clinic v Superior Court* (2003) 108 CA4th 917, 927, 134 CR2d 101 (same); *West Shield Investigations & Sec. Consultants v Superior Court* (2000) 82 CA4th 935, 946, 98 CR2d 612 (same). With respect to an order denying a defendant's motion for summary adjudication, the appellate court first reviews the motion to determine whether the defendant met its initial burden to establish that one or more causes of action in the complaint had no merit, by showing that one or more elements of the cause of action could not be established, or that there was a complete defense thereto. If the defendant met that burden, the court then examines whether the plaintiff showed, by setting forth specific facts, that a triable issue of fact existed as to that cause of action or defense. 82 CA4th at 946.

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F. CCP §1176: Denial of Stay in Unlawful Detainer Action

§16.78 1. Overview

Code of Civil Procedure §1176(a) authorizes a defendant in an unlawful detainer action whose petition for a stay of judgment pending appeal has been denied by the trial court to file a petition for an extraordinary writ with the appropriate court of appeal.

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§16.79 2. Deadline to File Writ Petition

A party seeking writ review of an order denying a petition for a stay of judgment in an unlawful detainer proceeding pending appeal must file the petition "forthwith." CCP §1176(a). The statute does not impose any more specific deadline for filing the petition.

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§16.80 3. Standard of Review if Writ Petition Accepted

On writ review, an order denying a stay of judgment pending appeal is reviewed under the abuse of discretion standard. See, *e.g.*, *Mehr v Superior Court* (1983) 139 CA3d 1044, 1050, 189 CR 138 (court abused discretion in denying tenants' motion for stay of execution of judgment pending appeal).

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G. CCP §904.1(a)(11)-(12): Monetary Sanction Judgment or Order of $5000 or Less

§16.81 1. Overview

In an unlimited jurisdiction civil case, an immediate appeal may be taken from an interlocutory judgment or order directing payment of sanctions of more than $5000. CCP §904.1(a)(11)-(12). A sanctions order or judgment of *$5000 or less* against a party or a party's attorney "may be reviewed on an appeal by that party after entry of final judgment in the main action, or, at the discretion of the court of appeal, may be reviewed upon petition for an extraordinary writ." CCP §904.1(b).

Because a sanction order or judgment of $5000 or less may be reviewed on appeal after final judgment or on petition for extraordinary writ, the failure to petition for writ relief from such an order or judgment should not affect the right to appeal after final judgment. Because CCP §904.1(a)(11)-(12) provides the right to appeal a sanctions order or judgment that exceeds $5000, a court may deny a writ petition that seeks review of an order or judgment of $5000 or less on the ground that appeal is an adequate remedy. For discussion of appeal as an adequate remedy, see §§15.56-15.60.

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§16.82 2. Request Writ of Mandate or Prohibition in Alternative

In requesting writ review of sanctions, the attorney should request issuance of a writ of mandate or prohibition in the alternative. A writ of mandate is an appropriate remedy to prevent or to obtain the imposition of sanctions. See, *e.g., Kirschenman v Superior Court* (1994) 30 CA4th 832, 835, 36 CR2d 166 (writ of mandate issued ordering trial court to vacate order imposing sanctions on attorney and client for failing to personally attend mediation session and ordering further mediation; trial court had no statutory authority to mandate mediation, and no enforceable agreement to mediate existed); *Yarnell & Assocs. v Superior Court* (1980) 106 CA3d 918, 923, 165 CR 421.

Prohibition is also appropriate to prevent an award of sanctions that exceeds the trial court's jurisdiction, even when execution on the order for sanctions has already issued. *Lund v Superior Court* (1964) 61 C2d 698, 709, 39 CR 891.

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Source: Civil Litigation/California Civil Writ Practice/16 Availability of Writ Relief/§16.83 3. No Statutory Deadline for Petition

§16.83 3. No Statutory Deadline for Petition

The statute does not specify a deadline within which to file the writ petition. CCP §904.1(b).

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§16.84 4. Standard of Review if Writ Petition Accepted

In general, an appellate court reviews a sanctions award for abuse of discretion. See, *e.g.*, *City & County of San Francisco v Ballard* (2006) 136 CA4th 381, 404, 39 CR3d 1.

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§16.85 5. Discovery Sanctions

There is a split of authority over the appealability of discovery sanctions. For discussion of special issues involving review of discovery sanctions, see §§16.125-16.127. See also California Civil Appellate Practice §§3.24, 3.41 (3d ed Cal CEB 1996).

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IV. OTHER CONTEXTS IN WHICH WRIT RELIEF HAS BEEN GRANTED

§16.86 A. Overview

This section discusses the various contexts in which appellate courts have granted writ relief despite the absence of a statute authorizing such relief. As with so-called statutory writs, the appellate courts retain the discretion to determine whether to entertain a writ petition on the merits. On factors the appellate courts consider in deciding whether to consider a petition on the merits, see chaps 15, 17. If the court entertains a writ petition on the merits, its decision turns on the applicable substantive law and the record.

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§16.87 B. Time to File Nonstatutory Writ Petition

When there is no statutory deadline for filing a writ petition, the appellate courts often apply an "unwritten" 60-day deadline from the date of the challenged order or ruling. See *People v Superior Court (Brent)* (1992) 2 CA4th 675, 682, 3 CR2d 375 (60 days is time limit within which petition "usually" must be filed). Many cases articulate this 60-day rule. See, *e.g.*, *Planned Parenthood Golden Gate v Superior Court* (2000) 83 CA4th 347, 356, 99 CR2d 627 ("[w]here there is otherwise no statutory time limit in filing a writ petition, it must usually be filed within 60 days"); *Popelka, Allard, McCowan & Jones v Superior Court* (1980) 107 CA3d 496, 499, 165 CR 748 ("[a]n appellate court *may* consider a petition for an extraordinary writ at any time [citation], but has discretion to deny a petition filed after the 60-day period applicable to appeals, and *should* do so absent 'extraordinary circumstances' justifying the delay"). But see *Good v Superior Court* (2008) 158 CA4th 1494, 1505 n9, 71 CR3d 125 (although 60-day rule is generally recognized, petition filed beyond 60-day deadline will not be denied unless respondent can show prejudice).

Some cases recognize exceptions to this "unwritten" rule. See, *e.g., Planned Parenthood Golden Gate v Superior Court*, *supra* (60-day rule relaxed because privacy rights of third parties implicated); *Irwin Mem. Blood Ctrs. v Superior Court* (1991) 229 CA3d 151, 156, 279 CR 911 (same).

A petition filed toward the end of the 60-day period is not necessarily timely if the petitioner has "slept on" his or her rights to the real party in interest's prejudice. In such cases, laches may apply and result in denial of the writ petition. See*, e.g.*, *H.D. Arnaiz, Ltd. v County of San Joaquin* (2002) 96 CA4th 1357, 1368, 118 CR2d 71 (laches principles govern timeliness of nonstatutory writ petition); *Wagner v Superior Court* (1993) 12 CA4th 1314, 1317, 16 CR2d 534 ("There is no absolute deadline for filing a petition for writ of mandamus, although the equitable doctrine of laches may bar relief when the petitioner has unreasonably delayed in filing the petition to the prejudice of the opposing party"; petition filed 4 months after challenged discovery order held timely); *People v Superior Court (Clements)* (1988) 200 CA3d 491, 496, 246 CR 122 ("the approach of the Supreme Court to the timeliness of a petition has been one of laches"), citing *Peterson v Superior Court* (1982) 31 C3d 147, 163, 181 CR 784.

The governing principle is reasonableness: if speedy appellate review of a trial court order is necessary, waiting until the 60th day to seek writ relief is risky.

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C. To Challenge Jurisdiction of Superior Court on Basis of Invalidity of Statute or Ordinance

§16.88 1. Overview

The appellate courts have entertained writ petitions by parties threatened with the enforcement of an unconstitutional or inapplicable statute or ordinance. A party may challenge the court's attempt to assume jurisdiction based on an unconstitutional law (see *Mendoza v Small Claims Court* (1958) 49 C2d 668, 321 P2d 9 (mandamus proceeding)), a law that has expired or been repealed without a savings clause (see *Charrot v Municipal Court* (1968) 260 CA2d 208, 66 CR 903), a law that is inapplicable to the petitioner's conduct (*In re Zerbe* (1964) 60 C2d 666, 668, 36 CR 286 (habeas corpus proceeding) (see §§4.17-4.26, 15.39-15.43 for discussion of habeas corpus), or a law that would be unconstitutional if applied in the manner contemplated (*Wetteland v Superior Court* (1967) 251 CA2d 607, 59 CR 605; *Patterson v Municipal Court* (1965) 232 CA2d 289, 293, 42 CR 769; see *In re Bevill* (1968) 68 C2d 854, 862, 69 CR 599 (habeas corpus proceeding)).

As these cases illustrate, the courts are somewhat flexible about the relief sought, and a petitioner may alternatively request either prohibition or mandate. Depending on the timing of the challenge, a writ of review (certiorari) also may be available. Depending on the circumstances, habeas relief may be appropriate. On the time for filing writ petition, see §16.87.

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§16.89 2. Use of Prohibition to Test Validity of Law

Prohibition has been used to test the constitutionality of a law on the ground that its invalidity deprives the trial court of jurisdiction to hear the case. See, *e.g.*, *Melancon v Superior Court* (1954) 42 C2d 698, 703, 268 P2d 1050 (civil statute; rule recognized but statute upheld), citing *Rescue Army v Municipal Court* (1946) 28 C2d 460, 171 P2d 8 (criminal ordinance). This rule applies to statutes (*Canon v Justice Court* (1964) 61 C2d 446, 39 CR 228), ordinances (*Lambert v Municipal Court* (1960) 53 C2d 690, 3 CR 168), and court rules (*Turlock Golf & Country Club v Superior Court* (1966) 240 CA2d 693, 50 CR 70).

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§16.90 3. Use of Mandate to Test Validity of Law

The appellate courts have also entertained challenges to the constitutionality of a statute by way of a petition for a writ of mandate. See, *e.g., Anderson v Superior Court* (1995) 11 C4th 1152, 1155, 48 CR2d 766 (original proceeding in court of appeal challenging local rule divesting county clerk of superior court clerk duties before expiration of elected term); *Zumwalt v Superior Court* (1989) 49 C3d 167, 170, 260 CR 545 (original proceeding in court of appeal challenging constitutionality of local court rule divesting county clerk of superior court clerk duties); *State Route 4 Bypass Auth. v Superior Court* (2007) 153 CA4th 1546, 1549, 64 CR3d 286 (authority filed mandate petition challenging trial court's pretrial ruling declaring right-of-way dedication requirement unconstitutional); *Hatch v Superior Court* (2000) 80 CA4th 170, 182, 94 CR2d 453 (writ petition challenging trial court's denial of motion to dismiss information on several grounds, including that statute was unconstitutional).

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§16.91 4. Standard of Review if Writ Petition Accepted

If the petition challenges the constitutionality of a statute, the appellate court will review the matter de novo because the issue presents a pure question of law. See, *e.g., Wells Fargo Bank v Superior Court* (2008) 159 CA4th 381, 385, 71 CR3d 506 (appellate courts "independently construe statutory law, as its interpretation is a question of law on which [the courts] are not bound by the trial court's analysis"); *County of Orange v Superior Court* (2007) 155 CA4th 1253, 1258, 66 CR3d 689 (on question of whether trial court correctly interpreted scope of its statutory authority, appellate court reviews issue de novo).

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D. In Cases of Exclusive, Conflicting, or Concurrent Jurisdiction

§16.92 1. Exclusive Jurisdiction

A trial court acts without or in excess of its jurisdiction if it attempts to act in a case over which another court or administrative tribunal has exclusive jurisdiction or over which another court first obtained jurisdiction. A writ of prohibition may issue to restrain that court from proceeding with the action. For examples of cases in which appellate courts have considered whether to issue a writ of prohibition under such circumstances, see:

- *Musicians Union, Local No. 6 v Superior Court* (1968) 69 C2d 695, 700, 73 CR 201 (prohibition issued restraining all further proceedings, including enforcement of any orders or injunctions previously issued; National Labor Relations Board and not superior court had jurisdiction because labor dispute affected interstate commerce);
- *People v Superior Court* (*Dyke Water Co.*) (1965) 62 C2d 515, 42 CR 849 (prohibition issued; trial court precluded from adjudicating same issues pending before Public Utilities Commission);
- *City & County of San Francisco v Small Claims Court* (1983) 141 CA3d 470, 190 CR 340 (prohibition unavailable to restrain small claims court from joining 183 claims against airport);
- *Commercial Ins. Co. v Superior Court* (1969) 272 CA2d 321, 77 CR 769 (prohibition issued; trial court had no jurisdiction when plaintiff insured employee was relegated exclusively to federal remedies under Defense Bases Act and Longshoremen's and Harbor Workers' Compensation Act);
- *Vick v Superior Court* (1965) 239 CA2d 105, 47 CR 840 (prohibition issued restraining trial court from hearing order to show cause why interlocutory judgment of divorce should not be modified to show husband was entitled to income tax deduction for minor's support; federal courts have exclusive jurisdiction to determine factual questions concerning deductions, exclusions, and exemptions).

On time to file writ petition, see §16.87.

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2. Conflicting or Concurrent Jurisdiction

§16.93 a. Trial Courts With Conflicting or Concurrent Jurisdiction

When two trial courts have concurrent jurisdiction over the same parties and the same subject matter in actions brought in different counties, the court in which jurisdiction of the defendant is first obtained is entitled to try the action. *Stearns v Los Angeles City School Dist.* (1966) 244 CA2d 696, 708, 53 CR 482. A writ of prohibition lies to restrain the second court from proceeding with the case until the first court renders a final decision. *People ex rel Garamendi v American Autoplan, Inc.* (1993) 20 CA4th 760, 771, 25 CR2d 192 ("rule of exclusive concurrent jurisdiction" requires second court to acquire jurisdiction to stay proceedings pending resolution of first action). For other examples, see:

- *Kresteller v Superior Court* (1967) 248 CA2d 545, 56 CR 771 (prohibition issued in action for child support; court with jurisdiction of dissolution action had concurrent and continuing primary jurisdiction);
- *Morrisette v Superior Court* (1965) 236 CA2d 597, 599, 46 CR 153 (prohibition issued to restrain trial court from proceeding in second adoption action filed by paternal grandparents pending finality of proceedings in first adoption action filed by maternal grandparents);
- *Adolph v Municipal Court* (1960) 181 CA2d 198, 5 CR 212 (because order overruling demurrer was not appealable, prohibition was proper to test municipal court's jurisdiction to try case on ground of prior action pending in superior court between same parties for same cause).

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§16.94 b. Determining Which Trial Court Has Jurisdiction

The preliminary question is often which trial court assumed jurisdiction first. The answer is found by determining in which action process was first served, not in which court the action was first filed. CCP §410.50; *Torrey Pines Inn, Inc. v Superior Court* (1964) 227 CA2d 265, 38 CR 565 (discussing former CCP §416, now CCP §410.50). See *People ex rel Garamendi v American Autoplan, Inc*. (1993) 20 CA4th 760, 770, 25 CR2d 192; *Figgs v Superior Court* (1962) 204 CA2d 231, 22 CR 199 (discussing former CCP §416, now CCP §410.50); *Cade v Superior Court* (1961) 191 CA2d 554, 12 CR 847.

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§16.95 c. Determining Choice of Law

A writ of mandate lies to determine the appropriate law among competing jurisdictions. In *State Farm Mut. Auto. Ins. Co. v Superior Court* (2003) 114 CA4th 434, 438, 8 CR3d 56, after certification of a nationwide class action, the court issued a writ of mandate determining that Illinois, not California, law governed.

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§16.96 d. Other Tribunals With Conflicting or Concurrent Jurisdiction

The rule of exclusive concurrent jurisdiction is not confined to trial courts, but applies to all tribunals exercising judicial functions. When two or more state tribunals have concurrent jurisdiction, the first to assume jurisdiction retains it to the exclusion of all others. *Scott v Industrial Acc. Comm'n* (1956) 46 C2d 76, 81, 293 P2d 18 (in conflict between California tribunals, prohibition, not mandate, is proper remedy). Note, however, that prohibition is available against *judicial* action only, and that most statewide administrative agencies are of legislative origin and do not exercise judicial functions. See discussion of judicial action in §§15.15-15.17.

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§16.97 3. Objecting Before Seeking Writ

Before seeking a writ of prohibition to restrain the second tribunal from proceeding, the petitioner must first object in the second tribunal, by motion or demurrer, to *that* tribunal's jurisdiction to hear and determine the action or proceeding. See, *e.g.*, *Howell v Superior Court* (1962) 211 CA2d 487, 27 CR 149 (priority rule recognized, but prohibition denied because petitioner failed to seek relief in second court before seeking writ relief). For discussion of the basic requirement that the petitioner perfect or exhaust other available remedies before seeking a writ, see §§2.15-2.16, 15.56-15.60.

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§16.98 4. Standard of Review if Writ Petition Accepted

Questions of jurisdiction and choice of law typically present pure questions of law that an appellate court reviews de novo. See, *e.g. State Farm Mut. Auto. Ins. Co. v Superior Court (2003) 114 CA4th 434, 439, 8 CR3d 56.*

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E. To Review Arbitration Issues

§16.99 1. Questions of First Impression

It is difficult to obtain writ review in an arbitration case. In Moncharsh v Heily & Blase (1992) 3 C4th 1, 12, 10 CR2d 183, the supreme court held that judicial review of private arbitration awards is limited to the grounds set out in CCP §§1286.2 (vacating awards) and 1286.6 (correcting awards). The supreme court specifically disapproved a line of cases permitting judicial review when an error appears on the face of the award and causes substantial injustice. 3 C4th at 28. But see Burlage v Superior Court (2009) 178 CA4th 524, 100 CR3d 531 (in denying writ petition, appellate court held that trial court properly vacated arbitrator's award based on arbitrator's wrongful refusal to consider material evidence; under Moncharsh, arbitrators have much, but not absolute, power). See also Cable Connection, Inc. v DIRECTV, Inc. (2008) 44 C4th 1334, 1340, 82 CR3d 229 (if parties limit arbitrators' authority by requiring dispute to be decided by rule of law, and make intention plain that award is reviewable for legal error, general rule of limited review is displaced by parties' agreement).

The Moncharsh court also held that claims of illegality of an arbitration provision are not sufficient to obtain judicial review, except in rare cases in which arbitration finality is incompatible with the protection of statutory rights. 3 C4th at 33. See, e.g., Board of Educ. v Round Valley Teachers Ass'n (1996) 13 C4th 269, 52 CR2d 115. See also Advanced Micro Devices, Inc. v Intel Corp. (1994) 9 C4th 362, 36 CR2d 581, in which a divided court upheld the arbitrator's remedy as rationally related to the underlying contract as interpreted by the arbitrator. But see California Faculty Ass'n v Superior Court (1998) 63 CA4th 935, 75 CR2d 1 (court denied petition for writ of mandate and upheld the trial court's vacation of an arbitrator's award when it determined that arbitrator had exceeded his authority under a collective bargaining agreement).

Many arbitration issues are reviewable by appeal (see CCP §§1294-1294.2) and thus not subject to writ review. For discussion of availability of appeal, see California Civil Appellate Practice §§3.23, 3.42 (3d ed Cal CEB 1996). See also §§15.57-15.61.

Successful petitions for writs involving arbitration issues are usually restricted to questions of first impression. See, e.g., Jevne v Superior Court (2005) 35 C4th 935, 28 CR3d 685 (on issue of first impression, affirming appellate court's denial of writ seeking to set aside trial court's denial of motion to set aside order compelling arbitration, supreme court held that Securities and Exchange Act preempts California Ethics Standards for Neutral Arbitrators in National Association of Securities Dealers arbitrations); Jakks Pac., Inc. v Superior Court (2008) 160 CA4th 596, 600, 72 CR3d 914 (challenging trial court's ruling as to when arbitrator's disclosures are required; affirming trial court and denying writ on merits); Blue Cross v Superior Court (1998) 67 CA4th 42, 78 CR2d 779 (application of California classwide arbitration rule not preempted by Federal Arbitration Act); Trump v Superior Court (1981) 118 CA3d 411, 173 CR 403 (trial de novo must include all issues); Depretto v Superior Court (1981) 116 CA3d 36, 171 CR 810 (writ issued because transfer order denied petitioner's right to establish that damages brought case within court's jurisdiction when initiated). But see Heritage Provider Network, Inc. v Superior Court (2008) 158 CA4th 1146, 1152, 70 CR3d 645 (writ issued to enforce stay of judicial proceedings pending arbitration).

On time to file writ petition, see §16.87.

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§16.100 2. Orders Compelling Arbitration

Orders compelling arbitration are not appealable (Wheeler v St. Joseph Hosp. (1976) 63 CA3d 345, 353, 133 CR 775), so writ review is the only mechanism for seeking review of such orders. Writ review of orders compelling arbitration "'is proper in at least two circumstances: (1) if the matters ordered arbitrated fall clearly outside the scope of the arbitration agreement or (2) if the arbitration would appear to be unduly time consuming or expensive.'" Parada v Superior Court (2009) 176 CA4th 1554, 1566, 98 CR3d 743, quoting Zembsch v Superior Court (2006) 146 CA4th 153, 160, 53 CR3d 69. For example, see:

- *Rodriquez v Superior Court (2009) 176 CA4th 1461, 98 CR3d 728 (writ of mandate issued directing trial court to vacate order compelling plaintiff to arbitrate wrongful death claim);*
- *County of Sonoma v Superior Court (2009) 173 CA4th 322, 329, 93 CR3d 39 (writ of mandate issued directing trial court to vacate order compelling county to arbitrate law enforcement union);*
- *Roman v Superior Court (2009) 172 CA4th 1462, 92 CR3d 153 (deciding writ petition on merits and upholding trial court's order compelling arbitration);*
- *Mercuro v Superior Court (2002) 96 CA4th 167, 173, 116 CR2d 671 (writ of mandate overturned trial court order compelling arbitration of employment-related tort claims based on finding that employee had been coerced into signing arbitration agreement);*
- *Rosenfield v Superior Court (1983) 143 CA3d 198, 191 CR 611 (writ of mandate directed trial court to vacate order staying action and requiring arbitration; arbitration agreement was unenforceable because it did not provide mandatory specific advisement of plaintiff patient's waiver of right to jury trial under CCP §1295).*

Mandate or prohibition may be invoked to reverse an order compelling arbitration if the matters ordered for arbitration fall clearly outside the scope of the arbitration agreement or if the arbitration would appear to be unduly time consuming or expensive. See Atlas Plastering, Inc. v Superior Court (1977) 72 CA3d 63, 68, 140 CR 59 (trial court had jurisdiction to order arbitration but exceeded its jurisdiction in joining parties not in privity). Mandate or prohibition is also appropriate to reverse an order compelling arbitration when enforcement of the arbitration provision would be unconscionable. In Discover Bank v Superior Court (2005) 36 C4th 148, 162, 30 CR3d 76, the supreme court reversed the court of appeal's issuance of a writ of mandate to compel arbitration of a consumers' class action claim. The court held that the waiver of class arbitration contained in a consumer contract of adhesion was unconscionable and thus unenforceable. See also Gentry v Superior Court (2007) 42 C4th 443, 467, 64 CR3d 773, in which the court of appeal denied a writ and found that a class action arbitration agreement provided to employees was not unconscionable; the employees were given an opportunity to opt out and the terms were clearly spelled out. The supreme court reversed, concluding that, despite the opt-out provision, the agreement was procedurally unconscionable because the employer's explanation of it was misleading. See also Trend Homes, Inc. v Superior Court (2005) 131 CA4th 950, 32 CR3d 411 (writ of mandate directed trial court to grant petitioner's motion to compel judicial reference; court of appeal found that clause in homebuyers' purchase contract requiring that disputes be submitted to judicial reference was not unconscionable).

Because arbitration reduces the judicial workload, a court might be more likely to issue a writ in support of arbitration. See, e.g., San Jose Fed'n of Adult Educ. Teachers v Superior Court (1982) 132 CA3d 861, 183 CR 410 (writ of mandate directed trial court to set aside order vacating arbitration award). See also Helzel v Superior Court (1981) 123 CA3d 652, 176 CR 740 (writ of mandate directed trial court to grant petition to compel arbitration); Dinong v Superior Court (1981) 120 CA3d 300, 174 CR 590 (writ of mandate directed trial court to vacate order disqualifying arbitrators).

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§16.101 3. Standard of Review if Writ Petition Accepted

The standard of review depends on the issue the writ petition presents. For example, the meaning and scope of an arbitration clause in a contract is generally a question of law reviewed de novo. See, e.g., Titolo v Cano (2007) 157 CA4th 310, 316, 68 CR3d 616. The same holds true for whether an arbitration clause is unenforceable due to unconscionability. Higgins v Superior Court (2006) 140 CA4th 1238, 1249, 45 CR3d 293 (whether arbitration agreement is unconscionable is a question of law; when facts are undisputed, appellate court reviews arbitration agreement de novo to determine unconscionability); see also Flores v Transamerica HomeFirst, Inc. (2001) 93 CA4th 846, 851, 113 CR2d 376 (same). The de novo standard also applies to whether the statute governing arbitration requires the disclosures that a party claimed. See Hayden v Robertson Stephens, Inc. (2007) 150 CA4th 360, 58 CR3d 333 (bank was not party to proceedings for arbitrator's disclosure purposes). See also Cardiff Equities, Inc. v Superior Court (2008) 166 CA4th 1541, 1548, 83 CR3d 699 (ordinarily trial court's decision to stay action pending arbitration is reviewed for abuse of discretion, but because underlying facts were undisputed and stay issue turned on legal question, court applied de novo standard of review).

On occasion, interpretation and enforceability issues present factual questions when the parties have introduced conflicting extrinsic evidence requiring resolution by the trier of fact. In such circumstances, the appellate court reviews the trial court's factual determinations under the substantial evidence standard. See, e.g., Baker v Osborne Dev. Corp. (2008) 159 CA4th 884, 892, 71 CR3d 854 (arbitration agreement reviewed de novo for enforceability; trial court's factual determinations bearing on unconscionability reviewed for substantial evidence).

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F. To Remedy Orders Concerning Counsel

§16.102 1. Disqualification Motions

An order granting or denying a motion to disqualify an adversary's attorney is appealable. See Jacuzzi v Jacuzzi Bros., Inc. (1963) 218 CA2d 24, 32 CR 188. However, the reviewing court may deem appeal to be an inadequate remedy because it is not as expeditious as a writ proceeding and because the right to counsel is involved. Thus, courts have issued writs to overturn orders concerning attorney disqualifications. See, e.g., Chambers v Superior Court (1981) 121 CA3d 893, 896, 175 CR 575 (state obtained disqualification of plaintiff's firm because one of its lawyers had previously worked for state; court issued writ of mandate vacating disqualification order based on plaintiff's right to counsel of her choice). Compare Shadow Traffic Network v Superior Court (1994) 24 CA4th 1067, 29 CR2d 693 (writ of mandate denied; trial court properly removed defense counsel for having retained experts who had received confidential information from plaintiff's counsel regarding lawsuit), to Western Digital Corp. v Superior Court (1998) 60 CA4th 1471, 71 CR2d 179 (writ of mandate issued directing trial court to vacate order disqualifying defense counsel and expert witness when plaintiff failed to establish that expert actually possessed attorney-client information, as opposed to merely having potential access to it). See also Baker Manock & Jensen v Superior Court (2009) 175 CA4th 1414, 96 CR3d 785 (writ of mandate issued directing trial court to vacate order disqualifying law firm; trial court erred in finding that case facts constituted conflict of interest); Gong v RFG Oil, Inc. (2008) 166 CA4th 209, 213, 82 CR3d 416 (party filed both notice of appeal and writ petition challenging order denying disqualification motion; court of appeal treated writ petition as petition for writ of supersedeas, stayed further proceedings in trial court, decided appeal, and reversed order); Cal W. Nurseries, Inc. v Superior Court (2005) 129 CA4th 1170, 29 CR3d 170 (writ of mandate issued directing trial court to disqualify law firm that continued to represent party adverse to another client in unrelated proceeding); Lyle v Superior Court (1981) 122 CA3d 470, 175 CR 918 (plaintiff's law firm disqualified because attorneys in firm were scheduled to testify for plaintiff; writ of mandate issued directing trial court to vacate disqualification order).

On time to file writ petition, see §16.87.

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§16.103 2. Other Issues Involving Counsel

Other issues involving attorney representation that have been resolved in writ proceedings include:

- *Propriety of appearing pro hac vice and trial court's authority to issue sanctions for misconduct. Sheller v Superior Court (2008) 158 CA4th 1697, 1701 n1, 71 CR3d 207 (writ of mandate issued).*
- *Discharged attorney's retention of files. Academy of Cal. Optometrists, Inc. v Superior Court (1975) 51 CA3d 999, 124 CR 668 (writ of mandate issued).*
- *Denial of representation by counsel of client's own choosing. See Meadow v Superior Court (1963) 59 C2d 610, 616, 30 CR 824 (writ of mandate issued); Golden State Glass Corp. v Superior Court (1939) 13 C2d 384, 90 P2d 75 (writ of mandate issued to compel recognition of attorney); Cloer v Superior Court (1969) 271 CA2d 143, 76 CR 217 (writ of mandate issued).*
- *Potential deprivation of counsel. Adams v Superior Court (1992) 2 CA4th 521, 532, 3 CR2d 49 (existence of malicious prosecution and abuse of process lawsuit would drive wedge between petitioner attorneys and their clients; writ issued to require trial court to sustain petitioners' demurrer to malicious prosecution and all other causes of action without leave to amend).*

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§16.104 3. Standard of Review if Writ Petition Accepted

The standard of review in these proceedings depends on the issue presented. Generally, an appellate court reviews an order on a disqualification motion for abuse of discretion. People ex rel Dep't of Corporations v SpeeDee Oil Change Sys., Inc. (1999) 20 C4th 1135, 1143, 86 CR2d 816. But when "there are no material disputed factual issues, the appellate court reviews the trial court's determination as a question of law." 20 C4th at 1144; see also Cal W. Nurseries, Inc. v Superior Court (2005) 129 CA4th 1170, 1174, 29 CR3d 170.

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G. To Review Orders on Pleadings

§16.105 1. When Issue Is Substantial or Resolution Would Result in Final Disposition of Case as to Party

Although appellate courts prefer to review cases on a full record and resolve the entire case at one time, in rare cases an appellate court may invoke mandate or prohibition to review rulings at the pleading stage. Courts may grant such review in instances of a serious nature, when the issue is of substantial legal importance, or when resolution of the issue would result in final disposition as to a party. For examples, see:

- *Covenant Care, Inc. v Superior Court (2004) 32 C4th 771, 776, 11 CR3d 222 (supreme court reviewed trial court ruling allowing fourth amended complaint to resolve conflict in courts of appeal regarding whether procedural prerequisites to seeking punitive damages against health care provider under CCP §425.13(a) applied to elder abuse actions);*
- *Brandt v Superior Court (1985) 37 C3d 813, 816, 210 CR 211 (court reviewed ruling at pleading stage because issue was of widespread interest, courts of appeal were in conflict, and trial court's ruling "effectively deprived petitioner of the opportunity to present a substantial portion of his cause of action");*
- *Coulter v Superior Court (1978) 21 C3d 144, 148, 145 CR 534, superseded by statute on other grounds ("mandamus will lie when it appears that the trial court has deprived a party of an opportunity to plead his cause of action or defense, and when that extraordinary relief may prevent a needless and expensive trial and reversal");*
- *Babb v Superior Court (1971) 3 C3d 841, 851, 92 CR 179 (court unwilling to endorse use of prerogative writ to review rulings on pleadings except in "instances of such grave nature or of such significant legal impact that we feel compelled to intervene through the issuance of an extraordinary writ");*
- *Los Angeles County Metro. Transp. Auth. v Superior Court (2004) 123 CA4th 261, 265, 20 CR3d 92 ("[d]ue to the novelty of the factual context in which this issue was raised," court issued order to show cause on petition for writ of mandate to reverse trial court order denying motion to strike allegations supporting claim for civil penalty under the Unruh Act, but then denied writ); and*
- *Campbell v Superior Court (1996) 44 CA4th 1308, 1315, 52 CR2d 385 (alternative writ issued to decide "novel and important question" in case in which demurrer was sustained without leave to amend with respect to less than all causes of action).*

On time to file writ petition, see §16.87.

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§16.106 2. When Ruling on Pleading Would Dramatically Affect Scope or Nature of Action

Appellate courts continue to exercise their discretion to hear writ petitions at the pleading stage in the interest of judicial economy, particularly when the trial court ruling may have a dramatic effect on the scope or the nature of the action. Some examples are:

- *Issuance of mandate to compel a trial court to permit an amendment or amended complaint. See, e.g., Peterson v Superior Court (1982) 31 C3d 147, 181 CR 784; Cuadros v Superior Court (1992) 6 CA4th 671, 8 CR2d 18 (allowing plaintiff to name correct defendant). See also 5 Witkin, California Procedure, Pleading §1197 (5th ed 2008).*
- *Issuance of mandate to compel a trial court to deny a motion to strike a pleading. See, e.g., Grafton Partners L.P. v Superior Court (2005) 36 C4th 944, 32 CR3d 5 (affirming writ of mandate issued to reverse trial court's order striking demand for jury trial on ground that predispute jury waivers by contract are unenforceable); Bruno v Superior Court (1981) 127 CA3d 120, 179 CR 342 (mandate issued to compel vacation of order striking certain requested remedies from complaint); Blegen v Superior Court (1981) 125 CA3d 959, 178 CR 470 (mandate issued to compel vacation of order striking claim for punitive damages).*
- *Issuance of mandate to compel trial court to vacate order allowing amendment to add punitive damages claim. See Freedman v Superior Court (2008) 166 CA4th 198, 201, 82 CR3d 563 (writ relief warranted to set aside trial court's ruling that excused plaintiff from statutory deadline for filing motion to amend complaint to add punitive damages claim).*
- *Issuance of mandate to compel trial court to vacate order denying motion to strike punitive damages claim for failure to make threshold showing on merits. Little Co. of Mary Hosp. v Superior Court (2008) 162 CA4th 261, 265, 75 CR3d 519 (trial court erred in concluding pretrial mechanism provided in CCP §425.14 does not apply in elder abuse cases seeking exemplary damages against religious organizations).*
- *Issuance of mandate to compel trial court to grant demurrer and motion to strike portions of class action complaint. TJX Cos. v Superior Court (2008) 163 CA4th 80, 83, 77 CR3d 114.*
- *Issuance of mandate to ensure a defendant's opportunity to defend the action. See Mediterranean Exports, Inc. v Superior Court (1981) 119 CA3d 605, 174 CR 169 (mandate issued to ensure corporation's opportunity to defend action; its answer and cross-complaint had been stricken in breach of lease action instituted against it).*
- *Issuance of mandate to compel trial court to partially vacate case management order. See Fire Ins. Exch. v Superior Court (2004) 116 CA4th 446, 10 CR3d 617 (construing case management order as denial of motion for judgment on the pleadings because order resolved disputed issues raised by the pleadings); Hernandez v Superior Court (2003) 112 CA4th 285, 303, 4 CR3d 883.*
- *Issuance of mandate to compel trial court to vacate order granting or denying motion for judgment on the pleadings. See Fire Ins. Exch. v Superior Court, supra; American Int'l Group, Inc. v Superior Court (1991) 234 CA3d 749, 755, 285 CR 765 (denial of motion for judgment on the pleadings may be reviewed by writ of mandate).*
- *Issuance of mandate in consolidation and severance matters. See State Farm Mut. Auto. Ins. Co. v Superior Court (1956) 47 C2d 428, 304 P2d 13 (mandate issued to compel severance; trial judge abused discretion in ordering consolidation); Omaha Indem. Co. v Superior Court (1989) 209 CA3d 1266, 1274, 258 CR 66 (mandate appropriate when severance motion denied with prejudice to bringing motion at later time).*
- *Issuance of order to show cause why mandate should not issue to determine collateral estoppel effect of prior court of appeal opinion. Zevnik v Superior Court (2008) 159 CA4th 76, 83, 70 CR3d 817 (important issue of law as to which there was uncertainty and which would significantly impact case).*

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§16.107 3. Standard of Review if Writ Petition Accepted

The standard of review of an order concerning a pleading issue depends on the particular issue that the writ petition presents. Generally, a court reviews an order denying or granting leave to amend for abuse of discretion. It reviews an order overruling or sustaining a demurrer, or an order granting or denying a motion for judgment on the pleadings, de novo, because the court assumes the truth of the allegations in the complaint. See, e.g., Poway Royal Mobilehome Owners Ass'n v City of Poway (2007) 149 CA4th 1460, 1470, 58 CR3d 153 (demurrer); Lazar v Hertz Corp. (1999) 69 CA4th 1494, 1501, 82 CR2d 368 (demurrer); see also Angelucci v Century Supper Club (2007) 41 C4th 160, 166, 59 CR3d 142 (judgment on the pleadings); Mendoza v. Continental Sales Co. (2006) 140 CA4th 1395, 1401, 45 CR3d 525 (same).

A court generally reviews other rulings on procedural matters (e.g., severance, consolidation, case management) for abuse of discretion. See Hernandez v Superior Court (2003) 112 CA4th 285, 294, 4 CR3d 883 (case management order); Omaha Indem. Co. v Superior Court (1989) 209 CA3d 1266, 1271, 258 CR 66 (severance); McLellan v McLellan (1972) 23 CA3d 343, 353, 100 CR 258 (severance); State Farm Mut. Auto. Ins. Co. v Superior Court (1956) 47 C2d 428, 304 P2d 13 (consolidation).

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H. To Review Rulings on Demurrer

§16.108 1. When Demurrer Is Overruled in Its Entirety

If a trial court erroneously overrules a demurrer there may be a needless and significant expenditure of resources absent immediate appellate review. Accordingly, in the interest of judicial economy, a writ may issue to review an order overruling a demurrer. For example:

- *State v Superior Court (2004) 32 C4th 1234, 1245, 13 CR3d 534 (in prison inmate's action against state, state agencies, and employees for inadequate medical treatment, supreme court granted review and held that failure to plead facts demonstrating or excusing compliance with claim presentation requirement of Government Claims Act (formerly known as the Tort Claims Act) (Govt C §§810-997.6) may be raised on general demurrer to complaint);*
- *Farb v Superior Court (2009) 174 CA4th 678, 682, 94 CR3d 586 (writ of mandate issued directing trial court to vacate order overruling demurrer on statute of limitations grounds and dismiss case);*
- *Wells Fargo Bank v Superior Court (2008) 159 CA4th 381, 385, 71 CR3d 506 (legal issue of preemption is "properly raised by demurrer and an order overruling a demurrer on that ground is properly reviewed by petition for a writ of mandate");*
- *Stavropoulos v Superior Court (2006) 141 CA4th 190, 193, 45 CR3d 705 (writ review appropriate on significant issue of first impression; court of appeal held malicious prosecution complaint was subject to 2-year limitations period of CCP §335.1, not 1-year period of CCP §340(c), and was timely filed);*
- *Big Valley Band of Pomo Indians v Superior Court (2005) 133 CA4th 1185, 1189, 35 CR3d 357 (writ review appropriate because tribe effectively would have lost sovereign immunity defense if required to proceed to trial on casino employees' breach of contract action);*
- *Mitsubishi Materials Corp. v Superior Court (2003) 113 CA4th 55, 60, 6 CR3d 159 (writ of mandate issued directing trial court to dismiss cases in which World War II prisoners of war asserted claims against Japanese companies for whom they were forced to do slave labor; case merited expeditious consideration because plaintiffs were World War II veterans and permitting lengthy trial only to reverse judgment years later would unfairly create false hope of monetary recovery).*

On time to file writ petition, see §16.87.

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§16.109 2. When Demurrer Is Partially Sustained

If a trial court sustains a demurrer to only part of a complaint or answer, writ relief may be available. See, e.g., Coulter v Superior Court (1978) 21 C3d 144, 148, 145 CR 534 (demurrer to portion of complaint); Alch v Superior Court (2004) 122 CA4th 339, 351, 19 CR3d 29 (in class action age discrimination case, plaintiffs appealed and petitioned for writs of mandate from trial court's grant of demurrer with leave to amend; court consolidated appeals and petitions and issued mandate to set aside trial court's rulings); Campbell v Superior Court (1996) 44 CA4th 1308, 1315, 52 CR2d 385 (demurrer sustained without leave to amend with respect to less than all causes of action; but writ issued to decide "novel and important question").

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§16.110 3. When Court Sustains Demurrer

If a trial court sustains a demurrer with leave to amend, appellate review in any form is usually premature. If a trial court sustains a demurrer to the entire complaint without leave to amend, appeal from the resulting judgment of dismissal is normally an adequate remedy, because appeal is immediately available. See, e.g., Babb v Superior Court (1971) 3 C3d 841, 850, 92 CR 179 (rule stated, but writ of mandate issued because issue presented could have significant impact on other cases).

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§16.111 4. Standard of Review if Writ Petition Accepted

Because a demurrer tests the complaint's legal sufficiency, an appellate court reviews an order on a demurrer de novo, exercising its independent judgment about whether the complaint states a cause of action. See, e.g., Zenith Ins. Co. v O'Connor (2007) 148 CA4th 998, 1006, 55 CR3d 911; Flying Dutchman Park, Inc. v City & County of San Francisco (2001) 93 CA4th 1129, 1134, 113 CR2d 690.

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I. When Court Denies Motion to Dismiss

§16.112 1. Overview

An order denying a motion to dismiss an action under the mandatory dismissal statutes (CCP §§583.210-583.250, 583.310-583.360) may be reviewable by petition for writ of mandate. For examples, see:

- *Moran v Superior Court (1983) 35 C3d 229, 240, 197 CR 546 (medical malpractice action was not brought to trial within 5-year period under former CCP §583(b), because clerk's office mistakenly sent case file to storage instead of resetting it for trial after arbitration; trial court denied motion to dismiss, and supreme court refused to issue writ of mandate because failure to meet statutory requirements was beyond plaintiff's control);*
- *Tunis v Superior Court (1963) 59 C2d 465, 466, 30 CR 135 (writ of mandate granted; failure to go to trial within 5 years);*
- *New W. Fed. Sav. & Loan Ass'n v Superior Court (1990) 223 CA3d 1145, 1152, 273 CR 37 (writ of mandate denied; 5-year statutory period in which to bring case to trial was tolled while writ petition challenging denial of summary judgment motion was pending);*
- *Kerr-McGee Chem. Corp. v Superior Court (1984) 160 CA3d 594, 597, 206 CR 654 (writ of mandate granted to quash service; defendant must be directly named or named and served as fictitious defendant within 3-year period of former CCP §581a);*
- *Lesko v Superior Court (1982) 127 CA3d 476, 485, 179 CR 595 (writ of mandate granted; failure to serve complaint within 3-year period of former CCP §581a).*

NOTE: *When reviewing older opinions involving motions to dismiss, counsel should be aware that the statute requiring service and filing of summons within 3 years, former CCP §581a, was in effect from 1982 until it was repealed and replaced by CCP §§583.210-583.250. Former CCP §581a excused compliance with the 3-year period only if there was a basis for estoppel or if the noncompliance was beyond the party's control. Counsel should also be aware that the statute requiring commencement of trial within 5 years, former CCP §583, was repealed in 1984 and replaced by CCP §§583.310-583.360.*

If the motion to dismiss is based on inconvenient forum or delay in prosecution and is made in lieu of the defendant's responsive pleading, writ review of denial of the motion may fall within CCP §418.10. See discussion in §§16.54-16.57.

On time to file writ petition, see §16.87.

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§16.113 2. Writ of Prohibition to Prevent Trial

Although mandate is available to compel a dismissal, prohibition may be used to prevent a trial. J. C. Penney Co. v Superior Court (1959) 52 C2d 666, 669, 343 P2d 919 (either writ of mandate to compel dismissal or writ of prohibition to prevent trial of action is appropriate remedy after expiration of time prescribed by former CCP §583). See also Rio Del Mar Country Club, Inc. v Superior Court (1948) 84 CA2d 214, 217, 190 P2d 295 (attempt to proceed with trial after meritorious motion to dismiss under mandatory dismissal statutes exceeds court's jurisdiction).

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§16.114 3. Standard of Review if Writ Petition Accepted

The standard of review for trial court orders denying a motion for mandatory dismissal is abuse of discretion. See New W. Fed. Sav. & Loan Ass'n v Superior Court (1990) 223 CA3d 1145, 1156, 273 CR 37 (writ of mandate denied; trial court did not abuse its discretion by denying motion to dismiss under CCP §583.310); Baccus v Superior Court (1989) 207 CA3d 1526, 1531, 255 CR 781 (writ of mandate issued; trial court denied motion to dismiss under CCP §583.310).

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J. To Correct Discovery Order

§16.115 1. Overview

As a general rule, appellate courts disfavor writ review of discovery orders because it is potentially disruptive of trial court proceedings and because routine review of such orders would overwhelm the appellate courts. This is so even though it is virtually impossible to obtain meaningful review of a discovery order on appeal after judgment. See, e.g., Sav-On Drugs, Inc. v Superior Court (1975) 15 C3d 1, 5, 123 CR 283; Pacific Tel. & Tel. Co. v Superior Court (1970) 2 C3d 161, 169, 84 CR 718; Catanese v Superior Court (1996) 46 CA4th 1159, 1163, 54 CR2d 280; Oceanside Union Sch. Dist. v Superior Court (1962) 58 C2d 180, 185 n4, 23 CR 375 (writ review of discovery orders should be limited to important matters of first impression and situations in which general guidelines can be established for future cases). In Roden v AmerisourceBergen Corp. (2005) 130 CA4th 211, 29 CR3d 810, the court denied a petition for a writ of mandate addressing a postjudgment discovery issue because the defendant had an adequate remedy at law. The court noted that "extraordinary relief is supposed to be extraordinary" and that writ relief "is not available as a matter of course just because a particular postjudgment order is nonappealable." 130 CA4th at 213.

Despite the general rule, courts sometimes grant writ review of a discovery order if it: (1) compels production of privileged information; (2) prevents a party from having a fair opportunity to litigate a case; or (3) involves unresolved issues of first impression and importance to the trial courts and bar. OXY Resources Cal. LLC v Superior Court (2004) 115 CA4th 874, 886, 9 CR3d 621. Often, the discovery order at issue in cases in which courts have granted review implicated several of these important considerations. See Paterno v Superior Court (2008) 163 CA4th 1342, 1357, 78 CR3d 244 (writ issued to reverse discovery order that delayed anti-SLAPP motion to enforce protections of anti-SLAPP statute (CCP §425.16) against harassing litigation and avoid irreparable injury); San Joaquin County Local Agency Formation Comm'n v Superior Court (2008) 162 CA4th 159, 166, 76 CR3d 93 (writ issued to prohibit discovery that would implicate privilege).

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§16.116 2. Significant Issues of First Impression Arising During Discovery

Courts may relax their general reluctance to review discovery orders (see §16.115) when an order presents a generally important question of first impression. See Oceanside Union Sch. Dist. v Superior Court (1962) 58 C2d 180, 185 n4, 23 CR 375; CashCall, Inc. v Superior Court (2008) 159 CA4th 273, 285 n6, 71 CR3d 441 (considering question of first impression regarding precertification discovery of identities of potential class members). For example, in Catanese v Superior Court (1996) 46 CA4th 1159, 54 CR2d 280, following 8 days of deposition, the plaintiff propounded a series of five interrogatories, asking the defendant whether he contended that any of the plaintiff's deposition answers were untruthful and what evidence supported those contentions. The defendant objected to the interrogatories as not being self-contained, and as violating the "Rule of 35" (CCP §2030.030), limiting the number of interrogatories without a declaration of good cause. The court of appeal issued a writ of mandate directing the trial court to vacate its order compelling further responses, noting that the discovery tactic tested the proper dividing line between protected work product and compelled contention interrogatories. Because such a tactic would have a major impact on litigation and litigation expenses and would likely achieve prevalence in practice, the issue merited review by writ. 46 CA4th at 1163. Additional examples include:

- *Urban Pac. Equities Corp. v Superior Court (1997) 59 CA4th 688, 693, 69 CR2d 635 (reviewing order quashing plaintiff's business records subpoena of court reporter to obtain copy of plaintiff's own deposition transcript; although intrigued by issue of first impression, court denied writ petition because transcript was "product," not "record," of court reporter's business);*
- *Palay v Superior Court (1993) 18 CA4th 919, 934, 22 CR2d 839 (writ of mandate denied regarding order compelling production of guardian ad litem's medical records; petition involved conflict between litigant's right to discovery and nonlitigant's right to invoke physician-patient privilege);*
- *Daly v Superior Court (1977) 19 C3d 132, 140, 137 CR 14 (writ review granted because power of trial court to grant prospective witness immunity to facilitate discovery by private party was important issue of first impression and general guidelines could be established).*

For other examples of issues of first impression, see discussion of procedural issues in §16.119.

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3. Constitutional Issues Arising During Discovery

§16.117 a. Overview

An appellate court may be persuaded to review the merits of a writ petition seeking review of a discovery order that presents a constitutional issue. Examples include:

- ***Immunity from criminal prosecution.*** *Compare Fremont Indem. Co. v Superior Court (1982) 137 CA3d 554, 187 CR 137 (writ of mandate issued directing trial court to order plaintiff to appear for deposition; plaintiff could not sue insurance company for bad faith settlement of claim for loss of restaurant by fire, then resist deposition on ground of self-incrimination after indictment for arson) to Gonzales v Superior Court (1980) 117 CA3d 57, 72, 178 CR 358 (writ of mandate issued to control interrogatories in civil paternity action to provide immunity to putative fathers whose answers to questions to establish paternity might also result in criminal prosecution for nonsupport).*
- ***Illegal search and seizure.*** *See Barnes v Molino (1980) 103 CA3d 46, 50, 162 CR 786 (writ of mandate issued to modify order regarding subpoena duces tecum alleged to interfere with freedom from unreasonable search and seizure). But see Tom v Schoolhouse Coins, Inc. (1987) 191 CA3d 827, 828 n1, 236 CR 541 (declining to treat appeal from order requiring compliance with subpoena duces tecum as petition for writ of mandate).*
- ***Freedom of speech.*** *See Maggi v Superior Court (2004) 119 CA4th 1218, 1226, 15 CR3d 161 (writ of mandate issued directing trial court to vacate restraining order; prohibiting petitioner and counsel from discussing lawsuit with third parties without court's permission, which was sought and denied, violated constitutional right to free speech and was not appropriate discovery sanction). See also Paterno v Superior Court (2008) 163 CA4th 1342, 1357, 78 CR3d 244 (writ of mandate issued to enforce protections of anti-SLAPP statute (CCP §425.16) against harassing litigation and reverse discovery order that delayed anti-SLAPP motion).*

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§16.118 b. Right to Privacy

In determining whether to grant writ review, courts continue to place emphasis on the right to privacy embodied in Cal Const art I, §1. For example, in Palay v Superior Court (1993) 18 CA4th 919, 22 CR2d 839, the court issued an alternative writ because the case involved an issue of first impression in the areas of privilege and constitutional privacy that was also "of general importance to the trial court and the profession." 18 CA4th at 925. The question presented was whether a nonlitigant mother may, in an action by her son for negligence against a hospital and doctors, assert her statutory privilege and constitutional right of privacy to prevent discovery of her prenatal records. See also Alch v Superior Court (2008) 165 CA4th 1412, 1422, 82 CR3d 470 (trial court denied discovery on privacy grounds; writ issued because trial court failed to properly weigh interests and should have allowed some discovery); Kahn v Superior Court (1987) 188 CA3d 752, 769, 233 CR 662 (trial court ordered university professor to be deposed about confidential faculty meeting concerning petitioner's possible permanent appointment to teaching position; mandate issued to set aside that order based on professor's right to privacy).

Courts have issued writs on a wide range of privacy issues, including:

- ***Financial privacy.*** *Courts have held that the right to privacy gives a litigant a presumptive right to a protective order restricting the use of discovered personal financial data. Moskowitz v Superior Court (1982) 137 CA3d 313, 317, 187 CR 4; Richards v Superior Court (1978) 86 CA3d 265, 272, 150 CR 77. But see GT, Inc. v Superior Court (1984) 151 CA3d 748, 754, 198 CR 892 (no presumption applied when corporate financial information sought concerning antitrust and unfair competition allegations).*
- ***Tax data.*** *A writ may issue to overturn an order requiring disclosure of data contained in sales tax returns. Sav-On Drugs, Inc. v Superior Court (1975) 15 C3d 1, 5, 123 CR 283 (writ of prohibition issued).*
- ***Sexual privacy.*** *A plaintiff does not surrender her right to privacy by bringing a sexual harassment suit. Vinson v Superior Court (1987) 43 C3d 833, 842, 239 CR 292 (writ of mandate issued limiting discovery of plaintiff's sexual history and setting standards for such inquiries in future cases). See also Fults v Superior Court (1979) 88 CA3d 899, 903, 152 CR 210 (writ of mandate issued limiting inquiry into mother's sexual history in paternity suit). In John B. v Superior Court (2006) 38 C4th 1177, 1181, 45 CR3d 316, a wife sought discovery of her husband's medical records and sexual history to confirm her allegations that he knowingly or negligently infected her with HIV. The husband filed a writ petition after the trial court permitted broad discovery into his sexual history and medical records. The supreme court limited discovery to protect the identities of the husband's previous sexual partners, denied requests for admissions concerning his lifestyle, and temporally limited discovery to the period of possible infection.*
- ***Marital privacy.*** *The marital relationship is a foundation for the right to privacy. Tylo v Superior Court (1997) 55 CA4th 1379, 1388, 64 CR2d 731 (in wrongful termination suit based on pregnancy discrimination, court of appeal issued writ of mandate; trial court erred in ordering plaintiff to answer deposition questions relating to possible emotional distress arising out of her marital relationship).*
- ***Associational privacy.*** *The right to associational privacy may also be protected by a writ. See Britt v Superior Court (1978) 20 C3d 844, 859, 143 CR 695 (writ of mandate issued to prevent forced disclosure of information on political affiliation, which violated freedom of association); Church of Hakeem, Inc. v Superior Court (1980) 110 CA3d 384, 387, 168 CR 13 (writ of prohibition issued nullifying contempt order and discovery order for refusal to disclose membership list in answer to interrogatories, on ground that disclosure order violated right of associational privacy of innocent nonlitigant church members). But see Bodenheimer v Superior Court (1980) 108 CA3d 885, 889, 167 CR 26 (writ petition denied; in defamation action, question concerning petitioner's membership in defendant organization did not violate right to associational privacy); Davies v Superior Court (1984) 36 C3d 291, 300, 204 CR 154 (petition for writ of mandate denied because trial court and real party in interest complied with alternative writ; nonetheless, in automobile accident case, court of appeal decided that information about other accidents at that location that did not disclose identifying material was not privileged, disapproving long line of contrary cases).*
- ***Medical privacy.*** *See Ombudsman Servs. of N. Cal. v Superior Court (2007) 154 CA4th 1233, 1239, 65 CR3d*

456 (mandate issued to prevent disclosure of records of long-term care facility not involving deceased plaintiff and his representatives); Doyle v Superior Court (1996) 50 CA4th 1878, 1887, 58 CR2d 476 (writ of mandate issued; plaintiff's allegation of past emotional distress did not place her mental condition in controversy and did not justify order for mental exam); Jones v Superior Court (1981) 119 CA3d 534, 544, 174 CR 148 (writs denied; right to privacy; physician-patient privilege). See also John B. v Superior Court, supra.

- ***Juvenile records.*** *See R.S. v Superior Court (2009) 172 CA4th 1049, 91 CR3d 546 (denying writ challenging order permitting disclosure of Child Abuse Services Team's tape of victim in juvenile's court file subject to protective order; trial court did not abuse its discretion in balancing competing interests).*
- ***Privileged communications or information.*** *On possible writ review of discovery orders impinging on privileged communications or information, see §§16.120-16.122.*

PRACTICE TIP: *It is essential to ask the appellate court to stay a discovery order requiring the disclosure of private or privileged information in connection with the filing of a writ petition. Without a stay, compliance with the discovery order may render the matter moot. On requesting a stay in appellate court writ proceedings, see chap 19.*

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§16.119 4. Recurring Procedural Issues

If the discovery order presents a recurring issue of discovery procedure, an appellate court may entertain the writ petition on the merits. Examples:

- *Sexton v Superior Court (1997) 58 CA4th 1403, 1406, 68 CR2d 708 (written opposition to motion to compel production of documents under former CCP §2031(l) (now CCP §2031.300) failed to raise timeliness; writ of mandate issued directing trial court to deny motion as untimely because time limit was mandatory and at least quasi-jurisdictional).*
- *Standon Co. v Superior Court (1990) 225 CA3d 898, 902, 275 CR 833 (writ review of order finding motion to compel further response to demand for inspection of documents under former CCP §2031(l) (now CCP §2031.300), filed more than 45 days after response date, untimely; 45-day period ran from service of written response, not from date set for production or inspection; petition denied, except to compel trial court to exercise its discretion on issue of sanctions).*
- *Roe v Superior Court (1990) 224 CA3d 642, 646, 273 CR 745 (writ of mandate issued directing trial court to require answers to interrogatories and production of documents; discovery automatically reopened when court-ordered arbitration proceedings were vacated by striking of at-issue memorandum; because question was one of first impression, trial court had discretion to deny sanctions).*
- *Carter v Superior Court (1990) 218 CA3d 994, 996, 267 CR 290 (writ of mandate issued directing trial court to vacate protective order and reconsider ruling on motion; party who missed deadline for compelling inspection of documents under former CCP §2031(l) (now CCP §2031.300) was not barred from requesting that same documents be brought to deposition under former CCP §2025 (now CCP §§2025.010-2025.620); failure of one procedure did not bar use of other procedure). See also Carpenter v Superior Court (2006) 141 CA4th 249, 252, 45 CR3d 821 (writ of mandate issued directing trial court to vacate order granting mental examination of plaintiff because order did not specify psychological tests to be administered, in violation of CCP §2032.320); Rancho Bernardo Dev. Co. v Superior Court (1992) 2 CA4th 358, 363, 2 CR2d 878 (writ review granted because petition concerning interpretation of former CCP §2034(i)(2) (now CCP §§2034.430-2034.450), limiting expert witness fees for depositions, raised issues of general concern that should receive early resolution).*

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5. Issues of Privilege

§16.120 a. Overview

Courts may grant writ review of discovery orders when privileged communications are at issue. See, e.g., Pacific Tel. & Tel. Co. v Superior Court (1970) 2 C3d 161, 170 n11, 84 CR 718; Marcus v Superior Court (1971) 18 CA3d 22, 23, 95 CR 545. In fact, interlocutory review of discovery orders by writ of mandate is the only adequate remedy when a court orders production of documents that may be subject to a privilege, because "once privileged matter has been disclosed there is no way to undo the harm which consists in the very disclosure." Crab Addison, Inc. v Superior Court (2008) 169 CA4th 958, 965, 87 CR3d 400, quoting People ex rel Lockyer v Superior Court (2004) 122 CA4th 1060, 1071, 19 CR 3d 324. See also Valley Bank v Superior Court (1975) 15 C3d 652, 657, 125 CR 553 (right to discover confidential bank records must be balanced against customer's right to privacy under Cal Const art I, §1).

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Source: *Civil Litigation/California Civil Writ Practice/16 Availability of Writ Relief/§16.121 b. Examples of Writ Review of Privilege Issues*

§16.121 b. Examples of Writ Review of Privilege Issues

Privileges that have been the subject of writ review of discovery orders include the following:

- ***Physician-patient privilege; psychotherapist-patient privilege.*** *Britt v Superior Court (1978) 20 C3d 844, 862, 143 CR 695 (although Evid C §§996 and 1016 provide exceptions to physician-patient and psychotherapist-patient privileges when patient puts medical condition at issue in lawsuit, mandate will issue to prevent discovery of unrelated past medical or psychotherapeutic treatment); Manela v Superior Court (2009) 177 CA4th 1139, 1143, 99 CR3d 736 (writ of mandate issued directing trial court to vacate order quashing subpoena for medical records on grounds father had waived privilege); Palay v Superior Court (1993) 18 CA4th 919, 925, 22 CR2d 839 (first impression issue of whether mother may assert physician-patient privilege to prevent disclosure of her prenatal medical records in child's negligence action against doctors and hospital); Rittenhouse v Superior Court (1991) 235 CA3d 1584, 1591, 1 CR2d 595 (writ of mandate issued directing trial court to quash deposition subpoenas for records protected by physician-patient and psychotherapist-patient privileges).*
- ***Law enforcement agency personnel records*** *(see Evid C §§1043, 1045). Shepherd v Superior Court (1976) 17 C3d 107, 116, 130 CR 257 (in police misconduct suit, supreme court discussed numerous privileges and statutory exemptions claimed by defendants resisting discovery; writ of mandate issued directing trial court to further consider petitioner's motion to compel), overruled on other grounds by People v Holloway (2004) 33 C4th 96, 131, 14 CR3d 212; County of Orange v Superior Court (2000) 79 CA4th 759, 763, 94 CR2d 261 (explaining analysis in Shepherd); Hackett v Superior Court (1993) 13 CA4th 96, 98, 16 CR2d 405 (writ of mandate issued directing trial court to deny motion to compel; privilege extends to answers to interrogatories seeking such information as officer's home address, telephone number, and driver's license number, even though information could be found outside officer's personnel file).*
- ***Official information.*** *City of Fresno v Superior Court (1988) 205 CA3d 1459, 1464, 253 CR 296 (writ review of document production order that might have caused police officers unnecessary annoyance, embarrassment, or oppression).*
- ***Deliberative process privilege.*** *San Joaquin County Local Agency Formation Comm'n v Superior Court (2008) 162 CA4th 159, 76 CR3d 93 (writ issued to prohibit discovery that would implicate legislative process).*
- ***Mediation privilege.*** *Rojas v Superior Court (2004) 33 C4th 407, 415, 15 CR3d 643 (tenants of apartment complex sought to compel production of photos and other raw data in possession of developers, who opposed motion on ground that items were exchanged in mediation in prior litigation and were protected by mediation privilege (Evid C §1119); supreme court held documents were protected); Doe 1 v Superior Court (2005) 132 CA4th 1160, 1173, 34 CR3d 248 (writ of mandate issued prohibiting church from publicly releasing written summaries of personnel files of priests accused of childhood sexual abuse that were prepared for submission in ongoing mediation because disclosure would violate mediation confidentiality privilege; disclosure of underlying information used in creating summaries, which existed before mediation proceeding, was not prohibited). But see Saeta v Superior Court (2004) 117 CA4th 261, 267, 11 CR3d 610 (petition for writ of mandate denied; mediation privilege did not apply to statements made during hearing conducted by employment termination review panel).*

NOTE: *As the current update to this publication was going to press, the California Supreme Court granted a petition for review in Cassel v Superior Court (review granted Feb. 3, 2010, B215215; superseded opinion at 179 CA4th 152, 101 CR3d 501). In a now-superseded opinion, the court of appeal granted a writ petition challenging an order excluding evidence, finding that the mediation privilege did not apply in an attorney malpractice case. On review, the supreme court will consider the following issues: (1) are the private conversations of an attorney and client for the purpose of mediation entitled to confidentiality under Evid C §§1115-1128, and (2) is an attorney a "participant" in a mediation such that communications between the attorney and his or her client for purposes of mediation must remain confidential under Evid C §§1119(c) and 1122(a)(2)? This publication will discuss the outcome of this case in a forthcoming update.*

- ***State newspersons' shield law.*** *KSDO v Superior Court (1982) 136 CA3d 375, 385, 186 CR 211 (writ of mandate issued nullifying trial court order requiring production of newsperson's notes in libel action; under qualified privilege of freedom of press, because newsperson was party to suit, information that went to "heart of the claim" was not discoverable, because it was available from other sources). On state newspersons' shield law (Cal Const art I, §2; Evid C §1070), see discussion of contempt in §16.132.*
- ***Confidential reporting required by law.*** *Union Bank of Cal. v Superior Court (2005) 130 CA4th 378, 385, 29 CR3d 894 (writ of mandate issued directing trial court to deny production of bank's internal suspicious activity forms used to file suspicious activity reports (SARs) required by federal law; under 12 CFR §21.11(k), bank was prohibited from producing SAR or providing any information that could disclose whether it prepared or filed SAR).*
- ***Miscellaneous matters.*** *County of Los Angeles v Superior Court (1975) 13 C3d 721, 732, 119 CR 631 (writ of prohibition issued restraining trial court from requiring members of board of supervisors to answer deposition questions concerning their motives for enacting legislation); American Airlines, Inc. v Superior Court (2003) 114 CA4th 881, 892, 8 CR3d 146 (writ of mandate issued directing trial court to compel deposition testimony of union representative; no privilege against disclosure of union representative's discussions with represented workers).*

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§16.122 c. Attorney-Client Privilege and Work Product Doctrine

If a discovery order presents an attorney-client privilege issue, an appellate court may grant writ review. For example:

- *Mitchell v Superior Court (1984) 37 C3d 591, 599, 208 CR 886 (writ of mandate issued; deposition questions about what plaintiff's attorneys told her concerning chemical alleged to have contaminated groundwater were clearly within purview of attorney-client privilege);*
- *Tritek Telecom, Inc. v Superior Court (2009) 169 CA4th 1385, 87 CR3d 455 (writ of mandate issued to protect corporate records generated in defense of suit brought by disgruntled director);*
- *Snyder v Superior Court (2007) 157 CA4th 1530, 1533, 69 CR3d 600 (writ of mandate issued; local general order requiring case discovery information in reports in asbestos cases infringed on work product doctrine);*
- *Best Prods., Inc. v Superior Court (2004) 119 CA4th 1181, 1190, 15 CR3d 154 (writ of mandate issued directing trial court to set aside order overruling defendant's boilerplate attorney-client privilege objections to document request; statutory law did not recognize failure to file privilege log as waiver of attorney-client privilege);*
- *OXY Resources Cal. v Superior Court (2004) 115 CA4th 874, 886, 9 CR3d 621 (writ of mandate issued when trial court erred by denying discovery based on common interest doctrine without first concluding that information was protected from disclosure by attorney-client privilege or work product doctrine, then determining whether disclosure was reasonably necessary to accomplish purpose for which attorneys were consulted);*
- *McKesson HBOC, Inc. v Superior Court (2004) 115 CA4th 1229, 1238, 9 CR3d 812 (petition for writ of mandate denied; despite written confidentiality agreement stating lack of intent to waive privileges, McKesson waived attorney-client and work product privileges by sharing documents with Securities and Exchange Commission for use in investigation of alleged securities fraud because McKesson and government were not aligned in litigation, did not share same stake, and did not have same goal); but see County of Los Angeles v Superior Court (2005) 130 CA4th 1099, 1107, 30 CR3d 708 (writ of mandate issued directing trial court to deny motion to compel production of documents; privilege not waived when legislative body disclosed closed session minutes to another governmental agency under confidentiality agreement, as provided by Govt C §6254.5(e));*
- *Shooker v Superior Court (2003) 111 CA4th 923, 929, 4 CR3d 334 (writ of mandate issued; plaintiff did not waive attorney-client privilege by designating himself as expert, then withdrawing before disclosing any confidential communications).*

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§16.123 6. Issues Involving Denial of Discovery

Mandate alone (rather than mandate and prohibition) usually will provide sufficient relief from an improper order denying discovery. In Burke v Superior Court (1969) 71 C2d 276, 78 CR 481, petitioners requested both mandate and prohibition to halt further trial court proceedings until they had received proper discovery responses, but the supreme court ultimately granted only mandate. The court reasoned that, because discovery ordinarily must be completed before trial, "it is implicit in a writ of mandate… that the trial should not proceed until discovery has been satisfactorily completed or appropriate sanctions have been imposed." 71 C2d at 277 n1. Selection of the appropriate writ or writs will depend on the circumstances of the case. On types of writs available, see chap 15.

The following cases illustrate situations in which courts issued writs of mandate to ensure proper discovery:

- *Emerson Elec. Co. v Superior Court (1997) 16 C4th 1101, 1111, 68 CR2d 883 (affirming mandate to compel personal injury plaintiff to demonstrate at videotaped deposition how injury occurred; "answer" in former CCP §2025 (now CCP §§2025.010-2025.620) includes nonverbal as well as verbal responses at videotaped deposition);*
- *Beesley v Superior Court (1962) 58 C2d 205, 208, 23 CR 390 (writ of mandate issued directing trial court to compel inspection of statements of independent witnesses taken by adjuster of defendant, an insurance company; trial court abused discretion in denying discovery when plaintiff presented facts showing good cause as a matter of law and defendant opposed only on ground that no good cause was shown);*
- *Wagner v Superior Court (1993) 12 CA4th 1314, 1316, 16 CR2d 534 (mandate issued directing trial court to vacate orders setting discovery cutoff date in "fast-track" case when no trial date had yet been set; trial court abused discretion as a matter of law by denying petitioner's statutory right under former CCP §2024(a) (now CCP §2024.020(a)) to conduct discovery up to 30 days before initial trial date);*
- *Abex Corp. v Superior Court (1989) 209 CA3d 755, 756, 257 CR 498 (writ of mandate issued; trial court clearly abused discretion by denying motion to compel physical exam of plaintiff in personal injury case).*

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§16.124 7. Issues Involving Grant of Discovery

Although writ review of orders granting discovery appears to be less favored than writ review of orders denying discovery, writs are available in egregious or important cases. For example:

- *City of Los Angeles v Superior Court (2002) 29 C4th 1, 10, 124 CR2d 202 (writ of mandate issued directing trial court not to disclose information in police officer's personnel records because material was more than 5 years old and, thus, not discoverable under Evid C §1045(b)(1));*
- *City of Santa Cruz v Municipal Court (1989) 49 C3d 74, 86, 260 CR 520 (writ of mandate issued upholding trial court order compelling discovery of prior incidents of police brutality under Evid C §1043(b) without affidavit based on personal knowledge);*
- *Pomona Valley Hosp. Med. Ctr. v Superior Court (1997) 55 CA4th 93, 100, 63 CR2d 743 (writ of mandate issued to set aside order permitting petitioner in administrative mandamus proceeding to depose witness and augment record because testimony sought was not reasonably calculated to produce evidence admissible under CCP §1094.5(e));*
- *Doyle v Superior Court (1996) 50 CA4th 1878, 1883, 58 CR2d 476 (writ of mandate issued vacating order compelling sexual harassment plaintiff to undergo mental exam for past emotional distress and to pay sanctions; writ review appropriate to resolve tension between defendant's right to discovery and plaintiff's constitutional right to privacy);*
- *Bridgestone/Firestone, Inc. v Superior Court (1992) 7 CA4th 1384, 1393, 9 CR2d 709 (writ of mandate issued to compel trial court to set aside order requiring defendant to provide tire rubber formula; opinion set stringent standards for trial courts that require disclosure of trade secrets);*
- *Olympic Club v Superior Court (1991) 229 CA3d 358, 362, 282 CR 1 (writ of mandate issued to vacate broad-based discovery order compelling private club to supply city with names and business addresses of applicants denied membership; although city's need for disclosure to prove prohibited discrimination outweighed rejected applicants' First Amendment right to associational privacy, trial court was required to establish notification procedures to give rejected applicants prior notice and opportunity to seek protective order).*

On writ review of orders granting discovery that involve issues of privilege, see §§16.120-16.122.

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§16.125 8. Issues Involving Orders Imposing Discovery Sanctions

Although trial courts are increasingly willing to impose sanctions to control the discovery process, appellate courts are unlikely to become involved in reviewing such orders by writ, because the trial court's ruling in discovery matters is often a matter within its discretion and many lawsuits produce a large number of discovery orders. The petitioner must show a serious abuse of discretion to obtain writ review. See, e.g., Newland v Superior Court (1995) 40 CA4th 608, 615, 47 CR2d 24 (terminating sanction issued solely because of failure to pay monetary discovery sanction was abuse of discretion). Nevertheless, courts have granted writ petitions from orders imposing sanctions, including discovery sanctions. See, e.g., Lund v Superior Court (1964) 61 C2d 698, 709, 39 CR 891; Maggi v Superior Court (2004) 119 CA4th 1218, 1226, 15 CR3d 161 (terminating restraining order prohibiting counsel from discussing lawsuit with third parties without court's permission as unconstitutional discovery sanction). See also Fairfield v Superior Court (1966) 246 CA2d 113, 121, 54 CR 721 (writ of mandate issued directing trial court to vacate order imposing sanctions; mandate and prohibition equally appropriate remedies to circumvent imposition of invalid sanctions).

In at least one instance, a court of appeal has issued a writ following an order denying discovery sanctions. In Do v Superior Court (2003) 109 CA4th 1210, 1218, 135 CR2d 855, pro bono counsel for an indigent defendant sought monetary sanctions for plaintiff's failure to appear at deposition. The trial court denied sanctions for the sole reason that counsel had taken the case pro bono. The appellate court granted defendant's petition for writ of mandate and ordered the trial court to award sanctions in an amount based on the reasonable value of counsel's services.

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§16.126 a. Review of Discovery Sanctions of $5000 or Less

If the sanctions imposed are $5000 or less, CCP §904.1(b) makes clear that the affected party may petition for writ review or wait until after a final judgment and appeal. See §§16.81-16.85.

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§16.127 b. Review of Discovery Sanctions of More Than $5000

In general, in an unlimited civil case, an order imposing sanctions over $5000 is immediately appealable. CCP §904.1(a)(11)-(12). A split of authority remains, however, about whether a party can immediately appeal from an interlocutory judgment or order directing payment of monetary discovery sanctions by a party or an attorney if the amount exceeds $5000.

Several cases hold that an order imposing discovery sanctions in excess of $5000 is appealable. Sears, Roebuck & Co. v Nat'l Union Fire Ins. Co. (2005) 131 CA4th 1342, 1352, 32 CR3d 717 (discovery sanctions in excess of $5000 appealable under CCP §904.1(a)(11)); Mileikowsky v Tenet Healthsystem (2005) 128 CA4th 262, 264, 26 CR3d 831 (monetary discovery sanctions in excess of $5000 immediately appealable under CCP §904.1(a)(12)); Rail-Transport Employees Ass'n v Union Pac. Motor Freight (1996) 46 CA4th 469, 475, 54 CR2d 713 (discovery sanctions in excess of $5000 directly appealable under CCP §904.1). See also California Civil Appellate Practice §3.41 (3d ed Cal CEB 1996).

There is also a line of cases, generally decided before the 1993 amendments to CCP §904.1, which holds that, although sanctions awards in excess of $5000 are appealable under CCP §904.1(11), discovery sanctions are not. See Ballard v Taylor (1993) 20 CA4th 1736, 25 CR2d 384; Hanna v Bankamerica Bus. Credit, Inc. (1993) 16 CA4th 913, 20 CR2d 430; Russell v General Motors Corp. (1992) 3 CA4th 1114, 4 CR2d 750; Ghanooni v Super Shuttle (1992) 2 CA4th 380, 3 CR2d 43; Rao v Campo (1991) 233 CA3d 1557, 285 CR 691; Imuta v Nakano (1991) 233 CA3d 1570, 285 CR 681.

PRACTICE TIP: *Although most recent authority holds that discovery sanctions in excess of $5000 are appealable, because of this split of authority, counsel seeking review should file both a notice of appeal and a writ petition, explaining in the papers that counsel has filed both in an abundance of caution to avoid loss of the right to immediate review. This will allow the court to determine the appropriate method of review.*

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§16.128 9. Time to File Writ Petition

Because a writ petition from a discovery order is not governed by statute, the "60-day rule" generally applies. See §16.87. However, if there is a looming deadline for production of discoverable evidence or if the need for expeditious discovery is compelling, counsel should file the petition well before the 60-day time period expires.

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§16.129 10. Standard of Review if Writ Petition Accepted

The standard of review that applies to a discovery order depends on the issues that the order presents. Courts review questions of privilege, privacy, and other pure questions of law de novo, while they review questions concerning motions to compel discovery, the burdensomeness of discovery, the timeliness of a discovery request, sanctions, and similar subjects for abuse of discretion. See, e.g., Britts v Superior Court (2006) 145 CA4th 1112, 1123, 52 CR3d 185.

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§16.129A K. To Review Class Certification Orders

Class certification rulings can dramatically affect the nature of a case. Accordingly, writ relief may be granted on a compelling showing that the trial court abused its discretion in granting or denying class certification. See, e.g., Sav-On Drug Stores, Inc. v Superior Court (2004) 34 C4th 319, 17 CR3d 906 (granting review and reversing court of appeal's decision granting writ relief as to class comprised of managerial employees in wage and hour case); Hewlett-Packard Co. v Superior Court (2008) 167 CA4th 87, 83 CR3d 836 (court of appeal issued order to show cause, stayed further trial court proceedings, reviewed class certification ruling on merits, and denied writ petition); County of Los Angeles v Superior Court (2008) 159 CA4th 353, 358, 71 CR3d 485 (same); Alch v Superior Court (2004) 122 CA4th 339, 19 CR3d 29 (issuing writ in 23 consolidated class action age discrimination cases to reverse three rulings: (1) dismissal of class claims under Govt C §12965(b) of Fair Employment and Housing Act when previous class action had been filed but dismissed in federal court, (2) dismissal of certain job applicants' claims as time-barred, and (3) requiring all individual claims to be pled with particularity); Corbett v Superior Court (2002) 101 CA4th 649, 654, 125 CR2d 46 (issuing writ directing trial court to vacate order refusing to consider class action under Unfair Competition Law); Stern v Superior Court (2003) 105 CA4th 223, 129 CR2d 275 (issuing writ directing trial court to vacate reclassification order entered without giving parties notice or opportunity to present facts and argument).

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§16.129B 1. Class Notification Issues

Writ relief may also be granted to correct rulings on class notice. See, e.g., Hypertouch, Inc. v Superior Court (2005) 128 CA4th 1527, 27 CR3d 839 (peremptory writ issued directing trial court to vacate order approving class notice requiring individual members of certified class to "opt in" to participate in action).

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§16.129C 2. Time to File Writ Petition

Because a writ petition from a class certification order is not governed by statute, the "60-day rule" generally applies. See §16.87.

PRACTICE TIP: *If there are pressing trial court matters that depend on the certification order, counsel should file the petition well before the 60-day time period expires.*

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§16.129D 3. Standard of Review if Writ Petition Accepted

An order on class certification generally is reviewed for abuse of discretion. See, e.g., County of Los Angeles v Superior Court (2008) 159 CA4th 353, 359, 71 CR3d 485; Capitol People First v State Dep't of Dev. Servs. (2007) 155 CA4th 676, 689, 66 CR3d 300; Reese v Wal-Mart Stores, Inc. (1999) 73 CA4th 1225, 1229, 87 CR2d 346. An abuse of discretion includes applying an incorrect legal standard.

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Source: *Civil Litigation/California Civil Writ Practice/16 Availability of Writ Relief/§16.130 L. To Review Judgments and Orders in Contempt Cases*

§16.130 L. To Review Judgments and Orders in Contempt Cases

When the court orders counsel or a party to do something that counsel or the party does not wish to do, there are two choices: (1) attack the order immediately by a petition for writ of prohibition or mandate; or (2) violate the order and mount a collateral attack on it by seeking review of the resulting contempt judgment or order, usually by petition for a writ of review (certiorari) (see §16.135) or habeas corpus (see §16.136). The latter course is obviously risky because, if the underlying order is correct, the contempt will stand. In some circumstances (usually counsel contempt), there may not be an underlying order to challenge.

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1. Review of Order Before Contempt Adjudication

§16.131 a. Writ of Prohibition Before Contempt Adjudication

When the court makes an invalid order, prohibition is appropriate to prevent the court from enforcing the order under penalty of contempt and from adjudging the person subject to the order to be in contempt for disobeying it. See, e.g.:

- *Lund v Superior Court (1964) 61 C2d 698, 708, 39 CR 891 (writ of prohibition issued; invalid contempt order based on nonattendance at deposition);*
- *Franchise Tax Bd. v Superior Court (1950) 36 C2d 538, 545, 225 P2d 905 (writ of prohibition issued to restrain enforcement of invalid orders for inspection of privileged information);*
- *Nelson v Superior Court (1937) 9 C2d 729, 731, 73 P2d 232 (writ of prohibition issued to prevent contempt proceedings for failure to comply with invalid deposition subpoena duces tecum);*
- *McMahon v Superior Court (1967) 255 CA2d 363, 62 CR 873 (writ of prohibition issued to prevent hearing on order to show cause why petitioner should not be committed for contempt);*
- *Farnham v Superior Court (1961) 188 CA2d 451, 455, 10 CR 615 (writ of prohibition issued to prevent contempt proceedings for disobedience of defective minute order in discovery proceedings);*
- *Hunter v Superior Court (1939) 36 CA2d 100, 110, 97 P2d 492 (writ of prohibition issued; violation of void injunction: "If the trial court is about to imprison or fine petitioner for contempt under a void judgment, prohibition is a proper remedy").*

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§16.132 b. State Newspersons' Shield Law Does Not Provide Relief Before Contempt Adjudication

A newsperson seeking extraordinary relief from an adverse trial court order under the state newspersons' shield law (Cal Const art I, §2(b) and Evid C §1070) must violate the adverse order and be adjudged guilty of contempt before he or she can claim the protection of the shield law. New York Times Co. v Superior Court (1990) 51 C3d 453, 273 CR 98. The shield law protects a newsperson who is not a party to civil litigation from contempt for failure to disclose unpublished information. It provides only immunity from contempt, not a privilege, and a petition for extraordinary relief under the shield law is premature until an order or judgment of contempt has been entered. 51 C3d at 458.

Although in New York Times the supreme court held that the appellate court's issuance of a writ of mandate was premature, it nonetheless ruled on the merits to avoid remanding the case merely to obtain a contempt judgment. The dissent noted that the decision makes possible precontempt and postcontempt writ review if the newsperson's resistance to disclosure is based on a qualified privilege under the First Amendment and on the shield law. 51 C3d at 469. On writ review of discovery orders involving issues of privilege and constitutional rights, see §§16.14-16.15, 16.120-16.122.

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2. Writ Review of Contempt Judgment or Order

§16.133 a. Overview

The judgments or orders in contempt cases that are made final and conclusive (CCP §1222) are not appealable (CCP §904.1(a)(1)(B)). They may be reviewed in a writ proceeding, however. See, e.g., McComb v Superior Court (1977) 68 CA3d 89, 93 n1, 137 CR 233. In In re Buckley (1973) 10 C3d 237, 259, 110 CR 121, the supreme court implied that the appellate courts should review all contempt orders challenged by writ petition, particularly if the person held in contempt is threatened with jail. This does not, however, appear to be the practice.

Writ review of contempt judgments and orders has been by way of petition for writ of review (certiorari) (see McComb v Superior Court, supra; Fontana v Superior Court (1977) 72 CA3d 159, 139 CR 851), writ of prohibition (see Lister v Superior Court (1979) 98 CA3d 64, 159 CR 280), writ of mandate (see Ramirez v Superior Court (1977) 72 CA3d 351, 140 CR 108), and writ of habeas corpus for individuals "in custody" (see In re Buckley, supra; see generally Appeals and Writs in Criminal Cases §9.21 (3d ed Cal CEB 2007)).

Writ petitions should include the allegations necessary to obtain the appropriate writ. On the requirements of mandate, prohibition, writ of review, and habeas corpus, see chap 15. On drafting the petition, see chaps 18, 27.

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§16.134 b. Scope of Review

Although the reviewing court is generally confined to determining whether substantial evidence supports the trial court's jurisdiction to adjudge the petitioner in contempt (see In re Buckley (1973) 10 C3d 237, 247, 110 CR 121; see also §16.142), the court may review the procedures by which the finding of contempt was made, the validity of the underlying order whose violation led to the contempt, or both. See, e.g., In re Berry (1968) 68 C2d 137, 150, 65 CR 273 (when contempt proceedings challenged, court reviews underlying order as well). See also 6 Witkin, California Procedure, Provisional Remedies §409 (5th ed 2008). A frequent basis for invalidating a judgment or order of contempt is the intrusion of that adjudication on constitutionally protected rights. See Church of Hakeem, Inc. v Superior Court (1980) 110 CA3d 384, 387, 168 CR 13 (writ of prohibition; court of appeal prohibited contempt for refusing to disclose membership list in answers to interrogatories on grounds that disclosure order violated right of associational privacy of innocent nonlitigant church members).

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§16.135 c. Review by Writ of Review (Certiorari)

When the contempt judgment or order imposes a fine, rather than custody or constructive custody, a writ of review (certiorari) may be used to challenge the contempt judgment. See In re Coleman (1974) 12 C3d 568, 572 n2, 116 CR 381; Anderson v Superior Court (1998) 68 CA4th 1240, 1245, 80 CR2d 891; Miller v Municipal Court (1967) 249 CA2d 531, 532, 57 CR 578. See also Moffat v Moffat (1980) 27 C3d 645, 656, 165 CR 877. On the definition, purpose, and requirements of a writ of review, see §§15.27-15.38. A writ of review is the writ most commonly used to review contempt judgments and orders.

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§16.136 d. Review by Writ of Habeas Corpus

If the petitioner is incarcerated or threatened with incarceration, rather than subject to a fine, he or she should seek a writ of habeas corpus. See Pen C §1473; In re Buckley (1973) 10 C3d 237, 259, 110 CR 121. On the definition, purposes, and requirements of habeas corpus, see §§15.39-15.43. The alleged contemner may apply for habeas corpus even though he or she is not in actual custody; habeas corpus relief is available to a person in constructive as well as in actual custody. See In re Berry (1968) 68 C2d 137, 146 n7, 65 CR 273.

If habeas corpus is unavailable, a writ of review (certiorari) may be appropriate. See Miller v Municipal Court (1967) 249 CA2d 531, 532, 57 CR 578 (petition for writ of habeas corpus had been changed to petition for writ of review because only fine was imposed). Because the scope of review on habeas corpus is "precisely the same" as that for writ of review (Wilde v Superior Court (1942) 53 CA2d 168, 176, 127 P2d 560), habeas corpus and writ of review cases are sometimes cited interchangeably. On scope of review in writ of review cases, see §§15.27-15.38.

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e. Review by Writ of Prohibition

§16.137 (1) Writ of Prohibition Not Available After Fine Has Been Paid or Jail Sentence Has Been Served

Prohibition usually issues to prevent enforcement of the contempt judgment or order after the adjudication of contempt, but before enforcement, at a time when a writ of review (certiorari) is also available. Because prohibition requires that the challenged action be threatened rather than completed, a prohibition petition must be filed before the fine has been paid or the jail sentence has been served. See §§15.18-15.21. Once punishment is more than threatened, only writ of review or habeas corpus is available.

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§16.138 (2) Writ of Prohibition Restrains Court That Failed to Comply With Prescribed Contempt Procedures

The procedures for imposing a contempt order under CCP §§1211-1218 are mandatory and jurisdictional. Thus, prohibition is appropriate when other remedies are inadequate to restrain a court that attempts to adjudge a person guilty of contempt when it lacks jurisdiction to do so because of failure to comply with the prescribed procedures. CCP §§1102-1103; Lund v Superior Court (1964) 61 C2d 698, 712, 39 CR 891 (writ of prohibition issued because trial court did not follow contempt procedures but instead imposed "sanctions"; supreme court held that under discovery statutes, trial court must proceed as contempt when proposed sanction is for refusal of nonparty witness to obey duly issued and served subpoena, or for failure of any person properly brought before court to obey order made to compel discovery).

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§16.139 (3) Using Writ of Prohibition to Challenge Defective Affidavits

If the contempt was not committed in the immediate presence of the court (indirect contempt), the facts constituting the contempt are presented to the court in an affidavit. CCP §1211(a). A petition for a writ of prohibition can be the appropriate means to challenge such affidavits on the ground that they are defective and cannot support an adjudication of contempt. See, e.g., McMahon v Superior Court (1967) 255 CA2d 363, 62 CR 873; Farnham v Superior Court (1961) 188 CA2d 451, 455, 10 CR 615. When challenging a defective affidavit, counsel should attach it as an exhibit to and incorporate it by reference in the writ petition. If the affidavit is not made a part of the record, the defect is not properly before the court and prohibition may be denied. See Morelli v Superior Court (1969) 1 C3d 328, 333, 82 CR 375.

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§16.140 f. Review by Writ of Mandate

Mandate is also available to review the contempt order. See, e.g., Ramirez v Superior Court (1977) 72 CA3d 351, 140 CR 108 (appellate court issued writ of mandate because trial court refused to consider evidence that petitioner did not have financial ability to comply with trial court's order). On definition, purpose, and requirements of mandate, see §§15.2-15.13. On requesting a stay in appellate court writ proceedings, see chap 19.

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§16.141 3. Time to File Writ Petition

Because a petition for a writ review of a contempt order is not governed by statute, the "60-day rule" generally applies (see §16.87), although it is inadvisable to wait until the 60th day if it is reasonable for the appellate court to expect more expeditious action.

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§16.142 4. Standard of Review if Writ Petition Accepted

The substantial evidence standard applies to an adjudication of contempt, although the ultimate question is whether the trial court had jurisdiction to render the contempt order. See, e.g., In re Marcus (2006) 138 CA4th 1009, 1015, 41 CR3d 861 ("In writ proceedings to review an adjudication of contempt, our inquiry is whether there was any substantial evidence before the trial court to prove the elements of the contempt. Absent such evidence, the order must be annulled"), citing Board of Supervisors v Superior Court (1995) 33 CA4th 1724, 1736, 39 CR2d 906 (review of contempt adjudication limited to determining whether substantial evidence sustained jurisdiction of trial court).

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§16.143 M. To Review Probate Proceedings

Probate Code §1300 (former Prob C §§7240, 1297, and 1240) sets out appealable probate proceeding orders. Orders that do not appear in Prob C §1300 may not be appealed (see McDonald v Structured Asset Sales, LLC (2007) 154 CA4th 1068, 1073, 65 CR3d 366), except for orders granting new trials, which case law has made appealable. See Estate of Wilhelm (1957) 152 CA2d 803, 805, 313 P2d 161, citing Estate of Noonan (1952) 113 CA2d 899, 249 P2d 306.

Some courts have held that a writ of review (certiorari) is the method for reviewing probate orders that are not appealable under Prob C §1300, if the other requirements for a writ of review are met (see §§15.27-15.38). See, e.g., Fredrickson v Superior Court (1952) 38 C2d 593, 597, 241 P2d 541; Kramer v Superior Court (1950) 36 C2d 159, 161, 222 P2d 874; Estate of Vai (1959) 168 CA2d 147, 335 P2d 501. For examples of nonappealable probate orders, see Estate of Vose (1970) 4 CA3d 454, 84 CR 347 (order allowing filing of an amended claim), disapproved on other grounds in Nathanson v Superior Court (1974) 12 C3d 355, 370, 115 CR 783; Estate of Cuneo (1963) 214 CA2d 381, 29 CR 497 (order denying petition to set aside prior allowance of claim); Estate of Windiate (1961) 197 CA2d 560, 17 CR 297 (order denying petition to revoke and annul letters of special administration); 9 Witkin, California Procedure, Appeal §205 (5th ed 2008).

On writ review of probate proceedings, see also 8 Witkin, California Procedure, Extraordinary Writs §36 (5th ed 2008).

On time to file writ petition, see §16.87.

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§16.143A N. To Review Family Law and Dependency Matters

Writ review may be sought in a variety of family law matters. For example:

- *Decision to dismiss dependency petition. Los Angeles County Dep't of Children & Family Servs. (2008) 162 CA4th 1408, 77 CR3d 52 (department challenged trial court order dismissing dependency petition; writ issued).*
- *Order denying reunification services and scheduling a permanent plan hearing. See S.T. v Superior Court (2009) 177 CA4th 1009, 99 CR3d 412 (parent challenged order terminating reunification services and setting permanency planning hearing; writ granted); Amanda H. v Superior Court (2008) 166 CA4th 1340, 83 CR3d 229 (same); David L. v Superior Court (2008) 166 CA4th 387, 83 CR3d 14 (father challenged order setting new permanent plan selection and implementation hearing; writ denied); Mardardo F. v Superior Court (2008) 164 CA4th 481, 78 CR3d 884 (father challenged order denying reunification services; writ denied).*
- *Order removing minors from parents' custody and denying reunification services. See Justin L. v Superior Court (2008) 165 CA4th 1406, 1411, 81 CR3d 884 (both parents challenged orders; writ issued "solely for purpose of ensuring compliance with [Indian Child Welfare Act]").*
- *Dependency ruling involving home schooling. See Jonathan L. v Superior Court (2008) 165 CA4th 1074, 81 CR3d 571 (children's counsel challenged trial court's refusal to order parents to send children to public or private school, instead of home schooling; writ granted).*
- *Order in Uniform Parentage Act (UPA) case. See Scott v Superior Court (2009) 171 CA4th 540, 89 CR3d 843 (woman who previously lived with children's father successfully petitioned to reopen and join UPA case seeking custody and visitation; writ granted overturning order allowing joinder).*

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§16.144 O. To Review Guardianship and Conservatorship Proceedings

Probate Code §§1300-1301 (former Prob C §1630) set out appealable guardianship or conservatorship orders. Those guardianship or conservatorship orders not appealable by the terms of §§1300-1301 may be subject to writ review. See, e.g., Greene v Superior Court (1951) 37 C2d 307, 310, 231 P2d 821 (writ of prohibition granted; decided under former Prob C §1630). See also 9 Witkin, California Procedure, Appeal §203 (5th ed 2008); California Conservatorship Practice §24.2 (Cal CEB 2005); and California Guardianship Practice §17.2 (Cal CEB Annual).

On time to file writ petition, see §16.87.

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§16.145 P. To Review Orders on Motions in Limine

A writ petition may be filed to challenge an in limine ruling. In Fatica v Superior Court (2002) 99 CA4th 350, 120 CR2d 904, for example, the court of appeal issued a writ of mandate directing the trial court to vacate its order granting a motion in limine which, if left standing, would have deprived petitioners of a fair and reasonable opportunity to present a substantial portion of their case. Plaintiffs filed the petition on the third day of trial; the court of appeal immediately ordered the trial stayed and issued the writ the following day.

In Cox v Superior Court (2002) 98 CA4th 670, 120 CR2d 45, by contrast, the court of appeal, citing judicial economy, intervened before the start of trial, directing the trial court to grant plaintiffs' motion in limine. See also Aguiar v Superior Court (2009) 170 CA4th 313, 87 CR3d 813 (petition challenging in limine ruling that regulation did not conflict with living wage ordinance; court issued order to show cause, stayed proceedings, determined regulation was invalid, and issued writ); State Farm Fire & Cas. Co. v Superior Court (2008) 164 CA4th 317, 320, 78 CR3d 828 (petition challenging order finding duty to defend after trial of that issue in "trifurcated" case); Southern Cal. Reg'l Rail Auth. v Superior Court (2008) 163 CA4th 712, 715, 77 CR3d 765 (petition challenging pre-trial ruling on preemption issue); Employers Reinsurance Co. v Superior Court (2008) 161 CA4th 906, 912, 74 CR3d 733 (petition challenging in limine ruling precluding evidence of 30 years of claims handling on issue of meaning of insurance policies; court issued order to show cause, stayed proceedings, and issued writ in part); Henry v Superior Court (2008) 160 CA4th 440, 449, 72 CR3d 808 (petition challenging pretrial ruling in premises liability case excluding evidence of medical malpractice in treating injuries; court stayed trial proceedings and subsequently issued writ); State Route 4 Bypass Auth. v Superior Court (2007) 153 CA4th 1546, 1549, 64 CR3d 286 (petition challenging trial court's determination as to dedication requirement in phase one of bifurcated condemnation cases; court stayed further trial proceedings and subsequently issued writ).

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§16.146 1. Time to File Writ Petition

As with other nonstatutory writs, there is no express deadline. See §16.87. However, because a motion in limine is usually heard and ruled on immediately before trial, if the ruling is erroneous and will inject reversible error into the case, the aggrieved party should ask the trial court for an immediate stay and seek writ review immediately, renewing the stay request if the trial court denies it.

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§16.147 2. Standard of Review if Writ Petition Accepted

The applicable standard of review depends on the nature of the in limine motion. In general, an appellate court reviews evidentiary rulings and orders on motions in limine for abuse of discretion. See, e.g., KB Home v Superior Court (2003) 112 CA4th 1076, 5 CR3d 587. However, when the facts are undisputed, pure questions of law are subject to independent review. See, e.g., Aas v Superior Court (2000) 24 C4th 627, 634, 101 CR2d 718.

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Q. To Review Order Requiring Jury Trial

§16.148 1. Overview

In Southern Pac. Transp. Co. v Superior Court (1976) 58 CA3d 433, 435, 129 CR 912, the court of appeal, without discussing why writ review was the appropriate remedy, issued a writ prohibiting the trial court from enforcing its order requiring a jury trial. The action was a suit for damages brought under CCP §871.1 by a good-faith improver of land that the petitioner owned. The petitioner contended that, because the good-faith improver action originated in equity, there was no right to a jury trial. Deciding an issue of first impression, the court of appeal determined that the legislature did not intend that a jury determine the issues under the statute and issued the writ.

In Hodge v Superior Court (2006) 145 CA4th 278, 282, 51 CR3d 519, the court, citing Southern Pac. Transp. Co. v Superior Court, supra, stated that a "petition for a writ of prohibition was a proper method" to challenge a trial court determination that a party was entitled to a jury trial. The court also noted that the case raised an important legal issue (the right to a jury trial in a suit alleging violation of the Unfair Competition Law (Bus & P C §§17200-17210)) and that an appeal would not provide plaintiffs with an adequate remedy if the trial court's determination was erroneous.

Conversely, in Jogani v Superior Court (2008) 165 CA4th 901, 81 CR3d 503, the court of appeal, without discussing why writ review was the appropriate remedy, issued a writ of mandate ordering the trial court to vacate its order denying the plaintiff a jury trial on a quantum meruit claim.

On time to file writ petition, see §16.87.

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§16.149 2. Standard of Review if Writ Petition Accepted

Whether a statute affords a party a jury trial is a pure question of law that an appellate court reviews de novo. See DiPirro v Bondo Corp. (2007) 153 CA4th 150, 179, 62 CR3d 722.

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R. To Review Injunctions

§16.150 1. Overview

Injunctive and preliminary injunctive orders, whether granting or denying relief, are appealable. CCP §§904.1(a)(6), 904.2(g); O'Connor v Superior Court (1979) 90 CA3d 107, 110, 153 CR 306 (preliminary injunction); District Election of Supervisors Comm. v O'Connor (1978) 78 CA3d 261, 264 n1, 144 CR 442 ("injunction" in former CCP §904.1(f) (now CCP §904.1(a)(6)) includes preliminary injunction).

In unusual situations, however, counsel may be able to obtain writ review rather than review on appeal. Some examples are:

- *United Farm Workers of Am. v Superior Court (1975) 14 C3d 902, 122 CR 877 (restraining order infringed on constitutionally protected free speech);*
- *O'Connell v Superior Court (2006) 141 CA4th 1452, 47 CR3d 147 (writ of mandate issued directing trial court to vacate preliminary injunction restraining Board of Education from denying diplomas to public high school students qualified to graduate but for their failure of high school exit exam);*
- *Biosense Webster, Inc. v Superior Court (2006) 135 CA4th 827, 37 CR3d 759 (writ of mandate issued directing trial court to vacate temporary restraining order enjoining employer from enforcing noncompetition agreement against former employees on ground that order improperly enjoined sister-state and federal actions outside California);*
- *American Booksellers Ass'n v Superior Court (1982) 129 CA3d 197, 205, 181 CR 33 (writ of mandate issued requiring entry of injunction because overbroad ordinance affected First Amendment right regarding display of explicit materials).*

Writs also can be used to direct a trial court to weigh the evidence and determine whether the facts warrant issuing an injunction (Kaplan's Fruit & Produce Co. v Superior Court (1979) 26 C3d 60, 80, 160 CR 745), or to direct the trial court to vacate its denial of a preliminary injunction and to grant the injunction (Robbins v Superior Court (1985) 38 C3d 199, 211 CR 398). If the trial court grants summary adjudication of issues and dismisses a count for injunctive relief, a petition for a writ of mandate, not an appeal, is the proper method of reviewing the order. Art Movers, Inc. v Ni W., Inc. (1992) 3 CA4th 640, 4 CR2d 689 (although an order granting a permanent injunction is appealable under former CCP §904.1(f) (now CCP §904.1(a)(6)), an interlocutory order dismissing a count for permanent injunctive relief is not). On writ relief from grant or denial of motions for summary adjudication, see §§16.66-16.77.

On time to file writ petition, see §16.87.

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§16.151 2. Standard of Review if Writ Petition Accepted

The abuse of discretion standard applies to the review of an injunction ruling. See, e.g., Robbins v Superior Court (1985) 38 C3d 199, 205, 211 CR 398. However, to the extent the trial court's assessment of probable success on the merits depends on legal rather than factual questions, review is de novo. See, e.g., O'Connell v Superior Court (2006) 141 CA4th 1452, 1463, 47 CR3d 147.

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§16.152 V. EXTRAORDINARY CIRCUMSTANCES THAT REQUIRE FILING BOTH WRIT AND APPEAL

In most cases, counsel will be able to determine whether a particular order is appealable. In rare cases, however, counsel may conclude that an appeal will not afford an adequate remedy, because of the more leisurely pace at which an appeal proceeds and the inability or difficulty of obtaining an interim stay that preserves the status quo. See, e.g., State Water Resources Control Bd. v Superior Court (2002) 97 CA4th 907, 913, 118 CR2d 784, quoting Reed v Superior Court (2001) 92 CA4th 448, 455, 111 CR2d 842 (petition for extraordinary relief on merits of attorney disqualification order is preferable to appeal because extraordinary writs are generally determined more speedily than appeals and "[t]he specter of [improper] disqualification of counsel should not be allowed to hover over the proceedings for an extended period of time for an appeal"). If this situation arises, counsel should file both a notice of appeal and a writ petition and advise the trial court of the filing of the notice of appeal so the court can determine whether it may continue to exercise jurisdiction.

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17

Determining Whether to File an Appellate Court Writ Petition

Robert H. Wright

I. SCOPE OF CHAPTER §17.1

II. EXPLORING ALTERNATIVES TO SEEKING WRIT RELIEF §17.2

III. HANDLING APPELLATE COURT WRIT PROCEEDING §17.3
- A. Ethical Considerations for Trial Counsel §17.4
- B. Ethical Considerations for Appellate Specialist
  - 1. Duty to Practice Competently §17.5
  - 2. Duty to Ensure That Client Is Aware of Appellate Counsel's Involvement in the Case §17.6
- C. Allocation of Responsibility Between Counsel §17.7

IV. CHECKING FOR CONFLICTS OF INTEREST §17.8
- A. Checking for Conflicts Before Discussing Case §17.9
- B. Potential Conflicts
  - 1. Conflict With the Interests of Another Current Client §17.10
  - 2. Conflict Arising From Receipt of Confidential Information From a Client or Former Client §17.11
  - 3. Conflict Arising From Attorney's Interests and Relationships §17.12
  - 4. Conflict Arising From Payment for Legal Services §17.13
  - 5. Conflict Arising From Legal Position Taken §17.14

V. GATHERING INFORMATION TO EVALUATE AND PREPARE WRIT PETITION
- A. Obtaining Copy of Order to Be Challenged §17.15
- B. Obtaining Register of Actions §17.16
- C. Obtaining All Potentially Relevant Pleadings and Trial Court Documents §17.17
- D. Obtaining Reporter's Transcript §17.18
- E. Preparing Declaration if Hearing Transcript Unavailable §17.19
- F. Obtaining Sample Writ Petition §17.20

VI. PRELIMINARY RESEARCH ON CHALLENGED ORDER OR RULING
- A. Determining if Challenged Order or Ruling Is Appealable
  - 1. Writ Relief Is Presumptively Unavailable if Order Is Appealable §17.21
  - 2. Exceptions to Presumption Against Writ Relief for Appealable Orders §17.22
- B. Determining Whether Statute Provides for Writ Review §17.23
  - 1. Is Order Reviewable Only by Writ Petition? §17.24
  - 2. Is Writ Petition Prerequisite for Postjudgment Review on Appeal? §17.25
- C. Calculating Deadline to File Writ Petition §17.26

VII. DETERMINING WHETHER APPELLATE COURT IS LIKELY TO GRANT EXTRAORDINARY RELIEF §17.27
- A. Most Writ Petitions Are Denied §17.28
- B. Is Writ Review on the Merits Required? §17.29
- C. Is There an Adequate Remedy at Law? §17.30
- D. Does Petitioner Face Irreparable Injury? §17.31
- E. Is Writ Relief Necessary to Decide Important Issue? §17.32
- F. What Is the Standard of Appellate Review? §17.33

VIII. POTENTIAL BENEFITS AND RISKS OF SEEKING WRIT
- A. Benefits of Seeking Writ §17.34
- B. Risks of Seeking Writ §17.35

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§17.1 I. SCOPE OF CHAPTER

This chapter provides a practitioner's "checklist" for determining whether to file an appellate court writ petition. It begins by discussing whether seeking further relief in the trial court is preferable to seeking writ relief in the court of appeal (see §17.2). The chapter next discusses ethical issues counsel should consider, including hiring an appellate specialist to handle the writ proceedings and allocating responsibility between trial counsel and appellate counsel (see §§17.3-17.7). It also covers potential conflicts of interest that may arise in handling an appellate court writ proceeding (see §§17.8-17.14). The chapter then turns to the information counsel must gather to evaluate and prosecute an appellate court writ proceeding (see §§17.15-17.20). This includes preliminary research to determine whether appellate review should be by appeal or writ petition (see §§17.21-17.26). The chapter next discusses factors to consider in evaluating the likelihood that the appellate court will grant extraordinary relief (see §§17.27-17.33), and concludes with a discussion of the potential risks and benefits of seeking immediate appellate review by way of a writ petition (see §§17.34-17.35).

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§17.2 II. EXPLORING ALTERNATIVES TO SEEKING WRIT RELIEF

The courts of appeal rarely grant writ relief; most claims of error or abuse of discretion will be decided on appeal from the final judgment unless immediate appellate action is required to prevent irreparable injury. See §§17.28, 22.15. Indeed, the courts of appeal summarily deny the vast majority of writ petitions in one- or two-sentence orders giving no reasons for the denial. See §§22.14-22.16. The appellate courts are not being uncharitable; they have a full docket of appeals and, absent extraordinary circumstances, do not have the resources to devote to interlocutory matters that can be reviewed on appeal. Accordingly, counsel should determine whether there are other means to obtain the relief sought before incurring the time and expense of preparing a writ petition.

For example, counsel might seek redress from an erroneous trial court ruling by a motion for reconsideration, although there are stringent statutory requirements for such motions. See CCP §1008, limiting motions for reconsideration to those based on new or different facts, circumstances, or law. On filing a motion for reconsideration, see California Civil Procedure Before Trial §§12.113-12.118 (4th ed Cal CEB 2004). Similarly, an issue raised on demurrer might be raised again in a summary judgment motion. Even if the motion is denied, the issue may be in a better procedural posture to interest the court of appeal, because there will be a more complete record. See §§16.66-16.77.

CAUTION: Certain statutory time limits for filing a writ petition (*e.g.,* review of the denial of a motion for summary judgment or summary adjudication) are strictly construed. Filing a motion for reconsideration does not change those limits. *Bensimon v Superior Court* (2003) 113 CA4th 1257, 1258, 7 CR3d 151 (motion for reconsideration does not extend jurisdictional time for writ petition when trial court has denied summary judgment motion).

JUDICIAL PERSPECTIVE: Petitions seeking relief from an order denying a motion for summary judgment or summary adjudication are rarely granted; when they are, it is usually because there is a case-dispositive legal issue that can be decided before the record is fully developed.

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§17.3 III. HANDLING APPELLATE COURT WRIT PROCEEDING

Appellate court writ proceedings differ significantly from any trial court proceeding. Trial counsel must candidly assess whether he or she has the time, expertise, and resources necessary to handle an appellate court writ proceeding.

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§17.4 A. Ethical Considerations for Trial Counsel

Trial counsel must consider:

- **The duty to practice competently.** Trial counsel must have the knowledge, time, and resources necessary to handle competently an appellate court writ proceeding. See Cal Rules of Prof Cond 3-110. On the duty to represent clients competently, see California Trial Practice: Civil Procedure During Trial §16.36 (3d ed Cal CEB 1995).

PRACTICE TIP: Regardless of how well qualified counsel may be to handle a trial, special concerns arise in the context of appellate court writ proceedings in which short deadlines and procedural requirements can become traps for the unwary. On appellate court writ practice, see chaps 18 (initiating writ proceeding in court of appeal), 21 (preliminary opposition), 22 (initial action by court of appeal), 23 (formal opposition and reply), 24 (action taken by court of appeal), 25 (review of court of appeal's decision).

- **The duty to bring in a specialist when necessary.** Trial counsel should consider whether an appellate lawyer would more fully and objectively advise the client about the merits of seeking writ relief, particularly if trial counsel may have committed error. Trial counsel is required to associate or consult with an appellate specialist when trial counsel lacks sufficient skill and experience to handle a writ petition. See Cal Rules of Prof Cond 3-110(C).

JUDICIAL PERSPECTIVE: Trial counsel should consult an appellate specialist early in any case of sufficient substance.

- **The duty to keep the client closely advised on the status of the matter.** Trial counsel should invite the client's input on whether the actual or potential costs of seeking writ review are justified by the chances (usually very low, see §17.28) of obtaining writ relief. See Cal Rules of Prof Cond 3-500. On the duty to communicate with the client and make the client part of the decision-making process, see A Litigator's Guide to Effective Use of ADR in California §§4.4-4.5 (Cal CEB 2005).

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B. Ethical Considerations for Appellate Specialist

§17.5 1. Duty to Practice Competently

Like trial counsel, appellate counsel has the obligation to provide competent representation. Cal Rules of Prof Cond 3-110(C). Although an appellate lawyer may have general expertise in appellate writ practice, he or she may not be familiar with a particular substantive area. In such cases, appellate counsel must work closely with the trial attorney or other counsel with expertise in the substantive area. Appellate counsel also must assess other time commitments, and candidly determine whether he or she can turn immediately to a writ petition. Finally, appellate counsel must ensure that he or she has all the information necessary to assess the merits and chances of success of a writ petition. On the duty to represent clients competently, see California Trial Practice: Civil Procedure During Trial §16.36 (3d ed Cal CEB 1995).

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§17.6 2. Duty to Ensure That Client Is Aware of Appellate Counsel's Involvement in the Case

Appellate counsel also has a duty to ensure that the client is aware of his or her involvement in the case. See Cal Rules of Prof Cond 3-500. An appellate specialist who is new to the case and was contacted by trial counsel rather than by the client should confirm with trial counsel that the client is aware of and has authorized the involvement of new counsel. Appellate counsel should participate in conversations with the client about seeking writ relief and, if relief is sought, about the status of the proceedings. On the duty to communicate with the client, see A Litigator's Guide to Effective Use of ADR in California §4.4 (Cal CEB 2005).

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Source: Civil Litigation/California Civil Writ Practice/17 Determining Whether to File an Appellate Court Writ Petition/ §17.7 C. Allocation of Responsibility Between Counsel

§17.7 C. Allocation of Responsibility Between Counsel

If the client retains an appellate specialist, trial counsel and appellate counsel must discuss and allocate the following tasks as soon as possible:

- Who will decide whether a writ petition is filed;
- Who will take the lead in drafting the petition;
- Who will obtain the necessary supporting documents; and
- Who will complete the final version of the petition and file it with the accompanying exhibits.

Practical considerations in making this allocation include the relative resources counsel can devote to the tasks and where the documents must be filed and served.

PRACTICE TIP: If an appellate specialist is retained, there should be from the outset frequent communication between trial and appellate counsel to ensure that all procedural minutiae are properly handled. For example, counsel should discuss the need to obtain verification from trial counsel or the client of the petition's allegations and, if a transcript of the hearing is unavailable, to prepare a declaration under Cal Rules of Ct 8.486(b)(3).

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§17.8 IV. CHECKING FOR CONFLICTS OF INTEREST

Trial and appellate counsel must ensure that there is no conflict of interest in representing the client in an appellate court writ proceeding. Cal Rules of Prof Cond 3-300.

JUDICIAL PERSPECTIVE: Losing a client is not the only concern for counsel with a conflict. Conflicts can fatally derail a case.

On avoiding conflicts of interest generally, see California Civil Procedure Before Trial, chap 2 (4th ed Cal CEB 2004).

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§17.9 A. Checking for Conflicts Before Discussing Case

To avoid conflicts of interest, counsel must identify all parties to the action and their counsel as soon as possible and, at the very least, before discussing the details of the case. Appellate counsel must be particularly vigilant because writ proceedings have relatively short deadlines. Trial counsel will want and need to communicate substantive information about the case very quickly. Despite time pressures, appellate counsel must obtain a complete list of *all* parties and their counsel and run a conflicts check before discussing any details about the case.

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B. Potential Conflicts

§17.10 1. Conflict With the Interests of Another Current Client

An attorney cannot represent more than one client in a matter in which the interests of the clients are actually or potentially in conflict without the informed written consent of each client. Cal Rules of Prof Cond 3-310(C)(1)-(2). Moreover, the attorney cannot represent a client in a matter and, at the same time in a separate matter, accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter. Cal Rules of Prof Cond 3-310(C)(3).

NOTE: In applying this rule, it is important to identify and evaluate the interests of *all* parties to the action, even if it appears that only one party has a direct interest in the order to be challenged in the writ proceeding.

On conflicting concurrent representation, see California Civil Procedure Before Trial §§2.25-2.34 (4th ed Cal CEB 2004).

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§17.11 2. Conflict Arising From Receipt of Confidential Information From a Client or Former Client

An attorney cannot, without the informed written consent of the client (or former client), accept employment adverse to the client if, as a result of representing the client, the attorney obtained confidential information material to the employment. Cal Rules of Prof Cond 3-310(E).

The receipt of confidential information will be presumed, and the attorney's disqualification is mandatory, if counsel represented the client or former client in any matter "substantially related" to the matter out of which the proposed writ proceedings arise. See *People ex rel Dept. of Corporations v SpeeDee Oil Change Sys., Inc.* (1999) 20 C4th 1135, 1146, 86 CR2d 816; *Flatt v Superior Court* (1994) 9 C4th 275, 283, 36 CR2d 537. See also, *e.g., Knight v Ferguson* (2007) 149 CA4th 1207, 1213, 57 CR3d 823 (substantial relationship between prior and current representation); *Fremont Indem. Co. v Fremont Gen. Corp.* (2006) 143 CA4th 50, 66, 49 CR3d 82 (substantial relationship not present); *Brand v 20th Century Ins. Co./21st Century Ins. Co.* (2004) 124 CA4th 594, 605, 21 CR3d 380 (substantial relationship between current and prior engagements mandates disqualification of attorney as expert witness against his former client); *Jessen v Hartford Cas. Ins. Co.* (2003) 111 CA4th 698, 712, 3 CR3d 877 (successive representations will be "substantially related" when information material to "evaluation, prosecution, settlement or accomplishment" of prior representation is also material to "evaluation, prosecution, settlement or accomplishment" of current representation).

On an attorney's use of confidential information against a present or former client, see California Civil Procedure Before Trial §§2.13-2.24 (4th ed Cal CEB 2004).

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§17.12 3. Conflict Arising From Attorney's Interests and Relationships

Conflicts of interest may arise from an attorney's interests in the subject matter of the representation or from an attorney's relationship with other parties or witnesses. All of these types of conflicts require written disclosure to the client. The Rules of Professional Responsibility define disclosure for these purposes as "informing the client… of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client." Cal Rules of Prof Cond 3-310(A).

An attorney cannot accept or continue representation of a client without written disclosure to the client if:

- The attorney has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter (Cal Rules of Prof Cond 3-310(B)(1));
- The attorney knows or reasonably should know that he or she (1) had a legal business, financial, professional, or personal relationship with a party or witness in the same matter, and (2) the previous relationship would substantially affect the attorney's representation (Cal Rules of Prof Cond 3-310(B)(2));
- The attorney has or had a legal, business, financial, professional, or personal relationship with another person or entity whose interest would be affected substantially by the matter (Cal Rules of Prof Cond 3-310(B)(3)); or
- The attorney has or had a legal, business, financial, or professional interest in the subject matter of the representation. Cal Rules of Prof Cond 3-310(B)(4).

Further, without written disclosure to the client, an attorney cannot represent a client in a matter in which another party's lawyer is a spouse, parent, child, or sibling of the attorney, lives with the attorney, is a client of the attorney, or has an intimate personal relationship with the attorney. Cal Rules of Prof Cond 3-320.

NOTE: This rule does not apply when an attorney fails to advise the client of a relationship with another lawyer who is merely a partner or associate in the same law firm as the adverse party's counsel, and who is not directly involved in the matter. Comment to Cal Rules of Prof Cond 3-320.

On conflicts arising from relationships with other persons, see California Civil Procedure Before Trial §§2.35-2.42 (4th ed Cal CEB 2004).

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Source: Civil Litigation/California Civil Writ Practice/17 Determining Whether to File an Appellate Court Writ Petition/ §17.13 4. Conflict Arising From Payment for Legal Services

§17.13 4. Conflict Arising From Payment for Legal Services

Generally, an attorney cannot accept payment for representing a client from anyone other than the client. Cal Rules of Prof Cond 3-310(F). This rule guards against possible conflicts of interest when the client and the party paying the attorney have adverse interests in the litigation.

NOTE: This rule may raise a particular concern for appellate specialists who are contacted by trial counsel to prepare a writ petition at trial counsel's expense. Appellate counsel should scrutinize any proposed fee arrangement with this rule in mind.

Payment can be accepted from someone other than the client only if (Rule 3-310(F)(1)-(3)):

- The payment does not interfere with the independence of the attorney's professional judgment or the attorney-client relationship;
- Information relating to the representation is protected under Bus & P C §6068(e) (requiring attorneys to maintain client confidences); and
- The client has given informed written consent.

On conflicts arising from payment for legal services, see California Civil Procedure Before Trial §2.21 (4th ed Cal CEB 2004).

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§17.14 5. Conflict Arising From Legal Position Taken

An attorney is not prohibited from representing in different cases parties with adverse positions on the same legal question. See Comment to Cal Rules of Prof Cond 3-310. As a practical matter, however, counsel should be wary of doing so, particularly when the legal issue in both cases is important, novel, and specific. Accepting clients with adverse positions on the same legal question and advancing dramatically different positions in these different actions can result in:

- Clients losing confidence in the attorney's commitment to their case; and
- Counsel losing credibility with the court.

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V. GATHERING INFORMATION TO EVALUATE AND PREPARE WRIT PETITION

§17.15 A. Obtaining Copy of Order to Be Challenged

Counsel should obtain and carefully review the trial court order or ruling that will be challenged in the anticipated writ proceeding. Trial counsel usually has a copy of the order or ruling in hand. If not, counsel can obtain a copy from the court or, if the court has an online register of actions, simply by pulling up and printing out the applicable document. If an appellate specialist is involved, trial counsel usually provides a copy of the pertinent order or ruling by fax or e-mail.

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§17.16 B. Obtaining Register of Actions

Counsel should also obtain a copy of the register of actions (also known as the docket sheet) if one is maintained by the superior court. This can be a useful document for newly retained appellate counsel because it should list every filing in the case. It can also be a handy document for trial counsel and acts as a double-check to ensure that trial counsel's files are complete. Many superior courts now provide online access to registers of actions, making it easy to pull up and print a copy.

PRACTICE TIP: Registers of actions are not infallible and may omit some documents filed in the case. If there is uncertainty about what has been filed, counsel should review the court file itself or send an attorney service to do so.

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§17.17 C. Obtaining All Potentially Relevant Pleadings and Trial Court Documents

Counsel must identify and review all documents relevant to seeking writ review. This includes the operative pleadings and all moving and opposing papers relevant to the order or ruling that may be challenged. Other documents may be relevant as well, providing background to or context for the challenged order or ruling. Trial counsel should have a complete file of these documents. If not, counsel must obtain copies from the court, or print them if the court has online access. Counsel must amass the relevant documents quickly, given the speed with which writ relief must be sought. See §§18.61-18.76.

PRACTICE TIP: Even if counsel is already familiar with these documents, it is best to assemble them chronologically as early as possible so that counsel can conveniently review them as a group. This will also facilitate preparation of the exhibits accompanying the writ petition. On preparation of exhibits to the petition, see chap 20.

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§17.18 D. Obtaining Reporter's Transcript

An appellate court writ petition must be accompanied by a transcript of the proceedings (if available) that led to the challenged order or ruling. See Cal Rules of Ct 8.486(b)(1)(D). Given the relatively short time period in which an appellate court writ petition should be filed, it is important to order any relevant hearing transcript as soon as possible. Hearings usually last only part of a day, and a transcript can be obtained relatively quickly at moderate cost. Early review of the transcript may reveal some nuance about the order or ruling undercutting a claim of error or prejudice, foreclosing any basis for writ relief.

On obtaining the reporter's transcript for the record in an appellate court writ proceeding, see §20.9.

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§17.19 E. Preparing Declaration if Hearing Transcript Unavailable

If a transcript of the proceedings that led to the ruling below is unavailable, the petition must be accompanied by a declaration from counsel including both (Cal Rules of Ct 8.486(b)(3)):

- An explanation of why a transcript is unavailable; and
- A fair summary of the proceedings, including oral arguments by both sides and any court statements on the basis for its ruling.

PRACTICE TIP: Take care of this housekeeping matter as soon as possible to avoid a last-minute scramble to obtain the materials necessary for the writ petition.

On preparing a declaration when the transcript is unavailable, see §20.9.

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§17.20 F. Obtaining Sample Writ Petition

If counsel has little experience in appellate court writ proceedings, it may be helpful to obtain an exemplar from another case to serve as a guide for format and style. For an example of a writ petition, see form in §28.1.

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VI. PRELIMINARY RESEARCH ON CHALLENGED ORDER OR RULING

A. Determining if Challenged Order or Ruling Is Appealable

§17.21 1. Writ Relief Is Presumptively Unavailable if Order Is Appealable

If the challenged order or ruling is appealable under CCP §904.1, a writ petition almost certainly will be denied because the court of appeal will conclude that the petitioner has an adequate remedy at law (*i.e.,* the right to immediate appeal). See also *Powers v City of Richmond* (1995) 10 C4th 85, 112, 40 CR2d 839 (remedy by direct appeal presumed adequate); *Marriage of Skelley* (1976) 18 C3d 365, 369, 134 CR 197 (right to immediate review by appeal is generally adequate remedy).

On determining whether an order is immediately appealable, see chaps 11, 15-16. On appealability of orders generally, see California Civil Appellate Practice, chap 3 (3d ed Cal CEB 1996). On the requirement that a petitioner have no adequate remedy at law, see §§15.56-15.60, 17.30.

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§17.22 2. Exceptions to Presumption Against Writ Relief for Appealable Orders

Writ review is sometimes available even when an order is immediately appealable. For example, courts have frequently reviewed attorney disqualification orders by writ even though such orders are appealable. Courts generally act more quickly on writ petitions, and the "specter of disqualification of counsel should not be allowed to hover over the proceedings for an extended period of time." *Apple Computer, Inc. v Superior Court* (2005) 126 CA4th 1253, 1263, 24 CR3d 818, quoting *Reed v Superior Court* (2001) 92 CA4th 448, 455, 111 CR2d 842. See *State Water Resources Control Bd. v Superior Court* (2002) 97 CA4th 907, 913, 118 CR2d 784 (order disqualifying counsel appropriate for extraordinary writ review).

Appellate courts may also grant writ review if an otherwise appealable order raises an important issue of first impression. See *Rodrigues v Superior Court* (2005) 127 CA4th 1027, 1032, 26 CR3d 194 (writ review of order vacating default judgment appropriate to promptly resolve issue of first impression and to establish guidelines for bench and bar). On writ review for issues of public or jurisprudential significance, see §17.32.

JUDICIAL PERSPECTIVE: If petitioner is seeking writ relief from an appealable order, the petition's introduction should say so and explain why an appeal will not provide an adequate remedy.

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§17.23 B. Determining Whether Statute Provides for Writ Review

In most cases, a party can challenge an interlocutory order on appeal either immediately or after entry of final judgment, without having sought writ relief. See *Premium Commercial Servs. Corp. v National Bank* (1999) 72 CA4th 1493, 1499, 86 CR2d 65 (trial court order setting aside CCP §998 settlement may be challenged on appeal even though plaintiff did not seek writ review of order). In some limited circumstances, however, there is no right of appeal, and by statute, writ review is the sole means of appellate review. See §17.24. In other limited circumstances, seeking writ review is a prerequisite to a subsequent challenge on appeal. See §17.25.

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§17.24 1. Is Order Reviewable Only by Writ Petition?

A statute may provide that the sole means of appellate review is by way of a writ proceeding. See, *e.g.*, Govt C §6259(c) (writ petition sole mode of appellate review in Public Record Act cases); CCP §170.3(d) (judicial disqualification ruling must be challenged by writ petition); *Curle v Superior Court* (2001) 24 C4th 1057, 1063, 103 CR2d 751 (noting that CCP §170.3(d) specifies exclusive manner of appellate review of ruling on judicial disqualification). But see *People v Brown* (1993) 6 C4th 322, 335, 24 CR2d 710 (§170.3(d) does not apply to appellate review of *nonstatutory* claim that final judgment is constitutionally invalid because of judicial bias). See also *O'Hearn v Hillcrest Gym & Fitness Ctr., Inc.* (2004) 115 CA4th 491, 498, 9 CR3d 342, quoting *Main Fiber Prods., Inc. v Morgan & Franz Ins. Agency* (1999) 73 CA4th 1130, 87 CR2d 108 (party must challenge merits of good faith settlement determination under CCP §877.6(e) by way of writ petition, not by way of appeal from final judgment).

NOTE: The California Supreme Court has rejected constitutional challenges to statutes allowing appellate review only by writ petition. *Leone v Medical Bd.* (2000) 22 C4th 660, 668, 94 CR2d 61 (legislature may restrict appellate review to extraordinary writ petition, rather than appeal, provided it does not substantially impair court's constitutional powers); *Powers v. City of Richmond* (1995) 10 C4th 85, 112, 40 CR2d 839 (upholding state constitutionality of writ review as sole mode of appellate review).

On writ petition as exclusive means of obtaining appellate review, see §§16.2-16.48.

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§17.25 2. Is Writ Petition Prerequisite for Postjudgment Review on Appeal?

A statute may provide that the filing of a timely writ petition is a prerequisite to postjudgment review on appeal. See, *e.g.*, Welf & I C §366(*l*)(1)(a) (order setting hearing to terminate parental rights is not appealable unless petition for extraordinary writ review was timely filed); see also *Premium Commercial Servs. Corp. v National Bank* (1999) 72 CA4th 1493, 1499, 86 CR2d 65 (trial court order setting aside CCP §998 settlement could be challenged on appeal because no statute or other authority required plaintiff to seek writ review). In *Reid v Balter* (1993) 14 CA4th 1186, 1196, 18 CR2d 287, the court of appeal rejected the defendants' appeal on several grounds, including that they had not sought writ relief from an order denying their motion for a discretionary dismissal. The appellate court observed that their failure to challenge the order and allowing the case to proceed to trial thwarted the public policies underlying the dismissal statute.

PRACTICE TIP: Counsel should always consider seeking immediate writ review of an order implicating public policies favoring speedy appellate review, rather than waiting for postjudgment review on appeal.

On when writ petition is a prerequisite for appellate review, see §§16.49-16.52.

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§17.26 C. Calculating Deadline to File Writ Petition

Counsel must calculate when a writ petition would be due and consider whether there is sufficient time in which to prepare it competently. On the duty to represent clients competently, see §17.5.

Many statutes providing for writ review also specify deadlines within which a party must file a writ petition. See §18.62). These deadlines can be extremely short (see §18.63). As a result, counsel should immediately calculate the deadline for filing the writ petition. On when to file an appellate writ petition, see §§18.61-18.76.

PRACTICE TIP: Counsel should immediately consider whether to seek an extension of any statutory deadline for filing a petition if the statute provides for one. See, *e.g.*, CCP §418.10(e) (trial court may extend by 20 days the deadline to file writ petition after order denying motion to quash service of summons for lack of jurisdiction).

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§17.27 VII. DETERMINING WHETHER APPELLATE COURT IS LIKELY TO GRANT EXTRAORDINARY RELIEF

The courts of appeal deny most writ petitions. See §17.28. Accordingly, counsel must weigh the chances of success against the time spent and costs incurred in going forward to determine whether it is prudent to file a writ petition.

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§17.28 A. Most Writ Petitions Are Denied

The appellate courts summarily deny about 90 percent of all writ petitions. See Judicial Council of California, Court Statistics Report, Courts of Appeal, Table 5 (2007), available at http://www.courtinfo.ca.gov/reference/documents/csr2007.pdf; *Premium Commercial Servs. Corp. v National Bank* (1999) 72 CA4th 1493, 1498, 86 CR2d 65. See also *Omaha Indem. Co. v Superior Court* (1989) 209 CA3d 1266, 1272, 258 CR 66 (denial rate shows "courts will not use their scarce resources to second-guess every ruling and order of the trial court, particularly when to do so would save neither time nor aid in the resolution of a lawsuit"). Thus, counsel should carefully consider whether the interim ruling to be challenged, *even if clearly erroneous*, warrants extraordinary relief.

PRACTICE TIP: The courts of appeal vary in the percentage of writ petitions that are not summarily denied. See Judicial Council of California, Court Statistics Report, Courts of Appeal, Tables 11, 13 (2007), available at http://www.courtinfo.ca.gov/reference/ documents/csr2007.pdf. In evaluating the chances of success, counsel might think about which appellate district will consider the petition. Within multi-division districts, summary denial rates also vary from division to division. Usually counsel will not know to which division a writ petition will be assigned unless there has been a prior writ proceeding or appeal in the case, in which case a new writ petition will be assigned to the same division.

Appellate courts are reluctant to grant discretionary writ relief for a number of reasons:

- **Interference with case management.** Writ review can interfere with both appellate and trial court case management. Appellate courts have cautioned that too relaxed a view of the extraordinary nature of prerogative writs "run[s] the risk of fostering the delay of trials, vexing litigants and trial courts with multiple proceedings, and adding to the delay of judgment appeals pending in the appellate court." *Omaha Indem. Co. v Superior Court* (1989) 209 CA3d 1266, 1272, 258 CR 66.
- **Appeal likely to provide better vehicle for review.** An appeal on a fully developed record may provide the court of appeal with a much better vehicle to review the challenged ruling. In contrast to appeals, which are "examined with slow deliberation on a full record after the trial is over," writ petitions are considered when "the record is developing and emotions are running high, often when reporters' transcripts are not ready and additional facts may be necessary." *Jones v Superior Court* (1994) 26 CA4th 92, 100, 31 CR2d 264.
- **Writ may be unnecessary.** Writ review ultimately may prove unnecessary, *e.g.,* when the issue presented is cured or rendered moot before or by the final judgment. *Science Applications Int'l Corp. v Superior Court* (1995) 39 CA4th 1095, 1100, 46 CR2d 332 ("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").

PRACTICE TIP: To highlight the need for extraordinary relief, counsel should consider requesting the trial court to certify under CCP §166.1 "that there is a controlling question of law as to which there are substantial grounds for difference of opinion, appellate resolution of which may materially advance the conclusion of the litigation." Although the trial court's certification is not binding on the appellate court, it may cause the appellate court to give more consideration to entertaining a writ petition.

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§17.29 B. Is Writ Review on the Merits Required?

If a statute provides that writ review is the sole avenue of appellate review (see §§16.2-16.48, 17.24), the appellate court must consider the merits of the petition. *Leone v Medical Bd.* (2000) 22 C4th 660, 670, 94 CR2d 61 (when writ petition is, by statute, exclusive means for appellate review, "an appellate court must judge the petition on its procedural and substantive merits"). In *Powers v City of Richmond* (1995) 10 C4th 85, 114, 40 CR2d 839, the supreme court explained that when the exclusive means of appellate review is by writ petition,

> an appellate court may not deny an apparently meritorious writ petition, timely presented in a formally and procedurally sufficient manner, merely because, for example, the petition presents no important issue of law or because the court considers the case less worthy of its attention than other matters.

Although the appellate court must consider the merits, it remains free to deny the petition summarily without explanation and without oral argument. See *Leone,* 22 C4th at 669.

PRACTICE TIP: When a writ petition is the only authorized mode of appellate review, the petitioner should always stress that point in the petition.

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§17.30 C. Is There an Adequate Remedy at Law?

Writ relief is ordinarily available only when the petitioner lacks an adequate remedy at law, *i.e.,* when an appeal is inadequate. CCP §§1086 (writ of mandate), 1103 (writ of prohibition); see also CCP §1068 (writ of review (certiorari)) (lack of any right to appeal is substantive requirement of writ). In determining whether there is an adequate remedy at law, courts consider the following:

- **Review on appeal is usually adequate remedy.** *Rescue Army v Municipal Court* (1946) 28 C2d 460, 466, 171 P2d 8 (courts usually view as adequate petitioner's remedy of proceeding to trial and appealing from judgment); *Running Fence Corp. v Superior Court* (1975) 51 CA3d 400, 409, 124 CR 339 (right to immediate appeal is adequate remedy absent showing that particular circumstances of case render remedy inadequate).
- **Immediate appeal is presumptively adequate.** The difficulty of showing that a remedy is inadequate is even greater when the challenged order is immediately appealable. See, *e.g., Powers v City of Richmond* (1995) 10 C4th 85, 112, 40 CR2d 839 (party seeking review by extraordinary writ bears burden of showing that appeal would not be adequate remedy under particular circumstances presented). See §§17.21-17.22.
- **Mere delay and expense usually do not make a remedy inadequate.** *Jollie v Superior Court* (1951) 38 C2d 52, 56, 237 P2d 641 (appeal not inadequate simply because it entails large expenditure of time and money); *Rescue Army v Municipal Court* (1946) 28 C2d 460, 466, 171 P2d 8 (remedy not inadequate merely because more time would be consumed by pursuing it than would be required by use of writ of prohibition); *Running Fence Corp. v Superior Court* (1975) 51 CA3d 400, 410, 124 CR 339 (citing *Jollie* and *Rescue Army*).

For further discussion of appeal as an adequate remedy, see §§15.56-15.60.

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§17.31 D. Does Petitioner Face Irreparable Injury?

The prospect of irreparable injury usually goes hand in hand with the absence of any adequate legal remedy (see §17.30). The strongest basis for seeking discretionary writ relief is often when there has been a clear error that will cause irreparable harm to petitioner absent extraordinary relief. Appellate courts are sympathetic to legitimate claims of irreparable injury and will grant writ review in such cases "because the lower court's determination imposes unusually harsh and unfair results for which ordinary appellate review is inadequate." *Science Applications Int'l Corp. v Superior Court* (1995) 39 CA4th 1095, 1100, 46 CR2d 332. See also *Roberts v Superior Court* (1973) 9 C3d 330, 336, 107 CR 309 (writ relief proper when discovery order forces petitioner either to disclose privileged information or be subjected to charge of contempt for refusing to obey court's order pending appeal); *Omaha Indem. Co. v Superior Court* (1989) 209 CA3d 1266, 1272, 258 CR 66 (extensive discussion of factors appellate courts consider in deciding whether to hear a writ petition on the merits).

For further discussion of irreparable injury, see §§15.61-15.65.

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§17.32 E. Is Writ Relief Necessary to Decide Important Issue?

In determining whether extraordinary relief is appropriate, the appellate courts have looked to the public and jurisprudential significance of the issue presented, such as whether:

- The issue is of widespread interest or presents a significant and novel constitutional question; or
- There are conflicting trial court interpretations of the law requiring resolution by the appellate court.

See *Southern Cal. Reg'l Rail Auth. v Superior Court* (2008) 163 CA4th 712, 717, 77 CR3d 765 (trial court certified pre-trial preemption issue under CCP §166.1 as involving controlling question of law on which there were substantial grounds for difference of opinion and appellate resolution would materially advance conclusion of litigation); *Roden v AmerisourceBergen Corp.* (2005) 130 CA4th 211, 218, 29 CR3d 810; *Science Applications Int'l Corp. v Superior Court* (1995) 39 CA4th 1095, 1100, 46 CR2d 332.

A writ petition may meet these criteria when it involves an important legal issue affecting a large number of parties or cases. See, *e.g., California Highway Patrol v Superior Court* (2006) 135 CA4th 488, 496, 38 CR3d 16 (writ review appropriate because petition raised issue of first impression and of widespread interest); *K.R.L. Partnership v Superior Court* (2004) 120 CA4th 490, 494, 15 CR3d 517 (writ review to consider issue of first impression—whether CCP §396b permits party to transfer venue based on allegations in cross-complaint purportedly rendering venue improper); *Smith v Superior Court* (1996) 41 CA4th 1014, 1020, 49 CR2d 20 (writ review proper to consider matter that had been subject of conflicting rulings); *Aktar v Anderson* (1997) 58 CA4th 1166, 1173, 68 CR2d 595 (writ review proper "[d]ue to the statewide importance of the issues presented"). See also *Omaha Indem. Co. v Superior Court* (1989) 209 CA3d 1266, 1272, 258 CR 66 (extensive discussion of factors appellate courts consider in deciding whether to hear a writ petition on the merits).

For further discussion of writ relief to decide novel or important issues, see §§15.67, 15.70.

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§17.33 F. What Is the Standard of Appellate Review?

The chances of success on a writ petition also depend on the standard of review that the appellate court will apply to the challenged order. If the issue is primarily factual rather than legal, and the courts will apply the abuse of discretion or substantial evidence standard, the appellate court will be particularly reluctant to address the issue in a writ proceeding. If the challenged order raises a pure legal question subject to de novo review, the court of appeal may be more willing to consider the issue on a limited record.

On circumstances in which courts have entertained and granted writ petitions, see §§16.86-16.151.

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VIII. POTENTIAL BENEFITS AND RISKS OF SEEKING WRIT

§17.34 A. Benefits of Seeking Writ

There are several significant benefits to seeking writ review. An extraordinary writ can:

- **Dispose of or narrow issues.** If an appellate court issues a writ, it may dispose of the dispute and avoid a costly trial. Even if a writ does not resolve all issues, it may narrow them so the dispute is more readily settled or tried, or it may provide the trial court with guidance to avoid error at trial.
- **Promote settlement.** A writ petition that persuasively shows weakness in the adversary's case can promote settlement even if the court of appeal summarily denies the petition.
- **Test new legal theories.** Important issues of widespread public interest and issues of first impression are properly raised in petitions for extraordinary relief. *California Highway Patrol v Superior Court* (2006) 135 CA4th 488, 496, 38 CR3d 16. If such an issue is raised by an order sustaining a demurrer without leave to amend or granting a summary judgment motion, and the plaintiff can appeal from the resulting judgment, an appellate court will likely be inclined to deny the petition because the appeal is an adequate remedy. When such issues arise in other contexts, however, counsel should consider filing an appellate court writ petition to urge the court to adopt a well-reasoned, innovative solution to an important legal issue, especially if it is an issue of widespread importance.

JUDICIAL PERSPECTIVE: When applicable, the writ petition should discuss the policy reasons calling for writ relief in that particular case, *e.g.*, the resolution of conflicts in the law, the avoidance of a costly trial, or the inadequacy of a resolution by appeal. Whatever the argument, the petition should be direct, concise, and to the point.

CAUTION: A writ may win a battle but lose the war. For example, mandate may be available to enforce a right to priority setting for trial (see CCP §1062.3), but it should not be used unless the case is in its strongest trial posture. Similarly, prohibition may be available to prevent a particular judge from trying a case (see CCP §170.6), but counsel should first ascertain who is likely to be the successor judge. Counsel should try to obtain a writ only if it will help win the case at the end of the day.

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§17.35 B. Risks of Seeking Writ

The most important risk to consider is the strong likelihood that the court of appeal will summarily deny the writ petition. Given that fact, counsel must weigh:

- **Financial costs.** Before undertaking the significant amount of work required to prepare an appellate court writ petition, counsel should attempt a realistic evaluation of the fees and costs that will be incurred (including the filing fee and the cost of preparing exhibits and transcripts). Counsel should also reexamine the original fee agreement with the client to ascertain whether a revised or additional fee agreement is necessary to account for proceedings in the court of appeal. On fee agreements generally, see Fee Agreement Forms Manual (2d ed Cal CEB 2007).
- **Strategic costs.** Counsel should consider the intangible costs of filing a writ petition, *e.g.,* costs that might result from a delay in the trial court proceedings or from a lack of cooperation from opposing counsel and the trial judge.
- **Sanctions.** If the appellate court concludes that a writ petition is wholly without merit or has been filed solely for tactical reasons, it may impose sanctions, including attorney fees. CCP §907; *Jones v Superior Court* (1994) 26 CA4th 92, 96, 31 CR2d 264 (under CCP §1109, CCP §907 is applicable to writs of mandate). See also Cal Rules of Ct 8.492. On sanctions for filing frivolous appeals, see California Attorney Fee Awards §§8.16, 20.28 (2d ed Cal CEB 1994).

JUDICIAL PERSPECTIVE: The court may impose sanctions on its own motion for the filing of a frivolous or dilatory writ petition. Cal Rules of Ct 8.492(a)(1).

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18

Initiating a Writ Proceeding in the Court of Appeal

Terry P. Anastassiou
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I. INTRODUCTION §18.1
A. Scope of Chapter §18.2
B. Seeking Appropriate Type of Writ §18.3
C. Checklist for Petitioner §18.4

II. DRAFTING THE PETITION
A. Format Requirements §18.5
1. In General
a. Type of Paper §18.6
b. Manner of Production §18.7
c. Length §18.8
d. Typeface §18.9
e. Page Layout §18.10
f. Binding §18.11
2. Cover (Caption) Page §18.12
a. Document Title §18.13
b. Court Title §18.14
c. Trial Court Information §18.15
d. Case Numbers §18.16
e. Identifying Counsel §18.17
f. Identifying Parties §18.18
g. If Requesting Stay §18.19
h. If Related Appeal §18.20
B. Contents of Petition
1. Certificate of Interested Entities or Persons §18.21
2. Tables
a. Table of Contents §18.22
b. Table of Authorities §18.23
3. Introductory Statement §18.24
4. Enumerated Allegations §18.25
a. If There Is Related Appeal §18.26
b. Jurisdiction §18.27
c. Standing §18.28
d. Prior Petitions §18.29
e. Factual Allegations §18.30
(1) Procedural Facts §18.31
(2) Other Material Facts §18.32
(3) Facts Showing Petition's Timeliness §18.33
(4) Facts Addressing Inadequacy of Other Remedies §18.34
(5) Facts Showing Preservation of Issue in Trial Court §18.35
5. Prayer for Relief §18.36
a. If Seeking Immediate Stay §18.37
b. If Seeking Issuance of Peremptory Writ in First Instance §18.38
c. If Seeking Issuance of Alternative Writ or Order to Show Cause §18.39
d. If Seeking Writ of Review (Certiorari) §18.40
e. Requesting Costs and Other Relief §18.41
6. Verification
a. Petition Must Be Verified §18.42
b. Verification Must Be Based on Personal Knowledge §18.43
c. Party Litigant Usually Must Verify Petition §18.44
d. Verification of Supporting Documents §18.45

e. Verification of Supplemental Evidence §18.46
f. Verification by State or Public Officials §18.47
g. Form: Verification §18.48
7. Supporting Memorandum §18.49
a. Argument Headings
(1) Use as Effective Advocacy Tool §18.50
(2) Exemplar Headings §18.51
b. Contents
(1) Introduction §18.52
(2) Statement of Facts §18.53
(3) Legal Argument §18.54
(a) Persuasive Arguments §18.55
(b) Legal Support §18.56
8. The Record; Exhibits §18.57
9. Request for Stay §18.58
a. Allegations in Support of Stay §18.59
b. Documents in Support of Stay §18.60

III. WHEN TO FILE WRIT PETITION §18.61
A. Determining Maximum Number of Days in Which to File
1. If Statute Specifies Deadline §18.62
a. Statutory Deadline May Be Short §18.63
b. Statutory Deadlines Generally Treated as Jurisdictional §18.64
c. Extensions Under CCP §1013 Are Generally Inapplicable §18.65
2. If No Applicable Statutory Deadline
a. 60-Day Period Applies §18.66
b. Doctrine of Laches May Apply to Petitions Filed After 60 Days §18.67
c. Court May Exercise Its Discretion and Consider Petitions Filed After 60 Days §18.68
3. If Order Specifies Due Date for Compliance §18.69
B. Determining When to File Writ Petition
1. Events That Trigger Time Period to File
a. Entry of Order §18.70
b. Service of Notice of Entry of Order §18.71
c. Mailing of Minute Order §18.72
d. Notice Given in Open Court §18.73
2. How to Count Days in Which to File §18.74
C. Filing Effective on Receipt by Court §18.75
D. Chart: Time for Filing Petitions §18.76

IV. FILING AND SERVING THE PETITION
A. Serving Procedures
1. When to Serve §18.77
2. How to Serve §18.78
3. Whom to Serve §18.79
4. Proof of Service §18.80
B. Filing Procedures
1. What to File
a. Petition §18.81
b. Record §18.82
c. Information Sheet in Fifth District §18.83
2. Filing Fee §18.84
3. Where to File §18.85
a. File in Lowest Court Capable of Granting Relief §18.86
b. Locations of Courts of Appeal §18.87

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§18.1 I. INTRODUCTION

The procedure for initiating a writ proceeding in the court of appeal is similar to that for filing an opening brief on appeal. For example, the format rules for filing an appellate brief generally apply to writ petitions (except as otherwise noted, this chapter uses the term "writ petition" as inclusive of the formal verified petition and supporting memorandum that are bound together into a single document). See Cal Rules of Ct 8.486(a)(6). A petitioner must take great care to comply with all applicable rules and procedures because the courts of appeal readily dismiss writ petitions that fail to comply.

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§18.2 A. Scope of Chapter

This chapter covers all aspects of initiating a writ proceeding in the court of appeal, beginning with a procedural checklist for petitioners. See §18.4. The chapter next discusses the format and contents of a writ petition. See §§18.5-18.60. The chapter then explains when to file the petition, including time limits and other issues that may affect the filing deadline. See §§18.61-18.76. Finally, the chapter addresses service of the petition on the respondent and real party in interest as well as filing the petition in the appropriate court of appeal. See §§18.77-18.87.

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§18.3 B. Seeking Appropriate Type of Writ

If no particular type of writ is required by statute, counsel should examine the general statutory definitions to determine which type of writ is most appropriate For example, a petitioner challenging an interim ruling by the trial court most frequently will seek a writ of mandate. However, a petitioner seeking review of a contempt order should seek a writ of review (certiorari) or habeas corpus. On common types of writs and their uses, see chaps 15-16.

PRACTICE TIP: If it is unclear which type of writ relief is appropriate, the petitioner should request more than one type of writ in the alternative, *e.g.,* "writ of mandate and/or prohibition or other appropriate extraordinary relief."

Requesting the wrong type of writ may not be fatal. If the court accepts the case and determines that writ relief is warranted, it can issue the appropriate writ, regardless of the writ specifically sought in the petition. See, *e.g., Honore v Superior Court* (1969) 70 C2d 162, 164, 74 CR 233 ("[W]e have concluded that although in seeking prohibition petitioners have mistaken their remedy, they have nevertheless made out a case entitling them to mandate"); *Coelho v State Personnel Bd.* (1989) 209 CA3d 968, 971, 257 CR 557 (petitioner incorrectly requested administrative mandamus, but court examined the petition to determine whether it alleged facts entitling petitioner to some form of relief).

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§18.4 C. Checklist for Petitioner

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

- Determine what type of writ to seek. See §18.3.
- Draft petition in compliance with all format requirements. See §§18.5-18.20.
- Use proper paper. See §18.6.
- Do not exceed word limits. See §18.8.
- Include required information on cover, *e.g.,* document title, court title, counsel, and parties. See §§18.12-18.20.
- Make sure formal petition is comprised of:
- Certificate of interested entities or persons (see §18.21);
- Table of contents (see §18.22);
- Table of authorities (see §18.23);
- Introductory statement (see §18.24);
- Allegations (see §§18.25-18.35); and
- Prayer for relief (see §§18.36-18.41).
- Include a verification of the formal petition through either declaration or affidavit. See §§18.42-18.48.
- Include supporting memorandum. See §§18.49-18.56.
- Submit supporting exhibits, either appended to petition or filed separately in appendix. See §18.57; chap 20.
- Consider whether to request stay of trial court proceedings. See §§18.58-18.60; chap 19.
- Determine deadline for filing petition.
- Check for statutory deadline, if any. See §§18.62-18.65, 18.76.
- If there is no statutory deadline, file within 60 days of order to be reviewed or explain reason for filing beyond 60-day period. See §§18.66-18.68.
- Check for any specified date for compliance included in order to be reviewed. See §18.69.
- Determine trigger for deadline to file petition. See §§18.70-18.74.
- Serve petition on respondent, real party in interest, and any other required persons or entities. See §§18.77-18.80.
- File petition in court of appeal. See §§18.81-18.87.

PRACTICE TIP: A petitioner should always check the local rules for the appellate district in which the petition will be filed.

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II. DRAFTING THE PETITION

§18.5 A. Format Requirements

It is extremely important to ensure that a writ petition fully complies with all applicable format rules. Courts are quick to deny a petition, and any format error will give the court an excuse to do so.

Failure to comply with format rules may result in the reviewing clerk declining to file the petition, marking it "received but not filed" and returning it to the party. Cal Rules of Ct 8.204(e)(1). The clerk may file the noncompliant petition, but the court may order it returned for corrections and refiling, strike it with leave to file a new one, or disregard the noncompliance. Cal Rules of Ct 8.204(e)(2).

JUDICIAL PERSPECTIVE: Whether the appellate court clerk will return a noncompliant writ petition for correction and refiling varies by division. Most divisions will probably not return a noncompliant writ petition for refiling because of the urgent nature of writs and strict jurisdictional time limits.

PRACTICE TIP: In addition to compliance with general format rules, the petitioner should always check for and comply with any local rules. For example, the Fourth Appellate District prohibits plastic or acetate covers on petitions. 4th App Dist, Local R 2; Sixth District Outline of Original Proceedings and Relief Ancillary to Appeal on the court's website (http://www.courtinfo.ca.gov/courts/courtsofappeal/6thDistrict/faq/6DCAproc.doc).

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1. In General

§18.6 a. Type of Paper

The petition and other documents must be on paper that is (Cal Rules of Ct 8.4(2), 8.144(a)(1)(A), 8.204(b)(1), 8.485(a)):

- White or unbleached;
- Recycled;
- 8½ by 11 inches; and
- At least 20-pound weight.

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§18.7 b. Manner of Production

It is acceptable to reproduce a brief in any way that produces a clear, black and white image of letter quality. Cal Rules of Ct 8.204(b)(1). Except for typewritten originals (see §18.9), documents can be printed on two sides, with each side numbered as a separate page. Cal Rules of Ct 8.204(b)(11)(B).

PRACTICE TIP: The petitioner should carefully photocopy and examine all copies to be sure they are legible and conform to the production rules. An illegible petition or a petition with unclear exhibits could result in summary denial by the court or rejection by the court clerk. Cal Rules of Ct 8.204(e). See also Cal Rules of Ct 8.18 (giving clerk authority to reject documents that fail to conform to requirements of California Rules of Court).

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§18.8 c. Length

A writ petition (inclusive of all text except the verification, including footnotes) generally may not exceed 14,000 words. Cal Rules of Ct 8.486(a)(6) (Rule 8.204(c) on appellate briefs governs length of writ petition and memorandum). The petition must include a certificate by counsel or an unrepresented party stating the word count. Cal Rules of Ct 8.204(c)(1) (person certifying length may rely on word count of computer program used to prepare brief). The word limit does not include tables, certificate, verification, and any supporting documents. Cal Rules of Ct 8.204(c)(3), 8.486(a)(6). For an example, see form in §28.1. On briefs produced on a typewriter, see §18.9.

PRACTICE TIP: The petitioner should keep supporting documents as short as possible. A lengthy document may evoke a negative reaction from an overburdened appellate court. The same factors that contribute to excessive length (*e.g.,* a rambling style, needless repetition, preoccupation with minutiae) detract from the petition's effectiveness.

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§18.9 d. Typeface

The petitioner may use any conventional typeface, either proportionally spaced or monospaced. Cal Rules of Ct 8.204(b)(2). The type size, including footnotes, must be at least 13 point. Cal Rules of Ct 8.204(b)(4).

Although the type style must be roman, counsel may use italics, boldface, or underscoring for emphasis. Cal Rules of Ct 8.204(b)(3) (case names must be italicized or underscored).

PRACTICE TIP: The petitioner should not overuse methods of showing emphasis; too much of it can be distracting and makes it harder to discern what the petitioner is really emphasizing.

If the writ petition is typewritten (*i.e.,* actually produced on a typewriter), the petitioner should:

- Obtain the presiding justice's permission before filing a typewritten original and carbon copies. File all other typewritten documents as photocopies. Cal Rules of Ct 8.204(b)(11)(A).
- Use only one side of a typewritten original and its carbon copies. It is acceptable to use both sides of a photocopied paper. Cal Rules of Ct 8.204(b)(11)(B).
- Use at least standard pica, 10 characters per inch type size for all text, including footnotes. Unrepresented incarcerated litigants may use elite type, 12 characters per inch, if they lack access to a typewriter with larger characters. Cal Rules of Ct 8.204(b)(11)(C).
- Not exceed 50 pages. Cal Rules of Ct 8.204(c)(2).
- Use any conventional typeface, either proportionally spaced or monospaced. Cal Rules of Ct 8.204(b)(2).

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§18.10 e. Page Layout

The lines of text in a writ petition must be unnumbered (*i.e.,* no pleading paper) and at least one-and-a-half-spaced. Headings and footnotes may be single-spaced, *i.e.,* six lines to a vertical inch. Quotations may be block-indented and single-spaced. Cal Rules of Ct 8.204(b)(5).

The margins must be at least 1½ inches on the left and right and 1 inch on the top and bottom. Cal Rules of Ct 8.204(b)(6).

Consecutively number the pages at the top or bottom. The tables and the brief may have different numbering systems. Cal Rules of Ct 8.204(b)(7).

Headings may be in uppercase letters. Cal Rules of Ct 8.204(b)(3). On headings in the supporting memorandum, see §§18.50-18.51.

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§18.11 f. Binding

The formal, verified petition, bound together with the verification and supporting memorandum, is commonly referred to as the "writ petition." The petitioner should bind the petition on the left margin with a suitable cover. Cal Rules of Ct 8.204(b)(8), (10). On the cover, see §18.12. If the petition is stapled, cover the bound edge and staples with tape. Cal Rules of Ct 8.204(b)(8). Supporting documents should be bound together at the end of the petition or in separate volumes. Cal Rules of Ct 8.486(c)(1)(A). On attaching supporting documents (*i.e.,* the record), see §18.57.

PRACTICE TIP: When binding documents, the petitioner should make sure that full pages are visible and check the local rules of the appellate district (and division) for any specific preferences on binding.

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Source: Civil Litigation/California Civil Writ Practice/18 Initiating a Writ Proceeding in the Court of Appeal/§18.12 2. Cover (Caption) Page

§18.12 2. Cover (Caption) Page

The petition's cover, preferably of card-weight recycled stock, must be red (Cal Rules of Ct 8.40(b)(1)) and must contain (Cal Rules of Ct 8.116(a), 8.486(a)(3), (a)(7)(B), 8.204(b)(10)):

- The document title (see §18.13);
- The court title, trial court number, and court of appeal number of the case (see §§18.14, 18.16);
- The names of the trial court and each participating trial judge (see §18.15);
- The name, address, telephone number, and California State Bar number of each attorney filing or joining in the petition (see §18.17);
- The name of the party that each attorney on the petition represents (see §18.18);
- If a stay is requested, the notice "STAY REQUESTED" prominently displayed (see §18.19); and
- If the petition seeks review of trial court proceedings that are also the subject of a pending appeal, the notice "RELATED APPEAL PENDING" (see §18.20).

For an example, see form in §28.1.

PRACTICE TIP: When supporting documents are separately bound as an appendix to the petition, the petitioner should note that on the petition's cover, *e.g.*, "EXHIBITS BOUND SEPARATELY." On attaching supporting documents (*i.e.,* the record), see §18.57.

In addition to compliance with general format rules, the petitioner should always check for and comply with any local rules relating to the petition's cover. For example, the Fourth and Sixth Appellate Districts prohibit plastic or acetate covers on petitions. See 4th App Dist, Local R 2; Sixth District Outline of Original Proceedings and Relief Ancillary to Appeal (available on the court's website at http://www.courtinfo.ca.gov/courts/courtsofappeal/6thDistrict/faq/6DCAproc.doc).

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§18.13 a. Document Title

The caption on the petition's cover must state the document's title. Cal Rules of Ct 8.204(b)(10)(A). The title should name the type of writ sought, *e.g.,* "Petition for Writ of Mandate." If the petitioner cannot determine what type of writ relief is appropriate, the petition should request a writ of "mandate and/or prohibition or other appropriate extraordinary relief." On determining the appropriate type of writ, see §18.3. For an example, see form in §28.1. On types of writs and their uses, see chaps 15-16.

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Source: Civil Litigation/California Civil Writ Practice/18 Initiating a Writ Proceeding in the Court of Appeal/§18.14 b. Court Title

§18.14 b. Court Title

When seeking extraordinary writ relief in the court of appeal, the petitioner must state the court title on the petition's caption page as follows:

CALIFORNIA COURT OF APPEAL
_ _ _ _ _ _ APPELLATE DISTRICT

In multi-division districts (*i.e.,* first, second, and fourth districts), add:

DIVISION _ _ _ _ _ _

JUDICIAL PERSPECTIVE: In the first and second appellate districts, counsel should leave a space for the clerk to fill in the division on the petition, because those districts do not assign petitions to a division until after filing.

For an example, see form in §28.1.

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Source: Civil Litigation/California Civil Writ Practice/18 Initiating a Writ Proceeding in the Court of Appeal/§18.15 c. Trial Court Information

§18.15 c. Trial Court Information

The cover must include the name of the trial court and each participating trial judge, as well as the trial court and appellate court case numbers. Cal Rules of Ct 8.204(b)(10)(C). For an example, see form in §28.1.

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Source: Civil Litigation/California Civil Writ Practice/18 Initiating a Writ Proceeding in the Court of Appeal/§18.16 d. Case Numbers

§18.16 d. Case Numbers

The cover must include the trial court and appellate court case numbers. Cal Rules of Ct 8.204(b)(10)(B). For an example, see form in §28.1.

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§18.17 e. Identifying Counsel

The petition's cover must state "[t]he name, address, telephone number, and California State Bar number of each attorney filing or joining in the brief." Cal Rules of Ct 8.204(b)(10)(D). For an example, see form in §28.1.

PRACTICE TIP: Although not required, providing counsel's fax number facilitates communication with the court and is especially important when the petitioner requests immediate review or a stay. On requesting a stay, see chap 19.

If appellate counsel is retained to handle the writ petition, include information on both the trial court attorney and the appellate attorney on the petition's cover. Because petitions for extraordinary writs are "original proceedings" (*i.e.,* a new action in the court of appeal), it is the petitioner's first appearance in the new action. As a result, a new attorney retained to file the petition need not file a substitution of attorney in the court of appeal. However, attorneys or unrepresented parties must serve and file a written notice with the appellate court of any change of address or telephone number occurring while the writ petition is pending. Cal Rules of Ct 8.32(b)-(c) (notice must include title and number of case to which it is applicable, or risk clerk using new information in all pending and concluded cases).

JUDICIAL PERSPECTIVE: It is not enough to file a change of address notice in the trial court. Counsel must also file the notice in the court of appeal. The same is true of a "Notice of Association of Counsel" if someone joins as counsel after filing of the first papers in the court of appeal.

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§18.18 f. Identifying Parties

The petitioner must identify the parties and their interest in the proceeding, as follows:

- "Petitioner" is the party seeking appellate court writ review;
- "Respondent" is the trial court or lower body that issued the order from which the petitioner is seeking relief; and
- "Real party in interest" is the adverse party in the respondent court.

The represented party for each attorney must be named on the caption page of all petition documents. If the respondent is a judge, court, board, or other public official, the petition must name any real party in interest. Cal Rules of Ct 8.486(a)(2). See *Tracy Press, Inc. v Superior Court* (2008) 164 CA4th 1290, 80 CR3d 464 (court of appeal dismissed writ petition for failure to name real party in interest, who was indispensible party under CCP §389).

For an example, see form in §28.1.

PRACTICE TIP: The trial court, rather than the judge, is normally the respondent because it is the action or order of the court that the petitioner is seeking to compel, prohibit, or annul. *Lois R. v Superior Court* (1971) 19 CA3d 895, 903, 97 CR 158. In rare cases, however, it may be appropriate to *name* the judge or other judicial officer who issued the order from which the petitioner is seeking relief. This most commonly occurs with challenges to the trial court judge and contempt orders. See §§23.21-23.24.

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§18.19 g. If Requesting Stay

If a stay request is made in the petition, the petitioner must conspicuously state on the cover "STAY REQUESTED." Cal Rules of Ct 8.116(a), 8.486(a)(7). The cover must also describe the act sought to be stayed and the date of the proposed act, *e.g.*, "STAY REQUESTED OF TRIAL SET FOR _ _[*DATE*]_ _." Cal Rules of Ct 8.116(a). See 4th App Dist Local R 1 (cover of petition must contain conspicuous notation "IMMEDIATE RELIEF REQUESTED" or "STAY REQUESTED," or similar wording in compliance with Cal Rules of Ct 8.116). In addition, the petitioner must state the trial court and department involved, and the name and telephone number of the trial judge whose order petitioner seeks to stay on the cover or at the beginning of the text. Cal Rules of Ct 8.116(b).

JUDICIAL PERSPECTIVE: A petition for extraordinary relief with a request for immediate stay sets off a flurry of activity in the reviewing court. As a practical matter, it is often useful to call the reviewing court shortly before filing and warn the clerk that counsel is filing a petition requesting an immediate stay, and when the petition will arrive. For telephone numbers for courts of appeal, see §18.87.

For an example, see form in §28.1. On requesting a stay, see §§18.58-18.60; chap 19.

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Source: Civil Litigation/California Civil Writ Practice/18 Initiating a Writ Proceeding in the Court of Appeal/§18.20 h. If Related Appeal

§18.20 h. If Related Appeal

If the petition seeks review of trial court proceedings that are also the subject of a pending appeal, the cover must include the words "RELATED APPEAL PENDING." Cal Rules of Ct 8.486(a)(3). Counsel should also include the docket number of the related appeal.

JUDICIAL PERSPECTIVE: The reason for this rule is simple: In many courts, once a division has heard any matter (petition or appeal) in a case, the same division hears all subsequent petitions and appeals in that case.

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B. Contents of Petition

§18.21 1. Certificate of Interested Entities or Persons

After the cover page and before the tables of contents and authorities, the petition must include a "certificate of interested entities or persons." The certificate names those with an interest in the proceeding, *e.g.,* those with a 10-percent interest in a party, or those who a party knows have a financial interest in the outcome of the proceeding. Cal Rules of Ct 8.208(e), 8.488(c). The information in the certificate helps the court of appeal justices to "determine whether to disqualify themselves from a proceeding." Cal Rules of Ct 8.208(a).

PRACTICE TIP: The petitioner must list only persons or entities that it *knows* to have an interest in the proceeding; it is not required to conduct an investigation into other possible interested persons or entities.

Failure to include a certificate could result in sanctions. Cal Rules of Ct 8.488(d). For an example of an attorney-drafted certificate, see form in §28.1; for the optional Judicial Council certificate, see §28.2.

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2. Tables

§18.22 a. Table of Contents

The petition must contain a table of contents. Cal Rules of Ct 8.204(a)(1)(A). The table of contents lists each heading and subheading in the petition, *e.g.,* Introduction, Petition, Verification, Memorandum (including all subheadings within the Memorandum), Conclusion. The table of contents may also include the other parts of the petition, *e.g.,* the table of authorities and list of exhibits.

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Source: Civil Litigation/California Civil Writ Practice/18 Initiating a Writ Proceeding in the Court of Appeal/§18.23 b. Table of Authorities

§18.23 b. Table of Authorities

The petition must contain a table of authorities listing each case cited in alphabetical order, each constitutional and code provision, each court rule, and other authorities, cited with their respective pages. Cal Rules of Ct 8.204(a)(1)(A).

JUDICIAL PERSPECTIVE: A table of authorities is crucial because it provides the fastest route to the discussion of the cases that the court believes are determinative.

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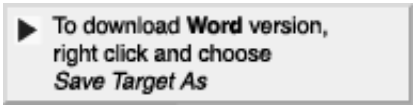
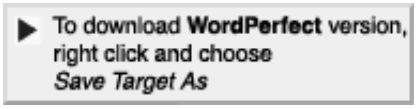
§18.24 3. Introductory Statement





The petition's introduction is crucial to signaling the court of appeal that its intervention is required because something went very wrong below. The first paragraph should generate not just concern, but a sense of disbelief that what occurred in the trial court could actually have happened. For example:

Petitioner is forced to bring this petition for extraordinary relief because the Los Angeles County Superior Court has ordered punitive damages stricken from his complaint for "failure" to do something that the California Supreme Court says he did not have to do in the first place.

Or:

The trial court improperly denied petitioner the opportunity to present evidence of X and then granted real party's motion on the ground that there was no evidence of X.

The court of appeal is far more likely to grant relief if the error is shown to be particularly obvious or egregious. Casting the error below as not just erroneous but impossible to understand increases the long odds of success.

For an example of a full-length introductory statement, see form in §28.1.

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§18.25 4. Enumerated Allegations

The enumerated allegations constitute the formal petition which is the *pleading* that initiates the writ proceeding. It immediately follows the introductory statement. Its allegations identify the parties, recite the operative and material facts, and state how the trial court went astray and why writ relief is appropriate and necessary. The formal petition is drafted in the form of a complaint, *i.e.,* with each paragraph numbered, but petitioner should not use pleading paper.

As with a complaint, the formal petition should include:

- The names of the parties and their status;
- The relevant background and procedural history;
- The action that the respondent took and how the action is erroneous and detrimental to the petitioner;
- A showing that the petition is timely; and
- Why a remedy at law is not available or adequate.

See generally *Omaha Indem. Co. v Superior Court* (1989) 209 CA3d 1266, 258 CR 66.

The formal petition should not be stilted in form. The allegations should be a narrative that is as persuasive as the statement of facts in a good appellate brief. The petitioner should keep the focus on convincing the appellate court to exercise its discretion and decide the writ petition on the merits.

PRACTICE TIP: It is not required that the allegations begin on a new page, and some petitioners begin them on the same page following the introduction, using a heading to make it clear that the formal petition has begun.

For an example, see form in §28.1.

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§18.26 a. If There Is Related Appeal

If the petition seeks review of trial court proceedings that are also the subject of a pending appeal, the first paragraph of the petition must state the appeal's title, the trial court docket number, and the docket number of the pending appeal. Cal Rules of Ct 8.486(a)(3)(A). For an example, see form in §28.1.

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§18.27 b. Jurisdiction

The petition should specifically allege that the appellate court has jurisdiction, and why. This is generally accomplished by simply stating that the petition seeks review of a trial court ruling. See CCP §§1087, 1103. For an example, see form in §28.1. On jurisdictional issues, see §§15.51-15.71, 17.29-17.33.

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§18.28 c. Standing

The petition must show that the petitioner has standing to seek relief, *i.e.,* a beneficial interest in the outcome of the proceedings. CCP §§1086, 1103(a). See, *e.g., Ra v Superior Court* (2007) 154 CA4th 142, 147 n4, 64 CR3d 539 (only party beneficially interested in order challenged may immediate appellate review by writ of mandate).

The petitioner can show standing by stating that:

- The petitioner is a plaintiff or a defendant (or other interested party) in the underlying action; and
- The petitioner is aggrieved by the trial court's order.

For an example, see form in §28.1. On the standing requirement, see §§15.51-15.55.

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Source: Civil Litigation/California Civil Writ Practice/18 Initiating a Writ Proceeding in the Court of Appeal/§18.29 d. Prior Petitions

§18.29 d. Prior Petitions

The petition should state whether there have been any prior writ petitions in the action or a related action. The petition should:

- Identify any prior petitions in the action or a related action;
- State how they were decided; and
- Explain how the instant petition differs from them.

See *Hagan v Superior Court* (1962) 57 C2d 767, 770, 22 CR 206 (to further orderly administration of justice and sound judicial policy, court may refuse to consider repetitive applications of same petition), disapproved on other grounds in *Kowis v Howard* (1992) 3 C4th 888, 899, 12 CR2d 728. Identify any prior petitions by the title, date of filing, and the trial court and appellate court docket numbers.

JUDICIAL PERSPECTIVE: This requirement allows the courts of appeal to be more efficient and assign the petition to the panel or division that considered the prior petition.

On cover requirements when a related appeal is pending, see §18.20.

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§18.30 e. Factual Allegations

The factual allegations in the writ petition tell a story about what happened and to whom. The allegations should tell this story simply and directly. It usually is best to tell the story in chronological order, but the petitioner should use whatever sequence provides the maximum force and continuity. The factual recitation must be accurate and truthful in every respect. Failure to impart the whole story or to tell it fairly can be extremely prejudicial to the petitioner's case.

PRACTICE TIP: When drafting the facts, the petitioner should keep in mind that the reviewing court is not familiar with the case and does not have the trial court file.

It is *essential* to use supporting citations to documents in the record. On supporting documents, see §18.57. On citing to exhibits in the record, see §20.14.

PRACTICE TIP: Because the facts must be verified, they must be in the formal petition. Some appellate districts also require facts to be recited in the supporting memorandum. Counsel should check local court rules and local practice for the preferred placement.

For examples of factual allegations, see form in §28.1.

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§18.31 (1) Procedural Facts

The factual allegations should include a concise statement of procedural facts relevant and material to the petition. The petition should not present a "laundry list" of filings and events; it is boring and unpersuasive.

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§18.32 (2) Other Material Facts

The factual allegations should include all other material facts necessary for the court to hear the matter, and on which petitioner wishes to rely in showing that extraordinary relief is required. For example, when arguing that the trial court acted or is threatening to act without or in excess of its jurisdiction, the petitioner should specifically describe the court's acts and the violation. When alleging that the trial court failed to exercise its discretion after assuming jurisdiction, the petitioner should allege that the trial court had a specific statutory duty to determine the matter on its merits and its failure to perform that duty. The allegation that the trial court abused its discretion should describe specifically the trial court's act, whether it is unconstitutional or unreasonable, and why it was a prejudicial abuse of discretion. On the bases for seeking writ relief, see §§15.51-15.71.

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§18.33 (3) Facts Showing Petition's Timeliness

The factual allegations should include facts showing that the writ petition is timely, *e.g.,* the date of hearing, the date of entry of the challenged order (if different from the date of hearing), the date when notice of the ruling was mailed, the date the petitioner received notice of the ruling, or that petitioner has obtained a statutorily authorized extension of time to file the petition. On the time for filing the petition, see §§18.61-18.76. On writs authorized by statute, including discussion of deadlines and availability of extensions, see chap 16.

JUDICIAL PERSPECTIVE: The court of appeal will deny a writ petition if it is not filed within the applicable deadline.

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§18.34 (4) Facts Addressing Inadequacy of Other Remedies

The factual allegations should include facts showing why other remedies at law, whether by appeal or otherwise, are inadequate. For example, the petition may allege the absence or inadequacy of other remedies by showing that there is no right of appeal, the right of appeal has been lost (*e.g.,* because the opportunity for timely appeal expired without petitioner's fault), or appeal is an inadequate remedy. On availability of appeal, see California Civil Appellate Practice, chap 3 (3d ed Cal CEB 1996). On the requirement of inadequate remedy at law, see §§15.56-15.65, 17.30.

JUDICIAL PERSPECTIVE: If a trial court has issued an order under CCP §166.1 indicating it believes its interlocutory order involves a controlling question of law about which there are substantial grounds for a difference of opinion and appellate resolution may materially advance the conclusion of the litigation, this also should be alleged in the petition. See *Safeco Ins. Co. v Superior Court* (2009) 173 CA4th 814, 825, 92 CR3d 814 (denying writ petition on merits after issuing stay and order to show cause).

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§18.35 (5) Facts Showing Preservation of Issue in Trial Court

The petition must show that the petitioner preserved the issue(s) asserted in the petition while in the trial court. To do this, the petitioner must allege facts showing either that the issues were brought to the attention of the trial court or that raising them below was impossible or futile.

To allege preservation of the issue, the petitioner should use either a statement in the procedural narrative, with citation to the record, or a separate allegation. For example, the petition can include a separate allegation specifically stating that when the objection was raised in the trial court, the trial court either rejected or failed to rule on that objection.

However, in exceptional cases, the courts of appeal will consider legal issues not presented to the trial court and raised for the first time in a writ petition. See, *e.g., Sheller v Superior Court* (2008) 158 CA4th 1697, 1709, 71 CR3d 207.

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§18.36 5. Prayer for Relief

The prayer for relief at the conclusion of the formal petition should set out each requested type of relief in a separate, numbered paragraph (including costs and attorney fees, when relevant). On requesting costs, see §18.41.

JUDICIAL PERSPECTIVE: Prayers for relief must be specific. The petitioner should tell the court precisely what he or she wants and not make the court guess at the relief sought.

For an example of a prayer for relief, see form in §28.1.

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§18.37 a. If Seeking Immediate Stay

If the petitioner seeks a stay, the prayer should mention that first and be specific about what is to be stayed, *i.e.*, an order or the entire action. For an example, see form in §28.1.

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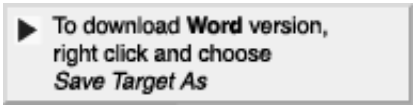
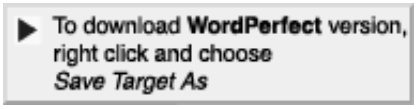
§18.38 b. If Seeking Issuance of Peremptory Writ in First Instance





A prayer for relief may request that the court issue a peremptory writ in the first instance, stressing the desire to avoid the further delay that issuance of an alternative writ or order to show cause would entail. When the court issues a peremptory writ in the first instance, there is no alternative writ, no standard briefing, and usually no oral argument. See §§22.18-22.22.

The following is exemplar language to use when seeking a peremptory writ in the first instance:

[2.] That the Court issue a peremptory writ of _ _[*mandate/prohibition*]_ _ **in the first instance under the seal of this Court commanding** _ _[*respondent(s)/real* _ _[*party/parties*]_ _ *in interest*]_ _ _ _[*specify names of those to whom order is directed*]_ _ _ _[*to vacate its order dated*_ _[*date*]_ _, *and enter a new and different order/to desist and refrain from taking any further action or proceedings* _ _[*including, e.g., trial/continuance/enforcement of earlier proceedings*]_ _ **to** _ _[*set out acts or duties required to be performed*]_ _]_ _**.**

For an example, see form in §28.1.

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Source: Civil Litigation/California Civil Writ Practice/18 Initiating a Writ Proceeding in the Court of Appeal/§18.39 c. If Seeking Issuance of Alternative Writ or Order to Show Cause

§18.39 c. If Seeking Issuance of Alternative Writ or Order to Show Cause

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▶ To download **WordPerfect** version, right click and choose *Save Target As*

The following is exemplar language to use when seeking an alternative writ or order to show cause:

18.39-1 Alternative: Petitioner seeks alternative writ of mandate

[2.] That the Court issue an alternative writ of mandate under seal of this Court commanding _ _[*respondent(s)/real* _ _[*party/parties*]_ _ *in interest*]_ _ _ _[*specify names of those to whom order is directed*]_ _ **to** _ _[*set out acts or duties required to be performed*]_ _**, or to show cause before this Court, at a time and place then or thereafter specified by Court order, why** _ _[*it/they*]_ _ _ _[*has/have*]_ _ **not done so and why a peremptory writ should not issue.**

[3.] On the return of the alternative writ and hearing on the order to show cause, a peremptory writ of mandate issue under the seal of this Court compelling respondent(s) to _ _[*set out acts or duties to be performed*]_ _**.**

18.39-2 Alternative: Petitioner seeks alternative writ of prohibition

[2.] That the Court issue an alternative writ of prohibition under seal of this Court commanding _ _[*respondent(s)/real* _ _[*party/parties*]_ _ *in interest*]_ _ _ _[*specify names of those to whom order is directed*]_ _ **to desist and refrain from taking any further action or proceedings** _ _[*including, e.g., trial/continuance/enforcement of earlier proceedings*]_ _ **in the above described** _ _[*action/matter*]_ _ **until further order of this Court, and directing and requiring respondent(s)** _ _[*and real* _ _[*party/parties*]_ _ *in interest*]_ _ **to show cause before this Court, at a time and place then or thereafter specified by Court order, why** _ _[*it/they*]_ _ **should not be absolutely and forever restrained from any further proceedings in the** _ _[*action/matter*]_ _**; or to show cause before this Court, at a time and place then or thereafter specified by Court order, why** _ _[*it/they*]_ _ _ _[*has/have*]_ _ **not done so and why a peremptory writ should not issue.**

[3.] On the return of the alternative writ and hearing on the order to show cause, a peremptory writ of prohibition issue under seal of this Court restraining respondent(s) absolutely and forever from taking any further proceedings in this _ _[*action/matter*]_ _**.**

For another example, see form in §28.1.

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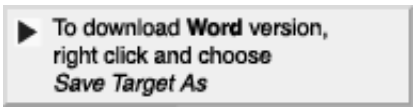
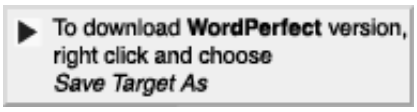
Source: Civil Litigation/California Civil Writ Practice/18 Initiating a Writ Proceeding in the Court of Appeal/§18.40 d. If Seeking Writ of Review (Certiorari)

§18.40 d. If Seeking Writ of Review (Certiorari)





The following is exemplar language to use when seeking a writ of review (certiorari):

[2.] That the Court issue a writ of review (certiorari) under seal of this Court commanding respondent _ _[*state name of court or agency*]_ _ to certify to this Court, at a time and place specified by Court order, a transcript of the record and proceedings of the above described _ _[*action/cause/matter/hearing*]_ _.

On seeking a writ of review, see §§15.27-15.38.

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§18.41 e. Requesting Costs and Other Relief

The party prevailing in an appellate writ proceeding resolved by written opinion after issuance of an alternative writ, order to show cause, or peremptory writ in the first instance is entitled to his or her appellate costs unless the court of appeal finds that the interests of justice dictate otherwise. Cal Rules of Ct 8.493(a)(1)(A). The court's opinion must specify the award or denial of costs. Cal Rules of Ct 8.493(a)(2). On awarding appellate costs, see §§24.23-24.27.

PRACTICE TIP: Attorney fees may be available in some writ proceedings. See §24.28.

Use the following exemplar language to request costs in the petition:

[4.] That the Court award petitioner(s) the costs of this proceeding.

[5.] That the Court grant such other relief as may be just and proper.

For an example, see form in §28.1.

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6. Verification

§18.42 a. Petition Must Be Verified

A writ petition must be verified in the same manner as an ordinary civil complaint. CCP §446(a) (requiring that party or party's attorney sign petition as well as verify its contents), §1109; Cal Rules of Ct 8.486(a)(4). See also CCP §§1069, 1086, 1103(a). The verification follows the formal petition, beginning either on the last page of the petition or on a new page immediately thereafter.

Verify the petition through either (CCP §§2009, 2015.5):

- A declaration under penalty of perjury; or
- An affidavit.

PRACTICE TIP: It is critical to include an adequate verification. The appellate court may decline to consider a petition on the merits for any reason, including lack of, or an inadequate, verification. See *Krueger v Superior Court* (1979) 89 CA3d 934, 939, 152 CR 870 (petition for extraordinary relief fatally defective because verification was dated December 3, but body of petition was dated December 22).

For an example, see form in §28.1.

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§18.43 b. Verification Must Be Based on Personal Knowledge

To the extent the petition alleges facts proffered as evidence, the verification *must* be based on personal knowledge, not information and belief. CCP §§1069, 1086, 1103(a). Verification of evidentiary facts on "information and belief" may be cause for a summary denial. See *Star Motor Imports, Inc. v Superior Court* (1979) 88 CA3d 201, 204, 151 CR 721 (affidavit based on "information and belief" is hearsay and must be disregarded).

The petition may survive if at least the material facts are properly verified or if the issues presented are solely questions of law. See, *e.g.*, *Soltani-Rastegar v Superior Court* (1989) 208 CA3d 424, 428, 256 CR 255 (part of verification stating it was based on information and belief was "mere surplusage"; court found that material facts were all stated to be true and correct of declarant's own knowledge); *Fall River Joint Unified Sch. Dist. v Superior Court* (1988) 206 CA3d 431, 436, 253 CR 587 (court proceeded despite arguably defective verification based on information and belief, because issue presented was purely one of law).

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§18.44 c. Party Litigant Usually Must Verify Petition

The beneficially interested party must verify the petition. CCP §§1069, 1086, 1103(a). In extenuating circumstances, the party's attorney may verify the petition. CCP §446; *Perlman v Municipal Court* (1979) 99 CA3d 568, 574, 160 CR 567 (verification by attorney merely for sake of convenience invalid). Extenuating circumstances might include:

- The party's absence from the county in which the attorney's office is located;
- The party litigant's inability to verify; or
- The existence of facts that are within the knowledge of the attorney (*e.g.,* proceedings that occurred in court).

In *Suzanne J. v Superior Court* (1996) 46 CA4th 785, 54 CR2d 25, the court dismissed a writ petition in a dependency proceeding because the mother's attorney had verified the petition without explaining why the mother had neither verified the petition nor executed a declaration indicating her consent to the attorney's signing the petition.

PRACTICE TIP: When verifying a petition, counsel must be careful not to verify facts that may constitute a waiver of the attorney-client privilege and subject the attorney to deposition inquiries concerning the factual basis for his or her verification. See *Alpha Beta Co. v Superior Court* (1984) 157 CA3d 818, 827, 203 CR 752 (information in declaration did not waive privilege).

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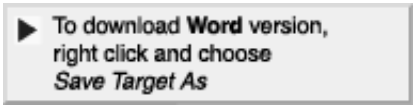
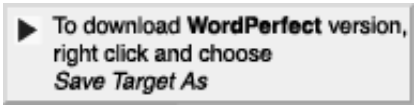
§18.45 d. Verification of Supporting Documents





The petition must include verification of the exhibits included in the record, *e.g.*:

All documents contained in the Appendix filed in conjunction with and in support of this writ petition are true and correct copies of said documents filed in the trial court.

The trial court's order denying summary adjudication is included in the Appendix as "Exhibit J" and is incorporated by reference as though fully set forth herein.

PRACTICE TIP: Given the ponderous effect of authenticating exhibits in the text of a petition, petitioner may choose to do so once, in one plenary authentication at the beginning of the petition, *e.g.,* "This and each subsequent exhibit is a true and correct copy of the document identified, [*and is attached to this petition/is contained in the appendix filed separately with this Court,*] and is incorporated by reference into this petition."

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§18.46 e. Verification of Supplemental Evidence

On rare occasions, counsel may need to supplement the record with new evidence by attaching declarations to the petition to support information not in the record. In such situations, the declaration cannot be made on information and belief, because this makes the facts mere hearsay. See *Star Motor Imports, Inc. v Superior Court* (1979) 88 CA3d 201, 204, 151 CR 721 (declaration made on information and belief is hearsay and does not establish evidentiary facts in petition); see also *DeGrandchamp v Texaco, Inc.* (1979) 100 CA3d 424, 437, 160 CR 899 (court refused to treat premature appeal as petition for writ of mandate based on absence of declaration to support claims of urgency and prejudice), disapproved on other grounds in *Morehart v County of Santa Barbara* (1994) 7 C4th 725, 743 n11, 29 CR2d 804.

PRACTICE TIP: An alternative to including a declaration stating "new" facts (*i.e.,* facts not in the trial court record) is to allege the facts in the petition and have the witness who would have executed the declaration execute a verification of that allegation (identified by paragraph number).

On the record in an appellate court writ proceeding, see chap 20.

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§18.47 f. Verification by State or Public Officials

Petitions generally need not be verified when the petitioner is a public officer acting in his or her official capacity. CCP §446. See, *e.g.*, *Fremont Union High Sch. Dist. v Santa Clara County Bd. of Educ.* (1991) 235 CA3d 1182, 1188, 286 CR 915 (school districts, as public entities, are exempt from verification requirement); *Murrieta Valley Unified Sch. Dist. v County of Riverside* (1991) 228 CA3d 1212, 1221, 279 CR 421 (same); *Crowl v Commission on Prof. Competence of the Governing Bd. of the San Juan Unified Sch. Dist.* (1990) 225 CA3d 334, 342, 275 CR 86 (same); *Elliott v Contractors' State License Bd.* (1990) 224 CA3d 1048, 1054, 274 CR 286 (state agency's unverified answer to petition was not legally incompetent). But see *People v Superior Court (Alvarado)* (1989) 207 CA3d 464, 470, 255 CR 46 (discussed division of authority in criminal cases regarding whether public entities and officials are required to verify writ petitions).

PRACTICE TIP: It is better practice for the state or state subdivision to verify the petition, because it is often used as evidence of the facts stated. See *People v Superior Court, supra* (criminal case holding that because CCP §§1086 and 1089 requiring verification are more specific than CCP §446, they would prevail).

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§18.48 g. Form: Verification

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18.48-1 Alternative: Affidavit with notary acknowledgment

State of _ _ _ _ _ _, County of _ _ _ _ _ _:

I, the undersigned, being sworn, say:

I am _ _[_ _[*one of***]_ _*/the attorney for*]_ _ the petitioner(s) in this action. _ _[***All facts alleged in the above document are true of my own personal knowledge/I have read the above Petition for Writ of _ _[***Mandate/Prohibition/Review (Certiorari)***]_ _ and know its contents. All facts alleged in the petition are true of my own personal knowledge.***]_ _**

I declare under penalty of perjury that the foregoing is true and correct and that this affidavit was executed on _ _[*date***]_ _, at _ _[***city***]_ _, California.**

__[*Signature of petitioner/petitioner's attorney*]__
_ _[*Typed name*]_ _
_ _[*Petitioner/Attorney for petitioner*]_ _

State of California

County of _ _[*name of county***]_ _**

On _ _[*date***]_ _, before me, _ _[***name and title of notary***]_ _, personally appeared _ _[***name of affiant(s)***]_ _ who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) _ _[***is/are***]_ _ subscribed to the within instrument and acknowledged to me that _ _[***he/she/they***]_ _ executed the same in _ _[***his/her/their***]_ _ authorized capacity(ies), and that by _ _[***his/her/their***]_ _ signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.**

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____ (Seal)

18.48-2 Alternative: Declaration

I, the undersigned, declare:

I am _ _[_ _[*one of***]_ _*/the attorney(s) for*]_ _ the petitioner(s) in this action. _ _[***All facts alleged in the above document are true of my own personal knowledge/I have read the above Petition for Writ of _ _[***Mandate/Prohibition/Review (Certiorari)***]_ _ and know its contents. All facts alleged in the petition are true of my own personal knowledge.***]_ _**

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on _ _[*date***]_ _, at _ _[***city***]_ _, California.**

__[*Signature of petitioner/petitioner's attorney*]__
_ _[*Typed name*]_ _
_ _[*Petitioner/Petitioner's attorney*]_ _

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Source: Civil Litigation/California Civil Writ Practice/18 Initiating a Writ Proceeding in the Court of Appeal/§18.49 7. Supporting Memorandum

§18.49 7. Supporting Memorandum

The petitioner must include a supporting memorandum along with the formal petition. Cal Rules of Ct 8.486(a)(5). The formal petition is the pleading that initiates the writ proceeding; the accompanying memorandum provides the legal argument and authorities supporting issuance of the requested writ. Because the court of appeal may summarily deny the writ petition, foreclosing further written and oral argument, it is imperative that the supporting memorandum be as complete and persuasive as possible.

For an example of a supporting memorandum, see form in §28.1.

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a. Argument Headings

§18.50 (1) Use as Effective Advocacy Tool

The supporting memorandum must be organized so that each point is made under a separate heading or subheading. Cal Rules of Ct 8.204(a)(1)(B). The petitioner should make effective use of these required headings and subheadings by having them concisely summarize the legal arguments presented in the memorandum. Dividing an argument into discrete pieces makes the supporting memorandum easier for the reader to follow and, thus, more effective. It also keeps the writer "honest" by forcing him or her to make each discrete point in a coherent and internally complete manner. Well-crafted headings provide an outline of the arguments that the reader can understand at first glance.

The headings may be in upper case letters. Cal Rules of Ct 8.204(b)(3).

PRACTICE TIP: Repeat each argument heading in the table of contents so that a review of the table gives the court a brief but thorough outline of the petition's contentions. On the table of contents, see §18.22.

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§18.51 (2) Exemplar Headings

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The following are exemplar argument headings:

ARGUMENT

I. THE CONTEMPT PROCEEDING WAS VOID *AB INITIO* AS AN ATTEMPT BY THE RESPONDENT COURT TO ENFORCE AN ORDER AUTOMATICALLY STAYED BY THE PERFECTED APPEAL.

[*Argument omitted*]

II. IN ADDITION TO HAVING NO JURISDICTION TO *COMMENCE* THESE PROCEEDINGS, RESPONDENT COURT HAD NO JURISDICTION TO *PURSUE* THEM UNDER THE PROCEDURES SHOWN IN THIS RECORD.

A. Jurisdiction Never Attached Because of the Absence of an Adequate Initiating Affidavit.

[*Argument omitted*]

B. The Respondent Court Lacked Jurisdiction to Make the Purported Order Because There Was No Evidence, Substantial or Otherwise, of a Prima Facie Case.

[*Argument omitted*]

For an example of a supporting memorandum, see form in §28.1.

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b. Contents

§18.52 (1) Introduction

The memorandum usually begins with an introduction. The introduction should track the organization of the argument, serving as a summary of the argument and preparing the reader to appreciate the material aspects of the factual and procedural background discussed in the body of the writ petition. Its length and substance will depend on the introduction that precedes the formal petition. See §18.24. Often that initial introduction will summarize the case, identify the issues, and summarize why writ relief should be granted. If so, the introduction to the memorandum can be more concise. In fact, depending on the content of the initial introduction, it may be appropriate to dispense with a second introduction.

JUDICIAL PERSPECTIVE: The petitioner can choose to include either a substantive introduction that lets the court know what happened and why it should grant the petition, or a very short introduction in the memorandum and use the petition as the first argument.

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§18.53 (2) Statement of Facts

The memorandum need not repeat the facts alleged in the formal petition. Cal Rules of Ct 8.486(a)(5). Particularly if the facts and procedural background are set forth clearly and persuasively in the formal petition, no purpose is served by restating them in a statement of facts in the memorandum. The formal petition should "tell the story" and the memorandum should supply the argument and legal authority for granting writ relief. The arguments, however, should tie directly to and cite the material facts. All factual statements in the memorandum should be supported by a citation to the record. Cal Rules of Ct 8.204(a)(1)(C). On citing the record, see §20.14.

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§18.54 (3) Legal Argument

The argument must be aimed at obtaining the relief sought, *i.e.,* intervention by the court of appeal. A memorandum that brilliantly vindicates public policy or makes obvious the respondent's error without convincing the court that an exercise of its extraordinary powers is necessary does not increase the petitioner's chance of success of the writ petition. The argument should be organized and supported not just to make the legal point that "we are right and the trial court was wrong," but to show that without immediate intervention by the court of appeal something very bad will happen to the petitioner.

The argument following each heading or subheading must clearly state:

- The precise error or abuse of discretion that allegedly occurred;
- The factual setting that gave rise to the error or abuse of discretion; and
- The relevant law, including the applicable standard of appellate review (sometimes placed in a footnote at the beginning of the argument on an issue), supported with citations of authority and applied to the facts.

PRACTICE TIP: Merely stating the alleged error and the relevant law is meaningless. The petitioner must identify the facts that relate directly to the particular error, and then demonstrate that the law is applicable to this set of facts.

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§18.55 (a) Persuasive Arguments

Persuading the appellate court to intervene can take different routes. If a statute provides for review by writ petition, stress that. On statutorily authorized writs, see chap 16. If appeal after final judgment is inadequate, explain why. On inadequate remedy at law, see chaps 15, 17. In any event, the memorandum should clearly state why relief by extraordinary writ is necessary. Some of the more persuasive reasons include (*Omaha Indem. Co. v Superior Court* (1989) 209 CA3d 1266, 1271, 258 CR 66):

- The trial court's order bars a substantial portion of the plaintiff's or the defendant's case from being heard on the merits.
- The trial court refuses to exercise its discretion in hearing and deciding, or has incorrectly decided, an issue involving a constitutional right or privilege.
- The trial court's order will result in the disclosure of privileged information.
- The trial court took an action clearly in excess of its jurisdiction.
- The trial court's action invades an uninvolved third party's rights.

In attempting to persuade the appellate court, the petitioner must not mislead the court, by either commission or omission, or risk incurring sanctions. On sanctions, see Cal Rules of Ct 8.492; §§24.61-24.65. The petitioner should candidly explain the opponent's arguments from below and why the trial court accepted them. It is also important to address "bad facts" (*i.e.,* those inimical to the petitioner's position) by admitting them and stating why they do not make a difference. Failing to mention such facts is a gift to the opposition; in addition to being able to reveal the "bad fact" to the reviewing court, the opposition may also accuse the petitioner of trying to mislead the reviewing court.

PRACTICE TIP: Although quotations from the record are permitted, and on crucial points may be preferable to summarization, avoid lengthy quotations. Any quoted material should be placed in quotation marks and followed by a citation to the record. See rules on quoted material in Jessen, California Style Manual §§4:12-4:27 (4th ed 2000). On citing the record, see chap 20.

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§18.56 (b) Legal Support

In choosing authority to support a particular point, and especially on issues related to the reason why extraordinary relief is required, counsel should cite a published decision in which a writ issued in an analogous circumstance. Citing authority arising from previous exercises of a reviewing court's extraordinary powers is usually more persuasive than a decision on the same issue rendered on appeal. A decision in a writ case implies that immediate intervention is justified by the circumstances.

PRACTICE TIP: Although not required by the rules, it is better practice to cite official reports for California cases in papers filed in the courts of appeal and the California Supreme Court. See Jessen, California Style Manual §1:12 (4th ed 2000). As a courtesy to opposing counsel, counsel may also provide parallel citations to the unofficial reports.

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§18.57 8. The Record; Exhibits

The petition must be accompanied "by an adequate record." Cal Rules of Ct 8.486(b)(1). If few in number, the documents constituting the record (see Cal Rules of Ct 8.486(b)(1), (3)(A)) can be appended to the petition; otherwise, the documents should be submitted to the court in a bound appendix. Cal Rules of Ct 8.486(c)(1)(A). On contents and format requirements for the record, see §§20.5-20.14. On the importance of filing a supporting record, see §20.4.

All documents in the record must be authenticated. This is usually accomplished by including appropriate language in the verified petition. On verification of exhibits included in the record, see §§18.45-18.46.

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§18.58 9. Request for Stay

To prevent issues raised in a writ petition from becoming moot while the appellate court considers the petition, the petitioner can request a stay of the trial court proceedings. On requesting a stay, see chap 19.

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§18.59 a. Allegations in Support of Stay

When requesting a stay in the petition or in a separate filing, the petitioner should allege facts showing:

- Why a stay is required (*e.g.,* that specific irreparable harm will result to the petitioner if the status quo is not maintained);
- Why the real party in interest will not be prejudiced;
- The date by which the stay must issue to prevent threatened harm;
- Whether and when the stay was requested from the trial court; and
- Facts supporting that the personal service requirements for a request for immediate stay have been satisfied. See, *e.g.,* 4th App Dist, Local R 1.

See Cal Rules of Ct 8.486(a)(7), 8.112(c).

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§18.60 b. Documents in Support of Stay

The record should include a copy of any order of denial and all moving and opposing papers relating to any stay request made in the trial court and any other trial court documents related to the request for a stay. If the record cannot be prepared in time to accompany the request for a stay and the petition, the petitioner should include a declaration of counsel explaining the urgency, describing why the documents are unavailable, and fairly summarizing their substance. Cal Rules of Ct 8.486(a)(4).

JUDICIAL PERSPECTIVE: In stating the facts in the declaration, absolute accuracy is essential. Nothing can be more harmful to a petitioner's cause than overstating or mischaracterizing the facts.

On preparing the record, see §18.57; chap 20. For an example of a stay request, see form in §28.1. On documents filed in support of a stay request, see chap 19.

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Source: Civil Litigation/California Civil Writ Practice/18 Initiating a Writ Proceeding in the Court of Appeal/§18.61 III. WHEN TO FILE WRIT PETITION

§18.61 III. WHEN TO FILE WRIT PETITION

Computing the deadline by which to file a writ petition in the court of appeal is complicated and includes traps for the unwary. The petitioner must identify both:

- The correct maximum number of days allowed for filing the petition (see §§18.62-18.69); and
- The correct date on which to begin counting (see §§18.70-18.74).

JUDICIAL PERSPECTIVE: The petitioner must carefully review the filing deadlines (see chart in §18.76) and file as soon as possible. It is unwise to wait until the last day.

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A. Determining Maximum Number of Days in Which to File

§18.62 1. If Statute Specifies Deadline

Many statutes providing for writ review also specify deadlines for filing a petition. Generally, if a writ is authorized by statute, the petitioner should follow the statutory deadlines. On writs authorized by statute, see chap 16; App A.

CAUTION: Certain statutory time limits for filing a writ petition (*e.g.,* review of the denial of a motion for summary judgment under CCP §437c(m)(1)) are strictly construed and not affected by filing a motion for reconsideration. *Bensimon v Superior Court* (2003) 113 CA4th 1257, 1258, 7 CR3d 151; *Schmidt v Superior Court* (1989) 207 CA3d 56, 61, 254 CR 827.

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§18.63 a. Statutory Deadline May Be Short

Statutory deadlines for filing a writ petition can be *extremely short*. See, *e.g.,* CCP §418.10(c) (writ petition must be filed within 10 days after service of written notice of entry of order denying motion to quash service of summons for lack of jurisdiction). As a result, the petitioner should immediately consider whether to seek an extension for filing a petition if one is available under the pertinent statute. See, *e.g.*, CCP §418.10(c) (trial court may extend by 20 days deadline for writ petition from order denying motion to quash service of summons for lack of jurisdiction). See also *Schmidt v Superior Court* (1989) 207 CA3d 56, 61, 254 CR 827 (court had good cause to grant 20-day extension under CCP §437c(*l*) (now CCP §437c(m)(1))). Some statutes require that petitioners request extensions within the original deadline period (see, *e.g.,* CCP §§405.39, 437c(m)(1)), while others do not (see, *e.g.,* CCP §418.10(c)). To be safe, it is best to always request extensions within the original time period. On statutory deadlines and extensions, see chart in §18.76 and chap 16.

PRACTICE TIP: If the petitioner receives notice of the trial court's ruling so late that only a few days remain before the writ petition must be filed, the petitioner should request an extension, if allowed, and use the extension application to explain why the petitioner needs more time to consider whether to file a writ, noting (if applicable) that the petitioner has or will retain appellate counsel for this purpose.

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§18.64 b. Statutory Deadlines Generally Treated as Jurisdictional

Courts generally treat mandatory statutory deadlines as jurisdictional, *i.e.,* the failure to comply with them results in the court not having power to consider the petition. See, *e.g., Eldridge v Superior Court* (1989) 208 CA3d 1350, 1355, 256 CR 724 (court dismissed untimely writ petition seeking review of denial of summary adjudication motion; time limits for filing petition were mandatory and court was without jurisdiction to entertain untimely petition); *Abadjian v Superior Court* (1985) 168 CA3d 363, 369, 214 CR 234 (limitation period for seeking writ review of summary adjudication decision is jurisdictional).

PRACTICE TIP: As a practical matter, courts treat virtually any statutory deadline as mandatory. See *Eldridge v Superior Court, supra* (court treated statute saying petition "may" be brought within 20 days as mandatory).

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§18.65 c. Extensions Under CCP §1013 Are Generally Inapplicable

Assume that the extensions of time set out in CCP §1013 do not apply to the deadlines for filing writ petitions unless specific statutory or decisional authority indicates otherwise in a particular situation. See *Mario Saikhon, Inc. v Agricultural Labor Relations Bd.* (1983) 140 CA3d 581, 583, 189 CR 632 (because statute at issue required that petition be filed within 30 days of issuance, not service, of decision, §1013 was inapplicable). If a statute states that the time for filing a writ petition begins to run from *service* of a particular paper, courts generally do not apply CCP §1013 to extend the statutory deadline if service was by mail (CCP §1013(a)), express mail, or other overnight delivery method or fax (see CCP §1013(c)).

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2. If No Applicable Statutory Deadline

§18.66 a. 60-Day Period Applies

If there is no statutory time limit for filing a writ petition, the appellate courts generally impose the 60-day filing period applicable to appeals. *Cal W. Nurseries, Inc. v Superior Court* (2005) 129 CA4th 1170, 1173, 29 CR3d 170. Because use of the 60-day filing rule for writ petitions is prudential, it is not jurisdictional. See *Good v Superior Court* (2008) 158 CA4th 1494, 1505 n9, 71 CR3d 125 (refusing to dismiss writ petition filed more than 60 days after trial court ruling). However, a petitioner will be hard pressed to make a case for the necessity of immediate intervention by the court of appeal if he or she delays more than 60 days in filing a writ petition.

JUDICIAL PERSPECTIVE: Filing a petition on the 59th day does not ensure a favorable response from the court. Unless there is good cause for a delay, the petitioner should always file the petition as soon as possible after entry of the challenged order.

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Source: Civil Litigation/California Civil Writ Practice/18 Initiating a Writ Proceeding in the Court of Appeal/§18.67 b. Doctrine of Laches May Apply to Petitions Filed After 60 Days

§18.67 b. Doctrine of Laches May Apply to Petitions Filed After 60 Days

If a petition is filed more than 60 days after issuance of the challenged ruling (and there is no statutory deadline), the respondent or real party in interest may assert the doctrine of laches. Under this doctrine, a writ petition may be denied if:

- A party unreasonably delays in filing the petition; and
- There is prejudice to the real party in interest.

See *Peterson v Superior Court* (1982) 31 C3d 147, 163, 181 CR 784 (laches did not apply because there was neither unreasonable delay in filing writ petition nor prejudice).

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§18.68 c. Court May Exercise Its Discretion and Consider Petitions Filed After 60 Days

Absent a showing of prejudice (and any statutory deadline), the courts of appeal have discretion to entertain a writ petition filed more than 60 days after issuance of the challenged ruling. See, *e.g.*, *Good v Superior Court* (2008) 158 CA4th 1494, 1505 n9, 71 CR3d 125 (refusing to dismiss writ petition filed more than 60 days after trial court ruling); *People v Superior Court (Lopez)* (2005) 125 CA4th 1558, 1562, 24 CR3d 66 (reaching merits of writ petition filed more than 60 days after trial court's order because there was no claim that delay prejudiced real party); *Planned Parenthood Golden Gate v Superior Court* (2000) 83 CA4th 347, 356, 99 CR2d 627 (hearing writ petition filed beyond 60-day period because issue presented implicated important privacy rights of third parties).

JUDICIAL PERSPECTIVE: It is crucial to file a writ petition as soon as possible, especially if the petition seeks a stay of trial court proceedings. The judicial attitude is that, if counsel does not think the matter is important enough to drop everything and immediately seek relief from the court of appeal, why should the court interrupt its work on appeals to let counsel cut in line? Counsel should never test the court's discretionary power unless there is a very good reason why the writ could not have been brought sooner. In addition, counsel should always provide an explanation for the delay to avoid application of the laches doctrine. On application of the laches doctrine, see §18.67.

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§18.69 3. If Order Specifies Due Date for Compliance

In some cases, the trial court's order may require performance of a certain act (*e.g.,* production of documents in discovery) by a certain date. As a practical matter, the date for performance determines the last day to file a writ petition, even if a statutory deadline would seem to grant more time, because counsel either defies the order (with the risks attendant on disregarding any court order) or complies with the order (potentially rendering the petition moot). However, counsel should not wait until the day before performance is required to file a writ petition and seek a stay. The better practice is to give the court of appeal several days to consider and act on a stay request. On requesting a stay, see §§18.19, 18.58-18.60; chap 19.

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B. Determining When to File Writ Petition

1. Events That Trigger Time Period to File

§18.70 a. Entry of Order

The most common trigger for the time period in which to file a writ petition is entry of the challenged order or ruling. If a statute authorizing writ review does not specify the trigger date for the time period in which to file a petition, counsel should consider it to be the date of entry of the order or ruling.

PRACTICE TIP: The appellate court may construe the entry of the order as the time that the petitioner first became *aware* of the trial court's order, such as when the court mailed a copy of the order to the parties. See *Schmidt v Superior Court* (1989) 207 CA3d 56, 60, 254 CR 827 (time for filing writ petition started when trial court mailed its minute order to parties reflecting its order denying summary judgment, even though party later mailed notice of order).

NOTE: If there is any doubt as to which event applies to trigger the time period to file the petition, prudence demands the use of the *first* event that occurs.

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Source: Civil Litigation/California Civil Writ Practice/18 Initiating a Writ Proceeding in the Court of Appeal/§18.71 b. Service of Notice of Entry of Order

§18.71 b. Service of Notice of Entry of Order

Service of a written notice of entry of the trial court's order is the trigger date for filing a writ petition in some statutes. See, *e.g.,* CCP §437c(m)(1) (on entry of order party may, within 20 days after service of written notice of entry of order, petition for peremptory writ). However, when the trial court directs the petitioner to serve notice of the underlying order, the appellate court may calculate the time limitations for filing the petition as though the time ran from the *entry* of the order and not from *service* of the notice. Otherwise, the petitioner could indefinitely extend the usually very short statutory time to file by simply failing to serve the notice.

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§18.72 c. Mailing of Minute Order

The court may also look to the minute order as giving the parties notice of entry of the order and start the time for filing the petition without a "formal" order ever being prepared or served. See *Schmidt v Superior Court* (1989) 207 CA3d 56, 60, 254 CR 827 (because petitioner became aware of trial court's ruling through minute order, that order constituted "written notice of entry of the order"); *Sturm, Ruger & Co. v Superior Court* (1985) 164 CA3d 579, 582, 210 CR 573 (mailing of minute order sufficient to begin running of time for filing writ petition). See also Caution in §18.73.

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§18.73 d. Notice Given in Open Court

For some types of orders, notice in open court may trigger the beginning of a filing period. For example, in *Guedalia v Superior Court* (1989) 211 CA3d 1156, 1163, 260 CR 99, the court held that the deadline for petitioning for relief from denial of a CCP §170.6 peremptory challenge began when the trial judge stated his decision in open court, because the parties were present, and thus received actual notice, and the statute did not expressly require that notice be *written*.

CAUTION: Trial courts often ask counsel to "waive notice" of a ruling, essentially converting the court's minute order into a sufficient notice of ruling and starting the time to petition running. Counsel should *not* waive notice unless the petition is ready, especially if petitioning for relief from denial of summary judgment or adjudication. Insisting on formal notice gives counsel time to prepare a convincing petition that he or she can file quickly once the court or opposing counsel serves notice of the ruling.

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§18.74 2. How to Count Days in Which to File

When calculating the time period to file an appellate court writ petition, counsel should exclude the day of the triggering event and include the last day, unless the last day is a judicial holiday, in which case it is also excluded. See CCP §§12-12a.

On treating any day that a court is authorized to be closed because of the state's fiscal crisis (*i.e.*, a "furlough day") as a holiday, see Govt C §68106(b)(1) (inoperative as of July 1, 2010, and repealed as of January 1, 2011, unless legislation deletes or extends those dates).

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§18.75 C. Filing Effective on Receipt by Court

Filing a writ petition in the court of appeal is effective only on the appellate court's *receipt* of the petition, not on the date that the petition was mailed. See Cal Rules of Ct 8.25(b)(1). The priority mail, express mail, or overnight delivery exceptions in Cal Rules of Ct 8.25(b)(3) do *not* apply to original writ petitions. See Cal Rules of Ct 8.25(b)(4).

PRACTICE TIP: If time is short or there is any question concerning timeliness, counsel should hand deliver the petition to the court.

Most courts do not permit electronic filing or fax filing of writ petitions. But see 2nd App Dist IOPP, "Invitation to File E-Briefs," at http://www.courtinfo.ca.gov/courts/courtsofappeal/2ndDistrict/efile.htm (encouraging filing of briefs electronically, *in addition* to "hard copies" filed with court).

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Source: Civil Litigation/California Civil Writ Practice/18 Initiating a Writ Proceeding in the Court of Appeal/§18.76 D. Chart: Time for Filing Petitions

§18.76 D. Chart: Time for Filing Petitions

Type of Action Being Reviewed	*Number of Days Within Which Petition Must Be Filed*
Order denying or granting motion for judicial disqualification.	Within 10 days after service of written notice of entry; time is extended under CCP §1013(a) if service is by mail. CCP §170.3(d); *People v Hull* (1991) 1 C4th 266, 271, 2 CR2d 526 (10-day limit of §170.3(d) applies to both peremptory and for-cause challenges). See also *Guedalia v Superior Court* (1989) 211 CA3d 1156, 1163, 260 CR 99 (notice may be given in open court).
Review of orders concerning coordination of action.	Within 20 days after service on petitioner of written notice of entry of court's order under CCP §§404-404.9. CCP §404.6. Trial court for good cause may order up to 10 more days if order is made within original 20-day period. CCP §404.6.
Denial of motion to quash service of process.	Within 10 days after service of written notice of entry of order denying motion. CCP §418.10(c). Trial court for good cause may allow up to 20 more days for filing. CCP §418.10(c).
Order denying or granting motion for summary adjudication of issues; denial of motion for summary judgment. (Judgment after order granting motion for summary judgment is appealable and thus not subject to review by writ. See §16.66.)	Within 20 days after service of written notice of entry of denial of motion. CCP §437c(m)(1). File petition 5 days later if court mailed notice of the judgment or order to an address in California, 10 days if mailed to an address in the United States, and 20 days if mailed to an address outside the United States. CCP §437c(m)(1). Trial court for good cause may allow an additional 10 days if motion made before expiration of original 20-day period. CCP §437c(m)(1). *Note:* The filing of a motion for reconsideration does not extend the filing period. *Schmidt v Superior Court* (1989) 207 CA3d

	56, 61, 254 CR 827.
Order on motion to expunge a lis pendens.	Within 20 days after service of written notice of order. CCP §405.39. Trial court may allow an additional 10 days if motion made before expiration of original 20-day period. CCP §405.39.
Order on motion to determine whether a settlement is in good faith.	Within 20 days after service of written notice of determination. CCP §877.6(e). Trial court may allow maximum 20-day extension. CCP §877.6(e).
Order granting or denying motion to change place of trial.	Within 20 days after service of written notice of order. CCP §400. Trial court for good cause may extend time an additional 10 days if motion made before expiration of the 20-day period. CCP §400.
Order granting or denying motion to reclassify an action or proceeding as a limited civil case under CCP §§403.010-403.090.	Within 20 calendar days after service of written notice of order. CCP §403.080. Trial court for good cause may extend time for filing an additional 10 days if motion made before expiration of the 20-day period. CCP §403.080.
Order granting or denying motion concerning disclosure of public records.	Within 20 days after service of written notice of entry of the order. Govt C §6259(c). Trial court may extend time for filing an additional 20 days. Govt C §6259(c).
All other orders and nonappealable judgments, unless a specific time period is provided by statute.	Courts of appeal generally require petitioners to file writ petitions within 60 days after entry of order at issue. *Cal W. Nurseries, Inc. v Superior Court* (2005) 129 CA4th 1170, 1173, 29 CR3d 170. See §18.66. Reviewing courts have discretion to review petition filed after 60-day period. See §18.68.

PRACTICE TIP: When relevant, the deadlines in this chart also apply to original writ proceedings filed in the California Supreme Court. On petitions filed in the supreme court, see §§27.2-27.11.

Counsel should always research the applicable code sections for time limits. For additional examples of statutory time limits, see "Sixth District Outline of Original Proceedings and Relief Ancillary to Appeal," available on the court's

website at http://www.courtinfo.ca.gov/courts/courtsofappeal/6thDistrict/faq/6DCAproc.doc.

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IV. FILING AND SERVING THE PETITION

A. Serving Procedures

§18.77 1. When to Serve

The petitioner must serve the writ petition (which includes the formal petition and the supporting memorandum) and exhibits (either appended to the petition or submitted in a separate appendix) on adverse parties *before* filing them in the court of appeal. Cal Rules of Ct 8.25(a), 8.486(e). In rare situations, the court may permit filing without service, with the proof of service to be filed later. CCP §§1088, 1088.5; Cal Rules of Ct 8.486(e)(6). Some courts have specific rules on service when the petitioner seeks a stay.

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§18.78 2. How to Serve

The petition must be served in the same manner as a brief in an ordinary civil appeal, *i.e.,* personally, by mail, or on counsel. See Cal Rules of Ct 8.25(a).

PRACTICE TIP: If seeking an immediate stay, the petitioner should expedite service through personal delivery (see CCP §1011) or (if there is a prior agreement) facsimile service, with proof of actual delivery filed with the petition. On requesting a stay, see chap 19.

Most courts insist on counsel's best efforts to give the opponent a realistic opportunity to respond. For example, in the Fourth Appellate District, the petitioner must file a declaration establishing prior service by personal delivery or other "expeditious method consented to in advance by the party served" of writ petitions that include a request for stay, injunction, or other form of immediate relief. Without this declaration, the court will not act on the request for 5 days, except to deny it summarily, absent a showing of good cause. See 4th App Dist Local R 1. Similarly, the Sixth Appellate District requires hand service for petitions seeking a temporary stay within 5 days of filing. See "Sixth District Outline of Original Proceedings and Relief Ancillary to Appeal," available on the court's website at http://www.courtinfo.ca.gov/courts/courtsofappeal/6thDistrict/faq/6DCAproc.doc.

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§18.79 3. Whom to Serve

Technically, Cal Rules of Ct 8.486(e) requires the petitioner to serve the respondent and real party in interest. In practice, if a party is represented by counsel in the underlying action, the petitioner may serve counsel; if the party is unrepresented, the petitioner may serve the party. In addition, the petitioner must serve the Attorney General if the petition contests a statute's constitutionality or is filed on behalf of the state, a county, or an officer whom the Attorney General may represent in specified proceedings. Cal Rules of Ct 8.29, 8.486(e)(4).

When serving the respondent trial court, petitioner should deliver the petition to the trial court clerk for forwarding to the trial court judge. In a multi-judge court, serve the presiding judge (CCP §416.50(a)) and deliver a courtesy copy of the petition to the trial judge (through delivery to the court clerk).

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§18.80 4. Proof of Service

The proof of service must name each party and the attorney who represents that party, and that attorney's telephone number. Cal Rules of Ct 8.486(e)(3). The court may accept a petition accompanied by a defective proof of service, but it may strike the petition or impose a lesser sanction if a proper proof of service is not filed within 5 calendar days. Cal Rules of Ct 8.486(e)(5).

A declaration of proof of service by mail creates a rebuttable presumption of receipt. The claimed recipient may rebut this presumption only by producing evidence supporting a finding of no actual notice. See *Bonzer v City of Huntington Park* (1993) 20 CA4th 1474, 1479, 25 CR2d 278 (in their six declarations, respondents had presented detailed, credible, and unimpeached evidence of no actual notice, entitling them to CCP §473 relief).

For sample proofs of service, see California Civil Procedure Before Trial §§18.21-18.24 (4th ed Cal CEB 2004).

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B. Filing Procedures

1. What to File

§18.81 a. Petition

The petitioner must file an original plus four copies of the petition (which consists of the formal petition and the supporting memorandum). Cal Rules of Ct 8.44(b)(3). Petitioner does not need to file any copies with the California Supreme Court.

PRACTICE TIP: Counsel should submit an additional copy for the court to return as a file stamped copy for counsel's files.

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Source: Civil Litigation/California Civil Writ Practice/18 Initiating a Writ Proceeding in the Court of Appeal/§18.82 b. Record

§18.82 b. Record

Only one copy of the record need be filed when it is submitted separately from the petition, unless the court orders otherwise by local rule or in the specific case. Cal Rules of Ct 8.44(b)(5). On submitting the record, see §18.57.

JUDICIAL PERSPECTIVE: Some districts, and divisions within districts, prefer multiple copies of the record unless it is so voluminous that extra copies would be wasteful. Counsel should check with local court clerks.

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§18.83 c. Information Sheet in Fifth District

All writ petitions (except petitions for writs of habeas corpus) filed in the Fifth District Court of Appeal must be accompanied by a completed face sheet entitled Appellate Court Writ Petition Information Sheet, available online at http://www.courtinfo.ca.gov/courts/courtsofappeal/5thDistrict/forms.htm. For an example, see form in §28.22.

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§18.84 2. Filing Fee

The fee for filing a writ petition within the original civil jurisdiction of a court of appeal is $655. Govt C §§68926, 68926.1(b).

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§18.85 3. Where to File

Counsel should file a writ petition in the appellate district with jurisdiction over the trial court in which the case is venued. See *Rivera v Division of Indus. Welfare* (1968) 265 CA2d 576, 581, 71 CR 739. This is a rule of practice, not jurisdictional; courts of appeal have statewide jurisdiction. Cal Const art VI, §10 (courts of appeal possess coequal jurisdiction with California Supreme Court to administer extraordinary relief without regard to existence of appellate jurisdiction over pending lawsuit to which relief relates).

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Source: Civil Litigation/California Civil Writ Practice/18 Initiating a Writ Proceeding in the Court of Appeal/§18.86 a. File in Lowest Court Capable of Granting Relief

§18.86 a. File in Lowest Court Capable of Granting Relief

Counsel should file the writ petition in the lowest court capable of granting relief. Cal Rules of Ct 8.486(a)(1). Technically, writ petitions may be filed in the first instance in the California Supreme Court. See CCP §§1068(a) (writ of review), 1085(a) (writ of mandate), 1103(a) (writ of prohibition). However, this is appropriate only in extraordinary circumstances. Cal Rules of Ct 8.486(a)(1). On writ petitions in the California Supreme Court, see §§27.2-27.11.

JUDICIAL PERSPECTIVE: As a practical matter, skipping a court is almost never justified. Unless counsel is reasonably certain that the higher court will share his or her view of the exceptional urgency or other unique factors concerning the case, applying to a higher court than would ordinarily be the first stop is a waste of time and resources.

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Source: Civil Litigation/California Civil Writ Practice/18 Initiating a Writ Proceeding in the Court of Appeal/§18.87 b. Locations of Courts of Appeal

§18.87 b. Locations of Courts of Appeal

The websites for the individual appellate courts provide local rules as well as the location and mailing address for each court of appeal. The trial court websites provide similar information as well as operating hours, which can be important when seeking an immediate stay of proceedings in connection with a petition for extraordinary relief. On seeking a stay of trial court proceedings, see chap 19.

The following are the locations for filing writ petitions with the courts of appeal, their websites, and the specific web addresses for their local rules.

First Appellate District (serves Alameda, Contra Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Napa, San Francisco, San Mateo, Solano, and Sonoma Counties; all divisions):

350 McAllister Street
San Francisco, CA 94102
(415) 865-7300
http://www.courtinfo.ca.gov/courts/courtsofappeal/1stDistrict
Local Rules:
http://www.courtinfo.ca.gov/courts/courtsofappeal/1stDistrict/localrules.htm

Second Appellate District:

Divisions 1-5, 7-8 (Los Angeles County)

300 S. Spring Street, Second Floor
Los Angeles, CA 90013
(213) 830-7000
http://www.courtinfo.ca.gov/courts/courtsofappeal/2ndDistrict
Local Rules:
http://www.courtinfo.ca.gov/courts/courtsofappeal/2ndDistrict/localrules.htm

Division 6 (San Luis Obispo, Santa Barbara, and Ventura Counties)

200 E. Santa Clara Street
Ventura, CA 93001
(805) 641-4700
http://www.courtinfo.ca.gov/courts/courtsofappeal/2ndDistrict
Local Rules:
http://www.courtinfo.ca.gov/courts/courtsofappeal/2ndDistrict/localrules.htm

Third Appellate District (serves Alpine, Amador, Butte, Calaveras, Colusa, El Dorado, Glenn, Lassen, Modoc, Mono, Nevada, Placer, Plumas, Sacramento, San Joaquin, Shasta, Sierra, Siskiyou, Sutter, Tehama, Trinity, Yolo, and Yuba Counties; no divisions):

900 N Street, Room 400
Sacramento, CA 95814
(916) 654-0209
http://www.courtinfo.ca.gov/courts/courtsofappeal/3rdDistrict
Local Rules:
http://www.courtinfo.ca.gov/courts/courtsofappeal/3rdDistrict/localrules.htm

Fourth Appellate District:

Division 1 (Imperial and San Diego Counties)

750 B Street, Suite 300
San Diego, CA 92101

(619) 645-2760
http://www.courtinfo.ca.gov/courts/courtsofappeal/4thDistrictDiv1
Local Rules:
http://www.courtinfo.ca.gov/courts/courtsofappeal/4thDistrict/documents/localrules2008.pdf

Division 2 (Inyo, Riverside, and San Bernardino Counties)

3389 12th Street
Riverside, CA 92501
(951) 248-0200
http://www.courtinfo.ca.gov/courts/courtsofappeal/4thDistrictDiv2
Local Rules:
http://www.courtinfo.ca.gov/courts/courtsofappeal/4thDistrict/documents/localrules2008.pdf

Division 3 (Orange County)

925 N. Spurgeon Street
Santa Ana, CA 92701
(714) 558-6777
http://www.courtinfo.ca.gov/courts/courtsofappeal/4thDistrictDiv3
Local Rules:
http://www.courtinfo.ca.gov/courts/courtsofappeal/4thDistrict/documents/localrules2008.pdf

Fifth Appellate District (serves Fresno, Kern, Kings, Madera, Mariposa, Merced, Stanislaus, Tulare, and Tuolumne Counties; no divisions):
2424 Ventura Street
Fresno, CA 93721
(559) 445-5491
http://www.courtinfo.ca.gov/courts/courtsofappeal/5thDistrict
Local Rules:
http://www.courtinfo.ca.gov/courts/courtsofappeal/5thDistrict/localrules.htm

Sixth Appellate District (serves Monterey, San Benito, Santa Clara, and Santa Cruz Counties; no divisions):
333 W. Santa Clara Street, Suite 1060
San Jose, CA 95113
(408) 277-1004
http://www.courtinfo.ca.gov/courts/courtsofappeal/6thDistrict
Local Rules:
http://www.courtinfo.ca.gov/courts/courtsofappeal/6thDistrict/localrules.htm

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19

Requesting a Stay in an Appellate Court Writ Proceeding

Christina J. Imre
Douglas J. Collodel

I. SCOPE OF CHAPTER §19.1

II. GENERAL CONSIDERATIONS
- A. Purpose of Stay §19.2
- B. Effect of Alternative Writs
  - 1. Alternative Writ of Mandate or Order to Show Cause Does Not Stay Trial Court Proceedings §19.3
  - 2. Alternative Writ of Prohibition or Order to Show Cause Stays Trial Court Proceedings §19.4
  - 3. Order to Show Cause Re Writ of Review (Certiorari) Does Not Stay Trial Court Proceedings §19.5
- C. Scope of Stay Request §19.6

III. REQUIREMENTS FOR STAY REQUEST
- A. Imminent Injury §19.7
- B. Stay Unsuccessfully Sought From Trial Court §19.8

IV. STAY APPLICATION
- A. Application Should Be Part of Writ Petition, But Can Be Separate Document §19.9
- B. Offer to Provide Undertaking §19.10
- C. Preparation of Documents
  - 1. Cover Requirements §19.11
    - a. Notice of Stay Request §19.12
    - b. Trial Court Identifying Information §19.13
  - 2. Statement of Urgency §19.14
  - 3. Allegations in Support of Stay §19.15
  - 4. Documents in Support of Stay §19.16
- D. Service of Stay Request
  - 1. Request Made in Writ Petition §19.17
  - 2. Request Made in Separate Application §19.18

V. OPPOSITION TO STAY REQUEST §19.19

VI. APPELLATE COURT ACTION ON STAY REQUEST §19.20

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§19.1 I. SCOPE OF CHAPTER

This chapter discusses staying trial court actions during the pendency of an appellate court writ proceeding. The chapter begins with a discussion of why and when a stay request may be necessary, including when an alternative writ acts as a stay. See §§19.2-19.5. It next discusses the scope of a stay request. See §19.6. The chapter then discusses requirements for a stay (see §§19.7-19.8), the contents of a stay application (see §§19.9-19.16), and service requirements. See §§19.17-19.18. The chapter concludes with a discussion of opposition to a stay request and the appellate court's action on a stay request. See §§19.19-19.20.

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II. GENERAL CONSIDERATIONS

§19.2 A. Purpose of Stay

A petitioner seeking writ review of a trial court ruling does not, of course, want to comply with the challenged ruling. Nor does the petitioner want the challenged ruling to dictate the course of further proceedings in the trial court. With very rare exceptions (such as an order expunging a notice of pendency of action; see CCP §405.35), the mere filing of a writ petition does not automatically stay the challenged ruling.

Thus, in many cases, the petitioner will want to seek a stay of the trial court ruling, and perhaps other trial court proceedings, pending the appellate court's disposition of the writ petition. A stay will forestall compliance with the trial court ruling and may halt other trial court proceedings while the challenged ruling is before the appellate court.

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B. Effect of Alternative Writs

§19.3 1. Alternative Writ of Mandate or Order to Show Cause Does Not Stay Trial Court Proceedings

The issuance of an alternative writ of mandate or order to show cause (OSC), in and of itself, does not automatically stay the challenged trial court ruling or further trial court proceedings. See CCP §1087; Cal Rules of Ct 8.486(a)(7), 8.487(a)(4). See also, *e.g.*, *Anglo Irish Bank Corp. v Superior Court* (2008) 165 CA4th 969, 977, 81 CR3d 535 (appellate court stayed trial court proceedings and issued order to show cause); *Zaremberg v Superior Court* (2004) 115 CA4th 111, 114, 8 CR3d 723 (alternative writ of mandate issued but stay request denied because petitioner would not suffer irreparable injury and stay would cause significant hardship); *County of Los Angeles v Superior Court* (1993) 18 CA4th 588, 593, 22 CR2d 409 (alternative writ of mandate issued but stay request initially overlooked; court of appeal subsequently considered request and granted stay).

Accordingly, the petitioner must specifically ask for a stay and do so in accordance with the rules of court. Cal Rules of Ct 8.486(a)(7) (if "petition requests a temporary stay, it must comply with rule 8.116 and explain the urgency"), 8.116(c) (if document fails to comply with rules, appellate court can refuse to consider stay request). See §§19.11-19.13.

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§19.4 2. Alternative Writ of Prohibition or Order to Show Cause Stays Trial Court Proceedings

An alternative writ of prohibition commands the party to whom it is directed (usually a court) "to desist or refrain from further proceedings in the action or matter specified therein, until the further order of the court from which it is issued, and to show cause before such court… why such party should not be absolutely restrained from any further proceedings in such action or matter." CCP §1104. Accordingly, issuance of an alternative writ of prohibition or order to show cause automatically stays the challenged proceedings.

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§19.5 3. Order to Show Cause Re Writ of Review (Certiorari) Does Not Stay Trial Court Proceedings

On receipt of a petition for writ of review (certiorari), the reviewing court "may require a notice of the application to be given to the adverse party, or may grant an order to show cause why it should not be allowed, or may grant the writ without notice." CCP §1069. However, given the due process concerns recognized in *Palma v U.S. Indus. Fasteners, Inc.* (1984) 36 C3d 171, 681 P2d 893, the court cannot issue the writ in the first instance without notice. As the statute provides, the court may issue an order to show cause, which would not of itself stay the underlying proceedings, and the petitioner would need to request an immediate temporary stay.

Upon issuance of the writ, however, the underlying proceedings are in most cases explicitly stayed, as the writ typically commands the party to whom it is directed to certify to the issuing court the record of the underlying proceedings and "in the meantime, to desist from further proceedings in the matter to be reviewed." CCP §1071. If this language is absent from the writ of review, it does not stay the underlying proceedings. CCP §1072. On writs of review (certiorari), see §§4.10-4.16 (in the superior courts), 15.27-15.38 (in the appellate courts).

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§19.6 C. Scope of Stay Request

Often, stay requests are limited to compliance with the challenged ruling, *e.g.*, staying an order compelling production of allegedly privileged information. Sometimes, a stay request seeks suspension of all further trial court proceedings. See *Greenberg v Superior Court* (2009) 172 CA4th 1339, 1345, 92 CR3d 96 (staying trial during writ proceeding challenging denial of summary judgment); *Anglo Irish Bank Corp. v Superior Court* (2008) 165 CA4th 969, 977, 81 CR3d 535 (staying trial court proceedings during writ proceeding challenging denial of motion to quash); *Henry v Superior Court* (2008) 160 CA4th 440, 448, 72 CR3d 808 (staying all trial court activity, including trial, during writ proceeding challenging pre-trial ruling excluding evidence); *California Pub. Employees' Retirement Sys. v Superior Court* (2008) 160 CA4th 174, 187, 72 CR3d 561 (same for challenge of order overruling demurrer); *Zevnik v Superior Court* (2008) 159 CA4th 76, 81, 70 CR3d 817 (staying discovery during writ proceeding challenging ruling on preclusive effect of prior action); *Ombudsman Servs. of N. Cal. v Superior Court* (2007) 154 CA4th 1233, 1240, 65 CR3d 456 (staying discovery during writ proceeding challenging order to produce records).

As these cases illustrate, the scope of a stay request will depend on the substance and impact of the challenged order. The following writ cases also are illustrative:

- Stay prevented disclosure of client information while appellate court considered whether information was subject to disclosure in judgment debtor examination (*Hooser v Superior Court* (2000) 84 CA4th 997, 1001, 101 CR2d 341);
- Stay delayed hearing on motion for return of property while appellate court considered whether defendant could bring or join in motion (*Ensoniq Corp. v Superior Court* (1998) 65 CA4th 1537, 1546, 77 CR2d 507);
- Stay prevented further trial court proceedings while appellate court reviewed order denying motion to stay or dismiss on forum non conveniens grounds (*Chong v Superior Court* (1997) 58 CA4th 1032, 1036, 68 CR2d 427);
- Stay prevented depositions while appellate court considered whether local planning officials could be questioned about alleged informal agreements about zoning (*City of Santa Cruz v Superior Court* (1995) 40 CA4th 1146, 1148, 48 CR2d 216);
- Stay prevented disclosure of records while appellate court considered whether information identifying individuals arrested during 10-year period was subject to disclosure (*County of Los Angeles v Superior Court* (1993) 18 CA4th 588, 593, 22 CR2d 409);
- Stay prevented further trial court proceedings while appellate court considered order disqualifying attorney (*State Water Resources Control Bd. v Superior Court* (2002) 97 CA4th 907, 913, 118 CR2d 784, quoting *Reed v Superior Court* (2001) 92 CA4th 448, 455, 111 CR2d 842 ("petition for extraordinary relief on the merits accompanied by a request for an immediate stay is preferable [to an appeal], because generally extraordinary writs are determined more speedily than appeals. The specter of [improper] disqualification of counsel should not be allowed to hover over the proceedings for an extended period of time for appeal"));
- Stay prevented further trial court proceedings while appellate court considered whether co-defendant's CCP §170.6 challenge was timely (*School Dist. of Okaloosa County v Superior Court* (1997) 58 CA4th 1126, 1130, 68 CR2d 612).

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III. REQUIREMENTS FOR STAY REQUEST

§19.7 A. Imminent Injury

A stay request is proper only if the party seeking relief is threatened with imminent injury. See Cal Rules of Ct 8.486(a)(7)(A) (if petition requests temporary stay, it must explain urgency), 8.487(a)(4) (without requesting opposition or awaiting reply, court can grant or deny a request for temporary stay). On statement of urgency in stay request, see §19.14.

NOTE: A frivolous stay request, especially if based on false representations, may lead to the imposition of sanctions. *Jones v Superior Court* (1994) 26 CA4th 92, 100, 31 CR2d 264. On sanctions for frivolous writ petitions, see §§24.60-24.65.

PRACTICE TIP: A petitioner seeking a stay must act expeditiously, regardless of any time limit for filing a writ petition (see §§18.61-18.76), because stay relief depends on a credible claim of imminent injury. The longer a petitioner waits to seek a stay, the less likely the appellate court will be to credit such a claim.

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§19.8 B. Stay Unsuccessfully Sought From Trial Court

Although it is not statutorily required, as a practical matter, a party should always seek a stay from the trial court before seeking one from the appellate court. Not only might this eliminate the need to seek a stay from the court of appeal, but it also shows the appellate court that the party acted promptly and exhausted all other avenues for immediate relief.

A party therefore should consider, before the trial court hearing, whether it will seek writ review of an adverse ruling. If the party anticipates filing a writ petition, or needs time to consider doing so, he or she should ask the trial court to stay an adverse ruling for (a) a specific period of time (*e.g.*, 20 days) to allow time to seek writ review, and (b) if writ relief is sought, a continuing stay pending the appellate court's disposition of the petition. See CCP §918(a).

A party can make this request orally at the hearing, offering to prepare the written stay order, or through an ex parte application immediately after the trial court issues an adverse ruling.

NOTE: Specific rules of court govern ex parte applications. See Cal Rules of Ct 3.1200-3.1207. On ex parte applications, see California Civil Procedure Before Trial §§13.3-13.14 (4th ed Cal CEB 2004).

PRACTICE TIP: If the trial court grants a stay to allow the aggrieved party to file a writ petition, that party should immediately notify the court of any later decision to forego writ relief.

On stays in a trial court writ proceeding, see chap 6.

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IV. STAY APPLICATION

§19.9 A. Application Should Be Part of Writ Petition, But Can Be Separate Document

A request for an immediate, temporary stay is most commonly made in the writ petition itself. See Cal Rules of Ct 8.486(a)(7)(A) (if petition requests temporary stay, it must, among other requirements, explain urgency). When the petitioner uses this approach, the petition (which is verified) must include all allegations necessary to support issuance of a stay. The cover of the petition should note that a stay is requested, and the introductory section of the petition should explain why a temporary stay is necessary. The prayer for relief, in turn, must include a request for an immediate, temporary stay. Cal Rules of Ct 8.116(a)-(b), 8.486(a)(7). On the cover and introductory section, see §§18.19, 18.24, 18.56-18.60; on the prayer for relief, see §§18.36-18.41.

JUDICIAL PERSPECTIVE: Whether made in a writ petition or a separate document, a request for immediate stay sets off a flurry of activity in the court of appeal. As a practical matter, it is often useful to call the court shortly before filing and let the clerk know that a petition requesting an immediate stay will be filed, and when the petition will arrive. For telephone numbers for courts of appeal, see §18.87.

Alternatively, a petitioner can file, in conjunction with a writ petition, a separate application for a stay. See Cal Rules of Ct 8.50. A separate stay application must comply with the rules of court, including the rules pertaining to stay requests. Cal Rules of Ct 8.50, 8.116(a)-(b), 8.486(a)(7).

JUDICIAL PERSPECTIVE: There is no advantage to making a stay request by separate application. Doing so unnecessarily adds to the amount of paper filed with the court of appeal and creates the danger of delay if the documents are separated at some point.

For an example of a stay request included in the petition, see form in §28.1.

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§19.10 B. Offer to Provide Undertaking

Although it is not a statutory requirement, the court of appeal has discretion to require that a party seeking a stay furnish an undertaking (security) as a condition thereof. Accordingly, if the circumstances warrant, a petitioner seeking a stay may offer to provide an undertaking to enhance the chances the court of appeal will act quickly and favorably on the stay request.

On the requirements for undertakings, see California Civil Appellate Practice §§6.21-6.62 (3d ed Cal CEB 1996).

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C. Preparation of Documents

§19.11 1. Cover Requirements

Any documents requesting a temporary stay from the court of appeal must include (1) a notice of the stay request on the cover (see §19.12) and (2) the trial court identifying information on either the cover or at the beginning of the text (see §19.13). Cal Rules of Ct 8.116(a)-(b). If the document does not comply with these rules, the court of appeal may decline to consider the request. Cal Rules of Ct 8.116(c).

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§19.12 a. Notice of Stay Request

The rules of court require that the cover of any document seeking an immediate stay from the court of appeal or supreme court, including writ petitions (Cal Rules of Ct 8.116(a), 8.486(a)(7)):

- Prominently display the notice "STAY REQUESTED"; and
- Identify the nature and date of the proceeding or act sought to be stayed (*e.g.,* the trial is scheduled to begin on [*insert the scheduled date*], the property at issue will be sold on [*insert the scheduled date*], privileged materials must be produced on [*insert the scheduled date*]).

See, *e.g.*, 4th App Dist Local R 1 (cover of petition must contain conspicuous notation "IMMEDIATE RELIEF REQUESTED" or "STAY REQUESTED" or similar wording in compliance with Cal Rules of Ct 8.116). This information is commonly set out at the top of the cover so it is the first information communicated to the court of appeal.

For an exemplar petition with stay request, see form in §28.1.

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§19.13 b. Trial Court Identifying Information

The following information must be provided either on the cover of the document seeking a stay or at the beginning of the text (Cal Rules of Ct 8.116(b)):

- The trial court and department involved; and
- The name and telephone number of the trial judge whose order the request seeks to stay.

For a sample petition including a stay request, see form in §28.1.

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§19.14 2. Statement of Urgency

Whether a stay request is made in the petition or by separate application (see §19.9), the petitioner must explain the urgency of the situation, *i.e.*, why a stay is necessary and what harm will befall the petitioner in the absence of a stay. Cal Rules of Ct 8.486(a)(7)(A).

If a stay is sought in the petition itself, the petitioner must allege in the verified petition why the situation is urgent. If a stay is sought by way of separate application, the petitioner must support the application by sworn declarations explaining the urgency of the situation. See Cal Rules of Ct 8.50(b).

PRACTICE TIP: Whether seeking a stay in the writ petition or by way of separate application filed in conjunction with a petition, the petitioner should not wait until the last minute to request "urgent" stay relief. See §19.7.

For a sample petition including a stay request, see form in §28.1.

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§19.15 3. Allegations in Support of Stay

When requesting a stay, either in the petition or by separate application, the petitioner should allege facts showing:

- Why a stay is required (*i.e.,* the specific irreparable harm that will result to the petitioner if the status quo is not maintained);
- Why the real party in interest will not be prejudiced;
- The date by which the stay must issue to prevent the threatened harm;
- Whether and when the stay was requested from the trial court (see §19.8); and
- Facts showing that personal service requirements for a request for immediate stay have been satisfied. See, *e.g.,* 4th App Dist, Local R 1. On service of a stay request, see §§19.17-19.18.

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§19.16 4. Documents in Support of Stay

The record filed in support of the writ petition must be adequate to support the relief sought (see chap 20) and should include a copy of any order denying a stay by the trial court and all related moving and opposing papers. However, if the circumstances are so "exigent" that this is not reasonably possible, counsel must instead submit a declaration explaining (Cal Rules of Ct 8.486(b)(2)):

- The urgency for filing the petition;
- The reason why the supporting documents cannot be submitted; and
- The substance of the documents.

If the petitioner does not submit the required documents or an adequate declaration of counsel, the court of appeal may summarily deny the stay request, the petition, or both. Cal Rules of Ct 8.486(b)(4).

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D. Service of Stay Request

§19.17 1. Request Made in Writ Petition

When a stay is sought in the writ petition, the rules governing service of the petition apply. See §§18.77-18.80. Local rules may also include specific service requirements for stay requests. See, *e.g.*, 4th App Dist Local R 1 (requiring prior personal service or "other expeditious method" with the consent of the party so served of urgent stay requests). Even if no local rule applies, counsel should check with the court clerk to determine if the court expects service prior to filing.

PRACTICE TIP: The better practice is always to serve a stay request before filing. The appellate court will likely deny a stay request in the absence of service or if service is made in a manner that does not give the respondent and real party in interest adequate time to respond. In matters of extreme urgency, the court of appeal has the power to issue an immediate, temporary stay, but the court will likely invite opposition within a specified time, *e.g.*, 5 days, following which the court will either extend or lift the stay.

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§19.18 2. Request Made in Separate Application

When the petitioner seeks a stay by separate application filed in conjunction with a writ petition, the petitioner must serve the application before filing, unless advance service is excused by the Chief Justice or presiding justice. Cal Rules of Ct 8.50(a).

Local rules may impose specific service requirements for stay requests. See, *e.g.*, 4th App Dist Local R 1 (requiring prior personal service or "other expeditious method" with the consent of the party so served of urgent stay requests).

PRACTICE TIP: Again, the better practice is to serve a stay application before filing. Otherwise, the court of appeal will likely deny the request. In extenuating circumstances, the court of appeal has the power to issue an immediate, temporary stay. If it does so, the court will probably invite opposition within a specific period of time, *e.g.*, 5 days, following which it will either extend or lift the stay.

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§19.19 V. OPPOSITION TO STAY REQUEST

Opposition to a stay request should be filed promptly. Because the court of appeal can act on a stay request immediately, it is often advisable for the respondent or real party in interest to let the court clerk know whether and when opposition will be filed. On responding to a stay request, see chap 23.

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§19.20 VI. APPELLATE COURT ACTION ON STAY REQUEST

The speed with which the court will act on a stay request is driven largely by the immediacy of the alleged irreparable harm. For example, if a writ challenges an order compelling the production of documents in 48 hours, the court will often issue an immediate temporary stay, with notice to the real party to submit any opposition by a specified date, at which time the court will review the appropriateness of a further stay. If a writ challenges an order compelling production in 30 days, the court may not act on the stay request for a week or two. On actions in an appellate court writ proceeding, including on stay requests, see chaps 22, 24.

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20

The Record in Appellate Court Writ Proceedings

David de Jesus

I. SCOPE OF CHAPTER §20.1

II. RECORD REQUIREMENTS §20.2
- A. Rules of Court §20.3
- B. Necessity of Sufficient Record §20.4

III. PREPARING THE RECORD
- A. Who Prepares the Record §20.5
- B. What the Record Includes
  - 1. All Documents Enabling Appellate Court to Review Ruling at Issue §20.6
  - 2. Opposing Party's Papers §20.7
  - 3. Additional Facts as Necessary §20.8
  - 4. Reporter's Transcript §20.9
- C. Record Requirement for Petition for Writ of Review (Certiorari) §20.10

IV. FORMAT OF THE RECORD
- A. Binding of Documents §20.11
- B. Indexing, Pagination, and Order of Documents §20.12
- C. Visual Quality of Documents §20.13
- D. Citation to the Record §20.14

V. SERVING AND FILING THE RECORD
- A. Serving the Record §20.15
- B. Filing the Record §20.16

VI. JUDICIAL NOTICE §20.17
- A. Materials Presented to Trial Court for Judicial Notice §20.18
- B. Materials Not Presented to Trial Court for Judicial Notice §20.19
- C. Procedure for Requesting Judicial Notice in Appellate Court
  - 1. Motion Requesting Judicial Notice §20.20
  - 2. Timing of Request for Judicial Notice §20.21
  - 3. Opposition to Request for Judicial Notice §20.22

VII. PROTECTING CONFIDENTIAL DOCUMENTS IN THE RECORD
- A. Public Policy Favors Open Records §20.23
- B. Procedures to Seal or Unseal Portions of Record and Briefs §20.24
  - 1. When Trial Court Sealed Records §20.25
  - 2. When Trial Court Did Not Seal Records
    - a. Requesting That Appellate Court Seal Records §20.26
    - b. Lodging the Record §20.27
  - 3. Unsealing Records §20.28

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§20.1 I. SCOPE OF CHAPTER

An appellate court writ petition must be supported by a record, *i.e.,* documents appended to the writ petition itself or bound and submitted separately. Cal Rules of Ct 8.486(b)-(c). This chapter first discusses why a record is required and why it needs to be as complete as possible (see §§20.2-20.4). It next discusses the mechanics of preparing the record (see §§20.5-20.10), including the format of the documents (binding, indexing, and so forth), and citation form (see §§20.11-20.14). The chapter also discusses judicial notice (see §§20.18-20.22). Finally, it discusses protecting confidential information by sealing portions of the record (see §§20.23-20.28).

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§20.2 II. RECORD REQUIREMENTS

The record—the exhibits in support of the writ petition—provides the appellate court with the information it needs to fully consider the issues presented by the petition. Court rules, as well as pragmatic considerations, require that the record be adequate for this purpose. See §§20.3-20.4.

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§20.3 A. Rules of Court

The Rules of Court expressly require that an "adequate record" accompany an appellate court writ petition. Cal Rules of Ct 8.486(b). On contents of the record, see §§20.6-20.10.

The petitioner bears the burden of providing an adequate record and must take this obligation seriously. Cal Rules of Ct 8.486(b)(1). If the petitioner fails to submit an adequate record, the appellate court likely will summarily deny the petition. Cal Rules of Ct 8.486(b)(4).

Only in "exigent circumstances" may a petitioner be excused from filing the required record. Cal Rules of Ct 8.486(b)(2). In such circumstances, counsel must file a declaration (Cal Rules of Ct 8.486(b)(2)):

- Explaining the urgency;
- Explaining the circumstances making the documents unavailable; and
- Summarizing the substance of the absent documents.

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§20.4 B. Necessity of Sufficient Record

The necessity of a sufficient record stems from a straightforward rationale: judgments and orders are presumed correct. Thus, the party challenging a ruling must demonstrate error or an abuse of discretion. Failure to provide a record means that the challenging party has prima facie failed to meet its burden. See *Universal City Studios, Inc. v Superior Court* (2003) 110 CA4th 1273, 1275, 2 CR3d 484 (denial of writ petition "foreordained" because of inadequate record); *Lantz v Superior Court* (1994) 28 CA4th 1839, 1847 n8, 34 CR2d 358 (writ petition summarily denied because of insufficient record); *Lemelle v Superior Court* (1978) 77 CA3d 148, 156, 143 CR 450 (petition denied in part because record failed to permit "intelligent review" of trial court ruling; at minimum, appellate court needed opposing papers, transcript of hearing, and trial court's order). See also *Guardado v Superior Court* (2008) 163 CA4th 91, 95 n1, 77 CR3d 149 (petitioner's motion to "augment" record was improper; augmentation applies to appeals, not original writ proceedings).

JUDICIAL PERSPECTIVE: Lack of an adequate record is one of the most common reasons appellate courts deny writ petitions. Counsel should be sure to provide a reporter's transcript, or, if that is not possible, to explain why. Counsel also should be sure to include the opponent's papers. A writ petition seeks to invoke the court's equitable powers, and clean hands, *i.e.,* full and complete disclosure, are critical. On contents of the record, see §§20.6-20.10.

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III. PREPARING THE RECORD

§20.5 A. Who Prepares the Record

It is the petitioner's responsibility to prepare an adequate record. Cal Rules of Ct 8.486(b). See *Lemelle v Superior Court* (1978) 77 CA3d 148, 156, 143 CR 450 (petitioner required to furnish record sufficient to enable appellate court to evaluate trial court's exercise of discretion). See also *Guardado v Superior Court* (2008) 163 CA4th 91, 95 n1, 77 CR3d 149 (petitioner's motion to "augment" record was improper; augmentation applies to appeals, not original writ proceedings).

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B. What the Record Includes

§20.6 1. All Documents Enabling Appellate Court to Review Ruling at Issue

The record must include all documents the trial court considered in connection with the challenged ruling and supporting the relief sought, including (Cal Rules of Ct 8.486(b)(1)):

- The challenged ruling;
- All documents and exhibits submitted to the trial court supporting and opposing the challenged ruling;
- All other documents submitted to the trial court necessary to a full understanding of the case and the challenged ruling; and
- A reporter's transcript of the oral proceedings on the challenged ruling.

PRACTICE TIP: A copy of the trial court's ruling or order attached to a party's notice of entry of the order is a sufficient copy of the lower court's ruling. In other words, there is no need to include both a copy of the trial court's order and a copy of the notice of entry to which a copy of the order is appended. Counsel should include a copy of the notice of entry to show timeliness in seeking writ relief and, in some cases, to show compliance with the time limit for seeking writ relief. When the trial court has not signed a formal order, counsel should include the minute order. If the trial court has not yet made a final ruling, the appellate court will likely deny the petition as premature.

These documents do not have to be certified copies. See *Olson v Cory* (1983) 35 C3d 390, 401, 197 CR 843. They should, however, be copies of file-endorsed copies.

JUDICIAL PERSPECTIVE: Although it is important to include all required documents, counsel should be careful not to include irrelevant documents, such as discovery motions with no bearing on the issues raised in the petition.

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§20.7 2. Opposing Party's Papers

The record must include all relevant documents filed in the trial court, including those filed by the real party in interest (usually the opposing party in the lower court) and in rare circumstances by the respondent. See §23.21. The reasons for this are threefold. First, the Rules of Court require that the opposing party's documents be included. Cal Rules of Ct 8.486(b)(1)(B). Second, the petition likely will be denied if the record is incomplete. See Cal Rules of Ct 8.486(b)(4). Third, a petitioner that omits relevant opposing documents likely will lose credibility with the court, as the omission suggests that the petitioner is not being completely candid about what transpired below. Conversely, a party that is forthcoming about the entirety of the record and the opposing party's positions gains credibility with the court.

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§20.8 3. Additional Facts as Necessary

In rare circumstances, the record in the trial court may not contain all the facts the petitioner believes are necessary for the court of appeal to understand the case. In that case, the petitioner should allege the additional facts in the verified writ petition.

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§20.9 4. Reporter's Transcript

If the trial court held a hearing and a reporter was present, the record must include all relevant portions of the reporter's transcript. Cal Rules of Ct 8.486(b)(1)(D). See *Snell v Superior Court* (1984) 158 CA3d 44, 49, 204 CR 200 (petitioner could not show trial court abused its discretion, in part, because he failed to provide transcript of hearing); *Lemelle v Superior Court* (1978) 77 CA3d 148, 156, 143 CR 450 (in absence of transcript, reviewing court "will have no way of knowing in many cases what grounds were advanced, what arguments were made and what facts may have been admitted, mutually assumed or judicially noticed at the hearing").

If a reporter's transcript is not available, the record must contain a declaration of counsel (Cal Rules of Ct 8.486(b)(3)):

- Explaining why the transcript is unavailable, and
- Summarizing what was said by both sides and by the trial court; or
- Stating when counsel ordered the transcript and the date by which he or she expects to file it.

PRACTICE TIP: This declaration is particularly important if the grounds of the trial court's order are not otherwise stated on the record. The declaration should not be made on information and belief. See *Star Motor Imports, Inc. v Superior Court* (1979) 88 CA3d 201, 204, 151 CR 721 (affidavit based on "information and belief" is hearsay and must be disregarded).

If a transcript has been ordered, the petitioner must file it with the appellate court as soon as it becomes available. The court will not act in the absence of the transcript other than to issue a temporary stay. Cal Rules of Ct 8.486(b)(3).

If the hearing in the trial court was recorded, the petitioner may lodge the recording itself and a transcription.

JUDICIAL PERSPECTIVE: Counsel should not assume that the appellate court will listen to a recording of a trial court or administrative hearing. Recordings are often inaudible or difficult to understand. Courts that use electronic recording of hearings should also provide certified transcripts.

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§20.10 C. Record Requirement for Petition for Writ of Review (Certiorari)

Even though a petition for a writ of review (certiorari) seeks a writ compelling the clerk of the lower tribunal to transmit and certify the record to the reviewing court, a petitioner seeking a writ of review still must provide a sufficient record with the petition to enable the appellate court to rule on it. The record should include any order to show cause, any opposition, the relevant orders (*e.g.,* the contempt order), and a hearing transcript. *Rose v Superior Court* (1941) 44 CA2d 599, 600, 112 P2d 713.

NOTE: The record submitted with a petition for writ of review need not be certified, but the trial court must supply certified copies of the relevant record to the court of appeal if a writ of review issues.

On writs of review (certiorari) in the court of appeal, see §§15.27-15.38.

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IV. FORMAT OF THE RECORD

§20.11 A. Binding of Documents

Documents submitted in support of a writ petition must be bound together either at the end of the petition, in a separate volume, or in multiple volumes not exceeding 300 pages. Cal Rules of Ct 8.486(c)(1)(A). If the documents consist of more than a few pages, it is better practice to bind and submit them as a separate appendix. Compare Cal Rules of Ct 8.204(d) (attachments to appellate briefs cannot exceed ten pages). The 300-page limit for appendix volumes is a maximum, not a minimum. If a volume is too thick for convenient use, or may come apart, counsel should use two volumes.

PRACTICE TIP: It is the rare petition that is supported by only a few pages of documentation. Thus, counsel normally will need to bind the exhibits in a separate volume.

PRACTICE TIP: It is becoming more common for courts to permit appellate briefing and records to be filed in CD-ROM format (with hyperlinks to authorities and to the record), as well as in hard copy, although this is usually done only in large cases. If an electronic version of the petition and record would be appropriate—or even feasible given the short time limits—in a writ proceeding, counsel should check with the court on its practices.

There is no required title for a separate volume of exhibits. Appropriate wording includes "Exhibits to Writ Petition" or "Appendix in Support of Petition for [TITLE]." A separately bound volume should have the same colored cover page as the writ petition. Courts do not like clear plastic or acetate covers. If there are multiple volumes, the cover page also should identify the number of the volume, *e.g.*, "Vol. 1 of 3."

PRACTICE TIP: The cardinal rule for any separate volume is that it must be easy for the appellate court to use. Counsel should consider spiral-binding the volume, which some judges prefer because the volume lays flat when open and thus is easier to read. Counsel should always check local court rules and practice for special binding requirements.

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§20.12 B. Indexing, Pagination, and Order of Documents

Regardless of whether counsel appends the documents to the petition or includes them in a separate volume (on binding documents, see §20.11), counsel must:

- **Index tab the documents by number or letter.** Tabs should extend below or to the side of the pages, and be of high quality so they stay in place. See Cal Rules of Ct 8.486(c)(1)(B).

PRACTICE TIP: It is generally easier to use numbered tabs rather than letters, because a petition with more than 26 documents will require an additional identifying convention, such as "AA" or "BB." The respondent or real party in interest should use a different system in the response to the petition to avoid confusion, *e.g.*, if the petitioner uses numbers, the respondent should use letters.

- **Consecutively paginate the documents.** Counsel must consecutively paginate the supporting documents throughout, whether appended to the petition or bound in a separate volume(s). The pagination of documents in separate volumes must continue consecutively from one volume to the next. See Cal Rules of Ct 8.486(c)(1)(A).

PRACTICE TIP: The rules do not specify whether documents appended to a petition must pick up from the page number of the last page of the petition, or whether the appended documents should be separately numbered. Whichever method counsel chooses, it is good practice to drop a footnote after the first citation to the record in the petition explaining the citation form.

- **Chronologically order the documents.** Counsel should place supporting documents in chronological order by date filed, with the earliest filed document appearing first.
- **Identify the documents in a table of contents.** A table of contents must precede the documents, identifying each document by title, index-tab number or letter, and a very brief description. If a document has attachments, the table of contents must give the title of each attachment and a brief description of its contents. See Cal Rules of Ct 8.486(c)(1)(C). For an example of a table of exhibits, see §28.3.

PRACTICE TIP: The title of the document is often descriptive enough. Counsel will only rarely need to include any additional description.

JUDICIAL PERSPECTIVE: When the exhibits to a motion or opposition are relevant to the issue raised in the petition, the table of contents should list the exhibits, not just the motion or opposition. As always, the goal is to make the appendix easily accessible for the court.

The clerk must file any documents supporting a petition that do not comply with these requirements. However, the court may notify the petitioner that it will strike or summarily deny the petition unless petitioner brings the documents into compliance within a stated time period of at least 5 days. Cal Rules of Ct 8.486(c)(3).

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§20.13 C. Visual Quality of Documents

All copies of supporting documents should be legible and unmarked. If a document contains handwritten notations that counsel cannot "white out" to produce a clean copy, counsel should obtain another copy from opposing counsel or the trial court's file. If available duplicating equipment will not produce a high-quality copy, counsel should use a professional copy service.

PRACTICE TIP: Counsel for petitioner should always keep in mind the odds against writ relief and that well-organized papers are well received by the courts, whereas messy and disorganized papers are not.

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§20.14 D. Citation to the Record

The petition and supporting memorandum must cite to the record. See §§18.30, 18.53. Record citations should be short and easily understood, *e.g.*, "App., Exh. A at 5," "App. Vol. 2, Exh. 36 at 310." See Cal Rules of Ct 8.486(c).

PRACTICE TIP: To ensure that the court understands the citation format, it is good practice to drop a footnote immediately after the first record citation, explaining the format, *e.g.,* "'App., Exh. A at 5' refers to page 5 of Exhibit A in the Appendix filed in conjunction with this writ petition" or "'Exh. A at 5' refers to page 5 of exhibit A appended to this petition." See Cal Rules of Ct 8.204(d), 8.224.

On index tabbing and pagination of documents in the record, see §20.12. On citation to exhibits in the record, also see §18.57.

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V. SERVING AND FILING THE RECORD

§20.15 A. Serving the Record

The petitioner must serve a copy of the petition and supporting documents on the respondent and any named real party in interest. Cal Rules of Ct 8.486(e)(1)-(2). The proof of service must comply with the requirements of Cal Rules of Ct 8.25 as well as provide the telephone number of each attorney served. Cal Rules of Ct 8.486(e)(3).

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§20.16 B. Filing the Record

If the supporting documents are appended to the writ petition, the petitioner must file an original and four copies of the petition and documents with the appellate court. Cal Rules of Ct 8.44(b)(3). If petitioner binds the supporting documents separately, the petitioner need only file one copy of the separate volume(s) with the court. Cal Rules of Ct 8.44(b)(5).

PRACTICE TIP: Practices vary among the appellate courts as to the filing of separately bound documents, so counsel should always check local rules for the court's preferences before filing.

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§20.17 VI. JUDICIAL NOTICE

The statutes governing judicial notice in ordinary civil actions, Evid C §§450-460, also apply to writ proceedings. See *McMahan v City & County of San Francisco* (2005) 127 CA4th 1368, 1373 n2, 26 CR3d 509 (appellate court applied Evid C §459 in writ proceeding and declined to judicially notice documents); *Resource Defense Fund v County of Santa Cruz* (1982) 133 CA3d 800, 806 n6, 184 CR 371 (appellate court applied evidence code sections in writ proceeding to determine that copies of code provisions were proper subject of judicial notice).

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§20.18 A. Materials Presented to Trial Court for Judicial Notice

The record supporting a writ petition must include any relevant matters that the trial court judicially noticed. If the trial court properly took judicial notice of these matters, judicial notice by the appellate court is mandatory. Evid C §459(a) (appellate court "shall" take judicial notice of any matter properly noticed by trial court).

If the trial court refused to take judicial notice of documents that the petitioner believes are relevant, the lower court's ruling is not conclusive, and the petitioner may ask the court of appeal to take judicial notice of the matters. Evid C §459(a). See *Ward Mfg. Co. v Miley* (1955) 131 CA2d 603, 608, 281 P2d 343; *Greif v Dullea* (1944) 66 CA2d 986, 998, 153 P2d 581 (appellate court could take judicial notice of ordinance trial court refused to judicially notice).

PRACTICE TIP: A party seeking judicial notice of material that the trial court did not judicially notice should (a) include in the record the original request for judicial notice, including the matters as to which judicial notice was sought, and (b) argue in the briefing why the trial court erred in denying the request.

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§20.19 B. Materials Not Presented to Trial Court for Judicial Notice

In rare situations, a party may need to ask the appellate court to take judicial notice of materials that the trial court did not consider, *e.g.*, when new matters affecting the outcome become available. However, the appellate court will not be inclined to take judicial notice of new material unless there are "exceptional circumstances" or compelling reasons why the party did not make a request in the trial court. See *Vons Cos. v Seabest Foods, Inc.* (1996) 14 C4th 434, 444 n3, 58 CR2d 899 (supreme court found no exceptional circumstances to justify deviating from rule that reviewing courts generally do not take judicial notice of evidence not presented to trial court); *Brosterhous v State Bar* (1995) 12 C4th 315, 325, 48 CR2d 87 (although reviewing court may take judicial notice of matters not before trial court, supreme court refused to do so because State Bar gave no reason for its failure to make request in either trial court or court of appeal); *McMahan v City & County of San Francisco* (2005) 127 CA4th 1368, 1373 n2, 26 CR3d 509 (court refused to take judicial notice of documents not presented to trial court).

PRACTICE TIP: Given that a party requesting judicial notice of matters not first presented to the trial court faces an uphill battle, it is critical to plan ahead and make a judicial notice request in the trial court. If judicial notice is requested for the first time in support of a writ petition, the petitioner must explain why there was no such request in the trial court.

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C. Procedure for Requesting Judicial Notice in Appellate Court

§20.20 1. Motion Requesting Judicial Notice

A party must request judicial notice in accordance with Cal Rules of Ct 8.252. See also Cal Rules of Ct 8.54 (general provisions governing motions in appellate courts). An application or motion for judicial notice should not be incorporated in the writ petition or in the opposition or return. If the matter to be judicially noticed is not in the record, a copy must be served and filed with the motion. Cal Rules of Ct 8.252(a)(3).

The application or motion requesting judicial notice must state (Cal Rules of Ct 8.252(a)(2)):

- Why the materials are relevant to the issues before the appellate court;
- Whether the materials were presented to the trial court, and if so, whether that court took judicial notice of them; and
- Whether the materials relate to proceedings occurring after the order or judgment that is on appeal.

See Cal Rules of Court 8.54(a)(1) (general provisions governing motions; motion must state grounds and relief requested and identify documents on which motion is based). See also 1st App Dist Local R 9(a) (requests for judicial notice must show relevance of matters to be judicially noticed).

PRACTICE TIP: Any request for judicial notice of legislative history materials should include legal authority establishing that the history is relevant and properly subject to judicial notice. *Kaufman & Broad Communities, Inc. v Performance Plastering, Inc.* (2005) 133 CA4th 26, 31, 34 CR3d 520.

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§20.21 2. Timing of Request for Judicial Notice

There is no specific time limit for requesting judicial notice. A petitioner seeking judicial notice should file a motion in conjunction with the writ petition, however, because the matters as to which petitioner seeks judicial notice are part of the basis of or support for the petition. Real parties in interest or respondents, in turn, should file a motion for judicial notice in conjunction with any opposition relying on matters as to which judicial notice is sought.

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§20.22 3. Opposition to Request for Judicial Notice

The real party in interest (and in rare cases, the respondent, see §23.21) must file opposition to a motion for judicial notice, if any, within 15 days after petitioner filed the motion. Cal Rules of Ct 8.54(a)(3). Parties are often unaware of this deadline because it is set forth in Rule 8.54, which governs motions generally, and not in Rule 8.252, which specifically addresses judicial notice. However, this is an important deadline, and the courts of appeal frequently grant unopposed motions shortly after the deadline for filing opposition has passed. Cal Rules of Ct 8.54(c).

PRACTICE TIP: The timing for opposition to a motion for judicial notice means that the real party in interest and/or respondent may need to file opposition to a motion before filing opposition to the writ petition (*e.g.*, when an alternative writ or *Palma* notice has been issued and the court has allowed more than 15 days to file, respectively, the return or opposition). Thus, counsel must keep two different deadlines in mind: the date to oppose the petition and the date to oppose a request for judicial notice. On deadlines for filing preliminary opposition, see §§21.14-21.17. On deadlines for filing a return and opposition briefing, see §§23.39-23.41. On deadlines for filing *Palma* opposition, see §§23.11-23.14.

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VII. PROTECTING CONFIDENTIAL DOCUMENTS IN THE RECORD

§20.23 A. Public Policy Favors Open Records

Unless confidentiality is required by law (*e.g.*, family conciliation court records (Fam C §1818(b)), in forma pauperis applications (Cal Rules of Ct 3.54)), the confidentiality of appellate court records is governed by the Rules of Court. Comment to Cal Rules of Ct 8.160. The rules recognize the First Amendment right of access to court documents and adopt the stringent requirements for confidentiality set forth in *NBC Subsidiary (KNBC-TV), Inc. v Superior Court* (1999) 20 C4th 1178, 1181, 86 CR2d 778. In *KNBC-TV*, the supreme court held that before closing civil proceedings to the public and media, the trial court must give notice of its findings that: (1) there is overriding interest in closure; (2) there is substantial probability that interest will be prejudiced without closure; (3) the proposed closure is narrowly tailored; and (4) there is no less restrictive means of achieving overriding interest.

In recent years, the courts have been increasingly more vigilant in enforcing the statutory requirements for sealing court documents. See Judge Kleinberg, *To Seal or Not to Seal: Protecting Confidential Records Under the Rules of Court*, 29 CEB Civ Litigation Rep 131 (Aug. 2007). On sealing of documents generally, see California Civil Procedure Before Trial §§12.122-12.139 (4th ed Cal CEB 2004).

JUDICIAL PERSPECTIVE: Other than cases involving sexual assaults, AIDS, and minors, the courts generally do not view motions to seal favorably.

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Source: Civil Litigation/California Civil Writ Practice/20 The Record in Appellate Court Writ Proceedings/§20.24 B. Procedures to Seal or Unseal Portions of Record and Briefs

§20.24 B. Procedures to Seal or Unseal Portions of Record and Briefs

California Rules of Court 8.160 sets forth the standards and procedures for sealing appellate court records. On standards and procedures for requests to seal records in the trial court, see §§7.27-7.33.

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§20.25 1. When Trial Court Sealed Records

Parties must file under seal any records (including pleadings, briefs, and orders) the trial court ordered sealed. Those records must remain sealed unless the reviewing court orders otherwise. Cal Rules of Ct 8.160(c)(1). For any record the trial court sealed, a party must include in the appellate court record (Cal Rules of Ct 8.160(c)(2)):

- The order sealing the document;
- The motion or application sealing the document; and
- All papers filed in support of or in opposition to the motion or application to seal in the trial court.

Records filed publicly in the reviewing court, including briefs, must not disclose material that has been sealed, has been lodged conditionally under seal, or is the subject of a pending motion to seal. Cal Rules of Ct 8.160(g). Thus, a petitioner must submit sealed records separately from the publicly available version of the petition or appendix. If only portions of a court record are sealed, the petitioner must submit a redacted version for public filing as well as unredacted copies of the documents to be filed separately under seal. Cal Rules of Ct 8.160(e)(4).

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2. When Trial Court Did Not Seal Records

§20.26 a. Requesting That Appellate Court Seal Records

A party cannot file under seal in the appellate court records filed or lodged publicly in the trial court unless the appellate court orders them sealed. Thus, the parties cannot stipulate to filing a record under seal in the appellate court (or in the trial court; see §7.27). Cal Rules of Ct 8.160(d), (e)(1)-(2).

To request that the appellate court file a record under seal:

- The party making the request must file a noticed motion for an order to file the record under seal. Cal Rules of Ct 8.160(e)(2).
- The appellate court must find that an "overriding interest" would be prejudiced if the record is not sealed. Cal Rules of Ct 2.550(d). See Cal Rules of Ct 8.160(e)(6).
- The proposed sealing must be narrowly tailored, and there should be no other less restrictive means available to achieve the overriding interest than sealing the record. Cal Rules of Ct 2.550(d). See Cal Rules of Ct 8.160(e)(6).

The record as to which sealing is sought must be lodged with the appellate court in conjunction with the motion to seal unless good cause exists to do otherwise. The record is "conditionally under seal" pending the court's ruling. Cal Rules of Ct 8.160(e)(2), (5). "Lodged" does not mean filed; it means temporarily placed or deposited with the court. Cal Rules of Ct 8.160(b)(3).

PRACTICE TIP: To preserve confidentiality, a public redacted version of the petition and supporting exhibits must be lodged along with a complete version conditionally placed under seal. Unless the court orders otherwise, any party that already possesses copies of the records placed under seal must be served with a complete, unredacted version as well as a redacted version. Cal Rules of Ct 8.160(e)(4).

If the court denies the motion to seal, the clerk cannot place the lodged record in the file and must return it to the submitting party unless that party notifies the clerk in writing within 10 days after the order denying the motion or application that the record is to be filed. Cal Rules of Ct 8.160(e)(7).

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§20.27 b. Lodging the Record

A party lodges a record with the court by doing all of the following (Cal Rules of Ct 8.160(e)(3)):

- Sealing it in an envelope (or other appropriate sealed container);
- Affixing a cover sheet containing all caption requirements specified in Cal Rules of Ct 8.40(c); and
- Labeling the envelope or container "CONDITIONALLY UNDER SEAL."

The clerk notes the date of receipt on the cover sheet and retains, but does not file, the record. The record remains conditionally under seal pending the court of appeal's determination of the motion or application. Cal Rules of Ct 8.160(e)(5).

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§20.28 3. Unsealing Records

Any person or entity may make a motion, application, or petition to unseal a record. Cal Rules of Ct 8.160(f)(2). If necessary to preserve confidentiality, the moving party must file the motion, application, or petition, as well as any opposition and supporting documents, in both a redacted version and a sealed, complete version. Cal Rules of Ct 8.160(f)(2).

The court of appeal may order the unsealing of a record on its own motion, but if it does so, it must give the parties notice of the proposed unsealing and allow time to serve and file opposition. Cal Rules of Ct 8.160(f)(3).

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21

Preliminary Opposition Authorized by Rules of Court

M.C. Sungaila

I. SCOPE OF CHAPTER §21.1

II. RULE OF COURT 8.487(a) §21.2

III. USE OF PRELIMINARY OPPOSITION
- A. Purpose of Preliminary Opposition §21.3
- B. Preliminary Opposition Is Optional §21.4
- C. Preliminary Opposition Not the Same as Opposition Requested by *Palma* Notice §21.5
- D. If Defects Solely Procedural, Consider Short Letter Before Filing Preliminary Opposition §21.6

IV. APPELLATE COURT CAN ACT BEFORE THE FILING OF PRELIMINARY OPPOSITION §21.7

V. CONTENT AND FORMAT OF PRELIMINARY OPPOSITION
- A. Content of Preliminary Opposition §21.8
- B. Format of Preliminary Opposition
  1. Briefing Format §21.9
  2. Use of Headings §21.10
  3. Citation to the Record §21.11
  4. Citation to Authority §21.12
- C. Preliminary Opposition Need Not Be Verified §21.13

VI. TIME TO FILE PRELIMINARY OPPOSITION
- A. File Within 10 Days After Writ Petition Is Filed §21.14
- B. If Petitioner Requests an Immediate, Temporary Stay
  1. Notifying Court of Intent to Oppose Stay §21.15
  2. Consider Filing Opposition to an Immediate, Temporary Stay Before Filing Preliminary Opposition to the Writ Petition §21.16
  3. Contents of Opposition to Immediate, Temporary Stay §21.17

VII. SERVICE AND FILING FEE
- A. Service §21.18
- B. Filing Fee §21.19
- C. Certificate of Interested Entities or Persons §21.20

VIII. PETITIONER'S REPLY TO PRELIMINARY OPPOSITION §21.21

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§21.1 I. SCOPE OF CHAPTER

This chapter discusses the filing of "preliminary opposition" to a writ petition filed in the appellate courts, as authorized by Cal Rule of Ct 8.487(a)(1). See §21.2. It examines the reasons to file preliminary opposition. See §§21.3-21.6. It also covers the content and format of the preliminary opposition (see §§21.8-21.13); the time for filing (see §§21.14-21.17); and service requirements (§§21.18-21.20). Finally, the chapter discusses replying to preliminary opposition. See §21.21.

On preparing a full, formal opposition to an appellate court writ petition, see chap 23.

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§21.2 II. RULE OF COURT 8.487(a)

California Rule of Court 8.487(a)(1) provides that "[w]ithin 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." See *Nguyen v Superior Court* (2007) 150 CA4th 1006, 1013 n2, 58 CR3d 802 (real party in interest has right to submit unsolicited informal response to writ petition, by way of letter or brief).

JUDICIAL PERSPECTIVE: Some courts of appeal will not act on a petition until after the 10-day period for preliminary opposition expires, unless an immediate stay is requested and, in that case, the courts will usually consider only the stay request. Some courts, however, will act on the petition if no opposition is expected. The real party in interest should contact the court to confirm its procedure and to indicate whether or not it plans to file a preliminary opposition.

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III. USE OF PRELIMINARY OPPOSITION

§21.3 A. Purpose of Preliminary Opposition

The purpose of preliminary opposition is to help the appellate court weed out writ petitions that are procedurally infirm or clearly without merit, thus summarily ending the proceedings without further expenditure of judicial resources and additional expense to the parties. See *Nguyen v Superior Court* (2007) 150 CA4th 1006, 1013 n2, 58 CR3d 802; 8 Witkin, California Procedure, *Extraordinary Writs* §184 (5th ed 2008).

The objective of preliminary opposition is to convince the court not to issue an alternative writ (see §§22.23-22.29) or "*Palma* notice" (see §§22.18-22.22) and to summarily deny the petition. This is the opportunity for the real party in interest (or in rare instances, the respondent) to tell the court of appeal the other side of the story told in the petition. The real party in interest or respondent should point out any procedural defects in the petition (*e.g.*, no verification or failure to submit an adequate record), or explain why the petition has no merit (*e.g.*, the petitioner has an adequate remedy by way of appeal, there is no need for immediate appellate review, or the trial court acted well within its discretion). See chaps 15, 17.

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§21.4 B. Preliminary Opposition Is Optional

Preliminary opposition under Cal Rules of Ct 8.487(a) is optional. In most cases, however, the real party in interest (or, in rare cases, the respondent) should file a preliminary opposition to assist the court in acting quickly on the petition.

PRACTICE TIP: Because the court of appeal summarily denies the majority of writ petitions (see §17.28), filing preliminary opposition may draw the appellate court's attention to a petition that might otherwise be denied. Thus, if a petition is egregiously defective, the real party in interest or respondent might consider not filing preliminary opposition. In general, however, it behooves an opposing party to file preliminary opposition when a petition suffers from procedural defects, misstates significant facts, or appears unmeritorious on its face.

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§21.5 C. Preliminary Opposition Not the Same as Opposition Requested by *Palma* Notice

Counsel should not confuse preliminary opposition permitted by Cal Rules of Ct 8.487(a) with opposition invited by a *Palma* notice. A *Palma* notice is a short order issued by the appellate court, advising that a peremptory writ may issue in the first instance (*i.e.,* without an opportunity for full opposition or oral argument) and inviting the real party in interest and respondent to file opposition by a specified date. On *Palma* notices, see §§22.18-22.22. On preparing and filing opposition solicited by a *Palma* notice, see chap 23.

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Source: Civil Litigation/California Civil Writ Practice/21 Preliminary Opposition Authorized by Rules of Court/§21.6 D. If Defects Solely Procedural, Consider Short Letter Before Filing Preliminary Opposition

§21.6 D. If Defects Solely Procedural, Consider Short Letter Before Filing Preliminary Opposition

If a writ petition suffers from a patent procedural defect (*e.g.*, lack of a verification), the real party in interest (and in rare cases the respondent) should consider sending a short letter to the court (with service on opposing counsel) identifying the defect before filing a preliminary opposition. See *Nguyen v Superior Court* (2007) 150 CA4th 1006, 1013 n2, 58 CR3d 802 (real party in interest filed informal letter raising failure to name indispensable party as grounds to deny petition).

NOTE: Sending a letter may trigger a summary denial of the petition before the 10-day period for filing preliminary opposition runs, thus obviating the need to file further opposition.

PRACTICE TIP: Some courts may consider an informal letter as the party's preliminary opposition, but others may not. If counsel plans to file preliminary opposition in addition to the letter, the letter should so indicate.

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§21.7 IV. APPELLATE COURT CAN ACT BEFORE THE FILING OF PRELIMINARY OPPOSITION

The court of appeal can take action on a writ petition before any preliminary opposition is filed. Cal Rules of Ct 8.487(a)(4). The court can:

- Summarily deny the writ petition (see §§22.14-22.17);
- Issue a *Palma* notice advising that the court may issue a peremptory writ in the first instance and inviting written opposition by a specified date (see §§22.18-22.22); or
- Issue an alternative writ directing the filing of a return and opposition briefing on the merits (see §§22.23-22.29).

In many appellate districts, however, the court will not act on a writ petition before the time to file preliminary opposition has run, except to consider a request for an immediate temporary stay. For example, no division of the Fourth Appellate District will grant "a request for immediate relief, other than a stay or other order necessary to preserve the status quo or the court's jurisdiction, … unless the court has received an unsolicited opposition or, alternatively, has requested opposition." Fourth App Dist Local Rule 1. Similarly, the Sixth Appellate District will not grant relief beyond a temporary stay until opposition has been requested and (if timely submitted) considered. See Sixth District Outline of Original Proceedings and Relief Ancillary to Appeal (July 2007).

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V. CONTENT AND FORMAT OF PRELIMINARY OPPOSITION

§21.8 A. Content of Preliminary Opposition

Preliminary opposition is not meant to be a full briefing on the merits. A preliminary opposition should succinctly identify and discuss the principal reasons the appellate court should deny writ relief, *e.g.*, the petition is procedurally defective, the petitioner has an adequate remedy by way of appeal, the petitioner will not suffer irreparable injury, or the trial court did not err or abuse its discretion. Preliminary opposition should also apprise the court of any material facts or circumstances about which the petitioner has been less than candid. On the purpose of preliminary opposition, see §21.3.

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B. Format of Preliminary Opposition

§21.9 1. Briefing Format

A preliminary opposition "must contain a memorandum and a statement of any material fact not included in the petition." Cal Rules of Ct 8.487(a)(2). In other words, a preliminary opposition should be in the form of a brief and contain an introduction, a statement of facts supported by citations to the record (*e.g.*, the exhibits submitted by the petitioner or additional exhibits submitted by the respondent or real party in interest), a succinct legal argument, and a short conclusion.

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Source: Civil Litigation/California Civil Writ Practice/21 Preliminary Opposition Authorized by Rules of Court/§21.10 2. Use of Headings

§21.10 2. Use of Headings

Counsel should use clear and concise headings and subheadings. Counsel can check whether the headings and subheadings are effective by examining the table of contents. If a reader can understand the organization of the brief, and identify the salient points made in the brief from the table of contents alone, the headings and subheadings are well crafted and serve their purpose.

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§21.11 3. Citation to the Record

All factual statements in the opposition should be supported by citation to the record, *e.g.*, the exhibits submitted by the petitioner or additional exhibits submitted by the real party in interest or the respondent. See Cal Rules of Ct 8.204(a)(1)(C) (factual statements in appellate briefs should be supported by record citation). On the proper form of record citations, see §20.14. On the importance of filing a supporting record, see §20.4.

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Source: Civil Litigation/California Civil Writ Practice/21 Preliminary Opposition Authorized by Rules of Court/§21.12 4. Citation to Authority

§21.12 4. Citation to Authority

Counsel should present arguments with citations to supporting legal authority when available. See Cal Rules of Ct 8.204(a)(1)(B) (points in appellate briefs should, if possible, be supported by authority).

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§21.13 C. Preliminary Opposition Need Not Be Verified

If the real party in interest (or, in rare cases, the respondent) needs to bring additional facts to the attention of the appellate court, this generally can be done by way of additional exhibits (*e.g.,* the real party in interest's trial court papers) attached to and authenticated by declaration of counsel. In the rare case that facts outside the trial court record must be brought to the court's attention, the real party in interest or the respondent should submit a sworn declaration that is based on personal knowledge and compliant with evidentiary rules.

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VI. TIME TO FILE PRELIMINARY OPPOSITION

§21.14 A. File Within 10 Days After Writ Petition Is Filed

If the real party in interest (or, in rare cases, the respondent) decides to file preliminary opposition, it must do so within 10 days after the writ petition is filed. Cal Rules of Ct 8.487(a)(1).

If the real party or respondent needs more time, the appellate courts will usually accommodate a request for a short extension if counsel can show good cause for the request. In some courts, counsel may obtain an extension simply by calling the clerk. In other courts, counsel must file an application for additional time. Check local rules to determine whether the court has specific requirements for applications for extension of time. See, *e.g.*, First App Dist Local Rule 11.

PRACTICE TIP: Before filing an extension request, counsel should check the court's docket (which can be done online) to see whether the court already has taken action on the petition, *i.e.,* summarily denied it, issued a *Palma* notice, or issued an alternative writ. The appellate courts can, and sometimes do, take action before any opposition is filed. On actions the appellate court can take, see chap 22.

NOTE: California Code of Civil Procedure §1107 provides that the real party in interest or respondent "may" file and serve "points and authorities in opposition" within 5 days after filing and service of an "application" for a writ. The Rules of Court for appellate courts also originally provided that informal opposition was to be filed within 5 days after filing and service of a writ petition. The Judicial Council concluded more time was advisable and, thus, doubled the time to 10 days.

Although there is a difference between the 5-day period in §1107 and the 10-day time period in Rule 8.487(a)(1), there is no actual conflict. The memorandum provided for by §1107 is not mandatory, nor is there any suggestion that the statute bars the Judicial Council from providing for optional "preliminary opposition" to be filed in the courts of appeal within a slightly longer period of time. Since the adoption of former Rule 8.490(g) (see now Rule 8.487(a)), the courts of appeal and appellate practitioners have, of course, followed it.

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B. If Petitioner Requests an Immediate, Temporary Stay

§21.15 1. Notifying Court of Intent to Oppose Stay

Sometimes a petitioner will ask for an immediate, temporary stay pending court action on the writ petition. See Cal Rules of Ct 8.486(a)(7). If the situation is very urgent and the real party in interest (or, in rare cases, the respondent) believes it is important to go on record immediately opposing a stay request, counsel should call the clerk's office and let the court know that there will be opposition and when the court can expect it (*e.g.*, the next morning). Counsel should confirm the call and its substance in a letter to the court, with a copy to counsel for the petitioner. On requests for a stay in appellate court writ proceedings, see chap 19.

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§21.16 2. Consider Filing Opposition to an Immediate, Temporary Stay Before Filing Preliminary Opposition to the Writ Petition

The real party in interest (or, in rare cases, the respondent) should file opposition to a request for an immediate, temporary stay within hours or, at most, a day or two. Counsel frequently cannot also prepare preliminary opposition to the writ petition within that tight time frame. If that is the case, counsel should consider submitting opposition to the stay request separately from the preliminary opposition to the petition. Counsel should alert the court that the real party in interest or the respondent plans to oppose the stay request promptly and when counsel will file the opposition. See §21.15.

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§21.17 3. Contents of Opposition to Immediate, Temporary Stay

Opposition to a request for an immediate, temporary stay should show why the petitioner will suffer no or little prejudice without a stay, how a stay would harm the real party in interest (or, in rare cases, the respondent), and why the facts and the law do not support a stay. If the writ petition is procedurally defective on its face or patently without merit, counsel should also succinctly explain those points. In addition, counsel should alert the court that preliminary opposition to the writ petition will be filed within the time prescribed by the rules of court (10 days). See Cal Rules of Ct 8.487(a)(1).

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VII. SERVICE AND FILING FEE

§21.18 A. Service

The real party in interest (or, in rare cases, the respondent) must serve preliminary opposition in the same manner as a brief in an ordinary civil action: personally, or by mail, on counsel. The proof of service must identify the party counsel represents and provide counsel's telephone number. See Cal Rules of Ct 8.486(e); CCP §§1073, 1096, 1105.

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§21.19 B. Filing Fee

There is no filing fee for a preliminary opposition. See Govt C §68926.

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Source: Civil Litigation/California Civil Writ Practice/21 Preliminary Opposition Authorized by Rules of Court/§21.20 C. Certificate of Interested Entities or Persons

§21.20 C. Certificate of Interested Entities or Persons

The preliminary opposition is the first document filed by the real party in interest (or, in rare cases, the respondent) in the court of appeal, and must include a "Certificate of Interested Entities or Persons" as required by Cal Rules of Ct 8.208. For an example of an attorney-drafted certificate, see form in §28.1; for the optional Judicial Council certificate, see §28.2.

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§21.21 VIII. PETITIONER'S REPLY TO PRELIMINARY OPPOSITION

The petitioner may file a reply within 10 days after preliminary opposition is filed. Cal Rules of Ct 8.487(a)(3). Although a reply is optional, a petitioner should take the opportunity to have the last word on the court of appeal's preliminary assessment of the case, particularly given the high percentage of summary denials. See §17.28. The reply should follow briefing format (see §§18.5-18.11) and respond directly and succinctly to the points made in the preliminary opposition.

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22

Initial Action by Court of Appeal

Mitchell E. Abbott
James C. Nielsen

I. SCOPE OF CHAPTER §22.1

II. HOW WRIT PETITIONS ARE ASSIGNED FOR HANDLING WITHIN THE COURT OF APPEAL §22.2
- A. First District §22.3
- B. Second District §22.4
- C. Third District §22.5
- D. Fourth District §22.6
- E. Fifth District §22.7
- F. Sixth District §22.8

III. TYPES OF ACTION COURT OF APPEAL MAY TAKE ON A WRIT PETITION §22.9
- A. Issuance of Temporary Stay Order §22.10
  - 1. Actions on Temporary Stay Request §22.11
  - 2. Contents of Temporary Stay Order §22.12
  - 3. Notice of Temporary Stay Order §22.13
- B. Issuance of Summary Denial
  - 1. Summary Denial Defined §22.14
  - 2. When Summary Denial Is Used §22.15
  - 3. Summary Denial Format §22.16
  - 4. Summary Denial Does Not Establish Law of Case §22.17
- C. Issuance of *Palma* Notice
  - 1. *Palma* Notice Defined §22.18
  - 2. When *Palma* Notice Is Used §22.19
  - 3. When Notice Is Given in Prayer for Relief §22.20
  - 4. Form of *Palma* Notice Given by Court of Appeal §22.21
  - 5. "Suggestive" *Palma* Notice §22.22
- D. Issuance of Alternative Writ or Order to Show Cause
  - 1. Alternative Writ or Order to Show Cause (OSC) Defined §22.23
  - 2. When Alternative Writ/Order to Show Cause (OSC) Is Used §22.24
  - 3. Content and Preparation of Alternative Writ/Order to Show Cause (OSC) §22.25
  - 4. Service and Filing of Alternative Writ/Order to Show Cause (OSC) §22.26
  - 5. "Coercive" Alternative Writ §22.27
    - a. If Trial Court Complies With Alternative Writ §22.28
    - b. If Trial Court Does Not Comply With Alternative Writ §22.29

IV. ISSUANCE OF WRIT OF REVIEW (CERTIORARI) §22.30

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§22.1 I. SCOPE OF CHAPTER

This chapter discusses how the courts of appeal assign and process writ petitions (see §§22.2-22.8) and the actions a court of appeal can take at the outset of a writ proceeding: granting a stay, summarily denying the petition, issuing a *Palma* notice, and issuing an alternative writ or order to show cause (OSC). See §22.9. The appellate courts can issue a stay to maintain the status quo pending further consideration of the writ petition. See §22.10. As for action on the petition itself, the courts of appeal are most likely to issue a summary denial. See §22.14. If an appellate court does not summarily deny a petition, it will likely issue an alternative writ or OSC, allowing for full briefing, oral argument on the merits, and disposition by written opinion. See §§22.23-22.29. In certain circumstances, the court may issue a "*Palma* notice," which permits the court to issue a peremptory writ in the first instance, without formal briefing or oral argument. See §§22.18-22.21.

This chapter also discusses appellate court action on a petition for a writ of review (certiorari). See §22.30.

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§22.2 II. HOW WRIT PETITIONS ARE ASSIGNED FOR HANDLING WITHIN THE COURT OF APPEAL

Three-justice panels hear and determine matters in the courts of appeal. Cal Const art VI, §3; see Internal Operating Practices and Procedures of California Courts of Appeal and Supreme Court ("IOPP").

NOTE: Although no rule governs the speed with which courts of appeal must process writ petitions, the courts usually try to consider them as expeditiously as circumstances permit. The calendaring of any particular writ proceeding depends on the urgency of the relief sought, the adequacy of the petition and the record, whether the court issues an alternative writ or *Palma* notice, and the number of other petitions pending at the time.

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§22.3 A. First District

In the First District Court of Appeal, the court normally assigns writ petitions among the five divisions on a rotational basis. If the petition relates to an appeal or previous petition from the same trial court case, the court will assign the petition to the same division that heard the prior matter. 1st App Dist IOPP §III.A.1. Each division employs a writ attorney supervised by its presiding justice. 1st App Dist IOPP §II.C.

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§22.4 B. Second District

The Second District assigns all cases from Ventura, San Luis Obispo, and Santa Barbara Counties to Division Six. Cases from Los Angeles County are randomly assigned to Divisions One through Five, Seven, and Eight. Within 1 to 2 weeks, a writ attorney will usually review writ petitions that do not seek immediate relief. The court discusses the petition documents and the writ attorney's memorandum at periodic writ conferences, usually weekly or biweekly.

If the petition seeks immediate relief, the writ attorney will review the matter shortly and distribute the same materials to the justices then available for determination. If the court issues an alternative writ, triggering entitlement to a hearing, the court will schedule the hearing at the earliest available date. 2d App Dist IOPP, Assignment of Cases.

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§22.5 C. Third District

In the Third District, a three-justice panel, the composition of which varies, holds weekly conferences at which staff attorneys present writ matters. If a matter has merit, the court will calendar and then decide it. 3d App Dist IOPP §V.

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Source: Civil Litigation/California Civil Writ Practice/22 Initial Action by Court of Appeal/§22.6 D. Fourth District

§22.6 D. Fourth District

The Fourth Appellate District is comprised of three Divisions divided geographically by county:

- In Division One (San Diego and Imperial Counties), a writ panel of three justices who rotate monthly decides writ petitions. The clerk forwards all writ petitions to the supervising writ attorney. If it appears that the matter requires an immediate stay or other urgent action, the writ attorney presents the petition to the writ panel orally. Otherwise, the court processes petitions in order of filing with adjustments for impending hearing or trial dates. The assigned attorney normally reviews the petition, prepares a memorandum evaluating the petition, and circulates it to the writ panel. Generally, the attorney who prepared the written memorandum will assist the lead justice in drafting the opinion when the court intends to issue a peremptory writ in the first instance. Otherwise, one of the lead justice's chambers attorneys will assist in drafting the opinion when the court has issued an alternative writ or an order to show cause. 4th App Dist, Div 1, IOPP §V.
- In Division Two (Riverside, San Bernardino, and Inyo Counties), all writ petitions go first to the writ attorney, who prepares a summary for the writ panel of justices. The real party in interest is not required to file a response unless the court requests one. The justices meet as required, with the panel rotating monthly among them. If the court issues an alternative writ, the court will treat the case as a direct appeal. 4th App Dist, Div 2, IOPP §III.
- In Division Three (Orange County), a writ panel of three justices assigned on a quarterly basis decides writ petitions. The clerk forwards all writs petitions to the managing appellate court attorney, who determines the urgency of the relief sought. The managing appellate attorney will calendar the matter for the weekly writ panel conference. If court action is required earlier, the panel will hold an impromptu writ conference. The managing appellate court attorney and central staff attorneys summarize the writ petition before the weekly conference. 4th App Dist, Div 3, IOPP §III.B.

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§22.7 E. Fifth District

In the Fifth District, the court has two writ panels of three justices each, the membership of which rotates among all the justices from month to month. The court holds writ conferences on a weekly basis. If the court does not summarily deny a petition and the court decides that the petition may have merit, it will normally schedule oral argument and prepare a written opinion. 5th App Dist, IOPP §III.C.

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§22.8 F. Sixth District

In the Sixth District, the court refers writ petitions to a writ attorney for initial review. The writ attorney communicates with the court, which will conduct a writ conference and meet specially when necessary. All participating justices review any parties' written submissions and any staff memorandums. 6th App Dist IOPP §II.D. See "Sixth District Court of Appeal Outline on Original Proceedings and Relief Ancillary to Appeal" on the court's website (http://www.courtinfo.ca.gov/courts/courtsofappeal/6thDistrict/faq/6DCAproc.doc) for more information.

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§22.9 III. TYPES OF ACTION COURT OF APPEAL MAY TAKE ON A WRIT PETITION

The court of appeal may take one or more of the following actions at the outset of a writ proceeding:

- Issue an order staying designated proceedings in the trial court while the court of appeal considers the writ petition (see §§22.10-22.13);
- Deny the petition summarily (the most frequent action) (see §§22.14-22.17);
- Issue a *Palma* notice, which normally is in the form of a letter requesting opposition and cautioning that the court may grant a peremptory writ in the first instance without a hearing (*Palma v U.S. Indus. Fasteners, Inc.* (1984) 36 C3d 171, 203 CR 626; see §§22.18-22.22);
- Request informal opposition and then issue an alternative writ or order to show cause (see *Roman v Superior Court* (2009) 172 CA4th 1462, 1468, 92 CR3d 153); or
- Issue an alternative writ directing the respondent trial court to take a specified act within a specified period of time or to show cause why the court of appeal should not order it to do so (CCP §§1087, 1104; see §§22.23-22.29). Sometimes the appellate courts use only the terminology "order to show cause." See §22.23.

NOTE: The court of appeal may act on a writ petition in any of the above-listed ways without waiting for preliminary opposition or a reply. Cal Rules of Ct 8.487(a)(4). On preliminary opposition and reply to preliminary opposition, see chap 21.

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§22.10 A. Issuance of Temporary Stay Order

No statute expressly authorizes the courts of appeal to temporarily stay trial court proceedings pending the disposition of a writ petition. Compare CCP §923 (expressly authorizing appellate courts to stay proceedings during pendency of appeal). However, Cal Rules of Ct 8.487(a)(4) expressly allows the courts to issue a stay in a writ proceeding without requesting or awaiting opposition. Indeed, "it is accepted that an appellate court has the power to issue a temporary stay of proceedings to maintain the status quo pending the determination of a petition for extraordinary relief." *Markley v Superior Court* (1992) 5 CA4th 738, 750 n15, 7 CR2d 328 (citing predecessor rule).

The court of appeal may issue a temporary stay without taking further action at that time, or it may issue a stay order in conjunction with other action, *e.g.*, issuance of an alternative writ. On court of appeal's possible actions on stay request, see §22.11.

NOTE: If the appellate court stays further proceedings in the trial court, the period during which the stay is in effect is excluded from the 5-year period in which the underlying action must be brought to trial. CCP §583.340(b). On dismissal for failure to prosecute, see California Civil Procedure Before Trial §§39.25-39.62 (4th ed Cal CEB 2004).

On requesting a temporary stay, see chap 19.

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§22.11 1. Actions on Temporary Stay Request

The court of appeal may take any one of the following actions on a request for a temporary stay:

- Issue a temporary stay immediately without requesting or awaiting opposition. See Cal Rules of Ct 8.487(a)(4) (appellate court may grant or deny request for temporary stay "[w]ithout requesting opposition or waiting for a reply").
- Request opposition to the stay only, before taking any other action, *e.g.*, issuing a *Palma* notice or alternative writ.
- Modify or vacate the stay at any time before taking further action on the writ petition if circumstances persuade the court that a stay is no longer warranted.

PRACTICE TIP: Given both the possibility of the court's modifying or vacating a stay and the court's authority to summarily deny a writ petition, the adverse party should file opposition to a stay request pointing out any good grounds to oppose the petition even if the court has not requested opposition to the stay request.

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§22.12 2. Contents of Temporary Stay Order

A temporary stay order generally provides that the stay will remain in effect pending disposition of the writ petition or until further order of the court. The stay order should be specific as to its coverage: *e.g.,* "all proceedings in the trial court are stayed" or "the order to turn over documents is stayed."

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§22.13 3. Notice of Temporary Stay Order

When the appellate court issues a temporary stay, the appellate court clerk may be required to make a reasonable effort to telephone the trial court clerk, who is to notify the trial judge. Cal Rules of Ct 8.489(b)(1) (clerk to make reasonable effort to call when proceedings stayed or prohibited are to occur within 7 days after issuance of stay "or in any other urgent situation").

The clerk is not required to notify the parties of a stay order, but many clerks do so by telephone or fax. Parties can determine whether the appellate court has issued a stay by checking the court's online docket or calling the clerk's office.

PRACTICE TIP: If a stay or its denial is important to a party, counsel should proactively track the status of the request, for example, by signing up for online notification of court actions. For court of appeal contact information, see §18.87.

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B. Issuance of Summary Denial

§22.14 1. Summary Denial Defined

Summary denial occurs when the court of appeal denies a writ petition without providing an opportunity for oral argument and without issuing a written decision with reasons stated. See *Kowis v Howard* (1992) 3 C4th 888, 894, 12 CR2d 728; *Omaha Indem. Co. v Superior Court* (1989) 209 CA3d 1266, 1271, 258 CR 66 (although courts generally do not state reason in summary denial, they occasionally cite authority). For an example of a summary denial, see form in §28.5.

A summary denial becomes final immediately because the court has not taken any action (such as issuing an alternative writ) that makes the proceeding a "cause" requiring disposition after oral argument and through written decision. See Cal Rules of Ct 8.490(b)(1); *Bay Dev., Ltd. v Superior Court* (1990) 50 C3d 1012, 1023, 269 CR 720 (appellate court did not issue immediately final summary denial, but rather issued order setting case for oral argument, which would be treated as alternative writ or order to show cause). On the effect of summary denial on the time to file a petition for review by the California Supreme Court, see §25.30.

PRACTICE TIP: Veteran appellate counsel use the terms "summary denial" and "postcard denial" interchangeably. A "postcard denial" refers to the obsolete practice of sending the petitioner a postcard stating that the court has summarily denied the writ petition.

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§22.15 2. When Summary Denial Is Used

The courts of appeal summarily deny about 90 percent of all writ petitions. See Judicial Council of California, Court Statistics Report, *Courts of Appeal* 5 (2007), available at http://www.courtinfo.ca.gov/reference/documents/csr2007.pdf; *Premium Commercial Servs. Corp. v National Bank* (1999) 72 CA4th 1493, 1498, 86 CR2d 65. See also *Omaha Indem. Co. v Superior Court* (1989) 209 CA3d 1266, 1272, 258 CR 66 (large number of denials shows that appellate "courts will not use their scarce resources to second-guess every ruling and order of the trial court, particularly when to do so would save neither time nor aid in the resolution of a lawsuit"). On analyzing the chances of a writ petition being successful, see §17.28.

The court of appeal considers only the papers (*i.e.*, the petition, supporting exhibits, and any opposition) in deciding whether to summarily deny a petition, to issue an alternative writ or order to show cause, or to issue a *Palma* notice. There is no oral argument.

JUDICIAL PERSPECTIVE: In many appellate districts, the court of appeal will wait to see whether the real party in interest or respondent files preliminary opposition before it issues a summary denial. Counsel should check with the court to learn its practice.

On preliminary opposition, see chap 21.

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§22.16 3. Summary Denial Format

In most cases, a summary denial order is only one or two sentences in length, stating simply that the court has denied the writ petition. Sometimes the court will add several sentences of explanation or cite to a statute or case. See *Omaha Indem. Co. v Superior Court* (1989) 209 CA3d 1266, 1271, 258 CR 66 (although courts generally do not state reasons for summary denial, they occasionally refer to authority). On rare occasions, the court will deny a writ petition "without prejudice," signaling that the court considered the petition premature and that petitioner may refile it later. For example, the court may, and indeed is likely to, deny a petition if the petitioner fails to meet procedural requirements. Cal Rules of Ct 8.486(b)(4). For an example of a summary denial, see form in §28.5.

NOTE: When there is no oral argument, counsel must assume that a denial with some explanation is a summary denial for purposes of determining the deadline for filing a petition for review by the California Supreme Court. See Cal Rules of Ct 8.490(b). On review of a summary denial, see §25.30. On petitions for review by the California Supreme Court, see chap 27.

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§22.17 4. Summary Denial Does Not Establish Law of Case

When an appellate court states a principle or rule of law necessary to its decision, that principle or rule becomes "law of the case" and must be adhered to throughout any subsequent trial and appellate court proceedings. *Kowis v Howard* (1992) 3 C4th 888, 893, 12 CR2d 728. An appellate court's disposition of a writ proceeding can establish law of the case, but only when the court allows briefing on the merits, holds argument, and decides the matter in a written decision with reasons stated; or, in other words, when the appellate court makes the writ proceeding a full-fledged "cause," which generally is accomplished by issuing an alternative writ. 3 C4th at 894. Thus, if an appellate court issues a written opinion following issuance of an alternative writ, the court's decision becomes law of the case. On issuance of an alternative writ, see §22.23.

In contrast, a summary denial, even when accompanied by reasons or citation to authority, does *not* establish law of the case. *Kowis v Howard, supra* (because court did not issue alternative writ or peremptory writ in first instance, it did not decide "cause" and thus did not establish law of case). This is true even when a court has issued an alternative writ but later dismisses it as improvidently granted. *Countrywide Home Loans, Inc. v Superior Court* (1997) 54 CA4th 828, 833, 62 CR2d 899. Thus, a summary denial does not preclude the parties from raising the issues presented in the petition again on appeal from a final judgment.

NOTE: When a writ petition is the only authorized mode of appellate review (see §§16.2-16.48), a summary denial is necessarily on the merits. *Leone v Medical Bd.* (2000) 22 C4th 660, 670, 94 CR2d 61. Even so, a summary denial does not establish the law of the case, whether or not the court intended the ruling to be on the merits. *Kowis v Howard* (1992) 3 C4th 888, 897, 12 CR2d 728 (summary denial of writ petition does not establish law of case even when "sole possible" ground of decision is on merits). See also *Varian Med. Sys., Inc. v Delfino* (2005) 35 C4th 180, 200, 25 CR3d 298.

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C. Issuance of *Palma* Notice

§22.18 1. *Palma* Notice Defined

The term "*Palma* notice" comes from *Palma v U.S. Indus. Fasteners, Inc.* (1984) 36 C3d 171, 180, 203 CR 626, in which the supreme court held that a court of appeal may issue a peremptory writ without awaiting a return or holding oral argument, as long as the court solicits opposition and informs the parties that it may issue a peremptory writ in the first instance.

Thus, the term "*Palma* notice" informally describes the first step in a streamlined procedure for deciding the merits of a writ petition that avoids the more formal procedures triggered by the issuance of an alternative writ. The notice advises the parties that the court is considering issuance of a peremptory writ in the first instance and invites the real party in interest or respondent to submit opposition by a specified date. For examples of *Palma* notices, see forms in §§28.7-28.9.

JUDICIAL PERSPECTIVE: Sometimes the appellate court will simply request opposition, without a formal *Palma* notice. The court may use this option for various reasons, *e.g.,* to decide whether *Palma* relief would be appropriate or whether an order to show cause is called for, or when one panel member has a question and wants to see what the real party in interest or respondent has to say. On preliminary opposition, see chap 21.

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§22.19 2. When *Palma* Notice Is Used

At one time, the courts of appeal regularly issued *Palma* notices instead of alternative writs or orders to show cause (OSC). However, the supreme court has more recently cautioned against issuing peremptory writs in the first instance absent "exceptional" circumstances, *i.e.*, when there is unusual urgency requiring acceleration of the normal decision-making process or the papers adequately address the issues raised by the petition, the issue is well settled, and no factual dispute exists. *Alexander v Superior Court* (1993) 5 C4th 1218, 1222, 23 CR2d 397, disapproved on other grounds in *Hassan v Mercy Am. River Hosp.* (2003) 31 C4th 709, 3 CR3d 623; *Ng v Superior Court* (1992) 4 C4th 29, 35, 13 CR2d 856 (accelerated *Palma* procedure is exception and should not become routine). See also *Lewis v Superior Court* (1999) 19 C4th 1232, 1236, 82 CR2d 85 (reiterating that *Palma* procedure is of limited application, but may be used when circumstances warrant).

JUDICIAL PERSPECTIVE: Courts of appeal still use the *Palma* procedure when they conclude that the trial court was so clearly wrong that the issue need not and should not wait for full briefing and argument. Similarly, the court may use a *Palma* notice when a writ is the only remedy available (*e.g.*, when the trial judge has a conflict of interest and refuses to recuse him or herself) and immediate action is necessary.

Despite the supreme court's stated limitations on the *Palma* procedure, the courts of appeal appreciate the inherent flexibility of the procedure and continue to publish decisions in *Palma*-notice cases. See, *e.g., United Cent. Bank v Superior Court* (2009) 179 CA4th 212, 215, 101 CR3d 395, quoting *Lewis v Superior Court* (1999) 19 C4th 1232, 1260, 82 CR2d 85 (court issued peremptory writ in first instance because petitioner's entitlement to writ relief was "so obvious that no purpose would be served by plenary consideration of the issue"); *C.C. v Superior Court* (2008) 166 CA4th 1019, 1023, 83 CR3d 225 (having satisfied procedural requirements of giving notice and receiving informal briefing, court issued peremptory writ in first instance); *Lempert v Superior Court* (2003) 112 CA4th 1161, 1175, 5 CR3d 700 (court issued peremptory writ finding applicable legal principles well established, relevant facts undisputed, and "petitioner's entitlement to relief is so obvious that plenary consideration of the issues is unwarranted"); *Maldonado v Superior Court* (1996) 45 CA4th 397, 400, 52 CR2d 805 (peremptory writ in first instance is exception, but procedure was warranted under the circumstances). However, the reality of appellate writ practice today is that in the few writ proceedings in which the court of appeal does not summarily deny a writ petition, the court will usually issue an alternative writ or an OSC. The courts use *Palma* notices far less frequently.

JUDICIAL PERSPECTIVE: Some courts of appeal use a "coercive" alternative writ instead of a *Palma* notice, telling the trial court that it appears that the writ petition has merit, giving the trial court a specified number of days to change its order, and stating that the court of appeal will discharge the alternative writ when the trial court complies. On coercive alternative writs, also known as "speaking alternative writs," see §22.27.

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§22.20 3. When Notice Is Given in Prayer for Relief

A writ petition frequently concludes with a stock prayer for relief asking for issuance of a peremptory writ in the first instance and, alternatively, for issuance of an alternative writ followed by issuance of a peremptory writ. The supreme court made it clear in *Palma v U.S. Indus. Fasteners, Inc.* (1984) 36 C3d 171, 180, 203 CR 626 that a prayer for relief, alone, is not sufficient notice that the court of appeal may, in fact, issue a peremptory writ in the first instance. The real party in interest and respondent must receive explicit notice that the court of appeal may issue a peremptory writ in the first instance and be given an opportunity to file opposition.

PRACTICE TIP: Theoretically, the petitioner could give this separate and explicit notice. As a matter of practice, however, the courts of appeal issue such notice when they conclude that the *Palma* procedure is appropriate.

JUDICIAL PERSPECTIVE: Some appellate court divisions regard the prayer for the peremptory writ in the first instance combined with the opportunity to file preliminary opposition (see chap 21) to be sufficient due process to issue a peremptory writ in the first instance. Whether this is permissible under *Palma* is highly questionable, because *Palma* held that "notice" by way of the prayer for relief is not sufficient, and when *Palma* was decided, CCP §1107 allowed opposition to be filed within 5 days. Thus, the supreme court clearly did not view the mere opportunity to file opposition as providing sufficient due process. Nevertheless, the real party and respondent may want to confirm that the court will not issue a peremptory writ in the first instance without issuing a *Palma* notice.

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§22.21 4. Form of *Palma* Notice Given by Court of Appeal

Typically, *Palma* notice is in the form of a letter from the court of appeal requesting opposition from the real party in interest and advising that the court may issue a peremptory writ in the first instance. For examples of *Palma* notices, see forms in §§28.7-28.9.

NOTE: *Palma* notice gives the appellate court the authority to issue a peremptory writ in the first instance. Even after issuing a notice, the court still may (and courts often do) summarily deny the petition or issue an alternative writ and hold oral argument. On summary denials, see §22.14. On issuance of an alternative writ, see §§22.23-22.24.

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§22.22 5. "Suggestive" *Palma* Notice

Some courts of appeal issue "suggestive" *Palma* notices, also known as "speaking" or "coercive" *Palma* notices, in which the court discusses the merits of the writ petition with citation to authority, determines that the trial court ruling was "erroneous," and gives the trial court the "power and jurisdiction" to change its order. See *Brown, Winfield & Canzoneri, Inc. v Superior Court* (Feb. 1, 2010, S156598), 2010 Cal Lexis 588 (describing such notices). For an example of a suggestive *Palma* notice, see §28.9.

Propriety of suggestive *Palma* notice. It has been debatable whether a suggestive *Palma* notice is ever proper absent solicitation of prior opposition. The California Supreme Court addressed that issue in a case that was not final as the current update to this publication went to press. In *Brown, Winfield & Canzoneri, Inc. v Superior Court* (Feb. 1, 2010, S156598), 2010 Cal Lexis 588, the supreme court held that it is not improper for an appellate court to issue a suggestive *Palma* notice, and a court may do so without first having solicited or received opposition from the real party in interest. A suggestive *Palma* notice, the court reasoned, is not the equivalent of a peremptory writ, and although the notice might be styled as an order it in no way requires a lower court to follow the course of action suggested by the appellate court. Instead, the notice is analogous to a tentative ruling and its conclusions are not binding on the appellate or trial court. Thus, a suggestive *Palma* notice may not direct a trial court to change its order (or purport to grant the trial court authority to change its order) without first affording the parties notice and an opportunity to be heard. The supreme court stated that a court of appeal "should refrain from describing its suggestive *Palma* notice as a 'directive,' or otherwise suggesting that the trial court must 'comply' with the notice.… [and such a notice] should acknowledge the procedural safeguards required in the event the trial court does revisit an interim ruling in response to such a notice…." If a trial court does then revisit its ruling, it must inform the parties of its intention to do so and provide them with an opportunity to be heard. Adherence to this procedure, the supreme court concluded, is "consistent with… case law, and reasonably balances the interests of conservation of scarce judicial resources with the parties' right to notice and an opportunity to be heard." *Brown, Winfield & Canzoneri, Inc., supra*.

NOTE: In *Brown*, the supreme court acknowledged that, "although the circumstances in which a *Palma* notice may issue are rare, the availability of [the suggestive *Palma* notice] procedure may place appellate counsel for the real party in interest in a difficult situation." Therefore, the court stated, "although not required, in order to help alleviate this practical dilemma we strongly encourage appellate courts to inform the parties—and invite preliminary opposition—in the event the appellate court anticipates taking any action other than summarily denying the writ petition. *Brown, Winfield & Canzoneri, Inc., supra*. Counsel should verify the finality of *Brown* before citing it as authority.

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D. Issuance of Alternative Writ or Order to Show Cause

§22.23 1. Alternative Writ or Order to Show Cause (OSC) Defined

An alternative writ is an order issued by the appellate court instructing the respondent, almost always the trial court, either to comply with the directions in the alternative writ or to show cause why the appellate court should not order it to do so. CCP §§1087 (mandate), 1104 (prohibition); *Palma v U.S. Indus. Fasteners, Inc.* (1984) 36 C3d 171, 177, 203 CR 626. See *Snyder v Superior Court* (2007) 157 CA4th 1530, 69 CR3d 600 (issuing alternative writ); *Ombudsman Servs. of N. Cal. v Superior Court* (2007) 154 CA4th 1233, 65 CR3d 456 (issuing alternative writ and staying further discovery proceedings). For an example of an alternative writ, see form in §28.6.

Issuance of an alternative writ makes the writ proceeding a "cause," requiring oral argument and a written decision on the merits of the petition. See *Kowis v Howard* (1992) 3 C4th 888, 899, 12 CR2d 728. If the writ proceeding becomes a "cause," the appellate court's decision becomes law of the case. On law of the case, see §22.17.

Issuance of an alternative writ may signal that the court of appeal has concluded that there is no other adequate remedy at law. See *Langford v Superior Court* (1987) 43 C3d 21, 28, 233 CR 387; *County of Sonoma v Superior Court* (2009) 173 CA4th 322, 336 n6, 93 CR3d 39 (by issuing order to show cause, court "necessarily determined the propriety of writ review"). After considering the merits, however, the court still may deny the petition.

Some appellate courts issue what is termed a "coercive" alternative writ or "speaking" alternative writ, which states that it appears the trial court is in error, directs the court to change its ruling within a specified number of days, and provides that the alternative writ will be discharged upon compliance. On coercive alternative writs, see §22.27.

Some appellate courts use only the terminology "order to show cause." See *Henry v Superior Court* (2008) 160 CA4th 440, 72 CR3d 808 (issued OSC and stay); *CenterPoint Energy, Inc. v Superior Court* (2007) 157 CA4th 1101, 1116, 69 CR3d 202 (issued OSC and received further briefing). The mandate and prohibition statutes do not expressly provide for OSCs absent an alternative writ. CCP §§1087 (mandate), 1104 (prohibition). Nevertheless, as the cited cases illustrate, some courts refer only to issuance of an OSC.

NOTE: Even after issuing an alternative writ, the court of appeal can discharge the writ as improvidently granted and deny the petition. This is treated as a summary denial and does not act as law of the case. *Countrywide Home Loans, Inc. v Superior Court* (1997) 54 CA4th 828, 833, 62 CR2d 899. On summary denials and law of the case, see §22.17.

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§22.24 2. When Alternative Writ/Order to Show Cause (OSC) Is Used

The California Supreme Court has stated a strong preference against the simplified *Palma* notice process and in favor of the more deliberate alternative writ process that entails a formal return, full merits briefing, oral argument, and disposition by opinion. See §22.19; *Ng v Superior Court* (1992) 4 C4th 29, 35, 13 CR2d 856. As a result, if the court of appeal does not summarily deny the writ petition, it will generally issue an alternative writ unless there are exceptional circumstances warranting use of the *Palma* procedure. See *Alexander v Superior Court* (1993) 5 C4th 1218, 1222, 23 CR2d 397, disapproved on other grounds in *Hassan v Mercy Am. River Hosp.* (2003) 31 C4th 709, 3 CR3d 623. On limited use of the Palma procedure, see §22.19.

JUDICIAL PERSPECTIVE: In divisions with large backlogs, the decision whether to issue an alternative writ or OSC is sometimes delayed for weeks or even months. Until the court issues an alternative writ or OSC, there is no deadline for the court to act.

When the court of appeal is reasonably certain that the trial court has reached an erroneous result, it may issue a "suggestive" *Palma* notice or a "coercive" alternative writ, stating that it appears the trial court has erred, allowing the trial court the opportunity to change its ruling within a specified period of time, and providing that the alternative writ will be discharged upon compliance by the trial court. The hope is that the trial court will take the hint, avoiding further expenditure of appellate resources and further expense to the parties. On suggestive *Palma* notices, see §22.22; on coercive alternative writs, see §22.27.

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Source: Civil Litigation/California Civil Writ Practice/22 Initial Action by Court of Appeal/§22.25 3. Content and Preparation of Alternative Writ/Order to Show Cause (OSC)

§22.25 3. Content and Preparation of Alternative Writ/Order to Show Cause (OSC)

California Code of Civil Procedure §1087 provides that "an alternative writ must command the party to whom it is directed immediately after receipt of the writ, or at some specified time, to do the act required to be performed, or to show cause before the court at a time then or thereafter specified by court order why he has not done so." See also CCP §1104 (prohibition). Thus, an alternative writ typically specifies a deadline for the real party in interest to file a return, and for the petitioner to file an optional reply.

If the court does not set a deadline, the return is due within 30 days, and the reply is due within 15 days after the return is filed. Cal Rules of Ct 8.487(b)(2)-(3). The alternative writ also may set a date for oral argument, but some courts reserve the setting of a hearing date for later. The alternative writ may also contain a temporary stay order, when appropriate. On issuance of temporary stay orders, see §22.10.

If the court issues only an OSC, the order usually establishes a briefing schedule and either sets an argument date or states that the court will hear the matter when "placed on the calendar."

NOTE: An order directing the parties to appear for oral argument and calling for the filing of a return and reply is the equivalent of an alternative writ. *Keenan v Superior Court* (2002) 27 C4th 413, 420 n7, 117 CR2d 1.

The court usually prepares the alternative writ/OSC, but some courts have ordered the petitioner to prepare it. For an example of an alternative writ, see form in §28.6.

PRACTICE TIP: If the court's order is unclear whether the court or the petitioner will prepare the alternative writ, counsel for the petitioner should check with the court clerk for clarification.

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Source: Civil Litigation/California Civil Writ Practice/22 Initial Action by Court of Appeal/§22.26 4. Service and Filing of Alternative Writ/Order to Show Cause (OSC)

§22.26 4. Service and Filing of Alternative Writ/Order to Show Cause (OSC)

The petitioner normally serves copies of the alternative writ or OSC on all parties, including the trial court, and then files the original with proof of service in the issuing court. See CCP §§1087-1088, 1105. See also Cal Rules of Ct 8.486(e). Some courts direct clerks to furnish the petitioner with sufficient copies of the alternative writ to serve all parties and a certified copy for the trial court, while others direct the clerk to serve all parties and the trial court.

PRACTICE TIP: Absent clear direction to the contrary, petitioners should serve all required parties and the trial court.

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§22.27 5. "Coercive" Alternative Writ

The court of appeal may issue an alternative writ worded to seriously encourage action by the trial court. This type of alternative writ states that it appears the trial court has erred, provides a date by which the trial court is to act, and provides that the alternative writ will be discharged upon compliance by the trial court. Some courts refer to this as a "coercive" alternative writ or a "speaking alternative writ" and use it instead of a *Palma* notice or a "suggestive" or "speaking" *Palma* notice. On *Palma* notice, see §§22.18-22.22. The appellate court's intent is to prompt the trial court to change its ruling without further use of appellate court resources and to save the parties time and money.

PRACTICE TIP: Before preparing briefs in response to an alternative writ, counsel may wish to ask the trial court, by phone call to the clerk, whether the court plans to comply with the writ. The court has no duty to inform counsel but may appreciate the courtesy of the call and may provide the information, which counsel should relay to the appellate court clerk as well.

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§22.28 a. If Trial Court Complies With Alternative Writ

If the trial court complies with the alternative writ, the petitioner promptly should submit to the appellate court clerk a copy of the trial court's order indicating compliance. The court of appeal will then discharge the alternative writ and dismiss the petition as moot. *Palma v U.S. Indus. Fasteners, Inc.* (1984) 36 C3d 171, 177, 203 CR 626.

NOTE: Even if the trial court complies with the appellate court's order, the appellate court still may decide to issue an opinion. See *People v Superior Court (Jump)* (1995) 40 CA4th 9, 12, 46 CR2d 829 (court of appeal discharged alternative writ and denied writ petition as moot, but still issued opinion on merits due to recurring nature and importance of issue).

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§22.29 b. If Trial Court Does Not Comply With Alternative Writ

A respondent trial court's most common response to an alternative writ is no response at all. If the trial court does not change its order, the real party in interest must show cause why the court's order is proper. The real party in interest does this by filing a return, which is similar to an answer in a civil case but which also includes a supporting memorandum and is the opposition to the writ petition. If the real party in interest does not file a return, the court may deem all factual matters in the petition admitted, and only legal issues remain for decision. CCP §1094; *Coppinger v Superior Court* (1982) 134 CA3d 883, 885, 185 CR 24 (real party in interest did not file return to petition but instead submitted memorandum addressing legal issues). On content of the opposition or return, see §23.26. The petitioner may also file a reply to the return with leave of court. On the reply, see §§23.48-23.50.

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§22.30 IV. ISSUANCE OF WRIT OF REVIEW (CERTIORARI)

The initial actions an appellate court can take with respect to a petition for writ of review (certiorari) under CCP §1067 differ somewhat from the initial actions the court can take with respect to a petition for writ of mandate or prohibition. Under CCP §1069, the court "may require a notice of the application [for a writ] to be given to the adverse party, or may grant an order to show cause why it should not be allowed, or may grant the writ without notice." Thus, no alternative writ may issue, only an order to show cause. Although the statute allows for issuance of a writ of review in the first instance without notice, *Palma v U.S. Indus. Fasteners, Inc.* (1984) 36 C3d 171, 180, 203 CR 626, would appear to preclude that option on due process grounds. The supreme court held in *Palma* that a prayer for issuance of a peremptory writ, alone, is not sufficient notice that the court of appeal may, in fact, issue a peremptory writ in the first instance. The real party in interest and respondent must receive explicit notice that the court of appeal may issue a peremptory writ in the first instance and be given an opportunity to file opposition.

In contrast to mandamus and prohibition proceedings, in which a peremptory writ is the ultimate relief sought, issuance of a writ of review only serves to call up the record and stay further proceedings in the lower court. CCP §1071. The appellate court then reviews the record, determines whether the lower court acted in excess of its jurisdiction, and either affirms, annuls, or modifies the proceedings below. CCP §§1074, 1075.

On writs of review, see §§15.27-15.38.

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23

Opposition and Reply

M.C. Sungaila

I. INTRODUCTION
A. Scope of Chapter §23.1
B. Terminology §23.2

II. OPPOSITION AFTER COURT OF APPEAL ISSUES *PALMA* NOTICE
A. Reason for Filing Opposition §23.3
B. Format of Opposition §23.4
1. Basic Briefing Structure §23.5
2. Citation to Record §23.6
3. Citation to Authority §23.7
4. Certificate of Interested Entities or Persons §23.8
C. Content of Opposition
1. Explain Why Court Should Deny Writ Relief §23.9
2. Do Not Raise New Issues §23.10
D. Timing of Opposition
1. Court Usually Sets Deadline §23.11
2. If Court Does Not Set Deadline, File Within 30 Days §23.12
3. Extensions of Time Available by Request
a. Request for Extension §23.13
b. Good Cause Required §23.14
E. Service and Filing of Opposition
1. Whom to Serve §23.15
2. How to File and Serve §23.16

III. REPLY TO *PALMA* OPPOSITION
A. Format and Content of Reply §23.17
B. Service and Filing of Reply §23.18

IV. RETURN AFTER COURT OF APPEAL ISSUES ALTERNATIVE WRIT OR ORDER TO SHOW CAUSE §23.19
A. Return Defined §23.20
1. Real Party in Interest Usually Files Return §23.21
2. When Respondent Court May File Return §23.22
3. When Respondent Is Not Lower Court, Respondent May File Return §23.23
4. Respondent and Real Party in Interest May File Joint Return §23.24
B. Format of Return §23.25
C. Contents of Return §23.26
D. Certificate of Interested Entities or Persons §23.26A
E. Formal Return §23.27
1. Answer §23.28
a. Responding to Verified Allegations in the Petition §23.29
b. Alleging Additional Material Facts §23.30
c. Pleading Affirmative Defenses §23.31
d. Verification §23.32
2. Demurrer §23.33
a. File With Answer §23.34
b. State Grounds for Demurrer §23.35
c. Do Not Raise Affirmative Defenses §23.36
F. Supporting Memorandum §23.37
G. Supporting Exhibits §23.38
H. Timing of Return
1. Court Usually Sets Deadline §23.39
2. If Court Does Not Set Deadline, File Within 30 Days §23.40

3. Extension of Time §23.41
I. Serving Return
1. Whom to Serve §23.42
2. How to Serve §23.43
J. Consequences of Not Filing Proper Return §23.44
K. Return in Writ of Review (Certiorari) Proceedings §23.45
1. Terminology §23.46
2. Demurrer §23.47

V. REPLY (TRAVERSE) TO RETURN §23.48
A. Format and Content of Reply (Traverse) §23.49
B. Filing and Service of Reply (Traverse) §23.50

VI. CHART: DEADLINES FOR *PALMA* OPPOSITION AND REPLY, FOR RETURN AND REPLY §23.51

VII. AMICUS CURIAE BRIEFS §23.52
A. Application to File Amicus Brief §23.53
B. Filing and Service of Amicus Brief §23.54
C. Seek Amicus Participation Only in Exceptional Cases §23.55

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I. INTRODUCTION

§23.1 A. Scope of Chapter

An appellate court can take a variety of actions on a writ petition short of deciding the petition on the merits. The court can summarily deny a petition, either before or after the respondent or real party in interest files preliminary opposition. On filing preliminary opposition, see chap 21. On summary denial, see §§22.14-22.17. Alternatively, a court can issue a *Palma* notice, advising the parties that the court may issue a peremptory writ in the first instance and inviting the respondent and real party in interest to file opposition. On *Palma* notices, see §§22.18-22.22. Or, the court can issue an alternative writ or order to show cause (OSC), specifying the date for a return and sometimes setting an oral argument date (or stating that oral argument will be scheduled at a future date following the completion of briefing). On alternative writs and OSCs, see §§22.23-22.29.

This chapter discusses how and when a respondent or real party in interest opposes a writ petition after the appellate court issues a *Palma* notice or an alternative writ or OSC, and when a petitioner can reply to such opposition.

This chapter first discusses opposition solicited by a *Palma* notice. See §§23.3-23.16. It also covers the petitioner's reply to such opposition. See §§23.17-23.18. The chapter next discusses the respondent's or real party in interest's "return" and merits briefing following the court of appeal's issuance of an alternative writ or OSC. See §§23.19-23.47. It also covers the petitioner's reply (traverse) to a return. See §§23.48-23.50. A chart of deadlines for all responsive documents follows. See §23.51. The chapter concludes with a discussion of amicus briefs in the courts of appeal. See §§23.52-23.55.

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§23.2 B. Terminology

In appellate court writ practice, there are various terms of art used in statutes, in rules, by courts, and by appellate counsel. The following terms refer to the kinds of responsive documents that may be filed in an appellate court writ proceeding:

"Preliminary opposition": Optional (but strongly recommended) document filed within 10 days after filing of a writ petition. Cal Rules of Ct 8.487(a). On preliminary opposition, see chap 21.

"Opposition": Document filed after court of appeal issues a *Palma* notice advising the parties that it may issue a peremptory writ in the first instance. Cal Rules of Ct 8.487(b)(1). This document is sometimes called the "formal" opposition. On such opposition, see §§23.3-23.16.

"Reply": Document petitioner may file within 10 days after preliminary opposition (Cal Rules of Ct 8.487(a)(3)) and document petitioner may file within 15 days after *Palma* opposition (Cal Rules of Ct 8.487(b)(3)). On these replies, see §§21.21, 23.17-23.18.

"Return": Document the respondent or real party in interest files after court of appeal issues an alternative writ or order to show cause. Cal Rules of Ct 8.487(b)(1). The return is made by demurrer, verified answer, or both. Cal Rules of Ct 8.487(b)(1). On the return, see §§23.19-23.47.

"Traverse": Document the petitioner files in response to the return. Cal Rules of Ct 8.487(b)(3). This document is also called a "reply" or "replication." On the traverse, see §§23.48-23.50.

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II. OPPOSITION AFTER COURT OF APPEAL ISSUES *PALMA* NOTICE

§23.3 A. Reason for Filing Opposition

The courts of appeal sometimes issue a short order, called a *Palma* notice, advising the parties that a peremptory writ may issue in the first instance (*i.e.,* without a return, formal briefing, or oral argument) and inviting the respondent and real party in interest to file opposition by a specified date. On *Palma* notices, see §§22.18-22.22.

Although a *Palma* notice does not make opposition mandatory, if an appellate court solicits opposition, the respondent or real party in interest should always file opposition. See Cal Rules of Ct 8.487(b)(1). This may be the *only* opportunity the respondent and real party in interest have to be heard on the merits of the writ petition, since a peremptory writ may issue without further briefing and without oral argument.

PRACTICE TIP: Even if the respondent or real party in interest has filed preliminary opposition (see chap 21), when the court of appeal issues a *Palma* notice, the respondent or real party in interest should file further opposition on the merits.

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§23.4 B. Format of Opposition

The Rules of Court specify the format requirements for an opposition. See Cal Rules of Ct 8.40 (form of documents, including opposition and answers to writ petitions), 8.204 (contents and form of appellate briefs), 8.487(b) (return or opposition).

Although *Palma* opposition should respond fully on the merits, it need not be as formalistic as a return and can be in the form of an appellate brief. See *Payless Drug Store v Superior Court* (1993) 20 CA4th 277, 279, 24 CR2d 506 (peremptory writ issued after court received only "informal" reply to petition in response to *Palma* notice; court held that no purpose would be served by further briefing). On the format and substance of a respondent's brief on appeal, see California Civil Appellate Practice, chap 13 (3d ed Cal CEB 1996).

Unlike a return, which must be verified, the respondent or real party in interest needs to verify a *Palma* opposition only in the rare instance when it includes material facts not already before the court in either the writ petition or exhibits in support of the petition. On the format of a return, see §23.25. On verification of a return, see §23.32.

For an example of *Palma* opposition, see form in §28.10.

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§23.5 1. Basic Briefing Structure

Palma opposition should be akin to a brief and contain an introduction, a statement of facts and procedural history, the legal argument, and a conclusion. See Cal Rules of Ct 8.204 (contents and form of appellate briefs). On basic briefing structure, see §§18.21-18.57.

Throughout the opposition, counsel should use clear and concise headings and subheadings.

PRACTICE TIP: Counsel can determine whether the argument headings and subheadings are clear and effective by examining the table of contents. If a reader can understand the organization of the brief and identify the salient points made in the brief from the table of contents alone, the headings and subheadings are well crafted and serve their purpose.

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§23.6 2. Citation to Record

The respondent or real party in interest should support all factual statements made in the opposition by citation to the record, *e.g.*, the exhibits submitted by the petitioner or additional exhibits submitted by the respondent or real party in interest. See Cal Rules of Ct 8.204(a)(1)(C) (citation to record should support factual statements in appellate briefs). On the proper form of record citations, see §20.14. On the importance of filing a supporting record, see §20.4.

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§23.7 3. Citation to Authority

The respondent or real party in interest should support all arguments with citations to legal authority. See Cal Rules of Ct 8.204(a)(1)(B) (legal authority should support points in appellate briefs, if possible).

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§23.8 4. Certificate of Interested Entities or Persons

Each party to an appellate court writ proceeding must comply with the requirements of Cal Rules of Court 8.208 concerning serving and filing a Certificate of Interested Entities or Persons. Cal Rules of Ct 8.488(a)-(b). The certificates of respondents and real parties in interest must be included in their first filed document, either preliminary opposition under Rule 8.487, *Palma* opposition, or a return. Cal Rules of Ct 8.488(c). The certificate must appear after the cover and before the tables. Cal Rules of Ct 8.488(c)(3).

If the respondent or real party fails to file the required certificate, the clerk must notify the party by mail to file a certificate within 10 days. Cal Rules of Ct 8.488(d)(1). The notice must further advise that failure to file the certificate may result in sanctions or the party's opposition or return being stricken. Cal Rules of Ct 8.488(d)(1)(B), (d)(2).

For sample form Certificate of Interested Entities or Persons (Judicial Council Form APP-008), see §28.2.

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C. Content of Opposition

§23.9 1. Explain Why Court Should Deny Writ Relief

Palma opposition should focus on two things:

- It should explain why writ review is unwarranted, *e.g.*, the petitioner has an adequate remedy by way of appeal and will not suffer irreparable harm if the petition is denied, or the petitioner has no beneficial interest in the outcome (on requirements for writ relief, see §§15.51-15.71); and
- It should explain why the petition lacks merit, *e.g.,* the trial court did not commit error or abuse its discretion.

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§23.10 2. Do Not Raise New Issues

The respondent or real party in interest may not raise new issues in a *Palma* opposition. See, *e.g., Campbell v Superior Court* (2005) 132 CA4th 904, 922, 34 CR3d 68 (real party in interest could not seek review of trial court's attorney fee decision through its opposition to writ petition).

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D. Timing of Opposition

§23.11 1. Court Usually Sets Deadline

Typically, the court of appeal specifies the deadline for filing opposition in its *Palma* notice. Usually, the court allows 20 days to file opposition.

PRACTICE TIP: If the court's notice does not specify a deadline, the respondent and real party in interest should check promptly with the court clerk to determine whether the court has nonetheless set a deadline or otherwise expects to receive an opposition by a specific date.

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Source: Civil Litigation/California Civil Writ Practice/23 Opposition and Reply/§23.12 2. If Court Does Not Set Deadline, File Within 30 Days

§23.12 2. If Court Does Not Set Deadline, File Within 30 Days

Unless the court of appeal orders otherwise, the respondent or real party in interest must serve and file opposition within 30 days after issuance of a *Palma* notice. Cal Rules of Ct 8.487(b)(2).

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3. Extensions of Time Available by Request

§23.13 a. Request for Extension

On a showing of good cause, the courts of appeal generally will grant an extension of time to file opposition under a *Palma* notice. A request for an extension of time must include (Cal Rules of Ct 8.60(c)(2)):

- The current due date of the document for which the party is requesting an extension;
- The length of the extension requested;
- Whether the party has obtained any previous extensions; and
- Good cause (or an exceptional showing of good cause, when required) for granting the extension.

PRACTICE TIP: The parties may not stipulate to an extension, but the respondent or real party in interest should obtain opposing counsel's agreement before applying to the court for an extension and state in the application that the requested extension is unopposed.

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Source: Civil Litigation/California Civil Writ Practice/23 Opposition and Reply/§23.14 b. Good Cause Required

§23.14 b. Good Cause Required

The factors pertaining to good cause include (Cal Rules of Ct 8.63(b)):

- The degree of prejudice, if any, to any party from a grant or denial of an extension;
- The position of the client and any opposing party;
- The length of the record;
- The number and complexity of the issues;
- Whether there are settlement negotiations;
- Whether the case is entitled to priority;
- Whether counsel responsible for handling the writ proceeding is new to the case;
- Whether other counsel or the client needs additional time to review the document;
- Whether counsel responsible for handling the matter has other specific time commitments preventing timely filing;
- Whether any illness or personal emergency prevents timely filing, or whether counsel has a pre-planned vacation that cannot reasonably be rearranged; and
- Any other factor constituting good cause in the context of the case.

Some courts of appeal may have local rules governing extension requests. See, *e.g.*, 1st App Dist, Local R 11. Extension requests may be, and generally are, made on Judicial Council Form APP 006.

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E. Service and Filing of Opposition

§23.15 1. Whom to Serve

The respondent or real party in interest must serve a copy of any written opposition on the petitioner and any other parties that have appeared during the proceeding. CCP §§465, 1109.

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§23.16 2. How to File and Serve

The respondent or real party in interest must serve *Palma* opposition in the same manner as an appellate brief in an ordinary civil action, generally on counsel by mail. Cal Rules of Ct 8.25-8.44. The proof of service must identify the party that counsel represents and provide counsel's telephone number. See Cal Rules of Ct 8.25(a)(2). On service in civil appeals, see California Civil Appellate Practice §12.63 (3d ed Cal CEB 1996).

The respondent or real party in interest must file an original of the opposition and four copies, showing proof of service. Cal Rules of Ct 8.44(b)(3).

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III. REPLY TO *PALMA* OPPOSITION

§23.17 A. Format and Content of Reply

The petitioner may file a reply to *Palma* opposition. Cal Rules of Ct 8.487(b)(3). Although a reply is optional, the petitioner always should take the opportunity to have the final word on the matter. Once the court of appeal has issued a *Palma* notice, the parties must assume the court will make its decision solely on the papers submitted (*i.e.*, the petition, opposition, and reply) and will not call for further briefing or hear oral argument.

A reply should be in the format of a reply brief on appeal, *e.g.,* contain an introduction, argument, and conclusion. On reply briefs on appeal, see California Civil Appellate Practice §§12.67-12.78 (3d ed Cal CEB 1996).

The reply should:

- Refocus the court on the facts and law supporting writ relief and demonstrate the merits of the petition; and
- Respond to the points and arguments made in the opposition.

The petitioner cannot raise new issues for the first time in the reply. See, *e.g., Save the Sunset Strip Coalition v City of W. Hollywood* (2001) 87 CA4th 1172, 1181 n3, 105 CR2d 172 (court refused to consider issue raised for first time in reply brief on appeal from judgment denying writ petition).

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§23.18 B. Service and Filing of Reply

The petitioner must serve and file a reply within 15 days after the respondent or real party in interest files the opposition, unless the court orders otherwise. Cal Rules of Ct 8.487(b)(3).

The petitioner must file an original of the reply with four copies, showing proof of service. Cal Rules of Ct 8.44(b)(3).

The petitioner must serve a reply to *Palma* opposition in the same manner as an appellate brief in an ordinary civil action, generally on counsel by mail. Cal Rules of Ct 8.25-8.44. The proof of service must identify the party that counsel represents and provide counsel's telephone number. See Cal Rules of Ct 8.25(a)(2). On service in civil appeals, see California Civil Appellate Practice §12.63 (3d ed Cal CEB 1996).

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§23.19 IV. RETURN AFTER COURT OF APPEAL ISSUES ALTERNATIVE WRIT OR ORDER TO SHOW CAUSE

An alternative writ of mandate commands the respondent, almost always the trial court in an appellate court writ proceeding, either to perform an act (*e.g.,* vacate its order and enter a new and different order) or show cause why it should not be compelled to do so. CCP §1087. Similarly, an alternative writ of prohibition commands the respondent to desist or to refrain from acting or to show cause why it should not be so ordered. CCP §1104. On alternative writs and orders to show cause, see §§22.23-22.29. If the respondent complies with the court of appeal's command, the court will usually discharge the alternative writ or order to show cause and dismiss the writ petition. Otherwise, the respondent or real party in interest must show cause why the requested writ should not issue by filing a "return," responding to the verified allegations in the petition and arguing that writ relief is unwarranted and should be denied. Cal Rules of Ct 8.487(b).

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§23.20 A. Return Defined

A "return" is the responsive pleading that the respondent or real party in interest files after the court of appeal issues an alternative writ of mandate or prohibition, or an order to show cause.

The vast majority of appellate court writ proceedings challenge a ruling made by a trial court, and thus the respondent in most appellate court writ proceedings is the lower court. When that is the case, the respondent trial court rarely appears. Rather, it is up to the real party in interest to file a return and defend the lower court's ruling. On who files a return, see §§23.21-23.23.

A return may be made by verified answer, demurrer, or both. See Cal Rules of Ct 8.487(b)(1); CCP §1089. On return by answer, see §§23.28-23.32. On return by demurrer, see §§23.33-23.36.

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Source: Civil Litigation/California Civil Writ Practice/23 Opposition and Reply/§23.21 1. Real Party in Interest Usually Files Return

§23.21 1. Real Party in Interest Usually Files Return

The real party in interest usually prepares and files the return because the respondent in most appellate court writ proceedings is the trial court, which is a neutral party. As such, the trial court usually has no beneficial interest in the outcome of the writ proceeding and thus lacks standing to file a return.

JUDICIAL PERSPECTIVE: The parties should not be misled by the nomenclature; the real party in interest is most often the party responsible for filing the return.

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§23.22 2. When Respondent Court May File Return

In rare situations, the respondent trial court has standing, *i.e.,* a beneficial interest in the outcome of the proceeding, and thus can prepare and file a return. This situation may arise if:

- The petition concerns the disqualification of the trial judge;
- The petition presents an issue affecting the court's operations, procedures, or budget;
- The real party in interest cannot meaningfully oppose the petition so as to ensure representation of the adverse position; or
- The petitioner seeks review of an order in which the respondent court refuses to recuse itself.

See, *e.g., James G. v Superior Court* (2000) 80 CA4th 275, 281, 95 CR2d 135 (after considering these grounds for standing, court of appeal held that trial court's participation was justified). See also *Settlemire v Superior Court* (2003) 105 CA4th 666, 129 CR2d 560 (respondent court may oppose writ petition when real party in interest does not appear and issue has direct impact on court's operations and procedures or potentially imposes financial obligations affecting court's operations).

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§23.23 3. When Respondent Is Not Lower Court, Respondent May File Return

In rare cases an appellate court writ proceeding challenges action by a nonjudicial body (*i.e.,* when the petitioner has "skipped over" the trial court or when statutes provide for initial writ review by the courts of appeal). See chaps 15-16. In such cases, the respondent likely will appear and file a return in defense of its action.

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§23.24 4. Respondent and Real Party in Interest May File Joint Return

In appellate court writ proceedings in which the respondent appears and files a return (see §§23.22-23.23), the real party may also file a return, or the respondent and real party may file a joint return. Cal Rules of Ct 8.487(b)(1). Or multiple real parties can file a joint return or file a joinder. See *Alch v Superior Court* (2008) 165 CA4th 1412, 1421, 82 CR3d 470 (two returns were filed on behalf of real parties in interest and others filed joinders in those returns).

PRACTICE TIP: Unless the real party is confident that the respondent has the time and resources to prepare a thorough and persuasive return, the real party should either file a separate return or take the laboring oar in preparing a joint return.

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§23.25 B. Format of Return

The Rules of Court specify the format requirements for a return. See Cal Rules of Ct 8.40 (form of documents, including opposition and answers to writ petitions), 8.204 (contents and form of appellate briefs), 8.487(b) (return or opposition).

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§23.26 C. Contents of Return

The contents of a return are similar to those of a writ petition. The return should include:

- Certificate of Interested Entities or Persons (see §18.21);
- Tables of Authorities and Contents (see §§18.22-18.23);
- Introductory statement (see §18.24);
- Formal return (either by verified answer, demurrer, or both, see §§23.27-23.36);
- Supporting memorandum (see §§18.49-18.56); and
- Exhibits (the record). See §18.57, chap 20.

On format requirements for a writ petition, see §§18.5-18.20. For an example of a return, see form in §28.11.

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Source: Civil Litigation/California Civil Writ Practice/23 Opposition and Reply/§23.26A D. Certificate of Interested Entities or Persons

§23.26A D. Certificate of Interested Entities or Persons

Each party to an appellate court writ proceeding must comply with the requirements of Cal Rules of Court 8.208 concerning serving and filing a Certificate of Interested Entities or Persons. Cal Rules of Ct 8.488(a)-(b). On the Certificate of Interest Entities or Persons, see §18.21.

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§23.27 E. Formal Return

The heart of the return, or the "formal" return, is the pleading part of the document in which the respondent or real party in interest responds to the allegations made in the writ petition. The formal return must be in the form of a verified answer, demurrer, or both. CCP §§1069.1, 1089, 1105, 1109; Cal Rules of Ct 8.487(b)(1).

NOTE: Although there is some authority for use of other pleadings, two courts of appeal have held that a document that is neither an answer nor a demurrer does not constitute a return. See *Shaffer v Superior Court* (1995) 33 CA4th 993, 996 n2, 39 CR2d 506 (supporting memorandum accompanied by counsel's declaration is not return); *County of San Bernardino v Superior Court* (1994) 30 CA4th 378, 382 n6, 35 CR2d 760 (document entitled "responsive brief" that does not attempt to respond to formal allegations of petition is not return).

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§23.28 1. Answer

The respondent or real party in interest may file a verified answer as the formal return. CCP §§1069.1 (review (certiorari)), 1089 (mandate), 1105 (prohibition); Cal Rules of Ct 8.487(b).

The answer must conform to the rules applicable to an answer in a civil action. See *Dulaney v Municipal Court* (1974) 11 C3d 77, 81 n3, 112 CR 777. On answers in civil actions, see California Civil Procedure Before Trial, chap 25 (4th ed Cal CEB 2004).

Unlike a demurrer, an answer may allege matters that are not contained in, or are inadequately alleged in, the writ petition. See §23.30. On demurrers, see §§23.33-23.36. However, an answer to an appellate court writ petition generally cannot raise new arguments that could have been, but were not, raised in the trial court. See, *e.g., Henry v Superior Court* (2008) 160 CA4th 440, 448 n4, 72 CR3d 808 (court refused to consider evidentiary challenges raised for first time in answer to writ petition).

For an example of a return by answer, see form in §28.11.

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§23.29 a. Responding to Verified Allegations in the Petition

The answer must respond to the verified allegations in the writ petition. See, *e.g., Addam v Superior Court* (2004) 116 CA4th 368, 371, 10 CR3d 39 (real party waived issue by not directly responding to verified factual allegations in petition). An answer usually admits some of the allegations, denies other allegations, and alleges additional facts if necessary, including affirmative defenses. CCP §431.30 (made applicable to writ proceedings by CCP §1109).

NOTE: The respondent or real party in interest must deny all allegations in a writ petition that he or she disputes, or risk the allegations being deemed admitted. *Dulaney v Municipal Court* (1974) 11 C3d 77, 81 n3, 112 CR 777.

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§23.30 b. Alleging Additional Material Facts

The answer must not only respond to all verified allegations in the petition, it must affirmatively allege any material facts not included in the petition that support the respondent's challenged action or order. An answer may raise both issues of fact and issues of law.

Just as allegations in a petition should, whenever possible, be supported by citations to supporting exhibits, affirmative allegations in an answer also should, whenever possible, be supported by citations to either the exhibits submitted by the petitioner or additional exhibits submitted by the respondent or real party. See, *e.g., Coy v Superior Court* (1962) 58 C2d 210, 221, 23 CR 393 (real party in interest claimed in return that petitioner's interrogatories were interposed for improper purpose, but failed to include record of any fact to substantiate that claim). On citation to the record in an appellate court writ proceeding, see §20.14.

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§23.31 c. Pleading Affirmative Defenses

An answer also must raise any applicable affirmative defenses, such as mootness, laches, and statutes of limitations. See, *e.g., Resource Defense Fund v County of Santa Cruz* (1982) 133 CA3d 800, 804, 184 CR 371.

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§23.32 d. Verification

Because it responds to a verified pleading, *i.e.,* a writ petition, an answer to a writ petition also must be verified. See CCP §§446(a), 1109; Cal Rules of Ct 8.487(b)(1). See, *e.g., Universal City Studios, Inc. v Superior Court* (2003) 110 CA4th 1273, 1287, 2 CR3d 484 (court of appeal struck unverified return that was not demurrer).

To the extent an answer alleges facts that the respondent or real party in interest will rely on as evidence, the verification must be based on personal knowledge, not information and belief. See CCP §§446(a), 1109; *Star Motor Imports, Inc. v Superior Court* (1979) 88 CA3d 201, 204, 151 CR 721.

NOTE: Certain public entities and officials acting in their public capacity are exempt from verification requirements. CCP §446(a). On verification by state or public officials, see §18.47.

For an example of a verification in a return, see form in §28.11. On verification, see §§18.42-18.48.

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§23.33 2. Demurrer

A return also can be made by way of demurrer, alone or in addition to an answer. CCP §§1069.1 (review (certiorari)), 1089 (mandamus), 1105 (prohibition); Cal Rules of Ct 8.487(b)(1). See, *e.g., Ivory v Superior Court* (1938) 12 C2d 455, 459, 85 P2d 894; *Chapman v Superior Court* (2005) 130 CA4th 261, 271, 29 CR3d 852 (overruled demurrer to petition). See also CCP §§430.10-430.80; Cal Rules of Ct 8.487(b).

On demurrers generally, see California Civil Procedure Before Trial, chap 23 (4th ed Cal CEB 2004).

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§23.34 a. File With Answer

If a demurrer is overruled, the court of appeal may, but is not required to, allow an answer. CCP §§1069.1, 1089, 1105. The court may also immediately consider the merits of the petition and issue a peremptory writ. Cal Rules of Ct 8.487(b)(4). See also Cal Rules of Ct 8.933(b)(4) governing writs in limited jurisdiction civil cases (if return is by demurrer alone and demurrer is not sustained, court may issue peremptory writ without granting respondent or real party in interest leave to answer). Accordingly, the respondent or real party in interest should always accompany a demurrer with an answer. See CCP §§1069.1 (review (certiorari)), 1089 (mandamus), 1105 (prohibition); Cal Rules of Ct 8.487(b)(1).

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§23.35 b. State Grounds for Demurrer

A demurrer must clearly set out and support all grounds asserted for the demurrer. The same or similar grounds for demurring to a civil complaint may apply and thus be interposed in a writ proceeding, *e.g.*, trial court has no jurisdiction, petitioner has no capacity to sue or lacks beneficial interest in the writ proceeding, or petition is not verified. See CCP §§430.10, 1109. On grounds for a demurrer to complaint, see California Civil Procedure Before Trial §23.22-23.24 (4th ed Cal CEB 2004).

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§23.36 c. Do Not Raise Affirmative Defenses

A demurrer is not the vehicle to challenge matters inadequately alleged in the petition or to raise new matters, such as affirmative defenses. Rather, these matters should be addressed and raised in an answer filed in addition to the demurrer. See CCP §430.30(b); *Resource Defense Fund v County of Santa Cruz* (1982) 133 CA3d 800, 804, 184 CR 371 (answer alleged affirmative defenses raised in demurrer, *i.e.,* mootness, laches, statute of limitations). On the answer, see §§23.28-23.32.

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§23.37 F. Supporting Memorandum

Just as the petition must be accompanied by a supporting memorandum (Cal Rules of Ct 8.486(a)(5)), a return also should include a memorandum in opposition to the writ petition. Although the rules of court do not expressly require a memorandum in conjunction with a return, they implicitly do so. Compare Cal Rules of Ct 8.486(a)(5) (petition must be accompanied by memorandum) and 8.487(a)(2) (preliminary opposition must contain memorandum). Indeed, the "formal" return, *i.e.*, the demurrer or answer, is simply a pleading. The legal arguments in support of that pleading and in opposition to the writ petition must be presented to the court of appeal in a memorandum.

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§23.38 G. Supporting Exhibits

In many cases, the petitioner will include all of the documents necessary for the court of appeal to fully consider and rule on the writ petition. Cal Rules of Ct 8.486(b) (petition seeking review of trial court ruling must be accompanied by adequate record), 8.486(c) (specifying format of supporting documents). However, if the respondent or real party believes additional documents should be brought to the court's attention, these documents should be bound with, or submitted in an appendix filed in conjunction with, the return. See Cal Rules of Ct 8.486(c). On submitting and citing to the record, see §§20.11, 20.14.

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H. Timing of Return

§23.39 1. Court Usually Sets Deadline

The court of appeal usually states in its alternative writ or order to show cause the filing date for the return. See CCP §§1069.1, 1089, 1105; Cal Rules of Ct 8.487(b)(2).

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§23.40 2. If Court Does Not Set Deadline, File Within 30 Days

If the appellate court does not specify in its alternative writ the deadline for filing a return, the respondent or real party in interest must serve and file a return no later than 30 days after the court issues the alternative writ. Cal Rules of Ct 8.487(b)(2).

PRACTICE TIP: When in doubt, the respondent or real party should call the clerk's office to confirm the deadline.

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§23.41 3. Extension of Time

On a showing of good cause, the courts of appeal generally will grant an extension of time to file a return. See Cal Rules of Ct 8.63(a)(2)-(3). On what a request for an extension of time must include, see §23.13. On what constitutes good cause under Cal Rules of Ct 8.63(b), see §23.14.

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I. Serving Return

§23.42 1. Whom to Serve

The respondent or real party in interest should serve a copy of the return on the petitioner and any other parties who have appeared during the proceeding. CCP §§465, 1109; Cal Rules of Ct 8.487(b)(1)-(2).

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§23.43 2. How to Serve

The respondent or real party in interest must serve a return in the same manner as a brief in an ordinary civil action, generally on counsel by mail. The proof of service must identify the party that counsel represents and provide counsel's telephone number. See CCP §§465, 1069.1, 1089, 1105, 1109; Cal Rules of Ct 8.25, 8.486(e). On service in civil appeals, see California Civil Appellate Practice §12.63 (3d ed Cal CEB 1996).

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§23.44 J. Consequences of Not Filing Proper Return

If the respondent or real party in interest fails to file a proper return, the court of appeal may accept as true the facts alleged in the writ petition and disregard those stated in the responsive pleading, leaving only legal issues for decision. See, *e.g., Titmas v Superior Court* (2001) 87 CA4th 738, 741, 104 CR2d 803 (despite court of appeal's invitation to do so, real parties did not file return and court accepted all factual allegations in petition as true).

PRACTICE TIP: Courts may invite the respondent and real party in interest to rely on preliminary opposition instead of filing a formal return. See *Lauermann v Superior Court* (2005) 127 CA4th 1327, 1329 n2, 26 CR3d 258 (court did not penalize real parties in interest for failing to file return because court had offered them option of relying on their informal opposition). However, the respondent and real party should usually decline such an invitation because the return presents the only opportunity to fully address and respond to the petition.

JUDGE'S PERSPECTIVE: The court will often treat a preliminary opposition as a return, but sometimes indicate specific issues it would like the real party in interest (or, in rare cases, the respondent) to address in a formal return.

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§23.45 K. Return in Writ of Review (Certiorari) Proceedings

Writs of review (certiorari) under CCP §§1067-1077 are rarely used in the courts of appeal except to review contempt adjudications. Review proceedings also differ somewhat from traditional mandamus and prohibition proceedings. On writs of review (certiorari), see §§15.27-15.38.

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§23.46 1. Terminology

The word "return" in the context of a petition for a writ of review (certiorari) can cause confusion because the statutes provide (a) that the respondent or real party in interest can file a return to the petition by demurrer or answer (CCP §1069.1, referring to CCP §1089) and (b) that when a writ of review is directed to a lower tribunal, the clerk, if there is one, "must return the writ with the transcript requested" (CCP §§1070-1071). Moreover, issuance of a writ of review only sets the stage for a hearing on the merits of the petition; the respondent or real party in interest must then file a response, called a "return" by some courts and "briefing" by others. See *Security-First Nat'l Bank v Board of Supervisors* (1933) 135 CA 208, 216, 26 P2d 862 (discussing use of return in context of writ of certiorari).

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§23.47 2. Demurrer

The respondent or real party in interest can demur to a petition for review (certiorari) on the ground that its allegations are legally insufficient to entitle the petitioner to relief. See CCP §§430.10, 430.30 (made applicable to writ proceedings by CCP §1109); Cal Rules of Ct 8.487(b)(1); *Stoner v Superior Court* (1945) 67 CA2d 760, 761, 155 P2d 697.

A demurrer may also be useful to test the legal sufficiency of a petition for writ of review that does not allege any disputed facts, or that attaches and incorporates by reference a sufficient record of the proceedings below. In these situations, the demurrer effectively makes the petition the return to the writ (see CCP §§1070-1071), making it unnecessary to bring up the entire record of the proceedings below and making consideration of the demurrer the consideration of the merits of the petition. See *Estrin v Superior Court* (1939) 14 C2d 670, 672, 96 P2d 340. If the court of appeal sustains the demurrer, it discharges the writ of review and dismisses the proceedings. See *Ivory v Superior Court* (1938) 12 C2d 455, 85 P2d 894 (writ of certiorari issued, then discharged on demurrer).

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§23.48 V. REPLY (TRAVERSE) TO RETURN

After the respondent or real party in interest files and serves its return, the petitioner may file a reply (also called a traverse or replication) to the return. See CCP §§1091 (mandate), 1105 (making mandate procedures applicable to prohibition); Cal Rules of Ct 8.487(b)(3). On filing and service of the return, see §§23.39-23.43.

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§23.49 A. Format and Content of Reply (Traverse)

The reply to a return (also called a traverse or replication) is a pleading that responds to any new allegations made in the return. See CCP §1091; Cal Rules of Ct 8.487(b)(3). Accordingly, the format of a reply is similar to that of a petition or return—a verified "pleading" denying any disputed allegations made in the return, plus a reply memorandum. On petition format, see §§18.5-18.20. On return format, see §§23.25-23.27.

The purpose of a reply is twofold. First, it puts at issue any new verified allegations made in the return. Indeed, if a petitioner does not dispute new allegations made in a return, those allegations will be deemed admitted. See *Titmas v Superior Court* (2001) 87 CA4th 738, 741, 104 CR2d 803 (despite court of appeal's invitation to do so, real parties did not file return and court accepted all factual allegations in petition as true). Second, the reply, and particularly the memorandum, refocuses the court of appeal on the facts and law that support issuance of the requested writ. A petitioner cannot, however, raise new issues for the first time in a reply. See, *e.g., Bell v Superior Court* (2007) 158 CA4th 147, 172 n25, 69 CR3d 328 (court refused to consider issue raised for first time in reply brief); *Save the Sunset Strip Coalition v City of W. Hollywood* (2001) 87 CA4th 1172, 1181 n3, 105 CR2d 172 (court refused to consider issue raised for first time in reply brief on appeal from judgment denying writ petition).

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§23.50 B. Filing and Service of Reply (Traverse)

The petitioner must serve and file its reply (also called a traverse or replication) within 15 days after the respondent or real party in interest files its return, unless the court of appeal orders otherwise. Cal Rules of Ct 8.487(b)(3). On a showing of good cause, the court of appeal likely will grant an extension of time. On extension requests, see §23.13-23.14.

The petitioner files an original of the reply plus four copies, showing proof of service. Cal Rules of Ct 8.44(b)(3).

The petitioner must serve a reply in the same manner as a reply brief in an ordinary civil action, generally on counsel by mail. The proof of service must identify the party that counsel represents and provide counsel's telephone number. See CCP §§465, 1069.1, 1089, 1105, 1109; Cal Rules of Ct 8.25, 8.486(e). On service in civil appeals, see California Civil Appellate Practice §12.63 (3d ed Cal CEB 1996).

For an example of a reply to a return, see form in §28.12.

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§23.51 VI. CHART: DEADLINES FOR *PALMA* OPPOSITION AND REPLY, FOR RETURN AND REPLY

Action	*Deadline*
Opposition to *Palma* notice	As stated in order or notice, or within 30 days after court issues *Palma* notice, unless court grants extension request. Cal Rules of Ct 8.487(b)(2). See §§23.11-23.14.
Reply to *Palma* opposition	Within 15 days after filing of opposition, unless court orders otherwise or grants extension request. Cal Rules of Ct 8.487(b)(3). See §23.18.
Return, by demurrer, or answer, to alternative writ or order to show cause (OSC)	Stated in alternative writ or OSC, or no later than 30 days after court issues alternative writ or OSC, unless court grants extension request. Cal Rules of Ct 8.487(b)(2). See §§23.39-23.41.
Reply (traverse or replication) to return	Within 15 days after filing of return, unless court orders otherwise or grants extension request. Cal Rules of Ct 8.487(b)(3). See §23.50.

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§23.52 VII. AMICUS CURIAE BRIEFS

A third party may file an amicus curiae brief in support of or in opposition to a writ petition after obtaining permission from the presiding justice of the court (or division of the court). See Cal Rules of Ct 8.200(c) (general amicus rules pertaining to appeals). The Attorney General, however, may file an amicus curiae brief in a writ proceeding in which an alternative writ or order to show cause has issued without leave of court. Cal Rules of Ct 8.487(c).

On filing amicus briefs in the courts of appeal, see California Civil Appellate Practice, chap 14 (3d ed Cal CEB 1996).

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§23.53 A. Application to File Amicus Brief

A party seeking leave to appear as amicus curiae in an appellate court writ proceeding must do so within 14 days after the petitioner's reply (also known as a traverse or replication) is filed or could have been filed. See Cal Rules of Ct 8.212, 8.487(b)(3). An application to file an amicus curiae brief in the court of appeal must (Cal Rules of Ct 8.200(c)(2)-(5)):

- State the applicant's interest;
- Explain how the proposed brief will assist the court in deciding the matter;
- Identify those who authored or monetarily contributed to the preparation or submission of the proposed brief;
- Be accompanied by the proposed brief; and
- Identify on the cover the party the applicant supports, if any.

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§23.54 B. Filing and Service of Amicus Brief

If the application is granted, the court of appeal will set a time within which to file the amicus curiae brief, as well as the time within which any party to the writ proceeding may file an answer to the amicus brief. Both the brief and answer must be served on all parties before being filed. Cal Rules of Ct 8.200(c)(6).

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§23.55 C. Seek Amicus Participation Only in Exceptional Cases

Amicus participation is not warranted if the parties can fully present the case to the court and no public policy issue beyond the interests of the parties are implicated. No purpose is served by, and the appellate courts do not appreciate receiving, amicus briefs which do no more than reiterate points already made by the parties. Thus, parties should be strategic in soliciting amicus support and avoid enlisting amici that add nothing to the briefing already before the court.

In the rare case involving an issue of compelling public importance, amicus participation can be helpful to the court of appeal by explaining the potential ramifications of a decision and by presenting the court with a different take on the issue.

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24

Action by Court of Appeal After Issuance of *Palma* Notice, Alternative Writ, or Order to Show Cause

Mitchell E. Abbott
James C. Nielsen

I. SCOPE OF CHAPTER §24.1

II. ACTION AFTER ISSUANCE OF *PALMA* NOTICE
- A. Possible Actions After Issuance of *Palma* Notice §24.2
- B. Most Writ Petitions Are Denied §24.3
- C. Issuance of Peremptory Writ in First Instance §24.4
- D. Issuance of Alternative Writ or Order to Show Cause (OSC) §24.5

III. ACTION AFTER ISSUANCE OF ALTERNATIVE WRIT OR ORDER TO SHOW CAUSE (OSC)
- A. Discharge of Alternative Writ or Order to Show Cause
  - 1. Writ/Order to Show Cause Improvidently Granted §24.6
  - 2. Trial Court Complies With Alternative Writ/Order to Show Cause §24.7
- B. Oral Argument
  - 1. Hearing Date §24.8
  - 2. Conduct of Hearing
    - a. Parties Present §24.9
    - b. Order of Argument §24.10
    - c. Number of Counsel §24.11
    - d. Time for Argument §24.12
    - e. Strategy for Argument §24.13
- C. Disputed Questions of Fact §24.14
- D. Written Opinion Granting or Denying Writ Petition
  - 1. Required When Proceeding Is a "Cause" §24.15
  - 2. Time for Issuance §24.16
    - a. Opinion Generally Issued Within 90 Days §24.17
    - b. Circumstances Extending Time Beyond 90 Days §24.18
  - 3. Contents of Opinion
    - a. Must State Reasons §24.19
    - b. Relief Not Limited by Petition's Prayer §24.20
    - c. Grant or Denial of Writ
      - (1) Granting Writ of Mandate and Prohibition §24.21
      - (2) Denying Writ of Mandate or Prohibition §24.22
  - 4. Award of Costs
    - a. Prevailing Party Usually Entitled to Costs §24.23
    - b. Opinion Must Specify Costs Award §24.24
    - c. Costs Awarded Against Parties, Not Trial Court §24.25
    - d. Items Recoverable as Costs §24.26
    - e. Procedure for Claiming and Opposing Costs §24.27
  - 5. Attorney Fees §24.28
  - 6. Service §24.29
  - 7. Publication §24.30

IV. DOCUMENTS PREPARED AFTER ISSUANCE OF OPINION
- A. Remittitur §24.31
  - 1. When Issued
    - a. Not Required After Summary Denial §24.32
    - b. After Time for Review by Supreme Court Expires §24.33
    - c. Immediately if Parties Stipulate or Petition Is Dismissed §24.34
  - 2. Clerk's Duties §24.35
  - 3. Stay or Recall of Remittitur §24.36

B. Peremptory Writ of Mandate or Prohibition §24.37
1. Time for Issuance §24.38
2. Clerk Usually Prepares Writ §24.39
3. Clerk Sends Writ to Trial Court §24.40
4. Service of Writ by Petitioner §24.41
5. Writ of Review (Certiorari) §24.42

V. ENFORCEMENT OF PEREMPTORY WRIT
A. Respondent's Return to Peremptory Writ §24.43
1. Return Not Mandatory §24.44
2. Contents of Return §24.45
B. Respondent's Duty to Comply §24.46
C. Remedies if Respondent Refuses to Comply With Writ
1. Possible Remedies §24.47
a. Enforcement Orders §24.48
b. Fine §24.49
c. Imprisonment §24.50
2. Procedure for Compelling Compliance With Writ
a. Motion or New Writ Petition §24.51
b. Challenging Respondent's Return §24.52
D. Methods of Enforcing Decision in Writ of Review (Certiorari) Proceeding §24.53
E. Cost Awards Enforceable in Same Manner as Money Judgments Generally §24.54

VI. TRANSFER OF CASE FROM COURT OF APPEAL TO CALIFORNIA SUPREME COURT BEFORE DECISION §24.55
A. Who Requests Transfer §24.56
B. How to Request Transfer §24.57
C. When to Request Transfer §24.58
D. Responding to Request for Transfer §24.59

VII. SANCTIONS FOR FRIVOLOUS WRIT PETITIONS §24.60
A. Against Party or Attorney §24.61
B. Procedure for Obtaining Sanctions §24.62
C. Types of Sanctions
1. Striking Pleading §24.63
2. Award or Denial of Costs §24.64
3. Attorney Fees or Damages §24.65

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§24.1 I. SCOPE OF CHAPTER

This chapter discusses actions a court of appeal can take after issuing a *Palma* notice, alternative writ, or order to show cause (OSC). These actions include:

- Summarily denying the writ petition (see §§22.14-22.17);
- Issuing a written decision and peremptory writ in the first instance (see §§22.18-22.21);
- Discharging a previously issued alternative writ or OSC (see §§24.6-24.7);
- Setting and holding oral argument (see §§24.8-24.13);
- Deciding how to resolve disputed issues of fact (see §24.14); and
- Issuing a written opinion granting or denying the writ petition (see §§24.15-24.30).

On initial actions a court of appeal can take in a writ proceeding, including summarily denying the petition, issuing a *Palma* notice, or issuing an alternative writ or OSC, see chap 22.

This chapter also discusses the documents prepared after the court issues an opinion, *e.g.,* a peremptory writ and the remittitur. See §§24.31-24.42. It next covers how a petitioner can enforce compliance with a peremptory writ. See §§24.43-24.54. The chapter then discusses the rare situation in which the supreme court transfers a case from the court of appeal to itself. See §§24.55-24.59. The chapter concludes with a discussion of sanctions for filing a frivolous writ petition. See §§24.60-24.65.

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II. ACTION AFTER ISSUANCE OF *PALMA* NOTICE

§24.2 A. Possible Actions After Issuance of *Palma* Notice

After issuing a *Palma* notice and receiving any opposition and reply papers, the court of appeal will:

- Deny the petition, either summarily or in an opinion (see §§22.14-22.17);
- Issue a peremptory writ in the first instance (see §§22.18-22.22); or
- Issue an alternative writ or order to show cause (see §§22.23-22.29).

On issuing a *Palma* notice, see §§22.18-22.21.

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§24.3 B. Most Writ Petitions Are Denied

Although issuance of a *Palma* notice indicates the court of appeal is somewhat interested in the writ petition, the court will probably still deny the petition, usually summarily, after the filing of opposition and any reply. See §22.15. On factors the courts of appeal weigh in determining whether to consider the merits of a writ petition, see §§15.51-15.71.

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§24.4 C. Issuance of Peremptory Writ in First Instance

The California Supreme Court has stated a strong preference for the alternative writ or order to show cause procedure (see §24.5), as opposed to the streamlined *Palma* notice procedure, when the court of appeal is considering issuing a peremptory writ. See §22.24. The supreme court has indicated that the *Palma* procedure, which allows issuance of a peremptory writ in the first instance without further briefing and without oral argument, should be limited to cases of unusual urgency or when further briefing by the parties would not be helpful. See, *e.g., Lewis v Superior Court* (1999) 19 C4th 1232, 1236, 82 CR2d 85 (*Palma* procedure is of limited application, but may be used when circumstances warrant); *Ng v Superior Court* (1992) 4 C4th 29, 35, 13 CR2d 856 (accelerated *Palma* procedure is exception and should not become routine). Nevertheless, the courts of appeal still regularly use the *Palma* procedure. On the *Palma* procedure, see §22.18.

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§24.5 D. Issuance of Alternative Writ or Order to Show Cause (OSC)

The court of appeal may issue an alternative writ or order to show cause (OSC) after issuing a *Palma* notice, but rarely does so. If the court does issue an alternative writ or OSC, the writ proceeding becomes a "cause," entitling the parties to oral argument and requiring disposition by written opinion with reasons stated. See *Countrywide Home Loans, Inc. v Superior Court* (1997) 54 CA4th 828, 832, 62 CR2d 899. On when a writ proceeding becomes a cause and the consequences thereof, see §22.23. On setting writ petition for oral argument, disposition by written opinion, and subsequent matters, see §§24.8-24.22.

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III. ACTION AFTER ISSUANCE OF ALTERNATIVE WRIT OR ORDER TO SHOW CAUSE (OSC)

A. Discharge of Alternative Writ or Order to Show Cause

§24.6 1. Writ/Order to Show Cause Improvidently Granted

After issuing an alternative writ or order to show cause (OSC), the court of appeal may discharge the alternative writ or OSC as improvidently granted and deny the writ petition. See *Countrywide Home Loans, Inc. v Superior Court* (1997) 54 CA4th 828, 831, 62 CR2d 899 (in light of new evidence, court concluded that alternative writ was improvidently granted).

The court may take such action—often after reading the respondent's or real party in interest's opposition papers—for a variety of reasons, including that the proceeding does not in fact present an issue appropriate for immediate discretionary review or that the facts are significantly different than they appeared from the petition and supporting memorandum. See 54 CA4th at 832 (court discharged alternative writ as improvidently granted based on new evidence supplied by real party in interest; had evidence been disclosed in petition, court would not have issued alternative writ). For additional examples, see §25.14. On the issuance of alternative writs and OSCs, see §§22.23-22.29.

For an example of an order discharging an alternative writ as improvidently granted, see form in §28.14.

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§24.7 2. Trial Court Complies With Alternative Writ/Order to Show Cause

If the trial court complies with an alternative writ or order to show cause (OSC), the appellate court will discharge the alternative writ or OSC and likely dismiss the petition as moot. See, *e.g., Palma v U.S. Indus. Fasteners, Inc.* (1984) 36 C3d 171, 177, 203 CR 626; *Environmental Protection Info. Ctr. v State Bd. of Forestry* (1993) 20 CA4th 27, 31, 24 CR2d 344.

NOTE: Even if the trial court complies with the appellate court's alternative writ or order, the appellate court may still decide to issue an opinion. See, *e.g., People v Superior Court (Jump)* (1995) 40 CA4th 9, 12, 46 CR2d 829 (alternative writ discharged and petition denied as moot, but opinion issued on merits because of recurring nature and importance of issue).

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B. Oral Argument

§24.8 1. Hearing Date

After the respondent or real party in interest files a return to the alternative writ or order to show cause (OSC) and the petitioner files a reply (also called a traverse or replication), the court of appeal will hear oral argument on the petition. The court will specify the argument date either in the alternative writ or OSC, or in a separate notice sent to the parties at least 20 days before the hearing date. Cal Rules of Ct 8.256(b).

Some courts of appeal send notice to the parties stating that they may waive oral argument and must file a written request for argument by a specified date or the court will deem argument waived. See 1st App Dist IOPP §III.B.28-29; 3d App Dist IOPP §VIII; 4th App Dist, Div 2 IOPP §VIII; 5th App Dist IOPP §III.C. The parties should check for applicable local rules or Internal Operating Practices and Procedures, or, if there are none, call the court clerk to determine the court's practice.

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2. Conduct of Hearing

§24.9 a. Parties Present

Counsel for petitioner and for real party in interest usually must appear in person for oral argument. There usually is no appearance by the respondent when the respondent is the trial court. See *Solberg v Superior Court* (1977) 19 C3d 182, 189, 137 CR 460 (although named as respondent, trial court is neutral party with no beneficial interest in outcome of case), superseded by statute on other grounds. If the writ proceeding is one of the rare instances in which the respondent is not the trial court, but a government entity or private body, counsel for respondent also must appear.

Some courts allow counsel to appear telephonically. See 1st App Dist Local R 13; 5th App Dist Local R 4; 5th App Dist IOPP §IV; 6th App Dist IOPP §II.A.3.

PRACTICE TIP: Counsel wishing to appear telephonically must fulfill additional procedural requirements and should consult the applicable local rules or procedures carefully.

Clients may attend oral argument but are not required to do so.

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§24.10 b. Order of Argument

The petitioner typically argues first, followed by the real party in interest and, in rare instances, the respondent. The petitioner then has the right to rebut. Cal Rules of Ct 8.256(c)(1). The court always has control of the argument, however, and may turn immediately to the real party or respondent. Amicus curiae, if any, has no right to argue unless the court grants a written request, in which case the court may expand or allocate time. Cal Rules of Ct 8.256(c)(2). On time for argument, see §24.12.

PRACTICE TIP: A request for oral argument by amicus curiae is more likely to be granted if supported by a party and the party offers to cede a portion of its time for argument.

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§24.11 c. Number of Counsel

Unless the court orders otherwise, no more than one counsel may argue for each party who appeared separately in the court below. Cal Rules of Ct 8.256(c)(3).

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§24.12 d. Time for Argument

The rules allow each side 30 minutes for oral argument. Cal Rules of Ct 8.256(c)(2). In exceptional cases, *e.g.,* those involving very complex issues, multiple parties, or issues of public importance, the presiding justice may allow extended argument. In addition, a party can file a written request for additional time, but the courts almost never grant such a request. See 3d App Dist Local R 3; 4th App Dist Div 1 IOPP §VII. Unless local rules specify a particular time, a party making written request for additional time should do so shortly after receipt of the court's notice scheduling oral argument.

PRACTICE TIP: As permitted by Cal Rules of Ct 8.256(c), some appellate districts have reduced the amount of time allotted for oral argument. See 3d App Dist Local R 3 (each side allowed 15 minutes, although court will consider advance, written request for additional time); 4th App Dist Div 1 IOPP §VII (same).

If separate counsel represents multiple parties, or if amicus curiae request and are granted argument, the presiding justice may apportion or expand the time. Cal Rules of Ct 8.256(c)(2). Usually amicus curiae do not participate at oral argument, but if they do, and if they are aligned with a specific party, as they usually are, that party almost always will have to share its argument time with its amicus.

PRACTICE TIP: The courts of appeal do not always slavishly enforce argument time limits. If the justices are interested in the case and want to ask additional questions, they will do so.

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§24.13 e. Strategy for Argument

The usual advice on counsel's presentation and conduct of appellate argument applies to appellate court writ proceedings: Counsel must be fully prepared on the record and the law. The justices will frequently be well prepared on both and naturally expect the same from counsel.

Any of the justices on the panel may ask questions of counsel at any time and repetition of written arguments is not necessary or even desirable. Counsel should focus on one or two principal points at argument (while being prepared to address any issue in response to questions by the court). Questioning by the justices does not extend the time available to counsel for argument, although the justices may allow counsel additional time if they are particularly interested in the case. On time for argument, see §24.12.

JUDICIAL PERSPECTIVE: Oral advocacy is more art than science. The best oral arguments are those in which the court and counsel engage in a dialogue about the issues.

On oral argument, see California Civil Appellate Practice §§16.29-16.33 (3d ed Cal CEB 1996).

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§24.14 C. Disputed Questions of Fact

Appellate courts do not generally resolve disputed issues of fact left undecided by the trial court. If resolution of a legal question in a writ proceeding depends on an unresolved question of fact, the court of appeal may either deny the petition outright or issue a writ and remand the matter to the trial court for a fact hearing. On rare occasions, an appellate court may order a reference by appointing a judge (often a retired judge or justice or a trial court judge) as a special referee, to take evidence and report findings on the disputed factual question. The reviewing court will usually adopt the findings of the special referee, although they are not binding. See *Holt v Kelly* (1978) 20 C3d 560, 562, 143 CR 625 (special referee's findings are not binding, but are entitled to "great weight"); 8 Witkin, California Procedure, *Extraordinary Writs* §203 (5th ed 2008).

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D. Written Opinion Granting or Denying Writ Petition

§24.15 1. Required When Proceeding Is a "Cause"

When the court of appeal issues an alternative writ or order to show cause, the writ proceeding becomes a "cause," and the court's decision must be in writing with reasons stated, regardless of whether it is published. Cal Const art VI, §14; *Lewis v Superior Court* (1999) 19 C4th 1232, 1241, 82 CR2d 85, quoting *Palma v U.S. Indus. Fasteners, Inc.* (1984) 36 C3d 171, 178 n5-6, 203 CR 626 (unless court summarily denies petition or respondent performs act specified in alternative writ, the matter becomes a "cause" that must be decided "in writing with reasons stated"). But see *Countrywide Home Loans, Inc. v Superior Court* (1997) 54 CA4th 828, 833, 62 CR2d 899 (no written opinion required if court discharges alternative writ as improvidently granted); §§22.17, 25.14.

For an example of a decision granting a petition for a writ of mandate, see form in §28.13.

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§24.16 2. Time for Issuance

Whether oral argument is waived or held, after the time has passed for filing all papers (*e.g.,* any supplemental briefing requested or allowed by the court), the matter is submitted for decision. Cal Rules of Ct 8.256(d). The court renders its decision in a written opinion. Cal Rules of Ct 8.264(a).

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§24.17 a. Opinion Generally Issued Within 90 Days

The court of appeal generally issues its opinion within 90 calendar days of the submission date. Although not formally prescribed by statute, court of appeal justices respect the 90-day period because receipt of their salaries is contingent on having no cause undetermined for 90 days after submission. Cal Const art VI, §19; Govt C §68210 (to receive salary, justice must file affidavit stating that no cause remains undetermined for 90 days after submission for decision). On determining submission date, see §24.16.

NOTE: As a practical matter, because the justices file the affidavits only once a month, the court often has slightly more than 90 days (to the end of the month in which the 90th day falls) to issue an opinion.

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§24.18 b. Circumstances Extending Time Beyond 90 Days

A court may issue an opinion beyond the 90-day period if:

- The court vacates the submission in an order stating its reasons for doing so and setting a timetable for resubmission. Cal Rules of Ct 8.256(e)(1).

NOTE: Although the rule requires that the court state its reasons, the rule does not limit the reasons justifying resubmission. Thus, the "reason" can be simply that the court is not yet finished.

- The submission does not coincide with oral argument. If it does not, the 90 days run from the submission date. Cal Rules of Ct 8.256(d)(1).

On determining submission date, see §24.16.

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3. Contents of Opinion

§24.19 a. Must State Reasons

The court's opinion must "be in writing with the reasons stated." Cal Const art VI, §14. This means the opinion usually summarizes the facts, discusses the parties' contentions, and explains the court's acceptance or rejection of those contentions with reference to supporting decisional and statutory law. See *Lewis v Superior Court* (1999) 19 C4th 1232, 1262, 82 CR2d 85 (opinion is sufficient if it "sets forth the grounds or principles upon which the justices concur in the judgment"; court of appeal's three-paragraph opinion was sufficient even though it did not address every issue raised by counsel, discuss potentially dispositive appellate decisions, or include citations to the record). See also *Amwest Sur. Ins. Co. v Wilson* (1995) 11 C4th 1243, 1266, 48 CR2d 12 (court of appeal opinion did not satisfy constitutional requirement because reasons that led one justice to concur in judgment could not be determined).

The court's opinion must identify the participating justices, including the majority opinion's author and the author of any concurring or dissenting opinion, or the justices participating in a *per curiam* ("by the court") opinion. Cal Rules of Ct 8.264(a)(2). The appellate court clerk then files the opinion and sends copies, showing the filing date, to the parties and the respondent. Cal Rules of Ct 8.264(a)(1).

For an example of a decision granting a petition for a writ of mandate, see form in §28.13.

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§24.20 b. Relief Not Limited by Petition's Prayer

The court of appeal is not limited by the petition's prayer and may grant any relief it deems appropriate. *George M. v Superior Court* (1988) 201 CA3d 755, 760, 247 CR 330. In addition, if the court rules in favor of the petitioner, it may grant total or partial relief. See, *e.g.*, *Victoria v Superior Court* (1985) 40 C3d 734, 747, 222 CR 1 (total relief granted; petitioner sought, and court issued, writ of mandate directing trial court to set aside order compelling arbitration in case involving claim of sexual assault); *Sheller v Superior Court* (2008) 158 CA4th 1697, 71 CR3d 207 (appeal treated in part as writ petition; court reversed and ordered trial court to vacate challenged order, but also remanded for trial court to consider removing trial counsel on different basis); *Coulter v Superior Court* (1978) 21 C3d 144, 155, 145 CR 534 (partial relief granted; court issued writ of mandate directing trial court to overrule defendant's demurrer to only one of two challenged causes of action).

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c. Grant or Denial of Writ

§24.21 (1) Granting Writ of Mandate and Prohibition

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When the court grants a petition for a writ of mandate or prohibition, its decision directs the clerk to issue a writ of mandate or prohibition:

LET A PEREMPTORY WRIT OF MANDATE ISSUE, DIRECTING THE TRIAL COURT TO VACATE ITS ORDER OF _ _[*DATE*]_ _, IN THE CASE OF _ _[*NAME v NAME*]_ _, TRIAL COURT NO. _ _ _ _ _ _, AND TO ENTER A NEW AND DIFFERENT ORDER _ _[*GRANTING/DENYING*]_ _ THE _ _[*SPECIFIC SUBJECT, e.g., SUMMARY JUDGMENT*]_ _ ORDER.

See, *e.g., Henry v Superior Court* (2008) 160 CA4th 440, 462, 72 CR3d 808 (court granted petition and directed trial court to vacate its order excluding evidence and to enter new order permitting evidence); *California Pub. Employees' Retirement Sys. v Superior Court* (2008) 160 CA4th 174, 187, 72 CR3d 561 (court granted petition and directed trial court to vacate its order overruling demurrer and to enter new order sustaining demurrer without leave to amend); *Heritage Provider Network, Inc. v Superior Court* (2008) 158 CA4th 1146, 1155, 70 CR3d 645 (court granted petition and directed trial court to vacate its order denying motion to stay pending arbitration proceedings and to enter new order granting motion).

For an example, see form in §28.13. On issuance of a writ of mandate or prohibition, see §§24.37-24.41.

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Source: Civil Litigation/California Civil Writ Practice/24 Action by Court of Appeal After Issuance of Palma Notice, Alternative Writ, or Order to Show Cause/§24.22 (2) Denying Writ of Mandate or Prohibition

§24.22 (2) Denying Writ of Mandate or Prohibition

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When the court denies a petition for a writ of mandate or prohibition, it usually concludes its decision as follows:

THE ALTERNATIVE WRIT IS DISCHARGED AND THE PETITION FOR WRIT OF _ _[*MANDATE/PROHIBITION*]**_ _ IS DENIED.**

See, *e.g.*, *Zevnik v Superior Court* (2008) 159 CA4th 76, 89, 70 CR3d 817; *Los Angeles Unified Sch. Dist. v Superior Court* (2007) 151 CA4th 759, 777, 60 CR3d 445.

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4. Award of Costs

§24.23 a. Prevailing Party Usually Entitled to Costs

The prevailing party is entitled to costs in an original writ proceeding (except one arising from a case in which a party is entitled to court-appointed counsel, such as a criminal or juvenile case) if the reviewing court issues a written opinion in the case granting a peremptory writ in the first instance or after issuing an alternative writ or order to show cause. Cal Rules of Ct 8.493(a)(1)(A). However, the court retains the discretion to award, deny, or apportion costs as it deems proper "in the interests of justice." Cal Rules of Ct 8.493(a)(1)(B). For example, if the petitioner has raised numerous issues and prevails on only one, the court may rule that each party should bear its own costs, even though the court grants the petition and issues a writ. Alternatively, if the court feels the case was a very close one, it may order each side to bear its own costs even though it denies the petition. See, *e.g., Wells Fargo Bank v Superior Court* (2008) 159 CA4th 381, 395, 71 CR3d 506; *Sheller v Superior Court* (2008) 158 CA4th 1697, 1718, 71 CR3d 207.

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§24.24 b. Opinion Must Specify Costs Award

The opinion or order must specify the award or denial of costs, *e.g.,* that the petitioner or the real party in interest is awarded costs or that each side is to bear its own costs. Cal Rules of Ct 8.493(a)(2).

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§24.25 c. Costs Awarded Against Parties, Not Trial Court

The court awards costs against the petitioner or the real party in interest, but not against the respondent judge or trial court if "the proceeding was defended in good faith." *Oksner v Superior Court* (1964) 229 CA2d 672, 690, 40 CR 621.

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§24.26 d. Items Recoverable as Costs

Items recoverable as costs in original writ proceedings are the same as in Cal Rules of Ct 8.278(b)-(d) governing civil appeals, and can include the cost of preparing the record used in the writ proceeding. Cal Rules of Ct 8.493(b).

On the items recoverable as appellate costs, see California Civil Appellate Practice §20.7 (3d ed Cal CEB 1996).

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§24.27 e. Procedure for Claiming and Opposing Costs

Within 40 days after the clerk sends notice of issuance of the remittitur, a party who wishes to claim costs awarded by the appellate court must serve and file in the trial court a verified memorandum of costs under Cal Rules of Ct 3.1700. Cal Rules of Ct 8.493(b), 8.278(c)(1). On issuance of the remittitur, see §§24.31-24.36.

PRACTICE TIP: A party claiming costs should do so using the mandatory Memorandum of Costs on Appeal (Judicial Council Form MC-013).

A party against whom costs have been claimed may move to strike or tax those costs in the same manner and within the same time limits as in the trial court. Cal Rules of Ct 8.493(b), 8.278(c)(2).

On the procedures for claiming and opposing costs, see California Civil Appellate Practice §§20.4-20.12 (3d ed Cal CEB 1996).

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§24.28 5. Attorney Fees

Under certain circumstances, attorney fees incurred in connection with a writ petition can be awarded either by the reviewing court or by the trial court after remittitur issues. See *Laurel Heights Improvement Ass'n v Regents of Univ. of Cal.* (1988) 47 C3d 376, 426, 253 CR 426; *Zuehlsdorf v Simi Valley Unified Sch. Dist.* (2007) 148 CA4th 249, 258, 55 CR3d 467 (affirming award of fees in trial court writ proceeding). On recovery of attorney fees in appellate court proceedings, see California Civil Appellate Practice §§20.13-20.18 (3d ed Cal CEB 1996); California Attorney Fee Awards, chap 15 (2d ed Cal CEB 1994). On requesting attorney fees in an appellate court writ proceeding, see §18.41; on requesting attorney fees in a trial court writ proceeding, see §§5.125-5.126.

PRACTICE TIP: Unless the court of appeal specifies otherwise, the court's award of costs on appeal has no bearing on whether or not attorney fees are recoverable. Cal Rules of Ct 8.278(d)(2).

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§24.29 6. Service

The appellate court clerk must promptly send a copy of the opinion to the lower court and to the parties. See Cal Rules of Ct 8.264(a)(1).

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§24.30 7. Publication

A court of appeal's opinion in a writ proceeding can be published if it meets the requirements for publication, *e.g.*, addresses an issue of first impression. See Cal Rules of Ct 8.1105(c)-(d). If the court has not designated its opinion for publication, but a party believes the court should publish the opinion, he or she should follow the procedures in Cal Rules of Ct 8.1120 to request publication before the opinion becomes final. See California Civil Appellate Practice, chap 21 (3d ed Cal CEB 1996). On determining when the opinion becomes final, see §§25.5-25.10. On criteria for publication, see §11.32.

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IV. DOCUMENTS PREPARED AFTER ISSUANCE OF OPINION

§24.31 A. Remittitur

The remittitur is the document the clerk of the court of appeal prepares and sends to the trial court notifying the lower court that the court of appeal's decision is final. Cal Rules of Ct 8.272(a)-(b), 8.499, See *Schwartz v Schwartz* (1969) 268 CA2d 685, 690, 74 CR 192 (remittitur designates judgment of appellate tribunal and is authenticated to court from which appeal is taken). On the finality of opinions, see §§25.5-25.10. On remittitur, see California Civil Appellate Practice, chap 18 (3d ed Cal CEB 1996).

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1. When Issued

§24.32 a. Not Required After Summary Denial

A remittitur is not required after a summary denial of a writ petition, but it is required in all other writ proceedings. Cal Rules of Ct 8.499. On the summary denial of writ petitions, see §§22.14-22.17.

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§24.33 b. After Time for Review by Supreme Court Expires

The clerk of the court of appeal issues a remittitur immediately after the California Supreme Court denies review, or the time for granting review expires. Cal Rules of Ct 8.272(b)(1)(A). When the supreme court grants but later vacates review (*e.g.*, as improvidently granted), the court of appeal decision is deemed final on the date review is vacated and the court of appeal clerk must promptly issue a remittitur. Cal Rules of Ct 8.272(b)(1)(A).

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§24.34 c. Immediately if Parties Stipulate or Petition Is Dismissed

The court of appeal may, in its discretion, direct the immediate issuance of a remittitur in a writ proceeding on the parties' stipulation or dismissal of the proceeding. See Cal Rules of Ct 8.272(c)(1); California Civil Appellate Practice §§18.6-18.9 (3d ed Cal CEB 1996).

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§24.35 2. Clerk's Duties

The remittitur is considered issued "when the clerk enters it in the record." Cal Rules of Ct 8.272(d)(1). The clerk is required to transmit the remittitur immediately, with a certified copy of the opinion or order, to the lower court. Cal Rules of Ct 8.272(b)(1)(B). As soon as the remittitur issues, the clerk must also mail notice to the parties that the remittitur has issued, showing the date of entry. Cal Rules of Ct 8.272(d)(1).

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§24.36 3. Stay or Recall of Remittitur

For good cause, on its own or a party's motion or by stipulation, the court of appeal may stay the issuance of the remittitur for a reasonable period or order its recall. Cal Rules of Ct 8.272(c)(2). See California Civil Appellate Practice §§18.10-18.21 (3d ed Cal CEB 1996).

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§24.37 B. Peremptory Writ of Mandate or Prohibition

The writ of mandate or prohibition is the document commanding the respondent to take or refrain from taking some action. If the court of appeal grants a petition for a writ of mandate or prohibition, its opinion directs the clerk to issue a writ of mandate or prohibition. See §24.21. For an example of a peremptory writ, see form in §28.15. On writs of mandate, see §§15.2-15.13; on writs of prohibition, see §§15.14-15.26.

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§24.38 1. Time for Issuance

A peremptory writ of mandate or prohibition only issues after the opinion granting the petition has become final and the remittitur has issued. See *Palma v U.S. Indus. Fasteners, Inc.* (1984) 36 C3d 171, 181, 203 CR 626. No court rule sets a specific deadline for issuance of the writ. On the finality of opinions, see §§25.5-25.10; on issuance of the remittitur, see §§24.31-24.36.

PRACTICE TIP: Because the period for issuance of a writ is flexible, the trial court normally will have sufficient time to comply before issuance becomes necessary. Often, no writ is needed or issued because the trial court already will have taken the action the writ would have compelled. *Palma v U.S. Indus. Fasteners, Inc., supra*.

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§24.39 2. Clerk Usually Prepares Writ

Although no court rules address the subject, in practice the appellate court clerk usually prepares the peremptory writ after issuing the remittitur. On issuance of the remittitur, see §§24.31-24.36. Occasionally, the court directs the petitioner to prepare the peremptory writ for filing and service on the other parties. In such cases, the petitioner prepares the writ for signature by the clerk in accordance with the written opinion and submits it to the clerk for approval and issuance.

PRACTICE TIP: The petitioner should call the clerk to determine the court's preferences and practices.

For an example of a peremptory writ, see form in §28.15.

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§24.40 3. Clerk Sends Writ to Trial Court

The clerk must "promptly" send a certified copy of the writ to the trial court to which it is addressed. Cal Rules of Ct 8.489(a). If the writ stays or prohibits proceedings that are set to occur within 7 days or requires action within 7 days—or in any other urgent situation—the clerk must make a reasonable attempt to notify the trial court clerk by telephone, who must then notify the judge directly concerned. Cal Rules of Ct 8.489(b)(1).

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§24.41 4. Service of Writ by Petitioner

Except when the court of appeal expressly orders otherwise, the petitioner must serve a writ of mandate or prohibition in the same manner as a summons in a civil action. CCP §1096. For jurisdictional purposes, this requirement likely supersedes the provision requiring that the clerk give notice of the writ in Cal Rules of Ct 8.489(a). See *Board of Supervisors v Superior Court* (1994) 23 CA4th 830, 840, 28 CR2d 560 (personal service of either alternative writ or petition is required at some point). Thus, counsel may wish to serve such writs by personal service on each party and on the trial judge or the judge's clerk to lay a foundation to compel compliance under CCP §1097 in the unlikely event that the trial court disobeys the writ.

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§24.42 5. Writ of Review (Certiorari)

No postdecision documents need to be prepared in writ of review (certiorari) proceedings because the judgment affirming, annulling, or modifying the proceedings below (see CCP §1075), rather than the writ of review, is the ultimate relief sought. The writ of review merely orders the party to whom it is directed (*e.g.,* the trial court) to certify or return to the reviewing court a record of the proceedings below and to desist from further proceedings in the matter under review. CCP §§1070-1072. On writs of review, see §§15.27-15.38.

Once the judgment in a writ of review proceeding has been entered, the appellate court clerk must transmit a copy to the trial court. CCP §1076.

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V. ENFORCEMENT OF PEREMPTORY WRIT

§24.43 A. Respondent's Return to Peremptory Writ

The respondent should notify the court issuing the peremptory writ of the action the respondent takes in response to the writ. The respondent's formal notification is called a "return" (this is entirely different from the return the respondent or real party in interest files to an alternative writ or order to show cause; see §§23.20-23.44). See CCP §1108.

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§24.44 1. Return Not Mandatory

The respondent need not file a return unless the court issuing the peremptory writ requires a return within a specified period of time. See CCP §1108. Most appellate courts prefer that the respondent make a return, particularly when the respondent is a person or entity other than a trial court.

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§24.45 2. Contents of Return

In the return, the respondent informs the appellate court that:

- The respondent has complied with the writ in whole or in part; or
- The respondent is excused from compliance because respondent or real party in interest is requesting review in the supreme court (*i.e.,* in a petition for review) of the decision directing issuance of the writ. On petitioning for review in the supreme court, see §§25.26-25.30.

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§24.46 B. Respondent's Duty to Comply

When a writ issues under the terms of a final decision, the respondent, whether a trial court or governmental or private entity, is under a legal duty to comply with it. On determining when a decision becomes final, see §§25.5-25.10.

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C. Remedies if Respondent Refuses to Comply With Writ

§24.47 1. Possible Remedies

If the respondent refuses to comply with a peremptory writ of mandate or prohibition (which rarely occurs in connection with an appellate court writ proceeding), the issuing court may order the following penalties (CCP §1097):

- Enforcement;
- A fine not exceeding $1000, if the court finds no good cause for the failure to comply; or
- Imprisonment, if the court finds persistent refusal to comply with the writ.

The court's determination of which of the three available penalties is appropriate depends on the severity of the circumstances and on the nature of the respondent (*e.g.*, if it is the trial court, the only feasible option may be enforcement). *King v Woods* (1983) 144 CA3d 571, 577, 192 CR 724.

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§24.48 a. Enforcement Orders

The appellate court may issue whatever orders are necessary and proper to enforce a writ. CCP §§1097, 1105. The court's power to order compliance with a writ is inherent and the court may use its power when there is any inadequacy in compliance; there is no requirement of a showing of willfulness or persistent refusal. See *King v Woods* (1983) 144 CA3d 571, 578, 192 CR 724 (affirming enforcement order issued in trial court writ proceeding, but generally discussing remedies under CCP §1097). To justify the issuance of an enforcement order, the petitioner need only show that it personally served the responding party or real party in interest and that that party has not adequately complied with the peremptory writ. CCP §§1097, 1105.

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§24.49 b. Fine

The court may impose a fine of up to $1000 for noncompliance with a peremptory writ if (*King v Woods* (1983) 144 CA3d 571, 578, 192 CR 724):

- The party was personally served with the writ;
- The party refused or neglected to obey the writ; and
- The party's refusal or neglect was without just excuse.

The court may impose a fine after finding that the respondent refused or neglected to obey the writ. The court need not find that the respondent deliberately intended to refuse to comply with the writ. 144 CA3d at 579 (fine valid given respondent's refusal or neglect to comply with writ).

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§24.50 c. Imprisonment

The court may order the respondent or real party in interest imprisoned for failure to comply with a peremptory writ if (*King v Woods* (1983) 144 CA3d 571, 578, 192 CR 724):

- The party was personally served with the writ;
- The party refused or neglected to obey the writ;
- The party's refusal or neglect was without just excuse; and
- The party's refusal to comply is persistent.

For the court to order imprisonment, it must find more than mere indifference. The court must find intentional refusal to obey the writ. 114 CA3d at 579. When appropriate, the court can order a willfully disobedient respondent jailed until the writ is fully satisfied.

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2. Procedure for Compelling Compliance With Writ

§24.51 a. Motion or New Writ Petition

In the event that the trial court refuses to comply with an appellate court's ruling, the petitioner may proceed by making a motion seeking one of the remedies listed in CCP §1097 or by filing a new writ petition seeking enforcement of the first writ.

PRACTICE TIP: Courts may treat a motion to compel enforcement brought under CCP §1097 as being "in the nature of sanctions for contempt." *King v Woods* (1983) 144 CA3d 571, 578, 192 CR 724, quoting *Carroll v Civil Serv. Comm'n* (1970) 11 CA3d 727, 733, 90 CR 128. Thus, a respondent's or real party in interest's noncompliance with a peremptory writ can be brought before the court by means of a sworn declaration and an order to show cause re contempt. The petitioner may include an affidavit regarding the facts constituting the failure to comply with the writ (the "contempt"). CCP §1211(a). On contempt procedures, see California Trial Objections, chap 57 (Cal CEB Annual); California Trial Practice: Civil Procedure During Trial §§16.99-16.129 (3d ed Cal CEB 1995); California Criminal Law Procedure and Practice, chap 58 (Cal CEB Annual).

Because a motion calls for the court to exercise its ongoing jurisdiction, the motion should bear the same action number. If the respondent's noncompliance does not appear in the record, the petitioner's motion must include an affidavit setting out the relevant facts. See CCP §1211.

PRACTICE TIP: If the court's original writ has not been discharged, efficiency suggests filing a motion to challenge the respondent's noncompliance rather than a new writ petition.

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§24.52 b. Challenging Respondent's Return

If the petitioner believes that the respondent's or real party in interest's return to a peremptory writ is invalid because of failure to comply with some or all terms of the writ or inaccurately reporting the basis for noncompliance, the petitioner can challenge the return by filing the following:

- An enforcement motion requesting a finding that respondent has not in fact complied with the writ (see *City of Carmel-By-The-Sea v Board of Supervisors* (1982) 137 CA3d 964, 970, 187 CR 379 (affirming enforcement order issued in trial court writ proceeding, but generally discussing enforcement orders under CCP §1097));
- A motion for an order to show cause re contempt; or
- A supplemental writ petition under the original action's case number or a new writ petition.

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§24.53 D. Methods of Enforcing Decision in Writ of Review (Certiorari) Proceeding

In contrast with the statutes applicable to mandamus and prohibition, the code sections dealing specifically with a writ of review (certiorari) (CCP §§1067-1077) contain no express remedy by which the petitioner may enforce a decision annulling a trial court's action. The petitioner's remedy is to file a new petition either for a writ of mandate to compel the trial court or other tribunal to comply with the reviewing court's decision, or for a writ of prohibition to restrain the trial court or other tribunal from acting in excess of its authority.

Although another writ is rarely needed to enforce a writ of review, the same standards applying to enforcement of appellate rulings in general should apply in this setting as well. See *Hampton v Superior Court* (1952) 38 C2d 652, 656, 242 P2d 1 (prohibition is proper remedy to restrain trial court from proceeding to trial in violation of terms of final judgment of reviewing court); *Carter v Superior Court* (1950) 96 CA2d 388, 391, 215 P2d 491 ("when the trial court is about to exceed its authority by proceeding otherwise than in accordance with directions given with respect to the issues to be tried, or judgment to be entered, either mandate or prohibition is a proper remedy to compel obedience to such directions").

PRACTICE TIP: Because it is sometimes unclear whether the more appropriate remedy is mandate or prohibition, the petitioner should seek both remedies in the alternative. See §18.3.

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§24.54 E. Cost Awards Enforceable in Same Manner as Money Judgments Generally

An award of costs in a writ proceeding is enforceable in the same manner provided for money judgments generally, whether the award is made by an appellate court or by a trial court. CCP §§1027, 1095, 1105; Cal Rules of Ct 8.493; Enforcement of Judgments Act (CCP §§680.010-724.260, in particular CCP §§695.010-709.030); *California Labor Fed'n v Occupational Safety & Health Standards Bd.* (1992) 5 CA4th 985, 989 n1, 7 CR2d 399. On cost awards, see §§24.23-24.27.

For procedure and forms for enforcing a judgment for costs, see Debt Collection Practice in California §§7.31-7.37, 7.44-7.57 (2d ed Cal CEB 1999). See also California Trial Practice: Civil Procedure During Trial, chap 27 (3d ed Cal CEB 1995).

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§24.55 VI. TRANSFER OF CASE FROM COURT OF APPEAL TO CALIFORNIA SUPREME COURT BEFORE DECISION

On very rare occasions, the California Supreme Court may transfer a case, including a writ proceeding, to itself after the case is filed in the court of appeal but before decision in that court. Cal Rules of Ct 8.552, 10.1000(A). This may arise if the case involves an "issue of great public importance that the Supreme Court must promptly resolve." Cal Rules of Ct 8.552(c); see *Brosnahan v Brown* (1982) 32 C3d 236, 241, 186 CR 30 (supreme court transferred writ petition to itself, noting that petition presented issue of great public importance, *i.e.,* whether manner in which Victims' Bill of Rights was submitted to voters as ballot initiative was constitutionally defective). A transfer order requires the votes of at least four supreme court justices. Cal Rules of Ct 8.552(e).

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§24.56 A. Who Requests Transfer

The supreme court may itself decide to transfer the case or may do so at a party's request. Cal Rules of Ct 8.552(a).

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§24.57 B. How to Request Transfer

A party requests transfer of a case from the court of appeal to the supreme court in a petition served and filed in the supreme court. Cal Rules of Ct 8.552(d). The petition must explain how the cause satisfies the requirements of Cal Rules of Ct 8.552(c). Cal Rules of Ct 8.552(d). The petition should conform to the format requirements of Cal Rules of Ct 8.504. Cal Rules of Ct 8.552(d). On the format requirements for petitions in the supreme court, see §§27.20-27.24.

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§24.58 C. When to Request Transfer

A party seeking transfer must file and serve a petition "promptly," although no specific time limit applies. Cal Rules of Ct 8.552(d). The transfer itself must take place before the decision in the court of appeal is final. Cal Rules of Ct 8.552(b).

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§24.59 D. Responding to Request for Transfer

The party opposing transfer should file and serve an answer to the petition within 20 calendar days after the filing of the petition. Cal Rules of Ct 8.552(d). The answer should be in the same format as the petition. Cal Rules of Ct 8.552(d).

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§24.60 VII. SANCTIONS FOR FRIVOLOUS WRIT PETITIONS

Under CCP §907 the court of appeal may issue sanctions on appeal when appeal is "frivolous or taken solely for delay." See *Lawrence v Superior Court* (1988) 206 CA3d 611, 619, 253 CR 748 (CCP §907 is made applicable to writ petitions by CCP §1109). Section 907 does not act as a limitation; rather, appellate courts have "inherent authority to impose sanctions." *Bryan v Bank of America* (2001) 86 CA4th 185, 188, 103 CR2d 148. Thus, in writ proceedings, sanctions may also be imposed for "any other unreasonable violation of" the California Rules of Court. Cal Rules of Ct 8.492(a)(2). See also Cal Rules of Ct 8.276 (specifying grounds for sanctions in appeal proceedings).

PRACTICE TIP: Appellate proceedings are more deliberate than those in fast-paced trial courts, in which conflicts over discovery, motions, and trial practice can become heated. Thus the issue of sanctions arises far less frequently in the appellate courts. An appellate court litigant should think carefully before seeking sanctions, and normally is better served by focusing on the merits. Counsel should keep in mind that, if the appellate court concludes that conduct is sanctionable, it has the power to award sanctions on its own motion. Cal Rules of Ct 8.492(a).

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§24.61 A. Against Party or Attorney

The court may award sanctions against a party or an attorney. Cal Rules of Ct 8.492(a).

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§24.62 B. Procedure for Obtaining Sanctions

A party who believes that another party or attorney has committed a sanctionable act (see §24.60) may file a motion seeking sanctions. Cal Rules of Ct 8.492(a). If a party files a sanctions motion, the court will do one of the following (Cal Rules of Ct 8.492(b)-(c)):

- Deny the motion; or
- Send a notice to the party against whom sanctions are sought indicating that the court is considering imposing sanctions and giving that party 10 days to file opposition.

A party may *not* file opposition to the sanctions motion until the court sends notice, and the court will not consider the failure to file opposition as consent to sanctions. Cal Rules of Ct 8.492(c). The court usually will hear oral argument on the sanctions motion with oral argument on the merits of the writ petition. Cal Rules of Ct 8.492(d). If the court imposes sanctions, it will provide counsel with a written statement of reasons for the penalty. See *Marriage of Flaherty* (1982) 31 C3d 637, 654, 183 CR 508 (given due process mandates, court imposing sanctions should provide attorney with written statement of reasons for penalty).

PRACTICE TIP: An appellate court litigant should think carefully before filing a motion seeking sanctions and make certain that the grounds for sanctions are well supported. It usually is sounder practice to forego a sanctions motion and simply accept winning on the merits.

An appellate court may impose sanctions on its own motion, although before doing so, it must give the party against whom sanctions are sought an opportunity to file opposition. Cal Rules of Ct 8.492(a)-(c).

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C. Types of Sanctions

§24.63 1. Striking Pleading

A party requesting sanctions may ask the court to strike the opposing party's petition or pleading. See *Berger v Godden* (1985) 163 CA3d 1113, 1119, 210 CR 109 (court of appeal struck brief and dismissed appeal after failure to comply with court rules in significant, rather than merely technical, ways).

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Source: Civil Litigation/California Civil Writ Practice/24 Action by Court of Appeal After Issuance of Palma Notice, Alternative Writ, or Order to Show Cause/§24.64 2. Award or Denial of Costs

§24.64 2. Award or Denial of Costs

The court may sanction a party by awarding or denying costs under Cal Rules of Ct 8.493. Cal Rules of Ct 8.492(a).

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§24.65 3. Attorney Fees or Damages

The court may impose as a sanction attorney fees or damages. See *Los Angeles Dep't of Children & Family Servs. v Superior Court* (1995) 37 CA4th 439, 457, 43 CR2d 757 (sanction of $1000 for filing frivolous writ petition); *Manzetti v Superior Court* (1993) 21 CA4th 373, 381, 25 CR2d 857 (sanction of $1500 for filing second writ petition following summary denial of prior identical petition); *Coast Sav. & Loan Ass'n v Black* (1986) 187 CA3d 1494, 1500, 232 CR 483 (petitioners fined $10,000 in writ of supersedeas proceeding); *Gottlieb v Superior Court* (1991) 232 CA3d 804, 813, 283 CR 771 (sanction of $5000 for refiling petition with intent to delay). But see *Jones v Superior Court* (1994) 26 CA4th 92, 102, 31 CR2d 264 (court declined to impose sanctions, finding that petition was not filed solely for purpose of delay).

NOTE: Although most of the cases cited above rely on CCP §907 (court may add to costs on appeal "such damages as may be just" when appeal is frivolous or taken solely for delay) in imposing sanctions, they provide support for the same type of sanctions under Cal Rules of Ct 8.492. *Lawrence v Superior Court* (1988) 206 CA3d 611, 619, 253 CR 748 (CCP §907 is made applicable to writ petitions by CCP §1109).

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25

Review of Court of Appeal's Action on Writ Petition

H. Thomas Watson

I. SCOPE OF CHAPTER §25.1

II. POSSIBLE COURT OF APPEAL ACTIONS ON WRIT PETITIONS §25.2

III. WHEN TO SEEK RELIEF FROM A COURT OF APPEAL'S ACTION ON A WRIT PETITION §25.3
- A. Importance of Finality of Court of Appeal's Action §25.4
- B. When Court of Appeal's Action Becomes Final
  - 1. Summary Denial Final Immediately §25.5
  - 2. Decision on Merits Final After 30 Days §25.6
    - a. 30-Day Period May Be Shortened by Court §25.7
    - b. 30-Day Period Shortened When It Ends on Day Court Closed §25.8
  - 3. Postdecision Actions That May Affect Finality Date
    - a. Modification of Decision §25.9
    - b. Publication of Decision §25.10

IV. HOW TO CHALLENGE COURT OF APPEAL ACTION ON WRIT PETITION §25.11
- A. Motion to Discharge Alternative Writ or Order to Show Cause §25.12
  - 1. Alternative Writ or Order to Show Cause Generally Creates "Cause" §25.13
  - 2. Alternative Writ or Order to Show Cause May Be Discharged §25.14
- B. Modification of Court of Appeal Decision §25.15
- C. Petition for Rehearing in the Court of Appeal §25.16
  - 1. Grounds for Rehearing §25.17
  - 2. Standing to Seek Rehearing §25.18
  - 3. Time Limits for Seeking Rehearing §25.19
  - 4. Petition for Rehearing
    - a. Contents of Petition for Rehearing §25.20
    - b. Format of Petition for Rehearing §25.21
  - 5. Answer to Petition for Rehearing §25.22
  - 6. Chart: Rehearing in Court of Appeal §25.23
  - 7. Action by Court of Appeal on Petition for Rehearing
    - a. Denial and Denial by Operation of Law §25.24
    - b. Granting Rehearing §25.25
- D. Petition for Review by the California Supreme Court §25.26
  - 1. Petitions for Review Rarely Granted §25.27
    - a. Same or Similar Issue in Pending Case Before Court §25.28
    - b. Review Sought to Exhaust State Court Remedies §25.29
  - 2. Petitions for Review Only Means of Challenging Summary Denial Order §25.30
- E. Petition for Certiorari by the United States Supreme Court §25.31

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§25.1 I. SCOPE OF CHAPTER

This chapter discusses how to challenge an appellate court's action on a writ petition. It begins with a brief discussion of the types of actions an appellate court can take on a writ petition because the action taken dictates the options for seeking relief. See §25.2. The chapter next explains the timing for seeking relief from a court of appeal's action on a writ petition, and includes a discussion of when a court of appeal's decision becomes final for purposes of seeking review by the California Supreme Court. See §§25.3-25.10.

The chapter then covers the various procedures for seeking relief from a court of appeal's action on a writ petition (see §25.11), including a motion to discharge an alternative writ or order to show cause (see §§25.12-25.14), a petition for modification of the court of appeal's decision (see §25.15), a petition for rehearing by the court of appeal (see §§25.16-25.25), a petition for review by the California Supreme Court (see §§25.26-25.30), and a petition for certiorari by the U.S. Supreme Court (see §25.31).

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§25.2 II. POSSIBLE COURT OF APPEAL ACTIONS ON WRIT PETITIONS

A court of appeal may take the following actions on a writ petition:

- Summarily deny the writ petition (see §§22.14-22.17, 24.3);
- Issue a peremptory writ in the first instance without issuing an alternative writ or order to show cause (see *Alexander v Superior Court* (1993) 5 C4th 1218, 1222, 23 CR2d 397 (*Palma* relief appropriate only when petitioner's right to relief is obvious or unusual urgency justifies expediting writ disposition process), disapproved in part on other grounds in *Hassan v Mercy Am. River Hosp.* (2003) 31 C4th 709, 724 n4, 3 CR3d 623; *Palma v U.S. Indus. Fasteners, Inc.* (1984) 36 C3d 171, 177, 203 CR 626 (on "*Palma*" notice see §§22.18-22.22, 24.4); or
- Issue an alternative writ or order to show cause (see §§22.23-22.29), followed by:
- An order discharging the alternative writ as improvidently granted and denying the writ petition (see §24.6); or
- A decision on the merits granting or denying the petition (see §24.15).

The appellate courts summarily deny most writ petitions. See §22.15. If the court of appeal does not summarily deny the petition, it is more likely to issue an alternative writ than a *Palma* notice. See *Ng v Superior Court* (1992) 4 C4th 29, 35, 13 CR2d 856 (cautioning that expedited *Palma* procedure should be used only when there is clear right to relief or unusual time pressures); §§22.19, 24.4.

The procedure for challenging the court of appeal's action depends on what action the court takes. See §25.11. On the types of action a court of appeal may take on a writ petition, see §§22.9-22.29.

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§25.3 III. WHEN TO SEEK RELIEF FROM A COURT OF APPEAL'S ACTION ON A WRIT PETITION

Until a court of appeal's action on a writ petition becomes final as to that court, an aggrieved party may seek relief directly from the appellate court.

Once the court of appeal's action becomes final, that court no longer has jurisdiction over the matter, and the period for seeking review by the California Supreme Court begins to run. See §25.4. The time period for seeking review differs depending on whether the court of appeal summarily denies the petition (see §25.5) or issues a decision on the merits (see §§25.6-25.8). If the court of appeal modifies its decision or grants rehearing, that also affects the time for seeking review. See §25.9.

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§25.4 A. Importance of Finality of Court of Appeal's Action

Determining when a court of appeal's action on a writ petition becomes final is crucially important for a party seeking review by the California Supreme Court. Finality terminates the court of appeal's jurisdiction to change or modify its order or decision, and triggers the period during which the aggrieved party may file a petition for review by the supreme court. Cal Rules of Ct 8.264(c)(1), 8.268(a). See §§25.15-25.25.

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B. When Court of Appeal's Action Becomes Final

§25.5 1. Summary Denial Final Immediately

If the court of appeal summarily denies a writ petition, its denial order is final immediately. Cal Rules of Ct 8.490(b)(1). Thus, the date of finality of a summary denial is the date the appellate court issues its order. See Cal Rules of Ct 8.264(a)(1), 8.490(b)(1). On supreme court review of summary denials, see §25.30. See also §§22.14-22.17.

PRACTICE TIP: As explained in §22.16, some denial orders include a brief explanation or cite authority and thus are sometimes referred to as not-so-summary denial orders. However, the appellate courts will almost certainly treat such an order as a summary denial. Thus, counsel should treat a not-so-summary denial like any other summary denial. In contrast, if the court of appeal heard oral argument before issuing an explanatory denial order, that may change the analysis and make the order final 30 days after issuance. See *Bay Dev., Ltd. v Superior Court* (1990) 50 C3d 1012, 1024, 269 CR 720 (immediate finality applies only to summary denials, not to cases in which appellate court, without first issuing either alternative writ or order to show cause, hears oral argument and files written opinion denying writ relief).

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§25.6 2. Decision on Merits Final After 30 Days

A court of appeal's written decision on the merits of a writ petition (after issuing an alternative writ, order to show cause, or notice under *Palma v U.S. Indus. Fasteners, Inc.* (1984) 36 C3d 171, 177, 203 CR 626) is usually final as to that court 30 calendar days after filing. Cal Rules of Ct 8.490(b)(2).

NOTE: The finality of a court of appeal's decision may be affected by a grant of rehearing, an order modifying the substance of the opinion, or an order certifying an unpublished decision for publication (in whole or in part). See Cal Rules of Ct 8.264(b)(3), (c)(2), 8.268(d); §§25.9-25.10, 25.25.

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§25.7 a. 30-Day Period May Be Shortened by Court

The court of appeal has discretion to shorten the time for finality of a decision (1) granting a writ or (2) denying a writ after issuance of an alternative writ or order to show cause. Cal Rules of Ct 8.490(b)(3). The court can do so if early finality is necessary to prevent mootness or to prevent frustration of the relief granted, or is otherwise necessary in the interests of justice. Cal Rules of Ct 8.490(b)(3); *Palma v U.S. Indus. Fasteners, Inc.* (1984) 36 C3d 171, 180, 203 CR 626. See *Freedman v Superior Court* (2008) 166 CA4th 198, 208, 82 CR3d 563 (decision final in 10 days in interests of justice); *Amanda H. v Superior Court* (2008) 166 CA4th 1340, 1348, 83 CR3d 229 (decision final immediately); *Woo v Superior Court* (2000) 83 CA4th 967, 979, 100 CR2d 156 (decision final after 7 days "to prevent frustration of the relief granted"); *Kennedy/Jenks Consultants, Inc. v Superior Court* (2000) 80 CA4th 948, 965, 95 CR2d 817 (decision final after 5 days to prevent delay of proceedings below). Thus, even a decision on the merits may be final immediately if the court of appeal determines it is necessary, as provided for by the rules of court.

If the court of appeal shortens the period for finality, that will affect the time a party has to petition for review, because a petition must be filed within 10 days after the court of appeal's decision is final as to that court. Cal Rules of Ct 8.500(e)(1). See *Ng v Superior Court* (1992) 4 C4th 29, 33, 13 CR2d 856. See also §§25.26-25.30 on filing petition for review in supreme court.

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§25.8 b. 30-Day Period Shortened When It Ends on Day Court Closed

The 30-day finality period generally applicable to a decision on the merits is not extended if the 30th day falls on a Saturday, Sunday, holiday, or any other day that the clerk's office is closed. Cal Rules of Ct 8.500(e)(1). Thus, if the 30th day after the decision is filed falls on a day that the clerk's office is closed, the court of appeal's jurisdiction is not extended to the following court day. If the court of appeal intends to act on the matter, then it must do so before that court-closed day, which effectively shortens the 30-day period. Cal Rules of Ct 8.500(e)(1); see CCP §12a.

On treating any day that a court is authorized to be closed because of the state's fiscal crisis (*i.e.*, a "furlough day") as a holiday, see Govt C §68106(b)(1) (inoperative as of July 1, 2010, and repealed as of January 1, 2011, unless legislation deletes or extends those dates).

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3. Postdecision Actions That May Affect Finality Date

§25.9 a. Modification of Decision

If the court of appeal modifies its decision on the merits of a writ petition, that may affect the date of finality. Cal Rules of Ct 8.264(c)(1).

If the modification *does not change* the judgment (*i.e.,* the modification is only as to analysis or style and does not alter the substance of the court's disposition), the modification does not affect the date of finality, which still runs from the original filing date of the decision. If the modification order *changes* the judgment (*i.e.*, alters the substance of the court's disposition), the period for finality begins to run anew from the date the modification order is filed. Cal Rules of Ct 8.264(c)(2).

An order modifying the merits of a decision must specify whether it effects a change in the judgment and thus changes the time for finality. Cal Rules of Ct 8.264(c)(2). See §25.15 on modification of appellate decision.

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§25.10 b. Publication of Decision

The appellate courts do not publish the vast majority of orders and decisions. A court may, on its own or at the request of a party, decide to publish a decision not previously published. Cal Rules of Ct 8.1105(b), 8.1120. The court must take such action before its decision becomes final. Cal Rules of Ct 8.1120(b). If the court certifies a formerly unpublished opinion for either partial or total publication, the finality period runs anew from the date of the publication order. Cal Rules of Ct 8.264(b)(3).

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§25.11 IV. HOW TO CHALLENGE COURT OF APPEAL ACTION ON WRIT PETITION

The procedure for challenging a court of appeal's action on a writ petition depends on the action taken by the appellate court. See §25.2 on possible actions by the court of appeal.

When the court of appeal summarily denies a writ petition, the only means of challenging the action is a petition for review by the California Supreme Court. See §25.26; chap 27. When the court of appeal issues an alternative writ or order to show cause (OSC), the respondent or real party in interest can move to discharge the alternative writ or OSC. See §§25.12-25.14.

When the appellate court issues a decision on the merits, either granting the petition and issuing a peremptory writ (following the issuance of an alternative writ/OSC or a *Palma* notice) or denying the petition, the losing party can:

- Seek modification of the decision (see §25.15);
- File a petition for rehearing by the court of appeal (see §§25.16-25.25);
- File a petition for review by the supreme court (see §§25.26-25.30); or
- Some combination of the above.

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§25.12 A. Motion to Discharge Alternative Writ or Order to Show Cause

An appellate court issues an alternative writ or order to show cause (OSC) when it wants to give serious attention to the petition and wants more than preliminary opposition. On preliminary opposition, see chap 21. On alternative writs and OSCs, see §§22.23-22.29. Issuance of an alternative writ may indicate that the court has decided the petitioner has no other adequate remedy at law. *Langford v Superior Court* (1987) 43 C3d 21, 28, 233 CR 387. An alternative writ is not a determination of the substantive sufficiency of the petition.

PRACTICE TIP: If the real party in interest or respondent believes that it made a strong case against issuance of an alternative writ/OSC in its preliminary opposition (see chap 21), or if subsequent events call into question the continued propriety of an alternative writ/OSC, the real party in interest or respondent should consider moving to discharge the alternative writ/OSC as improvidently granted and for summary denial of the petition. See Cal Rules of Ct 8.54, 8.57 (governing motions in courts of appeal).

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§25.13 1. Alternative Writ or Order to Show Cause Generally Creates "Cause"

Generally, the issuance of an alternative writ or order to show cause makes the writ proceeding a "cause" that the court of appeal must decide on the merits by written opinion after oral argument. See *Lewis v Superior Court* (1999) 19 C4th 1232, 1241, 82 CR2d 85 (unless court summarily denies petition or respondent performs act specified in alternative writ, matter becomes "cause" to be decided on merits); *Kowis v Howard* (1992) 3 C4th 888, 894, 12 CR2d 728 (court of appeal did not decide "cause" when it denied petition with brief explanation and did not issue alternative writ). See §22.17.

If the court of appeal makes a writ proceeding a "cause," its written decision on the merits establishes law of the case, which is controlling in further proceedings in the trial court and any later appeal from a final judgment. 3 C4th at 893. On law of the case, see §22.17.

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§25.14 2. Alternative Writ or Order to Show Cause May Be Discharged

After issuing an alternative writ or order to show cause (OSC) and making a writ proceeding a "cause" (see §22.17), the court of appeal can change its mind and discharge the alternative writ/OSC and deny the petition. Generally, real party in interest (and in rare instances the respondent) will have filed preliminary opposition pointing out any obvious deficiencies in the petition. See chap 21. Presumably, then, the court's issuance of an alternative writ/OSC indicates that the court has concluded the petition is facially sufficient. Sometimes, however, points can be overlooked. If the real party in interest or respondent believes that the court of appeal has inadvertently missed a critical point made in the preliminary opposition, the real party in interest or respondent should consider filing a motion to discharge the alternative writ/OSC as improvidently granted.

PRACTICE TIP: This should be a very rare occurrence; the courts of appeal will not look kindly on a motion to discharge that is a recycled version of the preliminary opposition.

Occasionally, new information comes to light indicating that writ relief cannot or should not be granted. The real party in interest or respondent can bring this information to the attention of the court through a motion to discharge the alternative writ/OSC and deny the petition. See *Countrywide Home Loans, Inc. v Superior Court* (1997) 54 CA4th 828, 829, 62 CR2d 899 (court discharged alternative writ as improvidently issued based on new evidence supplied by real party in interest that, had it been disclosed in petition, would have caused court not to issue alternative writ).

Sometimes, after the court begins working on the matter, it concludes that writ relief cannot or should not be granted. The court, on its own motion, can discharge the alternative writ/OSC as improvidently granted and deny the petition. See *People ex rel. Lynch v Superior Court* (1970) 1 C3d 910, 912, 83 CR 670 (supreme court discharged OSC as improvidently issued after determining attorney general requested an improper advisory opinion); *Krueger v Superior Court* (1979) 89 CA3d 934, 937, 152 CR 870 (court of appeal discharged alternative writ issued under supreme court order because petition procedurally defective); *Star Motor Imports, Inc. v Superior Court* (1979) 88 CA3d 201, 203, 151 CR 721 (court of appeal found alternative writ improvidently granted because writ application was fatally defective).

PRACTICE TIP: Although the rules permit a party to seek supreme court review of an interlocutory court of appeal order issuing an alternative writ or OSC (see Cal Rules of Ct 8.500(a)(1)), it is difficult to conceive of any reason why the supreme court would ever grant review of such an order rather than wait for the final decision by the court of appeal. See Cal Rules of Ct 8.500(b).

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Source: Civil Litigation/California Civil Writ Practice/25 Review of Court of Appeal's Action on Writ Petition/§25.15 B. Modification of Court of Appeal Decision

§25.15 B. Modification of Court of Appeal Decision

A party dissatisfied with a court of appeal's decision on the merits can seek modification of the decision. Cal Rules of Ct 8.264(c). Generally, an aggrieved party seeks modification to clarify the court's decision. If a party wants the court to change its decision, the more commonly used procedure is a petition for rehearing. See §§25.16-25.25.

A party can request modification in one of two ways:

- In conjunction with a petition for rehearing (see §25.16-25.25); or
- By letter filed with the court and served on opposing parties.

PRACTICE TIP: Check with the appellate court clerk's office for any special requirements for a modification request.

A party must make a request for modification before the court of appeal's decision becomes final as to that court. Cal Rules of Ct 8.264(c)(1). The court must state in a modification order whether the modification changes the judgment of the court and thus restarts the period for finality. Cal Rules of Ct 8.264(c)(2).

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§25.16 C. Petition for Rehearing in the Court of Appeal

The most common means of challenging a court of appeal's decision on the merits in the issuing court is a petition for rehearing. See Cal Rules of Ct 8.268. The losing party should file a petition for rehearing if it believes that the court of appeal's opinion misstates or omits pertinent facts or issues.

PRACTICE TIP: If grounds for rehearing exist, the proper protocol is to petition the court of appeal for rehearing before seeking review by the supreme court.

A petition for rehearing is not an express prerequisite for a petition for review by the supreme court. See Cal Rules of Ct 8.500(c)(1)-(2). The supreme court, however, accepts the court of appeal's statement of the issues and facts unless the petitioning party has raised alleged omissions or misstatements in the appellate court's decision on a petition for rehearing. See Cal Rules of Ct 8.500(c)(2).

PRACTICE TIP: Accordingly, a party seeking review by the supreme court may be well advised to file a petition for rehearing in the court of appeal first.

The court of appeal may order a rehearing on petition of a party or on its own motion, until the court of appeal's decision is final as to that court. Cal Rules of Ct 8.268(a)(1). On when a decision is final, see §§25.5-25.10.

NOTE: Rehearing is not available to challenge a summary denial, because such orders are immediately final. See §25.5.

On rehearing in the court of appeal, see §11.34; California Civil Appellate Practice, chap 19 (3d ed CEB 1996).

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§25.17 1. Grounds for Rehearing

Rehearing is appropriate if:

- The decision misstates or omits material facts or issues. See Cal Rules of Ct 8.500(c)(2).
- The decision decides an issue that the parties have not briefed. Govt C §68081; see *California Cas. Ins. Co. v Appellate Dept.* (1996) 46 CA4th 1145, 1147, 54 CR2d 118 (court of appeal issued writ of mandate directing appellate division of superior court to grant rehearing to allow parties to brief new issue).
- There is a procedural defect in the appellate process (*e.g.*, a different panel of justices signed the opinion than heard oral argument, or the court failed to give counsel notice of oral argument). See *Moles v Regents of Univ. of Cal.* (1982) 32 C3d 867, 187 CR 557 (change in panel composition after oral argument but before decision necessitated reargument and decision).
- The decision requires modification to, *e.g.,* correct a clerical error; clarify the directions to the trial court; or explain or eliminate confusing, unnecessary, or potentially troublesome dicta. See *Leamon v Krajkiewcz* (2003) 107 CA4th 424, 434, 132 CR2d 362 (petition for rehearing denied and opinion modified to clarify issues raised in rehearing request); *Consaul v City of San Diego* (1992) 6 CA4th 1781, 1813 n12, 8 CR2d 762 (dissenting opinion of Nares, J; petition for rehearing granted to consider objections to court's opinion); *No Oil, Inc. v Occidental Petroleum Corp.* (1975) 50 CA3d 8, 24, 123 CR 589 (court of appeal noted addition of footnote to supreme court's opinion in response to petition for rehearing).

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§25.18 2. Standing to Seek Rehearing

Any party who had notice and an opportunity to be heard (*i.e.,* the petitioner, respondent, and all real parties in interest) has standing to seek rehearing. See Cal Rules of Ct 8.268. Although Rule 8.268 only refers to parties as having standing to file a petition for rehearing, persons or entities that already have appeared in the writ proceeding as amicus curiae also may have standing to seek rehearing. (Alternatively, amicus can file a petition suggesting that the court grant rehearing on its own motion under Rule 8.268). See *New York Life Ins. Co. v Bank of Italy* (1923) 60 CA 602, 607, 214 P 61 (court permitted amicus curiae to seek rehearing following opinion on appeal), disapproved on other grounds in *In re Marriage of Saslow* (1985) 40 C3d 848, 861, 221 CR 546. See also *Le Francois v Goel* (2005) 35 C4th 1094, 1107, 29 CR3d 249 (party can suggest court reconsider its ruling on its own motion after deadline for moving for reconsideration has past). Other nonparties, such as a person or entity who could have appeared earlier as an amicus but did not, may seek leave to file an amicus petition for rehearing, or to suggest that the court of appeal grant rehearing on its own motion.

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§25.19 3. Time Limits for Seeking Rehearing

Petitions for rehearing in the courts of appeal must be served and filed within 15 calendar days after the filing of one of the following documents (Cal Rules of Ct 8.268(b)(1); see Cal Rules of Ct 1.10):

- The court of appeal's decision;
- An order modifying the judgment;
- An order publishing in whole or in part an unpublished decision; or
- A consent to an increase or decrease in the judgment amount under Cal Rules of Ct 8.264(d).

Before the court of appeal's decision is final and for good cause, the presiding judge may relieve a party from a failure to file a timely petition. Cal Rules of Ct 8.268(b)(4).

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4. Petition for Rehearing

§25.20 a. Contents of Petition for Rehearing

A petition for rehearing in the court of appeal should set out clearly and concisely why the court should rehear the matter. The petition usually should seek rehearing on one or more of the grounds discussed in §25.17.

It is generally unproductive to ask the appellate court to reconsider the same arguments and authorities it already has rejected. In addition, the court of appeal will usually not consider new arguments and authorities raised for the first time in a petition for rehearing. Jurisdictional issues, however, may be raised at any time, including for the first time in a petition for rehearing. *People v Silva* (1995) 36 CA4th 231, 235, 43 CR2d 8 (court's lack of jurisdiction to act is not waived and can be raised at any time).

If the court certified the challenged decision for publication, the challenging party may also, alternatively, ask that the opinion be depublished.

PRACTICE TIP: Counsel may seek depublication in a petition for rehearing, but it is inappropriate to ask the court of appeal to publish its opinion in a rehearing petition. Publication requests must be made by separate letter to the court of appeal within 20 days after the opinion is filed, explaining why the opinion meets the criteria for publication. Cal Rules of Ct 8.1120(a).

JUDICIAL PERSPECTIVE: Counsel does not aid his or her client's cause by telling the court of appeal that it is stupid and/or biased. Unfortunately, that is the tone of many petitions for rehearing. The appellate court, of course, has the last word and will deny petitions that are insulting, offensive, and rude.

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§25.21 b. Format of Petition for Rehearing

The format of a petition for rehearing and any answer is generally the same as for any other appellate brief. Cal Rules of Ct 8.204(b), 8.268(b)(3). See §§18.5-18.20; California Civil Appellate Practice, chap 12 (3d ed Cal CEB 1996).

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§25.22 5. Answer to Petition for Rehearing

The opposing party may not file an answer to a petition for rehearing unless the court of appeal requests one, and then it must be filed within 8 calendar days after the order is filed, unless the court orders otherwise. Cal Rules of Ct 8.268(b)(2). Normally, the appellate court will not grant a petition for rehearing unless it has requested an answer. Cal Rules of Ct 8.268(b)(2). Before the decision is final and for good cause, the presiding judge may relieve a party from a failure to file a timely answer. Cal Rules of Ct 8.268(b)(4).

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§25.23 6. Chart: Rehearing in Court of Appeal

Document	*Deadline*	*Copies*	*Color of Cover*
Petition for rehearing filed by dissatisfied party.	15 calendar days after the decision is filed. Cal Rules of Ct 8.268(b)(1). See §25.19.	Original plus 4 copies. Cal Rules of Ct 8.44(b)(3).	Orange. Cal Rules of Ct 8.40(b)(1).
Answer filed by opposing party.	If requested by the court, an answer may be filed 8 calendar days after the court's order requesting an answer is filed. Cal Rules of Ct 8.268(b)(2). See §25.19.	Original plus 4 copies. Cal Rules of Ct 8.44(b)(3).	Blue. Cal Rules of Ct 8.40(b)(1).

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7. Action by Court of Appeal on Petition for Rehearing

§25.24 a. Denial and Denial by Operation of Law

The courts of appeal deny the vast majority of petitions for rehearing. Usually, a court issues a denial order before its decision becomes final. If the court takes no action before its decision becomes final, the rehearing petition is deemed denied by operation of law. Cal Rules of Ct 8.268(c).

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§25.25 b. Granting Rehearing

If the court of appeal decides to grant rehearing, it must act before its decision becomes final. Cal Rules of Ct 8.268(a). An order granting rehearing vacates the court's opinion and sets the cause at large. Cal Rules of Ct 8.268(d). Unless the appellate court orders further briefing and argument, it often will order the case resubmitted in the same order that grants rehearing and then file a new opinion within 90 days.

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§25.26 D. Petition for Review by the California Supreme Court

A party can challenge an appellate court's action on a writ petition in the California Supreme Court by filing a petition for review. Cal Rules of Ct 8.500(a)(1); *Superior Court v County of Mendocino* (1996) 13 C4th 45, 52 n5, 51 CR2d 837 (supreme court had jurisdiction to review court of appeal's decision granting petition and issuing writ of mandate). See *Freedman v Superior Court* (2008) 166 CA4th 198, 203, 82 CR3d 563 (supreme court granted petition for review of court of appeal's order denying writ petition and retransferred case to court of appeal with directions to issue order to show cause and decide petition on merits). A party must file the petition for review in the supreme court within 10 calendar days after the court of appeal's decision becomes final. Cal Rules of Ct 8.500(e)(1). On finality, see §§25.5-25.10.

PRACTICE TIP: A petition for review by the supreme court is entirely different from the writ petition filed in the court of appeal. The latter is the operative pleading that initiated the original writ proceeding in the court of appeal. A petition for review asks the supreme court to review the court of appeal's action or decision on the original writ petition. A party may file an original writ petition directly in the supreme court, but this is rarely done and only in extraordinary circumstances; see §§27.2-27.11.

For an example of a petition for review, see form in §28.16. On the grounds and procedures for filing a petition for review in the supreme court, as well as possible dispositions of such petitions, see §§27.12-27.33; California Civil Appellate Practice, chap 22 (3d ed CEB 1996).

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§25.27 1. Petitions for Review Rarely Granted

The California Supreme Court summarily denies most petitions for review. Review generally is proper only when necessary to resolve conflicts between the courts of appeal or to settle an important issue of widespread public importance. Cal Rules of Ct 8.500(b)(1). Thus, petitions for review should emphasize one or both of the following (Cal Rules of Ct 8.500(b)(1)):

- Review is needed to resolve a conflict in decisions by the courts of appeal; and
- Review is needed to decide an important legal question that has wide application.

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§25.28 a. Same or Similar Issue in Pending Case Before Court

Sometimes the supreme court has already granted review in another case presenting the same (or similar) issue raised in the writ proceeding. A petitioner should highlight this circumstance in a petition for review and, alternatively, ask the court to grant review and hold the case until it decides the pending case (called a "grant and hold"). See Cal Rules of Ct 8.512(d)(2).

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§25.29 b. Review Sought to Exhaust State Court Remedies

Seeking review in the California Supreme Court is a prerequisite to petitioning the U.S. Supreme Court for a writ of certiorari. See §25.31. Parties planning to seek certiorari of an issue already settled by the California Supreme Court should explain that they are seeking review merely to exhaust state court remedies. See 28 USC §1257(a); *Banks v California* (1969) 395 US 708, 23 L Ed 2d 653, 89 S Ct 1901 (U.S. Supreme Court lacked jurisdiction under 28 USC §1257 to review California court of appeal's judgment because petitioner had not asked California Supreme Court to review judgment first). See also Cal Rules of Ct 8.508 (petition for review to exhaust state remedies in criminal cases).

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§25.30 2. Petitions for Review Only Means of Challenging Summary Denial Order

For all practical purposes, the sole means of challenging a court of appeal's summary denial of a writ petition is a petition for review by the California Supreme Court. See *Hagan v Superior Court* (1962) 57 C2d 767, 769, 22 CR 206.

PRACTICE TIP: In rare situations, relief also may be available by filing a new petition for writ relief in the court of appeal or directly in the California Supreme Court. An aggrieved party should do so only when "unusual or changed circumstances" exist, such as the publication of a new decision by the supreme court addressing the issue presented in the writ petition. See *Hagan v Superior Court*, *supra*.

An aggrieved party must file a petition for review by the supreme court within 10 calendar days after the court of appeal files its summary denial order (*i.e.*, 10 days after the denial order is final in the court of appeal). Cal Rules of Ct 8.490(b), 8.500(e)(1). This 10-day deadline applies even when the summary denial order includes reasons and/or cites to authority that counsel may need to research and analyze. Because this deadline is so short and summary denial orders are so common, counsel should seek the client's authorization regarding a petition for review *before* the court of appeal rules on the writ petition.

PRACTICE TIP: All petitions for review must explain why the case satisfies the Cal Rules of Ct 8.500(b)(1) criteria. Even when it is marginal whether these criteria are met (see §§25.13, 27.27), however, the supreme court may still grant review and transfer the matter back to the court of appeal for further proceedings. Cal Rules of Ct 8.500(b)(4). Thus, a party may seek review even when the court of appeal summarily denies a writ petition addressing a settled area of law that affects only the parties to the litigation. Under such circumstances, counsel, in addition to requesting a grant and transfer, may consider arguing that the supreme court should review the case to provide better guidance to the court of appeal regarding when it should grant writ relief from clear trial court error.

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§25.31 E. Petition for Certiorari by the United States Supreme Court

If a federal question is presented, a party challenging a decision in a writ proceeding may seek certiorari by the U.S. Supreme Court after exhausting all state court appellate remedies. See 28 USC §1257(a); *Bandini Petroleum Co. v Superior Court* (1931) 284 US 8, 13, 76 L Ed 136, 52 S Ct 103 (reaching merits of writ petition after California Court of Appeal denied writ relief and California Supreme Court denied review); *Rescue Army v Municipal Court* (1947) 331 US 549, 552, 91 L Ed 1666, 67 S Ct 1409 (reaching merits of writ petition after California Supreme Court denied relief).

PRACTICE TIP: The U.S. Supreme Court rarely grants certiorari petitions; it is most likely to grant a petition to resolve a split of authority on an important issue of federal law.

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26

Petition for Writ of Supersedeas

Jeremy B. Rosen

I. SCOPE OF CHAPTER §26.1

II. WRIT OF SUPERSEDEAS DEFINED
- A. What Is a Writ of Supersedeas? §26.2
- B. When to Seek Supersedeas Relief §26.3
- C. The Likelihood of Supersedeas Relief §26.4

III. SUPERSEDEAS RELIEF IF TRIAL COURT OR OPPONENT ACTS IN VIOLATION OF STATUTORY STAY PROVISIONS §26.5
- A. Matters Automatically Stayed by Filing Appeal §26.6
  - 1. When Matter Is Embraced in or Affected by Judgment or Order §26.7
  - 2. Examples of Matters Embraced in or Affected by Judgment or Order §26.8
  - 3. Mandatory Injunctions Stayed by Filing Appeal §26.9
  - 4. Mandamus Judgments Stayed by Filing Appeal §26.10
- B. Matters Not Stayed by Filing Notice of Appeal
  - 1. Chart: Judgments and Orders Subject to CCP §§917.1-917.9 §26.11
  - 2. Money Judgments for Which Undertaking (Bond) Is Posted Under CCP §917.1 §26.12
  - 3. Other Judgments and Orders Stayed on Filing Undertaking (Bond) Under CCP §917.9 §26.13
- C. Collateral Matters Are Not Stayed by Filing Appeal §26.14
  - 1. When Matter Is Collateral §26.15
  - 2. Examples of Collateral Matters Appeal §26.16

IV. SUPERSEDEAS RELIEF IN APPELLATE COURT'S INHERENT DISCRETION
- A. Appellate Court's Inherent Power to Grant Supersedeas Relief §26.17
- B. Factors Bearing on Discretionary Supersedeas Relief §26.18
- C. Situations in Which Discretionary Supersedeas May Be Appropriate
  - 1. Appeal From Unbonded Money Judgment §26.19
  - 2. When Judgment or Order Is Subject to CCP §§917.1-917.9 and Appellant Has Not Complied With Conditions for Stay §26.20
  - 3. Prohibitory Injunctions §26.21

V. HOW TO PETITION FOR AND OPPOSE THE ISSUANCE OF A WRIT OF SUPERSEDEAS
- A. Petition for Writ of Supersedeas
  - 1. Contents of Petition
    - a. General Requirements §26.22
    - b. Contents if Record on Appeal Has Not Yet Been Filed §26.23
    - c. Documents Filed With Petition §26.24
  - 2. When Requesting Temporary Stay §26.25
  - 3. Format of Petition §26.26
  - 4. Filing and Service of Petition §26.27
- B. Opposition
  - 1. Contents of Opposition §26.28
  - 2. Format of Opposition §26.29
  - 3. Filing and Service of Opposition §26.30

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§26.1 I. SCOPE OF CHAPTER

This chapter focuses on the use of supersedeas in the appellate and supreme courts to stay activity in a lower court during an appeal. This chapter first discusses the definition and uses of a writ of supersedeas. See §§26.2-26.4. The discussion covers the few instances in which the court is likely to grant supersedeas relief (*e.g.*, to prevent a trial court from acting in violation of automatic stay provisions) (§§26.5-26.16) as well as the far more common situation where supersedeas relief is highly discretionary and rarely granted (§§26.17-26.21). The chapter concludes with a discussion of the procedures for requesting and opposing supersedeas relief. See §§26.22-26.30.

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II. WRIT OF SUPERSEDEAS DEFINED

§26.2 A. What Is a Writ of Supersedeas?

A writ of supersedeas stays enforcement of a judgment or order pending appeal. CCP §923; Cal Rules of Ct 8.112; *Sacramento Newspaper Guild v Sacramento County Bd. of Supervisors* (1967) 255 CA2d 51, 62 CR 819. It is "a purely auxiliary writ, serving the sole function of preserving… appellate jurisdiction pending review of the appeal and a ruling on its merits." *Mills v County of Trinity* (1979) 98 CA3d 859, 861, 159 CR 679.

NOTE: Although most commonly filed in the intermediate appellate courts, the California Supreme Court will entertain supersedeas petitions seeking a stay pending high court review. See *Varian Med. Sys., Inc. v Delfino* (2005) 35 C4th 180, 201 n12, 25 CR3d 298.

On the contents, format, filing, and service of petitions for a writ of supersedeas, see §§26.22-26.27. For an example of a petition for writ of supersedeas, see form in §28.18.

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§26.3 B. When to Seek Supersedeas Relief

In some cases, filing a notice of appeal automatically stays enforcement of a judgment or ruling. CCP §916. If the trial court nevertheless allows further proceedings, the appellant should petition the court of appeal for a writ of supersedeas to enforce the automatic stay. See §§26.6-26.10. See, *e.g., Dowling v Zimmerman* (2001) 85 CA4th 1400, 1405 n6, 103 CR2d 174 (writ of supersedeas proper remedy to enforce automatic stay on appeal and prevent enforcement of judgment); *Gallardo v Specialty Restaurants Corp.* (2000) 84 CA4th 463, 467, 100 CR2d 884 (writ of supersedeas proper remedy to prevent execution on cost award).

In other cases, an appeal does not automatically stay enforcement of the challenged judgment or order. CCP §§917.1-917.9. For example, an appellant must post a bond to stay enforcement of a money judgment. CCP §917.1. If an appellant cannot post a bond, or if there is no bond option for obtaining a stay, the appellant can seek supersedeas relief from the appellate court, although supersedeas is rarely granted in this context. See *Leung v Verdugo Hills Hosp.* (2008) 168 CA4th 205, 212, 85 CR3d 203 (denying petition for writ of supersedeas to direct trial court to reduce amount of its appeal bond).

Thus, a petition for a writ of supersedeas always goes hand in hand with an appeal. It is a procedural vehicle within the appellate proceeding itself to secure an order from the appellate court staying further trial court proceedings. Cal Rules of Ct 8.112. Accordingly, a petition for writ of supersedeas bears the same title and appellate court docket number as the appeal. Cal Rules of Ct 8.112(a)(2). This is in contrast to the prerogative writs—mandamus, prohibition, and review (certiorari)—which are separate and independent (*i.e.*, original) proceedings in the appellate courts.

PRACTICE TIP: Code of Civil Procedure §923 empowers the courts of appeal "to stay" proceedings, "to issue a writ of supersedeas," "to suspend, or modify an injunction" or "to make any order" necessary to aid their appellate jurisdiction. The title of a petition for writ of supersedeas does not limit the appellate court's power to grant whatever order it deems proper. Nevertheless, an appellant may wish to title his or her submission as a "Petition for a Writ of Supersedeas or Appropriate Stay Order," and make a similar reference in the prayer for relief. On requesting an immediate, temporary stay pending action on a petition for a writ of supersedeas, see §26.25.

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§26.4 C. The Likelihood of Supersedeas Relief

Unlike petitions for prerogative writs, which the courts of appeal seldom grant (see §17.28), a well-taken petition for a writ of supersedeas may have a somewhat better chance of success. The courts of appeal have a strong interest in protecting their appellate jurisdiction and ensuring that any relief granted on appeal is real and meaningful. In acting on a supersedeas petition, the appellate court is more focused on weighing the relative hardships and potential for irreparable injury than on examining the merits of the case. An appellate court will not grant supersedeas relief, however, if it is not convinced there is a solid basis for the appeal. Cal Rules of Ct 8.112(a)(4). Thus, an appellant must make a significant showing justifying supersedeas relief, particularly when he or she is asking the court to override statutory provisions imposing conditions on a stay, *e.g.*, a bond requirement.

JUDICIAL PERSPECTIVE: As a condition of supersedeas, courts of appeal almost always set a very tight briefing schedule and inform the parties that, absent extraordinary circumstances, they will not grant any extensions.

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§26.5 III. SUPERSEDEAS RELIEF IF TRIAL COURT OR OPPONENT ACTS IN VIOLATION OF STATUTORY STAY PROVISIONS

The courts of appeal likely will grant supersedeas relief to prevent violation of statutory stay provisions. See *Estate of Dabney* (1951) 37 C2d 402, 408, 232 P2d 481 ("writ of supersedeas will issue 'in a corrective capacity' in case of a violation or threatened violation of such stay"); *Nielsen v Stumbos* (1990) 226 CA3d 301, 303, 276 CR 272 (writ of supersedeas proper remedy to prevent execution on portion of trial court's judgment during pendency of appeal). Trial court stays mandated by statute fall into two categories: those that are automatic upon filing an appeal (§§26.6-26.10) and those that require some additional step to perfect (*e.g.*, posting a bond) (§§26.11-26.13).

If a statute mandates a stay, an appellate court does not need to weigh relative hardships, as it would in other contexts. *Estate of Dabney* (1951) 37 C2d 402, 408, 232 P2d 481. Rather, the questions for the court are whether a statutory stay provision applies and whether the action or threatened action by the lower court or opposing party violates that provision.

NOTE: It is not clear what significance the recent amendment to Cal Rules of Ct 8.112(a)(4), requiring that supersedeas petitions demonstrate "substantial issues" on appeal, will have when the issue raised on supersedeas is violation of a statutory stay provision.

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§26.6 A. Matters Automatically Stayed by Filing Appeal

Under CCP §916(a), the perfecting of an appeal automatically stays proceedings in the trial court on all matters "embraced" in or "affected" by the appeal, "including enforcement of the judgment or order," except as provided in CCP §§917.1-917.9 (which provides a substantial list of exceptions). See §26.11. The purpose of CCP §916(a) is "to protect the appellate court's jurisdiction by preserving the status quo until the appeal is decided." *Varian Med. Sys., Inc. v Delfino* (2005) 35 C4th 180, 189, 25 CR3d 298.

The effect of CCP §916(a) is to deprive the trial court of subject matter jurisdiction. Thus the trial court lacks the power to proceed further on any matter "embraced in" or "affected by" the appeal during its pendency. See 35 C4th at 196; *Lerner v Superior Court* (1952) 38 C2d 676, 680, 242 P2d 321 (trial court loses jurisdiction over subject matter of appeal; parties' consent does not reinvest trial court with jurisdiction); *Betz v Pankow* (1993) 16 CA4th 931, 938, 20 CR2d 841 (trial court is "divested" of subject matter jurisdiction over matters embraced in or affected by appeal). A lack of jurisdiction "means an entire absence of power to hear or determine the case." *Abelleira v District Court of Appeal* (1941) 17 C2d 280, 288, 109 P2d 942.

Accordingly, all trial court proceedings conducted in violation of an automatic stay are void and subject to being vacated. *Varian Med. Sys., Inc. v Delfino* (2005) 35 C4th 180, 200, 25 CR3d 298. Enforcement of the automatic stay is therefore in the interest of all parties, as well as in the interests of the trial court and the appellate courts.

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§26.7 1. When Matter Is Embraced in or Affected by Judgment or Order

A matter is "embraced in" or "affected by" a judgment or appealable order when action on the matter would affect the "effectiveness" of the appeal. *Varian Med. Sys., Inc. v Delfino* (2005) 35 C4th 180, 189, 25 CR3d 298. That an action might render the appeal moot does not mean that the action, in and of itself, "affects" the appeal. Something more is needed, *e.g.*, the trial court directly or indirectly seeks to "enforce, vacate or modify" the judgment or order, or the possible outcomes on appeal and the actual or possible results in the trial court are irreconcilable. 35 C4th at 190.

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§26.8 2. Examples of Matters Embraced in or Affected by Judgment or Order

The automatic stay provisions apply in wide variety of contexts, including:

- **Anti-SLAPP motions.** An appeal from the denial of an anti-SLAPP motion under CCP §425.16 automatically stays further trial court action on the merits of the case. *Varian Med. Sys., Inc. v Delfino* (2005) 35 C4th 180, 186, 25 CR3d 298.
- **Motion to vacate spousal support.** An appeal from the denial of a motion to vacate a spousal support order precludes the trial court from terminating its jurisdiction over spousal support because the termination of jurisdiction is irreconcilable with possible outcomes on appeal. See *Marriage of Varner* (1998) 68 CA4th 932, 937, 80 CR2d 628.
- **Judicial foreclosure.** An appeal from an order declaring that plaintiffs take nothing by way of deficiency after a judicial foreclosure precludes the trial court from setting aside the foreclosure, because it would permit the plaintiffs to recover a deficiency judgment notwithstanding the appeal. See *Nelson v Orosco* (1981) 117 CA3d 73, 80, 172 CR 457.
- **Judgment on pleadings.** An appeal from a judgment on the pleadings precludes a trial court from granting leave to amend the complaint, because affirmance of the judgment is irreconcilable with an order granting leave to amend. See *Olson v Superior Court* (1969) 274 CA2d 311, 314, 79 CR 136.

On when an appeal stays a judgment or order, see California Civil Appellate Practice §§6.18-6.20 (3d ed Cal CEB 1996).

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§26.9 3. Mandatory Injunctions Stayed by Filing Appeal

An appeal stays a mandatory (but not a prohibitory) injunction. *Paramount Pictures Corp. v Davis* (1964) 228 CA2d 827, 835, 39 CR 791, citing *Byington v Superior Court* (1939) 14 C2d 68, 92 P2d 896. Whether an injunction is mandatory or prohibitory may be difficult to determine. An order entirely negative or prohibitory in form may actually be mandatory in essence and effect. Alternatively, an injunction may have a dual nature, in which event an appeal will stay operation of the mandatory, but not of the prohibitory, features of the injunction. *Kettenhofen v Superior Court* (1961) 55 C2d 189, 191, 10 CR 356 (portion of injunction ordering removal of fence mandatory and stayed by appeal).

PRACTICE TIP: It can be difficult to determine whether an injunction is mandatory or prohibitory, especially in light of the few cases on the subject. Thus, to persuade the trial court that an appeal will stay the injunction, counsel should define what constitutes the status quo without the injunction, and then demonstrate how the injunction alters the status quo, thus making it mandatory.

To determine whether an injunction is mandatory, consider whether it requires affirmative action and changes the status quo. *Hayworth v City of Oakland* (1982) 129 CA3d 723, 727, 181 CR 214. An injunction alters the status quo if it "contemplates a change in the relative positions or rights of the parties from those existing at the time the injunction is granted or the decree is entered." *Mark v Superior Court* (1900) 129 C 1, 5, 61 P 436. See *Kettenhofen v Superior Court* (1961) 55 C2d 189, 191, 358 P2d 684 (appeal stayed ruling because effect of removal order was to change status quo); *Dosch v King* (1961) 192 CA2d 800, 804, 13 CR 765 (injunction requiring individual to stay away from business he did not own or possess was prohibitory and not stayed by appeal).

PRACTICE TIP: Because an injunction is an immediately appealable order, it may be prudent to file a petition for a writ of supersedeas along with the notice of appeal to ensure that the court preserves the status quo pending appeal.

JUDICIAL PERSPECTIVE: Most courts disregard the language of the injunction when its effect on the status quo is the opposite of that suggested by its form.

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§26.10 4. Mandamus Judgments Stayed by Filing Appeal

An appeal stays a judgment issuing a writ of traditional mandate under CCP §1085. CCP §§916, 1110b; *Hayworth v City of Oakland* (1982) 129 CA3d 723, 727, 181 CR 214, 217. Either the trial or appellate court can order the stay lifted, however, if the petitioner persuades the court it will suffer irreparable injury if the writ is stayed. CCP §1110b.

An appeal also stays a judgment granting a writ of administrative mandamus, unless the court of appeal orders otherwise. CCP §1094.5(g). An appeal from an order denying a petition for administrative mandamus, however, does not stay the effect of the judgment, *i.e.*, it does not stay the challenged administrative decision, unless the court of appeal orders otherwise. CCP §1094.5(g). Thus, on appeal from a judgment denying a writ of administrative mandamus, the appellant must file a petition for a writ of supersedeas to stay the challenged administrative action during the pendency of the appeal.

JUDICIAL PERSPECTIVE: If the trial court has affirmed an administrative order for the suspension or revocation of a license, a licensee's request for supersedeas to stay the suspension or revocation order should be accompanied by a showing that no harm will result to others.

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B. Matters Not Stayed by Filing Notice of Appeal

§26.11 1. Chart: Judgments and Orders Subject to CCP §§917.1-917.9

Filing an appeal alone will not stay judgments and orders falling under CCP §§917.1-917.9. CCP §916. In some cases, the appellant must post an undertaking (bond) set by the trial court. In other cases, the appellant may be able to secure a stay through an order of the trial court. Failing that, the appellant must file a petition for supersedeas. The following chart shows the actions needed to stay judgments and orders subject to CCP §§917.1-917.8.

On orders and judgments under CCP §917.9, see §26.13.

Type of Judgment or Order	***Condition for Obtaining Stay of Enforcement***	***Method for Computing Amount***	***Procedure for Perfecting Stay***	***Procedure for Objecting***
1. Payment of money. CCP §917.1.	Post security.	Set by statute.	File security in statutory amount.	File objections within 10 days; set for hearing.
2. Assignment, sale, or delivery of personal property. CCP §917.2.	Post security.	Fixed by court.	Set motion to fix amount. File security.	Object to amount of security in hearing on motion to fix. Object to sureties by filing objection within 10 days.
3. Execution of instrument. CCP §917.3.	File executed document with court.	N/A	Deposit executed document.	None specified.
4. Sale, conveyance, or delivery of real property. CCP §917.4.	Post security.	Fixed by court.	Set motion to fix amount. File security.	Object to amount of security in hearing on motion to fix. Object to sureties by filing objection within 10 days.
5. Appointment of receiver. CCP §917.5.	Post security.	Fixed by court.	Set motion to fix amount. File security.	Object to amount of security in hearing on

				motion to fix. Object to sureties by filing objection within 10 days.
6. Attachment orders.				
a. Appealable order to attach. CCP §917.65.	Post security.	Fixed by court in right-to-attach order.	File security in amount set by court in right-to-attach order.	File objections within 10 days.
b. Stay to continue attachment after judgment. CCP §921.	Post security.	Set by statute (CCP §921) unless court orders otherwise under CCP §489.410.	File security in statutory amount unless respondent sets hearing under CCP §489.420.	File motion under CCP §489.410 before appeal perfected. File motion under CCP §921 to increase security after appeal perfected. Object to sureties by filing objection.
7. Child custody; exclusion from dwelling. CCP §917.7.	Stayed only by order of trial or appellate court. CCP §917.7.	Not required; may be ordered by court. CCP §917.9.	Motion for stay.	Object to motion for stay.
8. Public office wrongly held. CCP §917.8.	Stayed only by order of trial court. CCP §917.8.	Not required; may be ordered by court. CCP §917.9.	Motion for stay.	Object to motion for stay.
9. Inspection of corporate records. CCP §917.8.	Stayed only by order of trial court. CCP §917.8.	Not required; may be ordered by court. CCP §917.9.	Motion for stay.	Object to motion for stay.
10. Closure or discontinuance of building as public nuisance. CCP §917.8.	Stayed only by order of trial court. CCP §917.8.	Not required; may be ordered by court. CCP §917.9.	Motion for stay.	Object to motion for stay.
11. Remedy	Stayed only	Not	Petition for	Oppose

threatened release of hazardous substances. CCP §917.15.	by order of appellate court.	required; may be ordered by court. CCP §923.	writ of supersedeas in court of appeal.	petition for writ of supersedeas.

On posting an undertaking for a money judgment under CCP §917.1, see §26.12. On taking action regarding judgments and orders covered in this chart, see California Civil Appellate Practice §§6.21-6.84 (3d ed Cal CEB 1996).

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§26.12 2. Money Judgments for Which Undertaking (Bond) Is Posted Under CCP §917.1

If the appellant posts the required undertaking (bond), an appeal stays enforcement of a judgment or order directing the payment of money. CCP §917.1. The undertaking must be for "double the amount of the judgment or order unless given by an admitted surety insurer in which event it shall be for one and one-half times the amount." CCP §917.1(b). See *Leung v Verdugo Hills Hosp.* (2008) 168 CA4th 205, 212, 85 CR3d 203 (§917.1 is "rigidly formulaic"; trial court properly set amount of appeal bond based on lump-sum present value of judgment).

PRACTICE TIP: The appellant may need to include a cost award when calculating the amount of an undertaking or appeal bond. See CCP §917.1(a)(2)-(3), (d).

To be subject to §917.1, the judgment or order must direct the defendant to pay a specific amount of money that the trial court could directly enforce by a writ of execution. The section does not apply to a judgment that may be satisfied in one of multiple ways or is unenforceable against the defendant until after the plaintiff has exhausted another remedy. See *Kreling v Kreling* (1897) 116 C 458, 460, 48 P 383 (court found predecessor statute to §917.1 inapplicable and granted writ despite failure to post sufficient undertaking); *Peterson v Lampton* (1941) 46 CA2d 751, 753, 116 P2d 952 (bond is required to secure stay when appeal is from judgment for direct payment of money).

PRACTICE TIP: Section 917.1 does not apply when the money due is in the actual or constructive custody of the court; such cases are governed by the provisions of CCP §917.2. CCP §917.1(b).

On furnishing an undertaking (bond), see California Civil Appellate Practice §§6.21-6.62 (3d ed Cal CEB 1996).

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§26.13 3. Other Judgments and Orders Stayed on Filing Undertaking (Bond) Under CCP §917.9

Under CCP §917.9, the trial court may require and set the amount of an undertaking to secure a stay in all cases not otherwise provided for in §§917.1-917.8 if:

- Appellant was found to have money or other property belonging to respondent.
- Appellant is required to perform an act for respondent's benefit under the judgment or order on appeal.
- The judgment against appellant is solely for costs awarded to the respondent by the trial court.

In contrast to CCP §917.1, which specifies the amount of the required undertaking (see §26.12), CCP §917.9 leaves the amount of an undertaking to the trial court's discretion. The court's discretion is not unlimited, however; an excessive bond can be the subject of a petition for a writ of supersedeas and the court of appeal will set aside as an abuse of the trial court's discretion bonds that are "excessive" or based on speculation about harm. See *Vangel v Vangel* (1953) 116 CA2d 615, 632, 254 P2d 919 (trial court's discretion in setting size of appeal bond must be exercised in manner compatible with potential injury respondents might suffer during period of appeal; $100,000 undertaking based in part on claims of waste set aside); *Huston v Huston* (1948) 87 CA2d 8, 10, 195 P2d 551 ($20,000 undertaking set aside as "arbitrary, excessive and an abuse of the discretion of the court").

On when an appeal stays a judgment or order, see California Civil Appellate Practice §§6.18-6.20 (3d ed Cal CEB 1996).

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§26.14 C. Collateral Matters Are Not Stayed by Filing Appeal

An appeal does not stay proceedings on matters ancillary or collateral to the judgment or order on appeal. *Betz v Pankow* (1993) 16 CA4th 931, 938, 20 CR2d 841. A collateral matter, by definition, is not "embraced [in] or affected [by]" the order appealed from, within the meaning of CCP §916(a). On automatic stays of matters "embraced [in] or affected [by]" the order, see §26.6; California Civil Appellate Practice §§6.18-6.20 (3d ed Cal CEB 1996).

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§26.15 1. When Matter Is Collateral

Proceedings that will occur regardless of the outcome of an appeal, or that do not affect the appellate court's ability to grant meaningful relief, are ancillary or collateral to the appeal. *Varian Med. Sys., Inc. v Delfino* (2005) 35 C4th 180, 191, 25 CR3d 298. The courts have determined that certain proceedings are collateral to the merits of an appeal. See §26.16; *Varian Med. Sys., Inc. v Delfino, supra*.

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§26.16 2. Examples of Collateral Matters Appeal

Ancillary or collateral matters an appeal does not stay under CCP §916 include:

- **New trial motions.** A motion for a new trial is collateral to the judgment and may be heard despite an appeal from the judgment. See *Neff v Ernst* (1957) 48 C2d 628, 634, 311 P2d 849.
- **Lis pendens.** A proceeding to expunge a lis pendens is collateral to the judgment in the underlying action. See *Varian Med. Sys., Inc. v Delfino, supra*; *United Prof. Planning, Inc. v Superior Court* (1970) 9 CA3d 377, 383, 88 CR 551.
- **Preliminary injunctions.** An appeal from the denial of a preliminary injunction does not stay further trial court proceedings on the merits. *Gray v Bybee* (1943) 60 CA2d 564, 571, 141 P2d 32.
- **Disqualification of counsel.** An appeal from an order denying a motion to disqualify counsel does not automatically stay further trial court proceedings on the merits, because such proceedings would occur regardless of whether the reviewing court affirms or reverses the order. See *Reed v Superior Court* (2001) 92 CA4th 448, 453, 111 CR2d 842.

On when an appeal stays a judgment or order, see California Civil Appellate Practice §§6.18-6.20 (3d ed Cal CEB 1996).

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IV. SUPERSEDEAS RELIEF IN APPELLATE COURT'S INHERENT DISCRETION

§26.17 A. Appellate Court's Inherent Power to Grant Supersedeas Relief

Under CCP §923, a reviewing court has the inherent power to stay proceedings during the pendency of an appeal, or to issue a writ of supersedeas, or to make any order that will preserve the effectiveness of the judgment to be entered or that will otherwise aid its jurisdiction. *Davis v Custom Component Switches, Inc.* (1970) 13 CA3d 21, 27, 91 CR 181 (supersedeas preserves appellate court's jurisdiction while it considers merits of appeal, and CCP §923 is specifically designed to accomplish that purpose). See *Estate of Lee* (1945) 26 C2d 295, 296, 158 P2d 193 (supersedeas preserves subject matter of proceeding so that "appellant may not lose the fruits of a meritorious appeal").

Thus, even when an appellant is not otherwise entitled to the protection of a statutory stay (see §§26.6-26.13), the court of appeal may, in the exercise of its sound discretion, grant supersedeas relief on terms that adequately protect the respondent's rights. *Food & Grocery Bureau v Garfield* (1941) 18 C2d 174, 177, 114 P2d 579 (appellant's showing justified reviewing court's exercise of its inherent power to issue writ).

JUDICIAL PERSPECTIVE: : The courts of appeal grant very few supersedeas petitions by appellants who are not entitled to a statutory stay. That is because granting such a petition puts the courts in the position of making exceptions to the comprehensive statutory stay scheme, potentially creating uncertainty in the enforcement of important procedural components of the appellate process.

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§26.18 B. Factors Bearing on Discretionary Supersedeas Relief

An appellant seeking supersedeas relief should show that (Cal Rules of Ct 8.112(a)):

- The trial court refused to grant a stay, or extenuating circumstances justified not seeking a stay first from the trial court (*Nuckolls v Bank of Cal., Nat. Ass'n* (1936) 7 C2d 574, 577, 61 P2d 927 (supersedeas refused because appellant did not disclose nature of judgment and court could not determine if appellant had exhausted remedies in lower court, e.g., if judgment could have been stayed by filing bond));
- Irreparable injury will occur absent supersedeas (*Marriage of Dover* (1971) 15 CA3d 675, 679, 93 CR 384 (supersedeas proper when denial of stay would deprive appellant of rights and leave no forum to protect minor child's rights in custody action));
- No undue prejudice will inure to the respondent (*Nuckolls,* 7 C2d at 578);
- Supersedeas will help to preserve the appellate court's jurisdiction (*Nuckolls v Bank of Cal., Nat. Ass'n, supra*); and
- The appeal raises substantial questions (Cal Rules of Ct 8.112(a)(4)(A); *Deepwell Homeowners' Protective Ass'n v City Council* (1965) 239 CA2d 63, 67, 48 CR 321 (supersedeas will not issue when appellant fails to show substantial questions to be presented on appeal)).

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C. Situations in Which Discretionary Supersedeas May Be Appropriate

§26.19 1. Appeal From Unbonded Money Judgment

If an appellant from a money judgment cannot furnish an appeal bond (see CCP §917.1), the court of appeal has discretion to grant supersedeas relief if the appeal presents substantial issues and failure to issue a stay is more likely to injure the appellants than issuance of a stay is likely to injure the respondent. *Estate of Murphy* (1971) 16 CA3d 564, 569, 94 CR 141 (supersedeas without bond appropriate because appeal presented substantial issues relating to interpretation of trust terms and trust administration, and potential damage to appellants if estate were distributed outweighed hardship to respondent if distribution postponed); *Davis v Custom Component Switches, Inc.* (1970) 13 CA3d 21, 27, 91 CR 181 (supersedeas granted because execution against defendant's assets would wipe out minority shareholders).

PRACTICE TIP: It is extremely difficult to secure a writ of supersedeas on an unbonded money judgment. If the appellate courts regularly granted exceptions to the undertaking requirement it would seriously erode the purpose of CCP §917.1. Although there is little published case law on this point, an appellant may be more likely to obtain supersedeas relief if there is also some underlying constitutional or other important right at stake that could be imperiled if enforcement efforts were instituted. The likelihood of a stay may also increase on a compelling showing that the appeal has merit.

JUDICIAL PERSPECTIVE: If supersedeas is requested because the appellant cannot afford the appeal bond, the court will consider the request only if it is accompanied by solid documentation of the appellant's financial condition.

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§26.20 2. When Judgment or Order Is Subject to CCP §§917.1-917.9 and Appellant Has Not Complied With Conditions for Stay

If an appellant cannot satisfy the statutorily required conditions for a stay under CCP §§917.1-917.9 the courts of appeal can grant supersedeas relief. Courts are extremely reluctant, however, to exercise their discretion to eliminate these statutory stay conditions. See §26.19.

On judgments and orders subject to CCP §§917.1-917.9, see §§26.11-26.13.

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§26.21 3. Prohibitory Injunctions

Unlike mandatory injunctions (see §26.9), prohibitory injunctions are self-executing and their operation is not automatically stayed by an appeal. The court of appeal has inherent power, however, to issue a writ of supersedeas if such action is "necessary or proper to the complete exercise of its appellate jurisdiction." *Food & Grocery Bureau v Garfield* (1941) 18 C2d 174, 177, 114 P2d 579; see also *Agricultural Labor Relations Bd. v Tex-Cal Land Mgmt., Inc.* (1987) 43 C3d 696, 709, 238 CR 780. There is little case law on this point in connection with prohibitory injunctions, which likely reflects the difficulty of showing that preserving the status quo would result in irreparable injury requiring immediate relief.

PRACTICE TIP: An injunction may have a dual nature—some aspects may be mandatory while others are prohibitory. An appeal will stay operation of the mandatory features but not the prohibitory ones. *Kettenhofen v Superior Court* (1961) 55 C2d 189, 191, 10 CR 356 (portion of injunction ordering removal of fence is mandatory in character and stayed by appeal). It is important to examine injunctions carefully to identify any mandatory features that an appeal will automatically stay and include those in a petition for supersedeas if the trial court declines to stay those features of its order.

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V. HOW TO PETITION FOR AND OPPOSE THE ISSUANCE OF A WRIT OF SUPERSEDEAS

A. Petition for Writ of Supersedeas

1. Contents of Petition

§26.22 a. General Requirements

A petition for a writ of supersedeas must consist of (Cal Rules of Ct 8.112(a)):

- A verified petition, explaining the need for the stay; and
- A memorandum in support of the petition.

The appellant must combine the petition and supporting memorandum in a single document. Cal Rules of Ct 8.112(a)(3). The petition must have the same title and docket number as the appeal. Cal Rules of Ct 8.112(a)(2).

On the procedure for preparing a petition for a writ of supersedeas, see Cal Rules of Ct 8.112-8.116. On the contents of a petition for a writ of supersedeas, see California Civil Appellate Practice §§6.78-6.85 (3d ed Cal CEB 1996). For an example of a petition for writ of supersedeas, see form in §28.18.

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Source: Civil Litigation/California Civil Writ Practice/26 Petition for Writ of Supersedeas/§26.23 b. Contents if Record on Appeal Has Not Yet Been Filed

§26.23 b. Contents if Record on Appeal Has Not Yet Been Filed

If the appellant has not yet filed the record on appeal in the court of appeal, which is usually the case, the appellant must include a statement of the case in the supersedeas petition showing that appellant will raise substantial issues on appeal. The statement of the case should include (Cal Rules of Ct 8.112(a)(4)(A)):

- A fair summary of the material facts; and
- A recitation of the issues likely to be raised on appeal.

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§26.24 c. Documents Filed With Petition

If the appellant has not yet filed the record on appeal, the appellant also must file the following documents with the supersedeas petition (Cal Rules of Ct 8.112(a)(4)(B)):

- The judgment or order, showing its date of filing;
- The notice of appeal, showing its date of filing;
- A reporter's transcript of any oral statement by the court supporting its rulings on the issues likely to be raised on appeal (if a transcript is unavailable, a declaration fairly summarizing such statements);
- Any application for stay filed in the trial court and opposition to that request, and a reporter's transcript of the oral proceedings on the stay (if a transcript is unavailable, a declaration fairly summarizing the proceedings); and
- Any other document from the trial court proceeding that is necessary for consideration of the petition.

If the appellant needs to file additional documents, appellant must (Cal Rules of Ct 8.112(a)(4)(C)):

- Bind the documents together at the end of the petition or in separate volumes not exceeding 300 pages each, and paginate them consecutively;
- Index-tab the documents by number or letter; and
- Begin with a table of contents listing each document by its title and index-tab number.

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§26.25 2. When Requesting Temporary Stay

An appellant seeking supersedeas relief may obtain an immediate temporary stay pending the appellate court's decision on the petition. The request for an immediate temporary stay may be included in the petition for writ of supersedeas or filed separately. The appellant must serve a separately filed request on the respondent, unless the Chief Justice or presiding justice, for good cause, excuses advance service. Cal Rules of Ct 8.112(c)(2).

The cover of a supersedeas petition seeking an immediate stay must (Cal Rules of Ct 8.116):

- Prominently display the notice "IMMEDIATE STAY REQUESTED";
- Identify the nature and date of the proceeding or act sought to be stayed; and
- State the trial court and department involved as well as the name and telephone number of the trial judge whose order the request seeks to stay (this may appear on cover or at beginning of text).

For an example of a stay request in a petition for writ of supersedeas, see form in §28.18.

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§26.26 3. Format of Petition

Except as otherwise specified by Rule 8.112, the format of the petition must comply with Cal Rules of Ct 8.204(b). Cal Rules of Ct 8.40(a). The cover of the petition should be red. Cal Rules of Ct 8.40(b)(1).

PRACTICE TIP: Counsel need not provide a "writ" because, as a matter of practice, the court does not issue a formal writ. The court's order granting the petition and staying the specified action serves as the writ.

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§26.27 4. Filing and Service of Petition

The appellant must file the original petition for writ of supersedeas and four copies in the court of appeal. Cal Rules of Ct 8.44(b)(3). It is necessary to file only *one* set of any separately bound supporting documents accompanying the petition. Cal Rules of Ct 8.44(b)(5). If the petition is filed in the supreme court, the appellant must file the original and ten copies of all documents, unless otherwise ordered. Cal Rules of Ct 8.44(a)(2). There is no filing fee.

The appellant must serve the petition and one set of any supporting documents on each party. Cal Rules of Ct 8.25(a)(1). The appellant must file proof of appropriate service along with the petition. Cal Rules of Ct 8.25(a)(2).

PRACTICE TIP: Although personal service is not required, it is advisable in all cases in which an appellant requests an immediate stay. On seeking an immediate, temporary stay, see §26.25.

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B. Opposition

§26.28 1. Contents of Opposition

The appellate court cannot issue a writ of supersedeas until the respondent has had an opportunity to file opposition. Cal Rules of Ct 8.112(b)(3). Opposition should demonstrate why the petition fails to meet the requirements for granting relief. The opposition should consist of (Cal Rules of Ct 8.112(b)):

- A verified statement of facts setting out material omissions or misstatements in the petition;
- A memorandum in opposition; and
- Copies of any documents appellant did not attach as exhibits (or in the record on appeal, if filed) supporting the arguments.

Declarations may establish factual statements not otherwise supported.

PRACTICE TIP: Because the appellate courts rarely hold argument on a stay request, the respondent must submit a thorough opposition, including denying any erroneous facts or allegations in the petition. See *Mills v County of Trinity* (1979) 98 CA3d 859, 159 CR 679. The respondent should explain in the opposition all facts that the court needs to understand concerning why it should not grant a stay, including any loss or hardship if a stay is granted, and why the appeal has no merit. The respondent should also consider suggesting conditions that might reduce hardship if a stay is granted, *e.g.,* that a bond be posted in a specified amount, that appellant file the opening brief within a specified time, and that the appeal be expedited or that the stay be for a limited duration.

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§26.29 2. Format of Opposition

Except as otherwise provided by Cal Rules of Ct 8.112, the respondent should base the format of the opposition on the requirements set out in Cal Rules of Ct 8.204(b). Cal Rules of Ct 8.40(a). The cover of the opposition should be red. Cal Rules of Ct 8.40(b)(1).

On the format of opposition papers, see §§23.4-23.8.

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§26.30 3. Filing and Service of Opposition

Unless otherwise ordered, any opposition to a petition for a writ of supersedeas seeking a stay of the enforcement of a judgment or order pending appeal must be served and filed within 15 days after the petition is filed. Cal Rules of Ct 8.112(b).

PRACTICE TIP: The court may not issue a writ of supersedeas until the respondent has had the opportunity to file opposition. Cal Rules of Ct 8.112(b)(3).

The respondent must file the original opposition and four copies in the same court of appeal in which the petition was filed. Cal Rules of Ct 8.44(b)(3). It is necessary to file only *one* set of any separately bound supporting documents accompanying the opposition. Cal Rules of Ct 8.44(b)(5). If the petition is filed in the supreme court, respondent must file the original and ten copies of all documents, unless otherwise ordered. Cal Rules of Ct 8.44(a)(2).

The respondent must serve the opposition and one set of any supporting documents on each party. Cal Rules of Ct 8.25(a)(1). Any method of service is permitted. The respondent must file proof of appropriate service along with the opposition. Cal Rules of Ct 8.25(a)(2).

PRACTICE TIP: On receipt of a petition for writ of supersedeas, the respondent should notify the clerk's office that it intends to file opposition. Because the court may grant an immediate, temporary stay without waiting for opposition, the respondent also should advise the clerk if it intends to oppose an immediate stay and request time (*e.g.,* 24 hours) to file a response.

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27

Petitions in the California Supreme Court

Robert M. Dato

I. SCOPE OF CHAPTER §27.1

II. ORIGINAL WRIT PETITIONS
- A. When Original Jurisdiction Is Appropriate §27.2
  - 1. When Original Writ Is Exclusive Method of Review §27.3
    - a. Decisions of the Energy Resources Conservation and Development Commission §27.4
    - b. Decisions of the Public Utilities Commission §27.5
    - c. Decisions of the State Bar Court §27.6
    - d. Decisions of the Workers' Compensation Appeals Board §27.7
  - 2. When Extraordinary Circumstances Warrant Bypassing Lower Courts §27.8
  - 3. When Only Supreme Court Can Grant Writ Relief §27.9
- B. Filing Petition in Original Proceeding
  - 1. Timing and Procedures for Filing §27.10
  - 2. Content and Format of Petition §27.11

III. PETITIONS FOR REVIEW §27.12
- A. Grounds for Petition for Review §27.13
- B. Deciding Whether to Seek Review §27.14
- C. Procedures for Filing Petition, Answer, and Reply
  - 1. Timing
    - a. Petition §27.15
      - (1) No Extension for Holiday or Weekend §27.16
      - (2) Relief From Failure to File Timely Petition for Review §27.17
    - b. Answer §27.18
    - c. Reply §27.19
  - 2. Format §27.20
    - a. Length §27.21
    - b. Attachments §27.22
    - c. Cover §27.23
    - d. Number of Copies §27.24
  - 3. Contents
    - a. Petition for Review §27.25
    - b. Answer §27.26
    - c. Reply §27.27
  - 4. Chart: Filing Requirements for Petition for Supreme Court Review §27.28
- D. Disposition
  - 1. Types of Rulings §27.29
    - a. Supreme Court Denies Petition for Review §27.30
    - b. Supreme Court Grants Petition for Review §27.31
    - c. Supreme Court Transfers Matter to Court of Appeal §27.32
  - 2. Timing of Court's Action §27.33

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§27.1 I. SCOPE OF CHAPTER

This chapter discusses writ proceedings in the California Supreme Court. It first discusses original writ proceedings in the high court, which are rare and usually involve urgent matters of great public importance. See §§27.2-27.9. This discussion includes preparing and filing petitions in original proceedings. See §§27.10-27.11.

The chapter next discusses petitions for review. Supreme court review is the highest level of appellate review in the California courts. There is no right of "appeal" from the courts of appeal to the supreme court. Rather, the means of seeking appellate review by the supreme court is a petition for review. Review lies solely in the supreme court's discretion and is very rarely granted. This chapter discusses the grounds for review (see §§27.13-27.14) as well as the content of and procedures for filing petitions for review, answers to petitions for review, and replies (see §§27.15-27.28). The chapter closes with a discussion of the supreme court's options when it acts on a petition for review. See §§27.29-27.33.

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II. ORIGINAL WRIT PETITIONS

§27.2 A. When Original Jurisdiction Is Appropriate

In rare instances, the California Supreme Court will exercise original jurisdiction in a writ proceeding seeking a prerogative writ. This occurs when a petitioner seeking a writ of mandate, prohibition, or review (certiorari) files a writ petition in the supreme court in the first instance, bypassing the lower courts. Cal Rules of Ct 8.486(a)(1). In an extremely limited number of circumstances, statutes require that writ relief be sought directly from the supreme court. See §§27.3-27.7.

In other instances, the high court may accept a writ petition to consider an urgent matter of overriding public importance. See, *e.g., Lockyer v City & County of San Francisco* (2004) 33 C4th 1055, 1066, 17 CR3d 225 (original proceedings in supreme court to compel city and county officials to comply with marriage statutes and cease issuing marriage licenses to same-sex couples; court issued writ); *Farley v Healey* (1967) 67 C2d 325, 326, 62 CR 26 (mandamus proceeding filed in supreme court because urgency of issue made appeal to court of appeal inadequate remedy). See §27.8.

PRACTICE TIP: Original writ petitions filed in the supreme court are discouraged and rarely granted. Unless the petitioner feels that the allegations regarding time pressure and public importance are very strong, the prudent course is to file a writ petition in the lowest court capable of granting relief. See §15.68.

JUDICIAL PERSPECTIVE: In most cases, if the petitioner files improperly in the supreme court, the court will transfer the matter to the appropriate court of appeal for appellate review or issue an alternative writ that is returnable in the court of appeal. Filing in the wrong court will delay resolution of the case. See §27.32.

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§27.3 1. When Original Writ Is Exclusive Method of Review

A handful of statutes provide that the only means of appellate review is through an original writ proceeding in the California Supreme Court, although in at least one reported decision, such a statute was found unconstitutional. *Hollywood Park Land Co. v Golden State Transp. Fin. Corp.* (2009) 178 CA4th 924, 928, 100 CR3d 752 (statute dictating that original writ in supreme court is exclusive means for direct review of reverse validation actions concerning contracts and bonds authorized by amended Indian gaming compacts is unconstitutional because it abridges appellate courts' jurisdiction).

Nevertheless, when an original writ proceeding is the only statutory means to obtain appellate review, a denial order (even a summary denial) is a decision on the "merits" of the issues raised in the petition. *In re Rose* (2000) 22 C4th 430, 444, 93 CR2d 298, citing *Napa Valley Elec. Co. v Railroad Comm'n* (1920) 251 US 366, 64 L Ed 310, 40 S Ct 174. Accordingly, in that limited context, the supreme court's summary denial has res judicata effect, unlike summary denials by the courts of appeal or by the supreme court in other circumstances. *Consumers Lobby Against Monopolies v PUC* (1979) 25 C3d 891, 901 n3, 160 CR 124. See §§22.14-22.17.

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§27.4 a. Decisions of the Energy Resources Conservation and Development Commission

Decisions of the Energy Resources Conservation and Development Commission on applications for the certification of sites and related facilities can be reviewed only through a petition for a writ of review in the California Supreme Court. Pub Res C §25531(a). See *County of Sonoma v State Energy Resources Conserv. & Dev. Comm'n* (1985) 40 C3d 361, 363, 220 CR 114 (upholding constitutionality of statutory restriction on method of review); *Santa Teresa Citizen Action Group v California Energy Resources Conserv. & Dev. Comm'n* (2003) 105 CA4th 1441, 1446, 130 CR2d 392 (supreme court had exclusive jurisdiction regarding judicial review of Energy Commission's decision on power plant).

Review is limited to whether the Commission acted under its statutory authority and in conformity with constitutional safeguards. The Commission's findings of fact are final and not subject to review. Pub Res C §25531(b).

On review of State Energy Resources Conservation and Development Commission decisions and for a sample form, see 20 California Forms of Pleading and Practice §247.279 (2007).

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§27.5 b. Decisions of the Public Utilities Commission

Under prior law, Public Utilities Commission (PUC) decisions were subject to review only by the California Supreme Court in an original writ proceeding. Now PUC decisions generally may be challenged by writ petition in either the court of appeal or the supreme court. See Pub Util C §§1756-1756.2.

Some decisions, however, remain in the supreme court's exclusive jurisdiction, including decisions pertaining solely to water corporations that do not concern compliance or enforcement proceedings (Pub Util C §1756(f)), and decisions arising from proceedings concerning applications for Commission authority to complete certain telecommunications mergers or acquisitions (Pub Util C §§854, 1756(g)).

On the timing of applications for writ review of PUC decisions, see Pub Util C §1756(a). On other procedural issues, including parties who must appeal, venue, and the scope of review, see Pub Util C §§1756-1768. On writ review of PUC decisions, see §§16.33-16.45.

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§27.6 c. Decisions of the State Bar Court

Under Bus & P C §6082, either the disciplined attorney or the State Bar's chief trial counsel may file a petition in the supreme court seeking review of a decision in a State Bar Court disciplinary action. On filing procedures and deadlines for review of decisions in State Bar Court disciplinary actions, see Cal Rules of Ct 9.16-9.18.

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§27.7 d. Decisions of the Workers' Compensation Appeals Board

The exclusive method for obtaining review of decisions of the Workers' Compensation Appeals Board (WCAB) is by a special statutory writ of review. Lab C §§5950-5955; Cal Rules of Ct 8.495. Although a party can file a writ petition in the California Supreme Court (Lab C §5950), that court routinely transfers such petitions to the court of appeal without considering the merits.

On writ review of WCAB decisions, see §§16.46-16.48.

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§27.8 2. When Extraordinary Circumstances Warrant Bypassing Lower Courts

When time is critical and an issue of grave importance is at stake, the California Supreme Court may, in its discretion, exercise its original writ jurisdiction. This is an exceedingly rare event; however, the court has exercised its original jurisdiction in the following contexts:

- Challenging a voter-approved initiative. *Strauss v Horton* (2009) 46 C4th 364, 398, 93 CR3d 591 (initiative adding new section to California Constitution providing: "Only marriage between a man and a woman is valid or recognized in California"); *Legislature v Eu* (1991) 54 C3d 492, 500, 286 CR 283 (initiative to impose term and budget limitations on state legislators).
- Preventing Secretary of State from submitting initiative measure to voters. *Brosnahan v Eu* (1982) 31 C3d 1, 181 CR 100.
- Challenging California Industrial Welfare Commission wage orders. *Industrial Welfare Comm'n v Superior Court* (1980) 27 C3d 690, 699, 166 CR 331 (large number of affected employees and litigation history had prevented implementation of majority of wage orders in recent years).
- Protecting voter registration rights. *Jolicoeur v Mihaly* (1971) 5 C3d 565, 570 n1, 96 CR 697 (mandate issued to county registrar of voters after refusal to register persons between 18 and 21 years of age who were not living with parents). See also *Ramirez v Brown* (1973) 9 C3d 199, 203, 107 CR 137 (petition by ex-felons to compel election officials to register them as voters), rev'd on other grounds in *Richardson v Ramirez* (1974) 418 US 24, 41 L Ed 2d 551, 94 S Ct 2655.
- Enforcing State Board of Equalization's request to county assessor for records needed to assist legislative inquiry. *State Bd. of Equalization v Watson* (1968) 68 C2d 307, 310, 66 CR 377 (Board's investigation would not be of value to legislative committee unless records were available as soon as possible).
- Enforcing method of property tax assessment under newly enacted statute. *County of Sacramento v Hickman* (1967) 66 C2d 841, 845, 59 CR 609.
- Securing early hearing on paternity and support issues. *Thurmond v Superior Court* (1967) 66 C2d 836, 839, 59 CR 273 (any substantial delay would materially impair and perhaps destroy right of mother and child to apply for relief pendente lite, implicating serious constitutional questions).
- Compelling Secretary of State to submit initiative measure to voters. *Perry v Jordan* (1949) 34 C2d 87, 90, 207 P2d 47.

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§27.9 3. When Only Supreme Court Can Grant Writ Relief

If a party challenges an action by an appellate court justice or the court of appeal—other than an order or ruling pertaining to the merits of a particular case—the only court that can grant writ relief is the supreme court. Accordingly, a writ petition is properly filed in the supreme court in the first instance. See, *e.g.*, *Kaufman v Court of Appeal* (1982) 31 C3d 933, 184 CR 302 (appellate court justice sought writ nullifying court orders commanding him not to sit on certain matters because of alleged bias).

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B. Filing Petition in Original Proceeding

§27.10 1. Timing and Procedures for Filing

The timing and procedures for filing an original writ petition in the California Supreme Court are the same as the procedures for filing a writ petition in the court of appeal. See Cal Rules of Ct 8.4, 8.485-8.493. On the timing and procedures for filing writ petition in the court of appeal, see §§18.61-18.87.

The petitioner must file the original writ petition plus ten copies with the supreme court. Cal Rules of Ct 8.44(a)(2). The filing fee is $590. Govt C §§68926.1(b), 68927.

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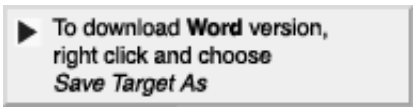
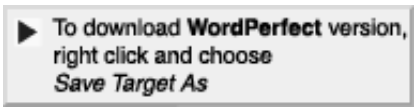
§27.11 2. Content and Format of Petition





The content and format requirements for a prerogative writ petition filed in the supreme court are largely the same as for a writ petition filed in the court of appeal. Cal Rules of Ct 8.485-8.493. See §§18.5-18.60. The petition must also set out the circumstances making it proper for the writ to issue originally from the supreme court. Cal Rules of Ct 8.486(a)(1).

The following is exemplar language for use when alleging that the supreme court should exercise its original jurisdiction:

Petitioner(s) seek(s) extraordinary relief from this Court in the first instance because, in addition to the matters set out above in paragraph(s) _ _, the following circumstances make it proper and necessary that a writ issue from this Court: _ _[*Specify compelling reasons in detail. The main categories are: the matters involved are of compelling and widespread interest to the people of the state of California; their speedy determination is necessary; they present questions of law not previously decided in the state; there is an urgent need for uniformity of decision within the state*]**_ _.**

NOTE: Under Cal Rules of Ct 8.486(a)(1), if petitioner could have filed the petition first in a lower court, the petition must explain why the reviewing court should issue the writ as an original matter. On the judicially created policy requiring that petitioners file in the lowest court capable of granting extraordinary relief absent compelling circumstances, see §15.68.

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§27.12 III. PETITIONS FOR REVIEW

The overwhelming majority of civil matters (as well as criminal matters not involving the death penalty) are presented to the California Supreme Court by way of a petition for review. See Cal Rules of Ct 8.500(a)(1) (party may file petition in supreme court for review of any decision of court of appeal except denial of transfer of case within appellate jurisdiction of superior court).

The supreme court generally accepts for review only cases presenting important legal issues on a well-developed record. This reflects the court's fundamental role: to clarify and chart the development of the state's law. The supreme court is not a court of error, *i.e.*, its purpose is not simply to correct mistakes allegedly made by the lower courts. Accordingly, the supreme court grants review in only a minute number of cases. For example, the court granted only 8 percent of the petitions for review filed in 2005-2006. See Judicial Council of California, Court Statistics Report, *Supreme Court*, Tables 1, 5 (2007), available online at http://www.courtinfo.ca.gov/reference/documents/csr2007.pdf. On maximizing the chances of obtaining review, see California Civil Appellate Practice §22.26 (3d ed Cal CEB 1996).

A party can seek review of a court of appeal's decision in an appeal and in an original writ proceeding. See, *e.g., Goldstein v Superior Court* (2008) 45 C4th 218, 225, 85 CR3d 213 (review granted in original writ proceeding). On the kinds of action an appellate court can take on a writ petition, see §§22.9-22.29, 24.2-24.30.

PRACTICE TIP: The supreme court very rarely grants review and decides the merits of a writ petition that the court of appeal has summarily denied. On review of a summary denial, see §25.30. Instead, if the supreme court entertains the petition for review at all (which is highly unlikely), the court is more likely to grant review and retransfer to the court of appeal with directions to decide the petition on the merits. See §27.32.

For an example of a petition for review, see form in §28.16.

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Source: Civil Litigation/California Civil Writ Practice/27 Petitions in the California Supreme Court/§27.13 A. Grounds for Petition for Review

§27.13 A. Grounds for Petition for Review

The grounds for review by the California Supreme Court are:

- To resolve splits among the courts of appeal and ensure uniformity of the law, or to decide an important legal issue (Cal Rules of Ct 8.500(b)(1));
- The court of appeal lacked jurisdiction (Cal Rules of Ct 8.500(b)(2));
- Insufficient qualified justices concurred in the court of appeal's decision (Cal Rules of Ct 8.500(b)(3)); or
- The supreme court intends to transfer the matter to the court of appeal for further proceedings as ordered (Cal Rules of Ct 8.500(b)(4)).

PRACTICE TIP: The supreme court most commonly grants review when it is necessary for uniformity of decision or to settle an important issue.

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§27.14 B. Deciding Whether to Seek Review

The California Supreme Court takes the grounds for review set forth in Cal Rules of Ct 8.500(b) seriously. For all practical purposes, a party should seek review only in the rare case that presents: (1) a substantial question of law likely to recur or involving important public policy, or (2) a real, not illusory, conflict in the law.

On factors to consider in deciding whether to petition for review, see California Civil Appellate Practice §§22.3-22.13 (3d ed Cal CEB 1996).

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C. Procedures for Filing Petition, Answer, and Reply

1. Timing

§27.15 a. Petition

A party aggrieved by a court of appeal's decision must file a petition for review within 10 days after the decision of the appellate court becomes final as to that court. Cal Rules of Court 8.500(e)(1). Unless the court of appeal grants rehearing, its decision normally becomes final 30 days after filing of the decision. Cal Rules of Ct 8.490(b)(2). When the court of appeal summarily denies a writ petition, however, its decision is final immediately. Cal Rules of Ct 8.490(b)(1); *Kowis v Howard* (1992) 3 C4th 888, 893, 12 CR2d 728. Therefore, a petition for review of a summary denial must be filed within 10 days of the denial order.

PRACTICE TIP: Given the short 10-day period to petition for review, the decision whether to seek review following a summary denial must be made quickly. In addition, in preparing a petition for review after a summary denial, counsel should keep in mind that the most likely outcome if the supreme court gives any consideration to the petition at all is a grant and retransfer back to the court of appeal, with directions to issue an alternative writ and decide the petition on the merits.

On the finality of court of appeal decisions, see §§25.4-25.10. On the time to file petitions for review, see also California Civil Appellate Practice §§22.14-22.23 (3d ed Cal CEB 1996).

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§27.16 (1) No Extension for Holiday or Weekend

For purposes of filing a petition for review, the date of finality is not extended if it falls on a day on which the clerk's office is closed. Cal Rules of Ct 8.500(e)(1).

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§27.17 (2) Relief From Failure to File Timely Petition for Review

The time to file a petition for review may not be extended. The Chief Justice, however, may relieve a party from a failure to file a timely petition for review if the time for the supreme court to order review on its own motion has not expired. Cal Rules of Ct 8.500(e)(2). The supreme court may order review on its own motion within 30 days after the court of appeal decision is final as to that court. Cal Rules of Ct 8.512(c)(1). The supreme court may extend that period up to 90 days after finality in the court of appeal. Cal Rules of Ct 8.512(c)(1).

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§27.18 b. Answer

The respondent or real party in interest must file and serve any answer to a petition for review within 20 days after the petition is filed. Cal Rules of Ct 8.500(e)(4). See California Civil Appellate Practice §§22.40-22.46 (3d ed Cal CEB 1996).

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§27.19 c. Reply

Petitioner may file and serve a reply within 10 days after an answer has been filed. Cal Rules of Ct 8.500(e)(5). See California Civil Appellate Practice §§22.41, 22.46 (3d ed Cal CEB 1996).

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§27.20 2. Format

The petition, answer, and reply generally must conform to the format requirements for briefs. See Cal Rules of Ct 8.504(a); California Civil Appellate Practice, chap 12 (3d ed Cal CEB 1996).

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§27.21 a. Length

The length of the petition or answer (including appended materials, but excluding the attached court of appeal opinion, index, table of contents, table of authorities, and any other indexes) may not exceed 8400 words if produced on a computer and 30 pages if typewritten. Cal Rules of Ct 8.504(d)(1)-(3). A reply may not exceed 4200 words if produced on a computer and 15 pages if typewritten, exclusive of tables and indexes. Cal Rules of Ct 8.504(d)(1)-(3).

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§27.22 b. Attachments

The only attachments that may be bound with a petition for review are: the opinion or order from which the petitioner seeks relief and any order modifying the opinion or ordering it published (these are required attachments under Cal Rules of Ct 8.504(b)(4)), any other court rulings or exhibits that the petitioner considers unusually significant, and copies of local rules, out-of-state statutes, or other similar citable materials that are not readily accessible. Cal Rules of Ct 8.504(e)(1). These attachments cannot exceed ten pages. Cal Rules of Ct 8.504(e)(2). The trial court's ruling and critical exhibits are particularly significant when the court of appeal has summarily denied a writ petition because the supreme court will not have an appellate court opinion summarizing the challenged trial court ruling.

PRACTICE TIP: Although a summary denial is not an "opinion," a copy of the denial must be bound with the petition for review.

For an example of a petition for review, see form in §28.16. See also California Civil Appellate Practice §§22.28-22.33, 22.40-22.46 (3d ed Cal CEB 1996).

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§27.23 c. Cover

The cover of a petition for review must be white. The cover of an answer must be blue. The cover of any reply must be white. Cal Rules of Ct 8.40(b)(1).

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Source: Civil Litigation/California Civil Writ Practice/27 Petitions in the California Supreme Court/§27.24 d. Number of Copies

§27.24 d. Number of Copies

A party must file with the supreme court the original plus 13 copies of a petition for review, answer, or reply. Cal Rules of Ct 8.44(a)(1).

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3. Contents

§27.25 a. Petition for Review

A petition for review must begin with a "concise, nonargumentative" statement of the issue(s) to be reviewed, framing them in terms of the facts of the case but without unnecessary detail. Cal Rules of Ct 8.504(b)(1).

PRACTICE TIP: Petitioner should not inundate the court with issues, particularly in light of its workload; generally, petitioner should only present one or two issues for review.

The remainder of the petition must include (Cal Rules of Ct 8.504(b)):

- A statement as to why review should be granted, identifying the grounds for review, *i.e.*, to address a conflict in the courts of appeal (on grounds for review, see §27.13);
- A concise statement of the case (facts and procedural history), including whether a petition for rehearing was filed and the outcome;
- A concise argument section; and
- A conclusion asking that the petition for review be granted and sometimes for alternative relief, *e.g.,* that the court of appeal's opinion be depublished, or that review be granted and the case held pending determination of a "lead" case in which review has already been granted. See California Civil Appellate Practice §22.25 (3d ed Cal CEB 1996).

PRACTICE TIP: A request for depublication of an opinion cannot be made as part of the petition for review but must instead be made by separate letter, even if depublication is presented as an alternative to granting review. Cal Rules of Ct 8.1125(a)(2).

PRACTICE TIP: Because of the short deadline to file a petition for review following the summary denial of a writ petition (see §27.15), the petitioner can use the appellate court writ petition and supporting memorandum as a beginning for a petition for review. The enumerated allegations in the writ petition can be modified to narrative form, and the legal arguments can be fine tuned. The petition for review must also include at the outset a statement of the issues presented and a section setting forth the reasons and grounds for granting review, neither of which is included in an appellate court writ petition. It should be kept in mind, however, that the supreme court rarely grants review of a summary denial order.

A petition for review cannot incorporate by reference any authorities or argument from another document, except to a petition for review, answer, or reply filed by another party in the case or filed in another case presenting the same issues. Cal Rules of Ct 8.504(e)(3).

For an example of a petition for review, see §28.16. On the drafting of a petition for review, see California Civil Appellate Practice §§22.24-22.39 (3d ed Cal CEB 1996).

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§27.26 b. Answer

A party opposed to supreme court review is not required to file an answer to a petition for review (Cal Rules of Ct 8.500(a)(2)), but it is advisable to do so. Counsel should not risk leaving the analysis of the issues solely to a busy court without providing some assistance. An answer may raise additional issues for review. Cal Rules of Ct 8.504(c).

In many cases, the answer can be fairly brief, pointing out that the petition fails to identify any conflict created by the court of appeal's decision or to raise any issue of pressing public importance, and that the petitioner has done no more than allege error by the lower court (which should, in any event, be followed by a brief explanation as to why the court of appeal did not err). See California Civil Appellate Practice §§22.40-22.44 (3d ed Cal CEB 1996).

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§27.27 c. Reply

The petitioner may, but is not required to, reply to an answer. Cal Rules of Ct 8.500(a)(3). When an answer raises additional issues for review, the petitioner should always file a reply, *e.g.*, to keep the court focused on the significant issues, or to avoid the impression that the case is so factually complicated it is not a good vehicle for deciding the issues presented in the petition. Even when the answer does not raise additional issues, the petitioner should file a reply in any case in which there is a serious case to be made for review. See California Civil Appellate Practice §§22.45-22.46 (3d ed Cal CEB 1996).

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Source: Civil Litigation/California Civil Writ Practice/27 Petitions in the California Supreme Court/§27.28 4. Chart: Filing Requirements for Petition for Supreme Court Review

§27.28 4. Chart: Filing Requirements for Petition for Supreme Court Review

Document	*Deadline*	*Copies*	*Color of Cover*
Petition for review filed by dissatisfied party	10 calendar days after the decision is final in the court of appeal. Cal Rules of Ct 8.500(e)(1). See §§27.15-27.17.	Original plus 13 copies. Cal Rules of Ct 8.44(a)(1). See §27.24.	White. Cal Rules of Ct 8.40(b)(1). See §27.23.
Answer filed by opposing party	An answer to a petition for review may be filed within 20 calendar days after the petition is filed. Cal Rules of Ct 8.500(e)(4). See §27.18.	Original plus 13 copies. Cal Rules of Ct 8.44(a)(1). See §27.24.	Blue. Cal Rules of Ct 8.40(b)(1). See §27.23.
Reply filed by petitioner(s)	Reply brief(s) due within 10 calendar days after the answer brief is filed. Cal Rules of Ct 8.500(e)(5). See §27.19.	Original plus 13 copies. Cal Rules of Ct 8.44(a)(1). See §27.24.	White. Cal Rules of Ct 8.40(b)(1). See §27.23.

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D. Disposition

§27.29 1. Types of Rulings

When ruling on a petition for review, the supreme court will generally do one of the following: (1) deny review; (2) grant review and rule on the merits of the case; or (3) grant review and immediately transfer back to the court of appeal with directions to decide the case (the likely scenario if the supreme court gives any consideration to a petition for review filed after a summary denial of a writ petition (see §27.32)).

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§27.30 a. Supreme Court Denies Petition for Review

The supreme court may, and in the vast majority of cases will, issue a one- to two-line order denying the petition for review. If the court fails to act on a petition within 60 days after the last petition for review in the case is filed, the petition is deemed denied by operation of law. Cal Rules of Ct 8.512(b)(2). The court may extend its time to act to a date not more than 90 days after the last petition in the case was filed. Cal Rules of Ct 8.512(b)(1). See §27.31. Such extensions are common. See California Civil Appellate Practice §22.47 (3d ed Cal CEB 1996).

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§27.31 b. Supreme Court Grants Petition for Review

The supreme court can grant review as to all or only some of the issues presented. Cal Rules of Ct 8.516(a), (b)(1). In most cases, the parties then file briefs on the merits, and the court eventually hears oral argument and decides the case. Cal Rules of Ct 8.520.

If the court has granted review in another case presenting the same issue(s), it likely will "hold" further briefing in the case at hand until it has decided the other case. See Cal Rules of Ct 8.512(d)(2).

On preparing briefs on the merits, see California Civil Appellate Practice §§22.55-22.57 (3d ed Cal CEB 1996). On postbriefing developments, see Civ App Prac §§22.58-22.70.

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§27.32 c. Supreme Court Transfers Matter to Court of Appeal

The supreme court sometimes grants review and immediately transfers the case to the court of appeal, usually with directions and sometimes supported by authority. Cal Rules of Ct 8.528(d). See, *e.g.*, *American Airlines, Inc. v Superior Court* (2003) 114 CA4th 881, 896, 8 CR3d 146 (supreme court transferred matter to court of appeal with directions to vacate order denying motion to compel deposition and to issue order granting motion).

This is the most likely result if the supreme court entertains a petition for review from a summary denial of a writ petition. The court usually directs the court of appeal to issue an alternative writ and decide the writ petition on the merits. See, *e.g., Omaha Indem. Co. v Superior Court* (1989) 209 CA3d 1266, 1270, 258 CR 66 (supreme court granted review and transferred case to court of appeal with direction to issue alternative writ); *Newman v Superior Court* (1986) 179 CA3d 377, 379, 224 CR 538 (same). See California Civil Appellate Practice §22.51 (3d ed Cal CEB 1996).

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§27.33 2. Timing of Court's Action

After the last petition for review is filed in a case (*e.g.*, when there are multiple parties who seek review), the supreme court has 60 calendar days to decide whether to grant review, but may extend the period to 90 calendar days. Cal Rules of Ct 8.512(b). If the court does not issue an order within the specified time limit, the petition is deemed denied. Cal Rules of Ct 8.512(b)(2). See California Civil Appellate Practice §22.47 (3d ed Cal CEB 1996).

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28

Court of Appeal and Supreme Court Forms

I. FORM: PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE RELIEF §28.1

II. FORM: CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (JUDICIAL COUNCIL FORM APP-008) §28.2

III. FORM: TABLE OF EXHIBITS §28.3

IV. FORM: PRELIMINARY OPPOSITION TO PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE WRIT AND STAY REQUEST §28.4

V. FORM: SUMMARY DENIAL §28.5

VI. FORM: ALTERNATIVE WRIT/ORDER TO SHOW CAUSE §28.6

VII. FORM: *PALMA* NOTICE (ORDER) §28.7

VIII. FORM: *PALMA* NOTICE (LETTER) §28.8

IX. FORM: "SUGGESTIVE" *PALMA* NOTICE §28.9

X. FORM: OPPOSITION TO ISSUANCE OF PEREMPTORY WRIT OF MANDATE IN THE FIRST INSTANCE §28.10

XI. FORM: RETURN TO PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER ALTERNATIVE RELIEF §28.11

XII. FORM: TRAVERSE TO RETURN §28.12

XIII. FORM: ORDER DIRECTING ISSUANCE OF PEREMPTORY WRIT OF MANDATE §28.13

XIV. FORM: ORDER DISCHARGING ALTERNATIVE WRIT AS IMPROVIDENTLY GRANTED §28.14

XV. FORM: PEREMPTORY WRIT OF MANDATE §28.15

XVI. FORM: PETITION FOR REVIEW (CALIFORNIA SUPREME COURT) §28.16

XVII. FORM: AMICUS CURIAE LETTER BRIEF §28.17

XVIII. FORM: PETITION FOR WRIT OF SUPERSEDEAS §28.18

XIX. FORM: ORDER GRANTING PETITION FOR WRIT OF SUPERSEDEAS §28.19

XX. FORM: PETITION FOR WRIT OF HABEAS CORPUS (JUDICIAL COUNCIL FORM MC-275) §28.20

XXI. FORM: PETITION FOR WRIT OF HABEAS CORPUS OR CERTIORARI (FILED BY ATTORNEY) §28.21

XXII. FORM: APPELLATE COURT WRIT PETITION INFORMATION SHEET (FIFTH DISTRICT) §28.22

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Source: Civil Litigation/California Civil Writ Practice/28 Court of Appeal and Supreme Court Forms/§28.1 I. FORM: PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE RELIEF

NOTE: The following forms are illustrative only. When drafting papers in writ proceedings, counsel should use his or her own independent legal and professional judgment in light of the particular client and factual situation. As always, counsel should consult all applicable statutes, rules of court, and local rules before filing any papers with the court.

§28.1 I. FORM: PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE RELIEF

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

IMMEDIATE STAY REQUESTED
Confidential Personal Financial Information
Must Be Produced by June 22, 2007

No. _____
(Related Appeal Pending in No. B78945)

In the Court of Appeal of the State of California
Second Appellate District, Division One

JOHN DOE,
Defendant and Petitioner,

vs.

SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent.

JANE DOE,
Plaintiff and Real Party in Interest.

PETITION FOR WRIT OF MANDATE,
PROHIBITION, OR OTHER APPROPRIATE RELIEF

From Orders Compelling the Disclosure of
Personal Financial Information
Los Angeles County Superior Court, No. 123456
The Honorable Rachel Smythe
213-987-6543

Roberta Jones, SBN 00001
Daniel Peters, SBN 11112
JONES & PETERS LLP
10 Main Street, 2nd Floor
Los Angeles, CA 90004
Telephone: 213-123-4567
Facsimile: 213-456-7891
Attorneys for Defendant and
Petitioner John Doe

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rules of Court, rule 8.488, the undersigned, counsel for Defendant and Petitioner

John Doe, certifies that she knows of no other entity or person other than the parties to this proceeding who has a financial or other interest in its outcome.

Executed on June 15, 2007, at Los Angeles, California.

_____

Roberta Jones

TABLE OF CONTENTS

Page

INTRODUCTION: WHY WRIT RELIEF SHOULD BE GRANTED

PETITION

PRAYER

VERIFICATION

MEMORANDUM

[*Include your argument headings here.*]

CONCLUSION

CERTIFICATE OF WORD COUNT

TABLE OF AUTHORITIES

CASES

[*List cases in alphabetical order by name, giving citation for each under name; give page number(s) on which citations are found to the right of the citation.*]

STATUTES

[*List statutes in alphabetical/numerical order; give page number(s) on which citations are found to the right of the citation.*]

CONSTITUTIONAL PROVISIONS

[*List constitutional provisions in alphabetical/numerical order, giving citation for each under name; give page number(s) on which citations are found to the right of the citation.*]

COURT RULES

[*List court rules in numerical order, giving citation for each under name; give page number(s) on which citations are found to the right of the citation.*]

OTHER AUTHORITIES

[*List other authorities in alphabetical order by name, giving citation for each under name; give page number(s) on which citations are found to the right of the citation.*]

INTRODUCTION: WHY WRIT RELIEF SHOULD BE GRANTED

This petition challenges an order requiring disclosure of private confidential financial information that is sought by real party in interest Jane Doe to justify an advance of legal fees on appeal—even though any such

fee award would be invalid as a matter of law. Real party in interest is asserting a right under the Family Code that, if it ever existed, was abrogated by a contract signed by the parties 4 years ago.

John Doe ("John") and Jane Doe ("Jane") entered into a marital settlement agreement to dissolve their marriage and to resolve all issues relating to the dissolution, including property division and support. The agreement provides that the prevailing party in any litigation over the contract is entitled to attorney fees.

In 2005, Jane sought a determination by the trial court that John had violated the agreement and breached his fiduciary duties to her. The trial court found that John had violated the agreement, but had not breached any fiduciary duty. Both sides appealed, challenging the court's interpretation and implementation of their contract.

Briefing has not yet begun on those appeals, but Jane has sought discovery of John's financial condition to support her motion for attorney fees under Family Code §2030 to pay for her attorney's efforts to enforce, on appeal, the rights she claims under the parties' contract. On May 24, 2007, the trial court ordered John to produce extensive financial documents by June 22, 2007.

The question presented by this writ petition is (1) whether Jane, who admits that she receives almost $30,000 per month in support from John, earns almost $12,000 per month more in dividends and interest, and has close to $5 million in stocks, bonds, or other relatively liquid assets (Exh. 11, p. 288), is entitled to discovery into John's assets so that she can support her motion under Family Code §2030 for an advance of attorney fees on appeal, or (2) whether the contractually agreed upon prevailing party attorney-fee provision in the parties' marital settlement contract trumps the Family Code and limits attorney fees solely to the prevailing party without any need to take intrusive discovery to determine ability to pay.

The trial court erred as a matter of law in applying a Family Code fee analysis under these circumstances. As part of their settlement contract, John and Jane agreed that they were resolving "all of the issues in this marital dissolution proceeding" and that they were "immediately, completely, and forever sett[ling] and determin[ing] all of his/her property rights and all of the rights, duties, and obligations of each to the other, existing or arising by reason of their marital relationship." (Exh. 16, p. 520.) The parties further agreed that their settlement agreement "shall be interpreted as a contract and in accordance with California law on this subject." (Exh. 3, p. 90.) One of the purposes of the settlement agreement was for both sides "not to proceed with further or complete formal discovery, appraisals, or other economic valuations." (Exh. 16, p. 521.) As to future attorney fees, the agreement provided that the prevailing party in any actions to enforce the agreement would be entitled to fees. (Exh. 16, pp. 523-524.) Such a contractual prevailing-party provision would have no meaning if one party could also seek attorney fees based on something other than prevailing on the merits.

Absent writ relief, John will have no remedy to avoid intrusive discovery into his financial condition by his ex-wife. Accordingly, this Court should grant this petition.

PETITION

John Doe petitions this Court for a writ of mandate and/or prohibition, or other appropriate relief, directing respondent Los Angeles County Superior Court to vacate its order requiring John Doe to comply with real party in interest Jane Doe's discovery requests relating to his personal and confidential finances incidental to Jane's motion for attorney fees.

To these ends, petitioner alleges:

BENEFICIAL INTEREST OF PETITIONER; CAPACITIES OF RESPONDENT AND REAL PARTY IN INTEREST.

1. Petitioner John Doe is a party in various postjudgment motions that are now pending before this Court on appeal (*Doe v Doe* (No. B78945; Super. Ct. No. 123456); see also Exh. 1, p. 8; Exh. 2, p. 70; Exh. 10, pp. 260-261). He has been ordered by the Los Angeles County Superior Court to comply with discovery requests that seek disclosure of his confidential personal financial information. (Exh. 19, p. 541.)

2. Respondent is the Los Angeles County Superior Court, which entered the discovery orders challenged in this petition. (Exh. 19, p. 541.)

3. Real party in interest is Jane Doe, John's ex-wife, who propounded the discovery requests seeking

John's confidential personal financial information. (Exh. 15, p. 375.)

AUTHENTICITY OF EXHIBITS.

4. The exhibits accompanying this petition are true and correct copies of original documents filed with respondent court or with respondent court's designated discovery referee, except for Exhibit 21, which is a true and correct copy of the reporter's transcript of the May 15, 2007 hearing before the Honorable Robert Smith, discovery referee, regarding Jane's motion to compel discovery. The exhibits are paginated consecutively from page 1 to page 673. Page references in this petition are to the consecutive pagination.

TIMELINESS OF THE PETITION.

5. On May 15, 2007, Referee Smith issued a Report and Recommendation granting Jane's motion to compel. (Exh. 19, pp. 542-550.) The trial court approved the Report and Recommendation on May 24, 2007. (Exh. 19, p. 541.) This petition is filed within a month of the trial court's approval of the Report and Recommendation.

SUMMARY OF RELEVANT FACTS AND PROCEDURE.

THE CONTRACTUAL SETTLEMENT BETWEEN THE PARTIES.

6. On July 3, 2003, John Doe and Jane Doe entered into a marital settlement agreement and stipulated judgment concluding their divorce proceedings. (Exh. 3, pp. 84-90.) The stipulated judgment provides that "[s]aid Marital Settlement Agreement resolves all of the issues in this marital dissolution proceeding" and that "[e]ach party has entered into this Stipulated Further Judgment to immediately, completely, and forever settle and determine all of her/his property rights and all of the rights, duties and obligations of each to the other, existing or arising by reason of their marital relationship." (Exh. 16, p. 520.)

7. The stipulated judgment further provided that "Petitioner and Respondent each have represented to the other, for the other to rely upon in entering into this Stipulated Further Judgment, and for the Court to rely upon in approving and signing this Stipulated Further Judgment, that she/he instructed her/his attorney not to proceed with further or complete formal discovery, appraisals or other economic valuations." (Exh. 16, p. 521.)

8. The stipulated further judgment included a bolded section heading entitled "ATTORNEY FEES AND COSTS." (Exh. 16, p. 523.) Attorney fees incurred by either party through the date of execution of the agreement and judgment were to be borne by each side except that John was obligated to pay a lump sum to Jane's counsel. (*Ibid.*) Future attorney fees were provided for as follows:

> **No provision of the Marital Settlement Agreement nor this Stipulated Further Judgment shall be deemed to prevent either party from seeking contribution from the other for the payment of her/his actual, reasonable, and substantiated legal fees and litigation expenses incurred in connection with any further matter pertaining to the Marital Settlement Agreement, this Stipulated Further Judgment, the enforcement of any such documents or provisions contained herein, or any other conditions subsequent contained herein. In the event any party fails to comply with any provision of the Marital Settlement Agreement and/or this Stipulated Further Judgment, she/he shall reimburse the other party for all expense, including reasonable attorney fees and costs of suit, which, as a result of such failure, are incurred to enforce the provisions of the Marital Settlement Agreement and this Stipulated Further Judgment.**

(Exh. 16, pp. 523-524.) The stipulated judgment also provided that "[t]he provisions of this Section do not affect any right to recover attorney fees and costs in any future proceeding relating to child custody or child support issues." (Exh. 16, p. 524.) Finally, the stipulated judgment provided that any issue "relating to the payment of attorney fees and costs of litigation" shall be brought before the court. (*Ibid.*)

[*Remainder of text of allegations 9-17 omitted.*]

BASIS FOR RELIEF.

18. The marital settlement agreement provides for attorney fees to the prevailing party. Permitting Jane to seek attorney fees based on Family Code provisions permitting fees to be paid by the party best able to pay, and the discovery necessary to prove that John has a greater ability to pay (he does not), contradicts the

express terms and purpose of the settlement agreement.

19. A limited protection is given to sensitive information that people may wish to keep confidential, such as their financial dealings (see, *e.g., Valley Bank of Nevada v Superior Court* (1975) 15 C3d 652, 656) and assets (see, *e.g., Richards v Superior Court* (1978) 86 CA3d 265, 271). "Where objection is made to discovery of such sensitive information in the trial court, the court must carefully weigh the competing factors in fashioning an order, considering: '… the purpose of the information sought, the effect that disclosure will have on the parties and on the trial, the nature of the objections urged by the party resisting disclosure, and ability of the court to make an alternative order which may grant partial disclosure, disclosure in another form, or disclosure only in the event that the party seeking the information undertakes certain specified burdens which appear just under the circumstances.' [Citations.] Where the court abuses its discretion in applying this balancing test and fashioning its order, relief is available by writ of mandate." (*Hofmann Corp. v Superior Court* (1985) 172 CA3d 357, 362.)

ABSENCE OF OTHER REMEDIES.

20. John Doe has no adequate, legal remedy other than writ relief. (See Code Civ. Proc., §904.1(a)(1) [interlocutory orders are not appealable].) Unless writ relief is granted, John will be forced to disclose private information about himself. The need for writ relief under these circumstances is obvious. (See *California Highway Patrol v Superior Court* (2000) 84 CA4th 1010, 1018 ["Writ review is appropriate when the petitioner seeks relief from a discovery order which may undermine a privilege or a right of privacy, because appellate remedies are not adequate to remedy the erroneous disclosure of information"].)

GROUNDS FOR AN IMMEDIATE STAY.

21. The trial court's order requires John to produce the demanded documents by June 22, 2007. (Exh. 19, p. 541.) A stay of respondent court's discovery orders is necessary to preserve the status quo and thereby provide this Court with sufficient time to consider this petition. The good faith filing of this writ petition should automatically excuse John from having to comply with the order pending completion of these proceedings. (See *Fairfield v Superior Court* (1966) 246 CA2d 113, 121-122.) However, out of an excess of caution, John requests that this Court order a stay of respondent court's discovery order to the extent the order is not stayed by the filing of this petition. As demonstrated in the following supporting memorandum, respondent court abused its discretion by ordering John to respond to this intrusive and oppressive discovery. Consequently, it would be unjust and unfair to force John to choose between contempt and the needless waste of his resources when this Court could instead ensure that the status quo is preserved by ordering a stay of respondent court's order pending the final resolution of this petition.

PRAYER

Petitioner John Doe prays that this Court:

1. Issue an immediate temporary stay of respondent court's discovery orders pending resolution of this writ petition; and

2. Issue a peremptory writ of mandate and/or prohibition in the first instance (Code Civ. Proc., §§1087-1088, 1104-1105; see *Palma v U.S. Indus. Fasteners, Inc.* (1984) 36 C3d 171, 178) directing respondent trial court to vacate its May 24, 2007 order granting Jane Doe's motion to compel; or

3. Should it deem such action necessary and appropriate, issue an alternative writ directing respondent court either to grant the relief specified in paragraph 2 of this prayer or to show cause why it should not be ordered to do so, and upon the return of the alternative writ, issue a peremptory writ as set forth in paragraph 2 of this prayer; and

6. Award his costs under California Rules of Court, rule 8.485-8.493; and

7. Grant such other relief as may be just and proper.

DATED: June 15, 2007

Respectfully submitted,

JONES & PETERS LLP

By _____
Roberta Jones

Attorneys for Defendant and
Petitioner John Doe

VERIFICATION

I am the petitioner in this matter. I have read the foregoing Petition for Writ of Mandate, Prohibition, or Other Appropriate Relief and know its contents. The facts alleged in this petition are within my own personal knowledge, and I know these facts to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this verification was executed on June __, 2007, at Los Angeles, California.

_____
John Doe

MEMORANDUM

A. THE MOTION TO COMPEL SHOULD BE SET ASIDE BECAUSE JANE DOE HAS NO RIGHT TO EVIDENCE REGARDING JOHN DOE'S PRESENT FINANCES.

1. Jane Doe Has an Extremely High Burden to Justify the Challenged Discovery Because John Doe Has a Significant Privacy Interest in His Personal Financial Information.

The first provision of the California Constitution states that privacy is one of the inalienable rights of all people. (Cal. Const., art. I, §1.) It is a right on a par with defending life and possessing property (*Vinson v Superior Court* (1987) 43 C3d 833, 841) and is a fundamental interest of our society (*Garstang v Superior Court* (1995) 39 CA4th 526, 532; *Kahn v Superior Court* (1987) 188 CA3d 752, 765). "'The right of privacy is the right to be left alone.'" (*Mite v Davis* (1975) 13 C3d 757, 774.)

In addition to the basic right to be left alone, "[i]t is elementary that a party has a privacy interest in his or her personal financial records." (*Babcock v Superior Court* (1994) 29 CA4th 721, 726; accord, *Valley Bank of Nevada v Superior Court, supra,* 15 Cal.3d at p. 656 ["we may safely assume that the right of privacy extends to one's confidential financial affairs as well as to the details of one's personal life"].)

For this reason, "[t]he burden is on the party seeking the constitutionally protected information to establish direct relevance." (*Davis v Superior Court* (1992) 7 CA4th 1008, 1017; accord, *John B. v Superior Court* (2006) 38 C4th 1177, 1200 ["where a plaintiff seeks discovery from a defendant concerning… matters protected by the constitutional right of privacy, the intrusion upon… privacy may only be done on the basis of 'practical necessity'"].)

[*Remainder of text of Memorandum omitted.*]

CONCLUSION

The order granting the motion to compel at issue in this petition is premised on the belief that discovery into John Doe's financial condition is relevant to Jane Doe's motion for an advance of attorney fees pursuant to §2030 of the Family Code. This petition demonstrates that Jane has no right to any advance of attorney fees under section 2030, and that only the prevailing party is entitled to such fees, irrespective of ability to pay. Accordingly, this Court should grant John's writ petition to protect him from this baseless and intrusive discovery.

DATED: June 15, 2008

Respectfully submitted,

JONES & PETERS LLP

By _____
Roberta Jones

Attorneys for Defendant and Petitioner John Doe

CERTIFICATE OF WORD COUNT

The foregoing Petition contains 5164 words (excluding tables and this Certificate). In preparing this certificate, I relied on the word count generated by MS Word 2003.

Executed on June 15, 2008, at Los Angeles, California.

_____
Roberta Jones

Note: This sample brief has not been updated for substantive legal accuracy. It is presented as an example of form, not content, and should not be presumed accurate with regard to the state of the law. The names of the parties and attorneys have been changed for publication.

Comment: The format of attorney-drafted court papers is governed generally by Cal Rules of Ct 8.144, 8.204. Writ petitions must also comply with the formatting requirements of Cal Rules of Ct 8.486, 8.488. If a stay is requested, the petition must comply with Cal Rules of Ct 8.116. On the many specific formatting details required, see §§18.5-18.20.

On drafting a writ petition, see §§18.21-18.60.

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Source: Civil Litigation/California Civil Writ Practice/28 Court of Appeal and Supreme Court Forms/§28.2 II. FORM: CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (JUDICIAL COUNCIL FORM APP-008)

§28.2 II. FORM: CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (JUDICIAL COUNCIL FORM APP-008)

TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, **APPELLATE DISTRICT, DIVISION**	Court of Appeal Case Number:
ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*: — TELEPHONE NO.: FAX NO. *(Optional)*: E-MAIL ADDRESS *(Optional)*: ATTORNEY FOR *(Name)*:	Superior Court Case Number: *FOR COURT USE ONLY*
APPELLANT/PETITIONER: RESPONDENT/REAL PARTY IN INTEREST:	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS *(Check one)*: ☐ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): _____

2. a. ☐ There are no interested entities or persons that must be listed in this certificate under rule 8.208.
   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	**Nature of interest *(Explain):***
(1)	
(2)	
(3)	
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date:

_____ ▶ _____

(TYPE OR PRINT NAME) (SIGNATURE OF PARTY OR ATTORNEY)

Form Approved for Optional Use
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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

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Comment: The Judicial Council has approved this form for optional use. It is available online at http://www.courtinfo.ca.gov/forms. On certificates of interested entities or persons, see §§21.19, 23.8.

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Source: Civil Litigation/California Civil Writ Practice/28 Court of Appeal and Supreme Court Forms/§28.3 III. FORM: TABLE OF EXHIBITS

§28.3 III. FORM: TABLE OF EXHIBITS

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TABLE OF EXHIBITS SUPPORTING PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION			
EXH. NO.	DOCUMENT	VOL.	PAGE
1	Plaintiff Jane Doe's Notice of Motion and Motion for Summary Judgment [Filed on February 4, 2008]	1	1
2	Memorandum in Support of Plaintiff's Motion for Summary Judgment [Filed on February 4, 2008]	1	3
3	Separate Statement of Undisputed Material Facts in Support of Plaintiff's Motion for Summary Judgment [Filed on February 4, 2008]	1	25
4	Declaration of John Doe in Support of Plaintiff's Motion for Summary Judgment [Filed on February 4, 2008]	1	43
5	Declaration of Roberta Jones in Support of Plaintiff's Motion for Summary Judgment [Filed on February 4, 2008] Exhibit A: Transcript pages from the deposition of John Doe Exhibit B: Transcript pages from the deposition of Elizabeth Bowman Exhibit C: Defendant John Smith's Responses to Plaintiff's Requests for Admission (Set One)	1 1 1 1	50 52 67 85
6	Declaration of Elizabeth Bowman in Support of Plaintiff's Motion for Summary Judgment [Filed February 4, 2008]	1	93
7	Defendant's Opposition to Plaintiff's Motion for Summary Judgment [Filed April 21, 2008]	1	97
8	Defendant's Response to Plaintiff's Separate Statement of Undisputed Material Facts [Filed April 21, 2008]	1	112
9	Declaration of John Smith in Support of Defendant's Opposition to Plaintiff's Motion for Summary Judgment [Filed April 21, 2008] Exhibit A: January 14, 2005 letter from Jane Doe to John Smith	1 1 1 1	132 136 138 188

	Exhibit B: Transcript pages from the deposition of Rachel Smythe Exhibit C: Defendant's Case Management Statement filed on January 9, 2008		
10	Case Management Conference Order filed on January 15, 2008	1	193

Note: This sample table of exhibits is presented as an example of form, not content. The names of the parties and attorneys and the case number information have been changed for publication.

Comment: Whether the exhibits that compose the record are bound together at the end of the petition or in separate volumes, they must begin with a table of contents. See Cal Rules of Ct 8.486(c)(1)(C).

On the format and content of the record, see §§20.6-20.14.

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§28.4 IV. FORM: PRELIMINARY OPPOSITION TO PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE WRIT AND STAY REQUEST

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No. A123456

In the Court of Appeal of the State of California
First Appellate District, Division Four

John Doe, et al.,
Plaintiffs and Petitioners,

vs.

Superior Court of San Francisco County,
Respondent.

ABC Corporation,
Defendant and Real Party in Interest.

PRELIMINARY OPPOSITION TO PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE WRIT AND STAY REQUEST

Writ Petition and Stay Request From Orders Granting
Motions in Limine
San Francisco County Superior Court,
No. 456789
Honorable Jane Smythe

Roberta Jones, SBN 00000	Brian Thomas, SBN 22222
Daniel Peters, SBN 11111	Lucy Adams, SBN 33333
JONES & PETERS LLP	THOMAS & ADAMS LLP
10 Main Street, 2nd Floor	100 University Avenue, Suite 100
San Francisco, CA 94111	Walnut Creek, CA 94596
Telephone: 415-123-4567	Telephone: 925-123-4567
Facsimile: 415-456-7891	Facsimile: 925-456-7891

Attorneys for Defendant and Real Party in Interest ABC Corporation

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rules of Court, rule 8.488, the undersigned, counsel for Defendant and Real Party in Interest ABC Corporation, certifies that she knows of no other entity or person other than the parties to this proceeding who has a financial or other interest in its outcome.

Executed on August 3, 2008, at San Francisco, California.

_____

Roberta Jones

TABLE OF CONTENTS

Page

I. INTRODUCTION

II. NO EXTRAORDINARY CIRCUMSTANCES WARRANT STOPPING THE TRIAL AND ISSUING AN ALTERNATIVE WRIT PETITION

III. ALLOWING THE MATTER TO PROCEED TO TRIAL MAY CURE THE PREJUDICE PLAINTIFFS CLAIM THAT THEY HAVE SUFFERED FROM THE PURPORTEDLY ERRONEOUS IN LIMINE RULINGS

IV. A STAY IS ALSO UNWARRANTED BECAUSE THE BALANCE DOES NOT TIP DECIDEDLY IN FAVOR OF PLAINTIFFS—THE CHALLENGED RULINGS ARE CORRECT

V. CONCLUSION

CERTIFICATE OF WORD COUNT

TABLE OF AUTHORITIES

Page

CASES

[*List cases in alphabetical order by name, giving citation for each under name; give page number(s) on which citations are found to the right of the citation.*]

STATUTES

[*List statutes in alphabetical/numerical order; give page number(s) on which citations are found to the right of the citation.*]

CONSTITUTIONAL PROVISIONS

[*List constitutional provisions in alphabetical/numerical order, giving citation for each under name; give page number(s) on which citations are found to the right of the citation.*]

COURT RULES

[*List court rules in numerical order, giving citation for each under name; give page number(s) on which citations are found to the right of the citation.*]

OTHER AUTHORITIES

[*List other authorities in alphabetical order by name, giving citation for each under name; give page number(s) on which citations are found to the right of the citation.*]

I. INTRODUCTION

John and Elizabeth Doe, plaintiffs in the San Francisco Superior Court proceeding to which this matter relates, have filed a writ petition and request for immediate stay of trial. The matter was assigned to a trial department on July 18, 2008, and motions in limine were argued and ruled upon on July 21 and 22. Jury

selection and the presentation of evidence are set to begin on August 8.

In their petition, plaintiffs seek to overturn orders on certain oral rulings granting seven motions in limine (MILs) in favor of defendant and real party in interest ABC Corporation ("ABC"). The eight challenged rulings are those on MIL Nos. 2, 3, 4, 5, 7, 8, 13, and 17. (Petition at p. 34 (prayer).) Plaintiffs' principal argument is that those rulings "severely restrict—indeed virtually eliminate"—their damages against real party on plaintiffs' "*tortuous [sic]* interference [claim] to the amount the jury in the first trial found to be the *contract* damages (on a partial cause of action) against then defendants James Monroe, *et al."* (*Id.* at p. 2 (fns. omitted, emphasis in original).)

In this preliminary opposition (filed under California Rules of Court, rule 8.487(a)), ABC urges the Court to summarily deny the petition and the request for an immediate stay. The principal reasons for doing so are that (1) plaintiffs unreasonably delayed filing this petition and, in any event, there are no extraordinary circumstances that warrant halting the trial and entertaining the merits of the petition; (2) the supposedly erroneous limitation on the amount of their recoverable damages will be rendered harmless if real party prevails on liability, so there is no compelling need for writ review; and (3) the trial court's orders were not as a matter of law clearly erroneous and substantially prejudicial.

II. NO EXTRAORDINARY CIRCUMSTANCES WARRANT STOPPING THE TRIAL AND ISSUING AN ALTERNATIVE WRIT

As noted, on July 18, this matter was assigned to a trial department—here, to the Honorable Jane Smythe. On that date and the days following, the parties and the court discussed scheduling, agreed to file and entertain, respectively, additional briefing, and argued and heard, respectively, the motions in limine. Those motions—including the ones at issue in this writ proceeding—were ruled upon orally on July 21 and 22.

On August 8, as noted, the court will empanel a jury and the parties will begin the presentation of their respective cases. The parties agree that trial will take at most 4 to 5 days. (Exh. 19, p. 843-44.)

Plaintiffs have known since the rulings were made on July 21 and 22 that they would be seeking writ review. They have had the reporter's transcript of the two relevant hearings since July 23. Nevertheless, by filing their petition and stay request 11 days after the trial court's rulings on the MILs (and less than one week before jury selection begins), plaintiffs have forced ABC to divide its efforts between the substantial work necessary to prepare for next week's trial and the equally substantial work necessary to prepare and file the present preliminary opposition.

If a stay is denied, plaintiffs will not suffer irreparable injury by being required to proceed to trial, particularly given the parties' estimate that only a week at most of trial time will be required. If a stay is granted, however, defendants will suffer the injury and expense of having prepared their case, including lining up their witnesses and clearing their and their counsel's calendars to ensure that the matter could be tried to judgment. Under these circumstances, and because plaintiffs unreasonably delayed the filing of their petition and stay request, the Court would be well within its discretion in denying relief on laches grounds alone. (See *Peterson v Superior Court* (1982) 31 C3d 147, 163 [laches requires unreasonable delay and prejudice].)

Moreover, the Court should be aware that two key witnesses, James and Patricia Monroe, are leaving the country in mid-August and will be away until after Labor Day. (Exh. 19, p. 843.) It was based on their schedules that, at the July 22 hearing, the parties agreed to slot Mr. Monroe's testimony for August 9 (he leaves on August 10) and Mrs. Monroe for later that same week (she leaves a few days after he leaves). (*Id.*) A stay would disrupt this schedule and render them unavailable until after Labor Day. There is no compelling need to cause that disruption. The petition and stay request should be denied.

III. ALLOWING THE MATTER TO PROCEED TO TRIAL MAY CURE THE PREJUDICE PLAINTIFFS CLAIM THAT THEY HAVE SUFFERED FROM THE PURPORTEDLY ERRONEOUS IN LIMINE RULINGS

The Court should also deny the petition and request for stay because, even assuming that the trial court's challenged MIL rulings were erroneous, any error could turn out to be harmless. This is because the trial court has ruled that ABC is not bound by any issue adjudicated in the Doe-Monroe breach of contract lawsuit. (Exh. 15, p. 710, 723.) Plaintiffs have not challenged that ruling in their petition. As a result, plaintiffs must prove all elements of their cause of action (even those common to breach of contract), and ABC may defeat liability by refuting any one of them.

[*Remainder of text of Section III omitted.*]

IV. A STAY IS ALSO UNWARRANTED BECAUSE THE BALANCE DOES NOT TIP DECIDEDLY IN FAVOR OF PLAINTIFFS—THE CHALLENGED RULINGS ARE CORRECT

Plaintiffs' petition principally challenges the trial court's rulings on those MILs related to certain items of claimed damages. Due in part to plaintiffs' unreasonable delay in filing and serving their petition, real party has not had sufficient opportunity to prepare a comprehensive response to these merits arguments. We nevertheless provide the following overview to show why the equities do not tip in favor of a stay or alternative writ, as the challenged in limine rulings were correct. (See *Omaha Indemn. Co. v Superior Court* (1989) 209 CA3d 1266, 1273-74 [one criteria for writ relief is that challenged order must be both "clearly erroneous as a matter of law and substantially prejudic[ial]"].)

[*Remainder of text of Section IV omitted.*]

V. CONCLUSION

There are no extraordinary circumstances that warrant granting plaintiffs' request to stop an ongoing trial and to entertain a merits challenge to interlocutory orders granting certain of ABC's motions in limine. The Court should summarily deny the petition and accompanying request for an immediate stay.

DATED: August 3, 2008

Respectfully submitted,

JONES & PETERS LLP

THOMAS & ADAMS LLP

By: _____
Roberta Jones

Attorneys for Defendant and Real Party in Interest
ABC Corporation

CERTIFICATE OF WORD COUNT

The foregoing Preliminary Opposition contains 8986 words (inclusive of footnotes, but exclusive of tables and this Certificate). In preparing this certificate, I relied on the word count generated by MS Word 2003.

Executed on August 3, 2008, at San Francisco, California.

_____
Roberta Jones

Note: This sample brief has not been updated for substantive legal accuracy. It is presented as an example of form, not content, and should not be presumed accurate with regard to the state of the law. The names of the parties and attorneys and the case number information have been changed for publication.

Comment: The format of attorney-drafted court papers is governed generally by Cal Rules of Ct 8.144, 8.204. Preliminary oppositions must also comply with the formatting requirements of Cal Rules of Ct 8.487, 8.488. If a stay is requested, the document must comply with Cal Rules of Ct 8.116. On the many specific formatting details required, see §§18.5-18.20. On drafting a preliminary opposition, see §§21.8-21.12.

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§28.5 V. FORM: SUMMARY DENIAL

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

ABC CORPORATION, **Petitioner,**	**No. 123456**
vs.	**(Superior Court No. 456789)**
THE SUPERIOR COURT OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES, **Respondent.**	**ORDER**
JANE DOE, **Real Party in Interest.**	

THE COURT:

The Court has read and considered the petition for a writ of mandate and request for a stay of proceedings filed on January 18, 2008. The petition is denied.

_____

SMITH, P.J., JONES, J., ROBERTS, J.

Note: This sample order is presented as an example of form, not content. The names of the parties have been changed for publication.

Comment: The court will sometimes indicate the reason for the summary denial, *e.g.*, untimeliness or inadequate record. On summary denials, see §§22.14-22.17.

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§28.6 VI. FORM: ALTERNATIVE WRIT/ORDER TO SHOW CAUSE

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

JANE DOE,	)	**No. 123456**
Petitioner,	)	
	)	**(Superior Court No. 456789)**
vs.	)	
	)	**(John Doe, Judge)**
SUPERIOR COURT OF	)	
CALIFORNIA FOR THE	)	**ORDER AND ALTERNATIVE**
COUNTY OF ALAMEDA,	)	**WRIT OF MANDATE**
Respondent.	)	
_____	)	
ABC CORPORATION,	)	
Real Party in Interest.	)	
_____	)	

TO THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES:

Good cause appearing therefor, you are commanded, immediately upon receipt of this writ, either to:

(1) Vacate your order of January 22, 2008, in Los Angeles County Superior Court case number 456789 expunging the lis pendens recorded by petitioner, and thereafter make a new and different order denying real party in interest's motion to expunge; or

(2) In the alternative, SHOW CAUSE, before this Court, in its courtroom at 300 South Spring Street, Los Angeles, California, 90013, at 10:00 a.m. on March 12, 2008, why you have not done so and why a peremptory writ of mandate requiring you to do so should not issue.

In the event that you comply with alternative (1) above, you shall so inform this Court by transmitting a copy of your minute order to this Court forthwith. In the event that you fail to comply with alternative (1) above, the written return to this writ shall be served and filed on or before February 15, 2008. Should petitioner wish to file a reply, such reply shall be served and filed on or before February 22, 2008.

Pending further order of this Court, all proceedings in Los Angeles County Superior Court case number 456789 are hereby stayed, provided however that the respondent shall have the power to comply with alternative (1) above.

By order of this Court.

ATTEST my hand and the seal of this court this 8th day of February 2008.

JOHN DOE, CLERK

By: _____
Deputy Clerk

Let the foregoing writ issue.

SMITH, P.J., JONES, J., ROBERTS, J.

Note: This sample order and writ is presented as an example of form, not content. The names of the parties and the case number information have been changed for publication.

Comment: On alternative writs and orders to show cause, see §§22.23-22.29.

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§28.7 VII. FORM: *PALMA* NOTICE (ORDER)

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

JANE DOE,	)	**No. 123456**
Petitioner,	)	
	)	**(Superior Court No. 456789)**
vs.	)	
	)	**(John Doe, Judge)**
SUPERIOR COURT OF	)	
CALIFORNIA FOR THE	)	**ORDER**
COUNTY OF LOS ANGELES,	)	
Respondent.	)	
_____	)	
ABC CORPORATION,	)	
Real Party in Interest.	)	
_____	)	

THE COURT:

The petition for writ of mandate or prohibition filed herein January 15, 2008, has been read and considered.

The parties are notified that the court may issue an order for a peremptory writ in the first instance requiring the respondent to release the appeal bond currently in place. (*Palma v U.S. Indus. Fasteners, Inc.* (1984) 36 C3d 171, 180.) The real party in interest is requested to file and serve opposition on or before January 29, 2008.

_____
SMITH, P.J., JONES, J., ROBERTS, J.

Note: This sample order is presented as an example of form, not content. The names of the parties and the case number information have been changed for publication.

Comment: On *Palma* notices, see §§22.18-22.22.

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§28.8 VIII. FORM: *PALMA* NOTICE (LETTER)

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FIRST APPELLATE DISTRICT

JANE DOE, CLERK

Joseph A. Smith
Attorney at Law
123 First Street, Suite 1000
San Francisco, CA 94111

December 1, 2008

350 McAllister Street
San Francisco, CA 94102

Re: A123456; *Robert Smythe v Superior Court*
(Elizabeth Jones, Real Party in Interest)

Dear Counsel:

Your client is named as a real party in interest to the above-captioned writ petition, which has been assigned to Division Two of this court. The court asks that you serve and file opposition to the petition within 10 days from the date of this letter. Your opposition should address all issues raised by the petition.

Take note that if circumstances warrant, the court may issue a peremptory writ in the first instance. (See Code Civ. Proc., §1088; *Palma v U.S. Indus. Fasteners, Inc.* (1984) 36 C3d 171, 180.)

Please direct inquiries to Deputy Clerk John Roe at 415-123-4567.

Very truly yours,
JANE DOE, Clerk

By: _____
Deputy Clerk

cc: John B. Jones

Note: This sample letter is presented as an example of form, not content. The names of the parties and the case number information have been changed for publication.

Comment: On *Palma* notices, see §§22.18-22.22.

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§28.9 IX. FORM: "SUGGESTIVE" *PALMA* NOTICE

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

DEPARTMENT OF RECORDS, **Petitioner,**	**No. 123456**
	(Superior Court No. 456789)
vs.	
	(John Smith, Judge)
SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, **Respondent.**	**ORDER**
JANE DOE, **Real Party in Interest.**	

THE COURT:

Petitioner challenges the respondent's order compelling disclosure of matters contained in peace officer personnel records (*e.g.*, names and addresses of complainants and witnesses to personnel complaints), without first conducting in camera review of the material as required by Evidence Code §1045(b).

In view of the apparent merit of the petition, we stayed enforcement of the order and requested opposition from the real party in interest. In lieu of opposition, real party has submitted a letter response acknowledging that the respondent was required to conduct in camera review of the personnel records before ordering disclosure of the information sought by real party in her discovery motions. Real party thus agrees that petitioner is entitled to relief.

The court has also read and considered the separate, unrequested response to the petition filed by county counsel on behalf of the respondent court. This response too acknowledges that section 1045 and the case law construing that statute require *in camera* review before disclosure of the requested material. (See *Pierre C. v Superior Court* (1984) 159 CA3d 1120.) The respondent, however, contends that *Pierre C.* was incorrectly decided and urges this court to "reconsider, clarify, or modify" that case's holding. We are not inclined to engage in such reconsideration under the circumstances of the instant case. Accordingly, the parties are notified of our intention to issue a peremptory writ in the first instance granting the relief requested by petitioner.

The respondent may wish to avoid issuance of a peremptory writ by (1) vacating its order of March 27, 2008, in Los Angeles Superior Court case number 456789 requiring petitioner to make disclosure of peace officer personnel record information, and (2) thereafter conducting *in camera* review of the relevant personnel files as required by Evidence Code §1045(b). If so, respondent shall, before April 23, 2008, transmit a copy of its minute order to this court.

In the event the respondent does not vacate its order, it is given leave to serve and file additional opposition to the petition, on or before April 21, 2008, with a view to expeditious disposition of this matter. (See *Ng v Superior Court* (1992) 4 C4th 29, 35.)

The stay of proceedings is modified to permit the respondent court to comply herewith and avoid issuance

of a peremptory writ.

SMITH, P.J., JONES, J., ROBERTS, J.

Note: This sample order is presented as an example of form, not content. The names of the parties and the case number information have been changed for publication.

Comment: On *Palma* notices, see §§22.18-22.22. On suggestive *Palma* notices, see *Brown, Winfield & Canzoneri, Inc. v Superior Court* (Feb. 1, 2010, S156598), 2010 Cal Lexis 588; §22.22.

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§28.10 X. FORM: OPPOSITION TO ISSUANCE OF PEREMPTORY WRIT OF MANDATE IN THE FIRST INSTANCE

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No. 0123456

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

ABC CORPORATION,
Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES,
Respondent.

SMITH CORPORATION,
Real Party in Interest.

Superior Court for Los Angeles County (Case No. 456789)
The Honorable Elizabeth Smythe

OPPOSITION TO ISSUANCE OF PEREMPTORY WRIT OF MANDATE IN THE FIRST INSTANCE

Roberta Jones (SBN 00001)
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Telephone: 213-123-4567
Facsimile: 213-456-7891
Attorneys for Real Party in Interest
Smith Corporation

TABLE OF CONTENTS

Page

INTRODUCTION

LEGAL DISCUSSION

[*Copy your argument headings here.*]

CONCLUSION

CERTIFICATE OF WORD COUNT

TABLE OF AUTHORITIES

CASES

[*List cases in alphabetical order by name, giving citation for each under name; give page number(s) on which citations are found to the right of the citation.*]

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CONSTITUTIONAL PROVISIONS

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COURT RULES

[*List court rules in numerical order, giving citation for each under name; give page number(s) on which citations are found*
to the right of the citation.]

OTHER AUTHORITIES

[*List other authorities in alphabetical order by name, giving citation for each under name; give page number(s) on which citations are found to the right of the citation.*]

INTRODUCTION

This court has given notice pursuant to *Palma v U.S. Indus. Fasteners, Inc.* ("*Palma*") (1984) 36 C3d 171 that the court might issue a peremptory writ in the first instance without an alternative writ or order to show cause and without oral argument. This opposition brief explains why this *Palma* notice is precluded by repeated admonitions from the California Supreme Court and should not be followed by issuance of a peremptory writ in the first instance (or by any writ relief at all). In addition, plaintiffs' petition is untimely, fails to demonstrate an inadequate remedy at law, and fails to comply with procedural requirements set forth in the Rules of Court.

***Palma* writs are reserved for exceptional cases in which either (1) a compelling temporal urgency requires an immediate decision, or (2) the petitioner's entitlement to relief is indisputably established by well-settled principles of law set forth in squarely applicable controlling authority and no reasonable contrary argument can be made. Neither is the situation here.**

Petitioner has pointed to no temporal urgency that would warrant depriving real party in interest of the opportunity for full briefing and oral argument. To the contrary, petitioner's own delay in seeking appellate review of the trial court's order directing opt-in notice demonstrates a *lack* of urgency to have the notice issue resolved.

Moreover, petitioner has no indisputable entitlement to relief. Real party in interest has presented several reasonable (indeed, meritorious) bases for denial of writ relief, including the trial court's broad discretion to order opt-in notice. The majority opinion in *Hypertouch, Inc. v Superior Court* ("*Hypertouch*") (2005) 128 CA4th 1527*,* on which petitioner relies, does not support writ relief here because the opinion does not address the circumstances of this case. In addition, in *Hypertouch*, one justice dissented in part and would have granted a petition for rehearing, demonstrating that the authority of trial courts to certify an opt-in class remains, at a minimum, disputable. (See *id.* at pp. 1556-1562 [conc. & dis. opn. of Haerle, J.].)

Accordingly, the *Palma* procedure has no proper role in this writ proceeding and would unlawfully deprive real party in interest of the right to oral argument should this court entertain the petition on its merits. In the event that the Court decides to reach the merits, real party in interest hereby requests an opportunity to submit a formal opposition. (See *Palma v U.S. Industrial Fasteners, Inc., supra,* 36 Cal.3d at p. 180.)

This opposition brief addresses the impropriety of the *Palma* procedure in this case. On all other points, this brief adopts by reference the preliminary opposition brief filed by real party in interest on March 31, 2008. (Cal. Rules of Court, rule 8.200(a)(5).)

LEGAL DISCUSSION

I. THIS COURT SHOULD NOT ISSUE A PEREMPTORY WRIT IN THE FIRST INSTANCE

A. THE *PALMA* PROCEDURE IS RESTRICTED TO EXCEPTIONAL CASES OF TEMPORAL URGENCY OR INDISPUTABLE ENTITLEMENT TO RELIEF

The California Supreme Court has repeatedly admonished that *Palma* writs are appropriate only in a narrow class of exceptional cases. The Supreme Court made that point clear in *Palma* itself, calling the *Palma* procedure a "rarity." *(Palma, supra,* 36 Cal.3d at p. 179.) Eight years later, in *Ng v Superior Court* (1992) 4 C4th 29, the court explained that "the accelerated *Palma* procedure is the exception; it should not become routine. Generally, that procedure should be adopted only when *petitioner's entitlement to relief is so obvious* that no purpose could reasonably be served by plenary consideration of the issue—for example, when such entitlement is conceded or when there has been clear error under well-settled principles of law and undisputed facts—or when there is an *unusual urgency requiring acceleration of the normal process.* If there is no compelling temporal urgency, and if the law and facts mandating the relief sought are not entirely clear, the normal writ procedure, including issuance of an alternative writ [citation] should be followed." (*Id.* at p. 35, italics added.)

Applying these principles in *Alexander v Superior Court* (1993) 5 C4th 1218, 1223, disapproved on another ground in *Hassan v Mercy Am. River Hosp.* (2003) 31 C4th 709, 724, fn. 4, the Supreme Court held that the Court of Appeal erred by directing issuance of a peremptory writ of mandate in the first instance when "[n]othing in the record suggests any 'unusual urgency'" and "the Court of Appeal could not legitimately have concluded that petitioners' 'entitlement to relief [was] so obvious that no purpose could reasonably be served by plenary consideration of the issue,' or that the matter involved 'conceded or… clear error under well-settled principles of law.'"

[*Remainder of text of Section A omitted.*]

B. IN THE PRESENT CASE THERE IS NO TEMPORAL URGENCY OR INDISPUTABLE ENTITLEMENT TO RELIEF

1. There Is No Temporal Urgency

Here, there is no "compelling temporal urgency requiring an immediate decision." (*Lewis v Superior Court, supra,* 19 Cal.4th at p. 1261.) Indeed, there is no urgency at all—compelling or otherwise—to justify a departure from "the normal writ procedure, including issuance of an alternative writ." (*Ng v Superior Court, supra,* 4 Cal.4th at p. 35.)

Petitioner's own actions prove this point. Petitioner failed to seek review of the trial court's July 2004 opt-in order when it was issued. It was not until almost 15 months later that petitioner asked this court to examine the ruling. (See Petition for Writ of Mandate, Prohibition, or Other Alternative Relief ("Petition") 2 ["issue presented" by petitioner is whether it was "an abuse of discretion for the trial court *to order that a certified California class be noticed as an opt-in class"* (emphasis added)].) If petitioner felt any urgency about obtaining review of the trial court's decision to certify an opt-in class, he should have challenged the ruling when made.

[*Remainder of text of Section 1 omitted.*]

2. There Is No Indisputable Entitlement to Relief

Likewise, this writ proceeding does not involve any "clear error under well-settled principles of law and undisputed facts." (*Ng v Superior Court, supra,* 4 Cal.4th at p. 35.) To the contrary, petitioner has presented—at a minimum—"[a] reasonable argument that the applicable law is unsettled or does not govern the precise issue presented in light of the particular undisputed facts… [or that] the application of legal principles set forth in various sources of law might lead to different results." (*Lewis v Superior Court, supra,* 19 Cal.4th at p. 1261.)

Real party in interest presented a "reasonable argument" that the trial court properly exercised its wide discretion in determining the manner of giving notice to class members. (See Opposition to Writ Petition at p. 14-26.) Real party in interest explained that no statute, rule, or decision by the California or United States

Supreme Courts prohibits opt-in classes. Indeed, the California Supreme Court has urged trial courts to be innovative and pragmatic in adopting procedures to administer class actions based on their broad discretionary authority in this area. (See, *e.g.*, *Vasquez v Superior Court* (1971) 4 C3d 800, 820-821.) Many other courts have recognized that potential class members may be required to act affirmatively, or "opt in," to join or remain in the class in appropriate circumstances. (See Opposition to Writ Petition at pp. 16-20 [citing cases].) Here, the trial court properly exercised its discretion in choosing an opt-in notice procedure to avoid the logistical nightmare of trying to administer a class action in which it is undisputed that the vast majority of notice recipients were not proper class members.

[*Remainder of text of Section 2 omitted.*]

C. THE *PALMA* PROCEDURE HERE WOULD UNLAWFULLY DEPRIVE REAL PARTY IN INTEREST OF ITS RIGHT TO ORAL ARGUMENT

There is no right to oral argument when a court has given *Palma* notice. (*Lewis v Superior Court, supra,* 19 Cal.4th at pp. 1260-1261.) The rarity of the *Palma* procedure, restricting it to exceptional cases of temporal urgency or indisputable entitlement to relief, justifies the extraordinary measure of dispensing with oral argument. "Denying an opportunity for oral argument before the issuance of a peremptory writ of mandate or prohibition in the first instance would be unfair to the parties… if the court's use of the accelerated *Palma* procedure were unwarranted. The remedy for such unfairness is not uniformly to require oral argument before a peremptory writ is issued in the first instance, but rather to restrict the use of that procedure to the narrow category of cases described above." (*Id.* at p. 1261.)

If this Court were to issue a *Palma* writ in the present case, the result would be an unlawful denial of real party in interest's right to oral argument, due to the absence of temporal urgency or indisputable entitlement to relief. (See *Lewis v Superior Court, supra,* 19 Cal.4th at p. 1261.)

II. THE PETITION IS UNTIMELY

Petitioner's petition challenging the method of determining class membership in this action was filed more than 10 months after the ruling that is at the heart of this challenge. (See Appendix of Exhibits in support of Writ Petition (App.) 183-186.) Petitioner took no action to seek review of the order when it was made. Now, however, it asks this Court to examine the ruling in light of the First District Court of Appeal's decision in *Hypertouch, Inc. v Superior Court* (2005) 128 CA4th 1527. Petitioner's decision to delay asserting any appellate challenge until this late date warrants denial of the petition.

[*Remainder of text of Section II omitted.*]

III. PETITIONER HAS FAILED TO DEMONSTRATE THAT ITS REMEDY BY APPEAL IN DUE COURSE IS INADEQUATE

Independent of the laches problem, petitioner has not demonstrated the lack of an adequate remedy at law, as is required to obtain extraordinary relief by writ. (See Code Civ. Proc., §§1086, 1103; accord, *Science Applications Int'l Corp. v Superior Court* (1995) 39 CA4th 1095, 1100.)

Absent interlocutory review, the parties here can simply proceed to trial with no threat of impeding judicial economy. *If* petitioner wins on the merits, and *if* it then successfully appeals the "opt-in" ruling, that ruling can be corrected after appeal without undoing all the proceedings on liability. On the other hand, if petitioner *loses* on the merits at trial, any supposed error with respect to the opt-in nature of the class will presumably be moot. Consequently, there is no compelling reason for this Court to allow plaintiffs to jump ahead of the line of litigants waiting for appellate review after final judgment.

Petitioner argues that interlocutory review must be afforded now because, if the trial court's order stands undisturbed, absent class members—*i.e.,* those who chose not to opt in to assert claims against real party in interest—will have no standing to object to a hypothetical class settlement if the case is resolved before trial and judgment. But the class notice recipients were individually identified and received a targeted mailing advising them of their rights. (App. 204-231.) It therefore seems inconceivable that any dentist who was unmoved to opt into the class in the first place would later take affirmative steps to challenge the settlement of an action that the dentist did not think was worth joining. Interlocutory review is therefore unnecessary for any reason.

IV. THE PETITION SUFFERS FROM RULE VIOLATIONS THAT PROVIDE AN INDEPENDENT BASIS FOR DENYING WRIT RELIEF

The petition demonstrates other defects warranting denial, such as the failure to include in the exhibits reporter's transcripts relating to the original notice ruling. California Rules of Court, rule 8.486(b) provides that a writ petition must be accompanied by "a reporter's transcript of the oral proceedings that resulted in the ruling under review" and if a transcript is unavailable, a declaration by counsel "explaining why the transcript is unavailable and fairly summarizing the proceedings, including counsel's arguments and any statement by the court supporting its ruling." (Cal. Rules of Court, rules 8.486(b)(1)(D) & (b)(3)(A).) "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… the petition." (Cal. Rules of Court, rule 8.486(b)(4).)

In the exhibits accompanying the writ petition, petitioner included the reporter's transcript relating to its motion to vacate the notice for an opt-in class (see A pp. 304-319), but failed to include pertinent oral proceedings on February 25 and March 14, 2008, which addressed the opt-in/opt-out issue that resulted in the April 2008 ruling that the class should be noticed as an opt-in class. It is the substance of this ruling that petitioner is now challenging in this writ petition. On this basis alone, the petition should be summarily denied. (See *Sherwood v Superior Court* (1979) 24 C3d 183, 186-187; *Lemelle v Superior Court* (1978) 77 CA3d 148, 156-157.)

V. IF THIS COURT ISSUES A PEREMPTORY WRIT, IT SHOULD DIRECT THE SUPERIOR COURT TO RECONSIDER WHETHER CLASS CERTIFICATION IS APPROPRIATE

If this court proceeds with issuance of a peremptory writ in the first instance, the court should order the trial court to reconsider its prior order certifying the class as framed by petitioner—of some *29,000* potential claimants—and to certify the class only if it finds certification *as an opt-out class* is warranted. After all, fewer than 180 opted into the class, demonstrating that the existing class definition encompasses many thousands of members with no interest in this litigation. At a minimum, this court should not prohibit the trial court from exercising its discretion to decertify, narrow, or otherwise modify the class.

CONCLUSION

For the foregoing reasons, and for those set forth in real party in interest's previously filed preliminary opposition to petitioner's writ petition, this court should summarily deny the petition. At a minimum, this court should adhere to normal writ procedures by issuing an alternative writ or order to show cause, obtaining a full-scale response from real party in interest, hearing oral argument, and issuing a written opinion.

However, if this court grants the petition, it should remand to the trial court with directions to consider whether to decertify the class.

DATED: April 16, 2008

Respectfully submitted,

JONES & PETERS LLP

By _____
Roberta Jones

Attorneys for Defendant
and Real Party in Interest
Smith Corporation

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.204(c)(1).)

The text of this brief consists of 5784 words as counted by the Corel WordPerfect version 12 word-processing program used to generate the brief.

Executed on __, at San Francisco, California.

_____
Roberta Jones

Note: This sample brief has not been updated for substantive legal accuracy. It is presented as an example of form, not content, and should not be presumed accurate with regard to the state of the law. In addition, because the real party in interest in this case had already filed a preliminary opposition addressing the merits of the writ petition, this brief's argument is limited to addressing the propriety of the *Palma* procedure. Had the party not done so, this opposition would also address the merits. The names of the parties and attorneys have been changed for publication.

Comment: The format of attorney-drafted court papers is governed generally by Cal Rules of Ct 8.144, 8.204. Oppositions to the issuance of peremptory writs in the first instance must also comply with the formatting requirements of Cal Rules of Ct 8.487(b). If this is the first paper being filed by a respondent or real party in interest, that party should include a certificate of interested entities or persons as required by Cal Rules of Ct 8.488. For an example, see §28.2. If a stay is requested, the document must comply with Cal Rules of Ct 8.116. On the many specific formatting details required, see §§18.5-18.20. On drafting an opposition to the issuance of a peremptory writ in the first instance, see §§23.3-23.10.

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§28.11 XI. FORM: RETURN TO PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER ALTERNATIVE RELIEF

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No. 0123456

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

ABC CORPORATION,
Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES,
Respondent.

SMITH CORPORATION,
Real Party in Interest.

Superior Court for Los Angeles County (Case No. 456789)
The Honorable Elizabeth Smythe

RETURN TO PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER ALTERNATIVE RELIEF; SUPPORTING MEMORANDUM

Roberta Jones (SBN 00001)
JONES & PETERS LLP
100 Main Street, 2nd Floor
Los Angeles, CA 90004
Telephone: 213-123-4567
Facsimile: 213-456-7891
ATTORNEYS FOR REAL PARTY IN INTEREST
SMITH CORPORATION

TABLE OF CONTENTS

Page

INTRODUCTION

RETURN BY ANSWER TO PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER ALTERNATIVE RELIEF

PRAYER

VERIFICATION

MEMORANDUM

[*Copy here your argument headings.*]

CONCLUSION

CERTIFICATE OF WORD COUNT

TABLE OF AUTHORITIES

CASES

[*List cases in alphabetical order by name, giving citation for each under name; give page number(s) on which citations are found to the right of the citation.*]

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OTHER AUTHORITIES

[*List other authorities in alphabetical order by name, giving citation for each under name; give page number(s) on which citations are found to the right of the citation.*]

INTRODUCTION

The *Hypertouch* majority held that the California Rules of Court governing class action management deprive trial courts of discretion to order opt-in notice. *(Hypertouch, Inc. v Superior Court* (2005) 128 CA4th 1527*,* 1550). This court has indicated it may adopt the *Hypertouch* majority's analysis.

***Hypertouch* was wrongly decided for the reasons previously outlined in real party in interest's briefing to this court, and for the reasons further explained below concerning the proper interpretation of the governing rules of court. In fact, the Rules of Court discussed in *Hypertouch* and emphasized in this court's order *invite* trial courts to craft procedural orders not specifically mentioned in the rules that would facilitate the management of a class action. (Cal. Rules of Court, rule 3.767(a)(4) & (5).) The rules even authorize trial courts to depart from the rules in appropriate cases. (Cal. Rules of Court, rule 3.760(b).) Thus, far from *prohibiting* opt-in notice as the *Hypertouch* majority believed, the rules of court *contemplate* the issuance of orders outside the rules' own confines based on a trial court's exercise of reasoned discretion within the circumstances of a particular case. Orders directing opt-in notice fall squarely within this category.**

Here, to facilitate the management of this class action, and after considering the circumstances of the case, the trial court ruled that the class would consist of those who opted into the class. The Rules of Court fully support this ruling. For this reason, and for the additional reasons set forth in real party in interest's preliminary opposition to petitioner's petition and real party in interest's opposition to issuance of a peremptory writ in the first instance, this court should deny the petition.

RETURN BY ANSWER TO PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER ALTERNATIVE RELIEF

Real party in interest, in answer to petitioner's Petition for Writ of Mandate, Prohibition, or Other Alternative Relief, admits, denies, and alleges as follows:

1. Real party in interest admits the allegation in paragraph 1.

2. Real party in interest admits the allegation in paragraph 2 based on information provided by petitioner.

3. Real party in interest admits the allegation in paragraph 3 based on information provided by petitioner.

4. Real party in interest admits the allegation in paragraph 4.

5. Real party in interest admits the allegation in the first sentence of paragraph 5. Assuming that the term "At all relevant times" (Petition at p. 3) in paragraph 5 refers to the period from January 1, 2007, to December 31, 2007, real party in interest manufactured and sold the dental cement at issue in this case at all relevant times to California dentists.

6. Real party in interest admits the allegation in the first sentence of paragraph 6 that real party in interest manufactured and sold the dental cement to ABC Corporation between January 1, 2007 and December 31, 2007. Real party in interest admits that, as stated in the first sentence of paragraph 6, the dental cement was a resin-reinforced glass ionomer dental cement.

Real party in interest admits that, as stated in the second sentence of paragraph 6, the dental cement was sold for use in such applications as the attachment of crowns and bridges, the buildup of core material under crowns, temporary tooth fillings, and cementing inlay and onlay fillings.

7. Real party in interest denies the allegation in paragraph 7 that it conducted no long-term testing of the dental cement.

Real party in interest denies that the dental cement had an unusual and excessive expansion characteristic.

Real party in interest admits that a few instances of breakage of ceramic and porcelain crowns were reported following, but not necessarily caused by, the application of the dental cement.

Real party in interest admits that it confirmed that under certain circumstances all-porcelain and all-ceramic crowns could fracture following the use, but not necessarily the proper and indicated use, of the dental cement as a luting cement.

Real party in interest denies that "an outside study by an academic consultant named John Doe reaffirmed real party in interest's findings." (Petition at p. 3.)

Real party in interest denies that "[t]he in-house scientist responsible for the product" was James Smith, and denies that such person "twice asked management to recall the product due to the expansion defect, but was rebuffed and ultimately fired." (Petition at p. 3.) Real party in interest alleges that, *after* experiencing performance problems and being denied a promotion, James Smith sent a letter regarding a possible recall.

Real party in interest admits the allegation that use of the dental cement was discontinued in January 2008.

8. Real party in interest denies the allegation in paragraph 8 that "[s]ubsequently published peer-reviewed testing of the dental cement confirmed universal expansion of more than 40 percent over the first 2 years after application." (Petition at p. 3.)

Real party in interest denies that "[s]uch inherent expansion also was found to cause unique and readily identifiable failures, including the cracking of crowns from internal pressure, lifting of crowns from their seatings, and fracturing of teeth in which the cement had been used." (Petition at p. 3.) Real party in interest alleges that all failures reported in connection with application of the dental cement are also known to occur clinically in the absence of its use.

For lack of information, real party in interest neither admits nor denies that "petitioner experienced such failures of his patients' dental work after application of the dental cement, necessitating repair or replacement of the dental work at his own expense." (Petition at p. 3-4.)

[*Remainder of text of Return omitted.*]

PRAYER

Real party in interest prays that this court deny the Petition for Writ of Mandate, Prohibition, or Other Alternative Relief.

Real party in interest further prays that, if this court grants the petition, it remand to the trial court with directions to consider whether to decertify the class.

VERIFICATION

I, Roberta Jones, declare as follows:

I am one of the attorneys for real party in interest. I have read the foregoing Return to Petition for Writ of Mandate, Prohibition, or Other Alternative Relief and know its contents. The facts alleged in this return are within my own knowledge and I know them to be true. Because of my familiarity with the rulings and facts pertaining to the trial court's proceedings, I, rather than any officer of real party in interest, verify this return.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this verification was executed on February __, 2008, in Los Angeles, California.

_____
Roberta Jones

MEMORANDUM

I. CONTRARY TO THE *HYPERTOUCH* MAJORITY'S HOLDING, THE CALIFORNIA RULES OF COURT DO NOT RESTRICT TRIAL COURTS' DISCRETION TO ORDER OPT-IN NOTICE.

In its Order, this court relied on rule 3.766 of the California Rules of Court, as interpreted in *Hypertouch*, to support the tentative conclusion that trial courts lack discretion to order opt-in notice. (See November 13, 2007 Order at p. 4.) However, the *Hypertouch* decision—like the analysis in this court's November 13 order—is flawed because it fails to consider the framework of class action rules of which rule 3.766 is a part.

[*Remainder of text of Memorandum omitted.*]

CONCLUSION

For the reasons stated above, and for those set forth in real party in interest's previously filed preliminary opposition to petitioner's writ petition and in real party in interest's opposition to issuance of a peremptory writ in the first instance, this court should deny the petition.

However, if this court grants the petition, it should remand to the trial court with directions to consider whether to decertify the class.

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.204(c)(1))

The text of this brief consists of 2000 words as counted by the Corel WordPerfect version 12 word-processing program used to generate this brief.

Executed on February __, 2008, at Los Angeles, California.

_____
Roberta Jones

Note: This sample brief has not been updated for substantive legal accuracy. It is presented as an example of form, not content, and should not be presumed accurate with regard to the state of the law. The names of the parties and attorneys have been changed for publication.

Comment: The format of attorney-drafted court papers is governed by Cal Rules of Ct 8.144, 8.204. Oppositions to the issuance of peremptory writs in the first instance must also comply with the formatting requirements of Cal Rules of Ct 8.487(b). If this is the first paper being filed by a respondent or real party in interest, that party should include a certificate of interested entities or persons as required by Cal Rules of Ct 8.488. For an example, see §28.2. If a stay is requested, the petition must comply with Cal Rules of Ct 8.116. On the many specific formatting details required, see §§18.5-18.20. On drafting a return to a writ petition, see §§23.20-23.38.

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§28.12 XII. FORM: TRAVERSE TO RETURN

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No. C00001

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

JOHN DOE,
Petitioner,

vs.

SUPERIOR COURT OF YOLO COUNTY,
Respondent.

CLAUDIA ALLEN,
Real Party in Interest.

TRAVERSE TO RETURN

Alameda County Superior Court, No. 123456
The Honorable Jane Smythe

Roberta Jones (SBN 00001)
JONES & PETERS LLP
100 Main Street, 2nd Floor
Los Angeles, CA 90004
Telephone: 213-123-4567
Facsimile: 213-456-7891
ATTORNEYS FOR PETITIONER JOHN DOE

TABLE OF CONTENTS

Page

INTRODUCTION

VERIFIED RESPONSE TO THE NEW FACTUAL ALLEGATIONS MADE IN RETURN

VERIFICATION

LEGAL ARGUMENT

[*Copy your argument headings here.*]

CONCLUSION

CERTIFICATE OF WORD COUNT

TABLE OF AUTHORITIES

CASES

[*List cases in alphabetical order by name, giving citation for each under name; give page number(s) on which citations are found to the right of the citation.*]

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CONSTITUTIONAL PROVISIONS

[*List constitutional provisions in alphabetical/numerical order, giving citation for each under name; give page number(s) on which citations are found to the right of the citation.*]

COURT RULES

[*List court rules in numerical order, giving citation for each under name; give page number(s) on which citations are found to the right of the citation.*]

OTHER AUTHORITIES

[*List other authorities in alphabetical order by name, giving citation for each under name; give page number(s) on which citations are found to the right of the citation.*]

INTRODUCTION

The limitations period on Real Party in Interest Claudia Allen's malpractice action against Petitioner John Doe expired in or before July 2007, which was one year after Allen had (a) learned of the factual basis for her malpractice claim against Doe; (b) suffered actual injury; and (c) terminated her attorney-client relationship with Doe. Accordingly, Allen's subsequent December 2007 malpractice complaint was untimely, and Doe is entitled to judgment as a matter of law. Nothing in Allen's return changes that fact.

VERIFIED RESPONSE TO THE NEW FACTUAL ALLEGATIONS MADE IN RETURN

In her return to Doe's writ petition, Allen answered Doe's factual allegations and made new factual allegations of her own. Code of Civil Procedure §1091 authorizes a petitioner to reply or answer the new allegations asserted in the real party in interest's return. (*Scott v Superior Court* (1928) 205 C 525, 526; see 8 Witkin, Cal. Procedure (4th ed. 1997) Extraordinary Writs, §197, p. 989.) Doe responds to Allen's new factual allegations as follows:

43a-b. Doe objects on relevancy grounds. The issue of who paid for Allen's appeal in the underlying action has no bearing on whether Allen's malpractice action against Doe is untimely. Regardless of whether Doe stated that an insurance carrier funded the underlying appeal based on his hope that the trial court's forfeiture order would be reversed (why else would he?), that statement has nothing to do with when Allen suffered actual injury. Doe also objects on the ground that Allen's spin on Doe's statement and notions about when injury occurred are arguments, not factual allegations.

43c. Admit. This allegation is consistent with the allegations in paragraph 6 (page 9) of Doe's petition; the additional details supplied by Allen are irrelevant to this writ proceeding.

43d. Admit. This allegation is consistent with the allegations in paragraph 8 (pages 9-10) of Doe's petition; the additional details supplied by Allen are irrelevant to this writ proceeding.

43e-f. Admit. This allegation is consistent with the allegations in paragraphs 9-10 (page 10) of Doe's petition; the additional details supplied by Allen are irrelevant to this writ proceeding.

43g. Admit that Allen did not file her malpractice action against Doe until December 3, 2007, but deny that Allen's lawsuit was timely.

43h. Admit, but object on relevancy grounds.

43i. Doe lacks the personal knowledge needed to admit or deny the truth of Allen's allegations regarding the transfer of her home, relinquishment of her stock, and her resignation from the board of directors of ABC Corporation. Doe admits that Allen repeats these allegations in the statement of damages portion of her malpractice complaint against Doe.

43j. Doe denies this allegation in so far as it claims Allen did not learn of the factual basis for her malpractice claim against Doe until December 5, 2006. Doe objects on relevancy grounds in so far as this allegation claims Allen did not understand the legal significance of that factual basis, her legal remedy, or the legal theory underlying her malpractice action against Doe until December 5, 2006.

44k-*l*. Admit. These allegations are consistent with the allegations found at paragraph 10 (page 10) of Doe's petition.

43m. Doe lacks the personal knowledge needed to admit or deny the truth of Allen's allegations regarding whether the children beneficiaries made false allegations about Allen during the trust and probate proceedings. Doe objects to these allegations on relevancy grounds.

VERIFICATION

I, Roberta Jones, declare as follows:

I am one of the attorneys for Petitioner John Doe in the proceedings captioned above. I have read this traverse to Real Party in Interest Claudia Allen's return to Doe's petition for a writ of mandate or prohibition or other appropriate relief and know its contents. I know, based on my own personal knowledge, that the facts alleged in this traverse are true according to the undisputed evidence before respondent court at the time that it denied Doe's motion for summary judgment. Because of my familiarity with the trial court's records, files, and proceedings described herein, I, rather than my client, verify this traverse.

Allen asserts in her return that "the exhibits are incomplete or inaccurate in the attachments" and specifically complains about Exhibit G. (Return, at p. 6.) The exhibits are true and correct copies of certified documents obtained from the trial court in the underlying estate and probate matters. Exhibit G contains two no-contest applications because one was filed as a "proposed" application when Allen sought declaratory relief from the court. The application was never refiled, but was merely redated after the court granted Allen's declaratory relief petition and the application was no longer a mere proposal.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this verification was executed on January __, 2008, at Los Angeles, California.

_____
Roberta Jones

LEGAL ARGUMENT

ALLEN'S MALPRACTICE ACTION IS UNTIMELY BECAUSE IT WAS FILED MORE THAN ONE YEAR AFTER SHE: (A) LEARNED THE FACTUAL BASIS OF HER CLAIM, (B) SUFFERED ACTUAL INJURY, AND (C) TERMINATED HER ATTORNEY-CLIENT RELATIONSHIP WITH DOE

A. Allen Learned the Factual Basis of Her Malpractice Claim Against Doe No Later Than July 2006.

The factual basis of Allen's malpractice claim was Doe's filing of Allen's IRA petition without first filing a safe harbor petition. (1 Exh. 2-3, ¶ 8; see Petition for Writ of Mandate at p. 14, ¶26.) Allen disputes this

characterization of the factual basis of her complaint against Doe, contending that it is "inaccurate and incomplete" (Return at p. 12, ¶26) and not supported by the cited evidence (3 Exh. 644). But Allen fails to identify any meaningful deficiency. In any event, no factual dispute is created by Allen's refusal to acknowledge what her complaint plainly states, since this court interprets the language of a complaint de novo. (*McCall v PacCare of Cal., Inc.* (2001) 25 C4th 412, 415 ["we examine the complaint de novo"]; see *Zelig v County of Los Angeles* (2002) 27 C4th 1112, 1126 ["we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context"]; *Berg & Berg Enterprises v Sherwood Partners, Inc.* (2005) 131 CaA4th 802, 836 ["the scope of our de novo review extends to all the claims pleaded against [the defendant]"].)

[*Remainder of text of Legal Argument omitted.*]

CONCLUSION

For the reasons presented in Doe's writ petition and this traverse, this court should grant writ relief from respondent court's February 10, 2008 order denying Doe's motion for summary judgment.

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.204(c)(1))

The text of this brief consists of 3568 words as counted by the Corel WordPerfect version 12 word-processing program used to generate this brief.

Executed on January __, 2008, at Los Angeles, California.

_____
Roberta Jones

Note: This sample brief has not been updated for substantive legal accuracy. It is presented as an example of form, not content, and should not be presumed accurate with regard to the state of the law. The names of the parties and attorneys have been changed for publication.

Comment: The format of attorney-drafted court papers is governed by Cal Rules of Ct 8.144, 8.204. On the many specific formatting details required, see §§18.5-18.20. On drafting a reply (traverse), see §§23.48-23.50.

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§28.13 XIII. FORM: ORDER DIRECTING ISSUANCE OF PEREMPTORY WRIT OF MANDATE

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

ABC INVESTMENT GROUP, **Petitioner,**	**No. 123456**
	(Superior Court No. 456789)
vs.	**ORDER**
THE SUPERIOR COURT OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES, **Respondent.**	
JANE DOE, **Real Party in Interest.**	

ORIGINAL PROCEEDING; petition for a writ of mandate. Rachel Smythe, Judge. Petition granted.

Jones & Peters LLP, Roberta Jones, and Daniel Peters for Petitioner.

No appearance for Respondent.

Law Offices of Brian Thomas and Lucy Adams for Real Party in Interest.

I. INTRODUCTION

An investor opened a checking account with a bank and a brokerage account with an affiliated broker. The checking account agreement required that disputes between the parties be resolved through arbitration before the American Arbitration Company ("AAC"). The brokerage account agreement required arbitration before the National Association of Securities Dealers ("NASD").

The investor filed this action against the broker and other affiliates (brokers), but not the bank, alleging that the brokers had provided false and misleading investment advice, resulting in a substantial loss in the value of her initial investment. The brokers moved to compel arbitration before the NASD. The trial court concluded that the arbitration provision governing the brokerage account lacked mutuality of obligation and was unenforceable. Nevertheless, the trial court ordered the parties to arbitrate the dispute before the AAC.

The brokers sought relief in this court by way of a petition for a writ of mandate. Having issued an order to show cause, and having considered the parties' arguments, we conclude that the parties' dispute concerns the brokerage account, and that the arbitration provision applicable to that account, which requires arbitration before the NASD, is enforceable. Accordingly, we direct the trial court to compel arbitration before the NASD.

II. BACKGROUND

In January 2001, Plaintiff and Real Party in Interest Jane Doe opened a "Master Relationship Account" with defendant and petitioner ABC Investment Group ("ABC"), a registered broker-dealer. The account consisted of a brokerage account with ABC and a checking account with Metropolitan Bank (not a defendant). Doe later opened other accounts.

[*Remainder of text of Background omitted.*]

III. DISCUSSION

"On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists." (Code Civ. Proc., §1281.2.) In a petition to compel arbitration, "the moving party, in essence, requests specific performance of a contractual agreement to arbitrate the controversy.... The trial court must determine in advance whether there is a duty to arbitrate the controversy.... This determination 'necessarily requires the court to examine and, to a limited extent, construe the underlying agreement.'" (*Green v Mt. Diablo Hosp. Dist.* (1989) 207 CA3d 63, 69, citations omitted.)

[*Remainder of text of Discussion omitted.*]

IV. DISPOSITION

Let a peremptory writ of mandate issue, commanding respondent court to: (1) vacate its order denying ABC's motion to compel arbitration before the NASD; (2) vacate its order granting Doe's request to compel arbitration before the AAC; and (3) enter a new order granting ABC's motion to compel arbitration before the NASD. The parties are to bear their own costs in connection with this proceeding.

BROWN, J.

We concur:

JONES, P.J.
SMITH, J.

Note: This sample order is presented as an example of form, not content. The names of the parties and the case number information have been changed for publication.

Comment: On orders granting writ petitions, see §§24.15-24.21.

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§28.14 XIV. FORM: ORDER DISCHARGING ALTERNATIVE WRIT AS IMPROVIDENTLY GRANTED

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

JANE DOE,	)	**No. 123456**
Petitioner,	)	
	)	**(Superior Court No. 456789)**
vs.	)	
	)	**(Elizabeth Smythe, Judge)**
SUPERIOR COURT OF	)	
CALIFORNIA FOR THE	)	**ORDER**
COUNTY OF LOS ANGELES,	)	
Respondent.	)	
_____	)	
JOE SMITH,	)	
Real Party in Interest.	)	
_____	)	

THE COURT:

An examination of the exhibits provided by real party in interest in his return to the alternative writ issued herein on April 10, 2008, discloses that petitioner has failed to provide to this court items of evidence presented to the trial court indicating that said court acted well within its discretion in granting real party's motion to expunge the lis pendens recorded by petitioner.

The alternative writ is discharged as improvidently granted, the petition is denied, and the stay of trial court proceedings is vacated.

_____
SMITH, P.J., JONES, J., ROBERTS, J.

Note: This sample order is presented as an example of form, not content. The names of the parties and the case number information have been changed for publication.

Comment: On the discharge of an alternative writ as improvidently granted, see §24.6.

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§28.15 XV. FORM: PEREMPTORY WRIT OF MANDATE

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COURT OF APPEAL—STATE OF CALIFORNIA
FIRST JUDICIAL DISTRICT
DIVISION ONE

PEREMPTORY WRIT OF MANDATE

JANE DOE, **Petitioner,**	**No. 123456**
vs.	**(Superior Court No. 456789)**
THE SUPERIOR COURT OF CALIFORNIA, IN AND FOR THE COUNTY OF ALAMEDA, **Respondent.**	**(Robert Smythe, Judge)**
ABC CORPORATION, **Real Party in Interest.**	

The People of the State of California to the Superior Court of the State of California, in and for the County of Alameda:

The petition for writ of mandate on file herein having been considered, and this court having ordered that a peremptory writ of mandate issue, WE DO COMMAND YOU forthwith upon receipt of this writ to set aside your order of December 6, 2006, denying petitioner's motion for summary judgment and to issue a new order granting the motion, consistent with the views expressed in this court's July 16, 2007 order and in conformance with Code of Civil Procedure §437c(c). Petitioner is awarded its costs, which shall be borne by Real Party ABC Corporation.

By order of the court.

Witness,
the Honorable Oliver Dennis
(Acting) Presiding Justice of the Court of Appeal of the State of California,
First Appellate District, Division One

Attest my hand and the seal of this Court on February __, 2008.

_____
Clerk Administrator

By:_____
Deputy Clerk

Note: This sample writ is presented as an example of form, not content. The names of the parties and attorneys have been changed for publication.

Comment: On writs of mandate, prohibition, and review (certiorari), see §§24.37, 24.42.

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Source: Civil Litigation/California Civil Writ Practice/28 Court of Appeal and Supreme Court Forms/§28.16 XVI. FORM: PETITION FOR REVIEW (CALIFORNIA SUPREME COURT)

§28.16 XVI. FORM: PETITION FOR REVIEW (CALIFORNIA SUPREME COURT)

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STAY REQUESTED
Trial Court-Ordered 30-Day Jury Survey Must Start by February 2, 2007

No. _____

In the Supreme Court of California

Department of Records,
Nonparty and Petitioner,

vs.

Superior Court of San Francisco County
Respondent.

John Doe,
Real Party in Interest.

PETITION FOR REVIEW

From an Order Summarily Denying a Writ Petition
Court of Appeal, First Appellate District, Division Two,
No. A123456

Petition From Order Directing Countywide Juror Survey
San Francisco County Superior Court, No. 987654
Elizabeth Smythe, Judge
415-987-6543

Roberta Jones, SBN 00000 Daniel Peters, SBN 11111 JONES & PETERS LLP 10 Main St., 2nd Fl. San Francisco, CA 94111 Tel: 415-123-4567 Fax: 415-456-7891	Brian Thomas, SBN 22222 Lucy Adams, SBN 33333 THOMAS & ADAMS LLP 100 University Ave., Ste. 100 Oakland, CA 94607 Tel: 510-123-4567 Fax: 510-456-7891	Jane Allen, SBN 44444 LAW OFFICES OF JANE ALLEN 15 Winter Dr., Ste. 200 Walnut Creek, CA 94597 Tel: 925-123-4567 Fax: 925-456-7891
Attorneys for Nonparty & Petitioner Department of Records		

TABLE OF CONTENTS

Page

I. ISSUES PRESENTED

II. WHY REVIEW SHOULD BE GRANTED

III. REASON WHY A STAY SHOULD BE GRANTED

IV. STATEMENT OF THE CASE

[*Copy any headings here.*]

V. LEGAL DISCUSSION

[*Copy argument headings here.*]

VI. CONCLUSION

CERTIFICATE OF WORD COUNT

TABLE OF AUTHORITIES

CASES

[*List cases in alphabetical order by name, giving citation for each under name; give page number(s) on which citations are found to the right of the citation.*]

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OTHER AUTHORITIES

[*List other authorities in alphabetical order by name, giving citation for each under name; give page number(s) on which citations are found to the right of the citation.*]

I. ISSUES PRESENTED

Code of Civil Procedure §205(c) states that "[t]he court may require a prospective juror to complete such additional questionnaires as may be deemed relevant and necessary… to ascertain whether a fair cross section of the population is represented as required by law, if such procedures are established by local court rule."

1. Does this statute authorize every individual trial judge—or only the superior court as a whole, acting through its presiding judge and jury commissioner—to order a countywide survey of prospective jurors?

2. Where no local court rule establishes "such procedures," may a court order a survey of prospective

jurors?

II. WHY REVIEW SHOULD BE GRANTED

A trial judge handling a capital murder prosecution in the San Francisco County Superior Court has ordered that court's Jury Commissioner to conduct a countywide survey of prospective jurors to ascertain whether they represent a fair cross section of the population. The content of the proposed survey is not at issue here. This petition presents more fundamental questions of judicial authority and superior court administration, including whether a single trial judge handling a single case may compel a jury commissioner to conduct a countywide survey of prospective jurors.

John Doe is the defendant in this capital murder case. Several months ago, he began questioning the fairness of the jury selection process in San Francisco County. He subpoenaed the superior court's jury selection records. The trial court upheld the subpoena and the Jury Commissioner complied with the trial court's discovery order in all but one respect. The Jury Commissioner filed a writ petition challenging that portion of the order requiring disclosure of Department of Motor Vehicles records, an apparent violation of Code of Civil Procedure §197(c). (*Garner v Superior Court* (D012345).) The Court of Appeal stayed that portion of the trial court's order, issued an order to show cause, and agreed to consider the petition with a nearly identical petition filed by the jury commissioner for Yolo County. (*Swanson v Superior Court* (D045678)).

The trial court then turned its focus to a different aspect of the jury system in San Francisco County. In response to Doe's three-sentence written request, the trial court ordered the Jury Commissioner to conduct the countywide survey of prospective jurors that is at issue here. But the trial court failed to consider the threshold issue of whether it had the broad authority necessary to do so.

This is an important question concerning the administration of justice, a question that is unanswered by case law. As we explain, however, the Trial Jury Selection and Management Act (Code Civ. Proc., §§190-237) demonstrates that the Legislature intended to preclude a single trial judge from ordering a countywide juror survey. Rather, such a survey can be ordered only by the superior court as a whole, acting through its presiding judge.

One section of the Act, Code of Civil Procedure §205, governs juror questionnaires, and subdivision (c) authorizes a juror survey to ascertain whether the jury pool represents a fair cross section of the community. But section 205, subdivision (c), confers no authority on individual trial judges. This interpretation is confirmed by the statute's plain language, the relationship between its subdivisions, its legislative history, and the structure and purpose of the Act as a whole.

Onerous consequences to superior court administration could flow from a contrary interpretation. This petition concerns one survey ordered by one judge. But the authority for that order—if left intact by this Court—could lead different judges in different cases to order different surveys. Prospective jurors could be deterred or become confused if they were required to complete multiple surveys, particularly if they posed conflicting questions. In addition, the administration of the jury system would be severely compromised if even a fraction of the 128 judges of the San Francisco Superior Court insisted on their own surveys. To avoid subjecting jury commissioners and prospective jurors to needless work and conflicting directives, the Legislature vested authority for conducting fair cross section surveys in the superior court as a whole, which can speak with one voice through its presiding judge, jury commissioner, and local rules.

Although it has already agreed to decide one aspect of Doe's inquiry into the San Francisco County Superior Court's jury system, the Court of Appeal summarily denied the Jury Commissioner's writ petition challenging the juror survey order and no court has squarely addressed the pertinent portions of the Trial Jury Selection and Management Act. This Court should grant review because the petition presents issues of statewide importance that affect the daily operations of the superior courts of this state.

These issues should not wait for resolution. There is little doubt that this trial court judge will continue to exercise his authority over the County's jury system—"whatever that ultimate outcome is in this case, the system is going to benefit from a tuneup" (Exh. K, p. 306)—even as he refuses to acknowledge the limits of his authority—"I haven't historically gotten too caught up in the procedural hoops I think. I would rather get to the substance of the matter." (*Ibid.*)

Moreover, neither the Department of Records nor any jury commissioner will ever have an opportunity to

appeal from a trial court's juror survey order because only the parties in a criminal case may appeal. (See Pen. Code, §1235(a).) These issues must be presented in a writ petition, and the Jury Commissioner's writ petition provides a suitable vehicle for resolving these questions of judicial authority and superior court administration. Indeed, because this is the Jury Commissioner's only chance to obtain appellate review, the Court of Appeal's summary denial of his writ petition may have been an abuse of discretion. (See *Powers v City of Richmond* (1995) 10 Cal.4th 85, 113-114.)

For these reasons, this Court should either grant review and decide the issues presented, or grant review and transfer the matter to the Court of Appeal with directions to consider the Jury Commissioner's writ petition on the merits. (See Cal. Rules of Court, rules 8.500(b)(1) & (b)(4), 8.528(a) & (d).)

III. REASON WHY A STAY SHOULD BE GRANTED

The Jury Commissioner believes that the trial court abused its discretion and exceeded its jurisdiction in ordering him to conduct a countywide survey of prospective jurors. But the Jury Commissioner will have no choice but to comply with the trial court's order unless this Court intervenes. Because the trial court ordered the Jury Commissioner to complete the 30-day juror survey by March 5, 2007 (Exh. K, pp. 309-311), he could not postpone starting the survey beyond February 2, which is even before the due date for any answer to this petition. (See Cal. Rules of Court, rule 8.500(e)(4).) Thus, to allow time to consider this petition before the Jury Commissioner must begin complying with the trial court's order, this Court should stay the order pending final action on this petition.

IV. STATEMENT OF THE CASE

A. THE TRIAL COURT GRANTS JOHN DOE'S REQUEST FOR DISCOVERY OF JURY SELECTION RECORDS. THE COURT OF APPEAL ISSUES A STAY AND AN ORDER TO SHOW CAUSE WHEN THE JURY COMMISSIONER CHALLENGES PART OF THE DISCOVERY ORDER.

John Doe is a defendant in a pending capital murder case in the San Francisco County Superior Court. (Exh. A, pp. 1-2.) He served a subpoena duces tecum on the superior court's jury commissioner (see Gov. Code, §71620(b)), demanding copies of jury selection records for San Francisco County so that his own experts could review the data and prepare for a potential jury selection challenge. (Exh. B, pp. 3-11; Exh. C, pp. 42-45, 53.)

The trial court upheld the subpoena and ordered the Jury Commissioner to produce his records subject to a protective order. (See Exh. E, p. 215; Exh. F. p. 226; Exh. G, pp. 242-243.) The Jury Commissioner subsequently provided Doe nearly all the jury selection records he sought. (See Exh. H, pp. 274-275.) But the Jury Commissioner filed a writ petition challenging the portion of the trial court's order requiring him to disclose Department of Motor Vehicles records. (See *Garner v Superior Court* (D012345).) On November 20, 2006, the Court of Appeal stayed that portion of the order, and on December 6 that court issued an order to show cause.

[*Remainder of text of Statement of the Case omitted.*]

V. LEGAL DISCUSSION

A. THIS COURT SHOULD GRANT REVIEW TO DECIDE WHETHER, UNDER CODE OF CIVIL PROCEDURE SECTION 205, SUBDIVISION (c), ONLY THE SUPERIOR COURT AS A WHOLE—NOT INDIVIDUAL JUDGES OF THAT COURT—MAY ORDER SURVEYS OF PROSPECTIVE JURORS TO ASCERTAIN THE FAIRNESS OF THE JURY POOL.

1. The statute's plain language demonstrates that only the superior court as a whole is authorized to conduct a survey to ascertain the fairness of the jury pool.

A single trial court judge has ordered the Jury Commissioner to conduct a countywide survey of prospective jurors. This Court should decide the important issue of whether one trial judge—and thus each individual trial judge in the state—has such broad authority. There is no case law on the issue, but all indications are that the Legislature intended to restrict power over matters affecting the entire court to the court as a whole acting through its presiding judge.

[*Remainder of text from Section A omitted.*]

B. THIS COURT SHOULD GRANT REVIEW TO DETERMINE WHETHER A COURT MAY ORDER A SURVEY OF PROSPECTIVE JURORS TO ASCERTAIN THE FAIRNESS OF THE JURY POOL IN THE ABSENCE OF A LOCAL COURT RULE SPECIFYING THE PROCEDURE FOR CONDUCTING A SURVEY.

Under Code of Civil Procedure §205(c), a court may order a fair cross section juror survey only "if such procedures are established by local court rule." The Legislature apparently decided that courts should not exercise their authority to order juror surveys in the absence of a specific protocol for conducting them described in local court rules. This requirement is sensible. A '"[p]rospective juror' means a juror whose name appears on the master list" (Code Civ. Proc., §194(i)); thus any survey of "prospective jurors" will necessarily include persons who never come to the attention of a particular trial judge in a particular courtroom. Because such a survey is a courtwide endeavor, the Legislature has required that it be performed under procedures adopted by the full court in its local rules.

In this case, there is no local rule establishing a protocol for administering the survey ordered by the trial court. The Superior Court has adopted a local rule requiring attorneys who propose jury questionnaires to use cover sheets provided by the court. (Super. Ct. San Francisco County, Local Rules, rule 0.0.0.) This local rule establishes a formatting requirement comparable to a local rule on page limits for criminal motions (*Id.*, rule 0.0.1), but it does not implement section 205, subdivision (c), by establishing a protocol for fair cross section juror surveys.

This Court should grant review and decide whether, in the absence of a local court rule, any court can order a fair cross section juror survey.

VI. CONCLUSION

This Court should grant review and decide the issues presented. In the alternative, the Court should grant review and transfer the matter to the Court of Appeal with directions to consider on the merits the relief sought by the Jury Commissioner.

DATED: January 15, 2007

Respectfully submitted,

JONES & PETERS LLP
THOMAS & ADAMS LLP
LAW OFFICES OF JANE ALLEN

By: _____
Roberta Jones

Attorneys for Nonparty and Petitioner Department of Records

CERTIFICATE OF WORD COUNT

The foregoing Petition for Review contains 8190 words (excluding tables and this certificate). In preparing this certificate, I have relied on the word count generated by Microsoft Office Word 2003.

Executed on January 15, 2007, at San Francisco, California.

_____
Roberta Jones

Note: This sample brief has not been updated for substantive legal accuracy. It is presented as an example of form, not content, and should not be presumed accurate with regard to the state of the law. The names of the parties and attorneys have been changed for publication.

Comment: The format of attorney-drafted court papers is governed by Cal Rules of Ct 8.144, 8.204. In addition, petitions for review filed in the California Supreme Court must comply with Cal Rules of Ct 8.504. If a stay is requested, the petition must comply with Cal Rules of Ct 8.116. On the many specific formatting details required, see

§§18.5-18.20, 27.20. On drafting petitions for review, see §27.25.

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§28.17 XVII. FORM: AMICUS CURIAE LETTER BRIEF

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January 28, 2008

Chief Justice Ronald M. George
and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-7303

Re: ***Jones v Superior Court of Contra Costa County***
Supreme Court No.: S123456
Amicus Curiae Letter in Support of Petition for Review

TO THE HONORABLE RONALD GEORGE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Human Rights Advocacy Group, Inc. respectfully submits the following amicus curiae letter in support of the petition for review in the above case. This letter is submitted under California Rules of Court, rule 8.500(g).

INTEREST OF AMICUS CURIAE

Human Rights Advocacy Group, Inc. (HRAG) is a private nonprofit agency established under federal law to protect, advocate for, and advance the human, legal, and service rights of Californians with disabilities. HRAG works in partnership with people with disabilities, striving toward a society that values all people and supports their rights to dignity, freedom, choice, and quality of life.

HRAG works with people with all categories of disability—sensory, physical, medical, learning, cognitive, genetic, emotional, and psychiatric. HRAG's services are client-directed, and include direct representation in administrative and court proceedings. HRAG has extensive experience advocating for Californians with disabilities under the Disabled Persons Act and other state and federal antidiscrimination statutes.

HRAG has a direct interest in the outcome of this case. The organization represents numbers of Californians whose right to access goods and services, right to be free from discrimination, and right to be fully included and integrated in their communities are contingent on the interpretation, application, and enforcement of State antidiscrimination statutes, including the Disabled Persons Act. HRAG also has an interest in ensuring that individuals have access to the full scope of remedies intended by the California Legislature when they experience discrimination as prohibited by these laws.

DISCUSSION

The State of California has required buildings to be designed to provide access to persons with disabilities for 35 years. In 1968, Government Code §4450 was enacted to require accessibility for publicly funded buildings and, in 1969, Health & Safety Code §19955 et seq. was added to deal with privately funded public accommodations. Thus, for more than 20 years, disability access provisions have been not only part of the State's building code (see Cal. Code Regs., tit. 24) but also available and familiar to architects and contractors licensed in this State. Additionally, the Americans With Disabilities Act's access guidelines have been in effect for more than 10 years. (See Appendix A of 28 C.F.R. §36, called the "ADA Accessibility Guidelines").

Violations of these longstanding accessibility laws and standards—including the undisputed violation of California Code of Regulations, title 24, §1129B—cannot be excused, ignored, or justified. Businesses must be

held liable for the damages that result from the blatant disregard of these well-established accessibility standards. To do otherwise will encourage noncompliance by businesses, frustrate the legislative intent and mission of State disability discrimination law, and render unachievable its vision of a more accessible society.

Through Ms. Jones's petition, which involves claims under the Disabled Persons Act and its implementing standards (see Cal. Code Regs., tit. 24), this Court has been presented with an issue of first impression in which HRAG takes particular interest. That is, whether the Disabled Persons Act excludes "personal injury" damages. This issue is of sufficient importance, particularly to Californians with disabilities, to support review under California Rules of Court, rule 8.500(b).

The Disabled Persons Act expressly provides for the recovery of "actual damages." (Civ. Code, §54.3(a)). "[T]he phrase 'actual damages'… means compensatory damages," and "compensatory damages include nonquantifiable general damages for emotional distress and pecuniarily measurable special damages for out-of-pocket losses." (*Walnut Creek Manor v Fair Employment and Hous. Comm'n* (1991) 54 C3d 245, 255.)

The trial court's ruling that the Act "was not intended by the Legislature to provide for personal injury damages" (App. 224) was entirely without reason or support. Had the Legislature intended to restrict damages available under the Act, they could have and would have done so. Moreover, there have been a number of attempts by the Legislature to limit liability under the Act and none of them have included proposed limitation on the "type" of damages recoverable. Rather, these bills have focused on issues including notification (*e.g.*, 2005's AB 855; 2004's AB 69 and AB 2594; 2003's AB 209; and 2001's AB 1040), and the type of violations/discrimination for which damages are available (*e.g.*, 2005's AB 20). Ninth Circuit case law also supports a determination that personal injury damages are available under the Act. (See, *e.g., Molski v Gleich* (9th Cir 2003) 318 F3d 937, 945-46 ["[a]ctual damages," for purposes of the Act, means compensatory damages, including general noneconomic damages and special economic damages—potentially covering, among other things, "physical injury" and "emotional distress"].) Notably, there is no case law to the contrary.

If the trial court's decision is permitted to stand, it will run afoul of legislative intent. It will directly, and without justification, limit the remedies available to persons with disabilities who have experienced discrimination, and will encourage businesses to wait until they are sued to make their establishments accessible. This, in turn, completely frustrates the purpose and goals of the Disabled Persons Act.

On the basis of the foregoing, HRAG respectfully requests that this Court grant Ms. Jones's petition for review.

Respectfully submitted,

_____
Jane Doe
Human Rights Advocacy
Group, Inc.

Note: This sample letter brief has not been updated for substantive legal accuracy. It is presented as an example of form, not content, and should not be presumed accurate with regard to the state of the law. The names of the parties and attorneys have been changed for publication.

Comment: The format of amicus curiae letters is governed by Cal Rules of Ct 8.500(g)(2).

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§28.18 XVIII. FORM: PETITION FOR WRIT OF SUPERSEDEAS

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IMMEDIATE TEMPORARY STAY REQUESTED OF ORDER MODIFYING CUSTODY
CRITICAL DATE: DECEMBER 22, 2007

No. _____
(Notice of Appeal Filed 11/21/07; appeal not yet docketed)

In the Court of Appeal of the State of California
First Appellate District, Division One

IN RE MARRIAGE OF JOHN DOE AND JANE DOE

JOHN DOE,
Petitioner and Appellant,

vs.

SAN MATEO COUNTY SUPERIOR COURT
Respondent.

JANE BENDER,
Real Party in Interest and Appellee.

PETITION FOR WRIT OF SUPERSEDEAS

_____

Appeal From an Order Modifying Custody of Minor Children
San Mateo County Superior Court, No. FAM 123456 (Dept. 00)
Honorable Robert Smythe, Commissioner,
Telephone 650-123-4567

Roberta Jones (SBN 00000) Daniel Peters (SBN 11111) JONES & PETERS LLP 100 Main St., 2nd Fl. San Francisco, CA 94111 Tel: 415-123-4567 Fax: 415-456-7891	Brian Thomas (SBN 22222) Lucy Adams (SBN 33333) THOMAS & ADAMS LLP 200 Wilshire Blvd., Ste. 250 Los Angeles, CA 90025 Tel: 310-123-4567 Fax: 310-456-7891
Attorneys for Petitioner and Appellant John Doe	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rules of Court, rule 8.488, the undersigned, counsel for Petitioner and Appellant John Doe, certifies that she knows of no other entity or person other than the parties to this proceeding who has a financial or other interest in its outcome.

Executed on December 6, 2007, at San Francisco, California.

Roberta Jones

TABLE OF CONTENTS

Page

INTRODUCTION: WHY WRIT RELIEF SHOULD BE GRANTED

PETITION

PRAYER

VERIFICATION

MEMORANDUM

[*Copy your argument headings here.*]

CONCLUSION

CERTIFICATE OF WORD COUNT

TABLE OF AUTHORITIES

CASES

[*List cases in alphabetical order by name, giving citation for each under name; give page number(s) on which citations are found to the right of the citation.*]

STATUTES

[*List statutes in alphabetical/numerical order; give page number(s) on which citations are found to the right of the citation.*]

CONSTITUTIONAL PROVISIONS

[*List constitutional provisions in alphabetical/numerical order, giving citation for each under name; give page number(s) on which citations are found to the right of the citation.*]

COURT RULES

[*List court rules in numerical order, giving citation for each under name; give page number(s) on which citations are found to the right of the citation.*]

OTHER AUTHORITIES

[*List other authorities in alphabetical order by name, giving citation for each under name; give page number(s) on which citations are found to the right of the citation.*]

I. INTRODUCTION

A writ of supersedeas is available to stay enforcement of a trial court order pending appeal whenever an appellant will raise substantial questions on appeal and would be deprived of the benefits of a successful appeal in the absence of supersedeas. A temporary and immediate stay pending supersedeas is similarly available whenever the appellant would otherwise be denied the relief he or she would likely obtain by supersedeas. As will appear here, petitioner John Doe is entitled to both supersedeas and a temporary stay pending the determination of his petition.

The October 23, 2007 order from which petitioner has appealed ordered a modification of custody of the twin 11-year-old children of petitioner and his former wife, real party in interest Jane Bender (formerly Doe), from sole legal and physical custody by petitioner to joint legal custody by petitioner and real party.

Nine years ago, the San Mateo County Superior Court dissolved petitioner's and real party's marriage. One year later, after a trial, the court awarded petitioner sole legal and physical custody, in part because of real party's history of abuse of drugs and alcohol. On four occasions over the ensuing years, real party moved for modification of custody. Under settled law, to succeed she had to prove that there had been a substantial change of circumstances affecting the children and that modification of custody was essential to their welfare. The court denied those motions (or real party withdrew them), and sanctioned her for filing two of them, because she was unable to prove a substantial change of circumstances: she had continued to abuse drugs and alcohol and was therefore unable to prove year-long sobriety, which she had stipulated was a necessary, but not sufficient, condition for changed circumstances. Then, in 2004 and 2005, respectively, the two twins, were admitted to a residential therapeutic treatment program for needed care.

Earlier this year, real party filed her fifth post-trial motion for modification of custody. This time, however, the trial court modified custody, awarding her joint legal, but not physical, custody, and requiring the children to be removed by December 22, 2007 from their current stable custody arrangements and to be placed in petitioner's home and enrolled, immediately, in public middle school without the support of a residential therapeutic treatment program, with regular visitation by real party.

Petitioner has appealed from that order, and now seeks supersedeas to stay its enforcement pending appeal. He also seeks a temporary and immediate stay pending the final disposition of this supersedeas petition.

Supersedeas is appropriate because petitioner will raise substantial questions on appeal. First, the trial court committed reversible error by failing to issue a requested written statement of decision or statement of reasons, as the law requires. Moreover, its oral statement failed to show, as the law requires, that real party proved there was a substantial change of circumstances affecting the children and modification of their current stable custody arrangements was essential to their welfare. Second, real party failed to show that there was such a substantial change and that the children's welfare required a modification in custody. Real party never offered substantial evidence of year-long sobriety and in any event did not offer any evidence of her fitness to assume joint legal custody. In addition, she offered no evidence that the children's welfare required a change from their current stable custody arrangements.

Supersedeas is also appropriate because, in its absence, petitioner would be deprived of the benefits of his appeal—namely, the preservation of the children's current stable custody arrangements. Without supersedeas, the trial court's order modifying custody would change the children's custody arrangements abruptly and would thereby set them back irreparably, contravening this State's policy to protect such arrangements.

Not only is supersedeas appropriate, so too is a temporary and immediate stay. Without such a stay, petitioner would be denied the relief he would likely obtain by supersedeas. To minimize the setbacks threatened, the children would require substantial preparation for the abrupt change looming against them. But such substantial preparation, which would itself be unsettling, would likely itself produce setbacks. Accordingly, a temporary and immediate stay is warranted to preserve the status quo pending the final determination of this petition.

Because both supersedeas and a temporary and immediate stay are warranted, this Court should grant petitioner the relief he seeks and stay enforcement of the trial court's order modifying custody pending an expedited appeal.

II. PETITION

Petitioner John Doe petitions this Court for a writ of supersedeas to stay enforcement, pending appeal, of the October 23, 2007 order of Respondent San Mateo County Superior Court (Hon. Robert Smythe, Commissioner), entered in *In re Marriage of John Doe and Jane Doe*, San Mateo County Superior Court No. FAM 0123456, modifying the custody of two minor children of petitioner and real party in interest Jane Bender (formerly Doe), namely, Joey and Emily Doe. Petitioner also asks the Court to immediately stay enforcement of that order temporarily, pending final determination of his petition for writ of supersedeas.

To these ends, petitioner presents the following allegations, which constitute a statement of the case including a summary of the material facts (Cal. Rules of Court, rule 8.112(a)(4)(A)):

1. Petitioner is John Doe, the petitioner in *In re Marriage of John Doe and Jane Doe*, San Mateo County Superior Court No. FAM 0123456, a proceeding for dissolution of marriage. (1 App. 47; "App." refers to the five-volume Appendix that petitioner is lodging in support of this Petition.)

2. Respondent is the San Mateo County Superior Court, which entered the order modifying custody challenged here. (4 App. 907-09.)

3. Real party in interest is Jane Bender, formerly Doe, the respondent in *In re Marriage of John Doe and Jane Doe*, San Mateo County Superior Court No. FAM 0123456. (1 App. 47.)

4. In 1996, petitioner filed a petition seeking dissolution of his marriage to real party and resolution of matters encompassing the custody of their children, twins born in 1995, arising in part from real party's history of abuse of drugs and alcohol. (2 App. 317-19, 394.)

5. In 1997, petitioner and real party's marriage was dissolved, and temporary custody arrangements were made for the children. (2 App. 394.)

6. In 1998, following a trial, petitioner was awarded sole legal and physical custody of the children; real party was allowed visitation, but in the face of her continuing abuse of drugs and alcohol was ordered to submit to substance abuse testing immediately upon the direction of an authorized person—so-called "stat testing." (2 App. 317-18, 399.)

7. A month later in 1998, real party filed her first post-trial motion for modification of custody. (2 App. 318-19, 388-91.) The motion proved unsuccessful because of real party's continuing abuse of drugs and alcohol. (*Id.*) Provisions for supervised visitation were put, and would remain, in place, and stat testing was maintained, and would be maintained, in effect. (*Id.*)

8. In 1999, real party filed her second post-trial motion for modification of custody. (2 App. 319.) This motion too proved unsuccessful because of real party's continuing abuse of drugs and alcohol. (*Id.*)

[*Allegations 9-21 omitted.*]

22. On October 23, 2007, shortly after the presentation of evidence and argument, respondent made an oral order, memorialized by a written minute order, in which it: (1) modified the custody arrangement concerning the twin children from sole legal and physical custody by petitioner to joint legal custody with respondent; (2) required the children to be removed from the residential treatment program no later than December 22, 2007; (3) required the children to live with petitioner but permitted respondent an unsupervised weekly dinner visit on Wednesdays and unsupervised visitation on alternating weekends; (4) mandated that the children attend Washington Middle School in Springfield and prohibited their enrollment in a private or boarding school; (5) appointed counsel for the children; and (6) discontinued stat and all other drug and alcohol testing for real party but directed her to attend a 16-month anger-management program. (4 App. 907-09.)

23. Also on October 23, 2007, in connection with its oral order, respondent orally stated that (1) real party was angry and frustrated and had an identified problem with anger but that she was sober; (2) petitioner wished to be in control, his exercise of sole legal custody had not worked, and he was not good at sharing information with real party; (3) it was time for the twin children to have a healthy relationship with both their parents and there was no reason not to order joint legal custody; and (4) real party could have the prescribed visitation with the children without monitoring. (4 App. 979.) In the course of its oral statement, respondent queried why the twins were at the residential treatment program and found they no longer needed to be there. (*Id.*) Respondent gave no explanation or reason for discontinuing stat and all other drug and alcohol testing for real party or for directing her to attend the 16-month anger-management program. (*Id.*)

24. On November 20, 2007, petitioner moved to stay enforcement of respondent's October 23, 2007 order modifying custody pending appeal. (4 App. 910-55; see 4 App. 980-87.) Respondent set a hearing on that motion for December 18, 2007. (*Id.*) As of today, November 29, 2007, real party has not filed opposition.

25. On November 21, 2007, petitioner filed a notice of appeal from respondent's October 23, 2007 order modifying custody. (4 App. 953-54.)

26. On November 22, 2007, petitioner applied to have respondent conduct the hearing on his motion to stay enforcement of respondent's October 23, 2007 order modifying custody pending appeal on shortened time. (4 App. 959-71.) As of today, November 29, 2007, real party has not filed opposition.

27. As of today, November 29, 2007, respondent has not acted on petitioner's application to conduct the hearing on his motion to stay enforcement of respondent's October 23, 2007 order modifying custody pending appeal on shortened time. (4 App. 980, 983-84.) In view of the urgency of this matter, and in order to allow this Court to consider and decide it in an orderly fashion, petitioner is filing this petition at this time. (4 App. 983-84.) Should respondent act on petitioner's application to conduct the hearing on his motion on shortened time while this petition is pending, he will inform this Court immediately that it has acted and also what action, if any, it has taken. (4 App. 984.)

28. Petitioner's appeal from respondent's October 23, 2007 order modifying custody raises substantial questions because respondent failed to issue the required statement of decision or statement of reasons in writing and because real party failed to present sufficient evidence to support the order—that is, to support the legally required elements that there had been a substantial change of circumstances affecting the twin children and that modification of their current stable custody arrangements was essential to their welfare.

29. Without supersedeas, petitioner would be deprived of the benefits of success on appeal because the twins' current stable custody arrangements would be upset irreparably.

30. In addition, petitioner will not benefit from the relief sought in this petition unless this Court issues an immediate stay of respondent's October 23, 2007 order modifying custody pending the final determination of this petition. Even if proceedings on the petition proceed expeditiously, they will not conclude in time to allow the staff at the residential treatment program a meaningful opportunity to mitigate the detriment the twins will suffer from preparations necessary to comply with the order or to allow them a meaningful opportunity to benefit from the staff's efforts in this regard. Furthermore, any attempt to mitigate will likely prove unsuccessful, since they need to continue in treatment through the planned discharge date of March 2008.

31. Petitioner explains the points made in the three preceding paragraphs in greater detail in the accompanying supporting memorandum, incorporated herein.

32. This petition is timely, inasmuch as (a) no statutory deadline applies; (b) the order challenged here issued only on October 23, 2007; and (c) petitioner attempted to obtain relief in the trial court by way of a motion to stay enforcement of that order (which also involved procuring contemporaneous declarations from the twins' therapists at the residential treatment program), which took more than a week, including the intervening Thanksgiving holiday.

Therefore, petitioner prays that:

1. This Court immediately issue a temporary stay of enforcement of respondent's October 23, 2007 order modifying custody, pending final determination of this petition;

2. This Court, after providing real party the opportunity to file opposition and after conducting a hearing (see Cal. Rules of Court, rule 8.112(b)(3) and (d)), cause issuance of a writ of supersedeas staying enforcement of respondent's October 23, 2007 order modifying custody pending appeal; and

3. This Court award petitioner costs and such other relief as may be appropriate.

DATED: December 6, 2007

Respectfully submitted,

JONES & PETERS LLP
THOMAS & ADAMS LLP

By: _____

Roberta Jones

Attorneys for Petitioner and Appellant John Doe

III. VERIFICATION

I, Roberta Jones, declare:

1. I am an attorney admitted to practice before the courts of this state and am a counsel in the law firm Jones & Peters LLP, which together with the law firm Thomas & Adams LLP, represents petitioner John Doe. I make this verification because I am familiar with the proceedings giving rise to this Petition.

2. I have read this Petition, and either know its allegations to be true or believe them to be true based on the documents contained in the accompanying Appendix. Further, the Appendix contains true and correct copies of documents filed or lodged in respondent San Mateo County Superior Court relating to the order in *In re Marriage of John Doe and Jane Doe*, San Mateo County Superior Court No. FAM 0123456, entered on October 23, 2007, modifying custody, which is the subject of this Petition.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this Verification was executed in San Francisco, California, on December 6, 2007.

_____
Roberta Jones

IV. MEMORANDUM

A. THIS COURT SHOULD ISSUE A WRIT OF SUPERSEDEAS STAYING ENFORCEMENT, PENDING APPEAL, OF THE TRIAL COURT'S OCTOBER 23, 2007 ORDER MODIFYING CUSTODY BECAUSE PETITIONER'S APPEAL RAISES SUBSTANTIAL QUESTIONS AND HE WOULD OTHERWISE BE DEPRIVED OF THE BENEFITS OF SUCCESS ON APPEAL

1. A Writ of Supersedeas Is Appropriate When the Petitioner's Appeal Raises Substantial Questions and the Petitioner Would Otherwise Be Deprived of the Benefits of Prevailing on Appeal

This Court has the power to direct the issuance of a writ of supersedeas to stay enforcement of a trial court order pending appeal, including an order modifying custody. (*In re Christy L.* (1986) 187 CA3d 753, 758; *Mancini v Superior Court* (1964) 230 CA2d 547, 553.) Its authority to do so arises from its "inherent power" to do whatever is "'necessary or proper to the complete exercise of its appellate jurisdiction.'" (*Deepwell Homeowners' Protective Ass'n v City Council of Palm Springs* (1965) 239 CA2d 63, 65 (quoting *Food & Grocery Bureau of S. Cal. v Garfield* (1941) 18 C2d 174, 177); see, *e.g.*, *Nuckolls v Bank of California, National Ass'n* (1936) 7 C2d 574, 578.) California Code of Civil Procedure §923 recognizes this power and places no limit on its exercise. (Code Civ. Proc., §923 [referring to "power of a reviewing court… to issue a writ of supersedeas"]; see, *e.g.,* Cal. Rules of Court, rules 8.112, 8.116 [setting out procedures for supersedeas].)

As prerequisites to the seeking of supersedeas, a petitioner should exhaust any available trial court remedies to obtain a stay of the order in question (see, *e.g.*, *Reed v Superior Court* (2001) 92 CA4th 448, 455; *Mancini v Superior Court, supra,* 230 Cal.App.2d at p. 553), and should file a notice of appeal from that order (*Solomon v Solomon* (1952) 110 CA2d 660, 662; see *In re Christy L., supra,* 187 Cal.App.3d at p. 759 [appeal must remain pending at time of issuance of supersedeas]).

To establish the appropriateness of supersedeas, moreover, the petitioner must show that he or she will raise "substantial questions… upon the appeal." (*Deepwell Homeowners' Protective Ass'n v City Council of Palm Springs, supra,* 239 CA2d at p. 67; accord, *Nuckolls v Bank of California, National Ass'n, supra,* 7 C2d at p. 578 ["probable error"]; *Reed v Superior Court, supra,* 92 CA4th at p. 455 ["arguably meritorious claim"].) The petitioner need not demonstrate he or she will *succeed* on appeal, inasmuch as it is "not the function of [the appellate] court in passing upon an application for supersedeas to pass upon the merits of the [order] appealed from; the validity of such [order] is to be reviewed on the appeal therefrom." (*Deepwell Homeowners' Protective Ass'n v City Council of Palm Springs, supra,* 239 CA2d at p. 67; see *Solomon v Solomon, supra,* 110 CA2d at p. 662 [implying as much].) Instead, the petitioner need only show the questions to be raised on appeal are "substantial."

The petitioner must also show he or she would be "depriv[ed]" of the "fruits" of a "successful" "appeal" if the order is not stayed by supersedeas. (*Deepwell Homeowners' Protective Ass'n v City Council of Palm Springs, supra,* 239 CA2d at p. 65; see, *e.g.*, *Reed v Superior Court, supra,* 92 CA4th at p. 455 [supersedeas may issue to prevent "prejudice"]; *Mills v County of Trinity* (1979) 98 CA3d 859, 861 [supersedeas should issue to prevent "irreparable injury"].) On this point, this Court must balance any harm that might arise from issuance of supersedeas against any harm that might arise from nonissuance. (See, *e.g.*, *id.* at p. 861 [balancing harms on issuance and nonissuance of supersedeas]; see also *Nuckolls v Bank of California, National Ass'n, supra,* 7 C2d at p. 578 [finding, on balance, "risk of destroying rights" on issuance of supersedeas]; *Julian v Schwartz* (1935) 2 C2d 280, 281-82 [finding, on balance, no "substantial damages" on issuance of supersedeas].)

2. Petitioner's Appeal Raises Substantial Questions Concerning the Correctness of the Trial Court's Order Modifying Custody

Petitioner has satisfied the prerequisites for supersedeas of the trial court's October 23, 2007 order modifying custody. He filed a notice of appeal from that order on November 21, 2007. (4 App. 953-54.) He also exhausted available trial court remedies by moving for an immediate stay in that court—but to no avail, since as of today the court has not acted. (4 App. 980, 983-84.)

Moreover, petitioner's appeal raises substantial questions. To understand why, some background concerning the law governing modification of custody is useful. (See *Mancini v Superior Court, supra,* 230 CA2d at p. 555-56 [implying that issuance of supersedeas to stay enforcement of order modifying custody depends on law governing modification of custody].)

[*Remainder of text from Section 2 omitted.*]

3. Without Supersedeas, Petitioner Would Be Deprived of the Benefits of His Success on Appeal Because Stable Custody Arrangements Would Be Upset Irreparably

Not only does petitioner's appeal raise substantial questions, but without supersedeas he would be deprived of the benefits of his success on appeal. Supersedeas is appropriate for this reason as well.

Unlike in most other matters, the benefits of success on appeal here consist of preserving the twin children's current stable custody arrangements for their own welfare. If supersedeas issues, they would remain in a caring and therapeutic environment—where they are enjoying stability and are making steady progress in integrating their feelings and attitudes toward themselves, petitioner, real party, and others—until they are ready to transition to another environment. As Emily's therapist stated in her November 16, 2007 declaration, Emily has made a "great deal of progress in treatment" and "uses staff and therapy well." (4 App. 928.) She should be ready to enroll in an appropriate boarding school—where she believes she will be going—in the near future. (*Id.*) As for Joey, his therapist states in his November 16, 2007 declaration that Joey has continued to make progress over the past several months but "has only recently been able to be open and clear with [real party]… about his feelings." (4 App. 926.) He needs further time—it would be in his "best interests to… remain in treatment through the planned discharge date of March 2008"—to continue along this positive path. (*Id.*)

By contrast, in the absence of supersedeas, the children would experience untoward consequences if the trial court's October 23, 2007 order modifying custody were implemented by the prescribed December 22 date—including immediate enrollment in a public middle school without the support of a residential therapeutic treatment program. Given Emily's repeated statements to staff that she does not wish to live with or have any other appreciable contact with real party in the near future, she would be at risk of experiencing the hostility that sent her into treatment in the first place, and of exhibiting the aggression and dangerous behavior that attended that hostility. (4 App. 928.) As her therapist explains, "[s]he needs time to adjust to the [trial court's] decision [modifying custody] and make some sort of peace with [real party] if she is to be successful in post-discharge living arrangement." (*Id.*)

[*Text omitted*]

In short, without supersedeas, implementing the trial court's October 23, 2007 order modifying custody by the prescribed December 22 date would produce setbacks for the children that would be irreparable in the sense it will take longer to return them to their present condition before they can progress. The harm that might arise from issuance of supersedeas, moreover, would not outweigh the harm that would arise from

nonissuance. For one thing, no harm threatens the children. Whether any harm threatens *real party* seems immaterial, since in custody-modification matters the "emphasis is not on the parents, but on the child[ren]." (*In re Marriage of Melville, supra,* 122 CA4th at p. 611.) In any event, any harm likely to befall real party would be reducible to that caused by "delay." (*Estate of Murphy* (1971) 16 Cal.App.3d 564, 569.) But that kind of harm could be "mitigated by expeditious prosecution and determination of the appeal." (*Id.*)

Here, petitioner intends to pursue his appeal expeditiously, is amenable to any reasonable briefing schedule, and knows this Court will decide his appeal in the same fashion. Moreover, during the limited period the appeal would be pending, real party would continue to be allowed to visit the children freely to develop her relationship with them in a positive manner, enabling their orderly transition from the treatment program to be in her best interests as well as theirs.

In short, without supersedeas petitioner would be deprived of the benefits of success on appeal, because by the time he prevailed (even if expeditiously), the children's now-stable custody arrangements would have been upset irreparably.

B. THIS COURT SHOULD IMMEDIATELY STAY THE TRIAL COURT'S ORDER MODIFYING CUSTODY PENDING THE FINAL DETERMINATION OF THIS PETITION.

This Court may temporarily stay enforcement of any appealed order pending final determination of a petition seeking supersedeas. (See *Mills,* 98 Cal.App.3d at p. 861 [temporarily staying enforcement of order pending determination of supersedeas petition].) Here, too, the law recognizes this power and places no limit on its exercise. (See Code Civ. Proc., §923 [reviewing court has power "to make any order appropriate to preserve the status quo, the effectiveness of the judgment subsequently to be entered, or otherwise in aid of its jurisdiction"]; see, *e.g.,* Cal. Rules of Court, rule 8.112(c)), 8.116 [setting out procedures for stay pending supersedeas].)

Without a temporary and immediate stay, petitioner would be denied the relief he would likely obtain by supersedeas. As things stand, the children require substantial preparation, through their therapists and others, for the attendant abrupt change in environment that the trial court's October 23, 2007 order modifying custody requires. (4 App. 926, 928.) That preparation itself would likely produce setbacks, since preparing for the abrupt change the October 23 order requires by December 22 would itself be unsettling. As explained, the children's welfare requires the Court to issue supersedeas to preserve the status quo pending an appeal that raises substantial issues. A temporary and immediate stay is therefore needed to preserve the status quo pending the final determination of this petition. The threat of irreparable harm that petitioner has shown to justify supersedeas pending appeal likewise justifies a temporary and immediate stay pending the disposition of this petition.

V. CONCLUSION

For these reasons, this Court should: (1) immediately issue a temporary stay of respondent's October 23, 2007 order modifying custody, pending final determination of this petition; (2) after soliciting opposition and conducting a hearing, cause issuance of a writ of supersedeas staying enforcement of that order pending appeal; and (3) award petitioner costs and such other relief as may be appropriate.

DATED: December 6, 2007

Respectfully submitted,

JONES & PETERS LLP
THOMAS & ADAMS LLP

By: _____
Roberta Jones

Attorneys for Petitioner and Appellant John Doe

CERTIFICATE OF WORD COUNT

The foregoing Petition contains 8163 words (including footnotes, but excluding tables and this certificate). In

preparing this certificate, I have relied on the word count generated by Microsoft Office Word 2003.

Executed on December 6, 2007, at San Francisco, California.

Roberta Jones

Note: This sample brief has not been updated for substantive legal accuracy. It is presented as an example of form, not content, and should not be presumed accurate with regard to the state of the law. The names of the parties and attorneys have been changed for publication.

Comment: The format of attorney-drafted court papers is governed by Cal Rules of Ct 8.144, 8.204. In addition, petitions for writs of supersedeas must comply with Cal Rules of Ct 8.112, 8.116. On the many specific formatting details required, see §§18.5-18.20, 26.26. On drafting a writ of supersedeas, see §26.22.

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§28.19 XIX. FORM: ORDER GRANTING PETITION FOR WRIT OF SUPERSEDEAS

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▶ To download **WordPerfect** version, right click and choose *Save Target As*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

ABC CORPORATION,	)	**No. 123456**
Plaintiff and	)	
Respondent,	)	**(Superior Court No. 456789)**
	)	
vs.	)	**(John Smith, Judge)**
	)	
JANE DOE,	)	**ORDER**
Defendant and	)	
Appellant.	)	
_____	)	

THE COURT:

The court has read and considered the petition for a writ of supersedeas filed herein by appellant on March 11, 2008, and respondent's opposition thereto filed on March 21, 2008. IT IS ORDERED that enforcement of the judgment in Los Angeles County Superior Court case number 456789, and all further proceedings thereon, are stayed pending final disposition of this appeal. (Code Civ. Proc., §923.)

_____
SMITH, P.J., JONES, J., ROBERTS, J.

Note: This sample order is presented as an example of form, not content. The names of the parties and the case number information have been changed for publication.

Comment: On writs of supersedeas, see chap 26.

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Source: Civil Litigation/California Civil Writ Practice/28 Court of Appeal and Supreme Court Forms/§28.20 XX. FORM: PETITION FOR WRIT OF HABEAS CORPUS (JUDICIAL COUNCIL FORM MC-275)

§28.20 XX. FORM: PETITION FOR WRIT OF HABEAS CORPUS (JUDICIAL COUNCIL FORM MC-275)

Name: _____

Address: _____

_____

_____

CDC or ID Number: _____

_____

_____

(Court)

_____

Petitioner

vs.

_____

Respondent

PETITION FOR WRIT OF HABEAS CORPUS

No. _____

(To be supplied by the Clerk of the Court)

INSTRUCTIONS—READ CAREFULLY

- **If you are challenging an order of commitment or a criminal conviction and are filing this petition in the Superior Court, you should file it in the county that made the order.**
- **If you are challenging the conditions of your confinement and are filing this petition in the Superior Court, you should file it in the county in which you are confined.**

- Read the entire form *before* answering any questions.
- This petition must be clearly handwritten in ink or typed. You should exercise care to make sure all answers are true and correct. Because the petition includes a verification, the making of a statement that you know is false may result in a conviction for perjury.
- Answer all applicable questions in the proper spaces. If you need additional space, add an extra page and indicate that your answer is "continued on additional page."
- If you are filing this petition in the superior court, you only need to file the original unless local rules require additional copies. Many courts require more copies.
- If you are filing this petition in the Court of Appeal and you are an attorney, file the original and 4 copies of the petition and, if separately bound, 1 set of any supporting documents (unless the court orders otherwise by local rule or in a specific case). If you are filing this petition in the Court of Appeal and you are *not* represented by an attorney, file the original and one set of any supporting documents.
- If you are filing this petition in the California Supreme Court, file the original and 10 copies of the petition and, if separately bound, an original and 2 copies of any supporting documents.
- Notify the Clerk of the Court in writing if you change your address after filing your petition.

Approved by the Judicial Council of California for use under rule 8.380 of the California Rules of Court (as amended effective January 1, 2007). Subsequent amendments to rule 8.380 may change the number of copies to be furnished to the Supreme Court and Court of Appeal.

Form Approved for Optional Use
Judicial Council of California
MC-275 [Rev. January 1, 2010]

CEB

Penal Code, § 1473 at seq.;
Cal. Rules of Court, rule 8.380
www.courtinfo.ca.gov

This petition concerns:

- ☐ A conviction
- ☐ Parole
- ☐ A sentence
- ☐ Credits
- ☐ Jail or prison conditions
- ☐ Prison discipline
- ☐ Other *(specify)*: _____

1. Your name: _____
2. Where are you incarcerated? _____
3. Why are you in custody? ☐ Criminal conviction ☐ Civil commitment

   Answer items a through i to the best of your ability.

   a. State reason for civil commitment or, if criminal conviction, state nature of offense and enhancements (for example, "robbery with use of a deadly weapon").

   _____

   _____

   b. Penal or other code sections: _____

   c. Name and location of sentencing or committing court: _____

   _____

   d. Case number: _____

   e. Date convicted or committed: _____

   f. Date sentenced: _____

   g. Length of sentence: _____

   h. When do you expect to be released? _____

   i. Were you represented by counsel in the trial court? ☐ Yes ☐ No *If yes, state the attorney's name and address:*

   _____

   _____

4. What was the LAST plea you entered? *(Check one)*:

   ☐ Not guilty ☐ Guilty ☐ Nolo contendere ☐ Other: _____

5. If you pleaded not guilty, what kind of trial did you have?

   ☐ Jury ☐ Judge without a jury ☐ Submitted on transcript ☐ Awaiting trial

6. GROUNDS FOR RELIEF

Ground 1: State briefly the ground on which you base your claim for relief. For example, "The trial court imposed an illegal enhancement." *(If you have additional grounds for relief, use a separate page for each ground. State ground 2 on page 4. For additional grounds, make copies of page 4 and number the additional grounds in order.)*

a. Supporting facts:
Tell your story briefly without citing cases or law. If you are challenging the legality of your conviction, describe the facts on which your conviction is based. *If necessary, attach additional pages.* CAUTION: You must state facts, not conclusions. For example, if you are claiming incompetence of counsel, you must state facts specifically setting forth what your attorney did or failed to do and how that affected your trial. Failure to allege sufficient facts will result in the denial of your petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.) A rule of thumb to follow is, *who* did exactly *what* to violate your rights at what time *(when)* or place *(where)*. *(If available, attach declarations, relevant records, transcripts, or other documents supporting your claim.)*

b. Supporting cases, rules, or other authority (optional):
(Briefly discuss, or list by name and citation, the cases or other authorities that you think are relevant to your claim. If necessary, attach an extra page.)

7. **Ground 2 or Ground** _____ *(if applicable):*

a. Supporting facts:

b. Supporting cases, rules, or other authority:

8. Did you appeal from the conviction, sentence, or commitment? ☐ Yes ☐ No If yes, give the following information:
   a. Name of court ("Court of Appeal" or "Appellate Division of Superior Court"):

   b. Result: _____ c. Date of decision: _____
   d. Case number or citation of opinion, if known: _____
   e. Issues raised: (1) _____
      (2) _____
      (3) _____
   f. Were you represented by counsel on appeal? ☐ Yes ☐ No If yes, state the attorney's name and address, if known:

9. Did you seek review in the California Supreme Court? ☐ Yes ☐ No If yes, give the following information:
   a. Result: _____ b. Date of decision: _____
   c. Case number or citation of opinion, if known: _____
   d. Issues raised: (1) _____
      (2) _____
      (3) _____
10. If your petition makes a claim regarding your conviction, sentence, or commitment that you or your attorney did not make on appeal, explain why the claim was not made on appeal:

11. Administrative review:
   a. If your petition concerns conditions of confinement or other claims for which there are administrative remedies, failure to exhaust administrative remedies may result in the denial of your petition, even if it is otherwise meritorious. (See *In re Muszalski* (1975) 52 Cal.App.3d 500.) Explain what administrative review you sought or explain why you did not seek such review:

   b. Did you seek the highest level of administrative review available? ☐ Yes ☐ No
      Attach documents that show you have exhausted your administrative remedies.

12. Other than direct appeal, have you filed any other petitions, applications, or motions with respect to this conviction, commitment, or issue in any court? ☐ Yes If yes, continue with number 13. ☐ No If no, skip to number 15.

13. a. (1) Name of court: _____

(2) Nature of proceeding (for example, "habeas corpus petition"): _____

(3) Issues raised: (a) _____

(b) _____

(4) Result *(attach order or explain why unavailable):* _____

(5) Date of decision: _____

b. (1) Name of court: _____

(2) Nature of proceeding: _____

(3) Issues raised: (a) _____

(b) _____

(4) Result *(attach order or explain why unavailable):* _____

(5) Date of decision: _____

c. *For additional prior petitions, applications, or motions, provide the same information on a separate page.*

14. If any of the courts listed in number 13 held a hearing, state name of court, date of hearing, nature of hearing, and result:

_____

_____

15. Explain any delay in the discovery of the claimed grounds for relief and in raising the claims in this petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.)

_____

_____

16. Are you presently represented by counsel? ☐ Yes ☐ No If yes, state the attorney's name and address, if known:

_____

_____

17. Do you have any petition, appeal, or other matter pending in any court? ☐ Yes ☐ No If yes, explain:

_____

_____

18. If this petition might lawfully have been made to a lower court, state the circumstances justifying an application to this court:

_____

_____

I, the undersigned, say: I am the petitioner in this action. I declare under penalty of perjury under the laws of the State of California that the foregoing allegations and statements are true and correct, except as to matters that are stated on my information and belief, and as to those matters, I believe them to be true.

Date:

▶ _____

(SIGNATURE OF PETITIONER)

Comment: This form must be used by a petitioner who is not represented by an attorney. Cal Rules of Ct 8.380(a).

An attorney may use this form (see Cal Rules of Ct 8.384(a)(1)); however, an attorney not using this form must make certain the petition contains all of the information requested in the form and that the petition complies with Cal Rules of Ct 8.40(b)-(c) and 8.204(a)-(b) (see Cal Rules of Ct 8.384(a)(1)). This form is available online at http://www.courtinfo.ca.gov/forms. On petitions for writs of habeas corpus, see §§15.39-15.43.

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§28.21 XXI. FORM: PETITION FOR WRIT OF HABEAS CORPUS OR CERTIORARI (FILED BY ATTORNEY)

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No. _____

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

JOHN DOE,
Petitioner,

vs.

CONTRA COSTA COUNTY SUPERIOR COURT,
Respondent.

ABC Corporation, et al.,
Real Parties in Interest.

PETITION FOR WRIT OF HABEAS CORPUS OR CERTIORARI

From Civil Contempt Orders
Contra Costa County Superior Court, No. 123456
The Honorable Rachel Smythe

Roberta Jones, SBN 00001
Daniel Peters, SBN 11112
JONES & PETERS LLP
10 Main Street, 2nd Floor
Oakland, CA 94612
Telephone: 510-123-4567
Facsimile: 510-456-7891
Attorneys for Petitioner John Doe

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rules of Court, rule 8.488, the undersigned, counsel for Petitioner John Doe, certifies that she knows of no other entity or person other than the parties to this proceeding who has a financial or other interest in its outcome.

Executed on April 17, 2008, at Oakland, California.

_____
Roberta Jones

TABLE OF CONTENTS

Page

INTRODUCTION

PETITION FOR WRIT OF HABEAS CORPUS OR CERTIORARI

PRAYER

VERIFICATION

MEMORANDUM

CONCLUSION

CERTIFICATE OF WORD COUNT

TABLE OF AUTHORITIES

CASES

[*List cases in alphabetical order by name, giving citation for each under name; give page number(s) on which citations are found to the right of the citation.*]

STATUTES

[*List statutes in alphabetical/numerical order; give page number(s) on which citations are found to the right of the citation.*]

CONSTITUTIONAL PROVISIONS

[*List constitutional provisions in alphabetical/numerical order, giving citation for each under name; give page number(s) on which citations are found to the right of the citation.*]

COURT RULES

[*List court rules in numerical order, giving citation for each under name; give page number(s) on which citations are found*
to the right of the citation.]

OTHER AUTHORITIES

[*List other authorities in alphabetical order by name, giving citation for each under name; give page number(s) on which citations are found to the right of the citation.*]

INTRODUCTION

Our worst fears have been realized. Petitioner has been ordered to jail for civil contempt, in conjunction with enforcement of a judgment that we believe imposes an unconstitutional prior restraint on speech and awards unrecoverable general damages.

This petition seeks a writ of habeas corpus or certiorari, which are the appropriate methods of review of a civil contempt order when the petitioner is incarcerated or threatened with incarceration. This petition adopts by reference two prior writ petitions in this case, filed on April 12 and April 15, 2008, seeking supersedeas, prohibition, and/or other appropriate relief.

Petitioner has appealed a judgment of $775,000 for libel and appropriation of name, which also includes an injunction commanding it to stop making statements on the Internet which the jury found to be tortious. The writ petition filed on April 12, 2008, asked this court to stay contempt proceedings on the appealed injunction, including discovery of proprietary and privileged information. The writ petition filed on April 15, 2008, asked this court to stay proceedings scheduled for today, April 17, in connection with enforcement of the damages portion of the judgment.

Today the trial court held petitioner in contempt for invoking the Fifth Amendment and the attorney-client privilege at a judgment debtor proceeding in enforcement of the damages portion of the judgment. For the reasons set forth in the writ petitions of April 12 and April 15—specifically, because the appeal presents compelling issues in favor of reversal and the balance of hardships favors petitioner—we urge this Court to

grant a writ of habeas corpus or certiorari precluding petitioner's incarceration and to stay further proceedings in enforcement of the judgment during the pendency of petitioner's appeal from the judgment.

PETITION FOR WRIT OF HABEAS CORPUS OR CERTIORARI

1. This petition adopts by reference the Petition for Writ of Supersedeas, Prohibition, and/or Other Appropriate Relief filed in this Court on April 12, 2008, and the Supplemental Petition for Writ of Supersedeas, Prohibition, and/or Other Appropriate Relief filed on April 15, 2008.

2. Exhibit 1 accompanying this petition is a declaration of appellate counsel summarizing the judgment debtor examination hearing of April 17, 2008, and stating that a reporter's transcript of the hearing has been ordered and is expected to be filed by April 19, 2008.

3. At the hearing of April 17, petitioner invoked the Fifth Amendment and the attorney-client privilege in response to certain questions posed to him, as described in the declaration of attached hereto as Exhibit 1.

4. Upon petitioner's invocation of the Fifth Amendment and the attorney-client privilege, the trial court held him in contempt and ordered him incarcerated on April 17, 2008.

5. Petitioner's incarceration is illegal and in contravention of rights guaranteed by the First and Fifth Amendments of the United States Constitution and by Articles 1, 2, 7, and 15 of the California Constitution, and should be stayed for the reasons set forth in the writ petitions of April 12 and 15, 2008.

6. This petition is addressed to this Court's original jurisdiction because petitioner has no other plain, speedy, or adequate remedy at law and has no other remedy at the trial court or at this court. The petition is timely filed on the same day that the trial court ordered petitioner's incarceration.

PRAYER

Petitioner prays that this Court:

1. Grant relief as prayed in the writ petitions filed in this Court on April 12 and 15, 2008, which are adopted herein by reference;

2 Issue a writ of habeas corpus or certiorari prohibiting the incarceration of petitioner for civil contempt;

3. Award petitioner his costs under California Rules of Court, rule 8.493; and

4. Grant such other relief as may be just and proper.

DATED: April 17, 2008

Respectfully submitted,

JONES & PETERS LLP

By: _____
Roberta Jones

Attorneys for Petitioner
John Doe

VERIFICATION

I, Roberta Jones, declare as follows:

I am one of the attorneys for petitioner herein. I have read the foregoing Petition for Writ of Habeas Corpus or Certiorari and know its contents. The facts alleged in the petition are within my own knowledge and I know these facts to be true. Based on my familiarity with these facts, I, rather than petitioner, verify this petition.

I declare under penalty of perjury that the foregoing is true and correct and that this verification was executed on April 17, 2008, at Oakland, California.

_____
Roberta Jones

MEMORANDUM

The remedy of a writ of habeas corpus or in the alternative a writ of certiorari "is properly invoked" when the petitioner is incarcerated or threatened with incarceration for civil contempt. (*In re Buckley* (1973) 10 C3d 237, 240, fn. 1; *Davidson v Superior Court* (1999) 70 CA4th 514, 522.)

The remedy is compelled here for the reasons set forth in the writ petitions of April 12 and 15, 2008. Petitioner has been ordered incarcerated in enforcement of a civil judgment that is not likely to survive appeal, because the judgment imposes an unconstitutional prior restraint on speech and because the case was wrongly tried on a theory of libel rather than slander. All trial court proceedings in enforcement of the judgment should be stayed during the pendency of petitioner's appeal from the judgment. The balance of hardships favors petitioner, for any injury to plaintiffs from delay in enforcement of the judgment pales in comparison to the injury to petitioner from incarceration, discovery of proprietary and privileged information, and infringement of his First Amendment rights.

The unthinkable and unprecedented have now occurred. Petitioner has been ordered incarcerated as a result of a judgment against him imposing an unconstitutional prior restraint on speech and awarding damages for speech that caused plaintiffs no pecuniary loss. It is time for a pause—and a stay of all further proceedings in enforcement of the appealed judgment—to allow careful, collegial reflection by this Court on the merits of the pending appeal before the judgment is enforced.

CONCLUSION

For the foregoing reasons, as set forth herein and in the April 12 and April 15, 2008 writ petitions, petitioner respectfully and urgently requests a writ of habeas corpus or, alternatively, certiorari, prohibiting his incarceration for civil contempt.

DATED: April 17, 2008

Respectfully submitted,

JONES & PETERS LLP

By: _____
Roberta Jones

Attorneys for Petitioner
John Doe

CERTIFICATE OF WORD COUNT

The foregoing Petition contains 2000 words (excluding tables and this Certificate). In preparing this certificate, I relied on the word count generated by MS Word 2003.

Executed on April 17, 2008, at Oakland, California.

_____
Roberta Jones

DECLARATION OF ROBERTA JONES

I, Roberta Jones, declare:

1. I am an attorney at law licensed to practice in the State of California and a partner in the law firm of Jones & Peters LLP, appellate counsel for Petitioner John Doe.

2. On April 17, 2008, in the Contra Costa County Superior Court, at a judgment debtor examination hearing in enforcement of a judgment currently on appeal to the First Appellate District, Judge Rachel Smythe held Petitioner John Doe in civil contempt for invoking the Fifth Amendment and the attorney-client privilege in response to questions regarding transfer of property, his business affairs, and attorney-client matters that petitioner believes are privileged and could furnish links in a chain of evidence that could incriminate him in proceedings to hold him in contempt of an injunction imposing an unconstitutional prior restraint on speech.

3. At the April 17 hearing, the judge ordered petitioner incarcerated in the Contra Costa County Jail for 10 days, beginning on April 17, 2008.

4. A reporter's transcript of the oral proceedings of April 17, 2008, was ordered that same day.

5. I expect to receive the transcript by Friday, April 19, and will forward it to the Court of Appeal, First Appellate District, immediately upon receiving it.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on April 17, 2008, at Oakland, California.

Note: This sample brief has not been updated for substantive legal accuracy. It is presented as an example of form, not content, and should not be presumed accurate with regard to the state of the law. The names of the parties and attorneys have been changed for publication.

Comment: An attorney filing a habeas corpus petition must make certain that the petition includes all of the information requested in *Petition for Writ of Habeas Corpus* (Judicial Council Form MC-275) and that the petition complies with Cal Rules of Ct 8.40(b)-(c) and 8.204(a)-(b). Cal Rules of Ct 8.384(a)(1). See §28.20. On petitions for writs of habeas corpus, see §§15.39-15.43.

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Source: Civil Litigation/California Civil Writ Practice/28 Court of Appeal and Supreme Court Forms/§28.22 XXII. FORM: APPELLATE COURT WRIT PETITION INFORMATION SHEET (FIFTH DISTRICT)

§28.22 XXII. FORM: APPELLATE COURT WRIT PETITION INFORMATION SHEET (FIFTH DISTRICT)

APPELLATE COURT WRIT PETITION INFORMATION SHEET

PETITIONER: RESPONDENT:	CASE NUMBER:

INSTRUCTIONS 1. This information sheet must be completed and inserted as page one of the petition for writ.
2. Exhibits must be tabbed or consecutively paginated with an index.

1. ☐ Trial is set for *(date)*:
2. The trial court order asserted to be erroneous was entered as follows:
   a. Title and location of court *(specify)*:
   b. Date of each order *(specify)*:
3. ☐ Reason for delay in filing this petition *(specify)*:

4. The record filed or lodged in support of this petition includes a copy of the lower court
   a. ☐ order.
   b. ☐ pleadings.
   c. ☐ motion with supporting and opposition papers.
   d. ☐ reporter s transcripts.
   e. ☐ other *(specify)*:
5. The following record was not filed or lodged in support of this petition:
   a. Record *(specify)*:
   b. Reason *(specify)*:
   c. Will be filed or lodged on *(date)*:
6. ☐ A petition concerning the subject of this petition was previously filed as follows:
   a. Title and location of court:
   b: Case number:
   c. Disposition:
7. ☐ A temporary stay order is requested pending the determination of the petition, and a court reporter s transcript will not be filed or lodged with the court before the stay order is decided.
   a. Real parties in interest ☐ have received ☐ have not received actual notice of the request for a stay order.
   b. A summary of all evidence concerning the matter of this petition and in support of the stay order is set forth *(include any testimony adverse to your petition)* ☐ in attachment 7b. ☐ as follows:

8. ☐ This petition seeks review of an order denying a motion to
   a. ☐ suppress evidence
   b. ☐ set aside an information
   AND
   c. defendant was arraigned on *(date)*:
   d. the trial court motion was
      ☐ made within 60 days following the date of the arraignment.
      ☐ not made within 60 days following the date of the arraignment for the reason set forth *(specify facts showing why defendant was unaware of any issue or had no opportunity to raise the issue of the motion)*
      ☐ in attachment 8d. ☐ as follows:

9. ☐ This petition seeks review of an order
   a. ☐ granting or denying a motion for change of venue
   b. ☐ denying a motion to quash service of summons
   c. ☐ granting or denying a motion to expunge notice of lis pendens
   AND
   d. ☐ written notice of the lower court order was served on (date):
   e. ☐ the lower court extended time to file this petition and a copy of the order is attached.
   f. ☐ other (specify):

10. I understand that the court must be advised of any matters affecting this petition which happen after the filing of this petition.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: ➤ _____
(SIGNATURE OF PETITIONER OR ATTORNEY)

(THIS FORM IS NOT REQUIRED FOR A PETITION FOR A WRIT OF HABEAS CORPUS)

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APPENDIX A

Chart: Review Method for Superior Court Orders

The following chart lists superior court orders and the proper method for obtaining review, *e.g.*:

- Wait until end of case and *appeal judgment*;
- *Appeal order* immediately; or
- Petition for writ of:
- Mandate;
- Prohibition; or
- Review (certiorari).

Issue/Procedure/Order/Code Sections	*Method of Review*	*Illustrative Cases/Circumstances*
1. Abatement		
Order of Abatement Granted	Mandate	See *Daum v Superior Court* (1964) 228 CA2d 283, 39 CR 443 (order denying amendment until future occurrence is order of abatement, which may be reviewed by mandate).
	Appeal judgment	Another action pending—CCP §597.
2. Advancement to Trial—CCP §36		
Motion to Advance—Denied	Appeal judgment	*Salas v Sears, Roebuck & Co.* (1986) 42 C3d 342, 345 n3, 228 CR 504.
	Mandate	*Rice v Superior Court* (1982) 136 CA3d 81, 185 CR 853.
Motion to Advance—Granted	Mandate	*Koch-Ash v Superior Court* (1986) 180 CA3d 689, 225 CR 657 (writ lies to challenge stay of order for advancement).
3. Amendment of Pleadings—CCP §§471.5, 473 (Supplementary Pleadings)		
Amended Pleading Not Timely Filed and Matter Dismissed	Appeal order of dismissal	*Leader v Health Indus. of Am., Inc.* (2001) 89 CA4th 603, 611, 107 CR2d 489.
Motion to Amend—Granted	Appeal judgment	*Deetz v Carter* (1965) 232 CA2d 851, 43 CR 321 (order granting motion to amend reviewed on appeal from judgment).
Motion to Amend—Denied	Appeal order	*Dominguez v City of Alhambra* (1981) 118 CA3d 237, 173 CR 345 (order denying leave to amend is final judgment if it disposes of all claims by or against one party); *American Advertising & Sales Co. v Mid-Western Transp.* (1984) 152 CA3d 875, 877 n1, 199 CR 735 (same). But see *Rainer v Community Memorial Hosp. (*1971) 18 CA3d 240, 95 CR 901 (motion to amend denied, but reviewed and

		reversed on appeal from judgment).
	Mandate	*Daum v Superior Court (*1964) 228 CA2d 283, 39 CR 443 (order denying amendment of complaint until future occurrence is unauthorized order of abatement that may be reviewed by mandate); *California Cas. Gen. Ins. Co. v Superior Court* (1985) 173 CA3d 274, 279, 218 CR 817, disapproved on other grounds in *Kransco v International Ins. Co.* (2000) 23 C4th 390, 407 n18, 97 CR2d 151.
Motion to File Supplementary Complaint—Denied	Mandate	*Louie Queriolo Trucking, Inc. v Superior Court* (1967) 252 CA2d 194, 196, 60 CR 389.
4. Anti-SLAPP—Order Granting or Denying a Special Motion to Strike Under CCP §425.16	Appeal	§CCP 425.16(i).
5. Arbitration—CCP §§1294, 1294.2		
Petition to Compel—Granted	Appeal judgment of confirmation	*Villacreses v Molinari* (2005) 132 CA4th 1223, 1229, 34 CR3d 281; *Maddy v Castle* (1976) 58 CA3d 716, 130 CR 160, disapproved in part on other grounds by *Doers v Golden Gate Hwy. & Transp. Dist.* (1979) 23 C3d 180, 188, 151 CR 837. See also *Graham v Scissor-Tail, Inc.* (1981) 28 C3d 807, 811 n1, 171 CR 604.
	Mandate or Prohibition	*Bertero v Superior Court* (1963) 216 CA2d 213, 222, 30 CR 719 (mandate lies to attack order before arbitration takes place), disapproved in part on other grounds by *St. Agnes Med. Ctr. v PacifiCare of Cal.* (2003) 31 C4th 1187, 1192, 8 CR3d 517. See also *Melchor Inv. Co. v Rolm Sys.* (1992) 3 CA4th 587, 592, 4 CR2d 343 (writ of prohibition is appropriate remedy if arbitration is unjustifiably ordered); *Atlas Plastering, Inc. v Superior Court* (1977) 72 CA3d 63, 68, 140 CR 59 (mandate or prohibition lies if matters ordered arbitrated fall outside scope of arbitration agreement or if arbitration would appear to be unduly time consuming or expensive). But see *International Film Inv. v Arbitration Tribunal of Directors Guild* (1984) 152 CA3d 699, 704, 199 CR 690 (prohibition not proper remedy because there was no judicial act to be restrained; prohibition does not lie to restrain acts of arbitrator). See §§16.99-16.101.
Petition to Compel—Dismissed or Denied	Appeal order	CCP §1294(a); *Porter v United Servs. Auto. Ass'n* (2001) 90 CA4th 837, 108

		CR2d 860.
Petition to Enjoin Arbitration—Granted	Appeal order	*International Film Inv. v Arbitration Tribunal of Directors Guild (*1984) 152 CA3d 699, 704, 199 CR 690 (dicta).
Petition to Enjoin Arbitration—Denied	Appeal judgment of confirmation	*International Film Inv. v Arbitration Tribunal of Directors Guild, supra* (characterizing petition for writ of prohibition to prevent arbitration as petition for injunction, and analogizing denial of writ to order compelling arbitration, which in the better view is not appealable).
Petition to Confirm Award—Granted	Appeal judgment of confirmation	CCP §1294(b).
Petition to Confirm Award—Denied	Appeal order	CCP §1294(b).
Petition to Vacate Award—Granted	Appeal order	CCP §1294(c) (order vacating award is appealable unless rehearing in arbitration is ordered).
6. Attachment—CCP §§482.010, 485.240		
Application for Right to Attach Order or Writ of Attachment—Granted	Appeal order	CCP §904.1(a)(5) or §904.2(f).
Application for Right to Attach Order or Writ of Attachment—Denied	Mandate	*San Diego Wholesale Credit Men's Ass'n v Superior Court* (1973) 35 CA3d 458, 461, 110 CR 657. See also *International Typographical Union Negotiated Pension Plan v Ad Compositors, Inc.* (1983) 142 CA3d 733, 735, 191 CR 227.
Application for Order to Set Aside Right-to-Attach Order and to Quash Writ of Attachment—Granted	Appeal judgment	*Islander Yachts, Inc. v One Freeport 36-Ft. Vessel* (1985) 173 CA3d 1081, 1086 n6, 219 CR 654.
Motion to Discharge an Attachment—Granted	Appeal order	CCP §§904.1(a)(5), 904.2(f).
Motion to Discharge an Attachment—Denied	Appeal order	CCP §§904.1(a)(5), 904.2(f).
7. Attorneys (see Counsel)		
8. Attorney Fees (see also Costs, Sanctions, Liens)		
Motion for Fees—CCP §1021.5—Granted	Appeal order	CCP §904.1(a)(2); *Nestande v Watson* (2003) 111 CA4th 232, 238, 4 CR3d 18.
Motion for Fees—CCP §1021.5—Denied	Appeal order	CCP §904.1(a)(2); *Consumer Cause, Inc. v Mrs. Gooch's Natural Food Markets, Inc.* (2005) 127 CA4th 387, 405, 25 CR3d 514; *Otto v Los Angeles Unified Sch. Dist.* (2003) 106 CA4th 328, 335, 130 CR2d 512.
Motion for Fees—CCP §§1717, 1033.5(a)(10)—Granted or Denied	Appeal order	CCP §904.1(a)(2); *Allstate Ins. Co. v Loo* (1996) 46 CA4th 1794, 1797, 54 CR2d 541.

9. Capacity to Sue (see Motion to Strike, Demurrer, Summary Judgment)		
10. Claim of Exemption After Levy—CCP §703.600		
Motion for Claim of Exemption—Granted	Appeal order	CCP §703.600.
Motion for Claim of Exemption—Denied	Appeal order	CCP §703.600.
11. Claims Statutes—Govt C §§911.2, 911.4, 945.4, 946.6		
Petition to Present Late Claim (for Relief from Claim Requirements)—Granted	Mandate	*County of Alameda v Superior Court* (1987) 196 CA3d 619, 622, 242 CR 215.
Petition to Present Late Claim (for Relief from Claim Requirements)—Denied	Appeal order	*Munoz v State* (1995) 33 CA4th 1767, 1772 n1, 39 CR2d 860; *Garcia v Los Angeles Unified Sch. Dist. (*1985) 173 CA3d 701, 706 n1, 219 CR 544.
12. Class Actions		
Motion to Certify Class—Granted	Mandate	*Sav-On Drug Stores, Inc. v Superior Court* (2004) 34 C4th 319, 17 CR3d 906; *Blue Chip Stamps v Superior Court* (1976) 18 C3d 381, 387 n4, 134 CR 393.
Motion to Certify Class—Denied	Appeal order	*Daar v Yellow Cab Co.* (1967) 67 C2d 695, 699, 63 CR 724 (discussing "death knell" doctrine*, i.e.,* order is appealable when it has effect of making further proceedings impractical); *Stephen v Enterprise Rent-A-Car* (1991) 235 CA3d 806, 811, 1 CR2d 130.
	Mandate	*General Motors Corp. v Superior Court* (1988) 199 CA3d 247, 250, 244 CR 776 (discussing split of authority on whether or not order denying class certification is appealable and deciding that mandate is only means of judicial review when "death knell" doctrine does not apply); *Hogya v Superior Court* (1977) 75 CA3d 122, 142 CR 325 (detailed discussion of why mandate lies in certain cases).
Motion to Dismiss Class Action—Granted	Appeal order	*Alch v Superior Court* (2004) 122 CA4th 339, 359, 19 CR3d 29 (court consolidated appeals and writ petitions to review trial court's dismissal of class action age discrimination claims).
	Mandate	*Alch v Superior Court* (2004) 122 CA4th 339, 359, 19 CR3d 29 (court consolidated appeals and writ petitions to review trial court's dismissal of class action age discrimination claims).
Motion to Dismiss Class Action—Denied	Appeal order	
13. Consolidation/Bifurcation/Severance		

—CCP §§597, 1048(a)

Motion to Consolidate/Sever—Granted	Appeal judgment	*State Farm Mut. Auto. Ins. Co. v Superior Court* (1956) 47 C2d 428, 432, 304 P2d 13 (consolidation order not appealable, reviewable on appeal from final judgment).
	Mandate	*State Farm Mut. Auto. Ins. Co. v Superior Court, supra* (when appeal from judgment would be inadequate).
Motion to Consolidate/Sever—Denied	Mandate	*Fisher v Superior Court* (1980) 103 CA3d 434, 163 CR 47 (issue of first impression).

14. Contempt—CCP §§904.1(a)(1)(B), 904.2(a)(2), 1222

Judgment of Contempt (Civil)	Review (certiorari)	*John Breuner Co. v Bryant* (1951) 36 C2d 877, 229 P2d 356; *Grant v Superior Court* (1963) 214 CA2d 15, 19, 29 CR 125.
	Prohibition	*Cohen v Superior Court* (1959) 173 CA2d 61, 343 P2d 286 (to restrain enforcement of judgment ordering petitioner committed to county jail for contempt).
Judgment of Contempt (Criminal)	Review (certiorari)	CCP §1209(d)
	Habeas corpus	*In re DeSilva* (1948) 33 C2d 76, 199 P2d 6.

15. Continuance—CCP §§594-595.4; Cal Rules of Ct 3.1332

Motion to Continue Trial—Granted	Appeal judgment	*Eastwood v Froehlich* (1976) 60 CA3d 523, 131 CR 577 (order not directly appealable, but reviewable on appeal from final judgment).
Motion to Continue Trial—Denied	Appeal judgment	*Oliveros v Couny of Los Angeles* (2004) 120 CA4th 1389, 1393, 16 CR3d 638.
	Mandate	*Polibrid Coatings, Inc. v Superior Court* (2003) 112 CA4th 920, 924, 6 CR3d 7.

16. Coordination—CCP §§404-404.9; Cal Rules of Ct 3.501-3.550

Motion to Coordinate—Granted or Denied	Mandate	CCP §404.6; Cal Rules of Ct 3.505(b). See §§16.8-16.10.

17. Counsel

Motion to Appoint Counsel—Granted	Mandate	*Brown v Superior Court* (1981) 119 CA3d 189, 173 CR 803 (without discussion of why writ lies).
	Review (certiorari)	*Estate of Bodger* (1954) 128 CA2d 710, 276 P2d 83 (special rule for probate proceeding).
Motion to Appoint Counsel—Denied	Appeal judgment	*In re Jacqueline H.* (1979) 94 CA3d 808, 156 CR 765 (without discussion).

Motion to Disqualify Counsel—Granted	Appeal order	*Cal Pak Delivery, Inc. v United Parcel Serv., Inc.* (1997) 52 CA4th 1, 8, 60 CR2d 207.
Motion to Disqualify Counsel—Denied	Appeal order	*Truck Ins. Exch. v Fireman's Fund Ins. Co.* (1992) 6 CA4th 1050, 1052, 8 CR2d 228; *Gregori v Bank of Am.* (1989) 207 CA3d 291, 300, 254 CR 853. See also *Kraus v Davis* (1970) 6 CA3d 484, 85 CR 846 (characterized as order to restrain counsel from proceeding (see CCP §904.1(a)(6)) and as final order on collateral matter).
Motion to Substitute (or to Withdraw as) Counsel—CCP §284(2)—Granted	Appeal judgment	*Messih v Lee Drug, Inc.* (1985) 174 CA3d 312, 220 CR 43.
Motion to Substitute (or to Withdraw as) Counsel—CCP §284—Denied	Mandate	*Ferruzzo v Superior Court* (1980) 104 CA3d 501, 163 CR 573 (corporate client); *Redevelopment Agency v Superior Court* (1961) 195 CA2d 591, 16 CR 45 (without discussion).
18. Cross-Complaints—CCP §426.10. See also Demurrer; Motion to Strike; Settlement		
Motion to File Cross-Complaint—Denied	Mandate	*Nelson v Superior Court* (1950) 97 CA2d 78, 217 P2d 119.
19. Default—CCP §§473, 585-587		
Request to Enter Default—Denied	Prohibition and mandate	*W. A. Rose Co. v Municipal Court* (1959) 176 CA2d 67, 1 CR 49 (prohibition to restrain further proceedings, mandate to compel entry of default).
Motion to Compel Entry of Default—Denied	Mandate	*California Pine Box & Lumber Co. v Superior Court* (1910) 13 CA 65, 108 P 882.
Motion to Set Aside Default—Granted	Appeal judgment	*Davis v Taliaferro* (1963) 218 CA2d 120, 32 CR 208.
Motion to Set Aside Default—Denied	Appeal judgment	*Rappleyea v Campbell* (1994) 8 C4th 975, 35 CR2d 669.
Motion to Vacate Default Judgment and Set Aside Default—Granted	Appeal order	*Baske v Burke* (1981) 125 CA3d 38, 43, 177 CR 794; *Yarbrough v Yarbrough* (1956) 144 CA2d 610, 301 P2d 426 (order is one after judgment and immediately appealable).
Motion to Vacate Default Judgment—Denied	Appeal order	CCP §904.1(a)(1)-(2); *Tunis v Barrow* (1986) 184 CA3d 1069, 1074, 229 CR 389.
20. Demurrer		
Demurrer Sustained *With* Leave to Amend	Mandate	Not an appealable order under CCP §904.1. See §16.110.
Demurrer Sustained *Without* Leave to Amend	Appeal judgment	CCP §472c(a). See §16.110.
Demurrer Overruled	Mandate	*State v Superior Court (Bodde)* (2004)

		32 C4th 1234, 1238, 13 CR3d 534 (court overruled demurrer); *Mitsubishi Materials Corp. v Superior Court* (2003) 113 CA4th 55, 6 CR3d 159 (after remand from supreme court, writ issued commanding superior court to vacate order). See §16.108.
21. Discovery—CCP §§2016.010-2036.050		
Issue Presented Is of First Impression or of General Importance to the Trial Courts of the Profession	Mandate	*Britt v Superior Court* (1978) 20 C3d 844, 851, 143 CR 695*; Save Open Space Santa Monica Mountains v Superior Court (2000) 84 CA4th 235, 245, 100 CR2d 725. See §16.116.*
Violation of a Privilege	Prohibition or mandate	*Sav-On Drugs, Inc. v Superior Court* (1975) 15 C3d 1, 3, 123 CR 283; *Titmas v Superior Court* (2001) 87 CA4th 738, 744 n4, 104 CR2d 803. See §§16.120-16.122.
Discovery Ruling Denies Party Fair Opportunity to Litigate the Case	Mandate	*Waicis v Superior Court* (1990) 226 CA3d 283, 287, 276 CR 45.
Motion to Compel Production/Answers—Granted	Prohibition	*Costco Wholesale Corp. v Superior Court* (2009) 47 C4th 725, 101 CR3d 758; *Roberts v Superior Court* (1973) 9 C3d 330, 107 CR 309; *Sav-On Drugs, Inc. v Superior Court* (1975) 15 C3d 1, 123 CR 283 (writ lies when discovery would invade privilege). See §16.124.
Motion to Compel Production/Answers—Denied	Mandate	*Rojas v Superior Court* (2004) 33 C4th 407, 15 CR3d 643; *2,022 Ranch v Superior Court* (2003) 113 CA4th 1377, 1381, 7 CR3d 197, disapproved in part on other grounds in *Costco Wholesale Corp. v Superior Court* (2009) 47 C4th 725, 101 CR3d 758. See §16.123.
Motion to Quash Subpoena or for Protective Order—Denied	Mandate	*Aetna Cas. & Sur. Co. v Superior Court* (1984) 153 CA3d 467, 471, 200 CR 471.
Motion for Protective Order (Nonparty Witness)—Denied	Appeal order	*Brun v Bailey* (1994) 27 CA4th 641, 32 CR2d 624 (appealable as collateral order).
	Mandate	*Monarch Healthcare v Superior Court* (2000) 78 CA4th 1282, 1290, 93 CR2d 619.
Nonparty Expert Witness Challenges Amount of Fee	Appeal order	*Marsh v Mountain Zephyr, Inc.* (1996) 43 CA4th 289, 298, 50 CR2d 493.
Order That Plaintiff Submit to Physical Examination—Granted	Mandate	*Browne v Superior Court* (1979) 98 CA3d 610, 613, 159 CR 669. See §16.118.
22. Dismissal—CCP §§583.110-583.430		
Motion to Dismiss—Granted	Appeal judgment	*Daley v County of Butte* (1964) 227 CA2d 380, 38 CR 693 (order is final

		judgment and appealable).
	Mandate	*Brown v Superior Court* (1970) 7 CA3d 366, 86 CR 670 (without discussion of why writ lies).
Motion to Dismiss—Denied	Prohibition	*J. C. Penney Co. v Superior Court* (1959) 52 C2d 666, 343 P2d 919. See §16.54.
	Mandate	*McDonough Power Equip. Co. v Superior Court* (1972) 8 C3d 527, 530, 105 CR 330 (mandate to compel dismissal or prohibition to restrain trial). See §16.54.
Motion to Vacate Dismissal—Denied	Appeal order	*Peltier v McCloud River R.R.* (1995) 34 CA4th 1809, 41 CR2d 182 (motion to vacate under CCP §473).
23. Dissolution of Partnership		
Order Granting	Appeal judgment	*Kinoshita v Horio* (1986) 186 CA3d 959, 231 CR 241 (judgment dissolving partnership and directing sale of assets interlocutory and appealable only on final judgment).
24. Dissolution of Marriage—CCP §904.1(a)(10); Fam C §2404		
Judgment—"Status Only"	Appeal judgment	Fam C §§2025, 2337.
Orders for Support	Appeal order	*Marriage of Skelley* (1976) 18 C3d 365, 134 CR 197; *Marriage of Hunt* (1985) 172 CA3d 872, 218 CR 451.
Order on Bifurcated Issue	Appeal order (with leave)	Fam C §2025; Cal Rules of Ct 5.175, 5.180.
Temporary Custody Orders	Mandate	*Lester v Lennane* (2000) 84 CA4th 536, 560 n13, 101 CR2d 86.
25. Good Faith Settlement (see Settlement)		
26. Government Claims Act		
Review of Agency Decision Not to Defend Public Employee Under Govt C §995.2(a)	Mandate	*Stone v Regents of Univ. of Cal.* (1999) 77 CA4th 736, 746, 92 CR2d 94. See also *Sparks v Kern County Bd. of Supervisors* (2009) 173 CA4th 794, 798, 93 CR3d 173 (public employee seeking reimbursement for defense costs must satisfy claims statutes before filing petition for writ of mandate).
27. Guardian ad Litem—CCP §§372-373.5		
Motion to Appoint—Granted or Revoked	Appeal order	*Estate of Hathaway* (1896) 111 C 270, 43 P 754; Prob C §1301(a) (granting or revoking letters of guardianship is appealable).
Motion to Remove—Granted	Review (certiorari)	*Hollaway v Scripps Mem. Hosp.* (1980)

		111 CA3d 719, 168 CR 782 (temporary removal of guardian ad litem).
28. Guardianship (Conservatorship)—		
The following motions are immediately appealable whether granted or denied:		
Granting or revoking letters, except temporary letters	Appeal order	CCP §904.1(a)(10); Prob C §1301(a).
Granting permission to fix ward's residence not within state	Appeal order	CCP §904.1(a)(10); Prob C §1301(b).
Directing, authorizing, approving, or modifying payments for support, maintenance, or education	Appeal order	CCP §904.1(a)(10); Prob C §1301(c).
Granting or denying petition under Prob C §2423 or Prob C §§2580-2586	Appeal order	CCP §904.1(a)(10); Prob C §1301(d).
Affecting legal capacity of conservatee under Prob C §§1870-1901	Appeal order	CCP §904.1(a)(10); Prob C §1301(e).
Adjudicating merits of claim under Prob C §§2500-2507	Appeal order	CCP §904.1(a)(10); Prob C §1301(f).
Granting or denying petition under Prob C §§3100-3154	Appeal order	CCP §904.1(a)(10); Prob C §1301(g).
29. Inconvenient Forum		
Motion to Dismiss—Granted	Appeal order	CCP §904.1(a)(3).
Motion to Dismiss or Stay—Denied	Mandate	See *Appalachian Ins. Co. v Superior Court* (1984) 162 CA3d 427, 208 CR 627; *Outboard Marine Corp. v Superior Court* (1976) 59 CA3d 434, 130 CR 642. See §16.54.
30. Injunctions—CCP §§525-534		
Injunction—Granted or Denied	Appeal order	CCP §§904.1(a)(6), 940.2(g). See §§16.150-16.151.
Motion to Dissolve—Granted	Appeal order	CCP §§904.1(a)(6), 904.2(g).
Motion to Dissolve—Denied	Appeal order	CCP §904.1(a)(6); *In re Glacier Gen. Ins. Co*. (1991) 234 CA3d 1549, 286 CR 262; *Welsch v Goswick* (1982) 130 CA3d 398, 181 CR 703; CCP §904.2(g); (by analogy to *Northcutt v Superior Court* (1924) 66 CA 350, 226 P 25, prohibition should lie in certain circumstances).
31. Interpleader—CCP §§386-386.6		
Application for Order Substituting Parties and Discharging Applicant—Granted	Appeal judgment	*Neilsen v Saylors* (1956) 146 CA2d 139, 303 P2d 781 (order not appealable, reviewable on appeal from subsequent judgment); *Camp v Oakland Mortgage & Fin. Co.* (1928) 205 C 380, 270 P 685 (writ of review will not issue).
Application for Order to Deliver Property—Denied	Appeal judgment	*Crocker-Anglo Nat'l Bank v American Trust Co.* (1959) 170 CA2d 289, 338

		P2d 617.
Application for Order Restraining Other Proceedings—Denied	Mandate	*Department of Educ. v Superior Court* (1979) 97 CA3d 977, 159 CR 265 (without discussion of why writ lies).
Application for Order Restraining Other Proceedings—Granted	Appeal order	*Surety Co. of the Pac. v Piver* (1983) 149 CA3d Supp 29, 31, 197 CR 531.
Judgment on Complaint in Interpleader—Granted	Appeal judgment	*Lincoln Nat'l Life Ins. Co. v Mitchell* (1974) 41 CA3d 16, 115 CR 723 (interlocutory judgment reviewable on appeal from final judgment on conflicting claims).
32. Intervention—CCP §387		
Application to Intervene—Granted	Appeal judgment	*Taylor v Western States Land & Mortgage Co.* (1944) 63 CA2d 401, 147 P2d 36 (order not appealable, reviewable on appeal from final judgment).
Application to Intervene—Denied	Appeal order denying motion	*Braun v Brown* (1939) 13 C2d 130, 87 P2d 1009; *City & County of San Francisco v State* (2005) 128 CA4th 1030, 1036, 27 CR3d 722; *City of Malibu v California Coastal Comm'n* (2005) 128 CA4th 897, 27 CR3d 501).
33. Judge's Disqualification—CCP §§170.1, 170.3(d), 170.6		
Motion to Disqualify—Granted	Mandate	CCP §170.3(d); *Curle v Superior Court* (2001) 24 C4th 1057, 1059, 103 CR2d 751 (CCP §170.1); *In re Sheila B.* (1993) 19 CA4th 187, 23 CR2d 482. See §§16.3-16.7.
Motion to Disqualify—Denied (CCP §§170.1, 170.6)	Mandate	CCP §170.3(d). See §§16.3-16.7.
34. Judgment		
Motion for Judgment—Granted	Appeal judgment	*Adohr Milk Farms, Inc. v Love* (1967) 255 CA2d 366, 63 CR 123 (nonappealable order, reviewable on appeal from final judgment).
Motion for Judgment—Denied	Mandate	CCP §904.1.
35. Jurisdiction—CCP §§418.10, 904.1(a)(3), 904.2(d)		
Motion to Quash—Granted	Appeal order	CCP §§904.1(a)(3), 904.2(d).
Motion to Quash—Denied	Mandate	CCP §418.10(c). See §§16.54-16.57.
36. Jury Trial—CCP §§592, 1090		
Motion for Jury Trial—Granted	Prohibition	*Southern Pac. Transp. Co. v Superior Court* (1976) 58 CA3d 433, 129 CR 912 (without discussion of why writ lies). See §§16.148-16.149.
Motion for Jury Trial—Denied	Prohibition	*Mallarino v Superior Court* (1953) 115 CA2d 781, 252 P2d 993 (writ issued to restrain trial without

		jury).
37. Liens		
Motion to Expunge Attorney Lien—Denied	Appeal order	*Trimble v Steinfeldt* (1986) 178 CA3d 646, 650, 224 CR 195.
38. Lis Pendens—CCP §§405-405.61		
Motion to Expunge—Granted or Denied	Mandate	CCP §405.39 (order not appealable, reviewable by mandate only). See §§16.11-16.13.
39. Mistrial		
Motion for Mistrial—Granted	Appeal judgment	*Bauguess v Paine* (1978) 22 C3d 626, 634 n3, 150 CR 461.
	Mandate	*Juarez v Superior Court* (1982) 31 C3d 759, 765, 183 CR 852.
Motion for Mistrial—Denied	Appeal judgment	*Blair v Williams* (1952) 109 CA2d 516, 561, 240 P2d 1043.
40. Nonsuit—CCP §581c		
Motion for Nonsuit—Granted	Appeal order	*Shepardson v McLellan* (1963) 59 C2d 83, 27 CR 884 (when order terminates litigation as to one party and does not indicate it would be followed by formal written judgment).
Motion for Nonsuit—Denied	Petition for extraordinary writ	Not appealable under CCP §904.1.
41. Partition		
Interlocutory Judgments	Appeal judgment	CCP §904.1(a)(9).
42. Pretrial Conference Order, Amendment of—CCP §576	Mandate	*Universal Underwriters Ins. Co. v Superior Court* (1967) 250 CA2d 722, 58 CR 870 (without discussion of why writ lies).
43. Powers of Attorney—Prob C §1302		
The following motions are immediately appealable whether granted or denied:		
Any final order under Prob C §4541, except order under §4541(c)	Appeal order	CCP §904.1(a)(10); Prob C §1302(a).
Any final order under Prob C §4766(c)	Appeal order	CCP §904.1(a)(10); Prob C §1302(b).
An order dismissing the petition or denying a motion to dismiss under Prob C §4953	Appeal order	CCP §904.1(a)(10); Prob C §1302(b).
44. Probate Orders—Prob C §§1300, 1303		
The following motions for Probate Orders are immediately appealable whether granted or denied:		
Directing, authorizing, approving, or confirming sale, lease, encumbrance, grant of option, purchase, conveyance, or exchange of property	Appeal order	CCP §904.1(a)(10); Prob C §1300(a).
Settling account of fiduciary	Appeal order	CCP §904.1(a)(10); Prob C §1300(b).

Authorizing, instructing, or directing fiduciary	Appeal order	CCP §904.1(a)(10); Prob C §1300(c).
Approving or confirming acts of fiduciary	Appeal order	CCP §904.1(a)(10); Prob C §1300(c).
Directing or allowing payment of debt, claim, or cost	Appeal order	CCP §904.1(a)(10); Prob C §1300(d).
Fixing, directing, authorizing, or allowing payment of compensation or expenses of attorney	Appeal order	CCP §904.1(a)(10); Prob C §1300(e).
Fixing, directing, authorizing, or allowing payment of compensation or expenses of fiduciary	Appeal order	CCP §904.1(a)(10); Prob C §1300(f).
Surcharging, removing, or discharging fiduciary	Appeal order	CCP §904.1(a)(10); Prob C §1300(g).
Transferring property of estate to fiduciary in another jurisdiction	Appeal order	CCP §904.1(a)(10); Prob C §1300(h).
Allowing or denying fiduciary's petition to resign	Appeal order	CCP §904.1(a)(10); Prob C §1300(i).
Discharging surety on fiduciary's bond	Appeal order	CCP §904.1(a)(10); Prob C §1300(j).
Adjudicating the merits of a claim made under Prob C §§850-859	Appeal order	CCP §904.1(a)(10); Prob C §1300(k).
Granting or revoking letters to personal representative (except special administration)	Appeal order	CCP §904.1(a)(10); Prob C §1303(a).
Admitting a will to probate or revoking probate	Appeal order	CCP §904.1(a)(10); Prob C §1303(b).
Setting aside an estate of less than $20,000 (Prob C §6609)	Appeal order	CCP §904.1(a)(10); Prob C §1303(c).
Setting apart homestead or other exempt property	Appeal order	CCP §904.1(a)(10); Prob C §1303(d).
Granting, modifying, or terminating family allowance	Appeal order	CCP §904.1(a)(10); Prob C §1303(e).
Determining heirship, succession, entitlement, or person to whom distribution should be made	Appeal order	CCP §904.1(a)(10); Prob C §1303(f).
Directing distribution of property	Appeal order	CCP §904.1(a)(10); Prob C §1303(g).
Determining or confirming property's passage to, or ownership by, surviving spouse	Appeal order	CCP §904.1(a)(10); Prob C §1303(h).
Authorizing investment or reinvestment of surplus by personal representative	Appeal order	CCP §904.1(a)(10); Prob C §1303(i).
Determining whether action constitutes contest under Prob C §§21310-21315, as those sections read before their repeal effective 1/2009.	Appeal order	CCP §904.1(a)(10); Prob C §1303(j).
Determining priority of debts under Prob C §§11440-11446	Appeal order	CCP §904.1(a)(10); Prob C §1303(k).

Any final order under Prob C §§20100-20125 or §§20200-20225	Appeal order	CCP §904.1(a)(10); Prob C §1303(*l*).
Motion for Leave to File Creditor's Claim—Denied	Mandate	*Estate of Hoertkorn* (1979) 88 CA3d 461, 151 CR 806 (mandate lies because order not appealable by Prob C §1240).
45. Public Records Act—Govt C §6259(c)	Mandate	*Filarsky v Superior Court* (2002) 28 C4th 419, 426, 121 CR2d 844. See §§16.14-16.17.
46. Receiver—CCP §§564-570		
Petition to Appoint Receiver—Granted	Appeal order	*Carpenson v Najarian* (1967) 254 CA2d 856, 861, 62 CR 687 (order must be appealed under CCP §§904.1(a)(7), 904.2(h)).
	Prohibition	*Rondos v Superior Court* (1957) 151 CA2d 190, 311 P2d 113 (writ available when under circumstances appeal not adequate remedy).
Petition to Appoint—Denied	Appeal order	*Conaway v Conaway* (1963) 218 CA2d 427, 32 CR 890 (questionable whether order appealable; appeal taken).
	Mandate	*Guay v Superior Court* (1957) 147 CA2d 764, 769, 305 P2d 990.
Motion to Vacate Appointment—Denied	Appeal order	*Raff v Raff* (1964) 61 C2d 514, 518, 39 CR 366 (order appealable in that essentially it is an order that receiver continue to serve, analogous to original order of appointment); *City & County of San Francisco v Shers* (1995) 38 CA4th 1831, 1837, 46 CR2d 57. But see *Title Ins. & Trust Co. v California Dev. Co.* (1911) 159 C 484, 114 P 838 (appeal judgment).
Motion to Discharge—Granted	Appeal order	*Hibernia Sav. & Loan Soc'y v Ellis Estate Co.* (1932) 216 C 280, 13 P2d 929 (characterized as final order on collateral matter).
Motion to Discharge—Denied	Mandate	*Fairbank v Superior Court* (1917) 34 CA 66, 166 P 864 (without discussion of why writ lies).
47. Reclassification—CCP §403.080		
Motion to Reclassify—Granted	Mandate	*Garau v Torrance Unified Sch. Dist.* (2006) 137 CA4th 192, 199, 40 CR3d 108. See §§16.58-16.61
48. Remand Proceedings—Superior Court Fails to Follow Court of Appeal's Instructions	Mandate	*Butler v Superior Court* (2002) 104 CA4th 979, 128 CR2d 403.
49. Sanctions—CCP §§128.5, 2023.030		
Motion for Sanctions—Granted against party or attorney if over $5000	Appeal	CCP §904.1(a)(11)-(12).
Motion for Sanctions—Granted against	Mandate,	CCP §904.1(b) (CCP §904.1(a)(11)-

party or attorney if $5000 or less	prohibition, or appeal judgment	(12). See §§16.81-16.85.
Motion for Sanctions—Denied	Mandate	*Do v Superior Court* (2003) 109 CA4th 1210, 135 CR2d 855; *Wells Props. v Popkin* (1992) 9 CA4th 1053, 1056, 11 CR2d 845. But see *Muller v Fresno Community Hosp. & Med. Ctr.* (2009) 172 CA4th 887, 905, 91 CR3d 617 (under circumstances, order denying motion for sanctions was appealable as collateral order). See §16.125.
Motion for Non-Monetary Discovery Sanctions—Granted		
	Mandate or Prohibition	*Maggi v Superior Court* (2004) 119 CA4th 1218, 15 CR3d 161 (protective order violated Fifth Amendment). See §16.117.
	Appeal order	*Barton v Ahmanson Devs. Inc.* (1993) 17 CA4th 1358, 1361, 22 CR2d 56.
50. Security for Costs—CCP §§1029.5, 1030; Corp C §800		
Motion for Security for Costs—Granted	Appeal judgment	*Woodman v Ackerman* (1967) 249 CA2d 644, 57 CR 687 (nonappealable order, reviewable on appeal from judgment of dismissal entered after party refused to post security under former Corp C §834 (now Corp C §800)).
	Prohibition	*Hagan v Superior Court* (1960) 53 C2d 498, 2 CR 288 (writ may issue to restrain court from enforcing order to post security).
Motion for Security for Costs—Denied	Appeal judgment	*Efron v Kalmanovitz* (1960) 185 CA2d 149, 8 CR 107 (nonappealable order).
	Prohibition	*Kennaley v Superior Court* (1954) 43 C2d 512, 514, 275 P2d 1.
51. Settlement		
Motion to Determine Good Faith of Settlement—Granted or Denied	Mandate	CCP §877.6(e). See §§16.49-16.51.
Dismissal of Cross-Complaint After Granting of Motion to Determine Good Faith of Settlement	Appeal order	*Greshko v County of Los Angeles* (1987) 194 CA3d 822, 827 n1, 239 CR 846 (order appealable as final judgment if dismissal terminates action as to party).
52. SLAPP—See Anti-SLAPP		
53. Stay—CCP §§418.10, 904.1(a)(3), 904.2(d)		
Motion for Stay—Granted	Appeal order	CCP §§904.1(a)(3) (if granted on grounds of inconvenient forum), 904.2(d) (same in limited jurisdiction cases).

	Mandate	*James v Superior Court* (1968) 261 CA2d 415, 67 CR 783 (without discussion of why writ lies in other cases). See §16.56-16.59.
Motion for Stay—Denied	Mandate	CCP §418.10(c) (if inconvenient forum); *Simmons v Superior Court* (1950) 96 CA2d 119, 214 P2d 844 (on grounds of comity). See §16.54-16.57.
54. Strike, Motion to—CCP §§435-437, 472c		
Motion to Strike—Granted	Appeal judgment	CCP §472c(b)(3) (nonappealable order, reviewable on appeal from final judgment).
	Appeal order	*Garza v Kantor* (1976) 54 CA3d 1025, 127 CR 164 (order appealable if it terminates action as to at least one party). See also CCP §586(a)(7).
Motion to Strike—Denied	Prohibition	*Tide Water Assoc. Oil Co. v Superior Court* (1955) 43 C2d 815, 279 P2d 35 (writ may lie to restrain trial of issues underlying motion when petitioner has no other adequate remedy).
55. Summary Adjudication of Issues and Orders Under CCP §437c (Other than Summary Judgment)	Mandate or Prohibition	CCP §437c(m)(1); *Whitney's at the Beach v Superior Court* (1970) 3 CA3d 258, 83 CR 237 (full discussion of when writ lies). See §16.68.
56. Summary Judgment—CCP §437c		
Motion for Summary Judgment—Granted	Appeal judgment	CCP §437c(m)(1). See §16.68.
Motion for Summary Judgment—Denied; Motion for Summary Adjudication Granted or Denied	Mandate or Prohibition	CCP 437c(m)(1). See §16.67.
Trial Court Takes Motion Off Calendar	Mandate	*Wells Fargo Bank v Superior Court* (1988) 206 CA3d 918, 254 CR 68. See §16.71.
Trial Court Shortens Motion Notice Period	Mandate	*McMahon v Superior Court* (2003) 106 CA4th 112, 130 CR2d 407. See §16.72.
Trial Court Denies Oral Argument	Mandate	*Brannon v Superior Court* (2004) 114 CA4th 1203, 1211, 8 CR3d 491. See §16.74.
Trial Court Denies Right to File Motion	Mandate	*Polibrid Coatings, Inc. v Superior Court* (2003) 112 CA4th 920, 6 CR3d 7. See §16.73.
Trial Court Refused to Consider Summary Adjudication in the Alternative	Mandate	*Hope Int'l Univ. v Superior Court* (2004) 119 CA4th 719, 744, 14 CR3d 643. See §16.75.
57. Tort Claims Act (see Government Claims Act)		
58. Trusts—Prob C §1304		
Any of the following orders are immediately		

appealable whether they are granted or denied:		
Any final order under Prob C §§17200-17211, except one compelling trustee to submit account or report acts as trustee, or accepting trustee's resignation	Appeal order	CCP §904.1(a)(10); Prob C §1304(a).
Any final order under Prob C §§19020-19030	Appeal order	CCP §904.1(a)(10); Prob C §1304(b).
Any final order under Prob C §§20100-20125 or Prob C §§20200-20225	Appeal order	CCP §904.1(a)(10); Prob C §1304(c).
Determining whether an action constitutes a contest under Prob C §§21320-21322, as those sections read before their repeal effective 1/2009.	Appeal order	CCP §904.1(a)(10); Prob C §1304(d).
59. Unlawful Detainer—CCP §1176		
Motion for Stay—Denied	Mandate	CCP §1176(a). See §§16.78-16.80.
60. Venue—CCP §§400, 904.2(c)		
Motion for Change of Venue—Granted or Denied	Mandate	CCP §400; *Mission Imports, Inc. v Superior Court* (1982) 31 C3d 921, 927 n4, 184 CR 296; *Hennigan v Boren* (1966) 243 CA2d 810, 814, 52 CR 748. But see CCP §904.2(c) (order granting or denying motion to change venue in limited civil case is appealable order). See §§16.62-16.65.

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APPENDIX B

Sacramento Superior Court Guide to the Procedures for Prosecuting Petitions for Prerogative Writs

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GUIDE TO THE PROCEDURES FOR PROSECUTING PETITIONS FOR PREROGATIVE WRITS

(as specified in Local Rule 2.01)

This guide to the procedures for prosecuting petitions for writs of mandate and other prerogative writs in the Sacramento Superior Court is made available for your general information pursuant to Local Rule 2.01(E). The department to which the writ is assigned (hereinafter "assigned writ department") should be contacted for additional information concerning the scheduling of hearings and filing of papers.

Topic **Page**

Filing a Writ Petition 2
Serving a Writ Petition 2
Filing Subsequent Papers 2
Noticing Related Writ Cases and Possible Consolidation 3
Applying for a Temporary Stay in Administrative Mandate Proceedings
(CCP § 1094.5 (g) or (h)) 4
Applying for a Temporary Stay in Traditional Mandate Proceedings (CCP § 1085) 5
Bringing Motions before the Hearing on the Merits of a Writ Petition 6
Setting a Hearing on the Merits of a Writ Petition 7
(1) By noticing a hearing on a writ petition 7
(2) By securing issuance of an alternative writ 8
Applying for a Continuance 9
Dismissing a Writ Petition 10
Lodging an Administrative Record 10
The Hearing on the Merits 10
Appearing by Telephone 11
Preparing a Judgment and Peremptory Writ 11

Print

Filing a Writ Petition:

Step	Action
1.	File an original and two copies of the petition and a civil case cover sheet at the civil front counter in Room 102 on the first floor of the main courthouse. *Or* mail an original and two copies of the petition and a civil case cover sheet to the Civil Division - Room 102, 720 9th Street, Sacramento, CA 95814.
2.	Pay the filing fee pursuant to Government Code section 70611 in Room 102.
3.	Receive from the civil front counter clerk a Notice of Case Assignment and a copy of this Guide to the Procedures for Prosecuting Petitions for Prerogative Writs.

Serving a Writ Petition:

Step	Action
1.	Serve the writ petition on respondent(s) and real party(ies) in compliance with the requirements of Code of Civil Procedure (CCP) sections 1107 and 1088.5. Until compliance with these statutory service requirements is established by the filing of an appropriate proof of service, the court cannot hear or act on the petition.
2.	Along with the writ petition, serve copies of the Notice of Case Assignment and this Guide to the Procedures for Prosecuting Petitions for Prerogative Writs.

For service of an application for an alternative writ, see below, "Setting a Hearing on the Merits of a Writ Petition, (2) Securing issuance of an alternative writ."

Filing Subsequent Documents:

Step	Action
1.	File an original and two copies of all subsequent documents related to the writ petition either at the civil front counter in Room 102 or by mail addressed to the Civil Division - Room 102, 720 9th Street, Sacramento, CA 95814. *Exception*: Documents filed one day before or on the day of the hearing shall be filed with the courtroom clerk in the assigned writ department after any applicable fees have been paid in Room 102.
2.	File documents by fax in compliance with rule 2.303 of the California Rules of Court and Local Rule 9.20. Documents faxed directly to the court **will not be filed**.
3.	Specify on the first page of each document the date, time and department of any scheduled hearing to which the document applies. To set a hearing, see below, "Bringing Motions before the Hearing on the Merits of a Writ Petition" and "Setting a Hearing on the Merits of a Writ Petition."

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Noticing Related Writ Cases and Possible Consolidation:

Step	Action
1.	When filing a Notice of Related Case pursuant to rule 3.300 of the California Rules of Court regarding two or more writ cases assigned to different judges in this court, file the Notice **in each writ case**.
2.	When filing a Response to a Notice of Related Case pursuant to rule 3.300 of the California Rules of Court, file the Response **in each writ case**.
3.	Serve the Notice or Response on **each party to each case**.

Note that the court proceeds with respect to related writ cases as follows:

When a judge becomes aware that a Notice of Related Case has, or should have, been filed concerning two or more writ cases assigned to different judges in this court and that the cases have not been consolidated, the judge may, if appropriate, issue a minute order indicating that a Notice of Related Case has, or should have, been filed concerning two or more writ cases pending in this court, that a Response to the Notice has or has not been filed by another party, that the cases are being referred to the Presiding Judge for determination as to the appropriateness of their assignment to a single judge or their consolidation before a single judge, and any other information the judge deems relevant. The judge shall serve the minute order on each party to each case, send it to each judge assigned to one of the cases and forward it to the Presiding Judge for determination as to the appropriateness of assignment or consolidation. Prior to determining the matter, the Presiding Judge may seek briefing from the parties and/or schedule a hearing regarding the assignment or consolidation of the cases.

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Applying for a Temporary Stay in Administrative Mandate Proceedings (CCP § 1094.5 (g) or (h)):

Step	Action
1.	Prepare an ex parte application for an order temporarily staying operation of the administrative decision under review in the proceeding. Identify whether the temporary stay order is requested pursuant to subdivision (g) or (h) of the CCP § 1094.5. Specify "Ex Parte" in the title of the application. Pursuant to rules 3.1201 and 3.1202 of the California Rules of Court and this Guide to the Procedures for Prosecuting Petitions for Prerogative Writs, an ex parte application for a stay order includes the following supporting documents and papers: ▪ Endorsed copy of the petition. ▪ Points and authorities, declarations and other supporting documents, including relevant portions of the administrative record if available. ▪ Proposed order to show cause why the administrative decision under review in the proceeding should not be temporarily stayed pending a hearing on the merits of the writ petition (OSC). This proposed OSC should contain: - blank spaces for the date and time of the hearing on the OSC, - an order for service of the OSC and any supporting papers not previously served with a blank space for a date of service prior to the hearing on the OSC, and - an order staying the administrative decision pending the hearing on the OSC. ▪ Proposed stay order. ▪ Notice of hearing on the petition with blank spaces for date and time (unless the stay is being requested in conjunction with an application for an alternative writ). ▪ Declaration regarding notice, as specified in rule 3.1204. In addition, CCP § 1094.5 (g) and (h) require that proof of service of a copy of the application on the respondent accompany an application for a stay. See subdivisions (g) and (h) for required manner of service.
2.	Contact the assigned writ department to reserve an ex parte hearing date and time and to determine whether the assigned writ department requires any of the documents or papers listed above in Step 1 to be filed before the hearing. Note that some writ departments hear writ matters only on Fridays.
3.	Notify respondent(s) and real party(ies) of the hearing on the ex parte stay application in accordance with rule 3.1203 of the California Rules of Court. Include the details of this notification in the declaration regarding notice prepared pursuant to rule 3.1204. **Note:** The Court prefers at least 48 hours' notice but, upon a showing of urgency, will accept less notice.
4.	If the assigned writ department does not require any of the documents listed above in Step 1 to be filed before the ex parte hearing, file and serve the documents and papers as soon as possible and no later than the time of the hearing. (See rule 3.1206 of the California Rules of Court.)

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At the ex parte hearing, depending on the nature of the factual and legal issues raised by the stay application and the practical exigencies of the matter, the court will either rule on the stay application immediately or issue the proposed OSC with or without a temporary stay order pending the hearing on the OSC at a specified date and time.

If the court grants a stay at the ex parte hearing or the hearing on the OSC, the court will sign and file the proposed stay order and set a date and time for a hearing on the merits of the petition. The court clerk will record the hearing date and time in the notice of hearing on the petition, or if the court has ordered the issuance of an alternative writ, in the alternative writ.

If the Court denies a stay at the ex parte hearing or the hearing on the OSC, the court, upon petitioner's request, will set a date and time for a hearing on the merits of the petition. The clerk will record the hearing date and time in the notice of hearing on the petition, or if the court has ordered the issuance of an alternative writ, in the alternative writ.

Applying for a Temporary Stay in Traditional Mandate Proceedings (CCP § 1085):

Step	Action
1.	Follow the statutory and regulatory provisions for obtaining a temporary restraining order (TRO), an order to show cause why a preliminary injunction should not be issued (OSC), and/or a preliminary injunction, set forth in the Code of Civil Procedure (including but not limited to CCP §§ 525, 526, 527, 528 and 529) and rule 3.1150 of the California Rules of Court. These provisions constitute rules of practice for temporary stays in mandate proceedings brought under CCP § 1085 in the absence of temporary stay provisions specific to such mandate proceedings. (See CCP § 1109.)
2.	When following the statutory and regulatory procedures for obtaining a TRO and/or an OSC, comply with the ex parte procedures outlined above in "Applying for a Temporary Stay in Administrative Mandate Proceedings" and in rule 3.1201 et seq. of the California Rules of Court.
3.	If no TRO or OSC is sought, notice a motion for a preliminary injunction following the procedures set forth below in "Bringing Motions Before the Hearing on the Merits

Note that a temporary stay in proceedings on a petition for a writ of prohibition may be obtained by following the procedures set forth below under "Setting a Hearing on the Merits of a Petition, (2) Securing issuance of alternative writ." An alternative writ of prohibition, unlike an alternative writ of mandate, stays specified action by the respondent until further order of the court. (See CCP §§ 1087, 1104.)

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Bringing Motions before The Hearing on the Merits of a Writ Petition:

Motions on the pleadings and other pretrial matters brought in civil actions -- including motions for change of venue, demurrers, motions to strike, motions to dismiss, discovery motions, and motions for summary judgment -- may generally be brought in writ proceedings. (See CCP § 1109.)

Motions addressing the merits of the petition in whole or in part should be calendared for a hearing at the same time as the hearing on the merits. Motions directed at resolving issues preliminary to and distinct from the issues related to the merits of the petition, such as untimeliness of the petition under an applicable statute of limitations, should be calendared before the hearing on the merits of a writ petition. The court, in the exercise of its discretion to control the order of litigation before it, may advance the hearing on a motion to a date before the hearing on the merits or may postpone a motion to the hearing on the merits when such advancement or postponement will promote the efficient conduct and disposition of the proceeding.

Because a writ petition is usually disposed of by a hearing on the merits which is limited to oral argument on written briefs and documentary evidence, the usefulness of a motion for summary judgment or summary adjudication in economically disposing of an unmeritorious case or claim is substantially reduced in writ proceedings. Thus, before bringing a motion for summary judgment or summary adjudication, counsel should carefully evaluate whether the purpose of the motion can be achieved more directly and completely through a hearing on the merits of the petition.

Step	Action
1.	Contact the assigned writ department to reserve a date and time available on the department's calendar for a hearing on the motion. Prior to reserving a date, contact the other parties to the writ petition and determine their availability on the date. Some assigned writ departments hear writ matters only on Fridays.
2.	Notice the motion in accordance with the civil law and motion procedures in CCP § 1005 and in compliance with the California Rules of Court, including rules 3.1110 through 3.1113, 3.1115-3.1116, 3.1300, and 3.1320 through 3.1324. Comply with the page limits for memoranda set forth in rule 3.1113. If the assigned writ department uses the tentative ruling system, the notice of motion must contain tentative ruling language available from the department.

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Setting a Hearing on the Merits of a Writ Petition:

If a hearing on the merits of a writ petition has not been set in conjunction with an ex parte hearing on an application for a temporary stay, it may be set either by (1) noticing a hearing on the petition or (2) securing issuance of an alternative writ. **Note:** The court prefers, as more efficient and economical for both itself and the parties, the procedure of noticing a hearing on the petition.

The date set for a hearing on the merits of a writ petition, whether by notice or alternative writ, should allow the parties to file briefs in accordance with the following schedule established in Local Rule 2.01(D):

Opening brief:	Due 45 days before the hearing
Opposition brief:	Due 25 days before the hearing
Reply brief:	Due 15 days before the hearing

Note that Local Rule 2.01(D) limits the length of each of these briefs to 50 pages instead of the page limits in rule 3.1113 of the California Rules of Court.

The date of the hearing on the merits may be expedited and the briefing schedule shortened upon an application setting forth circumstances warranting an expedited hearing. The application for an expedited hearing may be made orally at a hearing for a temporary stay or alternative writ or on an ex parte basis in accordance with rules 3.1201 through 3.1206 of the California Rules of Court.

(1) Noticing a hearing on a writ petition

Step	Action
1.	Contact the assigned writ department to reserve an available date and time for a hearing on the writ petition. Prior to reserving a date, contact the other parties to the writ petition and determine their availability on the date. Writ petitions are normally heard on Fridays.
2.	Prepare and file a notice of hearing on the writ petition specifying the reserved hearing date and time. If the assigned writ department uses the tentative ruling system, the notice of hearing must contain tentative ruling language available from the department.
3.	File the notice of hearing either at the civil front counter in Room 102 or by mail addressed to the Civil Division - Room 102, 720 9th Street, Sacramento, CA 95814.
4.	Serve a copy of the notice of hearing on respondent(s) and real party(ies) no later than the time allowed for filing and serving the opening brief. If not previously served, the writ petition, the Notice of Assignment, and this Guide should also be served no later than the time for filing and serving the opening brief.

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(2) Securing issuance of an alternative writ

The alternative writ is an order to show cause that calendars a writ petition for a hearing on the merits. With the exception of an alternative writ of prohibition issued pursuant to CCP § 1104, the alternative writ does not, in and of itself, accomplish a stay or afford any affirmative relief.

Note that, with the alternative writ method, two writs may be issued in the proceeding. First, the alternative writ is issued to set a hearing on the merits of the petition. Second, a peremptory writ may issue after the hearing on the merits.

Step	Action
1.	Prepare an ex parte application for an alternative writ. Specify "Ex Parte" in the title of the application. As provided in rules 3.1201 and 3.1202 of the California Rules of Court and this Guide, an ex parte application for an alternative writ includes the following supporting documents and papers: ▪ Endorsed copy of the petition. ▪ Points and authorities and any other supporting documents. ▪ Proposed order directing issuance of alternative writ. ▪ Proposed alternative writ with blank spaces for the date and time of a hearing on the petition. (Include a signature block for the clerk, not the judge.) ▪ Declaration regarding notice, as specified in rule 3.1204.
2.	Contact the assigned writ department to reserve an available date and time for an ex parte hearing on the application for an alternative writ and to determine whether the department requires the papers listed above in Step 1 to be filed before the hearing. Note that some writ departments hear writ matters only on Fridays. Also note that, absent a showing of good cause or waiver by the respondent(s) and real party(ies), some departments will not issue an alternative writ unless the writ petition and application for the alternative writ have been served on respondent(s) and real party(ies) at least five days before the ex parte hearing. (See CCP § 1088, requiring service of copy of petition in conjunction with application for alternative writ; CCP § 1107, providing a five-day period for respondent(s) and real party(ies) to respond to a writ petition after receiving service of the petition.)
3.	Notify the respondent(s) and real party(ies) of the date and time of the ex parte hearing on the alternative writ pursuant to rule 3.1203 of the California Rules of Court. Include the details of this notification in the declaration regarding notice pursuant to rule 3.1204. **Note**: The Court prefers at least 48 hours' notice but, upon a showing of urgency, will accept less notice.
4.	If the assigned writ department does not require any of the documents listed above in Step 1 to be filed before the hearing, file and serve on all parties the documents and papers as soon as possible and no later than the time of the hearing.

If the court grants the application for an alternative writ, the court signs and files the proposed order directing issuance of the alternative writ that sets the petition for a

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hearing on the merits. The clerk then issues the proposed alternative writ with the date and time of the hearing and provides it to the petitioner after the petitioner has paid the issuance fee in Room 102. The writ must be served upon respondent(s) and real party(ies) in the same manner as a summons in a civil action unless the court expressly orders otherwise. (See CCP §§ 1073, 1096.) Once served, the writ must be filed with a proof of service.

Applying for a Continuance:

After a hearing has been set on a motion or on the merits of a petition, it may be continued only upon approval of the Court. If the continuance requires a change in the briefing schedule, such change must also be approved.

Step	Action
1.	Present a telephone request for a continuance of the hearing to the clerk in the assigned writ department, including the reason(s) for the continuance and any necessary changes in the briefing schedule. Present the request as far in advance of the scheduled hearing date as possible. Upon the court's approval, the clerk will provide available dates on the court's calendar to which the hearing may be continued.
2.	Promptly confer with all counsel to agree upon a mutually convenient hearing date from among the dates provided by the clerk and any necessary changes in the briefing schedule. If counsel cannot agree to a continuance, a new hearing date and/or changes in the briefing schedule, the party seeking the continuance may apply for a continuance by noticed motion.
3.	Promptly present to the court a stipulation signed by all parties, including the reason for the continuance, the agreed upon hearing date and any agreed upon changes in the briefing schedule, with a proposed order. Pay the filing fee for the stipulation pursuant to subdivision (c) of Government Code section 70617 in Room 102.
4.	When the stipulation and order has been signed and filed by the Court, serve the stipulation and order on all parties.

Note that these procedures do not apply when a motion is dropped from the calendar by the moving party. In such circumstances, the moving party must telephonically notify the court and all other parties as far as possible in advance of the date on which the motion is to be heard and send a confirming letter to the court with copies to the other parties.

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Dismissing a Writ Petition:

Step	Action
1.	Promptly notify the assigned writ department pursuant to rule 3.1385 of the California Rules of Court when a writ proceeding is settled or otherwise disposed of.
2.	File a dismissal of the writ proceeding in the assigned writ department within 45 days after the date of the settlement pursuant to rule 3.1385(b) or after the date specified in the notice of conditional settlement pursuant to rule 3.1385(c).

Lodging an Administrative Record:

Step	Action
1.	When securing a date and time for a hearing on the merits of the petition, inform the clerk in the assigned writ department about the size of any administrative record in the case. Determine the department's preferences regarding the format, binding and container for the administrative record.
2.	Lodge the administrative record with the assigned writ department no later than 25 days prior to the hearing on the merits of a writ petition. If the record is not lodged by this time, some assigned writ departments may take the matter off calendar. Consult with the assigned writ department if you wish to lodge the administrative record more than 25 days before the hearing on the merits of a writ petition.
3.	Attach a cover sheet to the administrative record and any boxes containing the record that lists the: • Case name, • Case number, • Date and time of the hearing.

At the hearing on the merits of the petition, the court will mark the administrative record as an exhibit and admit it into evidence. At the conclusion of the proceedings on the petition, the court may return the administrative record to the party who lodged it or destroy it pursuant to CCP § 1952 through 1952.3.

The Hearing on the Merits:

All hearings on writ petitions proceed by way of oral argument. If a party wishes to present oral testimony at the hearing, the party must obtain permission pursuant to rule 3.1306 of the California Rules of Court.

If the assigned writ department uses a tentative ruling system and posts a tentative ruling on the court day before the hearing on the writ petition, a party desiring to be heard must contact the clerk and request oral argument by the time designated in the

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posted tentative ruling. When requesting oral argument, the party must advise the clerk that all other parties have been notified.

Appearing by Telephone:

Parties may appear by telephone in accordance with Local Rule 9.10.

Note that some assigned writ departments permit telephonic appearances in hearings on motions only on a limited basis and in hearings on the merits of a writ petition only under compelling circumstances.

Preparing a Judgment and Peremptory Writ:

If the court denies the writ petition, the party designated by the court shall, pursuant to rule 3.1312 of the California Rules of Court, prepare, serve on all parties, and present to the court a judgment denying the petition.

If the court grants the writ petition:

Step	Action
1.	The party designated by the court prepares (1) a judgment granting the writ petition and (2) a peremptory writ. The peremptory writ includes a signature block for the clerk, not the judge.
2.	Pursuant to rule 3.1312 of the California Rules of Court, prepare, serve on all parties, and present to the court a judgment granting the petition and the peremptory writ. The judgment, when approved, will be signed by the court. The clerk will issue the peremptory writ and provide it to the petitioner for service upon respondent(s) and real party(ies) after the petitioner pays the issuance fee in Room 102.
3.	Serve a copy of both the judgment granting the writ petition and the peremptory writ on the respondent(s) and real party(ies). The writ must be served in the same manner as summons in a civil action. (CCP §§ 1073, 1097.)
4.	Return the original peremptory writ with a proof of service to the assigned writ department for filing.
5.	Prepare, serve, and file in the assigned writ department a notice of entry of judgment pursuant to CCP § 664.5(a).

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Table of Statutes, Regulations, and Rules

CALIFORNIA

Constitution

Art I, §1: §§16.118, 16.120
Art I, §2: §16.121
Art I, §2(b): §16.132
Art II, §4: §2.56
Art II, §8(d): §2.48
Art VI, §3: §22.2
Art VI, §10: §§4.10, 4.17, 18.85
Art VI, §11: §§4.2, 16.14
Art VI, §12(b): §11.35
Art VI, §13: §11.15
Art VI, §14: §§24.15, 24.19
Art VI, §19: §§11.32, 24.17

Statutes

BUSINESS AND PROFESSIONS CODE

6068(e): §17.13
6082: §27.6
17200-17210: §16.148
23077: §16.22
23084: §16.22
23089: §16.22
23090: §§16.22-16.23
23090-23090.7: §16.22
23090.2: §16.24
23090.2(d): §16.24
23090.4: §16.22
23090.5: §§16.22, 16.25

CIVIL CODE

54.3(a): §28.17

CODE OF CIVIL PROCEDURE

2 of Code of Civil Procedure: §5.4
12-12a: §18.74
12a: §25.8
23: §5.4
36: App A
85: §12.2
86: §12.2
86(a)(8): §4.33
116.710(a): §12.26
116.710(b): §12.26
116.780(a): §12.27
128(a)(3): §12.9
128.5: App A
166(a)(1): §9.4
166.1: §§15.70, 17.28, 17.32, 18.34
170.1: App A
170.1-170.5: §16.3
170.1(a)(6)(A)(iii): §16.4
170.1(a)(6)(C) (former): §16.4
170.3: §16.3
170.3(b)(2)(B): §16.3

170.3(c): §16.3
170.3(d): §§16.3-16.6, 17.24, 18.76, App A
170.6: §§6.39, 16.3, 16.5, 17.34, 18.73, 19.6, App A
190-237: §28.16
194(i): §28.16
197(c): §28.16
205: §28.16
205(c): §28.16
284: App A
284(2): App A
307-1062.20: §§5.4, 6.20, 8.58
335.1: §16.108
337(1): §5.73
338: §5.73
338(a): §5.73
340(c): §16.108
363: §§5.4, 5.78
372-373.5: App A
386-386.6: App A
387: App A
389: §§5.34-5.35, 18.18
393(b): §5.75
396b: §17.32
400: §§16.62, 16.64, 18.76, App A
403.010-403.090: §18.76
403.080: §§16.58-16.60, 18.76, App A
404-404.9: §18.76, App A
404.2: §16.9
404.6: §§16.8-16.9, 18.76, App A
405-405.61: App A
405.35: §19.2
405.38: §16.11
405.39: §§16.11-16.12, 18.63, 18.76, App A
410.50: §16.94
410.50(a): §9.11
412.20: §5.4
413.10-417.40: §5.83
416 (former): §16.94
416.10-416.80: §9.15
416.50(a): §18.79
416.90: §9.15
417.10-417.40: §9.11
417.10(a): §5.85
417.10(f): §5.85
418.10: §16.112, App A
418.10(a): §16.54
418.10(c): §§16.54-16.55, 16.57, 18.63, 18.76, App A
418.10(e): §17.26
418.10(e)(1): §8.56
422.30: §5.31
422.40: §5.31
425.13(a): §16.105
425.14: §16.106
425.16: §§16.115, 16.117, 26.8, App A
426.10: App A
430.10: §§23.35, 23.47
430.10-430.80: §§8.40, 23.33
430.30: §23.47
430.30(b): §23.36
430.40(b): §8.58
430.80: §8.48
430.80(a): §8.48
431.10-431.30: §8.45
431.30: §§8.46, 23.29
435-437: App A

435(b)(1): §8.58
437c: §§16.66, 16.68-16.69, 16.71-16.72, App A
437c(a): §§8.54, 16.71
437c(b)(6): §16.76
437c(c): §28.15
437c(f)(1): §16.68
437c(g): §16.70
437c(l): §18.63
437c(m)(1): §§16.66, 16.76, 18.62-18.63, 18.71, 18.76, App A
438: §8.53
446: §§5.64-5.65, 5.67, 13.11, 18.44, 18.47
446(a): §§5.65, 8.49, 18.42, 23.32
465: §§8.13, 8.30, 8.61, 23.15, 23.42-23.43, 23.50
471.5: App A
472a(c): §9.18
472c: App A
472c(a): App A
472c(b)(3): App A
473: §§15.48, 18.80, App A
475: §11.15
481.010-492.090: §4.29
482.010: App A
483.010(a): §4.29
485.240: App A
489.410: §26.11
489.420: §26.11
515.010(a): §6.31
525: §4.33
525-534: §4.33, App A
526-527: §4.33
526(a): §13.1
526(a)(1): §13.8
526(a)(4)-(5): §13.8
527: §6.31
527(c)-(d): §6.31
527(d)(1): §§6.31, 6.35
527(d)(2): §6.35
527(d)(3): §6.35
529(a): §§6.37-6.38
529(b): §6.37
529(b)(2): §6.37
529(b)(3): §6.37
564-570: App A
576: App A
581(f)(1): §8.42
581a: §16.112
581a (former): §16.112
581c: App A
581d: §8.42
583 (former): §§16.112-16.113
583(b) (former): §16.112
583.110: §16.54
583.110-583.160: §15.26
583.110-583.430: App A
583.210-583.250: §§8.51, 16.54, 16.112
583.310: §16.114
583.310-583.360: §§8.51, 16.112
583.340(b): §22.10
583.410-583.430: §8.51
585-587: App A
586(a)(7): App A
592: App A
594-595.4: App A
597: App A
632: §§9.34-9.35, 9.37

656-662.5: §11.3
660: §15.26
663: §11.4
664.5: §5.123
680.010-724.260: §§4.30, 24.54
695.010-695.070: §4.30
695.010-709.030: §24.54
699.010-701.830: §4.30
703.600: App A
712.010-712.070: §§4.31-4.32
714.010-714.030: §4.31
715.010-715.050: §4.31
716.010-716.030: §4.32
803: §4.27
803-811: §§2.10, 4.27, 15.50
871.1: §16.148
877: §16.49
877-877.6: §16.49
877.6: §§16.49, 16.51
877.6(e): §§16.49-16.50, 17.24, 18.76, App A
904.1: §§6.27, 12.20, 16.127, 17.21, App A
904.1-904.2: §§15.57-15.58
904.1(11): §16.127
904.1(a): §12.20
904.1(a)(1): §§11.7, 28.1
904.1(a)(1)-(2): App A
904.1(a)(1)(B): §§15.37, 16.133, App A
904.1(a)(2): §11.13, App A
904.1(a)(3): App A
904.1(a)(5): App A
904.1(a)(6): §16.150, App A
904.1(a)(7): App A
904.1(a)(9): App A
904.1(a)(10): App A
904.1(a)(11): §16.127
904.1(a)(11)-(12): §§16.81, 16.127, App A
904.1(a)(12): §16.127
904.1(b): §§16.81, 16.83, 16.126, App A
904.1(f) (former): §16.150
904.2: §12.22
904.2(a)(2): App A
904.2(c): §16.63, App A
904.2(d): App A
904.2(f): App A
904.2(g): §16.150, App A
904.2(h: App A
904.3: §§12.18-12.20
907: §§17.35, 24.60, 24.65
909: §15.48
911: §12.23
916: §§12.28, 26.3, 26.10-26.11, 26.16
916(a): §§11.24, 26.6, 26.14
917.1: §§26.3, 26.11-26.13, 26.19
917.1-917.8: §§26.11, 26.13
917.1-917.9: §§26.3, 26.6, 26.11, 26.20
917.1(a)(2)-(3): §26.12
917.1(b): §26.12
917.1(d): §26.12
917.2: §§26.11-26.12
917.3: §26.11
917.4: §26.11
917.5: §26.11
917.7: §26.11
917.8: §26.11
917.9: §§26.11, 26.13

917.15: §26.11
917.65: §26.11
918(a): §19.8
921: §26.11
923: §§11.24, 15.49, 22.10, 26.2-26.3, 26.11, 26.17, 28.18-28.19
940.2(g): App A
995.010-996.560: §6.20
995.210: §6.20
995.220: §§6.20, 6.37
995.240: §6.37
998: §§17.23, 17.25
1003-1020: §§5.104, 8.50
1005: §16.76
1005(b): §§5.106, 8.17, 8.62-8.63
1005.5: §5.91
1008: §§11.5-11.6, 17.2
1008(b): §15.48
1010-1020: §§5.105, 8.14, 8.31, 8.61
1011: §18.78
1013: §§5.123, 16.47, 16.76, 18.65
1013(a): §§11.22, 12.13, 16.19, 16.30, 16.55, 18.65, 18.76
1013(c): §18.65
1021.5: §11.13, App A
1027: §24.54
1029.5: App A
1030: App A
1032: §5.121
1033: §5.121
1033.5: §§5.121-5.123, 5.127, 7.17
1033.5(a)(10): App A
1048(a): App A
1054: §15.38
1062.3: §17.34
1063: §§5.32, 5.85
1063-1064: §5.3
1064: §§9.54, 11.5, 11.7-11.8
1067: §§4.10, 15.27, 22.30
1067-1068: §15.30
1067-1077: §§5.3, 10.20, 16.22, 16.39, 23.45, 24.53
1067-1110b: §5.4
1068: §§4.4, 4.11, 12.3, 17.30
1068(a): §§4.10, 5.54, 12.26, 15.27, 15.31-15.32, 15.57-15.58, 18.86
1068(b): §§4.10, 12.3, 15.28
1069: §§5.64, 5.67, 9.49, 15.51, 18.42-18.44, 19.5, 22.30
1069.1: §§8.43-8.45, 9.49-9.50, 23.27-23.28, 23.33-23.34, 23.39, 23.43, 23.46, 23.50
1070-1071: §§4.10, 15.28, 23.46-23.47
1070-1072: §24.42
1071: §§6.4, 9.50, 19.5, 22.30
1072: §§6.4, 6.13, 19.5
1073: §21.18
1074: §§4.10-4.11, 9.50-9.51, 15.27, 15.31, 22.30
1074-1075: §9.51
1075: §§4.12, 9.51-9.52, 15.28, 22.30, 24.42
1076: §§9.52, 10.20, 24.42
1084: §§2.1, 3.2, 15.2
1084-1097: §5.3
1085: §§1.2, 2.1, 2.5, 2.33, 2.38, 3.2-3.3, 3.6, 3.18, 3.21, 4.4, 5.31, 5.37, 5.119, 6.4, 6.13, 6.27, 7.2, 7.6, 7.9, 7.12, 7.18, 7.25, 11.16, 12.3, 13.1, 13.3, 13.7, 13.12, 15.2, 16.33, 16.46, 26.10
1085-1086: §3.20
1085-1094: §2.2
1085(a): §§2.3-2.4, 15.3, 15.5-15.6, 18.86
1085(b): §12.3
1086: §§2.3, 2.11-2.12, 2.15, 5.53, 5.64, 5.67, 12.26, 13.3, 15.34, 15.51, 15.57, 17.30, 18.28, 18.42-18.44, 18.47, 28.10
1087: §§5.112, 6.4, 8.32, 9.7, 9.44, 18.27, 19.3, 22.9, 22.23, 22.25, 23.19
1087-1088: §§8.21, 9.2, 22.26, 28.1

1088: §§5.19, 5.81-5.82, 5.113, 8.6, 8.15, 8.21-8.22, 8.25, 8.27, 8.37, 8.44, 9.3, 9.12, 9.16, 9.20, 9.23, 9.25, 18.77
1088.5: §§5.81-5.82, 5.84, 18.77
1089: §§5.17, 5.120, 8.34-8.36, 8.43-8.45, 8.49, 9.5, 9.9, 10.3, 18.47, 23.20, 23.27-23.28, 23.33-23.34, 23.39, 23.43, 23.46, 23.50
1089-1090: §9.24
1089.5: §§5.4, 5.17, 5.128, 7.4, 8.6-8.9, 8.45
1090: §§7.10-7.11, 9.6, 9.31, App A
1090-1091: §9.28
1091: §§8.57-8.59, 23.48-23.49, 28.12
1092: §11.3
1094: §§8.6, 8.15, 8.37, 8.44, 9.6, 9.24-9.26, 22.29
1094.5: §§1.2, 2.1, 2.27, 2.32-2.33, 2.40, 3.2-3.8, 3.14, 3.18, 3.20-3.21, 4.13-4.14, 5.3, 5.37, 6.13, 7.1-7.2, 7.4, 7.6, 7.9, 7.12, 7.14, 7.25, 9.1, 15.2, 16.24
1094.5(a): §§2.32, 3.4-3.7, 3.20, 7.4, 7.8, 7.17
1094.5(b): §§3.8, 3.12, 15.13
1094.5(e): §§3.7, 7.9, 16.124
1094.5(g): §26.10
1094.5(g)-(h): §§6.2, 6.13
1094.6: §3.19
1094.6(c): §§7.4, 7.7-7.8, 7.15
1094.8(d)(1): §§7.4, 7.15
1095: §§5.57, 5.121, 9.38, 9.48, 24.54
1096: §§9.11, 9.15, 9.45, 10.12, 21.18, 24.41
1097: §§9.46, 10.2, 10.11-10.14, 10.16-10.20, 24.41, 24.47-24.48, 24.51-24.52
1102: §§4.2, 4.4-4.5, 11.16, 15.14-15.15, 15.18, 15.31
1102-1103: §§4.7-4.9, 15.22, 16.138
1102-1105: §5.3
1103: §§12.3, 17.30, 18.27, 28.10
1103(a): §§5.53, 5.64, 5.67, 12.26, 15.34, 15.51, 15.57, 18.28, 18.42-18.44, 18.86
1103(b): §§4.2, 12.3
1104: §§5.51, 5.112, 6.4, 8.32, 9.2, 9.8, 9.38, 9.44, 19.4, 22.9, 22.23, 22.25, 23.19
1104-1105: §28.1
1105: §§5.81-5.82, 5.121, 8.15, 8.34-8.37, 8.43-8.45, 8.57, 9.3, 9.5-9.6, 9.9, 9.11, 9.20, 9.23-9.26, 9.28, 9.31, 9.45-9.46, 10.3, 10.11-10.13, 10.17-10.20, 11.3, 21.18, 22.26, 23.27, 23.34, 23.38-23.39, 23.43, 23.48, 23.50, 24.48, 24.54
1107: §§5.81-5.84, 5.115, 8.14, 8.25, 8.31, 9.3, 9.23, 21.14, 22.20
1107-1110b: §5.3
1108: §§10.2-10.3, 24.43-24.44
1109: §§5.4, 5.64, 5.73, 5.75, 5.121, 6.20, 8.6, 8.13-8.14, 8.17, 8.30-8.31, 8.40, 8.42, 8.45-8.46, 8.48-8.49, 8.51, 8.55, 8.58, 8.61-8.62, 9.18, 9.22, 9.53, 17.35, 18.42, 23.15, 23.27, 23.29, 23.32, 23.35, 23.42-23.43, 23.47, 23.50, 24.60, 24.65
1109-1110: §§11.3-11.4
1110: §11.20
1110a: §11.25
1110b: §§10.8, 11.24-11.25, 26.10
1126: §3.3
1176: App A
1176(a): §§16.78-16.79, App A
1209(d): App A
1211: §24.51
1211-1218: §16.138
1211(a): §§10.14, 16.139, 24.51
1222: §§15.37, 16.133, App A
1281.2: §28.13
1286.2: §16.99
1286.6: §16.99
1294: App A
1294-1294.2: §16.99
1294(a): App A
1294(b): App A
1294(c): App A
1294.2: App A
1295: §16.100
1717: App A
1781(c)(3): §16.66
2009: §§5.64, 18.42
2015.5: §§5.64, 5.69, 18.42

2016.010-2036.050: App A
2023.030: App A
2024(a) (former): §16.123
2024.020(a): §16.123
2025 (former): §§16.119, 16.123
2025.010-2025.620: §§16.119, 16.123
2030.030: §16.116
2031(l) (former): §16.119
2031.300: §16.119
2032.320: §16.119
2034(i)(2) (former): §16.119
2034.430-2034.450: §16.119

CORPORATIONS CODE
800: App A
834 (former): App A

EDUCATION CODE
47611.5(e): §2.51

EVIDENCE CODE
450-460: §20.17
451: §13.13
452: §13.13
459: §20.17
459(a): §20.18
996: §16.121
1016: §16.121
1043: §16.121
1043(b): §16.124
1045: §16.121
1045(b): §28.9
1045(b)(1): §16.124
1070: §§16.121, 16.132
1115-1128: §16.121
1119: §16.121
1119(c): §16.121
1122(a)(2): §16.121

FAMILY CODE
1818(b): §20.23
2025: App A
2337: App A
2404: App A

GOVERNMENT CODE
800: §5.124
810-997.6: §16.108
911.2: App A
911.4: App A
945.4: App A
946.6: App A
965.5-965.6: §2.66
995.2(a): App A
3500-3508.5: §4.27
3542: §2.50
3542(b): §16.29
3542(c): §§16.30-16.31
3542(d): §16.32
4450: §28.17
6250-6276.48: §§2.68, 16.14
6254.5(e): §16.122
6258: §§2.68-2.69
6259: §§2.68, 16.16-16.17
6259(c): §§16.14-16.16, 17.24, 18.76, App A

11340-11529: §3.10
11425.50: §3.14
11521(a): §3.10
11523: §§3.19, 7.5, 7.7-7.8, 7.16-7.17, 8.9
12965(b): §16.129A
17559: §3.3
65009(c): §5.72
65009(c)(1): §3.19
66499.37: §5.72
68081: §§11.34, 25.17
68106(b)(1): §§18.74, 25.8
68210: §§11.32, 24.17
68600-68620: §5.120
68603: §5.120
68605.5: §5.120
68616(b): §§5.120, 8.10
68926: §§18.84, 21.19
68926.1(b): §§18.84, 27.10
68927: §27.10
70603(a)(3)-(5): §§8.12, 8.29
70611: §5.79
70612(a): §§8.12, 8.29
70616(b): §§8.12, 8.29
70626(a)(1): §9.41
71620(b): §28.16

HEALTH AND SAFETY CODE
19955: §28.17

LABOR CODE
98: §5.44
1160.8: §§4.28, 16.18-16.21
1160.9: §16.18
5901: §16.46
5950: §§16.46-16.47, 27.7
5950-5955: §27.7
5952-5953: §16.48
5955: §16.46

PENAL CODE
1235(a): §28.16
1265: §15.45
1473: §16.136
1473-1508: §4.26
1473(a): §§4.17, 15.39

PROBATE CODE
850-859: App A
1240: App A
1240 (former): §16.143
1297 (former): §16.143
1300: §16.143, App A
1300-1301: §16.144
1300(a): App A
1300(b): App A
1300(c): App A
1300(d): App A
1300(e): App A
1300(f): App A
1300(g): App A
1300(h): App A
1300(i): App A
1300(j): App A
1300(k): App A
1301(a): App A

1301(b): App A
1301(c): App A
1301(d): App A
1301(e): App A
1301(f): App A
1301(g): App A
1302: App A
1302(a): App A
1302(b): App A
1303: App A
1303(a): App A
1303(b): App A
1303(c): App A
1303(d): App A
1303(e): App A
1303(f): App A
1303(g): App A
1303(h): App A
1303(i): App A
1303(j): App A
1303(k): App A
1303(l): App A
1304: App A
1304(a): App A
1304(b): App A
1304(c): App A
1304(d): App A
1630 (former): §16.144
1870-1901: App A
2423: App A
2500-2507: App A
2580-2586: App A
3100-3154: App A
4541: App A
4541(c): App A
4766(c): App A
4953: App A
6609: App A
7240 (former): §16.143
11440-11446: App A
17200-17211: App A
19020-19030: App A
20100-20125: App A
20200-20225: App A
21310-21315: App A
21320-21322: App A

PUBLIC RESOURCES CODE
21000-21177: §5.72
21167: §5.72
21167.6(a): §7.14
25500-25543: §16.28
25531(a): §§16.26, 27.4
25531(b): §§16.26, 16.28, 27.4

PUBLIC UTILITIES CODE
854: §27.5
1709: §16.45
1731: §16.34
1731(b): §16.38
1732: §16.34
1733: §16.36
1733(a): §16.34
1756: §§16.33, 16.44
1756-1756.2: §27.5

1756-1768: §§4.15, 27.5
1756(a): §§16.37-16.38, 27.5
1756(d): §16.38
1756(f): §§16.33, 27.5
1756(g): §27.5
1756.2: §16.38
1757: §16.41
1757(a): §16.40
1757.1(a): §16.41
1757.1(b): §16.42
1757.1(c): §16.43
1758(a): §16.38
1758(b): §16.39
1758(c): §16.33
1758(d): §16.33
1759(a): §16.33
1759(b): §16.33
1760: §16.43A

REVENUE AND TAXATION CODE
4807: §2.63

VEHICLE CODE
13559: §2.40

WELFARE AND INSTITUTIONS CODE
317: §4.20
317.5: §4.20
366(l)(1)(a): §17.25
366.26: §§4.18, 16.52
366.26(l)(1)(A)-(C): §16.52
366.28: §16.52
366.28(b)(1): §16.52
4800(a): §4.25
5000-5550: §4.22
5150: §4.22
5254: §4.22
5254.1: §4.22
5256-5256.8: §4.22
5275: §4.22
5275-5277: §4.22
5276: §§4.22, 4.26
6000(b): §4.23
7250: §4.24
14171(j): §3.3

ACTS BY POPULAR NAME
Administrative Procedure Act (APA): §§2.65, 3.10, 3.14, 7.7-7.8
California Environmental Quality Act (CEQA): §§2.25, 3.16, 5.72
Consumers Legal Remedies Act (CLRA): §16.66
Enforcement of Judgments Act: §§4.30, 24.54
Fair Employment and Housing Act (FEHA): §§16.67, 16.129A
Government Claims Act: §§2.64, 16.108, App A
Indian Child Welfare Act: §16.143A
Lanterman-Petris-Short Act: §4.22
Meyers-Milias-Brown Act: §4.27
Proposition 103: §2.37
Proposition 51: §15.70
Public Records Act (PRA): §§2.68, 15.4, 15.59, 16.14-16.17, App A
Tort Claims Act: §16.108, App A
Trial Court Delay Reduction Act: §§5.1, 5.120, 8.10
Trial Jury Selection and Management Act: §28.16
Unfair Competition Law: §§16.129A, 16.148
Uniform Parentage Act (UPA): §16.143A
Unruh Act: §16.105

Workers' Compensation Act: §16.46

Rules

CALIFORNIA RULES OF COURT

1.6: §§5.5, 5.78
1.10: §25.19
2.1-2.1100: §5.5
2.2: §§5.5, 5.87, 8.19
2.100: §5.87
2.100-2.119: §§5.21, 5.87, 8.19, 13.1-13.15
2.100(a): §8.19
2.101(a): §5.23
2.102: §5.22
2.103: §5.23
2.104: §5.22
2.105-2.106: §5.22
2.107: §5.24
2.108(1): §5.22
2.108(4): §5.25
2.109: §5.26
2.110: §5.30
2.111: §§5.31, 7.31
2.113: §§5.27, 8.19
2.114: §5.29
2.115: §§5.28, 8.19
2.550-2.551: §7.26
2.550(c): §7.26
2.550(d): §§7.27, 20.26
2.551(b)(1): §7.29
2.551(b)(2): §7.29
2.551(b)(3)(A)(i): §7.30
2.551(b)(4): §7.30
2.551(b)(5): §7.29
2.551(d): §§7.30, 7.32
2.551(d)(1)-(2): §7.31
2.551(d)(3)(A)-(B): §7.31
2.551(d)(4): §7.32
2.551(g): §7.32
3.10: §§8.10, 8.43
3.54: §20.23
3.110(d): §8.10
3.220: §5.78
3.220(b): §5.78
3.501-3.550: App A
3.505(a): §16.9
3.505(b): §§16.8-16.9, App A
3.516: §16.5
3.760(b): §28.11
3.670(g)(1): §6.23
3.670(l): §6.23
3.710-3.715: §5.120
3.766: §28.11
3.767(a)(4): §28.11
3.767(a)(5): §28.11
3.1100: §§5.5, 5.87, 8.19, 9.18, 9.22, 13.1-13.15
3.1100-3.1370: §§5.5, 5.126, 6.10, 6.22, 8.50, 9.22
3.1103(a)(1): §6.10
3.1103(a)(2): §§5.5, 5.87, 5.110, 7.4, 7.9, 7.18-7.21, 7.23, 8.18-8.19, 8.40, 8.60, 9.18, 9.22, 9.29, 9.32-9.33, 13.1-13.15
3.1103(c): §§13.10-13.15
3.1109: §9.33
3.1110-3.1116: §§13.1-13.15
3.1110-3.1370: §§5.21, 5.87
3.1110(a): §5.89
3.1110(b): §5.87

3.1110(c): §§5.26, 8.19
3.1110(c)-(g): §§7.4, 7.18
3.1110(e): §5.27
3.1110(e)-(f): §§7.19-7.20
3.1110(f): §§5.93, 7.20-7.21, 8.18
3.1110(f)-(g): §5.29
3.1112: §5.91
3.1112(a): §5.88
3.1112(c): §5.27
3.1112(d): §5.90
3.1113: §§5.93, 6.12
3.1113(a): §5.110
3.1113(b): §8.18
3.1113(d): §§5.95, 8.19
3.1113(e): §§5.95, 8.19
3.1113(f): §8.19
3.1113(h): §5.94
3.1113(i): §8.18
3.1113(j): §§7.18-7.20
3.1113(k): §§7.4, 7.21, 7.23
3.1113(l): §7.9
3.1113(m): §5.103
3.1140: §§7.4, 7.18, 7.25
3.1150(b): §6.32
3.1200-3.1207: §§5.113-5.114, 6.11, 13.2-13.9, 19.8
3.1201: §5.114
3.1202: §5.114
3.1202(c): §5.114
3.1203(a): §§5.114, 9.3
3.1204: §5.114
3.1204(b): §6.15
3.1206: §5.115
3.1207: §5.116
3.1300(a): §5.126
3.1302(a): §5.107
3.1306: §§8.20, 9.30
3.1306(a): §9.29
3.1306(b): §§8.60, 9.30
3.1308: §9.32
3.1308(c): §9.32
3.1312: §§9.37, 9.47
3.1320(g): §§8.42-8.43, 9.18
3.1332: App A
3.1590: §§9.34, 9.36-9.37
3.1700: §24.27
3.1700(a)(1): §5.123
3.1700(b)(3): §5.123
3.1702(b)(1): §5.125
3.1702(b)(2): §5.125
3.1702(d): §5.125
4.550-4.552: §4.26
5.175: App A
5.180: App A
8.4: §27.10
8.4(2): §18.6
8.18: §18.7
8.25: §§20.15, 23.43, 23.50
8.25-8.44: §§23.16, 23.18
8.25(a): §§11.21, 18.77-18.78
8.25(a)(1): §§26.27, 26.30
8.25(a)(2): §§23.16, 23.18, 26.27, 26.30
8.25(b)(1): §18.75
8.25(b)(3): §18.75
8.25(b)(4): §18.75
8.29: §§12.10, 18.79

8.32(b)-(c): §18.17
8.40: §§12.14-12.15, 23.4, 23.25
8.40(a): §§26.26, 26.29
8.40(b)-(c): §§28.20-28.21
8.40(b)(1): §§18.12, 25.23, 26.26, 26.29, 27.23, 27.28
8.40(c): §20.27
8.44(a)(1): §§27.24, 27.28
8.44(a)(2): §§26.27, 26.30, 27.10
8.44(b)(3): §§18.81, 20.16, 23.16, 23.18, 23.50, 25.23, 26.27, 26.30
8.44(b)(5): §§18.82, 20.16, 26.27, 26.30
8.50: §19.9
8.50(a): §19.18
8.50(b): §19.14
8.54: §§20.20, 20.22, 25.12
8.54(a)(1): §20.20
8.54(a)(3): §20.22
8.54(c): §20.22
8.57: §25.12
8.60(c)(2): §23.13
8.63(a)(2)-(3): §23.41
8.63(b): §§23.14, 23.41
8.100(a)(1): §11.21
8.100(a)(2): §11.21
8.100(b)(1): §11.21
8.104: §§5.125, 11.11
8.104(a): §11.22
8.104(b): §11.23
8.108: §§5.125, 11.22
8.112: §§26.2-26.3, 26.26, 26.29, 28.18
8.112-8.116: §26.22
8.112(a): §§26.18, 26.22
8.112(a)(1): §15.49
8.112(a)(2): §§26.3, 26.22
8.112(a)(3): §26.22
8.112(a)(4): §§26.4-26.5
8.112(a)(4)(A): §§26.18, 26.23, 28.18
8.112(a)(4)(B): §26.24
8.112(a)(4)(C): §26.24
8.112(b): §§26.28, 26.30
8.112(b)(3): §§26.28, 26.30, 28.18
8.112(c): §§18.59, 28.18
8.112(c)(2): §26.25
8.122(d): §28.18
8.116: §§12.9, 18.19, 19.12, 26.25, 28.1, 28.4, 28.10-28.11, 28.16, 28.18
8.116(a): §§18.12, 18.19, 19.12
8.116(a)-(b): §§19.9, 19.11
8.116(b): §§18.19, 19.13
8.116(c): §§19.3, 19.11
8.120(a): §11.26
8.120(b): §11.26
8.121(a): §11.26
8.122: §11.26
8.124: §11.26
8.128: §11.26
8.130: §11.26
8.134(a)(2): §11.26
8.137: §11.26
8.144: §§28.1, 28.4, 28.10-28.12, 28.16, 28.18
8.144(a)(1)(A): §18.6
8.160: §20.24
Comment: §20.23
8.160(b)(3): §20.26
8.160(c)(1): §20.25
8.160(c)(2): §20.25
8.160(d): §20.26

8.160(e)(1)-(2): §20.26
8.160(e)(2): §20.26
8.160(e)(3): §20.27
8.160(e)(4): §§20.25-20.26
8.160(e)(5): §§20.26-20.27
8.160(e)(6): §20.26
8.160(e)(7): §20.26
8.160(f)(2): §20.28
8.160(f)(3): §20.28
8.160(g): §20.25
8.200(a)(3): §11.30
8.200(a)(5): §28.10
8.200(c): §23.52
8.200(c)(2)-(5): §23.53
8.200(c)(6): §23.54
8.204: §§11.28-11.29, 12.12, 12.14-12.15, 23.4-23.5, 23.25, 28.1, 28.4, 28.10-28.12, 28.16, 28.18
8.204(a)-(b): §§28.20-28.21
8.204(a)(1)(A): §§18.22-18.23
8.204(a)(1)(B): §§5.94, 18.50, 21.12, 23.7
8.204(a)(1)(C): §§18.53, 21.11, 23.6
8.204(b): §§25.21, 26.26, 26.29
8.204(b)(1): §§18.6-18.7
8.204(b)(2): §18.9
8.204(b)(3): §§18.9-18.10, 18.50
8.204(b)(4): §18.9
8.204(b)(5): §18.10
8.204(b)(6): §18.10
8.204(b)(7): §18.10
8.204(b)(8): §18.11
8.204(b)(10): §§18.11-18.12
8.204(b)(10)(A): §18.13
8.204(b)(10)(B): §18.16
8.204(b)(10)(C): §18.15
8.204(b)(10)(D): §18.17
8.204(b)(11)(A): §18.9
8.204(b)(11)(B): §§18.7, 18.9
8.204(b)(11)(C): §18.9
8.204(c): §18.8
8.204(c)(1): §§11.28, 18.8, 28.10-28.12
8.204(c)(2): §18.9
8.204(c)(3): §18.8
8.204(d): §§20.11, 20.14
8.204(e): §18.7
8.204(e)(1): §18.5
8.204(e)(2): §18.5
8.208: §§21.20, 23.8, 23.26A
8.208(a): §18.21
8.208(e): §18.21
8.212: §§11.28, 23.53
8.220: §11.28
8.224: §20.14
8.252: §§20.20, 20.22
8.252(a)(2): §20.20
8.252(a)(3): §20.20
8.256: §11.31
8.256(b): §24.8
8.256(c): §24.12
8.256(c)(1): §24.10
8.256(c)(2): §§24.10, 24.12
8.256(c)(3): §24.11
8.256(d): §24.16
8.256(d)(1): §§11.31, 24.18
8.256(e)(1): §24.18
8.264: §11.34
8.264(a): §24.16

8.264(a)(1): §§24.19, 24.29, 25.5
8.264(a)(2): §24.19
8.264(b): §11.34
8.264(b)(3): §§25.6, 25.10
8.264(c): §25.15
8.264(c)(1): §§25.4, 25.9, 25.15
8.264(c)(2): §§25.6, 25.9, 25.15
8.264(d): §25.19
8.268: §§11.34, 25.16, 25.18
8.268(a): §§25.4, 25.25
8.268(a)(1): §§11.34, 25.16
8.268(b)(1): §§25.19, 25.23
8.268(b)(2): §§25.22-25.23
8.268(b)(3): §25.21
8.268(b)(4): §§25.19, 25.22
8.268(c): §25.24
8.268(d): §§25.6, 25.25
8.272: §11.33
8.272(a)-(b): §24.31
8.272(b)(1)(A): §24.33
8.272(b)(1)(B): §24.35
8.272(c)(1): §24.34
8.272(c)(2): §24.36
8.272(d)(1): §24.35
8.276: §24.60
8.278(a)(1)-(2): §11.33
8.278(a)(3): §11.33
8.278(a)(5): §11.33
8.278(b)-(d): §24.26
8.278(b)(1): §11.33
8.278(c)(1): §§11.33, 24.27
8.278(c)(2): §24.27
8.278(d)(1): §11.33
8.278(d)(2): §§11.33, 24.28
8.380(a): §28.20
8.384(a)(1): §§28.20-28.21
8.406: §16.52
8.450-8.452: §16.52
8.450(a): §16.52
8.454-8.456: §16.52
8.454(a): §16.52
8.470: §16.52
8.472: §16.52
8.485-8.493: §§12.4, 12.14-12.15, 27.10-27.11, 28.1
8.485(a): §18.6
8.486: §28.1
8.486(a)(1): §§18.86, 27.2, 27.11
8.486(a)(2): §18.18
8.486(a)(3): §§18.12, 18.20
8.486(a)(3)(A): §18.26
8.486(a)(4): §§18.42, 18.60
8.486(a)(5): §§5.110, 18.49, 18.53, 23.37
8.486(a)(5): §23.37
8.486(a)(6): §§18.1, 18.8
8.486(a)(7): §§18.19, 18.59, 19.3, 19.9, 19.12, 21.15
8.486(a)(7)(A): §§19.7, 19.9, 19.14
8.486(a)(7)(B): §18.12
8.486(b): §§7.7, 20.3, 20.5, 23.38, 28.10
8.486(b)-(c): §§7.4, 20.1
8.486(b)(1): §§18.57, 20.3, 20.6
8.486(b)(1)(B): §§7.8, 20.7
8.486(b)(1)(D): §§7.8, 17.18, 20.9, 28.10
8.486(b)(2): §§19.16, 20.3
8.486(b)(3): §§17.7, 17.19, 20.9
8.486(b)(3)(A): §§18.57, 28.10

8.486(b)(4): §§19.16, 20.3, 20.7, 22.16, 28.10
8.486(c): §§7.23, 20.14, 23.38
8.486(c)(1)(A): §§7.19, 7.21, 18.11, 18.57, 20.11-20.12
8.486(c)(1)(B): §20.12
8.486(c)(1)(C): §§20.12, 28.3
8.486(c)(3): §20.12
8.486(e): §§18.77, 18.79, 21.18, 22.26, 23.43, 23.50
8.486(e)(1)-(2): §20.15
8.486(e)(3): §§18.80, 20.15
8.486(e)(4): §18.79
8.486(e)(5): §18.80
8.486(e)(6): §18.77
8.487: §§23.8, 28.4
8.487(a): §§21.4-21.5, 23.2, 28.4
8.487(a)(1): §§8.21, 21.1-21.2, 21.4, 21.14, 21.17
8.487(a)(2): §§12.12, 21.9, 23.37
8.487(a)(3): §§21.21, 23.2
8.487(a)(4): §§19.3, 19.7, 21.7, 22.9-22.11
8.487(b): §§23.4, 23.19, 23.25, 23.28, 23.33, 28.10-28.11
8.487(b)(1): §§23.2-23.3, 23.20, 23.24, 23.27, 23.32-23.34, 23.47
8.487(b)(1)-(2): §23.42
8.487(b)(2): §§23.12, 23.39-23.40, 23.51
8.487(b)(2)-(3): §22.25
8.487(b)(3): §§23.2, 23.17-23.18, 23.48-23.51, 23.53
8.487(b)(4): §23.34
8.487(c): §23.52
8.488: §§28.1, 28.4, 28.10-28.11, 28.18, 28.21
8.488(a)-(b): §§23.8, 23.26A
8.488(c): §§18.21, 23.8
8.488(c)(3): §23.8
8.488(d): §18.21
8.488(d)(1): §23.8
8.488(d)(1)(B): §23.8
8.488(d)(2): §23.8
8.489(a): §§24.40-24.41
8.489(b)(1): §§22.13, 24.40
8.490(b): §§22.16, 25.30
8.490(b)(1): §§16.44, 22.14, 25.5, 27.15
8.490(b)(2): §§25.6, 27.15
8.490(b)(3): §25.7
8.491: §16.57
8.492: §§17.35, 18.55, 24.65
8.492(a): §§24.60-24.62, 24.64
8.492(a)-(c): §24.62
8.492(a)(1): §17.35
8.492(a)(2): §24.60
8.492(b)-(c): §24.62
8.492(c): §24.62
8.492(d): §24.62
8.493: §§5.121, 24.54, 24.64, 28.21
8.493(a)(1)(A): §§18.41, 24.23
8.493(a)(1)(B): §24.23
8.493(a)(2): §§18.41, 24.24
8.493(b): §§24.26-24.27
8.495: §27.7
8.495-8.498: §2.50
8.498: §§16.19, 16.29
8.499: §§24.31-24.32
8.500(a)(1): §§11.35, 25.14, 25.26, 27.12
8.500(a)(2): §27.26
8.500(a)(3): §27.27
8.500(b): §§25.14, 27.14, 28.17
8.500(b)(1): §§25.27, 25.30, 27.13, 28.16
8.500(b)(2): §27.13
8.500(b)(3): §27.13

8.500(b)(4): §§25.30, 27.13, 28.16
8.500(c)(1)-(2): §25.16
8.500(c)(2): §§11.34, 25.16-25.17
8.500(e)(1): §§16.44, 25.7-25.8, 25.26, 25.30, 27.15-27.16, 27.28
8.500(e)(2): §27.17
8.500(e)(4): §§27.18, 27.28, 28.16
8.500(e)(5): §§27.19, 27.28
8.500(g): §28.17
8.500(g)(2): §28.17
8.504: §§12.24, 24.57, 28.16
8.504(a): §27.20
8.504(b): §27.25
8.504(b)(1): §27.25
8.504(b)(4): §27.22
8.504(c): §27.26
8.504(d)(1)-(3): §27.21
8.504(e)(1): §27.22
8.504(e)(2): §27.22
8.504(e)(3): §27.25
8.508: §25.29
8.512(b): §27.33
8.512(b)(1): §27.30
8.512(b)(2): §§27.30, 27.33
8.512(c)(1): §27.17
8.512(d)(2): §§25.28, 27.31
8.516(a): §27.31
8.516(b)(1): §27.31
8.520: §27.31
8.528(a): §28.16
8.528(d): §27.32
8.552: §24.55
8.552(a): §24.56
8.552(b): §24.58
8.552(c): §§24.55, 24.57
8.552(d): §§24.57-24.59
8.552(e): §24.55
8.824: §12.28
8.824(a): §12.28
8.824(a)(4): §12.28
8.824(a)(4)(C): §12.28
8.824(b)(1): §12.28
8.824(b)(2): §12.28
8.824(c): §12.28
8.824(d)(1): §12.28
8.843(a): §12.6
8.843(d): §12.6
8.888: §12.23
8.891(c): §12.25
8.930: §12.4
8.931: §12.4
8.931(a): §12.4
8.931(b): §§12.4, 12.6
8.931(b)(1): §12.6
8.931(b)(2): §12.6
8.931(c)(1): §12.7
8.931(c)(2): §12.8
8.931(d): §12.10
8.932: §12.4
8.932(b): §12.4
8.932(b)(5): §§12.5, 12.15
8.932(b)(7): §12.9
8.933(a): §12.12
8.933(a)(1): §12.13
8.933(a)(2): §12.12
8.933(a)(3): §12.16

8.933(a)(4): §§12.11-12.12
8.933(b)(1)-(2: §12.14
8.933(b)(1)-(2): §12.15
8.933(b)(3): §12.17
8.933(b)(4): §§8.44, 12.15, 23.34
8.936(a): §12.25
8.1000-1018: §12.23
8.1002: §12.23
8.1005(a): §12.23
8.1005(b): §12.23
8.1005(b)(1): §12.23
8.1005(b)(2): §12.23
8.1005(b)(3): §12.23
8.1005(c): §12.23
8.1005(d): §12.23
8.1005(e): §12.23
8.1005(f)(1): §12.23
8.1005(f)(2): §12.23
8.1008(a): §12.24
8.1008(b): §12.24
8.1008(b)(2): §12.24
8.1008(b)(3): §12.24
8.1008(b)(4): §12.24
8.1008(b)(5): §12.24
8.1008(c)(1)-(2): §12.24
8.1008(c)(3): §12.24
8.1008(e): §12.24
8.1010: §§12.23-12.24
8.1012: §12.24
8.1014: §12.23
8.1016(a): §12.24
8.1016(b)(1): §12.24
8.1018: §12.24
8.1105(b): §§11.32, 25.10
8.1105(c): §11.32
8.1105(c)-(d): §24.30
8.1120: §§24.30, 25.10
8.1120(a): §25.20
8.1120(b): §25.10
8.1125(a): §11.36
8.1125(a)(2): §27.25
8.1125(d): §11.36
9.16-9.18: §27.6
10.1000: §16.9
10.1000(A): §24.55
1515 (former): §16.5

CALIFORNIA RULES OF PROFESSIONAL CONDUCT

3-110: §17.4
3-110(C): §§17.4-17.5
3-300: §17.8
3-310
Comment: §17.14
3-310(A): §17.12
3-310(B)(1): §17.12
3-310(B)(2): §17.12
3-310(B)(3): §17.12
3-310(B)(4): §17.12
3-310(C)(1)-(2): §17.10
3-310(C)(3): §17.10
3-310(E): §17.11
3-310(F): §17.13
3-310(F)(1)-(3): §17.13
3-320: §17.12
Comment: §17.12

3-500: §§17.4, 17.6

Local Court Rules

FIRST APPELLATE DISTRICT
IOPP §II.C: §22.3
IOPP §III.A.1: §22.3
IOPP §III.B.28-29: §24.8
Local R 2(d): §11.19
Local R 9(a): §20.20
Local R 11: §§21.14, 23.14
Local R 13: §24.9

SECOND APPELLATE DISTRICT, POLICY STATEMENT
IOPP: §18.75
IOPP, Assignment of Cases: §22.4

THIRD APPELLATE DISTRICT
IOPP §V: §22.5
IOPP §VIII: §24.8
Local R 3: §24.12

FOURTH APPELLATE DISTRICT
Local R 1: §§18.19, 18.59, 18.78, 19.12, 19.15, 19.17-19.18, 21.7
Div 1
IOPP §III: §22.6
IOPP §VII: §24.12
Div 2
IOPP §V: §22.6
IOPP §VIII: §24.8
Local R 2: §§18.5, 18.12
Div 3
IOPP §III.B: §22.6

FIFTH APPELLATE DISTRICT
IOPP §III.C: §§22.7, 24.8
IOPP §IV: §24.9
Local R 4: §24.9

SIXTH APPELLATE DISTRICT
IOPP §II.D: §22.8
IOPP §II.A.3: §24.9

AMADOR COURT RULES
11.18: §§5.7, 5.9, 8.3

CALAVERAS COURT RULES
1.4: §8.3

CONTRA COSTA COURT RULES
7(G)(1)(a): §§5.7, 5.9

IMPERIAL COURT RULES
3.4.0: §8.3
3.4.0(a): §§5.7, 5.9

LOS ANGELES COURT RULES
9.5: §8.3
9.5(c): §5.82
9.5(d)(1): §§5.7, 5.9, 9.21
9.5(e): §9.10
9.5(e)(1): §§5.115, 9.3
9.5(e)(2): §5.113
9.5(g): §9.30
9.9(a): §6.23

SACRAMENTO COURT RULES
2.01(E): §9.21

SAN DIEGO COURT RULES
2.4.8: §8.3
2.4.8(A): §§5.7, 5.9, 9.21

SAN FRANCISCO COURT RULES
8.1(A)(3)(a): §5.7
9.0(A): §6.23
9.0(B): §6.17

SAN LUIS OBISPO COURT RULES
7.17(b): §6.23

UNITED STATES

Constitution

Amend I: §§2.56, 7.4, 16.124, 16.132, 16.150, 20.23
Amend V: App A

Statutes

UNITED STATES CODE
Title 28
1257: §25.29
1257(a): §§25.29, 25.31

ACTS BY POPULAR NAME
Americans with Disabilities Act of 1990 (ADA): §2.56
Defense Bases Act: §16.92
Federal Arbitration Act (FAA): §16.99
Longshoremen's and Harbor Workers' Compensation Act: §16.92
Securities and Exchange Act: §16.99

Regulations

CODE OF FEDERAL REGULATIONS
Title 12
21.11(k): §16.121

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Table of Cases

2,022 Ranch v Superior Court (2003) 113 CA4th 1377, 7 CR3d 197, disapproved in part on other grounds in Costco Wholesale Corp. v Superior Court (2009) 47 C4th 725, 101 CR3d 758: App A

A

ALRB v Tex-Cal Land Mgmt., Inc. (1987) 43 C3d 696, 238 CR 780: §4.28
Aas v Superior Court (2000) 24 C4th 627, 101 CR2d 718: §16.147
Abadjian v Superior Court (1985) 168 CA3d 363, 214 CR 234: §18.64
Abelleira v District Court of Appeal (1941) 17 C2d 280, 109 P2d 942: §§4.3, 15.23, 15.26, 26.6
Abex Corp. v Superior Court (1989) 209 CA3d 755, 257 CR 498: §16.123
Academy of Cal. Optometrists, Inc. v Superior Court (1975) 51 CA3d 999, 124 CR 668: §16.103
Adair v Stockton Unified Sch. Dist. (2008) 162 CA4th 1436, 77 CR3d 62: §§2.1, 2.24, 2.42
Adams v Superior Court (1992) 2 CA4th 521, 3 CR2d 49: §16.103
Adcock v Board of Educ. (1973) 10 C3d 60, 109 CR 676: §2.56
Addam v Superior Court (2004) 116 CA4th 368, 10 CR3d 39: §23.29
Adohr Milk Farms, Inc. v Love (1967) 255 CA2d 366, 63 CR 123: App A
Adolph v Municipal Court (1960) 181 CA2d 198, 5 CR 212: §16.93
Adoption of Alexander S. (1988) 44 C3d 857, 245 CR 1: §4.18
Advanced Micro Devices, Inc. v Intel Corp. (1994) 9 C4th 362, 36 CR2d 581: §16.99
Aetna Cas. & Sur. Co. v Superior Court (1984) 153 CA3d 467, 200 CR 471: App A
Agricultural Labor Relations Bd. v Tex-Cal Land Mgmt., Inc. (1987) 43 C3d 696, 238 CR 780: §26.21
Agua Caliente Band of Cahuilla Indians v Superior Court (2006) 40 C4th 239, 52 CR3d 659: §16.54
Aguiar v Superior Court (2009) 170 CA4th 313, 87 CR3d 813: §16.145
Akin v Board of Educ. of Riverside Unified Sch. Dist. (1968) 262 CA2d 161, 68 CR 557: §2.43
Aktar v Anderson (1997) 58 CA4th 1166, 68 CR2d 595: §17.32
Albin v Railroad Comm'n (1932) 216 C 655, 15 P2d 860: §16.34
Alch v Superior Court (2008) 165 CA4th 1412, 82 CR3d 470: §§16.118, 23.24
Alch v Superior Court (2004) 122 CA4th 339, 19 CR3d 29: §§16.109, 16.129A, App A
Alden v Superior Court (1963) 212 CA2d 764, 28 CR 387: §15.26
Alexander v Superior Court (1993) 5 C4th 1218, 23 CR2d 397: §25.2
Alexander v Superior Court (2003) 114 CA4th 723, 8 CR3d 111: §16.62
Alexander S., Adoption of (1988) 44 C3d 857, 245 CR 1: §4.18
Alexander v Superior Court (1993) 5 C4th 1218, 23 CR2d 397, disapproved on other grounds in Hassan v Mercy Am. River Hosp. (2003) 31 C4th 709, 3 CR3d 623: §§22.19, 22.24
Alice, People v (2007) 41 C4th 668, 61 CR3d 648: §11.34
Allen v Los Angeles County Dist. Council of Carpenters (1959) |51 C2d 805, 337 P2d 457: §7.8
Allen v Pitchess (1973) 36 CA3d 321, 111 CR 658: §6.33
Alliance for a Better Downtown Millbrae v Wade (2003) 108 CA4th 123, 133 CR2d 249: §§2.19-2.20, 2.47
Allstate Ins. Co. v Loo (1996) 46 CA4th 1794, 54 CR2d 541: App A
Alpha Beta Co. v Superior Court (1984) 157 CA3d 818, 203 CR 752: §§5.67, 18.44
Amanda H. v Superior Court (2008) 166 CA4th 1340, 83 CR3d 229: §§16.143A, 25.7
American Advertising & Sales Co. v Mid-Western Transp. (1984) 152 CA3d 875, 199 CR 735: App A
American Airlines, Inc. v Superior Court (2003) 114 CA4th 881, 8 CR3d 146: §§16.121, 27.32
American Bd. of Cosmetic Surgery v Medical Bd. (2008) 162 CA4th 534, 75 CR3d 574: §§2.22, 2.32
American Booksellers Ass'n v Superior Court (1982) 129 CA3d 197, 181 CR 33: §16.150
American Distilling Co. v City Council (1950) 34 C2d 660, 213 P2d 704: §2.24
American Employers Group, Inc. v Employment Dev. Dep't (2007) 154 CA4th 836, 65 CR3d 233: §2.16
American Fed'n of State, County & Mun. Employees v Metropolitan Water Dist. (2005) 126 CA4th 247, 24 CR3d 285: §§2.5, 2.51, 9.29
American Int'l Group, Inc. v Superior Court (1991) 234 CA3d 749, 285 CR 765: §16.106
American Radio Ass'n v Superior Court (1965) 237 CA2d 891, 47 CR 419: §15.24
Ameriloan v Superior Court (2008) 169 CA4th 81, 86 CR3d 572: §16.54
Amwest Sur. Ins. Co. v Wilson (1995) 11 C4th 1243, 48 CR2d 12: §24.19
Anderson v Superior Court (1995) 11 C4th 1152, 48 CR2d 766: §16.90
Anderson v Superior Court (1998) 68 CA4th 1240, 80 CR2d 891: §16.135
Anderson v Superior Court (1989) 213 CA3d 1321, 262 CR 405: §15.70
Andrews v Valdez (1995) 40 CA4th 492, 46 CR2d 744: §2.45
Angelucci v Century Supper Club (2007) 41 C4th 160, 59 CR3d 142: §16.107

Anglo Irish Bank Corp. v Superior Court (2008) 165 CA4th 969, 81 CR3d 535: §§16.54, 16.56, 19.3, 19.6
Annette F. v Sharon S. (2005) 130 CA4th 1448, 30 CR3d 914: §15.58
Antelope Valley Press v Poizner (2008) 162 CA4th 839, 75 CR3d 887: §§3.8, 3.16-3.17
Appalachian Ins. Co. v Superior Court (1984) 162 CA3d 427, 208 CR 627: App A
Apple Computer, Inc. v Superior Court (2005) 126 CA4th 1253, 24 CR3d 818, quoting Reed v Superior Court (2001) 92 CA4th 448, 111 CR2d 842: §17.22
Arens v Superior Court (1955) 45 C2d 623, 290 P2d 257: §15.36
Armstrong v Superior Court (1916) 173 C 341, 159 P 1176: §6.33
Arnold v California Exposition & State Fair (2004) 125 CA4th 498, 22 CR3d 790: §§11.5, 11.13
Aronoff v Franchise Tax Bd. (1963) 60 C2d 177, 32 CR 1: §15.18
Art Movers, Inc. v Ni W., Inc. (1992) 3 CA4th 640, 4 CR2d 689: §16.150
Artesia Dairy v ALRB (2008) 168 CA4th 598, 86 CR3d 91: §§16.18, 16.21
Associated Builders & Contractors, Inc. v San Francisco Airports Comm'n (1999) 21 C4th 352, 87 CR2d 654: §2.12
Atlas Plastering, Inc. v Superior Court (1977) 72 CA3d 63, 140 CR 59: §16.100, App A
Auerbach v Los Angeles County Assessment Appeals Bd. No. 2 (2008) 167 CA4th 1415, 85 CR3d 118: §§3.16-3.17
Auto Equity Sales, Inc. v Superior Court (1962) 57 C2d 450, 20 CR 321: §§12.22, 15.15, 15.22-15.23, 15.26-15.27, 15.29, 15.31
Azzarella, In re (1989) 207 CA3d 1240, 254 CR 922: §15.43

B

B & E Convalescent Ctr. v State Compensation Ins. Fund (1992) 8 CA4th 78, 9 CR2d 894: §16.69
BRV, Inc. v Superior Court (2006) 143 CA4th 742, 49 CR3d 519: §2.68
Babb v Superior Court (1971) 3 C3d 841, 92 CR 179: §§4.4, 16.105, 16.110
Baccus v Superior Court (1989) 207 CA3d 1526, 255 CR 781: §16.114
Baker v Osborne Dev. Corp. (2008) 159 CA4th 884, 71 CR3d 854: §16.101
Baker v Superior Court (1887) 71 C 583, 12 P 685: §15.38
Baker Manock & Jensen v Superior Court (2009) 175 CA4th 1414, 96 CR3d 785: §16.102
Bakersfield City Sch. Dist. v Superior Court (2004) 118 CA4th 1041, 13 CR3d 517: §2.68
Bakkebo v Municipal Court (1981) 124 CA3d 229, 177 CR 239: §10.15
Ballard v Taylor (1993) 20 CA4th 1736, 25 CR2d 384: §16.127
Balloon v Superior Court (1995) 39 CA4th 1116, 46 CR2d 161: §16.67
Bandini Petroleum Co. v Superior Court (1931) 284 US 8, 76 L Ed 136, 52 S Ct 103: §25.31
Bank of Am. Nat'l Trust & Sav. Ass'n v Superior Court (1942) 20 C2d 697, 128 P2d 357: §15.33
Banks v California (1969) 395 US 708, 23 L Ed 2d 653, 89 S Ct 1901: §25.29
Barber v Long Beach Civil Serv. Comm'n (1996) 45 CA4th 652, 53 CR2d 4: §3.17
Barnes v Molino (1980) 103 CA3d 46, 162 CR 786: §16.117
Barnes v Wong (1995) 33 CA4th 390, 39 CR2d 417: §2.45
Barr, In re (1952) 39 C2d 25, 243 P2d 787: §4.18
Barratt Am., Inc. v City of Rancho Cucamonga (2005) 37 C4th 685, 37 C3d 149: §2.15
Barrera, People v (1999) 70 CA4th 541, 82 CR2d 755: §16.3
Barton v Ahmanson Devs. Inc. (1993) 17 CA4th 1358, 22 CR2d 56: App A
Baske v Burke (1981) 125 CA3d 38, 177 CR 794: App A
Bauguess v Paine (1978) 22 C3d 626, 150 CR 461: App A
Baumgardner v City of Hawthorne (1951) 104 CA2d 512, 231 P2d 864: §8.47
Bay Dev., Ltd. v Superior Court (1990) 50 C3d 1012, 269 CR 720: §§22.14, 25.5
Be v Western Truck Exch. (1997) 55 CA4th 1139, 64 CR2d 527: §16.51
Beesley v Superior Court (1962) 58 C2d 205, 23 CR 390: §16.123
Bell v Superior Court (2007) 158 CA4th 147, 69 CR3d 328: §§15.11, 15.13, 15.56, 15.61, 15.63, 23.49
Belridge Farms v ALRB (1978) 21 C3d 551, 147 CR 165: §2.30
Benjamin G. v California Special Educ. Hearing Office (2005) 131 CA4th 875, 32 CR3d 366: §2.28
Bensen v WCAB (2009) 170 CA4th 1535, 89 CR3d 166: §§16.46, 16.48
Bensimon v Superior Court (2003) 113 CA4th 1257, 7 CR3d 151: §§16.76, 17.2, 18.62
Berger v Godden (1985) 163 CA3d 1113, 210 CR 109: §24.63
Bermudez v Municipal Court (1992) 1 C4th 855, 4 CR2d 609: §12.20
Berry, In re (1968) 68 C2d 137, 65 CR 273: §§16.134, 16.136
Bertero v Superior Court (1963) 216 CA2d 213, 30 CR 719: App A
Best Prods., Inc. v Superior Court (2004) 119 CA4th 1181, 15 CR3d 154: §16.122
Betz v Pankow (1993) 16 CA4th 931, 20 CR2d 841: §§15.44, 26.6, 26.14
Bevill, In re (1968) 68 C2d 854, 69 CR 599: §16.88
Biasca v Superior Court (1924) 194 C 366, 228 P 861: §6.33
Big Valley Band of Pomo Indians v Superior Court (2005) 133 CA4th 1185, 35 CR3d 357: §16.108
Bigbee v Pacific Tel. & Tel. Co. (1983) 34 C3d 49, 192 CR 857: §9.55
Billig v Voges (1990) 223 CA3d 962, 273 CR 91: §2.47
Biosense Webster, Inc. v Superior Court (2006) 135 CA4th 827, 37 CR3d 759: §§15.11, 16.150
Bixby v Pierno (1971) 4 C3d 130, 93 CR 234: §3.17
Blache v Superior Court (1939) 35 CA2d 740, 96 P2d 970: §15.19

Black Diamond Asphalt, Inc. v Superior Court (2003) 114 CA4th 109, 7 CR3d 466: §15.67
Blair v Williams (1952) 109 CA2d 516, 240 P2d 1043: App A
Blegen v Superior Court (1981) 125 CA3d 959, 178 CR 470: §16.106
Block v Superior Court (1998) 62 CA4th 363, 72 CR2d 610: §9.25
Blue Chip Stamps v Superior Court (1976) 18 C3d 381, 134 CR 393: App A
Blue Cross v Department of Health Care Servs. (2007) 153 CA4th 322, 62 CR3d 772: §2.33
Blue Cross v State Dep't of Health Servs. (2007) 153 CA4th 322, 62 CR3d 772: §3.4
Blue Cross v Superior Court (1998) 67 CA4th 42, 78 CR2d 779: §16.99
Board of Educ. v Round Valley Teachers Ass'n (1996) 13 C4th 269, 52 CR2d 115: §16.99
Board of Educ. v Watson (1966) 63 C2d 829, 48 CR 481: §2.61
Board of Med. Quality Assur. v Superior Court (1980) 114 CA3d 272, 170 CR 468: §6.27
Board of Supervisors v Superior Court (1995) 33 CA4th 1724, 39 CR2d 906: §16.142
Board of Supervisors v Superior Court (1994) 23 CA4th 830, 28 CR2d 560: §24.41
Bodenheimer v Superior Court (1980) 108 CA3d 885, 167 CR 26: §16.118
Bodger, Estate of (1954) 128 CA2d 710, 276 P2d 83: §15.35, App A
Bonzer v City of Huntington Park (1993) 20 CA4th 1474, 25 CR2d 278: §18.80
Boren v State Personnel Bd. (1951) 37 C2d 634, 234 P2d 981: §4.15
Brady, People v (1973) 30 CA3d 81, 105 CR 280: §15.44
Braewood Convalescent Hosp. v WCAB (1983) 34 C3d 159, 193 CR 157: §16.48
Branciforte Heights, LLC v City of Santa Cruz (2006) 138 CA4th 914, 42 CR3d 96: §11.16
Brand v 20th Century Ins. Co./21st Century Ins. Co. (2004) 124 CA4th 594, 21 CR3d 380: §17.11
Brandt v Superior Court (1985) 37 C3d 813, 210 CR 211: §16.105
Brannon v Superior Court (2004) 114 CA4th 1203, 8 CR3d 491: §16.74, App A
Braun v Brown (1939) 13 C2d 130, 87 P2d 1009: App A
BreakZone Billiards v City of Torrance (2000) 81 CA4th 1205, 97 CR2d 467: §3.16
Bridgestone/Firestone, Inc. v Superior Court (1992) 7 CA4th 1384, 9 CR2d 709: §16.124
Bright Dev. v City of Tracy (1993) 20 CA4th 783, 24 CR2d 618: §§7.6, 7.11, 9.28
Britt v Superior Court (1978) 20 C3d 844, 143 CR 695: §§16.118, 16.121, App A
Britts v Superior Court (2006) 145 CA4th 1112, 52 CR3d 185: §16.129
Brodie v WCAB (2007) 40 C4th 1313, 57 CR3d 644: §16.48
Brooks v State Personnel Bd. (1990) 222 CA3d 1068, 272 CR 292: §3.9
Brosnahan v Brown (1982) 32 C3d 236, 186 CR 30: §24.55
Brosnahan v Eu (1982) 31 C3d 1, 181 CR 100: §§2.48, 27.8
Brosterhous v State Bar (1995) 12 C4th 315, 48 CR2d 87: §20.19
Brown v Superior Court (1971) 5 C3d 509, 96 CR 584: §11.38
Brown v Superior Court (1981) 119 CA3d 189, 173 CR 803: App A
Brown v Superior Court (1970) 7 CA3d 366, 86 CR 670: App A
Brown, People v (1993) 6 C4th 322, 24 CR2d 710: §17.24
Brown, Winfield & Canzoneri, Inc. v Superior Court (Feb. 1, 2010, S156598), 2010 Cal Lexis 588: §§22.22, 28.9
Browne v Superior Court (1979) 98 CA3d 610, 159 CR 669: App A
Bruce v Gregory (1967) 65 C2d 666, 56 CR 265: §8.33
Brun v Bailey (1994) 27 CA4th 641, 32 CR2d 624: App A
Bruno v Superior Court (1981) 127 CA3d 120, 179 CR 342: §16.106
Bryan v Bank of America (2001) 86 CA4th 185, 103 CR2d 148: §24.60
Buckley, In re (1973) 10 C3d 237, 110 CR 121: §§15.37, 15.41, 16.133-16.134, 16.136
Building Indus. Ass'n v Marin Mun. Water Dist. (1991) 235 CA3d 1641, 1 CR2d 625: §2.8
Building Material & Constr. Teamsters Union, Local 216 v Farrell (1986) 41 C3d 651, 224 CR 688: §5.34
Bunker v County of Orange (2002) 103 CA4th 542, 126 CR2d 825: §2.62
Bunnett v Regents of Univ. of Cal. (1995) 35 CA4th 843, 41 CR2d 567: §§2.1, 2.33, 3.4, 3.18, 7.12
Burke v Superior Court (1969) 71 C2d 276, 78 CR 481: §16.123
Burke Concrete Accessories, Inc. v Superior Court (1970) 8 CA3d 773, 87 CR 619: §16.69
Burlage v Superior Court (2009) 178 CA4th 524, 100 CR3d 531: §16.99
Burlingame v Justice's Court of the City of Berkeley (1934) 1 C2d 71, 33 P2d 669: §15.53
Burt v County of Orange (2004) 120 CA4th 273, 15 CR3d 373: §3.5
Butchers' Union Local 229 v Cudahy Packing Co. (1967) 66 C2d 925, 59 CR 713: §2.51
Butler v Superior Court (2002) 104 CA4th 979, 128 CR2d 403: App A
Butt v State (1992) 4 C4th 668, 15 CR2d 480: §§6.30, 6.36
Byington v Superior Court (1939) 14 C2d 68, 92 P2d 896: §26.9

C

C. S. Smith Metro. Mkt. Co. v Superior Court (1940) 16 C2d 226, 105 P2d 587: §15.14
C.C. v Superior Court (2008) 166 CA4th 1019, 83 CR3d 225: §§16.5, 22.19
Cable Connection, Inc. v DIRECTV, Inc. (2008) 44 C4th 1334, 82 CR3d 229: §16.99
Cade v Superior Court (1961) 191 CA2d 554, 12 CR 847: §16.94
Cal Pak Delivery, Inc. v United Parcel Serv., Inc. (1997) 52 CA4th 1, 60 CR2d 207: App A

Cal W. Nurseries, Inc. v Superior Court (2005) 129 CA4th 1170, 29 CR3d 170: §§5.73, 16.102, 16.104, 18.66, 18.76
Calhoun v Superior Court (1958) 51 C2d 257, 331 P2d 648: §16.5
Calhoun v Vallejo City Unified Sch. Dist. (1993) 20 CA4th 39, 24 CR2d 337: §16.62
California Ass'n for Health Servs. at Home v State Dep't of Health Servs. (2007) 148 CA4th 696, 56 CR3d 102: §§2.5, 2.8, 2.12, 2.28
California Cas. Gen. Ins. Co. v Superior Court (1985) 173 CA3d 274, 218 CR 817, disapproved on other grounds in Kransco v International Ins. Co. (2000) 23 C4th 390, 97 CR2d 151: App A
California Cas. Ins. Co. v Appellate Dept. (1996) 46 CA4th 1145, 54 CR2d 118: §25.17
California Correctional Peace Officers Ass'n v State Personnel Bd. (1995) 10 C4th 1133, 43 CR2d 693: §§2.20, 2.31, 3.9, 5.34
California Dental Ass'n v American Dental Ass'n (1979) 23 C3d 346, 152 CR 546: §2.55
California Faculty Ass'n v PERB (2008) 160 CA4th 609, 72 CR3d 654: §§16.29, 16.31
California Faculty Ass'n v Superior Court (1998) 63 CA4th 935, 75 CR2d 1: §16.99
California Highway Patrol v Superior Court (2008) 162 CA4th 1144, 76 CR3d 578: §16.67
California Highway Patrol v Superior Court (2006) 135 CA4th 488, 38 CR3d 16: §§15.70, 17.32, 17.34
California Labor Fed'n v Occupational Safety & Health Standards Bd. (1992) 5 CA4th 985, 7 CR2d 399: §§10.11, 24.54
California Pine Box & Lumber Co. v Superior Court (1910) 13 CA 65, 108 P 882: App A
California Pub. Employees' Retirement Sys. v Superior Court (2008) 160 CA4th 174, 72 CR3d 561: §§15.6, 15.52, 15.56, 15.60-15.61, 15.64, 19.6, 24.21
California Sch. Bds. Ass'n v State (2009) 171 CA4th 1183, 90 CR3d 501: §§2.24, 5.119
California Standardbred Sires Stakes Comm., Inc. v California Horse Racing Bd. (1991) 231 CA3d 751, 282 CR 656: §§9.26-9.27
California Trial Lawyers Ass'n, Inc. v Eu (1988) 200 CA3d 351, 245 CR 916: §2.46
California Water Impact Network v Newhall County Water Dist. (2008) 161 CA4th 1464, 75 CR3d 393: §§2.1, 2.16, 2.22, 2.24, 2.30, 2.32, 2.34, 2.37, 8.53
Camp v Oakland Mortgage & Fin. Co. (1928) 205 C 380, 270 P 685: App A
Camp Meeker Water Sys. v PUC (1990) 51 C3d 845, 274 CR 678: §16.45
Campbell v Superior Court (2005) 132 CA4th 904, 34 CR3d 68: §§12.14, 23.10
Campbell v Superior Court (1996) 44 CA4th 1308, 52 CR2d 385: §§16.105, 16.109
Camper v WCAB (1992) 3 C4th 679, 12 CR2d 101: §16.47
Canandaigua Wine Co. v County of Madera (2009) 177 CA4th 298, 99 CR3d 264: §11.9
Canon v Justice Court (1964) 61 C2d 446, 39 CR 228: §16.89
Canova v Trustees of Imperial Irrig. Dist. Employee Pension Plan (2007) 150 CA4th 1487, 59 CR3d 587: §2.15
Capitol People First v State Dep't of Dev. Servs. (2007) 155 CA4th 676, 66 CR3d 300: §16.129D
Capo for Better Representation v Kelley (2008) 158 CA4th 1455, 71 CR3d 354: §§2.19, 11.7, 11.33
Cardiff Equities, Inc. v Superior Court (2008) 166 CA4th 1541, 83 CR3d 699: §16.101
Carl v Superior Court (2007) 157 CA4th 73, 68 CR3d 566: §16.6
Carmel Valley Fire Protection Dist. v State (2001) 25 C4th 287, 105 CR2d 636: §2.23
Carpenson v Najarian (1967) 254 CA2d 856, 62 CR 687: App A
Carpenter v Superior Court (2006) 141 CA4th 249, 45 CR3d 821: §16.119
Carrancho v California Air Resources Bd. (2003) 111 CA4th 1255, 4 CR3d 536: §§2.7, 2.23
Carrie M., In re (2001) 90 CA4th 530, 108 CR2d 856: §4.20
Carroll v Civil Serv. Comm'n (1970) 11 CA3d 727, 90 CR 128: §§10.11, 10.14
Carter v Superior Court (1990) 218 CA3d 994, 267 CR 290: §16.119
Carter v Superior Court (1950) 96 CA2d 388, 215 P2d 491: §24.53
CashCall, Inc. v Superior Court (2008) 159 CA4th 273, 71 CR3d 441: §§15.56, 15.70, 16.116
Cason v Glass Bottle Blowers Ass'n (1951) 37 C2d 134, 231 P2d 6: §2.52
Cassel v Superior Court (review granted Feb. 3, 2010, B215215; superseded opinion at 179 CA4th 152, 101 CR3d 501): §16.121
Castro v Superior Court (2004) 116 CA4th 1010, 10 CR3d 865: §16.11
Catalano, In re (1981) 29 C3d 1, 171 CR 667: §§4.17, 15.39
Catanese v Superior Court (1996) 46 CA4th 1159, 54 CR2d 280: §§16.115-16.116
CenterPoint Energy, Inc. v Superior Court (2007) 157 CA4th 1101, 69 CR3d 202: §§15.61, 15.64, 15.70, 16.56, 22.23
Chambers v Superior Court (1981) 121 CA3d 893, 175 CR 575: §16.102
Chapman v Superior Court (2005) 130 CA4th 261, 29 CR3d 852: §23.33
Charles A. Pratt Constr. Co. v California Coastal Comm'n (2008) 162 CA4th 1068, 76 CR3d 466: §2.41
Charrot v Municipal Court (1968) 260 CA2d 208, 66 CR 903: §16.88
Chase v Superior Court (1962) 210 CA2d 872, 27 CR 383: §§15.18, 15.21
Chavez v Superior Court (1984) 153 CA3d 130, 200 CR 75: §12.18
Chodos v Superior Court (1964) 226 CA2d 703, 38 CR 301: §15.19
Chong v Superior Court (1997) 58 CA4th 1032, 68 CR2d 427: §19.6
Church of Hakeem, Inc. v Superior Court (1980) 110 CA3d 384, 168 CR 13: §§16.118, 16.134
Ciro's of San Francisco, Inc. v State Bd. of Equalization (1956) 143 CA2d 99, 299 P2d 985: §§6.24, 6.28
Citizens Utils. Co. of Cal. v Superior Court (1963) 59 C2d 805, 31 CR 316: §15.68
Citizens for Planning Responsibly v County of San Luis Obispo (2009) 176 CA4th 357, 97 CR3d 636: §2.24
City & County of San Francisco v Ballard (2006) 136 CA4th 381, 39 CR3d 1: §16.84
City & County of San Francisco v Farrell (1982) 32 C3d 47, 184 CR 713: §2.58
City & County of San Francisco v Shers (1995) 38 CA4th 1831, 46 CR2d 57: App A

City & County of San Francisco v Small Claims Court (1983) 141 CA3d 470, 190 CR 340: §16.92
City & County of San Francisco v State (2008) 43 C4th 757, 76 CR3d 683: §2.56
City & County of San Francisco v State (2005) 128 CA4th 1030, 27 CR3d 722: App A
City & County of San Francisco v Superior Court (1959) 53 C2d 236, 1 CR 158: §§15.20, 15.23
City of Carmel-By-The-Sea v Board of Supervisors (1982) 137 CA3d 964, 187 CR 379: §§10.10, 10.15, 24.52
City of Dinuba v County of Tulare (2007) 41 C4th 859, 62 CR3d 614: §§2.5, 2.19, 2.57-2.58, 2.64
City of Fresno v Superior Court (1988) 205 CA3d 1459, 253 CR 296: §16.121
City of Gilroy v State Bd. of Equalization (1989) 212 CA3d 589, 260 CR 723: §2.12
City of King City v Community Bank (2005) 131 CA4th 913, 32 CR3d 384: §§2.1, 2.6, 15.3
City of Los Angeles v Superior Court (2002) 29 C4th 1, 124 CR2d 202: §16.124
City of Los Angeles v Superior Court (1959) 51 C2d 423, 333 P2d 745: §15.26
City of Malibu v California Coastal Comm'n (2005) 128 CA4th 897, 27 CR3d 501: App A
City of Oakland v Superior Court (1996) 45 CA4th 740, 53 CR2d 120: §16.68
City of Poway v City of San Diego (1991) 229 CA3d 847, 280 CR 368: §11.3
City of San Diego v Superior Court (2006) 137 CA4th 21, 40 CR3d 26: §16.67
City of Santa Barbara v Superior Court (1966) 240 CA2d 612, 49 CR 798: §§15.18, 15.26
City of Santa Clara v Von Raesfeld (1970) 3 C3d 239, 90 CR 8: §2.67
City of Santa Cruz v Municipal Court (1989) 49 C3d 74, 260 CR 520: §16.124
City of Santa Cruz v Superior Court (1995) 40 CA4th 1146, 48 CR2d 216: §19.6
City of Santa Monica v Grubb (1966) 245 CA2d 718, 54 CR 210: §2.67
City of Santa Monica v Superior Court (1964) 231 CA2d 223, 41 CR 824: §15.26
Civil Serv. Employees Ins. Co. v Superior Court (1978) 22 C3d 362, 149 CR 360: §15.68
Cleveland Bd. of Educ. v Loudermill (1985) 470 US 532, 84 L Ed 2d 494, 105 S Ct 1487: §3.11
Cloer v Superior Court (1969) 271 CA2d 143, 76 CR 217: §16.103
Coan v California (1974) 11 C3d 286, 113 CR 187: §2.64
Coast Sav. & Loan Ass'n v Black (1986) 187 CA3d 1494, 232 CR 483: §24.65
Coelho v State Personnel Bd. (1989) 209 CA3d 968, 257 CR 557: §§3.20, 5.36, 18.3
Coffelt v Coffelt (1964) 229 CA2d 659, 40 CR 513: §5.31
Cohen v Board of Supervisors (1985) 40 C3d 277, 219 CR 467: §6.36
Cohen v Superior Court (1967) 248 CA2d 551, 56 CR 813: §15.8
Cohen v Superior Court (1959) 173 CA2d 61, 343 P2d 286: App A
Coleman, In re (1974) 12 C3d 568, 116 CR 381: §16.135
Commercial Ins. Co. v Superior Court (1969) 272 CA2d 321, 77 CR 769: §16.92
Committee for Responsible Sch. Expansion v Hermosa Beach City Sch. Dist. (2006) 142 CA4th 1178, 48 CR3d 705: §11.16
Committee to Save the Hollywoodland Specific Plan v City of Los Angeles (2008) 161 CA4th 1168, 74 CR3d 665: §3.16
Community Facilities Dist. v Harvill (1999) 74 CA4th 876, 88 CR2d 405: §2.63
Conaway v Conaway (1963) 218 CA2d 427, 32 CR 890: App A
Conlan v Bonta (2002) 102 CA4th 745, 125 CR2d 788: §§2.1, 2.28, 3.18
Connolly v County of Orange (1992) 1 C4th 1105, 4 CR2d 857: §2.63
Consaul v City of San Diego (1992) 6 CA4th 1781, 8 CR2d 762: §25.17
Consolidated Title Sec. Co. v Hopkins (1934) 1 C2d 414, 35 P2d 320: §2.59
Consumer Cause, Inc. v Mrs. Gooch's Natural Food Markets, Inc. (2005) 127 CA4th 387, 25 CR3d 514: App A
Consumers Lobby Against Monopolies v PUC (1979) 25 C3d 891, 160 CR 124: §§16.44, 27.3
Consumers Union, Inc. v California Milk Producers Advisory Bd. (1978) 82 CA3d 433, 147 CR 265: §11.11
Continental Ins. Co. v Superior Court (1985) 165 CA3d 1069, 212 CR 140: §16.70
Cooke v Superior Court (1989) 213 CA3d 401, 261 CR 706 (writ relief denied after county passed resolution making changes sought by writ petition), disapproved on other grounds by County of San Diego v State (1997) 15 C4th 68, 61 CR2d 134: §15.66
Coombs v Pierce (1991) 1 CA4th 568, 2 CR2d 249: §2.40
Coppinger v Superior Court (1982) 134 CA3d 883, 185 CR 24: §22.29
Corbett v Superior Court (2002) 101 CA4th 649, 125 CR2d 46: §§15.71, 16.129A
Cornell Univ. Med. College v Superior Court (1974) 38 CA3d 311, 113 CR 291: §16.55
Corona Unified Hosp. Dist. v Superior Court (1964) 61 C2d 846, 40 CR 745: §15.23
Corrales v Bradstreet (2007) 153 CA4th 33, 62 CR3d 440: §§2.1, 2.5, 15.67
Costa v Superior Court (2006) 37 C4th 986, 39 CR3d 470: §2.48
Costco Wholesale Corp. v Superior Court (2009) 47 C4th 725, 101 CR3d 758: §15.62, App A
Coulter v Superior Court (1978) 21 C3d 144, 145 CR 534: §§16.105, 16.109, 24.20
Countrywide Home Loans, Inc. v Superior Court (1997) 54 CA4th 828, 62 CR2d 899: §§22.17, 22.23, 24.5-24.6, 24.15, 25.14
County Sanitation Dist. No. 2 v County of Kern (2005) 127 CA4th 1544, 27 CR3d 28: §2.37
County of Alameda v Superior Court (1987) 196 CA3d 619, 242 CR 215: App A
County of Los Angeles v Civil Serv. Comm'n (1995) 39 CA4th 620, 46 CR2d 256: §3.16
County of Los Angeles v Superior Court (1975) 13 C3d 721, 119 CR 631: §16.121
County of Los Angeles v Superior Court (2008) 159 CA4th 353, 71 CR3d 485: §§15.70, 16.129A, 16.129D
County of Los Angeles v Superior Court (2005) 130 CA4th 1099, 30 CR3d 708: §16.122
County of Los Angeles v Superior Court (1993) 18 CA4th 588, 22 CR2d 409: §§19.3, 19.6
County of Marin v Superior Court (1960) 53 C2d 633, 2 CR 758: §15.38

County of Orange v Superior Court (2007) 155 CA4th 1253, 66 CR3d 689: §16.91
County of Orange v Superior Court (2000) 79 CA4th 759, 94 CR2d 261: §16.121
County of Sacramento v Hickman (1967) 66 C2d 841, 59 CR 609: §§2.58, 2.61, 27.8
County of San Bernardino v Superior Court (1994) 30 CA4th 378, 35 CR2d 760: §23.27
County of San Diego v Bowen (2008) 166 CA4th 501, 82 CR3d 818: §2.37
County of San Diego v State (2008) 164 CA4th 580, 79 CR3d 489: §§2.3, 2.6, 2.12, 2.24, 5.119
County of San Luis Obispo v Superior Court (2001) 90 CA4th 288, 108 CR2d 753: §2.14
County of Santa Clara v Superior Court (2009) 170 CA4th 1301, 89 CR3d 374: §§16.14, 16.17
County of Sonoma v Commission on State Mandates (2000) 84 CA4th 1264, 101 CR2d 784: §3.3
County of Sonoma v State Energy Resources Conserv. & Dev. Comm'n (1985) 40 C3d 361, 220 CR 114: §§16.26, 27.4
County of Sonoma v Superior Court (2009) 173 CA4th 322, 93 CR3d 39: §§15.56, 15.61, 15.70-15.71, 16.100, 22.23
Covenant Care, Inc. v Superior Court (2004) 32 C4th 771, 11 CR3d 222: §16.105
Cox v Superior Court (2002) 98 CA4th 670, 120 CR2d 45: §16.145
Coy v Superior Court (1962) 58 C2d 210, 23 CR 393: §§8.46, 23.30
Crab Addison, Inc. v Superior Court (2008) 169 CA4th 958, 87 CR3d 400, quoting People ex rel Lockyer v Superior Court (2004) 122 CA4th 1060, 19 CR 3d 324: §16.120
Crawford v City of Los Angeles (2009) 175 CA4th 249, 95 CR3d 550: §11.26
Crittenden v Superior Court (1964) 61 C2d 565, 39 CR 380: §15.26
Crocker-Anglo Nat'l Bank v American Trust Co. (1959) 170 CA2d 289, 338 P2d 617: App A
Crowl v Commission on Prof. Competence of the Governing Bd. of the San Juan Unified Sch. Dist. (1990) 225 CA3d 334, 275 CR 86: §§8.49, 18.47
Cruz v Superior Court (2004) 120 CA4th 175, 14 CR3d 917: §15.8
Cuadros v Superior Court (1992) 6 CA4th 671, 8 CR2d 18: §16.106
Cubalevic v Superior Court (1966) 240 CA2d 557, 49 CR 698: §15.26
Cuneo, Estate of (1963) 214 CA2d 381, 29 CR 497: §16.143
Curle v Superior Court (2001) 24 C4th 1057, 103 CR2d 751: §§15.55, 16.4, 17.24, App A

D

Daar v Yellow Cab Co. (1967) 67 C2d 695, 63 CR 724: App A
Dabney, Estate of (1951) 37 C2d 402, 232 P2d 481: §26.5
Daily Journal Corp. v County of Los Angeles (2009) 172 CA4th 1550, 92 CR3d 219: §§2.8, 2.20, 2.30
Daley v County of Butte (1964) 227 CA2d 380, 38 CR 693: App A
Daly v Superior Court (1977) 19 C3d 132, 137 CR 14: §16.116
Daniel V. v Superior Court (2006) 139 CA4th 28, 42 CR3d 471: §16.7
Dare v Board of Med. Exam'rs (1943) 21 C2d 790, 136 P2d 304: §§7.11, 9.17, 9.28
Darley v Ward (1980) 28 C3d 257, 168 CR 481: §7.3
Darlice C., In re (2003) 105 CA4th 459, 129 CR2d 472: §§4.18, 4.20
Daro v Superior Court (2007) 151 CA4th 1079, 61 CR3d 716: §15.52
Dashaway Ass'n, People v (1890) 84 C 114, 24 P 277: §4.27
Daum v Superior Court (1964) 228 CA2d 283, 39 CR 443: App A
David L. v Superior Court (2008) 166 CA4th 387, 83 CR3d 14: §16.143A
Davidson v Superior Court (1999) 70 CA4th 514, 82 CR2d 739: §15.37
Davies v Superior Court (1984) 36 C3d 291, 204 CR 154: §16.118
Davis v Custom Component Switches, Inc. (1970) 13 CA3d 21, 91 CR 181: §§26.17, 26.19
Davis v Superior Court (1992) 7 CA4th 1008, 9 CR2d 331: §15.62
Davis v Superior Court (1980) 102 CA3d 164, 162 CR 167: §§12.26-12.27
Davis v Taliaferro (1963) 218 CA2d 120, 32 CR 208: App A
De Luca v Superior Court (1968) 262 CA2d 254, 68 CR 535: §15.26
DeCastro West Chodorow & Burns, Inc. v Superior Court (1996) 47 CA4th 410, 54 CR2d 792: §16.68
DeCuir v County of Los Angeles (1998) 64 CA4th 75, 75 CR2d 102: §§3.18, 3.20
DeGrandchamp v Texaco, Inc. (1979) 100 CA3d 424, 160 CR 899: §18.46
DeLucia v County of Merced (1968) 257 CA2d 620, 65 CR 177: §4.14
DeSilva, In re (1948) 33 C2d 76, 199 P2d 6: App A
Deacon v International Union of Operating Eng'rs, Local No. 12 (1965) 236 CA2d 302, 46 CR 11: §2.53
Dedrick v California Whaling Co. (1936) 16 CA2d 284, 60 P2d 551.: §2.54
Deepwell Homeowners' Protective Ass'n v City Council (1965) 239 CA2d 63, 48 CR 321: §26.18
Deetz v Carter (1965) 232 CA2d 851, 43 CR 321: App A
Defend Bayview Hunters Point Comm. v City & County of San Francisco (2008) 167 CA4th 846, 84 CR3d 486: §§2.19, 2.47
Dep't of Corporations, People ex rel v SpeeDee Oil Change Sys., Inc. (1999) 20 C4th 1135, 86 CR2d 816: §16.104
Department of Alcoholic Beverage Control v Alcoholic Beverage Control Appeals Bd. (2006) 40 C4th 1, 50 CR3d 585: §3.11
Department of Alcoholic Beverage Control v Alcoholic Beverage Control Appeals Bd. (2002) 99 CA4th 880, 121 CR2d 729: §3.11
Department of Conserv., People ex rel v El Dorado County (2005) 36 C4th 971, 32 CR3d 109: §2.12
Department of Corrections & Rehabilitation v WCAB (2008) 166 CA4th 911, 82 CR3d 920: §16.46
Department of Educ. v Superior Court (1979) 97 CA3d 977, 159 CR 265: App A
Depretto v Superior Court (1981) 116 CA3d 36, 171 CR 810: §16.99

Dept. of Corporations, People ex rel v SpeeDee Oil Change Sys., Inc. (1999) 20 C4th 1135, 86 CR2d 816: §17.11
Deputy Sheriffs' Ass'n, People ex rel v County of Santa Clara (1996) 49 CA4th 1471, 57 CR2d 322: §4.27
Derek W., In re (1999) 73 CA4th 828, 86 CR2d 742: §15.44
DiPirro v Bondo Corp. (2007) 153 CA4th 150, 62 CR3d 722: §16.149
Dinong v Superior Court (1981) 120 CA3d 300, 174 CR 590: §16.100
Discover Bank v Superior Court (2005) 36 C4th 148, 30 CR3d 76: §16.100
District Election of Supervisors Comm. v O'Connor (1978) 78 CA3d 261, 144 CR 442: §16.150
Dixon, In re (1953) 41 C2d 756, 264 P2d 513: §4.18
Do v Superior Court (2003) 109 CA4th 1210, 135 CR2d 855: §16.125, App A
Doe 1 v Superior Court (2005) 132 CA4th 1160, 34 CR3d 248: §16.121
Dominguez v City of Alhambra (1981) 118 CA3d 237, 173 CR 345: App A
Donnellan v City of Novato (2001) 86 CA4th 1097, 103 CR2d 882: §3.19
Dorel Indus., Inc. v Superior Court (2005) 134 CA4th 1267, 36 CR3d 742: §16.56
Dosch v King (1961) 192 CA2d 800, 13 CR 765: §26.9
Dover, Marriage of (1971) 15 CA3d 675, 93 CR 384: §26.18
Dowling v Zimmerman (2001) 85 CA4th 1400, 103 CR2d 174: §26.3
Doyle v Superior Court (1996) 50 CA4th 1878, 58 CR2d 476: §§16.118, 16.124
Dresser v Superior Court (1964) 231 CA2d 68, 41 CR 473: §§15.21, 15.23, 15.26
Drummey v State Bd. of Funeral Dirs. & Embalmers (1939) 13 C2d 75, 87 P2d 848: §2.6
Duke v Justice's Court (1940) 42 CA2d 178, 108 P2d 707: §§15.17-15.18
Dulaney v Municipal Court (1974) 11 C3d 77, 112 CR 777: §§8.47, 23.28-23.29
Duncan v Department of Personnel Admin. (2000) 77 CA4th 1166, 92 CR2d 257: §3.16
Duran v Cassidy (1972) 28 CA3d 574, 104 CR 793: §2.47
Dyer, In re (1948) 85 CA2d 394, 193 P2d 69: §15.48

E

Eastwood v Froehlich (1976) 60 CA3d 523, 131 CR 577: App A
Eder v California Dep't of Fish & Game (2009) 170 CA4th 216, 87 CR3d 788: §5.37
Efron v Kalmanovitz (1960) 185 CA2d 149, 8 CR 107: App A
Eight Unnamed Physicians v Medical Exec. Comm. of the Med. Staff of Washington Township Hosp. (2007) 150 CA4th 503, 59 CR3d 100: §§2.16, 2.34, 2.55
El Dorado Palm Springs, Ltd. v Rent Review Comm'n (1991) 230 CA3d 335, 281 CR 327: §5.74
Eldridge v Superior Court (1989) 208 CA3d 1350, 256 CR 724: §§16.76, 18.64
Elizabeth D. v Zolin (1993) 21 CA4th 347, 25 CR2d 852: §3.17
Elliott v Contractors' State License Bd. (1990) 224 CA3d 1048, 274 CR 286: §§5.65, 8.49, 8.57, 18.47
Emerson Elec. Co. v Superior Court (1997) 16 C4th 1101, 68 CR2d 883: §16.123
Emilye A., In re (1992) 9 CA4th 1695, 12 CR2d 294: §§4.19-4.20
Employers Reinsurance Co. v Superior Court (2008) 161 CA4th 906, 74 CR3d 733: §16.145
English v City of Long Beach (1952) 114 CA2d 311, 250 P2d 298: §§8.59, 9.26, 9.28, 9.31
Ensoniq Corp. v Superior Court (1998) 65 CA4th 1537, 77 CR2d 507: §19.6
Environmental Council v Board of Supervisors (1982) 135 CA3d 428, 185 CR 363: §2.25
Environmental Protection & Info. Ctr. v California Dep't of Forestry & Fire Protection (2008) 44 C4th 459, 80 CR3d 28: §3.14
Environmental Protection Info. Ctr. v State Bd. of Forestry (1993) 20 CA4th 27, 24 CR2d 344: §24.7
Estate of _____ (*see* name of decedent)
Estrin v Superior Court (1939) 14 C2d 670, 96 P2d 340: §23.47
Eureka Citizens for Responsible Gov't v City of Eureka (2007) 147 CA4th 357, 54 CR3d 485: §3.7
Eureka Teachers Ass'n v Board of Educ. of the Eureka City Schs. (1988) 199 CA3d 353, 244 CR 240: §§3.21, 5.36
Evans v Superior Court (1939) 14 C2d 563, 96 P2d 107: §§15.14, 15.20
Excelsior College v Board of Registered Nursing (2006) 136 CA4th 1218, 39 CR3d 618: §§2.33, 2.39

F

FEHC v Superior Court (Las Brisas Apartment, Ltd.) (2004) 115 CA4th 629, 9 CR3d 409: §3.19
Fair Employment & Hous. Comm'n v Superior Court (2004) 115 CA4th 629, 9 CR3d 409: §15.64
Fairbank v Superior Court (1917) 34 CA 66, 166 P 864: App A
Fairfield v Superior Court (1966) 246 CA2d 113, 54 CR 721: §16.125
Fall River Joint Unified Sch. Dist. v Superior Court (1988) 206 CA3d 431, 253 CR 587: §18.43
Farb v Superior Court (2009) 174 CA4th 678, 94 CR3d 586: §16.108
Farley v Healey (1967) 67 C2d 325, 62 CR 26: §§2.46, 11.38, 27.2
Farmers Ins. Exch. v Superior Court (1992) 10 CA4th 1509, 13 CR2d 449: §16.5
Farnham v Superior Court (1961) 188 CA2d 451, 10 CR 615: §§16.131, 16.139
Fascination, Inc. v Hoover (1952) 39 C2d 260, 246 P2d 656: §7.12
Fatica v Superior Court (2002) 99 CA4th 350, 120 CR2d 904: §16.145
Ferruzzo v Superior Court (1980) 104 CA3d 501, 163 CR 573: App A
Figgs v Superior Court (1962) 204 CA2d 231, 22 CR 199: §16.94
Filarsky v Superior Court (2002) 28 C4th 419, 121 CR2d 844: §§2.68, 16.14, App A

Fine v Superior Court (2002) 97 CA4th 651, 119 CR2d 376: §§15.37, 15.41
Finot v Pasadena City Bd. of Educ. (1967) 250 CA2d 189, 58 CR 520: §2.42
Fire Ins. Exch. v Superior Court (2004) 116 CA4th 446, 10 CR3d 617: §16.106
First Fed. Bank. v Superior Court (2006) 143 CA4th 310, 49 CR3d 296: §16.5
Fiscal v City & County of San Francisco (2008) 158 CA4th 895, 70 CR3d 324: §§2.1, 2.24, 7.9, 11.33
Fisher v Superior Court (1980) 103 CA3d 434, 163 CR 47: App A
Fisherman's Wharf Bay Cruise Corp. v Superior Court (2003) 114 CA4th 309, 7 CR3d 628: §§15.4-15.6, 15.10-15.11, 15.13, 16.68
Flaherty, Marriage of (1982) 31 C3d 637, 183 CR 508: §24.62
Flatt v Superior Court (1994) 9 C4th 275, 36 CR2d 537: §17.11
Flora Crane Serv., Inc. v Ross (1964) 61 C2d 199, 37 CR 425: §2.64
Florence W. Med. Clinic v Bont (2000) 77 CA4th 493, 91 CR2d 609, citing Ryne v Municipal Court (1980) 113 CA3d 807, 170 CR 312: §8.44
Flores v Transamerica HomeFirst, Inc. (2001) 93 CA4th 846, 113 CR2d 376: §16.101
Flying Dutchman Park, Inc. v City & County of San Francisco (2001) 93 CA4th 1129, 113 CR2d 690: §16.111
Fonseca v Fong (2008) 167 CA4th 922, 84 CR3d 567: §§2.28, 5.34, 8.40-8.41, 11.16
Fontana v Superior Court (1977) 72 CA3d 159, 139 CR 851: §16.133
Fontana Unified Sch. Dist. v City of Rialto (1985) 173 CA3d 725, 219 CR 254: §2.41
Food & Grocery Bureau v Garfield (1941) 18 C2d 174, 114 P2d 579: §§26.17, 26.21
Forrest v Trustees of Cal. State Univ. & Colleges (1984) 160 CA3d 357, 206 CR 595: §2.31
Franchise Tax Bd. v Superior Court (1950) 36 C2d 538, 225 P2d 905: §16.131
Fredrickson v Superior Court (1952) 38 C2d 593, 241 P2d 541: §16.143
Freedman v Superior Court (2008) 166 CA4th 198, 82 CR3d 563: §§16.106, 25.7, 25.26
Fremont Indem. Co. v Fremont Gen. Corp. (2006) 143 CA4th 50, 49 CR3d 82: §17.11
Fremont Indem. Co. v Superior Court (1982) 137 CA3d 554, 187 CR 137: §16.117
Fremont Union High Sch. Dist. v Santa Clara County Bd. of Educ. (1991) 235 CA3d 1182, 286 CR 915: §§5.65, 18.47
Friends of Bay Meadows v City of San Mateo (2007) 157 CA4th 1175, 68 CR3d 916: §§2.19, 2.46-2.47, 7.6
Friends of Mammoth v Board of Supervisors (1972) 8 C3d 247, 104 CR 761: §2.34
Friends of the Old Trees v Department of Forestry & Fire Protection (1997) 52 CA4th 1383, 61 CR2d 297: §3.4
Fullerton Joint Union High Sch. Dist. v State Bd. of Educ. (1982) 32 C3d 779, 187 CR 398: §2.45
Fults v Superior Court (1979) 88 CA3d 899, 152 CR 210: §16.118

G

GT, Inc. v Superior Court (1984) 151 CA3d 748, 198 CR 892: §16.118
Gallardo v Specialty Restaurants Corp. (2000) 84 CA4th 463, 100 CR2d 884: §26.3
Gallardo, People v (2000) 77 CA4th 971, 92 CR2d 161: §15.48
Gandolfo, In re (1984) 36 C3d 889, 206 CR 149: §4.25
Garamendi, People ex rel v American Autoplan, Inc. (1993) 20 CA4th 760, 25 CR2d 192: §§16.93-16.94
Garau v Torrance Unified Sch. Dist. (2006) 137 CA4th 192, 40 CR3d 108: §16.58, App A
Garcia v Los Angeles Unified Sch. Dist. (1985) 173 CA3d 701, 219 CR 544: App A
Garrett v Superior Court (1967) 248 CA2d 263, 56 CR 418: §16.65
Garza v Kantor (1976) 54 CA3d 1025, 127 CR 164: App A
Gelson's Mkts., Inc. v WCAB (2009) 179 CA4th 201, 101 CR3d 548: §§16.46, 16.48
General Elec. Capital Auto Fin. Servs. v Appellate Div. (2001) 88 CA4th 136, 105 CR2d 552: §§12.3, 12.18, 12.27
General Motors Corp. v Superior Court (1966) 65 C2d 88, 52 CR 460: §15.26
General Motors Corp. v Superior Court (1988) 199 CA3d 247, 244 CR 776: App A
Gentry v Superior Court (2007) 42 C4th 443, 64 CR3d 773: §16.100
George M. v Superior Court (1988) 201 CA3d 755, 247 CR 330: §24.20
Ghanooni v Super Shuttle (1992) 2 CA4th 380, 3 CR2d 43: §16.127
Gibson v Savings & Loan Comm'r (1970) 6 CA3d 269, 85 CR 799: §11.10
Gilbert v Homar (1997) 520 US 924, 138 L Ed 2d 120, 117 S Ct 1807: §3.11
Gilliland v County of Los Angeles (1981) 126 CA3d 610, 179 CR 73: §§2.23, 2.41
Ginns v Savage (1964) 61 C2d 520, 39 CR 377: §3.19
Glacier Gen. Ins. Co., In re (1991) 234 CA3d 1549, 286 CR 262: App A
Glendale City Employees Ass'n v City of Glendale (1975) 15 C3d 328, 124 CR 513: §2.25
Glendale Mem. Hosp. & Health Ctr. v State Dep't of Mental Health (2001) 91 CA4th 129, 110 CR2d 101: §3.14
Goble v Municipal Court (1956) 138 CA2d 725, 292 P2d 585: §15.33
Golden Drugs Co. v Maxwell-Jolly (2009) 179 CA4th 1455, 102 CR3d 446: §§2.9, 7.12
Golden State Glass Corp. v Superior Court (1939) 13 C2d 384, 90 P2d 75: §16.103
Goldstein v Superior Court (2008) 45 C4th 218, 85 CR3d 213: §27.12
Gong v RFG Oil, Inc. (2008) 166 CA4th 209, 82 CR3d 416: §16.102
Gonzales v Superior Court (1980) 117 CA3d 57, 178 CR 358: §16.117
Good v Superior Court (2008) 158 CA4th 1494, 71 CR3d 125: §§11.16, 16.87, 18.66, 18.68
Gottlieb v Superior Court (1991) 232 CA3d 804, 283 CR 771: §24.65
Grafton Partners L.P. v Superior Court (2005) 36 C4th 944, 32 CR3d 5: §16.106
Graham v Scissor-Tail, Inc. (1981) 28 C3d 807, 171 CR 604: App A

Grant v Superior Court (1963) 214 CA2d 15, 29 CR 125: App A
Gray v Bybee (1943) 60 CA2d 564, 141 P2d 32: §26.16
Gray v Superior Court (2005) 125 CA4th 629, 23 CR3d 50: §4.17
Great Oaks Water Co. v Santa Clara Valley Water Dist. (2009) 170 CA4th 956, 88 CR3d 506: §7.21
Greater Irvine Credit Union v Superior Court (1986) 186 CA3d 1189, 231 CR 296: §16.70
Green v Obledo (1981) 29 C3d 126, 172 CR 206: §2.13
Green v Superior Court (1974) 10 C3d 616, 111 CR 704: §15.67
Greenberg v Superior Court (2009) 172 CA4th 1339, 92 CR3d 96: §§16.67, 19.6
Greene v Municipal Court (1975) 51 CA3d 446, 124 CR 139: §12.22
Greene v Superior Court (1951) 37 C2d 307, 231 P2d 821: §16.144
Greener v WCAB (1993) 6 C4th 1028, 25 CR2d 539: §16.46
Gregori v Bank of Am. (1989) 207 CA3d 291, 254 CR 853: App A
Greif v Dullea (1944) 66 CA2d 986, 153 P2d 581: §20.18
Greshko v County of Los Angeles (1987) 194 CA3d 822, 239 CR 846: App A
Greyhound Lines, Inc. v PUC (1968) 68 C2d 406, 67 CR 97: §16.39
Gridley v Gridley (2008) 166 CA4th 1562, 83 CR3d 715: §15.66
Griffiths v Superior Court (2002) 96 CA4th 757, 117 CR2d 445: §3.17
Grinbaum v Superior Court (1923) 192 C 528, 221 P 635: §15.36
Griset v Fair Political Practices Comm'n (2001) 25 C4th 688, 107 CR2d 149: §§11.6, 11.9
Guardado v Superior Court (2008) 163 CA4th 91, 77 CR3d 149: §§16.5, 20.4-20.5
Guay v Superior Court (1957) 147 CA2d 764, 305 P2d 990: App A
Guedalia v Superior Court (1989) 211 CA3d 1156, 260 CR 99: §§18.73, 18.76
Guilbert v Regents of Univ. of Cal. (1979) 93 CA3d 233, 155 CR 583: §3.10

H

H.D. Arnaiz, Ltd. v County of San Joaquin (2002) 96 CA4th 1357, 118 CR2d 71: §16.87
Haas v County of San Bernardino (2002) 27 C4th 1017, 119 CR2d 341: §3.11
Hackett v Superior Court (1993) 13 CA4th 96, 16 CR2d 405: §16.121
Hadley v Superior Court (1972) 29 CA3d 389, 105 CR 500: §11.8
Hagan v Superior Court (1962) 57 C2d 767, 22 CR 206: §§18.29, 25.30
Hagan v Superior Court (1960) 53 C2d 498, 2 CR 288: §15.26, App A
Haight v City of San Diego (1991) 228 CA3d 413, 278 CR 334: §11.9
Hallinan v Mellon (1963) 218 CA2d 342, 32 CR 446: §2.10
Hamilton v Superior Court (1974) 37 CA3d 418, 112 CR 450: §16.62
Hammond Lumber Co. v Board of Supervisors (1948) 85 CA2d 568, 193 P2d 503: §8.52
Hampton v Superior Court (1952) 38 C2d 652, 242 P2d 1: §24.53
Hanna v Bankamerica Bus. Credit, Inc. (1993) 16 CA4th 913, 20 CR2d 430: §16.127
Hardy v Stumpf (1974) 37 CA3d 958, 112 CR 739: §2.56
Harris v Alcoholic Beverage Control Appeals Bd. (1965) 62 C2d 589, 43 CR 633, citing Bailey v Taaffe (1866) 29 C 422: §8.44
Harris v Alcoholic Beverage Control Appeals Bd. (1961) 197 CA2d 759, 18 CR 151: §5.75
Hartman v Hollingsworth (1967) 255 CA2d 579, 63 CR 563: §2.54
Hartwell Corp. v Superior Court (2002) 27 C4th 256, 115 CR2d 874: §16.33
Hassan v Mercy Am. River Hosp. (2003) 31 C4th 709, 3 CR3d 623: §25.2
Hatch v Superior Court (2000) 80 CA4th 170, 94 CR2d 453: §16.90
Hathaway, Estate of (1896) 111 C 270, 43 P 754: App A
Hayden v Robertson Stephens, Inc. (2007) 150 CA4th 360, 58 CR3d 333: §16.101
Hayward Area Planning Ass'n v Superior Court (1990) 218 CA3d 53, 266 CR 745: §11.37
Hayworth v City of Oakland (1982) 129 CA3d 723, 181 CR 214: §§26.9-26.10
Hebbard v Colgrove (1972) 28 CA3d 1017, 105 CR 172: §5.34
Hegwer v Board of Civil Serv. Comm'rs (1992) 5 CA4th 1011, 7 CR2d 389: §2.56
Heldt v Municipal Court (1985) 163 CA3d 532, 209 CR 579: §12.19
Helena F. v West Contra Costa Unified Sch. Dist. (1996) 49 CA4th 1793, 57 CR2d 605: §2.43
Helene Curtis, Inc. v Los Angeles County Assessment Appeals Bds. (2004) 121 CA4th 29, 16 CR3d 658: §§3.4, 3.20
Helzel v Superior Court (1981) 123 CA3d 652, 176 CR 740: §16.100
Hemingway v Superior Court (2004) 122 CA4th 1148, 19 CR3d 363: §16.7
Hennigan v Boren (1966) 243 CA2d 810, 52 CR 748: §16.62, App A
Henry v Superior Court (2008) 160 CA4th 440, 72 CR3d 808: §§15.6, 15.52, 15.56, 15.60-15.61, 15.63, 15.70, 16.145, 19.6, 22.23, 23.28, 24.21
Heritage Provider Network, Inc. v Superior Court (2008) 158 CA4th 1146, 70 CR3d 645: §§15.56, 15.61, 16.99, 24.21
Hernandez v County of Los Angeles (2008) 167 CA4th 12, 84 CR3d 10: §§2.24, 2.48, 11.4, 11.16
Hernandez v Superior Court (2003) 112 CA4th 285, 4 CR3d 883: §§16.106-16.107
Hewlett-Packard Co. v Superior Court (2008) 167 CA4th 87, 83 CR3d 836: §16.129A
Heyman & Co. v Landers (1859) 12 C 107: §6.33
Hibernia Sav. & Loan Soc'y v Ellis Estate Co. (1932) 216 C 280, 13 P2d 929: App A
Higgins v Superior Court (2006) 140 CA4th 1238, 45 CR3d 293: §16.101

Hillsboro Props. v Public Utils. Comm'n (2003) 108 CA4th 246, 133 CR2d 343: §15.38
Hobbs v Northeast Sacramento County Sanitation Dist. (1966) 240 CA2d 552, 49 CR 606: §2.66
Hobbs v Tom Reed Gold Mining Co. (1913) 164 C 497, 129 P 781: §2.54
Hock v Superior Court (1990) 221 CA3d 670, 270 CR 579: §15.8
Hodge v Superior Court (2006) 145 CA4th 278, 51 CR3d 519: §16.148
Hoertkorn, Estate of (1979) 88 CA3d 461, 151 CR 806: App A
Hoffman v State Bar (2003) 113 CA4th 630, 6 CR3d 592: §2.45
Hogar Dulce Hogar v Community Dev. Comm'n (2003) 110 CA4th 1288, 2 CR3d 497: §2.13
Hogya v Superior Court (1977) 75 CA3d 122, 142 CR 325: §15.60, App A
Hollaway v Scripps Mem. Hosp. (1980) 111 CA3d 719, 168 CR 782: App A
Hollister Convalescent Hosp., Inc. v Rico (1975) 15 C3d 660, 125 CR 757: §11.23
Holloway, People v (2004) 33 C4th 96, 14 CR3d 212: §16.121
Hollywood Circle, Inc. v Department of Alcoholic Beverage Control (1961) 55 C2d 728, 13 CR 104: §§3.10, 9.54
Hollywood Park Land Co. v Golden State Transp. Fin. Corp. (2009) 178 CA4th 924, 100 CR3d 752: §27.3
Holt v Kelly (1978) 20 C3d 560, 143 CR 625: §24.14
Honore v Superior Court (1969) 70 C2d 162, 74 CR 233: §18.3
Hooser v Superior Court (2000) 84 CA4th 997, 101 CR2d 341: §19.6
Hop, In re (1981) 29 C3d 82, 171 CR 721: §4.25
Hope Int'l Univ. v Superior Court (2004) 119 CA4th 719, 14 CR3d 643: §16.75, App A
Horner v Board of Trustees (1964) 61 C2d 79, 37 CR 185: §3.9
Houghtaling v Superior Court (1993) 17 CA4th 1128, 21 CR2d 855: §12.27
Houser v Superior Court (1932) 121 CA 31, 8 P2d 483: §6.31
Housing Auth. of the City of Eureka v Superior Court (1950) 35 C2d 550, 219 P2d 457, superseded by statute on other grounds: §15.16
Howard v Superior Court (1944) 25 C2d 784, 154 P2d 849: §§15.31, 15.33, 15.35
Howard S. Wright Constr. Co. v Superior Court (2003) 106 CA4th 314, 130 CR2d 641: §16.13
Howell v Superior Court (1962) 211 CA2d 487, 27 CR 149: §§15.68, 16.97
Hughson v Superior Court (1932) 120 CA 658, 8 P2d 227: §15.34
Hull, People v (1991) 1 C4th 266, 2 CR2d 526: §§16.3, 16.5-16.6, 18.76
Hunt, Marriage of (1985) 172 CA3d 872, 218 CR 451: App A
Hunter v Superior Court (1939) 36 CA2d 100, 97 P2d 492: §16.131
Huntington Beach Police Officers Ass'n v City of Huntington Beach (1976) 58 CA3d 492, 129 CR 893: §2.50
Huntington Park Redev. Agency v Martin (1985) 38 C3d 100, 211 CR 133: §2.58
Huson v Superior Court (1963) 220 CA2d 140, 33 CR 568: §15.25
Huston v Huston (1948) 87 CA2d 8, 195 P2d 551: §26.13
Hypertouch, Inc. v Superior Court (2005) 128 CA4th 1527, 27 CR3d 839: §16.129B

I

IT Corp. v County of Imperial (1983) 35 C3d 63, 196 CR 715: §§6.30, 6.36
Imagistics Int'l, Inc. v Department of Gen. Servs. (2007) 150 CA4th 581, 59 CR3d 18: §§2.16, 2.34, 5.34
Imuta v Nakano (1991) 233 CA3d 1570, 285 CR 681: §16.127
Independent Energy Producers Ass'n v McPherson (2006) 38 C4th 1020, 44 CR3d 644: §§2.48, 15.67
Industrial Welfare Comm'n v Superior Court (1980) 27 C3d 690, 166 CR 331: §27.8
Inland Counties Reg'l Ctr. v Office of Admin. Hearings (1987) 193 CA3d 700, 238 CR 422: §5.35
In re _____ (*see* name of party)
Interinsurance Exch. of the Automobile Club v Superior Court (2007) 148 CA4th 1218, 56 CR3d 421: §§15.56, 15.61, 15.70
International Ass'n of Fire Fighters v City of Oakland (1985) 174 CA3d 687, 220 CR 256: §4.27
International Film Inv. v Arbitration Tribunal of Directors Guild (1984) 152 CA3d 699, 199 CR 690: App A
International Typographical Union Negotiated Pension Plan v Ad Compositors, Inc. (1983) 142 CA3d 733, 191 CR 227: App A
International Union of Operating Eng'rs v Superior Court (1989) 207 CA3d 340, 254 CR 782: §6.31
Irvine v Citrus Pest Dist. No. 2 (1944) 62 CA2d 378, 144 P2d 857: §4.14
Irwin Mem. Blood Ctrs. v Superior Court (1991) 229 CA3d 151, 279 CR 911: §16.87
Islander Yachts, Inc. v One Freeport 36-Ft. Vessel (1985) 173 CA3d 1081, 219 CR 654: App A
Isrin v Superior Court (1965) 63 C2d 153, 45 CR 320: §15.8
Ivory v Superior Court (1938) 12 C2d 455, 85 P2d 894: §§15.32, 23.33, 23.47

J

J. C. Penney Co. v Superior Court (1959) 52 C2d 666, 343 P2d 919: §16.113, App A
JKH Enters., Inc. v Department of Indus. Relations (2006) 142 CA4th 1046, 48 CR3d 563: §11.8
Jackson v Gourley (2003) 105 CA4th 966, 130 CR2d 72: §2.28
Jacqueline H., In re (1979) 94 CA3d 808, 156 CR 765: App A
Jacuzzi v Jacuzzi Bros., Inc. (1963) 218 CA2d 24, 32 CR 188: §16.102
Jaffe v Carroll (1973) 35 CA3d 53, 110 CR 435: §5.31
Jakks Pac., Inc. v Superior Court (2008) 160 CA4th 596, 72 CR3d 914: §16.99
James v Superior Court (1968) 261 CA2d 415, 67 CR 783: App A

James G. v Superior Court (2000) 80 CA4th 275, 95 CR2d 135: §23.22
Jenkins v Knight (1956) 46 C2d 220, 293 P2d 6: §§2.6, 2.45, 15.7
Jennifer T. v Superior Court (2007) 159 CA4th 254, 71 CR3d 293: §16.52
Jensen v Superior Court (2008) 160 CA4th 266, 72 CR3d 594: §11.16
Jessen v Hartford Cas. Ins. Co. (2003) 111 CA4th 698, 3 CR3d 877: §17.11
Jevne v Superior Court (2005) 35 C4th 935, 28 CR3d 685: §16.99
Jogani v Superior Court (2008) 165 CA4th 901, 81 CR3d 503: §16.148
John B. v Superior Court (2006) 38 C4th 1177, 45 CR3d 316: §16.118
John Breuner Co. v Bryant (1951) 36 C2d 877, 229 P2d 356: App A
Johnson v Langdon (1902) 135 C 624, 67 P 1050: §2.54
Johnson v Superior Court (2006) 143 CA4th 297, 49 CR3d 52: §15.63
Jolicoeur v Mihaly (1971) 5 C3d 565, 96 CR 697: §27.8
Jollie v Superior Court (1951) 38 C2d 52, 237 P2d 641: §17.30
Jonathan L. v Superior Court (2008) 165 CA4th 1074, 81 CR3d 571: §§15.67, 16.143A
Jonathon M. v Superior Court (2006) 141 CA4th 1093, 46 CR3d 798: §16.5
Jones v Superior Court (1994) 26 CA4th 92, 31 CR2d 264: §§17.28, 17.35, 19.7, 24.65
Jones v Superior Court (1981) 119 CA3d 534, 174 CR 148: §16.118
Juarez v Superior Court (1982) 31 C3d 759, 183 CR 852: App A
Justin L. v Superior Court (2008) 165 CA4th 1406, 81 CR3d 884: §16.143A

K

K.R.L. Partnership v Superior Court (2004) 120 CA4th 490, 15 CR3d 517: §17.32
KB Home v Superior Court (2003) 112 CA4th 1076, 5 CR3d 587: §16.147
KSDO v Superior Court (1982) 136 CA3d 375, 186 CR 211: §16.121
Kahn v Superior Court (1987) 188 CA3d 752, 233 CR 662: §16.118
Kaplan v Coldwell Banker Residential Affiliates, Inc. (1997) 59 CA4th 741, 69 CR2d 640: §11.34
Kaplan's Fruit & Produce Co. v Superior Court (1979) 26 C3d 60, 160 CR 745: §16.150
Karriker, People v (2007) 149 CA4th 763, 57 CR3d 412: §2.22
Katosh v Sonoma County Employees' Retirement Ass'n (2008) 163 CA4th 56, 77 CR3d 324: §§2.1, 2.32, 3.3, 3.13
Kaufman v Court of Appeal (1982) 31 C3d 933, 184 CR 302: §27.9
Kaufman & Broad Communities, Inc. v Performance Plastering, Inc. (2005) 133 CA4th 26, 34 CR3d 520: §20.20
Kavanaugh v West Sonoma County Union High Sch. Dist. (2003) 29 C4th 911, 129 CR2d 811: §§2.5-2.6, 2.20, 15.7
Kawasaki Motors Corp. v Superior Court (2000) 85 CA4th 200, 101 CR2d 863: §15.56
Keeler v Superior Court (1956) 46 C2d 596, 297 P2d 967: §§2.33, 3.4
Keenan v Superior Court (2002) 27 C4th 413, 117 CR2d 1: §22.25
Kennaley v Superior Court (1954) 43 C2d 512, 275 P2d 1: App A
Kennedy/Jenks Consultants, Inc. v Superior Court (2000) 80 CA4th 948, 95 CR2d 817: §25.7
Kentucky Fried Chicken v Superior Court (1997) 14 C4th 814, 59 CR2d 756: §16.67
Kerr-McGee Chem. Corp. v Superior Court (1984) 160 CA3d 594, 206 CR 654: §16.112
Kettenhofen v Superior Court (1961) 55 C2d 189, 10 CR 356: §§26.9, 26.21
Kettenhofen v Superior Court (1961) 55 C2d 189, 358 P2d 684: §26.9
Kim, People v (2009) 45 C4th 1078, 90 CR3d 355: §15.44
King v Martin (1971) 21 CA3d 791, 98 CR 711: §10.9
King v Meese (1987) 43 C3d 1217, 240 CR 829: §6.36
King v Woods (1983) 144 CA3d 571, 192 CR 724: §§10.9, 10.16-10.19, 24.47-24.51
Kingston v Department of Motor Vehicles (1969) 271 CA2d 549, 76 CR 614: §9.17
Kinoshita v Horio (1986) 186 CA3d 959, 231 CR 241: App A
Kirby v Alcoholic Beverage Control Appeals Bd. (1968) 261 CA2d 119, 67 CR 628: §16.24
Kirschenman v Superior Court (1994) 30 CA4th 832, 36 CR2d 166: §16.82
Klose v Superior Court (1950) 96 CA2d 913, 217 P2d 97: §2.10
Knight v Ferguson (2007) 149 CA4th 1207, 57 CR3d 823: §17.11
Knoll v Davidson (1974) 12 C3d 335, 116 CR 97: §15.21
Koch-Ash v Superior Court (1986) 180 CA3d 689, 225 CR 657: App A
Koehn v State Bd. of Equalization (1958) 166 CA2d 109, 333 P2d 125: §4.15
Kohn v Superior Court (1966) 239 CA2d 428, 48 CR 832: §16.5
Kowis v Howard (1992) 3 C4th 888, 12 CR2d 728: §§9.55, 18.29, 22.14, 22.17, 22.23, 25.13, 27.15
Kramer v Superior Court (1950) 36 C2d 159, 222 P2d 874: §16.143
Kraus v Davis (1970) 6 CA3d 484, 85 CR 846: App A
Kreling v Kreling (1897) 116 C 458, 48 P 383: §26.12
Kresteller v Superior Court (1967) 248 CA2d 545, 56 CR 771: §16.93
Kristin H., In re (1996) 46 CA4th 1635, 54 CR2d 722: §4.20
Krueger v Superior Court (1979) 89 CA3d 934, 152 CR 870: §§5.64, 18.42, 25.14
Kugler v Yocum (1968) 69 C2d 371, 71 CR 687: §2.46
Kumar v Superior Court (1982) 32 C3d 689, 186 CR 772: §16.54
Kwolek, People v (1995) 40 CA4th 1521, 48 CR2d 325: §4.27

L

La Prade v Department of Water & Power (1945) 27 C2d 47, 162 P2d 13: §4.14
La Seigneurie U.S. Holdings, Inc. v Superior Court (1994) 29 CA4th 1500, 35 CR2d 175: §16.5
Lambert v Municipal Court (1960) 53 C2d 690, 3 CR 168: §16.89
Lambert v Municipal Court (1960) 179 CA2d 682, 3 CR 894: §15.18
Langan v City of El Monte (2000) 79 CA4th 608, 94 CR2d 254: §3.9
Langford v Superior Court (1987) 43 C3d 21, 233 CR 387: §§22.23, 25.12
Lantz v Superior Court (1994) 28 CA4th 1839, 34 CR2d 358: §§12.8, 20.4
Larsen v DMV (1995) 12 C4th 278, 48 CR2d 151: §2.40
Larson v City of Redondo Beach (1972) 27 CA3d 332, 103 CR 592: §§8.40-8.41
Lauermann v Superior Court (2005) 127 CA4th 1327, 26 CR3d 258: §23.44
Laurel Heights Improvement Ass'n v Regents of Univ. of Cal. (1988) 47 C3d 376, 253 CR 426: §24.28
Lautrup, Inc. v Trans-West Discount Corp. (1976) 64 CA3d 316, 134 CR 348: §16.8
Lawrence v Superior Court (1988) 206 CA3d 611, 253 CR 748: §§24.60, 24.65
Lazar v Hertz Corp. (1999) 69 CA4th 1494, 82 CR2d 368: §16.107
Le Francois v Goel (2005) 35 C4th 1094, 29 CR3d 249: §25.18
Leader v Health Indus. of Am., Inc. (2001) 89 CA4th 603, 107 CR2d 489: App A
League of Women Voters v Eu (1992) 7 CA4th 649, 9 CR2d 416: §5.66
League of Women Voters v McPherson (2006) 145 CA4th 1469, 52 CR3d 585: §2.56
Leal v Gourley (2002) 100 CA4th 963, 123 CR2d 220: §3.12
Leamon v Krajkiewcz (2003) 107 CA4th 424, 132 CR2d 362: §25.17
Lee v Blue Shield (2007) 154 CA4th 1369, 65 CR3d 612: §§2.38, 2.55, 5.31, 5.36
Lee v Superior Court (1961) 196 CA2d 161, 16 CR 268: §15.19
Lee, Estate of (1945) 26 C2d 295, 158 P2d 193: §26.17
Legislature v Eu (1991) 54 C3d 492, 286 CR 283: §27.8
Legislature v Reinecke (1972) 6 C3d 595, 99 CR 481; see also Silver v Brown (1965) 63 C2d 270, 46 CR 308: §2.44
Lemelle v Superior Court (1978) 77 CA3d 148, 143 CR 450: §§20.4-20.5, 20.9
Lempert v Superior Court (2003) 112 CA4th 1161, 5 CR3d 700: §22.19
Leone v Medical Bd. (2000) 22 C4th 660, 94 CR2d 61: §§16.14, 17.24, 17.29, 22.17
Lerner v Superior Court (1952) 38 C2d 676, 242 P2d 321: §26.6
Lesko v Superior Court (1982) 127 CA3d 476, 179 CR 595: §16.112
Lester v Lennane (2000) 84 CA4th 536, 101 CR2d 86: App A
Leung v Verdugo Hills Hosp. (2008) 168 CA4th 205, 85 CR3d 203: §§26.3, 26.12
Lewis v Superior Court (1999) 19 C4th 1232, 82 CR2d 85: §§8.22, 9.20, 22.19, 24.4, 24.15, 24.19, 25.13
Leyva v Superior Court (1985) 164 CA3d 462, 210 CR 545: §16.67
Liberal Catholic Church v Rogers (1944) 65 CA2d 196, 150 P2d 486: §2.54
Lin v City of Pleasanton (2009) 176 CA4th 408, 96 CR3d 730: §2.46
Lincoln Nat'l Life Ins. Co. v Mitchell (1974) 41 CA3d 16, 115 CR 723: App A
Lippman v City of Los Angeles (1991) 234 CA3d 1630, 286 CR 406: §§11.3-11.4
Lister v Superior Court (1979) 98 CA3d 64, 159 CR 280: §16.133
Little v Los Angeles County Assessment Appeals Bds. (2007) 155 CA4th 915, 66 CR3d 401: §§2.15, 2.60, 2.62, 5.121, 11.7
Little Co. of Mary Hosp. v Superior Court (2008) 162 CA4th 261, 75 CR3d 519: §16.106
Lockyer v City & County of San Francisco (2004) 33 C4th 1055, 17 CR3d 225: §§2.21, 27.2
Lockyer v County of Santa Cruz (2006) 416 F Supp 2d 797: §2.56
Lockyer, People ex rel v Superior Court (2004) 122 CA4th 1060, 19 CR3d 324: §15.62
Lois M., In re (1989) 214 CA3d 1036, 263 CR 100: §15.43
Lois R. v Superior Court (1971) 19 CA3d 895, 97 CR 158: §18.18
Lomeli v Department of Corrections (2003) 108 CA4th 788, 134 CR2d 179: §§2.28, 2.36
Lompoc Unified Sch. Dist. v Superior Court (1993) 20 CA4th 1688, 26 CR2d 122: §16.67
Long Beach Mem. Med. Ctr. v Superior Court (2009) 172 CA4th 865, 91 CR3d 494: §16.51
Los Angeles Airways, Inc. v Hughes Tool Co. (1979) 95 CA3d 1, 156 CR 805: §§15.47-15.48
Los Angeles County Dep't of Children & Family Servs. (2008) 162 CA4th 1408, 77 CR3d 52: §16.143A
Los Angeles County Employees Ass'n, Local 660 v County of Los Angeles (1973) 33 CA3d 1, 108 CR 625: §§2.7-2.8, 2.22, 2.50
Los Angeles County Metro. Transp. Auth. v Superior Court (2004) 123 CA4th 261, 20 CR3d 92: §16.105
Los Angeles Dep't of Children & Family Servs. v Superior Court (1995) 37 CA4th 439, 43 CR2d 757: §24.65
Los Angeles Teachers Union, Local 1021 v Los Angeles City Bd. of Educ. (1969) 71 C2d 551, 78 CR 723: §2.56
Los Angeles Times v Superior Court (2003) 114 CA4th 247, 7 CR3d 524: §15.68
Los Angeles Unified Sch. Dist. v Superior Court (2007) 151 CA4th 759, 60 CR3d 445: §§16.14-16.15, 16.17, 24.22
Louie Queriolo Trucking, Inc. v Superior Court (1967) 252 CA2d 194, 60 CR 389: App A
Loustalot v Superior Court (1947) 30 C2d 905, 186 P2d 673: §16.46
Lowell v Mother's Cake & Cookie Co. (1978) 79 CA3d 13, 144 CR 664: §8.46
Lund v Superior Court (1964) 61 C2d 698, 39 CR 891: §§15.20, 16.82, 16.125, 16.131, 16.138
Lyle v Superior Court (1981) 122 CA3d 470, 175 CR 918: §16.102
Lynch, People ex rel v Superior Court (1970) 1 C3d 910, 83 CR 670: §25.14

M

MCM Constr. Inc. v City & County of San Francisco (1998) 66 CA4th 359, 78 CR2d 44: §11.8
MHC Operating Ltd. Partnership v City of San Jose (2003) 106 CA4th 204, 130 CR2d 564: §11.12
Maben v Superior Court (1967) 255 CA2d 708, 63 CR 439: §15.26
MacFarland v Superior Court (1934) 3 CA2d 173, 38 P2d 800: §15.25
Maddy v Castle (1976) 58 CA3d 716, 130 CR 160, disapproved in part on other grounds by Doers v Golden Gate Hwy. & Transp. Dist. (1979) 23 C3d 180, 151 CR 837: App A
Maggi v Superior Court (2004) 119 CA4th 1218, 15 CR3d 161: §§16.117, 16.125, App A
Mahdavi v Superior Court (2008) 166 CA4th 32, 82 CR3d 121: §12.22
Main Fiber Prods., Inc. v Morgan & Franz Ins. Agency (1999) 73 CA4th 1130, 87 CR2d 108: §§16.49, 17.24
Maldonado v Superior Court (1996) 45 CA4th 397, 52 CR2d 805: §22.19
Malibu W. Swimming Club v Flournoy (1976) 60 CA3d 161, 131 CR 279: §2.57
Mallarino v Superior Court (1953) 115 CA2d 781, 252 P2d 993: App A
Manela v Superior Court (2009) 177 CA4th 1139, 99 CR3d 736: §16.121
Manhattan Sepulveda, Ltd. v City of Manhattan Beach (1994) 22 CA4th 865, 27 CR2d 565: §§11.5, 11.8
Manufactured Home Communities, Inc. v County of San Luis Obispo (2008) 167 CA4th 705, 84 CR3d 367: §§3.8, 3.11
Manzetti v Superior Court (1993) 21 CA4th 373, 25 CR2d 857: §24.65
Marcus v Superior Court (1971) 18 CA3d 22, 95 CR 545: §16.120
Marcus, In re (2006) 138 CA4th 1009, 41 CR3d 861: §16.142
Mardardo F. v Superior Court (2008) 164 CA4th 481, 78 CR3d 884: §16.143A
Mario Saikhon, Inc. v Agricultural Labor Relations Bd. (1983) 140 CA3d 581, 189 CR 632: §§16.19, 18.65
Mark v Superior Court (1900) 129 C 1, 61 P 436: §26.9
Markley v Superior Court (1992) 5 CA4th 738, 7 CR2d 328: §22.10
Marriage of Dover (1971) 15 CA3d 675, 93 CR 384: §26.18
Marriage of Flaherty (1982) 31 C3d 637, 183 CR 508: §24.62
Marriage of Hunt (1985) 172 CA3d 872, 218 CR 451: App A
Marriage of Skelley (1976) 18 C3d 365, 134 CR 197: §§15.57, 17.21, App A
Marriage of Varner (1998) 68 CA4th 932, 80 CR2d 628: §26.8
Marron v Superior Court (2003) 108 CA4th 1049, 134 CR2d 358: §16.68
Marsh v Mountain Zephyr, Inc. (1996) 43 CA4th 289, 50 CR2d 493: App A
Maryland Cas. Co. v Andreini & Co. (2000) 81 CA4th 1413, 97 CR2d 752: §16.49
Mason v Superior Court (1985) 163 CA3d 989, 210 CR 63: §15.13
Mass v Superior Court (1961) 197 CA2d 430, 17 CR 549: §15.26
Mathew Zaheri Corp. v New Motor Vehicle Bd. (1997) 55 CA4th 1305, 64 CR2d 705: §11.15
Mauro B. v Superior Court (1991) 230 CA3d 949, 281 CR 507: §15.58
May v Board of Dirs. of El Camino Irrigation Dist. (1949) 34 C2d 125, 208 P2d 661: §2.58
McComb v Superior Court (1977) 68 CA3d 89, 137 CR 233: §16.133
McDonald v Antelope Valley Community College Dist. (2008) 45 C4th 88, 84 CR3d 734: §16.67
McDonald v Structured Asset Sales, LLC (2007) 154 CA4th 1068, 65 CR3d 366: §16.143
McDonough Power Equip. Co. v Superior Court (1972) 8 C3d 527, 530, 105 CR 330: App A
McGhan Med. Corp. v Superior Court (1992) 11 CA4th 804, 14 CR2d 264: §16.10
McGill v Regents of the Univ. of Cal. (1996) 44 CA4th 1776, 52 CR2d 466: §§2.1, 2.23, 2.32-2.33
McHugh v Santa Monica Rent Control Bd. (1989) 49 C3d 348, 261 CR 318: §4.14
McKesson HBOC, Inc. v Superior Court (2004) 115 CA4th 1229, 9 CR3d 812: §16.122
McLellan v McLellan (1972) 23 CA3d 343, 100 CR 258: §16.107
McMahan v City & County of San Francisco (2005) 127 CA4th 1368, 26 CR3d 509: §§20.17, 20.19
McMahan's of Santa Monica v City of Santa Monica (1983) 146 CA3d 683, 194 CR 582: §8.46
McMahon v Superior Court (2003) 106 CA4th 112, 130 CR2d 407: §16.72, App A
McMahon v Superior Court (1967) 255 CA2d 363, 62 CR 873: §§16.131, 16.139
McManus v KPAL Broad. Corp. (1960) 182 CA2d 558, 6 CR 441: §6.31
McPheeters v Board of Med. Exam'rs (1946) 74 CA2d 46, 168 P2d 65: §11.14
Meadow v Superior Court (1963) 59 C2d 610, 30 CR 824: §16.103
Medical Bd. v Superior Court (1991) 227 CA3d 1458, 278 CR 247: §§6.24, 6.27
Mediterranean Exports, Inc. v Superior Court (1981) 119 CA3d 605, 174 CR 169: §16.106
Mednik v State Dep't. of Health Care Servs. (2009) 175 CA4th 631, 96 CR3d 112: §§2.3, 11.16
Medrano v WCAB (2008) 167 CA4th 56, 83 CR3d 802: §16.48
Mehr v Superior Court (1983) 139 CA3d 1044, 189 CR 138: §16.80
Mejia v City of Los Angeles (2007) 156 CA4th 151, 67 CR3d 228: §5.124
Melancon v Superior Court (1954) 42 C2d 698, 268 P2d 1050: §§15.18, 16.89
Melchor Inv. Co. v Rolm Sys. (1992) 3 CA4th 587, 4 CR2d 343: App A
Mendez v Superior Court (2001) 87 CA4th 791, 104 CR2d 839: §15.40
Mendoza v Continental Sales Co. (2006) 140 CA4th 1395, 45 CR3d 525: §16.107
Mendoza v Small Claims Court (1958) 49 C2d 668, 321 P2d 9: §16.88
Mendoza v State (2007) 149 CA4th 1034, 57 CR3d 505: §2.25
Meranda P., In re (1997) 56 CA4th 1143, 65 CR2d 913: §§4.18, 4.20, 15.58

Merced County Taxpayers Ass'n v Cardella (1990) 218 CA3d 396, 267 CR 62: §2.63
Mercuro v Superior Court (2002) 96 CA4th 167, 116 CR2d 671: §16.100
Messih v Lee Drug, Inc. (1985) 174 CA3d 312, 220 CR 43: App A
Mike Moore's 24-Hour Towing v City of San Diego (1996) 45 CA4th 1294, 53 CR2d 355: §3.20
Mileikowsky v Tenet Healthsystem (2005) 128 CA4th 262, 26 CR3d 831: §16.127
Mileikowsky v Tenet Healthsystem (2005) 128 CA4th 531, 27 CR3d 171: §§2.1, 2.38, 2.55
Mileikowsky v West Hills Hosp. & Med. Ctr. (2009) 45 C4th 1259, 91 CR3d 516: §§2.1, 2.38, 2.55
Miller v Municipal Court (1967) 249 CA2d 531, 57 CR 578: §§16.135-16.136
Miller v Superior Court (1968) 69 C2d 14, 69 CR 583: §15.21
Mills v County of Trinity (1979) 98 CA3d 859, 159 CR 679: §§26.2, 26.28
Mission Hosp. Reg'l Med. Ctr. v Shewry (2008) 168 CA4th 460, 85 CR3d 639: §§2.1, 2.5, 2.11-2.12, 2.19, 2.24, 2.28, 2.37, 11.7
Mission Imports, Inc. v Superior Court (1982) 31 C3d 921, 184 CR 296: App A
Mitchell v Superior Court (1984) 37 C3d 591, 208 CR 886: §16.122
Mitsubishi Materials Corp. v Superior Court (2003) 113 CA4th 55, 6 CR3d 159: §16.108, App A
Moffat v Moffat (1980) 27 C3d 645, 165 CR 877: §§15.37, 16.135
Moles v Regents of Univ. of Cal. (1982) 32 C3d 867, 187 CR 557: §§11.31, 25.17
Monarch Healthcare v Superior Court (2000) 78 CA4th 1282, 93 CR2d 619: App A
Moncharsh v Heily & Blase (1992) 3 C4th 1, 10 CR2d 183: §16.99
Monsan Homes, Inc. v Pogrebneak (1989) 210 CA3d 826, 258 CR 676: §15.48
Monterey Club v Superior Court (1941) 48 CA2d 131, 119 P2d 349: §§15.53, 15.68
Monterey Club v Superior Court (1941) 44 CA2d 351, 112 P2d 321: §15.34
Moore v City of Los Angeles (2007) 156 CA4th 373, 67 CR3d 218: §3.7
Moosa v State Personnel Bd. (2002) 102 CA4th 1379, 126 CR2d 321: §2.42
Moran v Department of Motor Vehicles (2006) 139 CA4th 688, 43 CR3d 116: §15.5
Moran v Superior Court (1983) 35 C3d 229, 197 CR 546: §16.112
Morehart v County of Santa Barbara (1994) 7 C4th 725, 29 CR2d 804: §§5.119, 11.9, 12.19, 18.46
Morelli v Superior Court (1969) 1 C3d 328, 82 CR 375: §16.139
Morongo Band of Mission Indians v State Water Resources Control Bd. (2009) 45 C4th 731, 88 CR3d 610: §3.11
Morris v Harper (2001) 94 CA4th 52, 114 CR2d 62: §§2.1, 2.5-2.7
Morrisette v Superior Court (1965) 236 CA2d 597, 46 CR 153: §16.93
Morton v Superior Court (1953) 119 CA2d 665, 260 P2d 215: §6.28
Mosk v Superior Court (1979) 25 C3d 474, 159 CR 494: §2.65
Moskowitz v Superior Court (1982) 137 CA3d 313, 187 CR 4: §16.118
Moss v County of Humboldt (2008) 162 CA4th 1041, 76 CR3d 428: §§3.13, 3.16
Most v First Nat'l Bank (1966) 246 CA2d 425, 54 CR 669: §2.54
Motors Ins. Corp. v Division of Fair Employment Practices (1981) 118 CA3d 209, 173 CR 332: §2.33
Muller v Fresno Community Hosp. & Med. Ctr. (2009) 172 CA4th 887, 91 CR3d 617: App A
Municipal Court v Superior Court (1993) 5 C4th 1126, 22 CR2d 504: §15.55
Municipal Court v Superior Court (1988) 202 CA3d 957, 249 CR 182: §15.55
Municipal Court v Superior Court (1988) 199 CA3d 19, 244 CR 591: §5.65
Munoz v State (1995) 33 CA4th 1767, 39 CR2d 860: App A
Munroe v Los Angeles County Civil Serv. Comm'n (2009) 173 CA4th 1295, 93 CR3d 716: §§2.3, 2.5, 2.9, 11.16
Murphy, Estate of (1971) 16 CA3d 564, 94 CR 141: §26.19
Murrieta Valley Unified Sch. Dist. v County of Riverside (1991) 228 CA3d 1212, 279 CR 421: §§5.65, 18.47
Musicians Union, Local No. 6 v Superior Court (1968) 69 C2d 695, 73 CR 201: §16.92

N

NBC Subsidiary (KNBC-TV), Inc. v Superior Court (1999) 20 C4th 1178, 86 CR2d 778: §§15.67, 20.23
Napa Valley Elec. Co. v Railroad Comm'n (1920) 251 US 366, 64 L Ed 310, 40 S Ct 174: §27.3
Nasha v City of Los Angeles (2004) 125 CA4th 470, 22 CR3d 772: §7.12
Nasha, LLC v City of Los Angeles (2004) 125 CA4th 470, 22 CR3d 772: §3.11
Nassif v Municipal Court (1989) 214 CA3d 1294, 263 CR 195: §12.19
Nathanson v Superior Court (1974) 12 C3d 355, 115 CR 783: §16.143
Neff v Ernst (1957) 48 C2d 628, 311 P2d 849: §26.16
Neighbors in Support of Appropriate Land Use v County of Tuolumne (2007) 157 CA4th 997, 68 CR3d 882: §§2.9, 2.41, 5.37
Neilsen v Saylors (1956) 146 CA2d 139, 303 P2d 781: App A
Nelson v Anderson (1999) 72 CA4th 111, 84 CR2d 753: §5.123
Nelson v Orosco (1981) 117 CA3d 73, 172 CR 457: §26.8
Nelson v Superior Court (1937) 9 C2d 729, 73 P2d 232: §16.131
Nelson v Superior Court (1950) 97 CA2d 78, 217 P2d 119: App A
Nerhan v Stinson Beach County Water Dist. (1994) 27 CA4th 536, 33 CR2d 10: §11.6
Nestande v Watson (2003) 111 CA4th 232, 4 CR3d 18: App A
New W. Fed. Sav. & Loan Ass'n v Superior Court (1990) 223 CA3d 1145, 273 CR 37: §§16.112, 16.114
New York Life Ins. Co. v Bank of Italy (1923) 60 CA 602, 214 P 61 (court permitted amicus curiae to seek rehearing following opinion on appeal), disapproved on other grounds in In re Marriage of Saslow (1985) 40 C3d 848, 221 CR 546: §25.18

New York Times Co. v Superior Court (1990) 51 C3d 453, 273 CR 98: §16.132
Newland v Kizer (1989) 209 CA3d 647, 257 CR 450: §2.29
Newland v Superior Court (1995) 40 CA4th 608, 47 CR2d 24: §16.125
Newman v Superior Court (1986) 179 CA3d 377, 224 CR 538: §27.32
Ng v Superior Court (1992) 4 C4th 29, 13 CR2d 856: §§8.22, 9.20, 22.19, 22.24, 24.4, 25.2, 25.7
Ng v Superior Court (1997) 52 CA4th 1010, 61 CR2d 49: §15.55
Nguyen v Superior Court (2007) 150 CA4th 1006, 58 CR3d 802: §§15.69, 21.2-21.3, 21.6
Nielsen v Stumbos (1990) 226 CA3d 301, 276 CR 272: §26.5
Nightlife Partners, Ltd. v City of Beverly Hills (2003) 108 CA4th 81, 133 CR2d 234: §3.11
No Oil, Inc. v Occidental Petroleum Corp. (1975) 50 CA3d 8, 123 CR 589: §25.17
Noonan, Estate of (1952) 113 CA2d 899, 249 P2d 306: §16.143
Northcutt v Superior Court (1924) 66 CA 350, 226 P 25: App A
Norton v San Bernardino City Unified Sch. Dist. (2008) 158 CA4th 749, 69 CR3d 917: §2.19
Nuckolls v Bank of Cal., Nat. Ass'n (1936) 7 C2d 574, 61 P2d 927: §26.18

O

O. S., In re (2002) 102 CA4th 1402, 126 CR2d 571: §4.20
O.W.L. Found. v City of Rohnert Park (2008) 168 CA4th 568, 86 CR3d 1: §§2.16, 2.22, 2.32-2.34, 2.41, 3.4, 3.18
OXY Resources Cal. LLC v Superior Court (2004) 115 CA4th 874, 9 CR3d 621: §§16.115, 16.122
Oaks Mgmt. Corp. v Superior Court (2006) 145 CA4th 453, 51 CR3d 561: §15.67
O'Brien v Olson (1941) 42 CA2d 449, 109 P2d 8: §4.6
Ocean Park Assoc. v Santa Monica Rent Control Bd. (2004) 114 CA4th 1050, 8 CR3d 421: §3.6
Oceanside Union Sch. Dist. v Superior Court (1962) 58 C2d 180, 23 CR 375: §§16.115-16.116
O'Connell v Superior Court (2006) 141 CA4th 1452, 47 CR3d 147: §§16.150-16.151
O'Connor v Superior Court (1979) 90 CA3d 107, 153 CR 306: §16.150
O'Hearn v Hillcrest Gym & Fitness Ctr., Inc. (2004) 115 CA4th 491, 9 CR3d 342: §§16.49, 17.24
Ohton v Board of Trustees of Cal. State Univ. (2007) 148 CA4th 749, 56 CR3d 111: §§2.1, 2.32
Oksner v Superior Court (1964) 229 CA2d 672, 40 CR 621: §24.25
Oliveros v Couny of Los Angeles (2004) 120 CA4th 1389, 16 CR3d 638: App A
Olson v Cory (1983) 35 C3d 390, 197 CR 843: §20.6
Olson v Superior Court (1969) 274 CA2d 311, 79 CR 136: §26.8
Olympic Club v Superior Court (1991) 229 CA3d 358, 282 CR 1: §16.124
Omaha Indem. Co. v Superior Court (1989) 209 CA3d 1266, 258 CR 66: §§15.58, 15.69, 15.71, 16.106-16.107, 17.28, 17.31-17.32, 18.25, 18.55, 22.14-22.16, 27.32
Ombudsman Servs. of N. Cal. v Superior Court (2007) 154 CA4th 1233, 65 CR3d 456: §§15.12, 15.53, 15.62, 15.67, 16.118, 19.6, 22.23
Orloff, People ex rel v Pacific Bell (2003) 31 C4th 1132, 7 CR3d 315: §16.33
Otto v Los Angeles Unified Sch. Dist. (2003) 106 CA4th 328, 130 CR2d 512: App A
Outboard Marine Corp. v Superior Court (1976) 59 CA3d 434, 130 CR 642: App A
Overstreet v County of Butte (1962) 57 C2d 504, 20 CR 631: §9.54

P

PG&E v State Bd. of Equalization (1980) 27 C3d 277, 165 CR 122: §2.62
PG&E Corp. v PUC (2004) 118 CA4th 1174, 13 CR3d 630: §15.59
Pacific Bell v Public Utils. Comm'n (2000) 79 CA4th 269, 93 CR2d 910: §§15.38, 16.44
Pacific Indem. Co. v Superior Court (1966) 246 CA2d 63, 54 CR 470: §15.12
Pacific Legal Found. v California Coastal Comm'n (1982) 33 C3d 158, 188 CR 104: §2.37
Pacific Tel. & Tel. Co. v Superior Court (1970) 2 C3d 161, 84 CR 718: §§16.115, 16.120
Page v Insurance Co. of N. Am. (1969) 3 CA3d 121, 83 CR 44: §15.48
Palay v Superior Court (1993) 18 CA4th 919, 22 CR2d 839: §§16.116, 16.118, 16.121
Palma v U.S. Indus. Fasteners (1984) 36 C3d 171, 681 P2d 893: §19.5
Palma v U.S. Indus. Fasteners, Inc. (1984) 36 C3d 171, 178 n5-6, 203 CR 626: §24.15
Palma v U.S. Indus. Fasteners, Inc. (1984) 36 C3d 171, 203 CR 626: §§8.22, 8.27, 8.39, 9.55, 22.9, 22.18, 22.20, 22.23, 22.28, 22.30, 24.7, 24.38, 25.2, 25.6-25.7
Palos Verdes Faculty Ass'n v Palos Verdes Peninsula Unified Sch. Dist. (1978) 21 C3d 650, 147 CR 359: §11.7
Pandazos v Superior Court (1997) 60 CA4th 324, 70 CR2d 669: §16.5
Paneno v WCAB (1992) 4 CA4th 136, 5 CR2d 461: §16.47
Parada v Small Claims Court (1977) 70 CA3d 766, 139 CR 87: §12.26
Parada v Superior Court (2009) 176 CA4th 1554, 98 CR3d 743: §16.100
Paramount Pictures Corp. v Davis (1964) 228 CA2d 827, 39 CR 791: §26.9
Parker v Bowron (1953) 40 C2d 344, 254 P2d 6: §8.48
Paterno v Superior Court (2008) 163 CA4th 1342, 78 CR3d 244: §§16.115, 16.117
Patterson v Board of Supervisors (1947) 79 CA2d 670, 180 P2d 945: §§8.26, 9.4
Patterson v Municipal Court (1965) 232 CA2d 289, 42 CR 769: §16.88
Patterson v Sharp (1967) 253 CA2d 838, 61 CR 517: §§2.65, 15.9

Patterson Flying Serv. v Department of Pesticide Regulation (2008) 161 CA4th 411, 74 CR3d 290: §3.16
Paul W., In re (2007) 151 CA4th 37, 60 CR3d 329: §§4.18-4.19, 15.39, 15.42
Pavlovich v Superior Court (2002) 29 C4th 262, 127 CR2d 329: §16.56
Payless Drug Store v Superior Court (1993) 20 CA4th 277, 24 CR2d 506: §23.4
Payne v Superior Court (1976) 17 C3d 908, 132 CR 405: §15.10
Peltier v McCloud River R.R. (1995) 34 CA4th 1809, 41 CR2d 182: App A
Penney, J. C., Co. v Superior Court (1959) 52 C2d 666, 343 P2d 919: §16.113, App A
People v _____ (*see* name of defendant)
People ex rel _____ (*see* name of relator)
Peralta Fed'n of Teachers v Peralta Community College Dist. (1979) 24 C3d 369, 155 CR 679: §5.73
Perlman v Municipal Court (1979) 99 CA3d 568, 160 CR 567: §§5.67, 18.44
Perry v Jordan (1949) 34 C2d 87, 207 P2d 47: §27.8
Peters v Superior Court (1989) 212 CA3d 218, 260 CR 426: §15.8
Peterson v Lampton (1941) 46 CA2d 751, 116 P2d 952: §26.12
Peterson v Superior Court (1982) 31 C3d 147, 181 CR 784: §§16.87, 16.106, 18.67
Pfeiffer Venice Props. v Superior Court (2003) 107 CA4th 761, 132 CR2d 400: §16.5
Phelan v Superior Court (1950) 35 C2d 363, 217 P2d 951: §§5.54, 15.58, 15.60, 15.65, 15.68
Phelps v State Water Resources Control Bd. (2007) 157 CA4th 89, 68 CR3d 350: §3.3
Philippine Export & Foreign Loan Guarantee Corp. v Chuidian (1990) 218 CA3d 1058, 267 CR 457: §15.48
Planned Parenthood Golden Gate v Superior Court (2000) 83 CA4th 347, 99 CR2d 627: §§16.87, 18.68
Polibrid Coatings, Inc. v Superior Court (2003) 112 CA4th 920, 6 CR3d 7: §16.73, App A
Pollak v State Personnel Bd. (2001) 88 CA4th 1394, 107 CR2d 39: §11.3
Pomona College v Superior Court (1996) 45 CA4th 1716, 53 CR2d 662: §3.4
Pomona Valley Hosp. Med. Ctr. v Superior Court (1997) 55 CA4th 93, 63 CR2d 743: §§7.3, 16.124
Popelka, Allard, McCowan & Jones v Superior Court (1980) 107 CA3d 496, 165 CR 748: §16.87
Porter v United Servs. Auto. Ass'n (2001) 90 CA4th 837, 108 CR2d 860: App A
Potomac Oil Co. v Dye (1909) 10 CA 534, 102 P 677: §2.54
Poway Royal Mobilehome Owners Ass'n v City of Poway (2007) 149 CA4th 1460, 58 CR3d 153: §16.107
Powers v City of Richmond (1995) 10 C4th 85, 40 CR2d 839: §§15.4, 15.59, 16.14-16.15, 16.20, 17.21, 17.24, 17.29-17.30
Pratt-Low Preserving Co. v Jordan (1933) 217 C 292, 18 P2d 676: §2.54
Premium Commercial Servs. Corp. v National Bank (1999) 72 CA4th 1493, 86 CR2d 65: §§17.23, 17.25, 17.28, 22.15
Prentiss v City of S. Pasadena (1993) 15 CA4th 85, 18 CR2d 641: §2.41
Preserve Shorecliff Homeowners v City of San Clemente (2008) 158 CA4th 1427, 71 CR3d 332: §7.9
Princess Cruise Lines, Ltd. v Superior Court (2009) 179 CA4th 36, 101 CR3d 323: §16.66
Professional Eng'rs in Cal. Gov't v State Personnel Bd. (1980) 114 CA3d 101, 170 CR 547: §10.14
Public Defenders' Org. v County of Riverside (2003) 106 CA4th 1403, 132 CR2d 81: §§11.5, 11.8, 11.12

Q

Quinchard v Board of Trustees of Alameda (1896) 113 C 664, 45 P 856: §15.29
Quintero v City of Santa Ana (2003) 114 CA4th 810, 7 CR3d 896: §3.11

R

R.S. v Superior Court (2009) 172 CA4th 1049, 91 CR3d 546: §16.118
Ra v Superior Court (2007) 154 CA4th 142, 64 CR3d 539: §§15.52, 16.68, 18.28
Raff v Raff (1964) 61 C2d 514, 39 CR 366: App A
Rail-Transport Employees Ass'n v Union Pac. Motor Freight (1996) 46 CA4th 469, 54 CR2d 713: §16.127
Rainer v Community Memorial Hosp. (1971) 18 CA3d 240, 95 CR 901: App A
Ramirez v Superior Court (1977) 72 CA3d 351, 140 CR 108: §§16.133, 16.140
Ramirez v Brown (1973) 9 C3d 199, 107 CR 137 (petition by ex-felons to compel election officials to register them as voters), rev'd on other grounds in Richardson v Ramirez (1974) 418 US 24, 41 L Ed 2d 551, 94 S Ct 2655: §27.8
Ramon v Aerospace Corp. (1996) 50 CA4th 1233, 58 CR2d 217: §11.5
Rancho Bernardo Dev. Co. v Superior Court (1992) 2 CA4th 358, 2 CR2d 878: §16.119
Rao v Campo (1991) 233 CA3d 1557, 285 CR 691: §16.127
Rappleyea v Campbell (1994) 8 C4th 975, 35 CR2d 669: App A
Redevelopment Agency v Superior Court (1961) 195 CA2d 591, 16 CR 45: App A
Redevelopment Agency of the City of San Bernardino v County of San Bernardino (1978) 21 C3d 255, 145 CR 886: §2.57
Redlands High Sch. Dist. v Superior Court (1942) 20 C2d 348, 125 P2d 490: §§15.23, 15.31
Reed v Superior Court (2001) 92 CA4th 448, 111 CR2d 842: §§16.152, 19.6, 26.16
Reese v Wal-Mart Stores, Inc. (1999) 73 CA4th 1225, 87 CR2d 346: §16.129D
Regents of Univ. of Cal. v PERB (1986) 41 C3d 601, 224 CR 631: §16.29
Reid v Balter (1993) 14 CA4th 1186, 18 CR2d 287: §§16.54, 17.25
Rental Hous. Ass'n v City of Oakland (2009) 171 CA4th 741, 90 CR3d 181: §2.24
Rescue Army v Municipal Court (1947) 331 US 549, 91 L Ed 1666, 67 S Ct 1409: §25.31
Rescue Army v Municipal Court (1946) 28 C2d 460, 171 P2d 8: §§16.89, 17.30
Resource Defense Fund v County of Santa Cruz (1982) 133 CA3d 800, 184 CR 371: §§8.48, 20.17, 23.31, 23.36

Rice v Superior Court (1982) 136 CA3d 81, 185 CR 853: App A
Rich v State Bd. of Optometry (1965) 235 CA2d 591, 45 CR 512: §2.39
Richards v Superior Court (1978) 86 CA3d 265, 150 CR 77: §16.118
Ridgecrest Charter Sch. v Sierra Sands Unified Sch. Dist. (2005) 130 CA4th 986, 30 CR3d 648: §§2.6-2.7, 2.9, 2.22
Rio Del Mar Country Club, Inc. v Superior Court (1948) 84 CA2d 214, 190 P2d 295: §16.113
Rittenhouse v Superior Court (1991) 235 CA3d 1584, 1 CR2d 595: §16.121
Rivera v Division of Indus. Welfare (1968) 265 CA2d 576, 71 CR 739: §§2.25, 18.85
Robbins v Superior Court (1985) 38 C3d 199, 211 CR 398: §§15.12, 16.150-16.151
Roberts v Superior Court (1973) 9 C3d 330, 107 CR 309: §§15.62, 17.31, App A
Roden v AmerisourceBergen Corp. (2005) 130 CA4th 211, 29 CR3d 810: §§15.69, 16.115, 17.32
Rodrigues v Superior Court (2005) 127 CA4th 1027, 26 CR3d 194: §17.22
Rodriguez v Municipal Court (1972) 25 CA3d 521, 102 CR 45: §9.25
Rodriquez v Superior Court (2009) 176 CA4th 1461, 98 CR3d 728 (writ of mandate issued directing trial court to vacate order compelling plaintiff to arbitrate wrongful death claim): §16.100
Roe v Superior Court (1990) 224 CA3d 642, 273 CR 745: §16.119
Roger S., In re (1977) 19 C3d 921, 141 CR 298: §4.23
Rogers v Municipal Court (1988) 197 CA3d 1314, 243 CR 530: §12.19
Rohr Indus., Inc. v First State Ins. Co. (1997) 59 CA4th 1480, 69 CR2d 872: §16.49
Rojas v Superior Court (2004) 33 C4th 407, 15 CR3d 643: §16.121, App A
Rollins v City & County of San Francisco (1974) 37 CA3d 145, 112 CR 168: §15.48
Roman v Superior Court (2009) 172 CA4th 1462, 92 CR3d 153: §§16.100, 22.9
Rondon v Alcoholic Beverage Control Appeals Bd. (2007) 151 CA4th 1274, 60 CR3d 295: §§15.28, 16.22, 16.24
Rondos v Superior Court (1957) 151 CA2d 190, 311 P2d 113: App A
Rose v Superior Court (1941) 44 CA2d 599, 112 P2d 713: §20.10
Rose, In re (2000) 22 C4th 430, 93 CR2d 298: §§16.44, 27.3
Rosenfield v Superior Court (1983) 143 CA3d 198, 191 CR 611: §16.100
Running Fence Corp. v Superior Court (1975) 51 CA3d 400, 124 CR 339: §§15.22, 17.30
Russell v General Motors Corp. (1992) 3 CA4th 1114, 4 CR2d 750: §16.127

S

S.T. v Superior Court (2009) 177 CA4th 1009, 99 CR3d 412: §16.143A
SN Sands Corp. v City & County of San Francisco (2008) 167 CA4th 185, 83 CR3d 885: §§2.1, 2.5, 2.9, 2.19, 2.24, 7.9-7.11, 11.7, 11.16
Saad v City of Berkeley (1994) 24 CA4th 1206, 30 CR2d 95: §3.14
Sacramento County Alliance of Law Enforcement v County of Sacramento (2007) 151 CA4th 1012, 60 CR3d 202: §11.7
Sacramento Newspaper Guild v Sacramento County Bd. of Supervisors (1967) 255 CA2d 51, 62 CR 819: §26.2
Saeta v Superior Court (2004) 117 CA4th 261, 11 CR3d 610: §16.121
Safeco Ins. Co. v Superior Court (2009) 173 CA4th 814, 92 CR3d 814: §18.34
Salas v Sears, Roebuck & Co. (1986) 42 C3d 342, 228 CR 504: App A
Saleeby v State Bar (1985) 39 C3d 547, 216 CR 367: §§2.9, 2.24, 2.31, 2.37
Samson Mkt. Co. v Kirby (1968) 261 CA2d 577, 68 CR 130: §16.25
San Diego Gas & Elec. Co. v Superior Court (1996) 13 C4th 893, 55 CR2d 724: §16.33
San Diego Water Co. v Pacific Coast S.S. Co. (1894) 101 C 216, 35 P 651: §6.31
San Diego Wholesale Credit Men's Ass'n v Superior Court (1973) 35 CA3d 458, 110 CR 657: App A
San Franciscans Upholding the Downtown Plan v City & County of San Francisco (2002) 102 CA4th 656, 125 CR2d 745: §3.16
San Francisco Bay Conserv. & Dev. Comm'n, People ex rel v Town of Emeryville (1968) 69 C2d 533, 72 CR 790: §15.49
San Francisco Found. v Superior Court (1984) 37 C3d 285, 208 CR 31: §16.62
San Gabriel Tribune v Superior Court (1983) 143 CA3d 762, 192 CR 415: §11.37
San Joaquin County Local Agency Formation Comm'n v Superior Court (2008) 162 CA4th 159, 76 CR3d 93: §§2.24, 7.11, 16.115, 16.121
San Jose Fed'n of Adult Educ. Teachers v Superior Court (1982) 132 CA3d 861, 183 CR 410: §16.100
San Mateo Fed'n of Teachers v Public Employment Relations Bd. (1994) 28 CA4th 150, 33 CR2d 387: §16.30
Santa Clara County v Superior Court (1949) 33 C2d 552, 203 P2d 1: §15.26
Santa Clara County Counsel Attorneys Ass'n v Woodside (1994) 7 C4th 525, 28 CR2d 617: §§2.1, 2.19, 2.50
Santa Clara County Local Transp. Auth. v Guardino (1995) 11 C4th 220, 45 CR2d 207: §2.58
Santa Teresa Citizen Action Group v California Energy Resources Conserv. & Dev. Comm'n (2003) 105 CA4th 1441, 130 CR2d 392: §27.4
Santa Teresa Citizen Action Group v State Energy Resources Conserv. & Dev. Comm'n (2003) 105 CA4th 1441, 130 CR2d 392: §16.26
Satinover v Dean (1988) 202 CA3d 1298, 249 CR 277: §6.38
Sav-On Drug Stores, Inc. v Superior Court (2004) 34 C4th 319, 17 CR3d 906: §16.129A, App A
Sav-On Drugs, Inc. v Superior Court (1975) 15 C3d 1, 123 CR 283: §§16.115, 16.118, App A
Save Open Space Santa Monica Mountains v Superior Court (2000) 84 CA4th 235, 100 CR2d 725: App A
Save the Sunset Strip Coalition v City of W. Hollywood (2001) 87 CA4th 1172, 105 CR2d 172: §§11.30, 23.17, 23.49
Savient Pharms., Inc. v Department of Health Servs. (2007) 146 CA4th 1457, 53 CR3d 689: §§2.12, 5.34

Schellinger Bros. v City of Sebastopol (2009) 179 CA4th 1245, 102 CR3d 394: §§3.19, 5.74
Schenley Affiliated Brands Corp. v Kirby (1971) 21 CA3d 177, 98 CR 609: §16.25
Schmidt v Superior Court (1989) 207 CA3d 56, 254 CR 827: §§16.76, 18.62-18.63, 18.70, 18.72, 18.76
Schoenfeldt v Municipal Court (1960) 187 CA2d 748, 9 CR 912: §15.14
School Dist. of Okaloosa County v Superior Court (1997) 58 CA4th 1126, 68 CR2d 612: §19.6
Schwartz v Schwartz (1969) 268 CA2d 685, 74 CR 192: §§11.33, 24.31
Science Applications Int'l Corp. v Superior Court (1995) 39 CA4th 1095, 46 CR2d 332: §§15.62, 17.28, 17.31-17.32
Scott v Common Council (1996) 44 CA4th 684, 52 CR2d 161: §2.26
Scott v Industrial Acc. Comm'n (1956) 46 C2d 76, 293 P2d 18: §16.96
Scott v Superior Court (2009) 171 CA4th 540, 89 CR3d 843: §16.143A
Scripps Clinic v Superior Court (2003) 108 CA4th 917, 134 CR2d 101: §16.77
Sea & Sage Audubon Soc'y v Planning Comm'n (1983) 34 C3d 412, 194 CR 357: §5.56
Sears, Roebuck & Co. v Nat'l Union Fire Ins. Co. (2005) 131 CA4th 1342, 32 CR3d 717: §§16.3, 16.127
Security-First Nat'l Bank v Board of Supervisors (1933) 135 CA 208, 26 P2d 862: §23.46
See Mission Hosp. Reg'l Med. Ctr. v Shewry (2008) 168 CA4th 460, 85 CR3d 639: §2.3
Sego v Santa Monica Rent Control Bd. (1997) 57 CA4th 250, 67 CR2d 68: §2.22
Senate v Jones (1999) 21 C4th 1142, 90 CR2d 810: §2.48
Serna v Superior Court (1985) 40 C3d 239, 219 CR 420: §12.21
Settlemire v Superior Court (2003) 105 CA4th 666, 129 CR2d 560: §23.22
Seven Up Bottling Co. v Superior Court (1951) 107 CA2d 75, 236 P2d 623: §15.53
Sexton v Superior Court (1997) 58 CA4th 1403, 68 CR2d 708: §16.119
Shadow Traffic Network v Superior Court (1994) 24 CA4th 1067, 29 CR2d 693: §16.102
Shaffer v Superior Court (1995) 33 CA4th 993, 39 CR2d 506: §§8.15, 8.37, 23.27
Shah v McMahon (2007) 148 CA4th 526, 55 CR3d 792: §16.11
Shamsian v Department of Conserv. (2006) 136 CA4th 621, 39 CR3d 62: §§2.8, 2.30
Shapell Indus., Inc. v Governing Bd. (1991) 1 CA4th 218, 1 CR2d 818: §§2.9, 7.11
Shearer v Superior Court (1977) 70 CA3d 424, 138 CR 824: §16.55
Sheila B., In re (1993) 19 CA4th 187, 23 CR2d 482: §16.3, App A
Sheller v Superior Court (2008) 158 CA4th 1697, 71 CR3d 207: §§15.68, 16.103, 18.35, 24.20, 24.23
Shepardson v McLellan (1963) 59 C2d 83, 27 CR 884: App A
Shepherd v Superior Court (1976) 17 C3d 107, 130 CR 257: §16.121
Sherwood v Superior Court (1979) 24 C3d 183, 154 CR 917: §7.3
Shively v Stewart (1966) 65 C2d 475, 55 CR 217: §2.65
Shooker v Superior Court (2003) 111 CA4th 923, 4 CR3d 334: §16.122
Silva, People v (1995) 36 CA4th 231, 43 CR2d 8: §25.20
Silverbrand v County of Los Angeles (2009) 46 C4th 106, 92 CR3d 595: §§11.22-11.23
Simac Design, Inc. v Alciati (1979) 92 CA3d 146, 154 CR 676: §11.4
Simmons v Superior Court (1959) 52 C2d 373, 341 P2d 13: §§15.33, 15.36
Simmons v Superior Court (1950) 96 CA2d 119, 214 P2d 844: App A
Skelley, Marriage of (1976) 18 C3d 365, 134 CR 197: §§15.57, 17.21, App A
Sklar v Franchise Tax Bd. (1986) 185 CA3d 616, 230 CR 42: §§2.23, 2.29-2.30
Slater v City Council of City of Los Angeles (1965) 238 CA2d 864, 47 CR 837: §15.66
Smiley, In re (1967) 66 C2d 606, 58 CR 579: §4.17
Smith v Anderson (1967) 67 C2d 635, 63 CR 391: §2.61
Smith v California State Bd. of Pharmacy (1995) 37 CA4th 229, 43 CR2d 532: §3.11
Smith v Superior Court (1996) 41 CA4th 1014, 49 CR2d 20: §§15.69, 15.71, 17.32
Snell v Superior Court (1984) 158 CA3d 44, 204 CR 200: §20.9
Snyder v Superior Court (2007) 157 CA4th 1530, 69 CR3d 600: §§15.6, 15.52, 15.56, 15.60-15.61, 15.63, 15.70, 16.122, 22.23
Solberg v Superior Court (1977) 19 C3d 182, 137 CR 460: §§15.55, 24.9
Soltani-Rastegar v Superior Court (1989) 208 CA3d 424, 256 CR 255: §§5.66, 18.43
Sonoma County Nuclear Free Zone 86 v Superior Court (1987) 189 CA3d 167, 234 CR 357: §§5.34-5.35, 15.51
Sonora Diamond Corp. v Superior Court (2000) 83 CA4th 523, 99 CR2d 824: §16.56
South Dakota v Brown (1978) 20 C3d 765, 144 CR 758: §2.20
Southern Cal. Reg'l Rail Auth. v Superior Court (2008) 163 CA4th 712, 77 CR3d 765: §§15.70, 16.145, 17.32
Southern Pac. Transp. Co. v Superior Court (1976) 58 CA3d 433, 129 CR 912: §16.148, App A
Southwest Airlines v WCAB (1991) 234 CA3d 1421, 286 CR 347: §16.47
Sparks v Kern County Bd. of Supervisors (2009) 173 CA4th 794, 93 CR3d 173: App A
Spielbauer v County of Santa Clara (2009) 45 C4th 704, 88 CR3d 590: §11.35
Standard Oil Co. v State Bd. of Equalization (1936) 6 C2d 557, 59 P2d 119: §§4.13-4.15
Standon Co. v Superior Court (1990) 225 CA3d 898, 275 CR 833: §16.119
Stanton v Dumke (1966) 64 C2d 199, 49 CR 380: §8.54
Star Motor Imports, Inc. v Superior Court (1979) 88 CA3d 201, 151 CR 721: §§5.66, 5.101, 8.49, 18.43, 18.46, 20.9, 23.32, 25.14
State v Superior Court (2004) 32 C4th 1234, 13 CR3d 534: §16.108
State v Superior Court (Bodde) (2004) 32 C4th 1234, 13 CR3d 534: App A
State Bd. of Chiropractic Exam'rs v Superior Court (2009) 45 C4th 963, 89 CR3d 576: §3.4

State Bd. of Chiropractic Exam'rs v Superior Court (1927) 201 C 108, 255 P 749: §4.13
State Bd. of Equalization v Superior Court (1937) 9 C2d 252, 70 P2d 482: §15.34
State Bd. of Equalization v Watson (1968) 68 C2d 307, 66 CR 377: §§2.59, 27.8
State Bldg. & Constr. Trades Council v Duncan (2008) 162 CA4th 289, 76 CR3d 507: §§2.9, 2.37, 11.8
State Dep't of Health Servs. v Superior Court (2003) 31 C4th 1026, 6 CR3d 441: §16.67
State Farm Fire & Cas. Co. v Superior Court (2008) 164 CA4th 317, 78 CR3d 828: §16.145
State Farm Mut. Auto. Ins. Co. v Superior Court (1956) 47 C2d 428, 304 P2d 13: §§16.106-16.107, App A
State Farm Mut. Auto. Ins. Co. v Superior Court (2003) 114 CA4th 434, 8 CR3d 56: §§16.95, 16.98
State Personnel Bd. v Department of Personnel Admin. (2005) 37 C4th 512, 36 CR3d 142: §2.31
State Route 4 Bypass Auth. v Superior Court (2007) 153 CA4th 1546, 64 CR3d 286: §§16.90, 16.145
State Water Resources Control Bd. v Superior Court (2002) 97 CA4th 907, 118 CR2d 784: §§16.152, 17.22, 19.6
Stationary Eng'rs Local 39 v County of Sacramento (1997) 59 CA4th 1177, 69 CR2d 598: §§2.19, 2.25
Stavropoulos v Superior Court (2006) 141 CA4th 190, 45 CR3d 705: §16.108
St. Agnes Med. Ctr. v PacifiCare of Cal. (2003) 31 C4th 1187, 8 CR3d 517: App A
Ste. Marie v Riverside County Reg'l Park & Open-Space Dist. (2009) 46 C4th 282, 93 CR3d 369: §§2.41, 11.35
Stearns v Los Angeles City School Dist. (1966) 244 CA2d 696, 53 CR 482: §16.93
Steen v Board of Civil Serv. Comm'rs (1945) 26 C2d 716, 160 P2d 816: §§11.5, 11.8
Stegs Invs. v Superior Court (1991) 233 CA3d 572, 284 CR 495: §16.5
Stephen v Enterprise Rent-A-Car (1991) 235 CA3d 806, 1 CR2d 130: App A
Stern v Superior Court (2003) 105 CA4th 223, 129 CR2d 275: §16.129A
Stevens v Fox Realty Corp. (1972) 23 CA3d 199, 100 CR 63: §2.62
Stier, In re (2007) 152 CA4th 63, 61 CR3d 181: §15.40
Stone v Board of Dirs. (1941) 47 CA2d 749, 118 P2d 866: §2.56
Stone v Regents of Univ. of Cal. (1999) 77 CA4th 736, 92 CR2d 94: App A
Stoner v Superior Court (1945) 67 CA2d 760, 155 P2d 697: §§15.32, 23.47
Stonewall Ins. Co. v City of Palos Verdes Estates (1996) 46 CA4th 1810, 54 CR2d 176: §12.19
Strand Prop. Corp. v Municipal Court (1983) 148 CA3d 882, 200 CR 47 (noting that no appeal lies from order denying petition for writ of prohibition in pending municipal court case), disapproved on other grounds in People v Superior Court (1989) 49 C3d 14, 259 CR 740: §12.18
Strauss v Horton (2009) 46 C4th 364, 93 CR3d 591: §27.8
Strumsky v San Diego County Employees Retirement Ass'n (1974) 11 C3d 28, 112 CR 805: §§2.23, 3.16-3.17, 3.20, 4.5, 4.14-4.15
Stryker v Antelope Valley Community College Dist. (2002) 100 CA4th 324, 122 CR2d 489: §2.42
Sturm, Ruger & Co. v Superior Court (1985) 164 CA3d 579, 210 CR 573: §18.72
Sullivan v Superior Court (1954) 128 CA2d 476, 275 P2d 595: §15.9
Summers v Superior Court (1959) 53 C2d 295, 1 CR 324: §15.38
Sunseri v Board of Med. Exam'rs (1964) 224 CA2d 309, 36 CR 553: §11.14
Sunset Retirement Villa v Dear (1997) 58 CA4th 948, 68 CR2d 416: §2.60
Superior Court v County of Mendocino (1996) 13 C4th 45, 51 CR2d 837: §25.26
Superior Court, People v (Alvarado) (1989) 207 CA3d 464, 255 CR 46: §§5.65, 8.49, 18.47
Superior Court, People v (Brent) (1992) 2 CA4th 675, 3 CR2d 375: §16.87
Superior Court, People v (Clements) (1988) 200 CA3d 491, 246 CR 122: §16.87
Superior Court, People v (Dyke Water Co.) (1965) 62 C2d 515, 42 CR 849: §16.92
Superior Court, People v (Jump) (1995) 40 CA4th 9, 46 CR2d 829: §§22.28, 24.7
Superior Court, People v (Lopez) (2005) 125 CA4th 1558, 24 CR3d 66: §18.68
Superior Court, People v (Williams) (1992) 8 CA4th 688, 10 CR2d 873: §15.55
Superior Court, State v (2004) 32 C4th 1234, 13 CR3d 534: §16.108
Superior Court, State v (Bodde) (2004) 32 C4th 1234, 13 CR3d 534: App A
Surety Co. of the Pac. v Piver (1983) 149 CA3d Supp 29, 197 CR 531: App A
Sustainability of Parks, Recycling & Wildlife Legal Defense Fund v County of Solano Dep't of Resource Mgmt. (2008) 167 CA4th 1350, 84 CR3d 889: §§2.5-2.6, 2.28, 2.31, 5.33, 8.40, 11.7, 11.16
Sutro Heights Land Co. v Merced Irrigation Dist. (1931) 211 C 670, 296 P 1088: §10.9
Sutter Union High Sch. Dist. v Superior Court (1983) 140 CA3d 795, 190 CR 182: §5.75
Suzanne J. v Superior Court (1996) 46 CA4th 785, 54 CR2d 25: §§5.67, 18.44
Swars v Council of the City of Vallejo (1944) 64 CA2d 858, 149 P2d 397: §8.51
Swartz v California Olive Growers' Packing Corp. (1942) 56 CA2d 168, 133 P2d 20: §16.65
Swift v Superior Court (2009) 172 CA4th 878, 91 CR3d 504: §16.5
Syngenta Crop Protection, Inc. v Helliker (2006) 138 CA4th 1135, 42 CR3d 191: §2.12

T

TJX Cos. v Superior Court (2008) 163 CA4th 80, 77 CR3d 114: §16.106
TSI Seismic Tenant Space, Inc. v Superior Court (2007) 149 CA4th 159, 56 CR3d 751: §§15.12, 15.67, 16.51
Tahoe Keys Prop. Owners' Ass'n v State Water Resources Control Bd. (1994) 23 CA4th 1459, 28 CR2d 734: §6.36
Tarkington v California Unemployment Ins. Appeals Bd. (2009) 172 CA4th 1494, 92 CR3d 131: §2.34
Taylor v State Personnel Bd. (1980) 101 CA3d 498, 161 CR 677: §3.5

Taylor v Western States Land & Mortgage Co. (1944) 63 CA2d 401, 147 P2d 36: App A
Tech-Bilt, Inc. v Woodward-Clyde & Assoc. (1985) 38 C3d 488, 213 CR 256: §16.51
Tera Pharms., Inc. v Superior Court (1985) 170 CA3d 530, 215 CR 923: §16.70
Terminal Plaza Corp. v City & County of San Francisco (1986) 186 CA3d 814, 230 CR 875: §2.19
Tevis v City & County of San Francisco (1954) 43 C2d 190, 272 P2d 757: §2.64
Tex-Cal Land Mgmt., Inc. v ALRB (1979) 24 C3d 335, 156 CR 1: §§16.20-16.21
The MEGA Life & Health Ins. Co. v Superior Court (2009) 172 CA4th 1522, 92 CA4th 399: §16.68
The Rescue Army v Municipal Court (1946) 28 C2d 460, 171 P2d 8: §15.23
The Termo Co. v Luther (2008) 169 CA4th 394, 86 CR3d 687: §3.17
Thelander v Superior Court (1962) 58 C2d 811, 26 CR 643: §15.38
Thomas v DMV (1970) 3 C3d 335, 90 CR 586: §2.40
Thomas v Shewry (2009) 170 CA4th 1480, 89 CR3d 105: §2.34
Thurmond v Superior Court (1967) 66 C2d 836, 59 CR 273: §§15.10, 27.8
Tide Water Assoc. Oil Co. v Superior Court (1955) 43 C2d 815, 279 P2d 35: App A
Tielsch v City of Anaheim (1984) 160 CA3d 570, 206 CR 738: §3.21
Timmons v McMahon (1991) 235 CA3d 512, 286 CR 620: §2.13
Title Ins. & Trust Co. v California Dev. Co. (1911) 159 C 484, 114 P 838: App A
Titmas v Superior Court (2001) 87 CA4th 738, 104 CR2d 803: §§8.15, 8.37, 23.44, 23.49, App A
Titolo v Cano (2007) 157 CA4th 310, 68 CR3d 616: §16.101
Tobe v City of Santa Ana (1995) 9 C4th 1069, 40 CR2d 402: §2.24
Tom v Schoolhouse Coins, Inc. (1987) 191 CA3d 827, 236 CR 541: §16.117
Tomlin v WCAB (2008) 162 CA4th 1423, 76 CR3d 672: §16.48
Topanga Ass'n for a Scenic Community v City & County of Los Angeles (1974) 11 C3d 506, 113 CR 836: §§3.4, 3.14
Torrey Pines Inn, Inc. v Superior Court (1964) 227 CA2d 265, 38 CR 565: §16.94
Toward Util. Rate Normalization v PUC (1978) 22 C3d 529, 149 CR 692: §16.35
Townsel v San Diego Metro. Transit Dev. Bd. (1998) 65 CA4th 940, 77 CR2d 231: §§11.5, 11.8
Tracy Press, Inc. v Superior Court (2008) 164 CA4th 1290, 80 CR3d 464: §§5.34-5.35, 18.18
Travelers Cas. & Sur. Co. v Superior Court (1998) 63 CA4th 1440, 75 CR2d 54: §16.77
Traverso v Department of Transp. (1996) 46 CA4th 1197, 54 CR2d 434: §2.41
Trend Homes, Inc. v Superior Court (2005) 131 CA4th 950, 32 CR3d 411: §16.100
Tri Counties Bank v Superior Court (2008) 167 CA4th 1332, 84 CR3d 835: §16.3
Trickey v Superior Court (1967) 252 CA2d 650, 60 CR 761: §15.8
Trimble v Steinfeldt (1986) 178 CA3d 646, 224 CR 195: App A
Tritek Telecom, Inc. v Superior Court (2009) 169 CA4th 1385, 87 CR3d 455: §16.122
Truck Ins. Exch. v Fireman's Fund Ins. Co. (1992) 6 CA4th 1050, 8 CR2d 228: App A
Trump v Superior Court (1981) 118 CA3d 411, 173 CR 403: §16.99
Tunis v Barrow (1986) 184 CA3d 1069, 229 CR 389: App A
Tunis v Superior Court (1963) 59 C2d 465, 30 CR 135: §16.112
Tuolumne County Citizens for Responsible Growth, Inc. v City of Sonora (2007) 155 CA4th 1214, 66 CR3d 645: §7.9
Turlock Golf & Country Club v Superior Court (1966) 240 CA2d 693, 50 CR 70: §§15.26, 16.89
20th Century Ins. Co. v Garamendi (1994) 8 C4th 216, 32 CR2d 807: §2.37
Tyler v Superior Court (1980) 102 CA3d 82, 162 CR 82: §7.3
Tylo v Superior Court (1997) 55 CA4th 1379, 64 CR2d 731: §16.118

U

US Ecology, Inc. v State (2001) 92 CA4th 113, 111 CR2d 689: §2.6
Unified Teachers—Los Angeles v Los Angeles Unified Sch. Dist. (1994) 24 CA4th 1510, 29 CR2d 897: §11.10
Union Bank of Cal. v Superior Court (2005) 130 CA4th 378, 29 CR3d 894: §16.121
Union Pac. R.R. v State Bd. of Equalization (1989) 49 C3d 138, 260 CR 565: §§4.2, 11.24
Union Pac. R.R. Co. v State Bd. of Equalization (1989) 49 C3d 138, 260 CR 565: §11.24
United Cent. Bank v Superior Court (2009) 179 CA4th 212, 101 CR3d 395: §22.19
United Farm Workers v ALRB (1977) 74 CA3d 347, 141 CR 437: §16.19
United Farm Workers of Am. v Superior Court (1975) 14 C3d 902, 122 CR 877: §16.150
United Prof. Planning, Inc. v Superior Court (1970) 9 CA3d 377, 88 CR 551: §26.16
United Teachers Los Angeles v Los Angeles Unified Sch. Dist. (review granted Dec. 23: §2.51, S177403; superseded opinion at 177 CA4th 863, 99 CR3d 524): §2.51
Universal City Studios, Inc. v Superior Court (2003) 110 CA4th 1273, 2 CR3d 484: §§20.4, 23.32
Universal Underwriters Ins. Co. v Superior Court (1967) 250 CA2d 722, 58 CR 870: App A
Unnamed Physician v Board of Trustees of St. Agnes Med. Ctr. (2001) 93 CA4th 607, 113 CR2d 309: §§2.16, 2.38, 2.55
Upson Metal Fabricators v Superior Court (1988) 203 CA3d 67, 251 CR 304: §12.26
Urban Pac. Equities Corp. v Superior Court (1997) 59 CA4th 688, 69 CR2d 635: §16.116
Usher v County of Monterey (1998) 65 CA4th 210, 76 CR2d 274: §3.13
Utility Reform Network v PUC (2008) 166 CA4th 522, 82 CR3d 791: §16.40

V

V.S. v Allenby (2008) 169 CA4th 665, 87 CR3d 143: §§2.3, 2.5
Vai, Estate of (1959) 168 CA2d 147, 335 P2d 501: §16.143
Valley Bank v Superior Court (1975) 15 C3d 652, 125 CR 553: §16.120
Vangel v Vangel (1953) 116 CA2d 615, 254 P2d 919: §26.13
Vannier v Superior Court (1982) 32 C3d 163, 185 CR 427: §15.68
Varian Med. Sys., Inc. v Delfino (2005) 35 C4th 180, 25 CR3d 298: §§22.17, 26.2, 26.6-26.8, 26.15
Varner, Marriage of (1998) 68 CA4th 932, 80 CR2d 628: §26.8
Vasquez v Happy Valley Union Sch. Dist. (2008) 159 CA4th 969, 72 CR3d 15: §§2.19, 5.34, 5.121, 11.7, 11.33
Veguez v Governing Bd. of Long Beach Unified Sch. Dist. (2005) 127 CA4th 406, 25 CR3d 526: §2.64
Venice Canals Resident Home Owners Ass'n v Superior Court (1977) 72 CA3d 675, 140 CR 361: §6.24
Verga v WCAB (2008) 159 CA4th 174, 70 CR3d 871: §16.48
Vernon Fire Fighters Ass'n v City of Vernon (1986) 178 CA3d 710, 223 CR 871: §3.19
Vick v Superior Court (1965) 239 CA2d 105, 47 CR 840: §16.92
Victoria v Superior Court (1985) 40 C3d 734, 222 CR 1: §24.20
Villa, People v (2009) 45 C4th 1063, 90 CR3d 344: §15.39
Villacreses v Molinari (2005) 132 CA4th 1223, 34 CR3d 281: App A
Vineyard Springs Estates, LLC v Superior Court (2004) 120 CA4th 633, 15 CR3d 587: §16.70
Vinson v Superior Court (1987) 43 C3d 833, 239 CR 292: §16.118
Violet C., In re (1989) 213 CA3d 86, 261 CR 470: §4.25
Voices of Wetlands v California State Water Resources Control Bd. (review granted Mar. 19, 2008 superseded opinion at 157 CA4th 1268, 69 CR3d 487: §3.7
Vons Cos. v Seabest Foods, Inc. (1996) 14 C4th 434, 58 CR2d 899: §§16.56, 20.19
Vose, Estate of (1970) 4 CA3d 454, 84 CR 347: §16.143

W

W. A. Rose Co. v Municipal Court (1959) 176 CA2d 67, 1 CR 49: §§15.9, 15.26, App A
Wagner v Superior Court (1993) 12 CA4th 1314, 16 CR2d 534: §§16.87, 16.123
Waicis v Superior Court (1990) 226 CA3d 283, 276 CR 45: App A
Walker v County of Los Angeles (1961) 55 C2d 626, 12 CR 671: §2.24
Wallace v Superior Court (1956) 141 CA2d 771, 298 P2d 69: §15.21
Ward Mfg. Co. v Miley (1955) 131 CA2d 603, 281 P2d 343: §20.18
Ware v Stafford (1962) 206 CA2d 232, 24 CR 153: §5.68
Warrack Med. Ctr. Hosp. v California State Bd. of Pharmacy (1967) 249 CA2d 118, 57 CR 85: §2.39
Wayne F. v Superior Court (2006) 145 CA4th 1331, 52 CR3d 519: §16.52
Weisman v Board of Bldg. & Safety Comm'rs (1927) 85 CA 493, 259 P 768: §9.25
Wells Fargo Bank v Superior Court (2008) 159 CA4th 381, 71 CR3d 506: §§15.64, 16.91, 16.108, 24.23
Wells Fargo Bank v Superior Court (1988) 206 CA3d 918, 254 CR 68: §16.71, App A
Wells Props. v Popkin (1992) 9 CA4th 1053, 11 CR2d 845: App A
Welsch v Goswick (1982) 130 CA3d 398, 181 CR 703: App A
Wenzler v Municipal Court (1965) 235 CA2d 128, 45 CR 54: §2.64
West Shield Investigations & Sec. Consultants v Superior Court (2000) 82 CA4th 935, 98 CR2d 612: §16.77
Western Digital Corp. v Superior Court (1998) 60 CA4th 1471, 71 CR2d 179: §16.102
Western States Petroleum Ass'n v Superior Court (1995) 9 C4th 559, 38 CR2d 139: §§2.32, 7.10-7.11
Wetteland v Superior Court (1967) 251 CA2d 607, 59 CR 605: §16.88
Wheeler v St. Joseph Hosp. (1976) 63 CA3d 345, 133 CR 775: §16.100
Wheelwright v County of Marin (1970) 2 C3d 448, 85 CR 809: §2.46
Whitney's at the Beach v Superior Court (1970) 3 CA3d 258, 83 CR 237: §16.67, App A
Whitten v California State Bd. of Optometry (1937) 8 C2d 444, 65 P2d 1296: §4.5
Wilde v Superior Court (1942) 53 CA2d 168, 127 P2d 560: §16.136
Wilder v Superior Court (1998) 66 CA4th 77, 77 CR2d 629: §2.69
Wilhelm, Estate of (1957) 152 CA2d 803, 313 P2d 161: §16.143
Wilshire Ins. Co. v Tuff Boy Holding, Inc. (2001) 86 CA4th 627, 103 CR2d 480: §16.49
Wilson v Eu (1991) 54 C3d 471, 286 CR 280: §2.44
Wilson v Hidden Valley Mun. Water Dist. (1967) 256 CA2d 271, 63 CR 889: §2.37
Wiltsie v Board of Supervisors (1966) 65 C2d 314, 54 CR 320: §2.44
Windiate, Estate of (1961) 197 CA2d 560, 17 CR 297: §16.143
Witt Home Ranch, Inc. v County of Sonoma (2008) 165 CA4th 543, 81 CR3d 123: §3.11
Women Organized for Employment v Stein (1980) 114 CA3d 133, 170 CR 176: §2.19
Wong v Superior Court (1966) 246 CA2d 541, 54 CR 782: §§15.24, 15.26
Woo v Superior Court (2000) 83 CA4th 967, 100 CR2d 156: §25.7
Wood v City Civil Serv. Comm'n (1975) 45 CA3d 105, 119 CR 175: §3.11
Woodland Hills Residents Ass'n, Inc. v City Council (1980) 26 C3d 938, 164 CR 255: §2.25
Woodman v Ackerman (1967) 249 CA2d 644, 57 CR 687: App A
Woodmansee v Lowery (1959) 167 CA2d 645, 334 P2d 991: §§2.10, 2.49
Woods v Superior Court (1981) 28 C3d 668, 170 CR 484: §2.37

Y

Y.K.A. Indus., Inc. v Redevelopment Agency (2009) 174 CA4th 339, 94 CR3d 424: §2.31
Yamaha Motor Co. v Superior Court (2009) 174 CA4th 264, 94 CR3d 494: §15.70
Yarbrough v Yarbrough (1956) 144 CA2d 610, 301 P2d 426: App A
Yarnell & Assocs. v Superior Court (1980) 106 CA3d 918, 165 CR 421: §16.82
Yellen v Fidelity & Cas. Co. (1931) 115 CA 434, 1 P2d 1019: §6.31
Young v Gannon (2002) 97 CA4th 209, 118 CR2d 187: §§3.13, 3.16, 5.37
Ytuarte v Superior Court (2005) 129 CA4th 266, 28 CR3d 474: §16.61

Z

Zaremberg v Superior Court (2004) 115 CA4th 111, 8 CR3d 723: §19.3
Zembsch v Superior Court (2006) 146 CA4th 153, 53 CR3d 69.: §16.100
Zenith Ins. Co. v O'Connor (2007) 148 CA4th 998, 55 CR3d 911: §16.111
Zenith Ins. Co. v WCAB (2008) 159 CA4th 483, 71 CR3d 724: §16.48
Zerbe, In re (1964) 60 C2d 666, 36 CR 286: §16.88
Zevnik v Superior Court (2008) 159 CA4th 76, 70 CR3d 817: §§15.6, 15.52, 15.56, 15.61, 16.106, 19.6, 24.22
Zuehlsdorf v Simi Valley Unified Sch. Dist. (2007) 148 CA4th 249, 55 CR3d 467: §§2.43, 5.124, 24.28
Zumwalt v Superior Court (1989) 49 C3d 167, 260 CR 545: §16.90
Zuniga v Los Angeles County Civil Serv. Comm'n (2006) 137 CA4th 1255, 40 CR3d 863: §3.9
Zurich Am. Ins. Co. v Superior Court (2007) 155 CA4th 1485, 66 CR3d 833: §11.5

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Table of References

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California Administrative Hearing Practice (2d ed Cal CEB 1997): §§3.13-3.14
California Administrative Mandamus (3d ed Cal CEB 2003): §§2.2, 2.65, 3.1-3.2, 3.4-3.8, 3.10-3.13, 3.15-3.17, 3.19, 4.5, 4.13, 5.3, 5.56, 5.75, 6.2, 7.16-7.17, 9.1, 11.26, 15.2, 16.24
California Attorney Fee Awards (3d ed Cal CEB 2010): §§5.121, 5.124, 5.126, 17.35, 24.28, App C
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California Civil Appellate Practice (3d ed Cal CEB 1996): §§6.20, 11.1-11.4, 11.14-11.16, 11.21-11.22, 11.24, 11.26, 11.28-11.37, 12.20, 12.26, 15.49, 15.57-15.58, 16.85, 16.99, 16.127, 17.21, 18.34, 19.10, 23.4, 23.16-23.18, 23.43, 23.50, 23.52, 24.13, 24.26-24.28, 24.30-24.31, 24.34, 24.36, 25.16, 25.21, 25.26, 26.8, 26.11-26.14, 26.16, 26.22, 27.12, 27.14-27.15, 27.18-27.20, 27.22, 27.25-27.27, 27.30-27.33
California Civil Litigation Forms Manual. 2 vols (Cal CEB 1980): §5.85
California Civil Procedure Before Trial (4th ed Cal CEB 2004): §§4.33, 5.34, 5.75, 5.82-5.83, 5.85, 5.89, 5.106, 5.113, 5.119, 6.10-6.12, 6.16, 6.19, 6.22, 6.30-6.33, 6.36-6.38, 7.26, 7.28, 8.14, 8.31, 8.41, 8.49-8.54, 8.58, 8.61, 9.22, 9.53, 12.2, 12.26, 17.2, 17.8, 17.10-17.13, 18.80, 19.8, 20.23, 22.10, 23.28, 23.33, 23.35
California Conservatorship Practice (Cal CEB 2005): §§4.22, 4.24-4.25, 16.144
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California Government Tort Liability Practice (4th ed Cal CEB 1999): §5.57
California Guardianship Practice (Cal CEB Annual): §§4.22, 16.144
California Juvenile Dependency Practice (Cal CEB Annual): §16.52
California Trial Objections (Cal CEB Annual): §§10.14, 10.20, 15.37, 24.51
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Debt Collection Practice in California (2d ed Cal CEB 1999): §§4.29-4.32, 24.54
Fee Agreement Forms Manual (2d ed Cal CEB 2007): §17.35
Witkin, Bernard E. California Procedure. Multivolume. San Francisco, Bancroft-Whitney, 4th ed 1996-: §§2.64, 4.27, 4.33, 5.35, 5.73, 5.75, 7.8, 15.15, 15.22, 15.29-15.31, 15.37, 16.65, 16.106, 16.134, 16.143-16.144, 21.3, 24.14

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Table of Forms

California Supreme Court, petition for review, 28.16
Court of appeal
- Alternative writ as improvidently granted, order discharging, 28.14
- Alternative writ/order to show cause, 28.6
- Amicus curiae letter brief, 28.17
- Appellate court writ petition information sheet (Fifth District), 28.22
- Certificate of interested entities or persons (Judicial Council Form APP-008), 28.2
- Exhibits, table of, 28.3
- Habeas corpus or certiorari, petition for writ of (filed by attorney), 28.21
- Habeas corpus, petition for writ of (Judicial Council Form MC-275), 28.20
- Memorandum in support of petition, exemplar headings, 18.51
- Prayer for relief in writ petition
  - Alternative writ or order to show cause, petitioner seeking, 18.39
  - Peremptory writ in first instance, petitioner seeking, 18.38
- Summary denial of writ, 28.5
- Traverse to return, 28.12
- Verification of petition, 18.48

Limited civil cases
- Information on writ proceedings in misdemeanor, infraction, and limited civil cases (Judicial Council Form APP-150-INFO), 13.16
- Petition for writ (misdemeanor, infraction, or limited civil case) (Judicial Council Form APP-151), 13.17

Mandate in court of appeal
- Opposition to issuance of peremptory writ of mandate in first instance, 28.10
- Order directing issuance of peremptory writ of mandate, 28.13
- Peremptory writ of mandate, 28.15
- Petition for writ of mandate, prohibition, or other appropriate relief, 28.1
- Preliminary opposition to petition for writ of mandate, prohibition, or other appropriate writ and stay request, 28.4
- Return to petition for writ of mandate, prohibition, or other alternative relief, 28.11

Mandate in superior court
- Demurrer
  - Memorandum in support of demurrer to petition for writ of mandate, 13.11
  - Petition for writ of mandate, demurrer to, 13.10
- Ex parte proceeding
  - Application for alternative writ of mandate and order to show cause, 13.2
  - Declaration of notice in support of ex parte application for alternative writ of mandate and order to show cause, 13.4
  - Memorandum in support of ex parte application for alternative writ of mandate and order to show cause, 13.3
  - Proposed order directing issuance of alternative writ of mandate, 13.5
- Notice of hearing on petition for writ of mandate, 13.7
- Opposition to petition for writ of mandate
  - Declaration in opposition to petition for writ of mandate, 13.14
  - Proposed order denying petition for writ of mandate, 13.15
  - Request for judicial notice in opposition to petition for writ of mandate, 13.13
  - Sample form of opposition to petition for writ of mandate, 13.12
- Sample form of alternative writ of mandate, 13.6
- Verified petition for alternative writ of mandate and verified complaint for declaratory relief, 13.1

Palma notice
- Letter, 28.8
- Order, 28.7
- Suggestive *Palma* notice, 28.9

Prohibition in court of appeal
- Petition for writ of mandate, prohibition, or other appropriate relief, 28.1
- Preliminary opposition to petition for writ of mandate, prohibition, or other appropriate writ and stay request, 28.4
- Return to petition for writ of mandate, prohibition, or other alternative relief, 28.11

Superior court writ petition
- Absence or inadequacy of other remedies, 5.54
- Costs and attorney fees, 5.61
- Exhaustion of administrative remedies, 5.56
- Identity of parties

Petitioner, 5.41
Real party in interest, 5.43
Respondent, 5.42
Nonjudicial action, petition challenging, 5.44
Ongoing administrative proceeding, petitioner party to, 5.45
Other appropriate relief, 5.62
Signature block, 5.63
Types of relief, 5.60
Verification of, 5.69
Supersedeas
Order granting petition for writ of supersedeas, 28.19
Petition for writ of, 28.18
Temporary restraining order and order to show cause in superior court
Ex parte application for temporary restraining order and order to show cause, 13.8
Proposed temporary restraining order and order to show cause, 13.9

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Index

A B C D E F G H I J K L M N O P Q R S T U V W X Y Z

The symbol "" after a section number indicates that a form appears in the section.

Abuse of Discretion
See also **Discretion of Court**
Court of appeal
Class certification order, abuse of discretion as standard for reviewing, 16.129A, 16.129D
Disqualification of attorney, abuse of discretion as standard of review, 16.104
Good faith settlement determination, abuse of discretion as standard of review, 16.51
Injunction ruling, abuse of discretion as standard for reviewing, 16.151
In limine motions, abuse of discretion as standard for reviewing orders on, 16.147
Mandate challenging judicial disqualification, abuse of discretion as standard of review, 16.7
Mandate to correct abuse of discretion, 15.11-15.12
Mandatory dismissal, abuse of discretion as standard for reviewing order denying motion for, 16.114
Monetary sanction or judgment order of $5000 or less, abuse of discretion as standard of review, 16.85
Reclassify action or proceeding, abuse of discretion as standard of review, 16.61
Unlawful detainer action, abuse of discretion as standard for reviewing denial of stay in, 16.80
Defined, 15.11
Superior court
Administrative mandamus to review administrative body's abuse of discretion. See **Administrative Mandamus in Superior Court**
Traditional mandate, petition to correct abuse of discretion, 2.9

Adequate Remedy at Law
Appeal as adequate remedy. See **Appeals**
Drafting writ petition in superior court, allegations concerning lack of adequate legal remedies. See **Drafting Writ Petition for Superior Court**
Petitioner's lack of adequate remedy at law. See **Courts of Appeal**
Sustaining demurrer without leave to amend, appeal from resulting judgment of dismissal as adequate remedy, 16.110
Traditional mandate in superior court. See **Traditional Mandate in Superior Court**

Administrative Agencies' Acts and Decisions, Traditional Mandate to Compel
Generally, 2.27
Final administrative decision, traditional mandate to compel agency to comply with, 2.36
Mandatory duty, compelling agency, official, or employee to perform
Discretion, compelling administrative agencies to exercise, 2.30
Funds to perform mandatory duty, mandate to compel legislative action to provide, 2.26
Legally required hearings or comply with administrative procedures, compelling agency to hold, 2.31
Legally required ministerial duties, traditional mandate to compel administrative agencies to perform, 2.28
Regulations, compelling administrative agencies to adopt statutorily required, 2.29
Quasi-judicial agency decisions, review of
Generally, 2.32
Exhaustion of administrative remedies as prerequisite for seeking review, 2.34
Special writ proceedings for certain administrative agencies, 2.35
Statutory requirements for administrative mandamus not met, applicability of traditional mandate if, 2.33
Quasi-legislative acts, review of, 2.37

Administrative Mandamus in Superior Court
See also **Traditional Mandate in Superior Court**
Generally, 3.1
Administrative record, review limited to, 3.7
Defined, 3.2
Differences between traditional and administrative mandamus
Generally, 3.18

Checklist for choosing between traditional and administrative mandamus, 3.20
Filing deadlines, 3.19
Discretion of administrative body
Hearing officer or decision-maker's discretion to determine contested factual issues, 3.6
Prejudicial abuse of discretion (see Prejudicial abuse of discretion by administrative body, review of, below)
Due process (see Scope of judicial review in administrative mandamus proceedings, below)
Evidence
Legal requirement of presentation of evidence at underlying administrative hearing as prerequisite for administrative mandamus, 3.5
Prejudicial abuse of discretion by administrative body, agency's findings not supported by evidence as, 3.15-3.17
Findings (see Prejudicial abuse of discretion by administrative body, review of, below)
Hearing
Fair hearing, determining if petitioner received, 3.11
Underlying administrative proceeding, hearing in as prerequisite for administrative mandamus (see Requirements for administrative mandamus, below)
Jurisdiction, review of administrative body exceeding or acting without
Independent judgment standard, review of administrative decisions under, 3.17
Reconsideration or modification of decision by administrative body, express authorization required for, 3.10
Statute or constitution, jurisdiction limited by, 3.9
Pleading administrative and traditional mandamus in the alternative, 3.21
Prejudicial abuse of discretion by administrative body, review of
Generally, 3.12
Evidence, agency's findings not supported by, 3.15-3.17
Failure of administrative body to proceed as required by law, 3.13
Findings, agency's decision not supported by, 3.14
Substantial evidence, determining if administrative findings supported by, 3.16
Quasi-judicial agency decisions, review of, 2.32
Questions of law. See **Questions of Law and Fact**
Requirements for administrative mandamus
Generally, 3.3
Evidence presented at administrative hearing, legal requirement of, 3.5
Hearing officer or decision-maker's discretion to determine contested factual issues, 3.6
Underlying administrative proceeding, requirement of hearing in, 3.4
Scope of judicial review in administrative mandamus proceedings
Generally, 3.8
Fair hearing, determining if petitioner received, 3.11
Jurisdiction (see Jurisdiction, review of administrative body exceeding or acting without, above)
Prejudicial abuse of discretion (see Prejudicial abuse of discretion by administrative body, review of, above)
Statute of limitations for filing, 3.19
Statutory authority for, 5.3
Statutory requirements for administrative mandamus not met, applicability of traditional mandate, 2.33

Administrative Proceedings, Writ Review of
Agricultural Labor Relations Board. See **Agricultural Labor Relations Board (ALRB)**
Alcoholic Beverage Control Appeals Board. See **Alcoholic Beverage Control Appeals Board**
Energy Resources Conservation and Development Commission, review of decisions by. See **Review in California Supreme Court**
Public Employment Relations Board. See **Public Employment Relations Board, Petition for Writ of Review of Decisions by**
Public Utilities Commission. See **Public Utilities Commission (PUC)**
Workers' Compensation Appeals Board. See **Workers' Compensation Appeals Board (WCAB), Petition for Review of Decisions by**

Affidavits and Declarations
Court of appeal
Contempt cases, using writ of prohibition to challenge defective affidavits in, 16.139
Hearsay, declaration made on information and belief constituting, 18.46
Preliminary opposition, real party in interest or respondent submitting sworn declaration of facts, 21.13
Record accompanying writ petition in court of appeal, counsel's declaration explaining absence of, 20.3
Stay by appellate court, declaration explaining urgency and unavailability of supporting documents, 18.60, 19.16
Transcript of proceedings in lower court, declaration explaining absence of, 17.19
Mandate in superior court
Alternative writ of mandate or prohibition. See **Alternative Writs of Mandate or Prohibition in Superior Court**
Opposition to petition for writ of mandate, declaration in, 13.14
Superior court
Limited jurisdiction civil cases, declaration explaining unavailability of documents supporting writ petition filed in, 12.6

Mandate (see Mandate in superior court, above)
Noticed motion for writ in superior court, declaration supporting, 5.101
Record in superior court writ proceedings, supporting declarations. See **Record in Superior Court Writ Proceeding**
Stay pending superior court's decision on merits of writ petition. See **Stay of Proceedings Pending Writ Petition in Superior Court**

Affirmative Defenses. See **Defenses to Writ Petition**

Agencies. See **State and Local Agencies**

Agricultural Labor Relations Board (ALRB)
Enforcement of orders issued by, 4.28
Final order, petition for review of
Deadline for filing writ petition, 16.19
Discretion of appellate court to summarily deny petition, 16.20
Exclusive means of obtaining appellate review of ALRB's final order, writ petition as, 16.18
Standard of review if writ petition accepted, 16.21

Alcoholic Beverage Control Appeals Board
Deadline to file and serve writ petition, 16.23
Exclusive means of obtaining review of Board's adjudicatory order, petition for writ as, 16.22
Mandate in appellate court challenging nonadjudicatory action by Board, 16.25
Standard of review if writ petition accepted, 16.24

Alternative Writs in Courts of Appeal
See also **Order to Show Cause (OSC)**
Generally, 22.24
Action by court of appeal after issuing alternative writ
Generally, 24.1
Discharge of alternative writ (see Discharge of alternative writ or order to show cause, below)
Disputed questions of fact, appellate court appointing special referee to resolve, 24.14
Opinion granting or denying writ petition. See **Opinion by Appellate Court Granting or Denying Writ Petition**
Oral argument. See **Oral Argument in Appellate Court**
Coercive alternative writ
Generally, 22.23, 22.27
Compliance with writ by trial court, 22.28
Defined, 22.23
Failure of trial court to respond to writ, 22.29
Palma notice, use of coercive alternative writ in lieu of, 22.19, 22.27
Content and preparation of alternative writ, 22.25
Definitions
Alternative writ, 22.23
Coercive writ, 22.23
Denial of writ
Discharge of alternative writ (see Discharge of alternative writ or order to show cause, below)
Opinion granting or denying writ petition. See **Opinion by Appellate Court Granting or Denying Writ Petition**
Discharge of alternative writ or order to show cause
Generally, 25.12
"Cause," alternative writ or order to show cause creating, 25.13
Denial of petition, discharge resulting in, 25.14
Denial of writ petition on grounds alternative writ or order to show cause improvidently granted, 24.6
Opinion of appellate court discharging alternative writ, 24.22
Order discharging alternative writ as improvidently granted, 28.14
Trial court's compliance with alternative writ or order to show cause, appellate court discharging alternative writ or OSC, 24.7
Form, alternative writ/order to show cause, 28.6
Opinion granting or denying writ petition. See **Opinion by Appellate Court Granting or Denying Writ Petition**
Palma notice. See ***Palma* Notice**
Prayer for relief seeking alternative writ or order to show cause, 18.39
Preparation of, 22.25
Return to alternative writ. See **Return to Alternative Writ in Appellate Court Proceedings**
Service and filing of, 22.26
Speaking alternative writ (see Coercive alternative writ, above)
Stay of writ proceeding, effect of alternative writ on. See **Stay of Proceedings by Appellate Court**
Time
Issuance of alternative writ, lack of deadline for, 22.24

Return. See **Return to Alternative Writ in Appellate Court Proceedings**

Alternative Writs of Mandate or Prohibition in Superior Court
See also **Noticed Motion in Superior Court**
Generally, 1.3, 5.9, 5.108, 9.1
Action by court on application for alternative writ
Generally, 9.2
Content of writ (see Content of alternative writ, below)
Denial of writ (see Denial of writ if petition defective or meritless, below)
Effect of issuing alternative writ, 8.32, 9.6
Ex parte application (see Ex parte application for writ, below)
Merits of petition (see Merits of petition, below)
Peremptory writ of mandate or prohibition, court's issuance of, 9.20
Rulings and judgments (see Rulings and judgments, below)
Advantages and disadvantages of alternative writ procedure
Denial of alterative writ and dismissal of petition, 5.18
Early hearing on writ, 5.17
Immediate relief, availability of, 5.16
Compliance with writ by respondent
Generally, 8.33
Noncompliance with writ, effect of, 8.34
Content of alternative writ
Hearing on merits of return and petition, alternative writ specifying date for, 9.10, 9.24
Mandate, action commanded by writ of, 9.7
Prohibition, action commanded by writ of, 9.8
Return to writ petition, alternative writ specifying date for, 9.9
Date for hearing
Briefing schedule and hearing date on merits of petition, court setting, 9.5
Minimum notice before court can issue peremptory writ, 9.23
Noticed motion, setting hearing date for, 9.21
Return and writ petition, alternative writ setting date for hearings on, 9.10, 9.24
Standard law and motion rules, applicability of, 9.22
Declarations
Generally, 5.111
Evidence, presenting by declaration, 9.29
Ex parte application for alternative writ of mandate and order to show cause, declaration of notice in support of, 5.114, 13.4
Default, superior court prohibited from issuing writ by, 9.25
Denial of writ if petition defective or meritless
Generally, 5.18, 9.17
Leave to amend, court granting, 8.42, 9.18
Noticed motion seeking issuance of peremptory writ, 9.19
Res judicata, inapplicability to denial of alternative writ, 9.55
Discretion of court
Jury trial on factual disputes, court's discretion to allow, 9.31
Oral testimony, discretion of court to allow, 9.30
Evidence on merits of petition, parties' right to present
Generally, 9.28
Declaration or judicial notice, presenting evidence by, 9.29
Oral testimony, discretion of court to allow, 9.30
Ex parte application for writ
Generally, 5.113, 9.3
Action by court on, 5.118
Contents of ex parte application, 5.114
Declaration of notice in support of ex parte application for alternative writ of mandate and order to show cause, 5.114, 13.4
Form, ex parte application for alternative writ of mandate and order to show cause, 13.2
Hearing on ex parte application (see Hearing, below)
Issuance of writ, 9.5
Local rules and policies, attorney consulting, 5.117
Minimal notice to opposing party of ex parte appearance, 9.3
Opposition memorandum in response to ex parte application for alternative writ, time for filing, 8.24
Opposition to application if petitioner seeks ex parte issuance of writ, 8.21, 8.26
Proposed order directing issuance of alternative writ of mandate, 13.5
Service of, 5.115
Supporting memorandum for ex parte application for alternative writ of mandate and order to show cause, 13.3
Ex parte hearing

Generally, 9.4
Personal appearance by petitioner or counsel at ex parte hearing, 5.116
Service of ex parte application before hearing, 5.115
Factual disputes, return raising
Burden of proof on petitioner to establish disputed facts, 9.27
Evidence (see Evidence on merits of petition, parties' right to present, above)
Jury trial on factual disputes, court's discretion to allow, 9.31
Form, alternative writ of mandate, 13.6
Hearing
Date for hearing (see Date for hearing, above)
Early hearing on writ, 5.17
Ex parte hearing (see Ex parte hearing, above)
Factual disputes (see Factual disputes, return raising, above)
Judgments (see Rulings and judgments, below)
Notice of hearing on petition for writ of mandate, 13.7
Return (see Return to alternative writ, below)
Judgments (see Rulings and judgments, below)
Local rules of court
Ex parte application for writ, attorney consulting local rules and policies concerning, 5.117
Preference for noticed motion or alternative writ, local rules expressing, 5.9, 9.21
Memorandums
Ex parte application for alternative writ (see Ex parte application for writ, above)
Opposition to petition for writ, 9.23
Return to alternative writ, memorandum of opposition accompanying, 8.38
Supporting memorandum, 5.110
Merits of petition
Court hearing merits of return, 9.6
Date for hearing (see Date for hearing, above)
Evidence (see Evidence on merits of petition, parties' right to present, above)
Hearing (see Hearing, above)
Notice
Date for hearing (see Date for hearing, above)
Declaration or judicial notice, presenting evidence by, 9.29
Hearing on petition for writ, notice of, 13.7
Noticed motion. See **Noticed Motion in Superior Court**
Palma notices not used in superior court writ proceedings, 8.39
10 days notice of application for writ by petitioner, requirement of filing written opposition if petitioner gives, 8.22, 8.27
Opposition to application for alternative writ
Generally, 8.2
All parties, service of opposition on, 8.30
Appellate division of superior court, opposition and return if alternative writ issued by, 12.15
Content of opposition, 8.26-8.27
Ex parte application for writ, opposition to (see Ex parte application for writ, above)
Filing fee, 8.29
Filing opposition in same court as writ petition, 8.28
Memorandum in opposition, 9.23
Method of service, statutes governing, 8.31
Return to alternative writ, memorandum of opposition accompanying, 8.38
10 days notice of application for writ by petitioner, requirement of filing written opposition if petitioner gives, 8.22, 8.27
Time for filing opposition (see Time for filing opposition to application for alternative writ, below)
Orders
Proposed order directing issuance of alternative writ of mandate, 13.5
Service of order (see Service of alternative writ, below)
Order to show cause (see Ex parte application for writ, above)
Petitioner prevailing
Preparation of judgment (see Preparation of judgment by petitioner, below)
Preparation of peremptory writ (see Preparation of peremptory writ by petitioner, below)
Preparation of judgment by petitioner
Generally, 9.37
Conformed copies for parties, petitioner submitting to court clerk, 9.40
Content of judgment, 9.39
Denial of writ, preparation of judgment by respondent, 9.47
Purpose of judgment, 9.38
Submission of proposed peremptory writ with proposed judgment and proposed statement of decision, 9.43
Preparation of papers

Exhibits and declarations, 5.111
Memorandum in support of writ petition, 5.110
Proposed alternative writ, submission of, 5.112
Writ petition, 5.109
Preparation of peremptory writ by petitioner
Content of writ, 9.44
Enforcement of writ, laying foundation for, 9.46
Proposed peremptory writ, 9.41
Return date in peremptory writ for respondent, petitioner including, 9.42
Service of writ, 9.45
Submission of proposed peremptory writ with proposed judgment and proposed statement of decision, 9.43
Respondent prevailing
Content of judgment, 9.48
Preparation of judgment denying writ by respondent, 9.47
Responsive pleading (see Opposition to application for alternative writ, above)
Return to alternative writ
Generally, 8.35
Appellate division of superior court, opposition and return if alternative writ issued by, 12.15
Date of return to writ petition, alternative writ specifying, 9.9
Defective return or no return, consequences of filing, 8.37
Defined, 8.2
Factual disputes (see Factual disputes, return raising, above)
Hearing merits of return and petition, alternative writ specifying date for, 9.10, 9.24
Memorandum in opposition to petition accompanying return, 8.38
Merits of return, court hearing, 9.6
No return filed, superior court assuming truth of petitioner's factual allegations, 9.25
Petitioner including return date in peremptory writ for respondent, 9.42
Questions of law, hearing on return raising, 9.26
Time for filing, 8.36
Rulings and judgments
Conclusion of hearing, ruling at, 9.33
Petitioner prevailing (see Petitioner prevailing, above)
Respondent prevailing (see Respondent prevailing, above)
Statement of decision (see Statement of decision, below)
Submission of case, ruling after, 9.33
Tentative rulings before hearing based on review of submitted papers, 9.32
Service of alternative writ
Copy of petition, requirement of serving with alternative writ, 9.12
Ex parte application for writ, service of, 5.115
Issuance of alternative writ, service of order directing, 9.13
Opposition to application for alternative writ, service of (see Opposition to application for alternative writ, above)
Petitioner's responsibility for serving alternative writ, 9.11
Respondents and real parties in interest, service on, 9.15
Stay order, service in conjunction with alternative writ, 9.14
Time for serving alternative writ, 9.16
Service of peremptory writ, 9.45
Statement of decision
Generally, 9.34
Content of, 9.36
Respondent preparing proposed statement of decision, 9.47
Submission of proposed peremptory writ with proposed judgment and proposed statement of decision, 9.43
Timing of request for, 9.35
Time
Amended petition, time to file and serve, 8.42, 9.18
Chronology of alternative writ procedure, 5.15
Opposition, time for filing (see Time for filing opposition to application for alternative writ, below)
Return to alternative writ, time for filing, 8.36
Service of alternative writ, time for, 9.16
Statement of decision, timing of request for, 9.35
Time for filing opposition to application for alternative writ
Generally, 8.23
Ex parte application for alternative writ, time to file opposition memorandum in response to, 8.24
10 days notice of application for issuance of writ, time for filing opposition if petitioner gives, 8.25
Verified writ petition for alternative writ of mandate and verified compliant for declaratory relief, 13.1

Amendments and Modifications
Administrative body, express authorization required for modification of decision by, 3.10
Alternative writ of mandate or prohibition in superior court, leave to amend petition for, 8.42, 9.18
Complaint, mandate to compel trial court to permit amended, 16.106
Court of appeal's decision, modification of. See **Courts of Appeal**
Denial of motion to amend writ petition, nonappealability of, 11.14
Stay of proceedings in superior court, modification of, 6.28
Sustaining demurrer without leave to amend, appeal from resulting judgment of dismissal as adequate remedy, 16.110

Amicus Curiae
Generally, 23.52
Application to file amicus brief, 23.53
Exceptional cases, seeking amicus participation only in, 23.55
Filing and service of amicus brief, 23.54
Letter brief, 28.17
Oral argument, amicus curiae request to participate in, 24.10
Rehearing in court of appeal, amicus curiae's standing to file petition for, 25.18

Answers in Courts of Appeal
Rehearing in court of appeal, answer to petition for, 25.22
Return to alternative, verified answer as formal. See **Return to Alternative Writ in Appellate Court Proceedings**

Answers in Superior Court
Generally, 8.45
Content of answer
Generally, 8.46
Affirmative defenses, raising in answer, 8.48
Allegations deemed admitted if not denied in answer, 8.47
Defined, 8.2, 8.45
Demurrer. See **Demurrer**
Reply to answer. See **Replication (Petitioner's Reply) in Superior Court**
Responsive motion, filing answer in conjunction with, 8.56
Verification of answer, 8.49

Answer to Petition for Review in California Supreme Court. See **Review in California Supreme Court**

Appeals
See also **Courts of Appeal**
Adequate remedy, appeal as
Generally, 15.56
Final judgment, appeal from, 15.58
Interlocutory orders and judgments, immediate appeal from, 15.57
Agricultural Labor Relations Board, appealability of superior court orders enforcing final order issued by, 4.28
Arbitration issues, appealability of, 16.99-16.100
Briefs. See **Briefs**
Contempt cases, nonappealability of judgments or orders in, 16.133
Coordination of actions, nonappealability of order concerning, 16.8
Costs on appeal
Factor in considering appeal, costs as, 11.17
Opinion by appellate court, award of costs in. See **Opinion by Appellate Court Granting or Denying Writ Petition**
Prayer for costs in writ petition to court of appeal, 18.41
Prevailing party's recovery of costs, 11.33
Remittitur, awards of costs in, 11.33
Risk of seeking writ, financial costs as, 17.35
Sanctions for frivolous writ petition, court awarding or denying costs as, 24.64
Discovery sanctions, appealability of, 16.126-16.127
Disqualification of attorney, appeal of order, 16.102, 17.22
Disqualification of judge, nonappealability of order granting or denying motion for, 16.3
Extraordinary circumstances requiring filing both writ and appeal, 16.152
Factors in considering appeal of superior court's decision on writ
Generally, 11.15
Consequences of adverse judgment, severity of, 11.18
Standard of review on appeal, 11.16
Time and financial costs, 11.17
Final decision of superior court on writ petition, appeal of

Generally, 11.7
Disposal of all issues and causes of action between parties, requirement of, 11.9-11.11
Factors in considering appeal (see Factors in considering appeal of superior court's decision on writ, above)
Formal judgment, no requirement of, 11.8
Interlocutory rulings, nonappealability of, 11.13
Multi-party cases, appealability of order resolving all issues with respect to one party, 11.11
Noncompliance with writ, finality of decision despite, 11.12
Post-judgment orders, appealability of, 11.13
Without prejudice, appealability of order denying writ petition, 11.10
Final judgment, appeal from, 15.58
Grounds for not complying with writ, appeal as, 10.8
Injunction, appealability of, 16.150, 26.9
Interlocutory orders and judgments, immediate appeal from, 15.57
Jurisdiction of appellate court. See **Jurisdiction**
Limited jurisdiction civil cases, appeal to appellate division of superior court. See **Limited Jurisdiction Civil Cases**
Lis pendens, nonappealability of order granting or denying expungement of, 16.11
Notice of appeal
Generally, 11.21
Filing writ petition in court of appeal, effect on time limit for filing notice of appeal, 11.37
Jurisdiction, failure to timely file notice of appeal resulting in loss of, 11.23
Supersedeas. See **Supersedeas**
Time to file, 11.22
Opinions of court of appeal
Generally, 11.32
Grant or denial of writ petition. See **Opinion by Appellate Court Granting or Denying Writ Petition**
Publication of opinion. See **Publication of Opinion**
Oral argument. See **Oral Argument in Appellate Court**
Probate orders, appealability of, 16.143
Record on appeal. See **Record in Appellate Court Writ Proceeding**
Review, no right of appeal from challenged action of lower court as prerequisite for writ of. See **Review (Certiorari) in Courts of Appeal**
Rules governing appeals of writ proceedings, 11.20
Settlement of writ proceeding on appeal, 11.19
Small claims court judgment, defendant appealing, 12.26
Stay of proceedings pending writ petition in superior court, appeal of order granting or denying application for, 6.27
Stay on appeal. See **Stay of Proceedings by Appellate Court**
Summary judgment, appealability of order granting, 16.66
Supersedeas, filing writ petition with appeal, 26.3
Time
Memorandum of costs, time limit for filing, 11.33
Notice of appeal (see Notice of appeal, above)
Opinion, deadline for court of appeal to issue, 11.32
Traditional writ of mandate in superior court compelling Board of Equalization to hear appeal challenging assessment, 2.60

Appearance
Ex parte proceedings. See **Ex Parte Proceedings**
Hearing on stay request, respondent appearing at, 6.19
Oral argument. See **Oral Argument in Appellate Court**
Return to alternative writ in appellate court proceedings, serving return on petitioner and parties appearing in proceeding, 23.42

Appellate Courts. See **Courts of Appeal**

Arbitration
See also **Mediation**
Generally, 16.99
Appealability of arbitration issues, 16.99-16.100
Compelling arbitration
Orders compelling arbitration, writ petition as exclusive means of reviewing, 16.100
Traditional mandate petition to compel arbitration, 2.51
Questions of first impression, writ review limited to, 16.99
Standard of review if writ petition accepted, 16.101

Assessments. See **Taxes, Traditional Writ of Mandate Concerning**

Associations, Actions by. See **Traditional Mandate in Superior Court**

Attachment
Superior court issuing writ of, 4.29

Attorney-Client Privilege
Discovery order affecting attorney-client privilege, writ review of, 16.122

Attorney General
Amicus curiae brief filed by, 23.52
Service of writ petition contesting statute's constitutionality on, 18.79

Attorneys
Appointment of counsel for person detained under Lanterman-Petris-Short (LPS) Act, 4.22
Courts of appeal. See **Courts of Appeal**
Disciplinary action by State Bar Court, disciplined attorney or chief trial counsel for State Bar filing petition with California Supreme Court for review of, 27.6
Ineffective assistance of counsel in proceedings involving children, habeas petition raising issue of, 4.20
Orders concerning counsel, petition for writ to review
Disqualification of attorney, writ petition to review. See **Disqualification**
Other issues involving attorney representation, writ proceedings over, 16.103
Standard of review if writ petition accepted, 16.104
Verification of writ petition by attorney, 5.67, 18.44
Work product, review of discovery order affecting, 16.122
Work product, writ review of discovery order affecting, 16.112

Attorneys' Fees
Court of appeal
Award of costs by appellate court, effect on fee award, 11.33
Conflict of interest arising from payment for legal services, 17.13
Lis pendens, writ of mandate challenging attorney fee order in action for expungement of, 16.11
Sanctions for frivolous writ petition, attorney fees awarded as, 24.65
Superior court
Contents of fee motion, 5.126
Prayer for attorney fees in writ petition, 5.61
Procedure for recovering fees, 5.125-5.126
Separate documents required to recover fees and costs, 5.127
Statute or contractual attorney fees provision, recovery of fees under, 5.124
Stay of proceedings pending writ petition in superior court, court requiring undertaking to cover enjoined party's attorney fees, 6.38
Time to file motion for fees, 5.125
Trial court or reviewing court, award of fees by, 24.28

Automatic Stay
Generally. See **Stay of Proceedings by Appellate Court**
Supersedeas. See **Supersedeas**

Beneficial Interest, Requirement Petitioner Have. See **Courts of Appeal**

Bias and Prejudice
Administrative mandamus to review prejudicial abuse of discretion by administrative body. See **Administrative Mandamus in Superior Court**
Court of appeal's discretion to consider writ petition filed more than 60 days after issuance of challenged ruling absent showing of prejudice, 18.68
Irreparable injury to petitioner, trial court's erroneous and substantially prejudicial ruling resulting in, 15.64
Supersedeas relief, appellant's burden of showing lack of prejudice to respondent, 26.18

Board of Equalization
Traditional writ of mandate in superior court compelling Board of Equalization to hear appeal challenging assessment, 2.60

Bonds and Undertakings
Stay of enforcement of money judgment by appellate court, bond required for, 26.3, 26.12
Stay of proceedings, appellate court's discretion to require undertaking, 19.10
Stay pending superior court's decision on merits of writ petition, request for undertaking. See **Stay of Proceedings Pending Writ Petition in Superior Court**

Supersedeas. See **Supersedeas**

Briefs
Generally, 11.27
Amicus curiae briefs. See **Amicus Curiae**
Appellant's opening brief, 11.28
Appellant's reply brief, 11.30
CD-ROM format, filing briefs in, 20.11
Respondent's brief, 11.29

Burden of Proof
Alternative writ of mandate or prohibition in superior court, petitioner's burden of proof to establish disputed facts at hearing on, 9.27
Inadequacy of other remedies, writ petitioner's burden to show, 15.60
Irreparable injury, writ petitioner's burden to show, 15.65
Issues presented in writ petition, burden on petitioner to submit information for superior court to decide, 7.2
Prohibition in appellate court, petitioner's burden of proof to show lower court has decided to take challenged action, 15.19
Supersedeas relief, appellant's burden of showing grounds for, 26.18

California Public Records Act. See **Public Records Act**

California Rules of Court. See **Rules of Court**

California Supreme Court
See also **Review in California Supreme Court**
Appellate division of superior court's writ decision, filing new writ petition in California Supreme Court seeking review of, 12.21
Discretion of Supreme Court to grant review. See **Review in California Supreme Court**
Exclusive method of review, original writ as
Generally, 27.3
Denial order, effect of, 27.3
Energy Resources Conservation and Development Commission's decisions on application for certification of sites, review of, 27.4
Public Utilities Commission's decisions, review of. See **Public Utilities Commission (PUC)**
State Bar Court disciplinary action, disciplined attorney or chief trial counsel for State Bar filing petition for review of, 27.6
Workers' Compensation Appeals Board, special statutory writ of review for decisions by, 27.7
Filing petition in original proceedings
Content and format of petition, 27.11
Fee for filing petition, 27.10
Timing and procedures for filing, 27.10
Format of petitions. See **Format of Petitions and Other Documents**
Jurisdiction
Grounds for review by California Supreme Court, court of appeal's lack of jurisdiction as, 27.13
Original jurisdiction in writ proceeding (see Original writ petitions, below)
Original writ petitions
Generally, 11.38
Challenge to action by appellate court justice or court of appeal, writ relief from supreme court, 27.9
Distinction between seeking petition for review challenging court of appeal's opinion from petition invoking supreme court's original jurisdiction seeking issuance of prerogative writ of mandate, prohibition, or review, 11.35
Exclusive method of review (see Exclusive method of review, original writ as, above)
Extraordinary circumstances warranting bypassing lower courts, 27.8
Filing petition in original proceedings (see Filing petition in original proceedings, above)
Original jurisdiction in writ proceeding, Supreme Court exercising, 27.2
Petitions for writs
Generally, 27.1
Original writ petitions (see Original writ petitions, above)
Review. See **Review in California Supreme Court**
Supersedeas. See **Supersedeas**
Transfer of case from appellate court to California Supreme Court before decision
Generally, 24.55
Court or party initiating request for transfer, 24.56
Petition requesting transfer, 24.57
Timing of request for transfer, 24.58

Certificates and Certification

Class certification. See **Class Certification**
Court of appeal certifying opinion for publication, 11.32
Filing of certificates (see Interested Entities or Persons, Certificate of, below)
Initiative or referendum petition, certification of. See **Election Processes, Traditional Mandate Challenging**
Interested Entities or Persons, Certificate of
Generally, 18.21
Judicial Council Form APP-008, 28.2
Opposition to writ petition filed in court of appeal, service and filing of certificate, 23.8
Preliminary opposition to writ petition filed in court of appeal, inclusion of certificate in, 21.20
Return to alternative writ in appellate court proceedings, requirements for serving and filing certificate, 23.26A
Sanctions for failing to file certificate. See **Penalties**
Limited jurisdiction civil case, party seeking certification to court of appeal, 12.23
Peremptory writ of mandate or prohibition, clerk of appellate court transmitting certified copy to trial court, 24.40
Question of law, request that trial court certifying existence of, 17.28
Service of certificates (see Interested Entities or Persons, Certificate of, above)
Traditional mandate challenging professional certificating decisions, 2.39

Certiorari in Courts of Appeal. See **Review (Certiorari) in Courts of Appeal**

Certiorari in Superior Court. See **Review (Certiorari) in Superior Court**

Certiorari in U.S. Supreme Court
Challenging court of appeal decision by seeking certiorari in U.S. Supreme Court, 25.31
Review in California Supreme Court, petition for as prerequisite to petitioning U.S. Supreme Court for certiorari, 25.29

Change of Venue. See **Venue**

Charts, Checklists, Questionnaires, and Tables
Court of appeal
Drafting writ petition. See **Drafting Writ Petition for Court of Appeal**
Exhibits, table of, 28.3
Initiating writ proceeding in court of appeal, checklist for petitioner, 18.4
Judgments and orders subject to CCP §917.1-917.9, chart, 26.11
Palma opposition and reply, return and reply, deadlines for filing, 23.51
Rehearing in court of appeal, chart, 25.23
Time for filing petitions, chart, 18.76
Petition for review in California Supreme Court, filing requirements for, 27.28
Superior court
Administrative and traditional mandamus, checklist for choosing between, 3.20
Pitfalls to avoid in writ petitions, checklist of, 5.128
Review method for superior court orders, chart, App A
Sacramento Superior Court guide to procedures for prosecuting petitions for prerogative writs, App B
Stay of proceedings pending writ petition in superior court, checklist for obtaining order, 6.39

Children. See **Parent and Child**

Civil Commitment Proceedings, Habeas Corpus Challenging. See **Habeas Corpus in Superior Court**

Civil Rights
Traditional writ of mandate to enforce, 2.56

Class Certification
Notification issues, 16.129B
60-day rule, applicability of, 16.129C
Standard of review for order on class certification, abuse of discretion as, 16.129A, 16.129D

Coercive Alternative Writ. See **Alternative Writs in Courts of Appeal**

Complaints
Amended complaint, issuance of mandate to compel trial court to permit, 16.106
Combining writ petition with complaint for damages, 5.119
Demurrer. See **Demurrer**

Compliance with Writ
Alternative writ, effect of respondent complying with. See **Alternative Writs of Mandate or Prohibition in Superior Court**

Alternative writ, trial court's compliance with. See **Alternative Writs in Courts of Appeal**
Penalties for noncompliance. See **Enforcement of Writs of Mandate or Prohibition in Courts of Appeal**
Peremptory writ, compliance with See **Enforcement of Writs of Mandate or Prohibition in Superior Court**

Computers and Computer Software
CD-ROM format, filing briefs and records in, 20.11

Confidentiality
Appellate court records, confidentiality of. See **Record in Appellate Court Writ Proceeding**
Information received from client, presumption of confidentiality, 17.11
Record in superior court, protecting confidential documents. See **Record in Superior Court Writ Proceeding**

Conflict of Interest in Representing Client. See **Courts of Appeal**

Consent
Client consenting to payment for legal services by third party, 17.13

Conservatorships and Guardianships
Petition for writ to review conservatorship or guardianship orders, 16.144

Constitutional Law
Administrative mandamus to determine if administrative body exceeded constitutional authority, 3.9
Attorney General, service of writ petition contesting statute's constitutionality on, 18.79
Discovery, writ review of constitutional issues arising during. See **Discovery**
Due process. See **Administrative Mandamus in Superior Court**
Jurisdiction of superior court, challenge based on unconstitutional law. See **Jurisdiction**
Mandate in court of appeal to test statute's constitutionality, 16.90
Prohibition in appellate court to test law's constitutionality, 16.89
Public Utilities Commission's orders, reviewing court's exercise of independent judgment in reviewing constitutional questions involving, 16.43A
Statewide agencies
Certiorari, availability to review adjudicatory decisions of constitutional statewide agencies, 4.15
Prohibition, availability to review adjudicatory decisions of constitutional statewide agencies, 4.6
Statutes allowing appellate review solely by writ petition, constitutionality of, 17.24
Traditional writ of mandate. See **Traditional Mandate in Superior Court**
Workers' compensation legislation, challenging constitutionality of, 16.46

Construction and Interpretation
Statutory time limits for filing writ petition with court of appeal, strict construction of, 17.2

Contempt
Before contempt adjudication, review of order
Newspersons' shield law not providing relief before contempt adjudication, 16.132
Prohibition, seeking writ before contempt adjudication, 16.131
Enforcement of peremptory writ in appellate court by seeking sanctions for contempt, 24.51
Enforcement of writ by superior court, order to show cause re contempt, 10.14
Prohibition, filing writ in appellate court to prevent enforcement of contempt
Defective affidavits, use of prohibition to challenge, 16.139
Payment of fine or completed jail sentence, writ of prohibition unavailable after, 16.137
Prescribed contempt procedures, prohibition restraining court's failure to comply with, 16.138
Prohibition, seeking writ before contempt adjudication, 16.131
Review of judgments and orders in contempt cases
Generally, 16.130, 16.133
Before adjudication (see Before contempt adjudication, review of order, above)
Habeas corpus, review of incarceration by writ of, 15.37, 15.41, 16.136
Mandate, review of contempt order by writ of, 16.140
Prohibition (see Prohibition, filing writ in appellate court to prevent enforcement of contempt, above)
Review (certiorari) in court of appeal, challenging contempt ruling by seeking writ of, 15.37, 16.133, 16.135
Scope of review, 16.134
Standard of review if writ petition accepted, 16.142
Time to file writ petition, 16.141

Coordination of Actions, Appellate Review of Order Concerning. See **Mandate in Courts of Appeal**

Coram Nobis and Coram Vobis

See also **Vacating and Setting Aside**
Generally, 15.44
Case law governing writs, 15.45
Civil cases, availability of writ in, 15.48
Criminal cases, writs used in, 15.46
Requirements for issuance of writ, 15.47

Corporations
Prohibition, applicability to corporations, 4.7
Traditional mandate to compel performance by, 2.38, 2.54
Water corporations, limits on judicial review cases pertaining to, 16.42

Costs
See also **Expenses and Expenditures; Fees**
Appeals, costs on. See **Appeals**
Enforcement of costs award, 24.54
Limited jurisdiction civil cases, prevailing party's entitlement to costs in, 12.25
Prohibition in appellate court to prevent award of costs not provided for by statute, 15.26
Superior court
Appeal of superior court's final decision on writ petition, costs of. See **Appeals**
Items of recoverable costs, statute specifying, 5.122
Prayer for costs in writ petition, 5.61
Prevailing party, recovery of costs by, 5.121
Procedure for claiming costs, 5.123
Record in underlying proceeding, requesting cost estimate for preparation of, 7.16
Separate documents required to recover attorney fees and costs, 5.127
Time limit for filing memorandum of costs, 5.123

Court Clerk
Court of appeal
Mandate. See **Mandate in Courts of Appeal**
Prohibition. See **Prohibition in Courts of Appeal**
Remittitur, clerk's duties regarding, 24.35
Temporary stay order, appellate court clerk notifying trial judge and parties of, 9.40
Superior court
Alternative writ of mandate or prohibition in superior court, petitioner submitting conformed copies for parties to court clerk, 9.40
Ex parte proceeding, scheduling with court clerk, 6.17

Courts of Appeal
See also **Appeals; Superior Court**
Generally, 14.1, 15.1, 22.1
Actions by court of appeal on writ petition
Generally, 25.2
Challenging court's action on writ petition (see Challenging court of appeal's action on writ petition, below)
Types of actions (see Types of action appellate court can take on writ petition, below)
Adequate remedy at law, petitioner's lack of
Generally, 17.30
Appeal as remedy, adequacy as. See **Appeals**
Burden on petitioner to show inadequacy of other remedies, 15.60
Drafting writ petition, facts addressing inadequacy of other remedies at law, 18.34
Drafting writ petition for court of appeal, facts addressing inadequacy of other remedies at law, 18.34
Exclusive means of appellate review, writ proceeding as, 15.59
Review (certiorari), effect of appeal failing to provide plain, speedy, or adequate remedy on right to writ of, 15.34
Alternatives to seeking writ relief, 17.2
Alternative writs. See **Alternative Writs in Courts of Appeal**
Assignment of writ petitions for handling within court of appeal
Generally, 22.2
Fifth District Court of Appeal, 22.7
First District Court of Appeal, 22.3
Fourth District Court of Appeal, 22.6
Second District Court of Appeal, 22.4
Sixth District Court of Appeal, 22.8
Third District Court of Appeal, 22.5
Attorneys

Conflict of interest (see Conflicts of interest, counsel checking for, below)
Cover for writ petition in appellate court, identification of counsel on, 18.17
Disqualification of attorney, writ petition in court of appeal for review of, 17.22
Ethical considerations (see Ethical considerations for appellate specialist, below)
Fees. See **Attorneys' Fees**
Frivolous writ petitions. See **Frivolous Writ Petitions in Courts of Appeal, Sanctions for Filing**
Handling writ proceedings (see Handling appellate court writ proceedings, below)
Preparation of writ petition (see Preparation of writ petition, gathering information for, below)
Beneficial interest in outcome of proceeding, requirement petitioner have
Definition of beneficial interest, 15.51
Nonjudicial action, petitioner challenging in court of appeal, 15.54
Trial court ruling, aggrieved party having beneficial interest in, 15.52
Trial court's lack of beneficial interest in proceeding, 15.55
Underlying action, no requirement petitioner be party in, 15.53
Benefits of seeking writ, 17.34
Burden of proof. See **Burden of Proof**
Certiorari. See **Review (Certiorari) in Courts of Appeal**
Challenging court of appeal's action on writ petition
Generally, 25.11
Certiorari, petitioning U.S. Supreme Court for writ of, 25.31
Discharge of alternative writ, motion for. See **Alternative Writs in Courts of Appeal**
Modification of decision, party seeking (see Modification of court's decision, below)
Rehearing. See **Rehearing in Court of Appeal**
Review by California Supreme Court. See **Review in California Supreme Court**
Conflicts of interest, counsel checking for
Generally, 17.8
Accepting clients with adverse positions on same legal question, conflict arising from, 17.14
Confidential information received from client or former client, conflict arising from, 17.11
Current client, conflict with interests of another, 17.10
Discussion of case, checking for conflicts before, 17.9
Payment for legal services, conflict arising from, 17.13
Potential conflicts, 17.10-17.14
Subject matter of action and relationships, conflict arising from attorney's interest in, 17.12
Contents of petition
Generally, 14.2
Alternative writ, contents of, 22.25
Drafting petition. See **Drafting Writ Petition for Court of Appeal**
Opposition to writ petition. See **Opposition to Writ Petition Filed in Court of Appeal**
Rehearing, contents of petition for, 25.20
Reporter's transcript, appellate court writ petition accompanied by copy of, 17.18
Supersedeas. See **Supersedeas**
Coram vobis. See **Coram Nobis and Coram Vobis**
Costs. See **Costs**
Court clerk. See **Court Clerk**
Decision on merits. See **Decision on Merits**
Declarations. See **Affidavits and Declarations**
Denial of writ. See **Denial of Writ by Appellate Court**
Determining appealability of challenged order or ruling
Correctness of order, presumption affecting, 20.4
Exception to presumption against writ relief for appealable orders, 17.22
Unavailability of writ relief if order appealable, presumption of, 17.21
Discretion of court. See **Discretion of Court**
Distinguishing appellate and superior court writ proceedings, 14.1
Ethical considerations for appellate specialist
Client's awareness of appellate counsel's involvement in case, appellate counsel's duty to ensure, 17.6
Competent representation, duty to provide, 17.5
Conflicts of interest (see Conflicts of interest, counsel checking for, above)
Exclusive means of appellate review, writ proceeding as
Generally, 15.59
Arbitration, review of order compelling, 16.100
Statutes specifying use of writ petition. See **Statutes Specifying Use of Writ Petition to Obtain Appellate Review**
Exhibits. See **Exhibits**
Extraordinary circumstances requiring filing both writ and appeal, 16.152
Extraordinary relief, determining if appellate court likely to grant
Generally, 17.27

Adequate remedy at law, effect of existence or lack of, 17.30
Denial of writ. See **Denial of Writ by Appellate Court**
Important issue, necessity of writ relief to decide, 17.32
Irreparable injury, effect of petitioner facing, 17.31
Merits of petition, review on, 17.29
Standard of appellate review, 17.33
Filing writ petition in
Generally, 11.37, 17.1
Alternative writ in court of appeal, filing petition for, 22.26
Fee for filing, 18.84
Frivolous writ petitions. See **Frivolous Writ Petitions in Courts of Appeal, Sanctions for Filing**
Information sheet (Fifth District), filing with writ petition, 18.83
Jurisdiction over trial court, filing writ petition with appellate district having, 18.85
Locations of courts of appeal, 18.87
Lowest court capable of granting relief, filing writ petition in, 18.86
Original and copies of petition and supporting memorandum, filing requirements for, 18.81
Preliminary opposition to writ petition. See **Preliminary Opposition to Writ Petition Filed in Appellate Courts**
Record, filing of, 18.82, 20.16
Rehearing in court of appeal, filing petition for, 25.19
Return to alternative writ. See **Return to Alternative Writ in Appellate Court Proceedings**
Supersedeas, filing petition for writ of. See **Supersedeas**
Time limits for filing writ petition. See **Time**
Finality of court's decision. See **Finality of Court of Appeal's Decision**
Format of petitions. See **Format of Petitions and Other Documents**
Habeas corpus. See **Habeas Corpus in Courts of Appeal**
Handling appellate court writ proceedings
Generally, 17.3
Allocation of responsibility between trial and appellate counsel, 17.7
Assignment of writ petitions (see Assignment of writ petitions for handling within court of appeal, above)
Conflicts of interest (see Conflicts of interest, counsel checking for, above)
Ethical considerations for appellate specialist (see Ethical considerations for appellate specialist, above)
Ethical considerations for trial counsel, 17.4
Information sheet for appellate court writ (Fifth District), 18.83, 28.22
Initiating writ petition in court of appeal
Generally, 18.1-18.2
Checklist for petitioner, 18.4
Determining most appropriate writ to file, 18.3
Drafting writ petition. See **Drafting Writ Petition for Court of Appeal**
Time to file writ petition. See **Time**
Wrong type of writ, effect of requesting, 18.3
Irreparable injury, requirement petitioner facing
Generally, 15.61
Burden on petitioner to show irreparable injury, 15.65
Erroneous and substantially prejudicial ruling by trial court, 15.64
Extraordinary relief, effect of petitioner facing irreparable injury on appellate court granting, 17.31
Present case, trial court's ruling depriving petitioner of opportunity to present case, 15.63
Specific and immediate harm, 15.62-15.64
Judicial notice. See **Judicial Notice**
Jurisdiction of. See **Jurisdiction**
Mandate. See **Mandate in Courts of Appeal**
Memorandum. See **Memorandum in Support or Opposition**
Modification of court's decision
Finality of court's decision, effect of order modifying substance of opinion on, 25.6, 25.9, 25.15
Methods for requesting modification of decision, 25.15
Rehearing to seek modification of court's decision. See **Rehearing in Court of Appeal**
Mootness of issue, effect on writ relief
Generally, 15.66
Public interest in issue, court hearing case despite mootness of issue, 15.67
Nonstatutory writ relief. See **Discretion of Court**
Notice. See **Notice and Notification**
Opinion by appellate court. See **Opinion by Appellate Court Granting or Denying Writ Petition**
Opposition to writ petition. See **Opposition to Writ Petition Filed in Court of Appeal**
Oral argument. See **Oral Argument in Appellate Court**
Orders
Alternative writs. See **Alternative Writs in Courts of Appeal**

Appeal from final order. See **Appeals**
Copy of order to be challenged, obtaining copy of, 17.15
Finality of court's decision, effect of order modifying substance of opinion on, 25.6, 25.9, 25.15
Mandate, appellate court order directing issuance of peremptory writ of, 24.37, 28.13
Palma notice, 28.7
Preliminary research on challenged order or ruling (see Preliminary research on challenged order or ruling, below)
Presumption affecting correctness of, 20.4
Stay of proceedings by appellate court, order for. See **Stay of Proceedings by Appellate Court**
Supersedeas, order granting petition for writ of, 28.19
Temporary stay order, court's issuance of. See **Stay of Proceedings by Appellate Court**
Time period to file writ petition in court of appeal, entry of order triggering, 18.70
Preliminary opposition. See **Preliminary Opposition to Writ Petition Filed in Appellate Courts**
Preliminary research on challenged order or ruling
Appealability of order or ruling (see Determining appealability of challenged order or ruling, above)
Calculating deadline for filing writ petition, 17.26
Statute providing for writ review. See **Statutes Specifying Use of Writ Petition to Obtain Appellate Review**
Preparation of writ petition, gathering information for
Declaration explaining absence of transcript of proceedings in lower court, 17.19
Order to be challenged, obtaining copy of, 17.15
Register of actions, obtaining copy of, 17.16
Relevant pleadings and trial court documents, counsel identifying and reviewing, 17.17
Reporter's transcript, obtaining copy of, 17.18
Sample writ petition, counsel obtaining from another case, 17.20
Presumptions (see Determining appealability of challenged order or ruling, above)
Procedures for prosecuting appellate court writs, 14.2
Prohibition. See **Prohibition in Courts of Appeal**
Public Utilities Commission's decisions, review of. See **Public Utilities Commission (PUC)**
Record in appellate court writ proceeding. See **Record in Appellate Court Writ Proceeding**
Rehearing in court of appeal. See **Rehearing in Court of Appeal**
Requirements for writ relief
Adequate remedy at law (see Adequate remedy at law, petitioner's lack of, above)
Beneficial interest (see Beneficial interest in outcome of proceeding, requirement petitioner have, above)
Irreparable injury (see Irreparable injury, requirement petitioner facing, above)
Mootness of issue (see Mootness of issue, effect on writ relief, above)
Omaha factors, 15.69-15.71
Raising issue in trial court as prerequisite for writ relief, 15.68
Standing (see Standing to seek writ, below)
Trial courts reaching conflicting results, effect of, 15.71
Widespread public importance or first impression, issue one of, 15.70
Return to writ. See **Return to Alternative Writ in Appellate Court Proceedings**
Review in California Supreme Court. See **Review in California Supreme Court**
Review. See **Review (Certiorari) in Courts of Appeal**
Risks of seeking writ, 17.35
Rules of court. See **Rules of Court**
Seeking relief directly from court of appeal, 25.3
Service of papers. See **Service of Process and Papers**
Standing to seek writ
Allegation in petition for writ in court of appeal concerning petitioner's standing, 18.28
Beneficial interest (see Beneficial interest in outcome of proceeding, requirement petitioner have, above)
Disqualification of judge, standing to file petition for writ of mandate for review of, 16.4
Rehearing in court of appeal, standing to seek, 25.18
Return, standing to file in appellate court. See **Return to Alternative Writ in Appellate Court Proceedings**
Statutes specifying use of writ petition. See **Statutes Specifying Use of Writ Petition to Obtain Appellate Review**
Stay of proceedings. See **Stay of Proceedings by Appellate Court**
Supersedeas. See **Supersedeas**
Time. See **Time**
Transcript (see Preparation of writ petition, gathering information for, above)
Transfer of case to California Supreme Court before decision. See **California Supreme Court**
Trial counsel (see Handling appellate court writ proceedings, above)
Types of action appellate court can take on writ petition
Generally, 22.9
Alternative writs. See **Alternative Writs in Courts of Appeal**
Palma notice, issuance of. See ***Palma* Notice**
Summary denial of writ. See **Denial of Writ by Appellate Court**
Temporary stay order, court's issuance of. See **Stay of Proceedings by Appellate Court**

Verification of writ petition. See **Verification**

Criminal Law
See also **Prison and Prisoners**
Coram nobis and coram vobis, 15.46
Habeas corpus, 15.40

Damages
Combining writ petition with complaint for damages, 5.119
Drafting writ petition in superior court, allegations concerning damages, 5.57
Sanctions for filing frivolous writ petition, damages awarded as, 24.65

Deadlines. See **Time**

Decision on Merits
Finality of court's decision. See **Finality of Court of Appeal's Decision**
Law of case, decision on merits creating, 25.13

Declarations. See **Affidavits and Declarations**

Declaratory Relief
Verified writ petition for alternative writ of mandate and verified complaint for declaratory relief, 13.1

Defamation
Mandate nullifying trial court's order requiring production of newsperson's notes in libel action, 16.121

Default
Alternative writ of mandate or prohibition, superior court prohibited from issuing by default, 9.25
Prohibition to prevent court from proceeding if defendant failed to answer and plaintiff requests default judgment, 15.26

Defenses to Writ Petition
Affirmative defenses
Failure to raise affirmative defenses in answer in superior court, effect of, 8.48
Return to alternative writ. See **Return to Alternative Writ in Appellate Court Proceedings**
Laches, 3.19
Unclean hands, 7.8

Definitions
Abuse of discretion, 15.11
Actions, 5.5
Administrative mandamus, 3.2
Administrative record, 3.7
Alcoholic Beverage Control Appeals Board, 16.22
Alternative writ, 22.23
Ancillary matters, 26.14
Answer, 8.2, 8.45
Bad facts, 18.55
Beneficial interest, 2.12
Beneficial interest in outcome of proceeding, 15.51
Beneficially interested party, 15.51
Civil case, 5.5
Coercive writ, 22.23
Collateral maters, 26.14
Discretion of public functionaries, 2.7
Docket sheet, 17.16
Extra-record evidence, 7.9
Final order, 11.9
Formal return (court of appeal), 23.27
Grant and hold, 25.28
Injunction, 4.33
Judgment (in writ proceedings), 11.5
Jurisdictional error, 4.3
Jurisdiction, lack of, 26.6
Limited jurisdiction civil case, 12.2

Lodged with court, 20.26
Mandate, 15.3
Ministerial act, 2.6, 15.7
Ministerial duty, 2.6, 2.19, 15.7
Motion, 6.10
Nonjudicial action, 15.54
Notice of motion, 5.89
Opposition (court of appeal), 23.2
Opposition memorandum, 8.2
Opposition to application for alternative writ, 8.2
Ordinary mandate, 2.1
Palma notice, 21.5, 22.18
Petitioner, 5.32, 18.18
Postcard denial, 22.14
Preliminary opposition (court of appeal), 23.2
Prohibition, writ of, 15.14
Real party in interest, 18.18
Register of actions, 17.16
Remittitur, 11.33, 24.31
Replication, 8.2
Reply (court of appeal), 23.2
Reply memorandum, 8.2
Reply to return, 23.49
Respondent, 5.33, 18.18
Responsive pleading, 8.6
Return (court of appeal), 23.2, 23.20, 23.46
Return (superior court), 8.2
Return filed after issuance of peremptory writ, 10.3
Speaking alternative writ, 22.23
Statutory writs, 16.53
Substantial evidence, 3.15
Summary denial of writ, 22.14
Superior court appellate division, 12.4
Supersedeas, writ of, 26.2
Temporary restraining order (TRO), 6.31
Traverse (court of appeal), 23.2
Without or in excess of jurisdiction, 15.23
Writ petition, 18.77

Demurrer
Answer in superior court
Filing answer in conjunction with demurrer, 8.44
Overruling demurrer, time limit for filing answer after, 8.43
Basis for demurrer, 8.41
Dismissal of action
Order for dismissal with or without leave to amend, court sustaining demurrer by entering, 8.42
Sustaining demurrer without leave to amend, appeal from resulting judgment of dismissal as adequate remedy, 16.110
Legal sufficiency of writ petition, demurrer testing, 8.40
Mandate, demurrer to petition for writ of. See **Mandate in Superior Court**
Return to alternative writ in appellate court, demurrer as. See **Return to Alternative Writ in Appellate Court Proceedings**
Return to alternative writ in appellate division of superior court, demurrer as, 12.15
Review (certiorari) in court of appeal, demurrer to petition for, 23.47
Rulings on demurrer, writ petition to review
Overruling demurrer in entirety, writ review of order, 16.108
Standard of review if writ petition accepted, 16.111
Sustaining demurrer to only part of complaint or answer, availability of writ relief, 16.109
Sustaining demurrer without leave to amend, appeal from resulting judgment of dismissal as adequate remedy, 16.110

Denial of Writ by Appellate Court
See also **Opinion by Appellate Court Granting or Denying Writ Petition**
Alternative writs. See **Alternative Writs in Courts of Appeal**
Discharge of alternative writ resulting in denial of petition, 24.6, 25.14
Insufficient record as grounds for, 20.4
Mandate to review denial of motion to dismiss. See **Mandate in Courts of Appeal**
Palma notice, appellate court denying petition after issuance of, 24.3

Postcard denial (see Summary denial, below)
Rate of denial, 14.1, 15.4
Summary denial
Generally, 17.28, 22.15
Defined, 22.14
Finality of court's order denying writ, 25.5
Format for summary denial order, 22.16
Grounds for, 17.28
Law of case, summary denial not establishing, 22.17
Oral argument, lack of, 22.15
Rehearing in court of appeal, unavailability after summary denial, 25.16
Remittitur not required after, 24.32
Review of denial by petitioning California Supreme Court for review, 25.11, 25.30
Sample form, 28.5
Time limit for petitioning for review by California Supreme Court, 25.30
Verification of petition
Information and belief, denial of petition if verification based on, 18.43
Lack of verification resulting in denial of petition, 18.42

Denial of Writ in Superior Court
Adequate record, lack of as grounds for denial of writ, 7.3, 12.8
Alternative writs. See **Alternative Writs of Mandate or Prohibition in Superior Court**
Appeal from order granting or denying writ. See **Appeals**
Traditional mandate, loss of beneficial interest during proceeding resulting in denial of writ, 2.14

Department of Motor Vehicles (DMV)
Traditional mandate to review DMV suspension or revocation of license, 2.40

Depublication of Opinion. See **Publication of Opinion**

Disabled Persons, Habeas Corpus Challenging Commitment of. See **Habeas Corpus in Superior Court**

Discharge of Alternative Writ. See **Alternative Writs in Courts of Appeal**

Disclosure
Attorney's disclosure to client of interest in subject matter of representation or relationship with other parties and witnesses, 17.12

Discovery
Constitutional issues arising during discovery, writ review of
Generally, 16.117
Privacy rights, effect of, 16.118
Motion for, 8.55
Petition for writ review of discovery order
Generally, 16.115
Constitutional issues (see Constitutional issues arising during discovery, writ review of, above)
Denying discovery, mandate for review of order, 16.123
Grant of discovery, availability of writ review in actions involving, 16.124
Privilege (see Privileged communications, writ review of discovery orders affecting, below)
Recurring procedural issues, effect of, 16.119
Sanctions (see Sanctions, writ review of order imposing, below)
Significant issues of first impression, effect of discovery order presenting, 16.116
Standard of review if writ petition accepted, 16.129
Time to file writ petition, 16.128
Privileged communications, writ review of discovery orders affecting
Generally, 16.120
Attorney-client privilege and work product doctrine, writ review of discovery order impacting, 16.122
Examples of writ review of privilege issues, 16.121
Requesting stay in connection with filing writ petition for review of discovery order requiring disclosure of privileged information, 16.118
Sanctions, writ review of order imposing
Generally, 16.125
$5000 or less, review of discovery sanctions of, 16.126
Greater than $5000, review of discovery sanctions of, 16.127

Discretion of Court
See also **Abuse of Discretion**
Court of appeal
Abuse of discretion, appellate review of. See **Abuse of Discretion**
Appellate division of superior court's judgment granting or denying writ petition, court of appeal's discretion to review. See **Limited Jurisdiction Civil Cases**
Costs, appellate court's discretion to award, deny, or apportion, 11.33, 24.23
Erroneous appeal, appellate court's discretion to treat as writ petition, 12.19
Finality of court of appeal's decision, discretion of court to shorten time for, 25.7
Mandate. See **Mandate in Courts of Appeal**
Nonstatutory writ relief (see Nonstatutory writ relief, appellate court's discretion to consider writ petition on the merits, below)
Petition for writ filed in appellate court more than 60 days after issuance of challenged ruling, court's discretion to consider, 18.68
Public Records Act, limits on appellate court's discretion to deny writ petition for review of trial court order under, 16.15
Remittitur, court's discretion to order immediate issuance on parties' stipulation, 24.34
Stay of proceedings, appellate court's discretion to require undertaking, 19.10
Supersedeas relief, discretion of appellate court to grant. See **Supersedeas**
Nonstatutory writ relief, appellate court's discretion to consider writ petition on the merits
Generally, 16.86
Arbitration issues. See **Arbitration**
Attorneys, orders concerning. See **Attorneys**
Contempt. See **Contempt**
Demurrer. See **Demurrer**
Discovery order. See **Discovery**
Dismissal of action. See **Dismissal of Actions**
Guardianship and conservatorship orders, petition for review of, 16.144
Injunctions. See **Injunctions**
In limine motions. See **In Limine Motions, Writ Petition Challenging Ruling on**
Jurisdiction. See **Jurisdiction**
Jury trial, review order requiring. See **Jury Trial**
Pleadings. See **Pleadings**
Probate orders, writ of review (certiorari) for reviewing, 16.143
Time to file nonstatutory writ petition, 16.87, 16.129C
Superior court
Abuse of discretion. See **Abuse of Discretion**
Alternative writ of mandate or prohibition in superior court. See **Alternative Writs of Mandate or Prohibition in Superior Court**
Stay of proceedings, discretion of court regarding. See **Stay of Proceedings Pending Writ Petition in Superior Court**
Supreme Court's discretion to grant petitions for review. See **Review in California Supreme Court**

Dismissal of Actions
Abuse of discretion as standard for reviewing order denying motion for mandatory dismissal, 16.114
Alternative writ of mandate or prohibition, dismissal of petition as result of respondent complying with, 8.33
Demurrer. See **Demurrer**
5-year period for bringing action to trial, effect of temporary stay on, 22.10
Mandate to overturn order denying dismissal. See **Mandate in Courts of Appeal**
Motion to dismiss in response to writ petition, 8.51
Remittitur, discretion of court to order immediate issuance on dismissal of proceeding, 24.34

Disqualification
Attorney disqualification
Appellate review of, 16.102, 16.104, 17.22
Petition for writ to review, 16.102
Judges. See **Mandate in Courts of Appeal**

DMV. See **Department of Motor Vehicles (DMV)**

Drafting Writ Petition for Court of Appeal
Contents of petition
Allegations (see Enumerated allegations, below)
Certificate of interested parties or persons, 18.21
Introductory statement, 18.24
Memorandum (see Memorandum in support of petition, below)
Prayer for relief (see Prayer for relief, below)
Record attached to petition, 18.57

Stay request. See **Stay of Proceedings by Appellate Court**
Table of authorities, 18.23
Table of contents, 18.22
Verification of petition. See **Verification**
Cover (caption) page
Generally, 18.12
Case number, 18.16
Counsel, identification of, 18.17
Parties, identification of, 18.18
Related pending appeal, cover indicating, 18.20
Stay, request for, 18.19, 19.9, 19.11
Title of court, 18.14
Title of document, 18.13
Trial court information, 18.15
Enumerated allegations
Generally, 18.25
Factual allegations (see Factual allegations, below)
Jurisdiction of appellate court, allegation concerning, 18.27
Prior petitions, 18.29
Related pending appeal, allegations stating information about, 18.26
Standing of petitioner, 18.28
Factual allegations
Generally, 18.30
Inadequacy of other remedies at law, facts addressing, 18.34
Material facts, inclusion of, 18.32
Preservation of issues in trial court, facts showing, 18.35
Procedural facts, concise statement of, 18.31
Stay, factual allegations supporting request for, 18.59, 19.15
Timeliness of petition, facts showing, 18.33
Format requirements
Generally, 18.5
Binding, 18.11
Length of petition, 18.8-18.9
Page layout, 18.10
Production and legibility of petition, 18.7
Typeface, 18.9
Type of paper, 18.6
Memorandum in support of petition
Generally, 18.49
Contents of, 18.52-18.56
Exemplar headings, 18.51
Introduction, 18.52
Legal argument, 18.54-18.56
Legal authority, citation of, 18.56
Organization of supporting memorandum into headings or subheadings, 18.50
Persuasive arguments, 18.55
Statement of facts, 18.53
Prayer for relief
Generally, 18.36
Alternative writ or order to show cause, petitioner seeking, 18.39
Costs and other relief, request for, 18.41
Immediate stay, petitioner seeking, 18.37
Peremptory writ in first instance, petitioner seeking, 18.38
Review (certiorari), petitioner seeking, 18.40
Related pending appeal
Allegations stating information about, 18.26
Cover page indicating, 18.20
Supporting documents, 18.8
Tables (see Contents of petition, above)
Time for filing writ petition. See **Time**

Drafting Writ Petition for Superior Court
Generally, 5.20
Adequate legal remedy, allegations concerning lack of
Absence or inadequacy of other remedies, 5.54

Mandate and prohibition, lack of adequate legal remedy at law as prerequisite for, 5.53
Alternative forms of writ relief (see Requesting alternative forms of writ relief, below)
Basis for challenging action
Generally, 5.49
Mandate, specific allegations required for, 5.50
Prohibition, specific allegations required for, 5.51
Review (certiorari), specific allegations required for, 5.52
Contents of petition
Enumerated allegations (see Enumerated allegations, below)
Exhibits, 5.29, 5.70
Opening paragraph, 5.38
Signature block, 5.63
Stay, request for, 5.39, 5.58
Verification (see Verification of petition, below)
Description of challenged action and factual background
Legal basis for relief, relating factual allegations to, 5.48
Statement of facts, 5.46
Supporting citations, use of, 5.47
Designation of parties
Petitioner, 5.32
Real party in interest (see Real party in interest, below)
Respondent, 5.33
Enumerated allegations
Generally, 5.40
Adequate legal remedy (see Adequate legal remedy, allegations concerning lack of, above)
Basis for challenging action (see Basis for challenging action, above)
Damages, allegations concerning, 5.57
Description of challenged action (see Description of challenged action and factual background, above)
Exhaustion of administrative remedies, 5.55, 5.56
Identity of parties (see Identity of parties, below)
Legal basis for relief, relating factual allegations to, 5.48
Nonjudicial action, petition challenging, 5.44
Factual background (see Description of challenged action and factual background, above)
Format requirements
Generally, 5.21
Binding, 5.27
Exhibits, attachment of, 5.29
First (caption) page, requirements for, 5.31
Footer, 5.30
Hole punching, 5.28
Line numbers, 5.25
Margins, 5.24
Page numbers, 5.26
Type and size of paper, 5.23
Typewritten or printed papers, 5.22
Identity of parties
Ongoing administrative proceeding, petitioner as party to, 5.45
Real party in interest, allegation concerning, 5.43
Respondent, 5.42
Petitioner
Allegation concerning, 5.41
Designation of, 5.32
Prayer for relief
Generally, 5.59
Costs and attorney fees, 5.61
Other appropriate relief, request for, 5.62
Types of relief, 5.60
Real party in interest
Allegation concerning, 5.43
Determining existence of, 5.34
Notice and hearing, real party in interest's right to, 5.35
Requesting alternative forms of writ relief
Pleading and praying for different forms of writ relief, 5.37
Selection of wrong writ, effect of, 5.36
Respondent

Allegation concerning, 5.42
Designation of, 5.33
Verification of petition
Generally, 5.64
Attorney, verification by, 5.67
Defects in verification, opposing party challenging, 5.68
Personal knowledge, verification based on, 5.66
Petitioner, verification by, 5.67
Public entities' exemption from verification requirements, 5.65
Sample form, 5.69

Due Process. See **Administrative Mandamus in Superior Court**

Education. See **Schools**

Election Processes, Traditional Mandate Challenging
Generally, 2.45
Initiative or referendum petition, certification of
Placement of initiative or referendum on ballot, mandate challenging, 2.46
Pre- or post-election review of initiative, 2.48
Process initiative petition, compelling election officials to, 2.47
Reapportionment and redistricting, mandate challenging, 2.44

Employers and Employees
Public employees. See **Public Entities and Officials**
Workers' Compensation Appeals Board (WCAB). See **Workers' Compensation Appeals Board (WCAB), Petition for Review of Decisions by**

Energy Resources Conservation and Development Commission, Review of Decisions by. See **Review in California Supreme Court**

Enforcement of Judgment. See **Judgments**

Enforcement of Writs of Mandate or Prohibition in Courts of Appeal
Duty of respondent to comply with writ, 24.46
Penalties for noncompliance with writ (see Remedies if respondent refuses to comply with writ, below)
Procedure for compelling compliance with writ
Challenging respondent's return, 24.52
Motion for remedies or filing new writ petition seeking enforcement of original writ, 24.51
Remedies if respondent refuses to comply with writ
Challenging respondent's return, 24.52
Fine for noncompliance with writ, 24.49
Imprisonment of respondent or real party in interest for failure to comply with writ, 24.50
Orders for enforcement of writ, court issuing, 24.48
Possible remedies, 24.47-24.50
Procedure for compelling compliance (see Procedure for compelling compliance with writ, above)
Return to peremptory writ, respondent filing
Generally, 24.43
Challenging respondent's return, 24.52
Contents of return, 24.45
Mandatory filing of return, no requirement of, 24.44
Sample form, return to petition for writ of mandate, prohibition, or other alternative relief, 28.11

Enforcement of Writs of Mandate or Prohibition in Superior Court
Generally, 10.1
Certiorari. See **Review (Certiorari) in Superior Court**
Compliance with peremptory writ
Obligation to comply with peremptory writ of mandate or prohibition, 10.2
Penalties for noncompliance (see Penalties for noncompliance, below)
Return regarding compliance (see Return regarding compliance, respondent filing, below)
Contents of return
Generally, 10.4
Failure of respondent or real party in interest to comply with writ, contents of return if, 10.7
Full compliance with writ by respondent or real party in interest, contents of return if, 10.5

Partial compliance with writ by respondent or real party in interest, contents of return if, 10.6
Jurisdiction to enforce writ, court's retention of, 10.11
Laying foundation for, 9.46
Methods of enforcing writ
Contempt, order to show cause re, 10.14
Motion to enforce compliance, 10.13
New or supplemental writ petition, 10.15
Penalties for noncompliance
Generally, 10.16
Contempt, order to show cause re, 10.14
Fine for noncompliance, 10.18
Imprisonment of respondent, court ordering, 10.19
Order for enforcement of writ, court issuing, 10.17
Personal service of writ on petitioner as prerequisite for enforcement, 10.12
Return regarding compliance, respondent filing
Generally, 10.3
Acceptable reasons for not complying with writ, 10.8
Challenging return, 10.10
Contents of return (see Contents of return, above)
Definition of return, 10.3
Financial burden not acceptable reason for noncompliance with peremptory writ, 10.9
Review. See **Review (Certiorari) in Superior Court**

Ethics. See **Legal Ethics**

Evidence
Administrative mandamus. See **Administrative Mandamus in Superior Court**
Alternative writ, parties' right to present evidence concerning factual disputes at hearing on petition for. See **Alternative Writs of Mandate or Prohibition in Superior Court**
Enforcement of peremptory writ by superior court, petitioner's evidence supporting motion for, 10.13
Hearsay, declaration made on information and belief constituting, 18.46
Judicial notice. See **Judicial Notice**
Noticed motion in superior court, citations to evidence in memorandum in support of, 5.99
Noticed motion in superior court for writ, citations to evidence in supporting memorandum, 5.99
Public Utilities Commission (PUC), prohibition against introducing new or additional evidence in writ proceeding reviewing decisions by, 16.43
Record in superior court writ proceedings, inclusion of evidence in. See **Record in Superior Court Writ Proceeding**
Replication (reply) made by evidence presented at hearing, requirement of advance notice if, 8.60
Substantial evidence defined, 3.16
Verification of supplemental evidence in writ petition, 18.46

Execution, Writ of
Superior court issuing writ of, 4.30

Exhaustion of Administrative Remedies
Drafting writ petition for superior court, allegations concerning exhaustion of administrative remedies, 5.55, 5.56
Quasi-judicial agency decisions, exhaustion of administrative remedies as prerequisite for seeking review of, 2.34

Exhaustion of State Court Remedies
Seeking review in California Supreme Court for purposes of exhausting state remedies, 25.29

Exhibits
Court of appeal
Record in appellate court writ proceeding, separate volume for exhibits, 20.11
Return to alternative writ in appellate court, exhibits supporting, 23.38
Table of exhibits, 28.3
Superior court
Alternative writs of mandate or prohibition in superior court, exhibits supporting petition for, 5.111
Attachment of exhibits, 5.29, 5.70
Format requirements for exhibits, 5.29
Limited jurisdiction civil cases. See **Limited Jurisdiction Civil Cases**
Noticed motion for writ in superior court, exhibits supporting, 5.101
Record in superior court writ proceedings. See **Record in Superior Court Writ Proceeding**

Ex Parte Proceedings

Alternative writ of mandate or prohibition, ex parte application for. See **Alternative Writs of Mandate or Prohibition in Superior Court**
Appearance
Noticed motion for writ in superior court, no requirement of ex parte appearance, 5.11
Personal appearance by petitioner or counsel at ex parte hearing on alternative writ of mandate or prohibition in superior court, 5.116
Court clerk, scheduling ex parte proceeding with, 6.17
Stay, application for. See **Stay of Proceedings Pending Writ Petition in Superior Court**
TRO. See **Temporary Restraining Order (TRO)**

Expenses and Expenditures
See also **Costs; Fees**
Adequate remedy at law, effect of expenditure of time and money on determining existence of, 17.30

Expungement of Lis Pendens, Appellate Review of Order for. See **Mandate in Courts of Appeal**

Extension and Shortening of Time
Court of appeal
Change of venue order, extension of time to file writ petition under CCP §400 for review of, 16.64
Expiration of deadline for filing writ petition in court of appeal, requesting extension of time before, 18.63
Finality of court of appeal's decision, discretion of court to shorten time for, 25.7
Good faith settlement determination, extension of time to file writ petition to review grant or denial of motion for, 16.50
Mandate. See **Mandate in Courts of Appeal**
Maximum number of days to file writ petition in court of appeal, inapplicability of extension of time under CCP §1013, 18.65
Opinion by appellate court granting or denying writ petition, extension of time for issuance of, 24.18
Opposition to writ petition filed in court of appeal, extension of time to file. See **Opposition to Writ Petition Filed in Court of Appeal**
Points and authorities in opposition, real party in interest or respondent filing, 21.14
Preliminary opposition, extension of time to file, 21.15
Quash service of summons, stay or dismiss for inconvenient forum, or dismiss for delay in prosecution, extension of deadline for filing writ of mandate to overturn order denying motion for, 16.55
Reclassify action or proceeding, extension of time to file writ petition for review of order granting or denying motion to, 16.59
Reply (traverse) to return in appellate court, extension of time to file, 23.50
Return to alternative writ in appellate court, extension of time to file, 23.41
Statutory deadline for filing writ petition, extension of, 17.26
Summary judgment order, extension of time to file writ petition for review of, 16.76
Notice of appeal, time limit for filing not extended by filing writ petition in court of appeal, 11.37
Review in California Supreme Court. See **Review in California Supreme Court**
Superior court
Memorandum of costs, extension of time to file, 5.123
Responsive pleading, stipulation or application for extension of time to file, 8.10

Extraordinary Writs
Mandate. See **Mandate in Courts of Appeal; Mandate in Superior Court**
Prohibition. See **Prohibition in Courts of Appeal; Prohibition in Superior Court**
Public Records Act. See **Public Records Act**
Review (certiorari). See **Review (Certiorari) in Courts of Appeal; Review (Certiorari) in Superior Court**

Family Law
Petition for writ review of family law and dependency matters, 16.143A

Fees
See also **Costs; Expenses and Expenditures**
Alternative writs of mandate or prohibition in superior court, filing fee for opposition to application for, 8.29
Attorney fees. See **Attorneys' Fees**
California Supreme Court, fee for filing original writ petition in, 27.10
Court of appeal, fee for filing writ petition in, 18.84
Noticed motion for writ in superior court. See **Noticed Motion in Superior Court**
Peremptory writ, filing fee for, 9.41
Preliminary opposition to writ petition, no filing fee for, 21.19
Responsive pleadings. See **Responsive Pleadings**
Supersedeas petition, lack of filing fee for, 26.27

Filing of Petitions

California Supreme Court, filing petition in original proceedings. See **California Supreme Court**
Court of appeal, filing writ petition in. See **Courts of Appeal**
Fees for filing. See **Fees**
Limited jurisdiction civil cases. See **Limited Jurisdiction Civil Cases**
Preliminary opposition. See **Preliminary Opposition to Writ Petition Filed in Appellate Courts**
Review in California Supreme Court. See **Review in California Supreme Court**
Service of petition. See **Service of Process and Papers**
Stay application and writ petition, filing in superior court, 6.17
Superior court, filing writ petition in. See **Superior Court**

Finality of Court of Appeal's Decision
Decision on merits
Discretion of court to shorten time for finality of decision, 25.7
30 days, finality of decision after, 25.6
Weekend or holiday, effect of end of 30-day period falling on, 25.8
Determining when court's action on writ petition becomes final, importance of, 25.4
Jurisdiction of court, effect of finality on, 25.3
Post-decision actions affecting finality date
Modification of decision, 25.6, 25.9, 25.15
Publication of decision, 25.6, 25.10
Summary denial of writ petition, immediate finality of order, 25.5

Findings
Deferential substantial evidence standard, court of appeal reviewing superior court's factual findings under, 11.16
Prejudicial abuse of discretion by administrative body, review of. See **Administrative Mandamus in Superior Court**

Foreign Languages. See **Translations**

Format of Petitions and Other Documents
California Supreme Court
Content and format of petition to, 27.11
Review in California Supreme Court. See **Review in California Supreme Court**
Court of appeal
Drafting writ petition for court of appeal, format requirements. See **Drafting Writ Petition for Court of Appeal**
Opposition to writ petition. See **Opposition to Writ Petition Filed in Court of Appeal**
Preliminary opposition. See **Preliminary Opposition to Writ Petition Filed in Appellate Courts**
Record in appellate court, format of. See **Record in Appellate Court Writ Proceeding**
Rehearing in court of appeal, formation of petition for, 25.21
Return to alternative writ. See **Return to Alternative Writ in Appellate Court Proceedings**
Summary denial of writ by appellate court, format for order, 22.16
Supersedeas, petition and opposition to, 26.26, 26.29
Superior court
Drafting writ petition. See **Drafting Writ Petition for Superior Court**
Limited jurisdiction civil cases. See **Limited Jurisdiction Civil Cases**
Noticed motion. See **Noticed Motion in Superior Court**
Record in superior court writ proceedings. See **Record in Superior Court Writ Proceeding**

Frivolous Writ Petitions in Courts of Appeal, Sanctions for Filing
Generally, 17.35, 24.60
Opposition to sanctions motion, 24.62
Party or attorney, sanctions awarded against, 24.61
Procedure for obtaining sanctions, 24.62
Risk of filing appellate court writ petition, sanctions for filing frivolous petition as, 17.35
Stay, sanctions for frivolous request for, 19.7
Types of sanctions
Attorney fees or damages, award of, 24.65
Costs, award or denial of, 24.64
Striking opposing party's petition or pleading, 24.63

Good Faith
Settlement in good faith, review of trial court's determination of. See **Settlement**

Government Claims Act
Demurrer to complaint failing to plead facts demonstrating or excusing compliance with claim presentation requirement of,

16.108

Guardianships. See **Conservatorships and Guardianships**

Habeas Corpus in Courts of Appeal
Generally, 15.39
Alternatively requesting review or habeas relief, 15.37
Civil proceedings
Child custody proceedings, availability of habeas corpus in, 15.42
Commitment to psychiatric facility, petitioner challenging, 15.43
Contempt, petition for habeas if wrongfully imprisoned for, 15.37, 15.41, 16.136
Criminal cases, use of habeas corpus in, 15.40
Incarcerated person seeking writ of habeas corpus, 15.37, 15.41, 16.136
Petition for writ of habeas corpus (Judicial Council Form MC-275), 28.20
Petition for writ of habeas corpus or certiorari (filed by attorney), 28.21
Purpose of writ, 15.39

Habeas Corpus in Superior Court
Generally, 4.17
Children, proceedings involving
Custody proceedings, 4.18
Ineffective assistance of counsel, habeas petition based on, 4.20
Juvenile dependency proceedings, 4.19
Termination of parental rights, use of habeas corpus to challenge, 4.18
Civil commitment proceedings
Generally, 4.21
Developmentally disabled, commitment to state hospital for, 4.25
Lanterman-Petris-Short (LPS) Act, commitment of mentally disordered persons under, 4.22
Mentally disordered, commitment to state hospital for, 4.24
Parental commitment of minor to state hospital, 4.23
Purpose of writ, 4.17
Requirements for writ, 4.26

Hearings
Administrative mandamus. See **Administrative Mandamus in Superior Court**
Alternative writs of mandate or prohibition. See **Alternative Writs of Mandate or Prohibition in Superior Court**
Noticed motion. See **Noticed Motion in Superior Court**
Oral argument. See **Oral Argument in Appellate Court**
Rehearing in court of appeal. See **Rehearing in Court of Appeal**
Review. See **Review (Certiorari) in Superior Court**
Stay pending superior court's decision on merits of writ petition, hearing on application for. See **Stay of Proceedings Pending Writ Petition in Superior Court**
Traditional writ of mandate. See **Traditional Mandate in Superior Court**

Hearsay
Declaration made on information and belief constituting, 18.46

Holidays. See **Saturdays, Sundays, and Holidays**

Immediate Temporary Stay, Request For. See **Preliminary Opposition to Writ Petition Filed in Appellate Courts**

Inconvenient Forum, Mandate Overturning Order Denying Motion to Dismiss for. See **Mandate in Courts of Appeal**

Inferences. See **Presumptions and Inferences**

In Forma Pauperis
Record in underlying proceedings, petitioner proceeding in forma pauperis not required to pay agency's preparation costs, 7.17

Initiatives. See **Election Processes, Traditional Mandate Challenging**

Injunctions
See also **Temporary Restraining Order (TRO)**
Appeal of, 16.150, 26.9

Defined, 4.33
Distinction between mandatory and prohibitory injunctions, 26.9
Mandatory injunctions stayed by filing appeal, 26.9
Order granting injunction, petition for writ review of
Generally, 16.150
Standard of review if writ petition accepted, 16.151
Preliminary injunction
Generally, 4.33
Order granting preliminary injunction (see Order granting injunction, petition for writ review of, above)
Stay of proceedings, preliminary injunction for. See **Stay of Proceedings Pending Writ Petition in Superior Court**
Prohibition in appellate court to restrain enforcement of, 15.20, 15.26
Prohibitory injunctions
Discretion of appellate court to issue writ of supersedeas to stay, 26.21
Distinction between mandatory and prohibitory injunctions, 26.9
Types of injunctive relief, 4.33

In Limine Motions, Writ Petition Challenging Ruling on
Generally, 16.145
Standard of review if writ petition accepted, 16.147
Time to file writ petition, 16.146

Inspection of Records
Corporation's records, traditional mandate to compel inspection of, 2.54
Union's records, traditional mandate to compel inspection of by union member, 2.53

Interested Entities or Persons, Certificate of. See **Certificates and Certification**

Interlocutory Orders and Judgments
Immediate appealability from, 15.57
Nonappealability of interlocutory rulings, 11.14

Interpretation of Cases and Statutes. See **Construction and Interpretation**

Irreparable Injury, Petitioner Facing. See **Courts of Appeal**

Jail. See **Prison and Prisoners**

Judges, Disqualification of. See **Mandate in Courts of Appeal**

Judgment on the Pleadings
Answer to writ petition in superior court, filing motion for judgment on the pleadings after filing, 8.53
Vacate order granting or denying motion for judgment on pleadings, issuance of mandate to compel trial court to, 16.106

Judgments
Alternative writ of mandate or prohibition. See **Alternative Writs of Mandate or Prohibition in Superior Court**
Appeal of. See **Appeals**
Contempt, writ petition to review judgment of. See **Contempt**
Defined, 11.5
Enforcement of judgment
Execution, writ authorizing seizure and appropriation of defendant's property to satisfy money judgment, 4.30
Possession, writ enforcing judgment for possession of real or personal property, 4.31
Prohibition to prevent enforcement of void judgment, 15.26
Review (certiorari), filing new writ of mandate or prohibition petition to enforce judgment on merits issued after issuance of writ of, 10.21
Sale, writ enforcing judgment for sale of real or personal property, 4.32
Stay of enforcement of judgment. See **Stay of Proceedings by Appellate Court**
Noticed motion for writ in superior court, submission of proposed order and judgment, 5.103
Presumption affecting correctness of, 20.4
Real property, enforcing judgment for (see Enforcement of judgment, above)
Res judicata. See **Res Judicata**
Review (certiorari). See **Review (Certiorari) in Superior Court**
Small claims court judgment. See **Small Claims Court**
Summary judgment. See **Summary Judgment**

Judicial Notice
Generally, 20.17
Extra-record evidence, request for judicial notice of, 7.9
Legislative history, request for judicial notice of, 7.9
Mandate
Alternative writ of mandate or prohibition in superior court, presenting evidence at hearing by judicial notice, 9.29
Request for judicial notice in opposition to petition for writ of mandate, 13.13
Materials not presented to trial court for judicial notice, 20.19
Materials presented to trial court for judicial notice, 20.18
Procedure for requesting judicial notice in appellate court
Motion requesting judicial notice, 20.20
Opposition to request for judicial notice, 20.22
Timing of request for judicial notice (see Time, below)
Time
Opposition to request for judicial notice, time limit for filing, 20.22
Request for judicial notice, 20.21

Jurisdiction
California Supreme Court. See **California Supreme Court**
Conflicting or concurrent jurisdiction, trial courts with
Generally, 16.93
Choice of law, writ of mandate determining, 16.95
Determining which trial court has jurisdiction, 16.94
Objection in second tribunal as prerequisite to seeking writ, 16.97
Other tribunals with conflicting or concurrent jurisdictions, 16.96
Standard of review if writ petition accepted, 16.98
Court of appeal
Allegation in writ petition concerning appellate court's jurisdiction, 18.27
Filing writ petition with appellate district having jurisdiction over trial court, 18.85
Finality of court of appeal's decision, effect on court's jurisdiction, 25.3
Notice of appeal, failure to timely file resulting in loss of jurisdiction, 11.23
Prohibition to prevent tribunal or person from erroneously assuming jurisdiction. See **Prohibition in Courts of Appeal**
Review, writ of. See **Review (Certiorari) in Courts of Appeal**
Supersedeas, effect of writ on appellate jurisdiction, 26.2
Enforcement of peremptory writ, court's retention of jurisdiction for purposes of, 10.11
Habeas corpus proceedings, original jurisdiction of all California courts in, 4.17
Invalidity of statute or ordinance, challenging superior court's jurisdiction on basis of
Generally, 16.88
Mandate, testing statute's constitutionality with petition for writ of, 16.90
Prohibition, testing constitutionality of law through use of, 16.89
Standard of review if writ petition accepted, 16.91
Limited jurisdiction civil cases. See **Limited Jurisdiction Civil Cases**
Mandatory statutory deadlines treated as jurisdictional, 18.64
Superior court
Actions in excess or without jurisdiction, writ of prohibition challenging, 16.92
Administrative mandamus to determine if administrative body exceeded or acted without jurisdiction. See **Administrative Mandamus in Superior Court**
Certiorari to review actions without or in excess of jurisdiction, 4.10
Conflicting or concurrent jurisdiction (see Conflicting or concurrent jurisdiction, trial courts with, above)
Invalidity of statue or ordinance (see Invalidity of statute or ordinance, challenging superior court's jurisdiction on basis of, above)
Limited jurisdiction civil cases. See **Limited Jurisdiction Civil Cases**
Perfecting appeal, effect on trial court's subject matter jurisdiction, 26.6
Prohibition to prevent tribunal or person from erroneously assuming jurisdiction, 4.3
Remittitur by appellate court returning jurisdiction to superior court, 11.33
Subject matter jurisdiction of trial court, effect of perfecting appeal on, 26.6
Unconstitutional law (see Invalidity of statute or ordinance, challenging superior court's jurisdiction on basis of, above)

Jury Trial
Alternative writ of mandate or prohibition in superior court, court's discretion to allow jury trial on factual issues, 9.31
Order requiring jury trial, petition for writ of prohibition to review
Generally, 16.148
Standard of review if writ petition accepted, 16.149
Timely request for jury trial, prohibition to prevent court from denying, 15.26

Juvenile Dependency Proceedings
Challenging order setting termination hearing or post-termination placement order, writ petition, 16.52
Habeas corpus challenging dependency order, 4.19

Labor Unions. See **Unions, Traditional Mandate to Compel Action by**

Laches
Court of appeal, applicability of laches to writ petition filed more than 60 days after issuance of challenged ruling, 18.67
Defense to writ petition, laches as, 3.19
Nonstatutory writ petition, effect of laches on, 16.87
Superior court writ petition, effect of laches on late filing of, 5.74

Land Use. See **Zoning and Land Use**

Law of the Case
Decision on merits creating, 25.13
Issuance of written opinion after issuance of alternative writ establishing, 22.17
Summary denial of writ petition not establishing, 22.17

Legal Ethics
Appellate specialist, ethical considerations for. See **Courts of Appeal**
Trial counsel's ethical duties in handling appellate writ proceedings, 17.4

Legislation Actions Subject to Traditional Writ of Mandate. See **Public Entities and Officials**

Legislative History
Judicial notice of legislative history materials, request for, 20.20

Libel. See **Defamation**

Licenses and Permits
Suspension or revocation of license, licensee's request for supersedeas to stay, 26.10
Traditional mandate
DMV suspension or revocation of driver's license, review of, 2.40
Land use permits, challenging issuance or denial of, 2.41
Professional licensing decisions, challenges to, 2.39

Limine, Motions in. See **In Limine Motions, Writ Petition Challenging Ruling on**

Limitation of Actions. See **Statutes of Limitations**

Limited Jurisdiction Civil Cases
Generally, 12.1
Change of venue order, appealability of, 16.63
Costs, prevailing party's entitlement to, 12.25
Definitions
Limited jurisdiction civil case, 12.2
Superior court's appellate division, 12.4
Discretion of appellate court
Certification of case to court of appeal by appellate division, court of appeal's discretion to accept, 12.24
Review of appellate division's writ decision (see Review of appellate division's decision on writ petition, below)
Exhibits (see Supporting record, below)
Format of petitions
Generally, 12.4
Preliminary opposition to writ petition, format of, 12.12
Supporting record, format of, 12.7
Information on writ proceedings in misdemeanor, infraction, and limited civil cases (Judicial Council Form APP-150-INFO), 13.16
Initial actions on writ petition by superior court's appellate division, 12.11
Initiating writ proceeding in appellate division of superior court
Filing and service of writ petition, 12.10
Format and contents of petition, 12.4
Memorandum in support of writ petition, 12.5
Stay, request for, 12.9
Supporting record (see Supporting record, below)

Jurisdiction of superior court's appellate division to grant writs of mandate, prohibition, or review (certiorari) in limited jurisdiction civil cases, 12.3
Memorandum
Preliminary opposition to writ petition, inclusion of memorandum in, 12.12
Supporting memorandum, 12.5
Opposition to writ petition
Alternative writ, opposition and return if appellate division issues, 12.15
New issues for interlocutory appellate review, respondent prohibited from raising in opposition to writ petition, 12.14
Peremptory writ in first instance, opposition if appellate division notifies parties of possibility of issuing, 12.14
Preliminary opposition (see Preliminary opposition to writ petition, below)
Reply to opposition and return, 12.17
Petition for writ (misdemeanor, infraction, or limited civil case) (Judicial Council Form APP-151), 13.17
Preliminary opposition to writ petition
Format and contents of preliminary opposition, 12.12
Reply to, 12.16
Time limit for filing preliminary opposition, 12.13
Reply by petitioner
Opposition and return, reply to, 12.17
Preliminary opposition, petitioner's reply to, 12.16
Return (see Opposition to writ petition, above)
Review of appellate division's decision on writ petition
California Supreme Court, filing new writ petition in, 12.21
Erroneous appeal, court of appeal's discretion to treat as writ petition, 12.19
Mandate and prohibition, nonappealability of appellate division's judgment granting or denying writ of, 12.18-12.19
New writ petition, filing in court of appeal, 12.18
Review (certiorari) cases, filing appeal in, 12.20
Review of appellate division's judgment on appeal
Certification of case to court of appeal, party seeking, 12.23
Filing writ petition in court of appeal, 12.22
Transfer of case to court of appeal, petition for, 12.24
Superior court as "inferior tribunal" to appellate division of superior court, 12.3
Supersedeas, petitioning appellate division of superior court for writ of, 12.28
Supporting record
Contents of record, 12.6
Declaration explaining unavailability of documents, 12.6
Filing and service of, 12.10
Format of record, 12.7
Inadequate or nonconforming record as grounds for denial of writ petition, 12.8
Time
Petition for writ, time limit for filing, 12.10
Preliminary opposition to writ petition, time limit for filing, 12.13
Reply to opposition, time limit for filing, 12.17

Liquor. See **Alcoholic Beverage Control Appeals Board**

Lis Pendens, Appellate Review of Order Expunging. See **Mandate in Courts of Appeal**

Local Agencies. See **State and Local Agencies**

Local Rules of Court
See also **Rules of Court**
Generally, 5.6-5.7
Alternative writ of mandate or prohibition. See **Alternative Writs of Mandate or Prohibition in Superior Court**
Unwritten procedures, 5.8

Lodging Documents with Superior Court. See **Sealing Documents in Superior Court**

Lodging Record with Court of Appeal. See **Sealing Appellate Court Records**

Malicious Prosecution
Statute of limitations for malicious prosecution action, 16.108

Mandate in Courts of Appeal
Generally, 15.2

Alcoholic Beverage Control Appeals Board's nonadjudicatory action, writ of mandate challenging, 16.25
Arbitration. See **Arbitration**
Constitutionality of statute, using mandate to test, 16.90
Contempt order, petition for writ of mandate to review, 16.140
Coordination of actions, order concerning (CCP §404.6)
  Deadline to file writ petition, 16.9
  Exclusive means of obtaining appellate review, writ proceeding as, 16.8
  Standard on review if writ petition accepted, 16.10
Court clerk
  Issuance of writ by, 24.37
  Preparation of writ by, 24.39
  Trial court, clerk transmitting certified copy of writ to, 24.40
Defined, 15.3
Delay in prosecution (see Quash service of summons, stay or dismiss for inconvenient forum, or dismiss for delay in prosecution, petition to overturn order denying motion for (CCP §418.10(c)), below)
Denial of motion to dismiss, petition for writ to review
  Generally, 16.112
  Standard of review if writ petition accepted, 16.114
Discovery orders, review of, 16.123
Discretion, mandate to compel exercise of
  Generally, 15.10
  Abuse of discretion. See **Abuse of Discretion**
  Error of law committed by trial court, 15.13
Discretion of court to issue writ, 15.4
Dismissal of action
  Generally, 16.112
  Denial of motion to dismiss (see Denial of motion to dismiss, petition for writ to review, above)
  Inconvenient forum (see Quash service of summons, stay or dismiss for inconvenient forum, or dismiss for delay in prosecution, petition to overturn order denying motion for (CCP §418.10(c)), below)
Disqualification of judges (see Judicial disqualification or challenge, reviewing grant or denial of (CCP §170.3), below)
Enforcement of petition. See **Enforcement of Writs of Mandate or Prohibition in Courts of Appeal**
Expungement of lis pendens (see Lis pendens, grant or denial of motion to expunge (CCP §405.39), below)
Extension of time
  Coordination of actions, extension of time to file writ petition concerning, 16.9
  Lis pendens, extension of time to file writ petition concerning expungement of, 16.12
Good faith settlement determination, reviewing grant or denial of motion for. See **Settlement**
Inconvenient forum, stay or dismiss action on grounds of (see Quash service of summons, stay or dismiss for inconvenient forum, or dismiss for delay in prosecution, petition to overturn order denying motion for (CCP §418.10(c)), below)
Issuance of writ by court clerk, 24.21
Judicial disqualification or challenge, reviewing grant or denial of (CCP §170.3)
  Generally, 16.3
  Deadline to file writ petition under CCP §170.3(d), 16.6
  Examples of cases showing availability of mandate to review judicial challenge orders, 16.5
  Exclusive means of obtaining appellate review, writ proceeding as, 16.3
  Standard of review if writ petition accepted, 16.7
  Standing to file writ petition, judge's lack of, 16.4
Jurisdictions, writ of mandate to determine appropriate law among competing, 16.95
Lis pendens, grant or denial of motion to expunge (CCP §405.39)
  Deadline to file writ petition, 16.12
  Exclusive means of obtaining appellate review, writ proceeding as, 16.11
  Standard of review if writ petition accepted, 16.13
Mediation confidentiality privilege, mandate prohibiting release of records in violation of, 16.121
Ministerial duty, mandate to compel performance of
  Generally, 15.6
  Definition of ministerial duty, 15.7
  Examples of ministerial trial court actions, 15.8
  Examples of nonjudicial court officer's ministerial duties, 15.9
Opinion by appellate court. See **Opinion by Appellate Court Granting or Denying Writ Petition**
Opposition to issuance of peremptory writ of mandate, 28.10
Order directing issuance of peremptory writ of mandate, 24.37, 28.13
Petition for writ of mandate or other appropriate relief, 28.1
Physician-patient privilege, mandate directing trial court to quash deposition subpoenas for records protected by, 16.121
Pleadings, mandate to review orders on. See **Pleadings**
Prayer for relief seeking alternative writ of mandate, 18.39
Preliminary opposition to petition for writ of mandate or other appropriate writ and stay request, 28.4

Public entities and officials (see Ministerial duty, mandate to compel performance of, above)
Public Utilities Commission's decisions, petition for mandate seeking review of. See **Public Utilities Commission (PUC)**
Purpose of mandate
Generally, 15.3
Discretion (see Discretion, mandate to compel exercise of, above)
Ministerial duty (see Ministerial duty, mandate to compel performance of, above)
Quash service of summons, stay or dismiss for inconvenient forum, or dismiss for delay in prosecution, petition to overturn order denying motion for (CCP §418.10(c))
Generally, 16.54
Deadline to file writ petition, 16.55
Responsive pleading, effect of filing petition on time to file, 16.57
Standard of review if writ petition accepted, 16.56
Raising issue in trial court as prerequisite for, 15.68
Reclassify action or proceeding, mandate to review order granting or denying motion to (CCP §403.080)
Generally, 16.58
Deadline to file writ petition under CCP §403.080, 16.59
Standard of review if writ petition accepted, 16.61
Trial court, filing copy of petition in, 16.60
Return to petition for writ of mandate, prohibition, or other alternative relief, 28.11
Sample form, peremptory writ of mandate, 28.15
Service of writ by petitioner, 24.41
Statutes authorizing appellate review
CCP §170.3 (see Judicial disqualification or challenge, reviewing grant or denial of (CCP §170.3), above)
Coordination of actions (see Coordination of actions, order concerning (CCP §404.6), above)
Lis pendens (see Lis pendens, grant or denial of motion to expunge (CCP §405.39), above)
Public Records Act. See **Public Records Act**
Quash service of summons (see Quash service of summons, stay or dismiss for inconvenient forum, or dismiss for delay in prosecution, petition to overturn order denying motion for (CCP §418.10(c)), above)
Reclassify action or proceeding (see Reclassify action or proceeding, mandate to review order granting or denying motion to (CCP §403.080), above)
Summary judgment order, writ review of (CCP §437c). See **Summary Judgment**
Venue, grant or denial of motion to change (CCP §400). See **Venue**
Stay of execution of writ of mandate, appeal resulting in, 11.24, 26.10
Substantive requirements for issuance of writ of mandate, 15.5
Time
Change of venue order, deadline to file writ petition under CCP §400 for review of, 16.64
Coordination of actions, deadline to file writ petition concerning, 16.9
Disqualification of judge, deadline to file writ petition challenging order concerning, 16.6
Extension of time (see Extension of time, above)
Issuance of mandate, 24.38
Lis pendens, deadline to file writ petition to review expungement of, 16.12
Quash service of summons, stay or dismiss for inconvenient forum, or dismiss for delay in prosecution, deadline for filing writ petition to overturn order denying motion for, 16.55
Reclassify action or proceeding, deadline for filing writ petition for review of order granting or denying motion to, 16.59
Trial court's completion of challenged act before appellate court's ruling on petition for prohibition, treatment of proceeding as petition for mandate, 15.21
Workers' Compensation Appeals Board, statute authorizing issuance of mandate to, 16.46

Mandate in Superior Court
Administrative mandamus. See **Administrative Mandamus in Superior Court**
Alternative writ. See **Alternative Writs of Mandate or Prohibition in Superior Court**
Appeal from order granting or denying writ. See **Appeals**
Declarations. See **Affidavits and Declarations**
Demurrer
Memorandum in support of demurrer to petition for writ of mandate, 13.11
Petition for writ of mandate, demurrer to, 13.10
Distinguishing writ of prohibition from mandate, 4.4
Drafting writ petition. See **Drafting Writ Petition for Superior Court**
Enforcement of writ. See **Enforcement of Writs of Mandate or Prohibition in Superior Court**
Judicial notice. See **Judicial Notice**
Limited jurisdiction civil cases, appellate division of superior court granting writ of mandate in. See **Limited Jurisdiction Civil Cases**
Opposition to petition for writ of mandate
Declaration in opposition to petition for writ of mandate, 13.14
Proposed order denying petition for writ of mandate, 13.15

Request for judicial notice in opposition to petition for writ of mandate, 13.13
Sample form, opposition to petition for writ of mandate, 13.12
Review (certiorari), filing new writ of mandate petition to enforce judgment on merits issued after issuance of writ of, 10.21
Stay, alternative writ of mandate not acting as, 6.4
Traditional mandate. See **Traditional Mandate in Superior Court**

Mediation
See also **Arbitration**
Mandate prohibiting release of records in violation of mediation confidentiality privilege, 16.121

Memorandum in Support or Opposition
See also **Preliminary Opposition to Writ Petition Filed in Appellate Courts**
Agricultural Labor Relations Board's final order, memorandum in support of writ petition to review, 16.20
Alternative writ of mandate or prohibition in superior court, respondent filing memorandum in opposition to petition for, 9.23
Attorney fees, memorandum in support of motion for, 5.126
Definition of opposition memorandum, 8.2
Demurrer to petition for writ of mandate in superior court, memorandum in support of, 13.11
Drafting petition for writ on court of appeal, memorandum in support of. See **Drafting Writ Petition for Court of Appeal**
Limited jurisdiction civil cases. See **Limited Jurisdiction Civil Cases**
Noticed motion, filing memorandum in support or opposition to. See **Noticed Motion in Superior Court**
Original and copies of petition and supporting memorandum, filing requirements for, 18.81
Preliminary opposition, real party in interest or respondent filing points and authorities in opposition, 21.14
Replication (petitioner's reply), memorandum filed by petitioner. See **Replication (Petitioner's Reply) in Superior Court**
Return to writ petition in appellate court proceedings, supporting memorandum for, 22.29, 23.37
Sealing documents in superior court, memorandum supporting motion for, 7.29
Stay application in superior court. See **Stay of Proceedings Pending Writ Petition in Superior Court**
Supersedeas, memorandum in support or opposition to petition for, 26.22, 26.28

Mentally Disordered Persons
Habeas corpus challenging commitment of, 4.24

Ministerial Duty of Public Entities and Officials. See **Public Entities and Officials**

Minors. See **Parent and Child**

Modifications. See **Amendments and Modifications**

Mootness of Issue. See **Courts of Appeal**

Motor Vehicles. See **Department of Motor Vehicles (DMV)**

Multiple Parties
Appealability of superior court's final order resolving all issues with respect to one party, 11.11
Review sought by multiple parties, time limit for California Supreme Court to grant or deny, 27.33

Newspersons' Shield Law
Contempt adjudication, shield law not providing relief before, 16.132
Mandate nullifying trial court's order requiring production of newsperson's notes in libel action, 16.121

New Trial
Superior court's final decision on writ, motion for new trial to challenge, 11.3

Nonstatutory Writ Relief. See **Discretion of Court**

Notice and Notification
Alternative writs. See **Alternative Writs of Mandate or Prohibition in Superior Court**
Appeal, notice of. See **Appeals**
Court of appeal
Class notice, issuance of mandate to correct ruling on, 16.106
Class notice, writ relief granted to correct rulings on, 16.129B
Immediate temporary stay, notifying appellate court of intent to oppose, 21.15
Review (certiorari), appellate court requiring notice to adverse party of application for writ of, 22.30
Stay of proceedings, notice of request for. See **Stay of Proceedings by Appellate Court**
Time period for filing writ petition in court of appeal, notice triggering. See **Time**

Unsealing of record by appellate court, notice to parties of, 20.28
Ex parte application for alternative writ of mandate or prohibition in superior court, notice to opposing parties of, 9.3
Judicial notice. See **Judicial Notice**
Palma notice. See ***Palma* Notice**
Real party in interest, notifying of writ proceeding, 5.35
Replication (reply) made by evidence presented at hearing, requirement of advance notice if, 8.60
Summary judgment motion, writ of mandate to vacate trial court order shortening notice period for, 16.72
Traditional mandate to compel publication of public notices, 2.67
Waiving notice of court ruling, effect of, 18.73

Noticed Motion in Superior Court
See also **Alternative Writs of Mandate or Prohibition in Superior Court**
Generally, 1.3, 5.9
Additional papers, submission of
Administrative record, 5.102
Declaration supporting petition, 5.101
Exhibits, 5.101
Proposed order and judgment, submission of, 5.103
Advantages of
Control over timing of hearing on merits, 5.14
Ex parte appearance, no requirement of, 5.11
Greater likelihood of hearing merits of petition, 5.13
Time savings for court, 5.12
Chronology of noticed motion procedure, 5.10
Fees
Generally, 5.79
Responsive pleading or motion, filing fee for, 8.12
Filing of motion papers, 5.107
Filing of writ petition
Generally, 5.76
Civil case cover sheet, requirement of, 5.78
Copies of petition, 5.80
Fee for filing, 5.79
Place of filing, 5.77
Responsive pleading, filing in same court as writ petition, 8.11
Format of papers
Generally, 5.87
Memorandum in opposition to motion for issuance of writ, format of, 8.19
Memorandum in support of motion for issuance of writ, format of, 5.94
Proof of service, 5.85
Hearings
Advantages of noticed motion procedure (see Advantages of, above)
Setting hearing date for noticed motion in superior court, 9.21
Stay of proceedings pending writ petition in superior court, noticed motion procedure for hearing on application for, 6.22
Local rules of court expressing preference for noticed motion or alternative writ, 5.9, 9.21
Memorandum in opposition to motion for issuance of writ
Generally, 8.16
Contents of, 8.18
Evidence in opposition, 8.20
Format of opposition papers, 8.19
Time for filing opposition papers, 8.17
Memorandum in support of motion for issuance of writ
Basis for issuance of writ, statement of, 5.98
Evidence, citations to, 5.99
Format of, 5.94
Page limits, 5.95
Persuasiveness of, 5.97
Purpose of, 5.92
Quotations, use of, 5.100
Required contents of supporting memorandum, 5.93
Style of supporting memorandum, 5.96-5.100
Preparing motion for issuance of requested writ, 5.86
Proof of service
Format of, 5.85
Time of filing, 5.84

Required papers
Generally, 5.88
Additional papers (see Additional papers, submission of, above)
Combining notice of motion and motion, 5.91
Memorandum in support of motion (see Memorandum in support of motion for issuance of writ, above)
Motion, 5.90
Notice of motion, 5.89
Responsive pleading or motion
Generally, 8.6
Consequences of not filing responsive pleading, 8.15
Filing fee, 8.12
Filing responsive pleading in same court as writ petition, 8.11
Opposition papers (see Memorandum in opposition to motion for issuance of writ, above)
Service of (see Service of responsive pleadings, below)
Time to file (see Time to file responsive pleading or motion, below)
Service of motion
Generally, 5.104
All parties, service of motion on, 5.105
Time for serving, 5.106
Service of petition
Generally, 5.76
Manner of service, 5.83
Proof of service (see Proof of service, above)
Respondent and real party in interest, service of, 5.82
Time for serving, 5.81
Service of responsive pleadings
All parties, requirement of serving responsive pleading or motion on, 8.13
Method of service, 8.14
Time
Chronology of noticed motion procedure, 5.10
Proof of service, time for filing, 5.84
Service of motion, time for, 5.106
Service of petition, time for, 5.81
Time to file responsive pleading or motion
Generally, 8.7
Administrative record filed or unnecessary, time for filing responsive pleading in event of, 8.8
Administrative record requested but not filed, time for filing responsive pleading, 8.9
Extension of time by stipulation or application, 8.10

Opinion by Appellate Court Granting or Denying Writ Petition
See also **Denial of Writ by Appellate Court**
Attorney fee, award of, 24.28
"Cause," requirement of opinion if proceeding becomes, 24.15
Contents of opinion
Generally, 24.19
Denial of writ, discharge of alternative writ, 24.22
Granting writ, court directing clerk to issue writ of mandate or prohibition, 24.21
Relief granted by court not limited by petitioner's prayer for relief, 24.20
Written opinion, requirement of, 24.19
Costs, award of
Discretion of court to award, deny, or apportion costs, 24.23
Items recoverable as costs, 24.26
Party, award of costs against, 4.25
Petitioner or real party in interest, award of costs against, 24.25
Prevailing party's entitlement to costs, 24.23
Procedure for claiming and opposing costs, 24.27
Specify costs award, requirement that opinion, 24.24
Depublication of opinion. See **Publication of Opinion**
Documents prepared after issuance of opinion
Mandate. See **Mandate in Courts of Appeal**
Prohibition. See **Prohibition in Courts of Appeal**
Remittitur. See **Remittitur**
Review (certiorari), post-decision documents not required for writ of, 24.42
Law of case, issuance of written opinion after issuance of alternative writ establishing, 22.17

Publication of opinion. See **Publication of Opinion**
Service of opinion on lower court and parties, 24.29
Time for issuance of opinion
Generally, 24.16
Circumstances extending time for issuance of opinion beyond 90 days, 24.18
90 calendar days, court issuing opinion within, 24.17
Time limit for submitting memorandum of costs, 24.27

Opinion of California Supreme Court. See **Review in California Supreme Court**

Opposition to Writ Petition Filed in Court of Appeal
See also **Preliminary Opposition to Writ Petition Filed in Appellate Courts**
Generally, 23.1
Amicus curiae briefs. See **Amicus Curiae**
Contents of opposition
Generally, 23.5
New issues, raising in opposition prohibited, 23.10
Reasons why writ review unwarranted, opposition explaining, 23.9
Definitions, 23.2
Extension of time to file opposition
Good cause required for extension, 23.14
Request for, 23.13
Format of opposition
Generally, 23.4
Authority, citation to, 23.7
Certificate of Interested Entities or Persons, service and filing of, 23.8
Organization of, 23.5
Palma opposition, format and content of reply to, 23.17
Record, citation to, 23.6
Reasons for filing opposition, 23.3
Reply to *Palma* opposition
Chart, deadlines for *Palma* opposition, 23.51
Format and content of, 23.17
Service and filing of reply, 23.18
Service and filing of
Certificate of Interested Entities or Persons, service and filing of, 23.8
Manner of serving opposition, 23.16
Reply, service and filing of, 23.18
Respondent or real party in interest serving opposition on petitioner and other parties, 23.15
Timing of opposition
Chart, deadlines for opposition, 23.51
Extension of time (see Extension of time to file opposition, above)
Reply to *Palma* opposition, time limit for filing, 23.18
Setting of deadline by court of appeal, 23.11
30 days for filing opposition if court of appeal fails to set deadline, 23.12

Opposition to Writ Petition in Superior Court
Alternative writ, opposition to application for. See **Alternative Writs of Mandate or Prohibition in Superior Court**
Limited jurisdiction civil cases, opposition to writ petition in. See **Limited Jurisdiction Civil Cases**
Mandate, opposition to writ petition for. See **Mandate in Superior Court**

Oral Argument in Appellate Court
Generally, 11.31
Appearance by parties
Equivalent of alternative writ, order directing parties to appear for oral argument, 22.25
Telephone appearance, permissibility at oral argument on writ petition, 24.9
Conduct of hearing
Amicus curiae request to participate in oral argument, 24.10
Appearance by petitioner and real party in interest, requirement of, 24.9
Number of counsel, limits on, 24.11
Order of argument, 24.10
Questions by justices, effect on time limits for oral argument, 24.13
Strategy for argument, 24.13
Time for argument, 24.12
Date of hearing, alternative writ or OSC specifying, 22.25, 24.8

Ex parte application for alternative writ of mandate and order to show cause, 13.2
Stay request, argument on, 26.28
Summary denial of writ petition, lack of oral argument, 22.15
Summary judgment motion, court's error in denying oral argument on, 16.74
Waiver of oral argument
Generally, 11.31
Alternative writ, party's failure to file written request for oral argument resulting in waiver of oral argument, 24.8

Orders
Agricultural Labor Relations Board's orders. See **Agricultural Labor Relations Board (ALRB)**
Appellate court orders. See **Courts of Appeal**
Arbitration, writ petition as exclusive means of reviewing orders compelling, 16.100
Attorneys, petition for writ to review orders concerning. See **Attorneys**
Contempt, writ petition to review. See **Contempt**
Demurrer. See **Demurrer**
Denial of writ. See **Denial of Writ by Appellate Court**
Discovery orders. See **Discovery**
Discretion of court to review. See **Discretion of Court**
Injunction, writ review of order granting. See **Injunctions**
Interlocutory orders, immediate appeal from, 15.57
Jury trial, review of order requiring. See **Jury Trial**
Juvenile dependency order, habeas corpus challenging, 4.19
Pleadings, review of orders on. See **Pleadings**
Prohibition to prevent enforcement of void order, 15.26
Superior court orders
Agricultural Labor Relations Board, enforcement of order issued by, 4.28
Alternative writs. See **Alternative Writs of Mandate or Prohibition in Superior Court**
Chart, review method for superior court orders, App A
Definition of final order, 11.9
Mandate in superior court. See **Mandate in Superior Court**
Noticed motion for writ in superior court, submission of proposed order and judgment, 5.103
Sealing documents in superior court, motion for order, 7.29
Stay pending superior court's decision on merits of writ petition, order for. See **Stay of Proceedings Pending Writ Petition in Superior Court**
TRO. See **Temporary Restraining Order (TRO)**

Order to Show Cause (OSC)
See also **Alternative Writs in Courts of Appeal**
Alternative writs in superior court. See **Alternative Writs of Mandate or Prohibition in Superior Court**
Enforcement of writ by superior court, order to show cause re contempt, 10.14
Form, alternative writ/order to show cause, 28.6
Review (certiorari), appellate court granting OSC against, 22.30
Review (certiorari), superior court's issuance of OSC stating why writ should not be allowed, 9.49
TRO. See **Temporary Restraining Order (TRO)**

Ordinary Mandate. See **Traditional Mandate in Superior Court**

***Palma* Notice**
Generally, 22.19
Actions by court of appeal after issuance of *Palma* notice
Generally, 24.1
Alternative writ or order to show cause, court's issuance of, 24.5
Denial of petition, 24.3
Peremptory writ in first instance, limits on issuance of, 24.4
Possible actions after issuing *Palma* notice, 24.2
Alternative writ
Coercive alternative writ, using in lieu of *Palma* notice, 22.19, 22.27
Issuance of alternative writ or order to show cause, 24.5
Definition of *Palma* notice, 22.18
Form of *Palma* notice given by court of appeal, 22.21
Letter, 28.8
Opposition to writ petition after appellate court's issuance of *Palma* notice. See **Opposition to Writ Petition Filed in Court of Appeal**
Order, 28.7
Prayer for relief, effect of giving notice of request for peremptory writ in, 22.20

Preliminary opposition distinguished from, 21.5
"Suggestive" or "speaking" *Palma* notice
Issuance of, 22.22
Sample form, 28.9
Superior court writ proceedings, *Palma* notices not used in, 8.39

Parent and Child
Habeas corpus in proceedings involving children
Child custody proceedings, availability of habeas corpus in appellate court, 15.42
Superior court, habeas corpus in. See **Habeas Corpus in Superior Court**
Juvenile dependency proceedings. See **Juvenile Dependency Proceedings**

Penalties
Certificate of Interested Entities or Persons
Opposition to writ petition filed in court of appeal, sanctions for failure to file certificate, 23.8
Writ petition in court of appeals, sanctions for omitting certificate from, 18.21
Contempt. See **Contempt**
Discovery sanctions. See **Discovery**
Enforcement of writ
Peremptory writ, court of appeal imposing penalties for noncompliance with. See **Enforcement of Writs of Mandate or Prohibition in Courts of Appeal**
Superior court writ, penalties for noncompliance with. See **Enforcement of Writs of Mandate or Prohibition in Superior Court**
Frivolous writ petitions. See **Frivolous Writ Petitions in Courts of Appeal, Sanctions for Filing**
Imprisonment for failure to comply with peremptory writ. See **Prison and Prisoners**
Monetary sanction judgment or order of $5000 or less, petition for writ of review under CCP §904.1(a)(11)-(12)
Generally, 16.81
Abuse of discretion as standard of review, 16.85
Requesting writ of mandate or prohibition in alternative, 16.82
Standard of review if writ petition accepted, 16.84
Statutory deadline for filing petition, lack of, 16.83

Peremptory Writs
Clerk of appellate court transmitting certified copy of peremptory writ of mandate or prohibition to trial court, 24.40
Enforcement of writs
Courts of appeal. See **Enforcement of Writs of Mandate or Prohibition in Courts of Appeal**
Superior court. See **Enforcement of Writs of Mandate or Prohibition in Superior Court**
Filing fee for, 9.41
Imprisonment for failure to comply with peremptory writ. See **Prison and Prisoners**
Issuance of peremptory writ in first instance, 5.19
Mandate
Alternative writs. See **Alternative Writs of Mandate or Prohibition in Superior Court**
Courts of appeal. See **Mandate in Courts of Appeal**
Superior court. See **Mandate in Superior Court**
Opposition to peremptory writ if appellate division notifies parties of possibility of issuing peremptory writ in first instance, 12.14
Palma notice. See ***Palma* Notice**
Prayer for relief, requesting peremptory writ in, 18.38, 22.20
Prohibition
Alternative writs. See **Alternative Writs of Mandate or Prohibition in Superior Court**
Courts of appeal. See **Prohibition in Courts of Appeal**
Superior court. See **Prohibition in Superior Court**
Res judicata of superior court's judgment granting or deny issuance of peremptory writ. See **Res Judicata**
Service of. See **Service of Process and Papers**

Permits. See **Licenses and Permits**

Pleadings
See also **Responsive Pleadings**
Administrative and traditional mandamus, pleading in the alternative, 3.21
Answers. See **Answers in Courts of Appeal; Answers in Superior Court**
Appellate court writ review, counsel reviewing pleadings relevant to order or ruling to be challenged, 17.17
Complaints. See **Complaints**
Judgment on the pleadings. See **Judgment on the Pleadings**
Orders on pleadings or at pleading stage, writ petition for review of

Demurrer. See **Demurrer**
Scope or nature of action, ruling on pleading affecting, 16.106
Standard of review if writ petition accepted, 16.107
Substantial issue or resolution of issue resulting in final disposition of case as to party, 16.105
Verification of. See **Verification**

Possession
Superior court issuing writ of, 4.31

Postcard Denial of Writ. See **Denial of Writ by Appellate Court**

Prayer for Relief in Writ Petition
Court of appeal. See **Drafting Writ Petition for Court of Appeal**
Peremptory writ, effect of giving notice of request in prayer for relief, 22.20
Superior court. See **Drafting Writ Petition for Superior Court**

Prejudice. See **Bias and Prejudice**

Preliminary Injunction. See **Injunctions**

Preliminary Opposition to Writ Petition Filed in Appellate Courts
See also **Memorandum in Support or Opposition; Opposition to Writ Petition Filed in Court of Appeal**
Generally, 21.1
Action by appellate court on writ petition before filing of preliminary opposition, 21.7
Additional facts, bringing to attention of trial court, 21.13
Contents of preliminary opposition
Generally, 21.8
Certificate of Interested Entities or Persons, inclusion in preliminary opposition, 21.20
Declaration of facts, real party in interest or respondent submitting sworn, 21.13
Distinction between preliminary opposition and opposition requested by *Palma* notice, 21.5
Filing fee, lack of, 21.19
Format of preliminary opposition
Authority, citation to, 21.12
Briefing format, 21.9
Headings, use of, 21.10
Record, factual statements supported by citation to, 21.11
Immediate temporary stay, petitioner's request for
Contents of opposition to immediate temporary stay, 21.17
Filing opposition to stay before filing preliminary opposition, 21.16
Form, preliminary opposition to petition for writ of mandate, prohibition, or other appropriate writ and stay request, 28.4
Notifying court of intent to oppose stay, 21.15
Optional use of preliminary opposition by real party in interest, 21.4
Procedural defect in writ petition, real party in interest sending short letter to court identifying defect before filing preliminary opposition, 21.6
Purpose of preliminary opposition, 21.3
Reply by petitioner to preliminary opposition, 21.21
Return to alternative writ, court treating preliminary opposition to, 23.44
Rule of Court 8.490(g), preliminary opposition authorized under, 21.2
Service of preliminary opposition, 21.18
Stay (see Immediate temporary stay, petitioner's request for, above)
Time to file preliminary opposition
Generally, 21.14
Extension of time, 21.14
Reply to preliminary opposition, time limit for filing, 21.21

Preliminary Opposition to Writ Petition Filed in Superior Court's Appellate Division. See **Limited Jurisdiction Civil Cases**

Presumptions and Inferences
Court records, presumption of openness to public, 7.26
Declaration of proof of service by mail, rebuttable presumption of receipt created by, 18.80
Information received from client, presumption of confidentiality, 17.11
Judgment, presumption affecting correctness of, 20.4
Petition for writ relief in appellate court, presumption affecting. See **Courts of Appeal**

Prison and Prisoners

See also **Criminal Law**
Appellate court writ of mandate or prohibition, imprisonment of respondent for failure to comply with, 24.50
Superior court writ of mandate or prohibition, imprisonment of respondent for failure to comply with, 10.19

Privacy
Discovery order, effect of privacy rights on petition for writ review of, 16.118

Privileged Communications. See **Discovery**

Probate
Review (certiorari), petition for writ to review probate orders, 16.143

Prohibition in Courts of Appeal
Generally, 15.14
Constitutionality of law, using prohibition to test, 16.89
Contempt, petition for prohibition to prevent enforcement of. See **Contempt**
Court clerk
Issuance of writ by, 24.37
Preparation of writ by clerk, 24.39
Trial court, clerk transmitting certified copy of writ to, 24.40
Defined, 15.14
Enforcement of writ. See **Enforcement of Writs of Mandate or Prohibition in Courts of Appeal**
Issuance of writ by court clerk, 24.21
Judicial acts
Substantive requirements for writ (see Substantive requirements for writ, below)
Threatened judicial acts (see Threatened but not completed exercise of judicial power, applicability of writ to, below)
Judicial disqualification, unavailability of prohibition to challenge, 16.5
Jurisdictional defect as prerequisite for issuance of writ
Generally, 15.22
Actions by trial court in excess or without jurisdiction, 16.92
Conflicting or concurrent jurisdiction, prohibition restraining second court from proceeding with case until first court renders final decision, 16.93
Existence of jurisdictional defect, test for determining existence of, 15.23
Portion of threatened judicial action exceeds court's jurisdiction, availability of prohibition to restrain, 15.24
Raising jurisdictional challenge in trial court as prerequisite to seeking writ in appellate court, 15.25
Jury trial, prohibition to review order requiring. See **Jury Trial**
Ministerial acts performed by court or officers not qualifying as judicial acts for purposes of writ of prohibition, 15.17
Opinion by appellate court. See **Opinion by Appellate Court Granting or Denying Writ Petition**
Petition for writ of prohibition or other appropriate relief, 28.1
Pleadings, prohibition to review orders on. See **Pleadings**
Prayer for relief seeking alternative writ of prohibition, 18.39
Preliminary opposition to petition for writ of prohibition or other appropriate writ and stay request, 28.4
Prevent trial, use of prohibition to, 16.113
Purpose of writ, 15.14
Raising issue in trial court as prerequisite for, 15.68
Return to petition for writ of mandate, prohibition, or other alternative relief, 28.11
Service of writ by petitioner, 24.41
Stay of execution of writ of prohibition mandate, appeal not resulting in, 11.24
Substantive requirements for writ
Courts subject to prohibition, 15.16
Judicial act, challenged action as, 15.15
Ministerial actions performed by court or officers not qualifying as judicial acts, 15.17
Threatened but not completed exercise of judicial power, applicability of writ to
Generally, 15.18
Burden of proof on petitioner to show lower court has decided to take challenged action, 15.19
Continuing or incomplete judicial action, prohibition restraining, 15.20
Examples of threatened judicial acts in excess of jurisdiction, 15.26
Trial court's completion of act before appellate court's ruling on petition, treatment of proceeding as petition for writ of review (certiorari) or mandate, 15.21
Time for issuance of, 24.38

Prohibition in Superior Court
Generally, 4.2
Alternative writ. See **Alternative Writs of Mandate or Prohibition in Superior Court**
Applicability of prohibition

Corporations, 4.7
Persons, 4.8
State agencies (see State agencies, below)
Distinction between writ of prohibition and other writs, 4.4
Drafting writ petition. See **Drafting Writ Petition for Superior Court**
Enforcement of writ. See **Enforcement of Writs of Mandate or Prohibition in Superior Court**
Limited jurisdiction civil cases, appellate division of superior court granting writ of prohibition in. See **Limited Jurisdiction Civil Cases**
Public officials, applicability of writ to, 4.8
Purpose of writ, 4.2
Requirements for, 4.9
Review (certiorari), filing new writ of prohibition petition to enforce judgment on merits issued after issuance of writ, 10.21
Scope of review limited to jurisdictional error, 4.3
State agencies
Constitutional statewide agencies, availability of prohibition to review adjudicatory decisions of, 4.6
Legislative origin, inapplicability of prohibition to state agencies of, 4.5
Statutory authority for, 5.3
Stay, alternative writ of prohibition acting as, 6.4

Prohibitory Injunctions. See **Injunctions**

Proof
Burden of proof. See **Burden of Proof**
Service, proof of. See **Service of Process and Papers**

Property Taxes
Traditional writ of mandate, unavailability to prevent collection of property taxes, 2.63

Publication of Opinion
Generally, 24.30
Certification of opinion for publication, 11.32
Criteria for publishing opinion, 11.32
Depublication of opinion
California Supreme Court opinion, depublication of. See **Review in California Supreme Court**
Rehearing in court of appeal, counsel seeking request for depublication in petition for, 25.20
Requesting depublication of published court of appeal opinion, 11.36
Finality of court of appeal's decision, effect of order certifying unpublished decision for publication, 25.6, 25.10

Public Employment Relations Board, Petition for Writ of Review of Decisions by
Generally, 16.29
Deadline for filing writ petition for review, 16.30
Mandamus in court of appeal or superior court, Board seeking enforcement of final decision or order by filing writ for petition of, 16.32
Standard of review if writ petition accepted, 16.31

Public Entities and Officials
See also **State and Local Agencies**
Administrative agency's officials and employees. See **Administrative Agencies' Acts and Decisions, Traditional Mandate to Compel**
Discretion of public functionaries defined, 2.7
Government Claims Act, demurrer to complaint failing to plead facts demonstrating or excusing compliance with claim presentation requirement of, 16.108
Legislative actions, effect of traditional writ of mandate on
Exception, implementation of legislation, 2.25
Exception, legislative action depriving agency of funds to perform mandatory duty, 2.26
Exception, legislative and quasi-legislative action in excess of authority, 2.24
General rule, legislative actions not subject to writ of mandate, 2.23
Ministerial duty, traditional writ of mandate to compel performance of
Generally, 2.5, 2.17-2.18
Administrative agencies. See **Administrative Agencies' Acts and Decisions, Traditional Mandate to Compel**
Definition of ministerial duty, 2.6, 2.19, 15.7
Distinguishing ministerial duty from discretionary action, 2.7
Extra-record evidence in traditional mandamus action challenging or seeking to compel ministerial actions, appropriateness of, 7.10
Implementation of legislation as ministerial duty, 2.25

Judgment or discretion, ministerial duty not requiring exercise of, 2.20
Mandate to compel performance of duty, appellate court's issuance of writ. See **Mandate in Courts of Appeal**
Prohibition, ministerial acts performed by court or officers not qualifying as judicial acts for purposes of, 15.17
Unconstitutionality of statute, effect on writ petition to compel performance of duty, 2.21
Prohibition, writ of
Applicability of writ to public officials, 4.8
Ministerial acts performed by court or officers not qualifying as judicial acts for purposes of writ of prohibition, 15.17
Traditional writ of mandate
Elections. See **Election Processes, Traditional Mandate Challenging**
Exercise of discretion, petition for writ to compel, 2.22
Legislative actions (see Legislative actions, effect of traditional writ of mandate on, above)
Ministerial duty (see Ministerial duty, traditional writ of mandate to compel performance of, above)
Negotiations with union, mandate compelling governmental entities to enter into, 2.50
Taxes. See **Taxes, Traditional Writ of Mandate Concerning**
Title to public office, determination of, 2.49
Undertaking requirement for stay of proceedings, exemption of public agencies and officers from, 6.20
Verification of pleadings
Extraordinary relief, public entities' exemption from verification requirements, 5.65
Official capacity, verification of appellate court writ petition by public officer acting in, 18.47
Return to alternative writ in appellate court, public entities and officials exempt from requirement of verifying answer, 23.32

Public Records Act
Extraordinary writ, petition under Govt C §6259(c) for
Deadline to file writ petition, 16.16
Discretion of court to deny writ petition, limits on, 16.15
Exclusive means of obtaining appellate review of trial court order under California Public Records Act, writ petition as, 16.14
Standard of review if writ petition accepted, 16.17
Stay, standard for granting, 16.16
Traditional mandate to compel disclosure of records under
Denial of disclosure, mandate for review of, 2.68
Inadequate remedy at law, no requirement of, 2.69

Public Utilities Commission (PUC)
Petition for writ of review of PUC's decisions
Generally, 16.33, 27.5
Deadline to file petition for writ of review, 16.37
Rehearing (see Rehearing, below)
Standard of review (see Standard of review if writ petition accepted, below)
Rehearing
Application for rehearing as prerequisite to filing petition for writ of review, 16.34
Application for rehearing deemed denied, 16.36
Decision on rehearing, no petition for rehearing required after, 16.35
Res judicata
Legislative power, no res judicata effect of PUC's exercise of, 16.45
Summary denial of petition for writ of review constituting decision on merits, 16.44
Standard of review if writ petition accepted
Generally, 16.39
Cases in which Pub Util C §1757 not applicable, limits on judicial review in, 16.41
Complaint or enforcement proceedings, ratemaking or licensing proceedings, limits on judicial review of, 16.40
Constitutional questions, reviewing court's exercise of independent judgment in reviewing, 16.43A
New or additional evidence, prohibition against presenting in writ proceeding, 16.43
Water corporations, limits on judicial review cases pertaining to, 16.42
Standing to seek writ review, 16.38
Venue for petition for writ review, 16.38

Quash, Motion to
Mandate to overturn order denying motion to quash. See **Mandate in Courts of Appeal**
Service of writ petition, motion to quash, 8.52

Quasi-Judicial Agency Decisions, Review of. See **Administrative Agencies' Acts and Decisions, Traditional Mandate to Compel**

Questionnaires. See **Charts, Checklists, Questionnaires, and Tables**

Questions of Law and Fact
Administrative body's failure to act as required by law as question of law, 3.13
Answer to writ petition in superior court raising issues of fact and law, 8.46
Controlling question of law, request that trial court certify existence of, 17.28
Fair hearing for administrative complainant, determination of as question of law, 3.11
Findings by administrative fact finder, adequacy to support administrative decision as question of law, 3.14
Return to writ petition for alternative writ of mandate or prohibition, hearing on questions of law raised in, 9.26
Special referee, court of appeal appointing to resolve disputed questions of fact, 24.14

Quo Warranto
Historical background and abolishment of writ, 4.27, 15.50

Real Property
Enforcing judgment for. See **Judgments**
Unlawful detainer. See **Unlawful Detainer Action, Writ Petition to Review Denial of Stay in**

Reclassification of Action or Proceeding, Review of Order Concerning. See **Mandate in Courts of Appeal**

Reconsideration, Motion for
Statutory time limits for filing writ petition in court of appeal, effect of filing motion for reconsideration on, 17.2
Summary judgment order, filing motion for consideration not extending time to file writ petition for review of, 16.76
Superior court's final decision on writ
Final judgment, unavailability of motion for reconsideration of, 11.5
Order not determining all issues, motion for reconsideration if, 11.6

Record in Appellate Court Writ Proceeding
Generally, 20.1
Agricultural Labor Relations Board filing certified record of proceeding in court of appeal, time limit for, 16.19
Appendix containing record, attachment to writ petition, 18.57
Confidentiality of appellate court records
Generally, 20.23
Sealing appellate court records. See **Sealing Appellate Court Records**
Contents of record
Additional facts, 20.8
All documents considered by trial court, 20.6
Judicial notice, inclusion of matters presented to trial court for, 20.18
Opposing party's papers, 20.4, 20.7
Reporter's transcript, 20.9
Ruling by trial court, inclusion of, 20.6
Supersedeas petition, required contents if record on appeal not filed. See **Supersedeas**
Denial of writ petition, lack of sufficient record as grounds for, 20.4
Filing record, 18.82, 20.16
Format of record
Binding of documents, 20.11
CD-ROM format, filing briefs and records in, 20.11
Citation to record, 20.14
Exhibits, separate volume for, 20.11
Indexing, pagination, and order of documents, 20.12
Legible and unmarked documents, requirement of, 20.13
Maximum page length, 20.11
Table of contents, 20.12
Judicial notice. See **Judicial Notice**
Preparation of record
Contents of record (see Contents of record, above)
Petitioner's responsibility for, 20.5
Petition for writ of review (certiorari), record requirement for, 20.10
Requirements affecting record
Generally, 20.2
Rules of Court, requirement that adequate record accompany writ petition, 20.3
Sufficient record, necessity of, 20.4
Review (certiorari), effect of granting petition for, 22.30
Service of petition and supporting documents, 20.15

Record in Superior Court Writ Proceeding

Generally, 7.1
Burden on petitioner to submit information for superior court to decide issues presented in writ petition, 7.2
Confidential documents, protection of
Generally, 7.26
Sealing documents. See **Sealing Documents in Superior Court**
Contents of record
Extra-record evidence (see Extra-record evidence, inclusion of, below)
Opposing party's evidence presented during underlying proceeding, inclusion of, 7.8
Relevant evidence presented during underlying proceeding, inclusion of, 7.7
Type of petition and nature of underlying proceeding, record dependent on, 7.6
Decision-making body in underlying proceeding, obtaining record from
Generally, 7.14
Method of requesting underlying record, 7.16
Paying for preparation of underlying record, 7.17
Timing of request for underlying record, 7.15
Declarations
Filing with court, 7.25
Separate supporting documentation, submission by declaration, 7.20
Denial of writ, lack of adequate record as grounds for, 7.3, 12.8
Evidence (see Contents of record, above)
Exhibits
Filing exhibits with court, 7.25
Format of record (see Format of record presented to superior court, below)
Extra-record evidence, inclusion of
Generally, 7.9
Quasi-legislative actions, exclusion of extra-record evidence in action challenging, 7.11
Traditional mandamus action challenging adjudicatory decisions, 7.12
Traditional mandamus actions challenging or seeking to compel ministerial actions, extra-record evidence in, 7.10
Format of record presented to superior court
Administrative record versus documentation submitted by exhibits, 7.18
Appending supporting documentation to petition, 7.19
Citation to record, 5.47, 7.23
Indexing, pagination, and order of supporting documentation, 7.21
Separate supporting documentation, submission by declaration or exhibits, 7.20
Visual quality of documents, 7.22
Lodging administrative record with superior court, 7.25
Necessity of sufficient record, 7.3
Noticed motion for writ in superior court, lodging administrative record with court, 5.102
Pre-merits hearing, record in, 7.13
Preparation of record
Contents of record (see Contents of record, above)
Petitioner's responsibility for preparing record, 7.5
Purpose of record, 7.2
Serving copy of record on opposing party, 7.24
Statutory guidelines for handling record, 7.4
Traditional mandate (see Extra-record evidence, inclusion of, above)

Records and Reports
Administrative record defined, 3.7
Appellate court writ proceeding, record in. See **Record in Appellate Court Writ Proceeding**
Discovery of. See **Discovery**
Inspection of records. See **Inspection of Records**
Preliminary opposition to writ petition, supporting factual statements by citation to record, 21.11
Public Records Act. See **Public Records Act**
Superior court writ proceeding, record in. See **Record in Superior Court Writ Proceeding**
Traditional mandate. See **Traditional Mandate in Superior Court**
Transcripts. See **Transcripts**

Referendums. See **Election Processes, Traditional Mandate Challenging**

Rehearing in Court of Appeal
Generally, 11.34, 25.16
Answer to petition for rehearing, 25.22
Chart, 25.23
Contents of petition for rehearing, 25.20

Denial of petition and denial by operation of law, 25.24
Format of petition for rehearing, 25.21
Granting rehearing
Generally, 25.25
Finality of court's decision, effect of granting rehearing on, 25.6
Grounds for, 25.17
Service and filing of petition for rehearing, 25.19
Standing to seek rehearing, 25.18

Rehearing, Petitioning PUC for. See **Public Utilities Commission (PUC)**

Remittitur
Generally, 11.33
Court clerk, duty of, 24.35
Defined, 24.31
Issuance of
Discretion of court to order immediate issuance of remittitur on parties' stipulation or dismissal of proceeding, 24.34
Summary denial of writ petition, remittitur not required after, 24.32
Time for issuing, 24.33
Stay or recall of remittitur, 24.36

Replication (Petitioner's Reply) in Superior Court
Generally, 8.57
Alternative writ, time limit for reply in court of appeal, 22.25
Contents of replication, 8.59
Defined, 8.2
Evidence presented at hearing, requirement of advance notice if replication made by, 8.60
Filing and service of
Generally, 8.61
Reply memorandum (see Reply memorandum filed by petitioner, below)
Time for filing (see Time, below)
Limited jurisdiction civil case, petitioner's reply in. See **Limited Jurisdiction Civil Case**
Reply memorandum filed by petitioner
Alternative writ procedure used, filing reply memorandum if, 8.63
Defined, 8.2
Noticed motion procedure used, filing reply memorandum if, 8.62
Review in California Supreme Court, reply to answer to petition for. See **Review in California Supreme Court**
Time
Filing reply, deadline for, 8.58
Reply memorandum, time for filing, 8.62

Replication to Return in Appellate Court Proceedings. See **Return to Alternative Writ in Appellate Court Proceedings**

Reply. See **Replication (Petitioner's Reply) in Superior Court; Return to Alternative Writ in Appellate Court Proceedings**

Reply to *Palma* Opposition. See **Opposition to Writ Petition Filed in Court of Appeal**

Reporter's Transcript. See **Transcripts**

Reports. See **Records and Reports**

Res Judicata
Public Utilities Commission. See **Public Utilities Commission (PUC)**
Summary denial of writ petition by California Supreme Court, res judicata effect of, 27.3
Superior court judgments, res judicata effect of
Alternative writ, inapplicability of res judicata to denial of, 9.55
Final judgment in writ proceeding, preclusive effect of, 9.54

Responsive Motions
Generally, 8.50
Answer, filing in conjunction with motion, 8.56
Change of venue, motion for, 8.55
Discovery motion, 8.55
Dismiss, motion to, 8.51
Judgment on the pleadings, motion for, 8.53

Noticed motion, filing responsive pleading or motion in response to. See **Noticed Motion in Superior Court**
Quash service of writ petition, motion to, 8.52
Strike, motion to, 8.55
Summary judgment, motion for, 8.54

Responsive Pleadings
See also **Pleadings**
Generally, 8.1
Alternative writ for mandate or prohibition. See **Alternative Writs of Mandate or Prohibition in Superior Court**
Answers
Court of appeal, answers in. See **Answers in Courts of Appeal**
Superior court, answers in. See **Answers in Superior Court**
Appellate briefs. See **Briefs**
Definitions, 8.2
Demurrer. See **Demurrer**
Fees
Alternative writ, fee for filing opposition to application for issuance of, 8.29
Noticed motion by respondent, fee for filing responsive pleading or motion in response to, 8.12
Joint response by respondent and real party in action, 8.5
Mandate, effect of filing writ petition on time limit for filing responsive pleadings in superior court, 16.57
Manner in which petitioner proceeds, response controlled by, 8.3
Noticed motion, filing responsive pleading or motion in response to. See **Noticed Motion in Superior Court**
Opposition memorandum. See **Memorandum in Support or Opposition**
Reply. See **Replication (Petitioner's Reply) in Superior Court**
Stay of challenged action or decision, petitioner seeking, 8.4

Return in Appellate Writ Review Proceedings
Mandate or prohibition. See **Enforcement of Writs of Mandate or Prohibition in Courts of Appeal**
Review. See **Review (Certiorari) in Courts of Appeal**

Return to Alternative Writ in Appellate Court Proceedings
Generally, 23.19
Affirmative defenses
Answer, raising affirmative defenses in, 23.31
Demurrer, raising affirmative answers in prohibited, 23.36
Answer as formal return
Generally, 23.28
Affirmative defenses, answer raising, 23.31
Demurrer, filing with answer, 23.34
Material facts, answer alleging additional, 23.30
Responding to verified allegations in petition, 23.29
Verification of answer, 23.32
Certificate of Interested Entities or Persons, service and filing of, 23.26A
Consequences of not filing proper return, 23.44
Contents of return, 23.26
Defenses (see Affirmative defenses, above)
Definitions
Formal return, 23.27
Return, 23.20
Demurrer, return by way of
Generally, 23.33
Affirmative defenses, raising in demurrer prohibited, 23.36
Answer, filing demurrer with, 23.34
Grounds for demurrer, 23.35
Exhibits supporting return, 23.38
Formal return
Generally, 23.27
Answer (see Answer as formal return, above)
Demurrer (see Demurrer, return by way of, above)
Format of return
Generally, 23.25
Reply (traverse) to return, format of, 23.49
Memorandum in support of, 22.29, 23.37
Preliminary opposition, court treating as return, 23.44
Replication to return (see Reply (traverse) to return, petitioner filing, below)

Reply (traverse) to return, petitioner filing
Generally, 23.48
Amicus curiae briefs. See **Amicus Curiae**
Chart, deadlines for filing reply, 23.51
Defined, 23.2
Filing and service of reply, 23.50
Format and content of reply, 23.49
New issues in reply, petitioner prohibited from raising, 23.49
Purpose of, 23.49
Sample form, 28.12
Responsibility for filing return
Joint return, respondent and real party in interest filing, 23.24
Real party in interest, return filed by, 23.21
Respondent other than lower court, return filed by, 23.23
Respondent trial court's standing to file return, 23.22
Sample form, return to petition for writ of mandate, prohibition, or other alternative relief, 28.11
Service of return
Manner of serving, 23.43
Petitioner and parties appearing in proceeding, serving return on, 23.42
Reply (traverse) to return, service of, 23.50
Standing to file return (see Responsibility for filing return, above)
Time limit for filing return, 22.25
Timing of return
Chart, deadlines for filing return, 23.51
Extension of time for filing return, 23.41
Filing date for return, court of appeal setting deadline for, 23.39
30 days for filing return if court of appeal fails to set deadline, 23.40
Traverse to return (see Reply (traverse) to return, petitioner filing, above)
Verification (see Answer as formal return, above)

Return to Writ in Superior Court Proceedings
Alternative writ for mandate or prohibition in superior court. See **Alternative Writs of Mandate or Prohibition in Superior Court**
Defined, 8.2
Enforcement of peremptory writ. See **Enforcement of Writs of Mandate or Prohibition in Superior Court**
Limited jurisdiction civil cases. See **Limited Jurisdiction Civil Cases**
Review (certiorari), court ordering further return, 9.51

Review (Certiorari) in Courts of Appeal
Generally, 15.27
Alternatively requesting review or habeas relief, 15.37
Appeal from challenged action, lack of as prerequisite for writ
Generally, 15.32
Final judgment, effect of availability of appeal from, 15.33
Loss of right to appeal through no fault of petitioner, exception affecting right to writ of review, 15.36
Plain, speedy, or adequate remedy, effect of appeal failing to provide, 15.34
Related ruling or order, effect on availability of writ of appeal from, 15.35
Waiver of appeal by party's neglect, effect on right to writ, 15.33
Challenging court of appeal decision by seeking certiorari by U.S. Supreme Court, 25.31
Completed judicial actions, applicability of writ to, 15.18
Enforcing decision in writ of review proceeding, 24.53
Examples of completed judicial action subject to writ review
Contempt proceedings, rulings in, 15.37, 16.133, 16.135
Other judicial actions subject to review, 15.38
Issuance of, 22.30
Opinion by appellate court. See **Opinion by Appellate Court Granting or Denying Writ Petition**
Petition for writ of habeas corpus or certiorari (filed by attorney), 28.21
Post-decision documents not required for writ of review, 24.42
Prayer for relief seeking, 18.40
Probate orders, petition for review of, 16.143
Purpose of writ, 15.27
Raising issue in trial court as prerequisite for, 15.68
Record of proceeding from lower court, writ of review ordering lower court to certify or return to reviewing court, 15.28
Record requirement for petition for writ, 20.10
Return in writ review proceedings

Generally, 23.45
Definition of return, 23.46
Demurrer to petition for review, 23.47
Review in California Supreme Court, petition for as prerequisite to petitioning U.S. Supreme Court for certiorari, 25.29
Stay of trial court proceeding, effect of issuing writ of review on, 19.5
Substantive requirements for
Appeal (see Appeal from challenged action, lack of as prerequisite for writ, above)
Completed judicial acts, writ review limited to, 15.30
Excess of court's jurisdiction, requirement that judicial act be in, 15.31
Limiting writ to review of judicial action, 15.29
Trial court's completion of challenged act before appellate court's ruling on petition for prohibition, treatment of proceeding as petition for writ of review, 15.21

Review (Certiorari) in Superior Court
Generally, 4.10, 9.1
Adjudicatory decisions of constitutional statewide agencies, availability of writ to review, 4.15
Appeal from order granting or denying writ. See **Appeals**
Appellate division of superior court granting or denying petition for writ of review, appealability to court of appeal, 12.20
Applicability of writ (see State and local agencies, applicability of writ to, below)
Distinguishing writ of prohibition from writ of review (certiorari), 4.4
Drafting writ petition. See **Drafting Writ Petition for Superior Court**
Enforcement of writ
Filing new writ of mandate or prohibition petition to enforce judgment in writ of review proceedings, necessity of, 10.21
Remedies for failure to comply with writ, 10.20
Further return, court ordering, 9.51
Hearing after issuance of certiorari, requirement of, 4.12
Hearing and decision on merits, 9.51
Issuance of writ, 9.50
Judgments
Filing new writ of mandate or prohibition petition to enforce judgment on merits issued after issuance of writ of review, 10.21
Ruling and judgment by superior court on petition for review, 9.52
Limited jurisdiction civil cases, appellate division of superior court granting writ of review in. See **Limited Jurisdiction Civil Cases**
Order to show cause why writ should not be allowed, court's issuance of, 9.49
Purpose of, 4.10
Requirements for writ, 4.16
Scope of review by superior court, 4.11
State and local agencies, applicability of writ to
Adjudicatory decisions of statutorily-created state agencies, unavailability of writ for review of, 4.13
Local agencies not subject to review (certiorari), 4.14
Statutory authority for, 5.3
Stay, discretion of court granting certiorari to omit, 6.4

Review in California Supreme Court
See also **California Supreme Court**
Generally, 11.35, 25.1
Answer to petition for review
Contents of, 27.26
Cover for, 27.23
Maximum length of, 27.21
Number of copies, 27.24
Reply to answer (see Reply to answer, below)
Time limit for filing, 27.18
Depublication of opinion
Request for depublication, attaching to petition for review prohibited, 27.25
Separate petition for, 11.36
Disposition of petition
Generally, 27.29
Denial of petition, 27.30
Granting review on all or some issues, 27.31
Multiple parties seeking review, time limit for supreme court to grant or deny review, 27.33
Transfer of matter to court of appeal, 27.32
Energy Resources Conservation and Development Commission, review of decisions by
Generally, 16.26
Deadline to file petition for writ review, lack of, 16.27

Original writ jurisdiction of supreme court for reviewing decisions by, 27.4
Standard of review if writ petition accepted, 16.28
Extension of time
Disposition of petition, supreme court extending time for, 27.30
Holiday or weekend, no extension of time if final date for filing falls on, 27.16
Multiple parties seeking review, supreme court extending time limit to grant or deny review, 27.33
Factors in party's decision to seek review, 27.14
Filing petition, procedures for
Chart, filing requirements for petition for review, 27.28
Number of copies, 27.24
Timing (see Timing for filing review petition, below)
Format of petition
Generally, 27.20
Attachments, 27.22
Cover of petition, 27.23
Length of petition, 27.21
Grant and hold, effect of, 25.28
Grounds for petition review, 25.27, 27.13
Opinion of Supreme Court
Depublication of opinion (see Depublication of opinion, above)
Distinction between seeking petition for review challenging court of appeal's opinion from petition invoking supreme court's original jurisdiction seeking issuance of prerogative writ of mandate, prohibition, or review, 11.35
Petitions for review
Generally, 25.26, 27.12
Answer (see Answer to petition for review, above)
Certiorari, seeking review in California Supreme Court as prerequisite to petitioning U.S. Supreme Court for, 25.29
Contents of petition, 27.22, 27.25
Disposition of petition (see Disposition of petition, above)
Exhausting state remedies, seeking review for purposes of, 25.29
Filing petition (see Filing petition, procedures for, above)
Format of petition (see Format of petition, above)
Same or similar issue in pending case before court as grounds for seeking review, 25.28
Sample form, petition for review, 28.16
Summary denial of petition for review, 25.27
Rehearing in court of appeal before seeking review in California Supreme Court, 11.34
Reply to answer
Contents of, 27.27
Cover for, 27.23
Number of copies, 27.24
Time limit for filing, 27.19
Summary denial of writ petition, review of, 25.11, 25.30
Timing for filing review petition
Generally, 27.15
Answer to petition, time limit for filing, 27.18
Energy Resources Conservation and Development Commission, lack of deadline for filing petition for review of decisions by, 16.27
Extension of time (see Extension of time, above)
Relief for failure to timely file petition for review, 27.17
Reply by petitioner to answer, 27.19

Rules of Court
See also **Local Rules of Court**
Case cover sheet, rules of court requiring, 5.78
Court of appeal
Opposition to writ petition filed in court of appeal, rules of court specifying format requirements for, 23.4
Record accompanying writ petition in court of appeal, Rules of Court requiring, 20.3
Supersedeas petition demonstrating substantial issues on appeal, rules requiring, 26.5
Superior court
Generally, 1.3
Applicability of California Rules of Court to superior court writ proceedings, 5.5
Local rules of court. See **Local Rules of Court**

Sacramento County
Procedures for prosecuting petitions for prerogative writs in Sacramento Superior Court, App B

Sale
Superior court issuing writ of, 4.32

Sanctions. See **Penalties**

Saturdays, Sundays, and Holidays
Calculating time limit for filing writ petition in court of appeal, exclusion of last day if falling on judicial holiday, 18.74
Finality of appellate court's decision, effect of 30-day period falling on weekend or holiday, 25.8
Review in California Supreme Court, no extension of time to file petition if final date for filing falls on holiday or weekend, 27.16

Schools
Students, traditional mandate to review decisions and actions concerning, 2.43
Teachers, traditional mandate to review decisions and actions concerning, 2.42, 2.56

Sealing Appellate Court Records
Generally, 20.24
Lodging record with court
Generally, 20.27
Defined, 20.26
Request that appellate court seal records, 20.26
Trial court, records sealed by, 20.25
Unsealing records, motion or petition for, 20.28

Sealing Documents in Superior Court
Criteria for, 7.27
Joint motion for sealing document, 7.27
Lodging document with court
Generally, 7.30
Conditionally sealing document (record), 7.31
Court's handling of conditionally sealed document (record), 7.32
Slip pages for sealed documents, petitioner including in record, 7.33
Procedure for sealing documents
Generally, 7.28
Motion or application for order sealing documents, 7.29
Stipulation of parties for sealing documents prohibited, 7.27

Service of Process and Papers
Alcoholic Beverage Control Appeals Board's final order, deadline to serve writ petition for review of, 16.23
Certificate of Interested Entities or Persons, service of. See **Certificates and Certification**
Court of appeal
Alternative writ in court of appeal, service of, 22.26
Amicus brief, service of, 23.54
Manner of serving writ petition, 18.78
Opinion by appellate court granting or denying writ petition, service on lower court and parties, 24.29
Opposition to writ petition, service of. See **Opposition to Writ Petition Filed in Court of Appeal**
Peremptory writ of mandate or prohibition, petitioner's service of, 24.41
Preliminary opposition to writ petition, service of, 21.18
Proof of service, 18.80
Rehearing in court of appeal, service of petition for, 25.19
Reply (traverse) to return in appellate court, service of, 23.50
Respondent and real party in interest, petitioner serving, 18.79
Return to alternative writ. See **Return to Alternative Writ in Appellate Court Proceedings**
Stay request. See **Stay of Proceedings by Appellate Court**
Supersedeas petition, service of. See **Supersedeas**
Supporting documents and petition, service of, 20.15
Time for serving writ petition in court of appeal, 18.77
Time period to file writ petition in court of appeal, service of notice of entry of order triggering, 18.71
Unsealing of record by appellate court, parties serving opposition to, 20.28
Proof of service
Court of appeal, 18.80
Noticed motion. See **Noticed Motion in Superior Court**
Superior court
Generally, 5.71
Alternative writ of mandate or prohibition, service of. See **Alternative Writs of Mandate or Prohibition in Superior Court**

Enforcement of peremptory writ by superior court, personal service of writ on petitioner as prerequisite for, 10.12
Limited jurisdiction civil cases, service of writ petition and supporting record, 12.10
Noticed motion. See **Noticed Motion in Superior Court**
Quash service of writ petition, motion to, 8.52
Record of superior court writ proceedings, service on opposing party, 7.24
Replication (petitioner's reply), service of, 8.61
Responsive pleading and motion in response to noticed motion, service of. See **Noticed Motion in Superior Court**
Stay order, service of, 6.25
Time (see Court of appeal, above)

Setting Aside. See **Vacating and Setting Aside**

Settlement
Appeal, settlement of writ proceeding on, 11.19
Good faith settlement determination, grant or denial of motion for
Deadline to file writ petition, 16.50
Prerequisite to obtaining appellate review, writ proceeding as, 16.49
Standard of review if writ petition accepted, 16.51

Shield Law. See **Newspersons' Shield Law**

Shortening of Time. See **Extension and Shortening of Time**

Slander. See **Defamation**

Small Claims Court
Generally, 12.1
Challenging small claims court judgment, unavailability of writ review for, 12.26
Superior court's judgment on appeal, writ petition for review of, 12.27

Speaking Alternative Writ. See **Alternative Writs in Courts of Appeal**

Standing
Appellate court, standing to seek writ in. See **Courts of Appeal**
Public Utilities Commission's decision, standing to seek writ review of, 16.38
Return to alternative writ. See **Return to Alternative Writ in Appellate Court Proceedings**
Traditional mandate, petitioner's standing to seek writ of. See **Traditional Mandate in Superior Court**

State and Local Agencies
See also **Public Entities and Officials**
Administrative mandamus. See **Administrative Mandamus in Superior Court**
Constitutional statewide agencies. See **Constitutional Law**
Prohibition, applicability to state agencies. See **Prohibition in Superior Court**
Record in underlying proceedings, petitioner proceeding in forma pauperis not required to pay agency's preparation costs, 7.17
Review in superior court. See **Review (Certiorari) in Superior Court**
Undertaking requirement for stay of proceedings, exemption of public agencies and officers from, 6.20

State Bar
Disciplinary action by State Bar Court, disciplined attorney or chief trial counsel for State Bar filing petition with California Supreme Court for review of, 27.6

Statement of Decision. See **Alternative Writs of Mandate or Prohibition in Superior Court**

Statutes of Limitations
See also **Time**
Administrative mandamus in superior court, statute of limitations for filing petition for, 3.19
Malicious prosecution complaint, statute of limitations for, 16.108
Superior court, statute of limitations for filing writ petition in, 5.73

Statutes Specifying Use of Writ Petition to Obtain Appellate Review
Generally, 17.23
Administrative proceedings. See **Administrative Proceedings, Writ Review of**
Exclusive means of appellate review, writ petition as
Generally, 16.2
Agricultural Labor Relations Board's final order, writ petition as exclusive means of obtaining appellate review of, 16.18

Alcoholic Beverage Control Appeals Board's adjudicatory order, petition for writ as exclusive means of obtaining review of, 16.22
Mandate, statutes authorizing exclusive review by. See **Mandate in Courts of Appeal**
Public Records Act, writ petition as exclusive means of obtaining appellate review of trial court order under, 16.14
WCAB's decisions, special statutory writ of review as exclusive means of obtaining review of, 16.46, 27.7
Miscellaneous statutes authorizing writ review
Generally, 16.53
Change of venue order, review under CCP §400. See **Venue**
Monetary sanction judgment of $5000 or less, review under CCP §904.1(a)(11)-(12). See **Penalties**
Quash service of summons, dismissal for inconvenient forum or for delay in prosecution, petition for mandate to overturn order. See **Mandate in Courts of Appeal**
Reclassify action or proceeding, grant or denial of superior court motion to. See **Mandate in Courts of Appeal**
Summary judgment order, review under CCP §437c. See **Summary Judgment**
Unlawful detainer action, writ petition for review of denial of stay in (CCP §1176). See **Unlawful Detainer Action, Writ Petition to Review Denial of Stay in**
Nonstatutory writ relief. See **Discretion of Court**
Prerequisite for post-judgment review on appeal, writ petition as, 17.25
Prerequisite to appeal, writ petition as
Good faith settlement determination, grant or denial of motion for. See **Settlement**
Juvenile dependency proceedings, writ challenging order setting termination hearing or post-termination placement order, 16.52
Public Records Act. See **Public Records Act**
Sole means of appellate review, statute providing for writ as, 17.24, 17.29

Stay of Proceedings by Appellate Court
Generally, 11.26, 19.1
Action by appellate court on stay request, 19.20
Alternative writs
Mandate or order to show cause, no automatic stay as result of issuance of alternative writ of, 19.3
Order to show cause re writ of review (certiorari), trial court proceedings not stayed by issuance of, 19.5
Prohibition or order to show cause, automatic stay of challenged proceeding as result of issuing alternative writ of, 19.4
Temporary stay order, alternative writ containing, 22.25
Application for stay
Drafting request for stay (see Drafting request for stay, below)
Separate document or part of writ petition, stay application as, 19.9
Service of stay request (see Service of stay request, below)
Undertaking, court's discretion to require, 19.10
Automatic stay, generally (see Alternative writs, above)
Automatic stay of execution of writ
Exceptions to automatic-stay rule, 11.25
Mandate but not prohibition, appeal resulting in stay of, 11.24
Contents of, 11.26
Cover of document seeking stay, requirements for
Generally, 19.11
Notice of request for stay, 18.19, 19.9, 19.12
Trial court identifying information, inclusion of, 19.13
Decision of appellate court on petition, appellant obtaining temporary stay pending, 26.25
Discovery order requiring disclosure of private or privileged information, requesting stay in connection with filing writ petition for review of, 16.118
Drafting request for stay
Generally, 18.58
Allegations in support of stay, 18.59, 19.15
Cover (see Cover of document seeking stay, requirements for, above)
Declaration in support of stay request, 19.16
Documents in support of stay, 18.60, 19.16
Statement of urgency, 19.14, 19.16
Issuance of stay order by appellate court
Generally, 22.10
Actions on temporary stay, 22.11
Contents of temporary stay order, 22.12
Notice of temporary stay order, 22.13
Judgment, stay of
Money judgment, bond required for stay of, 26.3
Supersedeas. See **Supersedeas**
Notice

Cover of document seeking stay, notice of request for stay on, 18.19, 19.9, 19.12
Temporary stay order, notice of, 22.13
Opposition to stay request, 19.19
Oral argument on request for, 26.28
Prayer for relief in writ petition requesting immediate stay, 18.37
Preliminary opposition. See **Preliminary Opposition to Writ Petition Filed in Appellate Courts**
Preparation of documents (see Drafting request for stay, above)
Public Records Act, standard for granting stay under, 16.16
Purpose of stay, 19.2
Remittitur, stay of, 24.36
Requirements for stay request
Cover of document seeking stay (see Cover of document seeking stay, requirements for, above)
Imminent injury to party seeking relief as prerequisite for stay, 19.7
Unsuccessful attempt to obtain stay from trial court, 19.8
Review (certiorari), effect of granting petition for, 22.30
Scope of stay request, 19.6
Service of stay request
Separate application for stay, service of, 19.18
Writ petition requesting stay, service of, 18.78, 19.17
Unlawful detainer. See **Unlawful Detainer Action, Writ Petition to Review Denial of Stay in**

Stay of Proceedings Pending Writ Petition in Superior Court
Generally, 6.1, 8.4
Alternative writ of mandate or prohibition, service of stay order in conjunction with, 9.14
Appeal, stay of writ by, 10.8
Application for stay
Alleging basis for stay, 5.39, 5.58
Grant or denial of application (see Grant or denial of stay application, below)
Hearing (see Hearing on stay request, below)
Length of stay, 6.8
Opening paragraph of writ petition, noting request for stay in, 5.39
Opposing stay application (see Opposing stay application, below)
Petition for writ or separate document, stay application as part of, 6.7
Preparation of documents (see Preparation of documents, below)
Automatic stay, vacating trial court proceedings conducted in violation of, 26.6
Bond (see Undertaking if stay granted, respondent's request for, below)
Declarations
Contents of petitioner's declaration supporting stay application, 6.15
Opposition to stay application, declaration supporting, 6.19
Denial of application (see Grant or denial of stay application, below)
Determining necessity or appropriateness of stay or preliminary injunction
Generally, 6.3
Factors to consider when choosing between stay or preliminary injunction, 6.6
Merits of petition, court's preliminary decision on, 6.5
Type of writ relief sought as determinative of need for stay, 6.4
Discretion of court
Grant or denial of stay application, court's discretion concerning, 6.24
Temporary restraining order, court's discretion to require bond or undertaking for, 6.33
Undertaking (see Undertaking if stay granted, respondent's request for, below)
Ex parte proceeding
Generally, 6.23
Declaration in support of stay, statement concerning notice of ex parte hearing, 6.15
Scheduling ex parte applications with court clerk, 6.17
Temporary restraining order, issuance of, 6.31
Title of ex parte stay application, 6.11
Grant or denial of stay application
Appealability of order granting or denying stay, 6.27
Denial of stay application, 6.26
Discretion of court to grant or deny stay application, 6.24
Grant of stay application, 6.25
Hearing on stay request
Ex parte hearing (see Ex parte proceeding, above)
Noticed motion procedure, 6.22
Preliminary injunction, time limit for setting hearing on, 6.35
Respondent appearing at, 6.19

Injunction (see Preliminary injunction, seeking stay through, below)
Limited jurisdiction civil case, request for stay in, 12.9
Mandate to overturn order denying stay for inconvenient forum or dismiss for delay in prosecution. See **Mandate in Courts of Appeal**
Memorandum
Opposing stay application, 6.19
Supporting stay application, 6.12
Methods for staying challenged action or decision
Generally, 6.2, 8.4
Application for stay (see Application for stay, above)
Preliminary injunction (see Preliminary injunction, seeking stay through, below)
Temporary restraining order (see Temporary restraining order (TRO), seeking stay through, below)
Modification or dissolution of stay, 6.28
Opposing stay application
Stipulation by parties in event of no opposition to stay, 6.18
Undertaking (see Undertaking if stay granted, respondent's request for, below)
Written opposition, respondent filing, 6.19, 8.4
Order for stay
Application for stay pending superior court's decision on merits of writ petition, submission of proposed order with, 6.16
Checklist for obtaining stay order, 6.39
Grant or denial of stay application, appealability of order for, 6.27
Service of stay order, 6.25
Preliminary injunction, seeking stay through
Generally, 6.29
Bond, amount of, 6.38
Bond, requirement of, 6.31, 6.37
Criteria for issuance of, 6.36
Determining necessity for injunction (see Determining necessity or appropriateness of stay or preliminary injunction, above)
Factors considered by superior court, 6.30
Hearing on preliminary injunction, time limit for setting after granting temporary restraining order, 6.35
Temporary restraining order (TRO), preliminary injunction superseding, 6.31
Preparation of documents
Part of writ petition, stay application as, 6.9
Separate document (see Separate document, stay application as, below)
Separate document, stay application as
Generally, 6.7, 6.10
Criteria governing stays in writ proceedings, 6.13
Declaration by petitioner explaining necessity for stay, contents of, 6.15
Memorandum supporting stay application, 6.12
Proposed order, submission of, 6.16
Title of stay application, 6.11
Verified allegations in writ petition, 6.14
Temporary restraining order (TRO), seeking stay through
Generally, 6.29
Denial of TRO application, 6.34
Description and purpose of TRO, 6.31
Discretion of court to require bond or undertaking, 6.33
Factors considered by superior court, 6.30
Grant of TRO application, 6.35
Lack of requirement for bond or undertaking, 6.31
Preliminary injunction hearing, time limit for setting after granting TRO application, 6.35
Verified copy of writ petition, inclusion with application for TRO, 6.32
Undertaking if stay granted, respondent's request for
Amount of undertaking, court's discretion to set, 6.21
Preliminary injunction (see Preliminary injunction, seeking stay through, above)
Requirement of undertaking, court's discretion concerning, 6.20
TRO, undertaking for (see Temporary restraining order (TRO), seeking stay through, above)
Unlawful detainer. See **Unlawful Detainer Action, Writ Petition to Review Denial of Stay in**
Verification
Allegations in writ petition, verification of, 6.14
TRO, inclusion of verified copy of writ petition with application for, 6.32

Stipulations
Opposition to writ petition filed in court of appeal, parties prohibited from stipulating to extension of time to file, 23.13
Remittitur, discretion of court to order immediate issuance on parties' stipulation, 24.34

Responsive pleading, stipulation for extension of time to file, 8.10
Sealing records, inability of parties to stipulate to, 7.27, 20.26
Stay pending superior court's decision on merits of writ petition, stipulation by parties in event of no opposition to, 6.18

Strike, Motion to
Response to writ petition, motion to strike as, 8.55
Sanctions for frivolous writ petition, court striking opposing party's petition or pleading as, 24.63

Subpoenas
Mandate directing trial court to quash deposition subpoenas for records protected by physician-patient privilege, 16.121
Traditional mandate challenging issuance or failure to issue, 2.65

Summary Denial of Writ. See **Denial of Writ by Appellate Court**

Summary Judgment
Appealability of order granting motion for summary judgment, 16.66
Basis for writ petition for review of summary judgment order
Denial of motion, court's error in, 16.69
Oral argument on summary judgment motion, court's error in denying, 16.74
Right to file motion, court's error in depriving party of, 16.73
Shortening notice period, court's error in, 16.72
Specify issues and evidence relied on, court's failure to, 16.70
Summary adjudication in alternative, court's error by refusing to consider, 16.75
Taking motion off calendar, court's error in, 16.71
Motion for summary judgment in response to writ petition, 8.54
Petition for writ review of order denying summary judgment under CCP §437c
Generally, 16.66
Basis for writ petition (see Basis for writ petition for review of summary judgment order, above)
Deadline to file writ petition for review, 16.76
Denial of motion for summary judgment, 16.67
Standard of review if writ petition accepted, 16.77
Summary adjudication, grant or denial of, 16.68

Superior Court
See also **Courts of Appeal**
Generally, 1.1, 1.4, 5.1-5.2
Appellate division of superior court. See **Limited Jurisdiction Civil Cases**
Attachment, requirements for writ of, 4.29
Attorney fees. See **Attorneys' Fees**
Certiorari. See **Review (Certiorari) in Superior Court**
Challenging superior court's final decision on writ
Generally, 11.1-11.2
Appeal. See **Appeals**
New trial, motion for, 11.3
Reconsideration, motion for. See **Reconsideration, Motion for**
Vacate judgment, motion to, 11.4
Charts and checklists. See **Charts, Checklists, Questionnaires and Tables**
Combining writ petition with complaint for damages, 5.119
Coram nobis. See **Coram Nobis and Coram Vobis**
Costs. See **Costs**
Court clerk. See **Court Clerk**
Declarations. See **Affidavits and Declarations**
Denial of writ. See **Denial of Writ in Superior Court**
Discretion of court. See **Discretion of Court**
Distinguishing appellate and superior court writ proceedings, 14.1
Drafting writ petition. See **Drafting Writ Petition for Superior Court**
Execution, writ of, 4.30
Exhibits. See **Exhibits**
Ex parte proceedings. See **Ex Parte Proceedings**
Filing writ petition in
Generally, 5.71
Administrative mandamus petition, filing deadline for, 3.19
Alternative writ. See **Alternative Writs of Mandate or Prohibition in Superior Court**
Noticed motion. See **Noticed Motion in Superior Court**
Replication. See **Replication (Petitioner's Reply) in Superior Court**

Stay application and writ petition, filing of, 6.17
Time for filing. See **Time**
Venue in writ proceedings, 5.75
Final decision on writ (see Challenging superior court's final decision on writ, above)
Format of petitions. See **Format of Petitions and Other Documents**
Habeas corpus. See **Habeas Corpus in Superior Court**
Issuance of peremptory writ in first instance, 5.19
Judicial notice. See **Judicial Notice**
Jurisdiction of. See **Jurisdiction**
Jury trial. See **Jury Trial**
Limited jurisdiction civil cases. See **Limited Jurisdiction Civil Cases**
Mandate, writ of
Generally. See **Mandate in Superior Court**
Alternative writs. See **Alternative Writs of Mandate or Prohibition in Superior Court**
Traditional mandate. See **Traditional Mandate in Superior Court**
Memorandum. See **Memorandum in Support or Opposition**
Motions, superior court's authority to hear, 9.53
Noticed motion. See **Noticed Motion in Superior Court**
Orders. See **Orders**
Pleadings. See **Pleadings**
Possession, superior court issuing writ of, 4.31
Prevent trial, use of prohibition to, 16.113
Procedures for prosecuting superior court writ actions
Generally, 1.3
Alternative writs. See **Alternative Writs of Mandate or Prohibition in Superior Court**
Noticed motion. See **Noticed Motion in Superior Court**
Sacramento Superior Court guide to procedures for prosecuting petitions for prerogative writs, App B
Prohibition, writ of. See **Prohibition in Superior Court**
Question of law, request that trial court certifying existence of, 17.28
Record in superior court writ proceeding. See **Record in Superior Court Writ Proceeding**
Record of trial court proceedings. See **Record in Appellate Court Writ Proceeding**
Relief from superior court's final decision on writ (see Challenging superior court's final decision on writ, above)
Res judicata effect of superior court judgment granting or denying peremptory writ. See **Res Judicata**
Responsive pleadings in superior court. See **Responsive Pleadings**
Return to writ. See **Return to Writ in Superior Court Proceedings**
Review. See **Review (Certiorari) in Superior Court**
Rules of court. See **Rules of Court**
Sale, superior court issuing writ of, 4.32
Sealing documents. See **Sealing Documents in Superior Court**
Sealing of records by trial court, 20.25
Service of writ. See **Service of Process and Papers**
Statutory authorities
Generally, 5.3
Other statutes, applicability to writ proceedings, 5.4
Rules of Court, applicability to writ proceedings. See **Local Rules of Court; Rules of Court**
Stay of proceedings pending writ petition in superior court. See **Stay of Proceedings Pending Writ Petition in Superior Court**
Supersedeas, trial court's violation of statutory stay provision. See **Supersedeas**
Time. See **Time**
Trial Court Delay Reduction Act, effect on writ petitions, 5.120
Types of writs available, 1.2
Verification. See **Verification**

Supersedeas
Generally, 15.49, 26.1
Ancillary matters (see Collateral or ancillary matters, filing appeal not resulting in stay of, below)
Appeal, filing writ of supersedeas with, 26.3
Automatic stay on filing of appeal
Generally, 26.6
Determining if matter "embraced" or "affected" by judgment or order, 26.7
Examples of matters "embraced" or "affected" by judgment or order, 26.8
Mandamus, filing appeal staying judgment issuing writ of, 26.10
Mandatory injunction stayed by filing appeal, 26.9
Vacating trial court proceedings conducted in violation of automatic stay, 26.6
Bonds and undertakings
Discretion of appellate court to grant supersedeas relief if appellant unable to furnish appeal bond, 26.19

Matters not stayed by filing notice of appeal (see Matters not stayed by filing notice of appeal, below)
Collateral or ancillary matters, filing appeal not resulting in stay of
Generally, 26.14
Definition of collateral and ancillary matters, 26.15
Examples of collateral or ancillary matters on appeal, 26.16
Contents of writ petition
Generally, 26.22
Documents filed with petition if record on appeal not filed, 26.24
Statement of case, inclusion if record on appeal not filed, 26.23
Definitions
Collateral and ancillary matters, 26.15
Writ of supersedeas, 26.2
Discretion of appellate court, supersedeas relief within
Grounds for relief, appellant's burden of showing, 26.18
Inherent power of appellate court to grant supersedeas relief, 26.17
Prohibitory injunction, court's discretion to stay, 26.21
Statutory conditions for stay, effect of appellant's inability to comply with, 26.20
Unbonded money judgment, appellate court's discretion to grant supersedeas relief in actions involving, 26.19
Limited jurisdiction civil case, superior court issuing writ of supersedeas in, 12.28
Matters not stayed by filing notice of appeal
Chart, judgments and orders subject to CCP §917.1-917.9, 26.11
Money judgment, posting bond or undertaking for, 26.12
Other judgments and orders stayed on filing undertaking or bond, 26.13
Memorandum in support or opposition to petition for, 26.22, 26.28
Notice of appeal (see Matters not stayed by filing notice of appeal, above)
Opposing petition for supersedeas
Contents of opposition, 26.28
Filing and service of opposition to petition, 26.30
Format of opposition, 26.26, 26.29
Memorandum in opposition to petition for, 26.28
Order granting petition for writ of supersedeas, 28.19
Petition for writ of supersedeas
Contents of petition (see Contents of writ petition, above)
Filing and service of petition, 26.27
Format of petition, 26.26
Opposing petition (see Opposing petition for supersedeas, above)
Sample form, 28.18
Temporary stay, appellant obtaining pending appellate court's decision on petition, 26.25
Record on appeal (see Contents of writ petition, above)
Relief, likelihood of, 26.4
Service of papers
Opposition to petition, service of, 26.30
Petition for supersedeas, service of, 26.27
Undertakings (see Bonds and undertakings, above)
Violation of statutory stay provision by trial court or opponent
Generally, 26.5
Automatic stay (see Automatic stay on filing of appeal, above)
Collateral matters (see Collateral or ancillary matters, filing appeal not resulting in stay of, above)
Matters not stayed by filing notice of appeal (see Matters not stayed by filing notice of appeal, above)

Supreme Court
California Supreme Court. See **California Supreme Court**
Certiorari in U.S. Supreme Court. See **Certiorari in U.S. Supreme Court**

Tables. See **Charts, Checklists, Questionnaires, and Tables**

Taxes, Traditional Writ of Mandate Concerning
Generally, 2.57
Appeal challenging assessment, mandate to compel Board of Equalization to hear, 2.60
Compliance with tax laws requiring levying of taxes and assessments, use of writ to compel, 2.58
County assessment practices, traditional mandate challenging, 2.61
Exceptions to use of writ
Challenging assessment, unavailability of mandate for, 2.62
Property taxes, unavailability of mandate to prevent collection of, 2.63

Tax refund action testing legality of action, effect on availability of writ, 2.57
Recordkeeping and handling duties, mandate to compel, 2.59
Retroactive payment of taxes due to agency, mandate compel, 2.64

Telephone, Appearance by
Oral argument on writ petition for, permissibility of telephonic appearance, 24.9

Temporary Restraining Order (TRO)
See also **Injunctions**
Ex parte application for temporary restraining order and order to show cause, 13.8
Ex parte proceeding for TRO, 4.33
Proposed temporary restraining order and order to show cause, 13.9
Stay of superior court proceedings through use of TRO. See **Stay of Proceedings Pending Writ Petition in Superior Court**

Temporary Stay Order. See **Stay of Proceedings by Appellate Court**

Third Parties
Payment for legal services by third party, client consenting to, 17.13

Time
See also **Statutes of Limitations**
Administrative mandamus, statutory deadlines for filing, 3.19
Agricultural Labor Relations Board's final order, deadline for filing writ petition to review, 16.19
Alcoholic Beverage Control Appeals Board's final order, deadline to file writ petition for review of, 16.23
Alternative writs in courts of appeal. See **Alternative Writs in Courts of Appeal**
Amicus curiae brief, time limit for filing in appellate court writ proceeding, 23.53
Appeals. See **Appeals**
California Supreme Court, time for filing original writ petition in, 27.10
Computing deadline for filing writ petition in court of appeal
Generally, 18.61
Events triggering time period for filing writ petition (see Events triggering time period for filing writ petition in court of appeal, below)
Maximum number of days (see Maximum number of days to file writ petition in court of appeal, below)
Court of appeal
Calculating deadline for filing writ petition, 17.26
Chart, time for filing petitions, 18.76
Computing deadline for filing writ petition (see Computing deadline for filing writ petition in court of appeal, above)
Contempt order, time for filing writ petition to review, 16.141
Discovery order, time to file writ petition for review of, 16.128
Events triggering time period for filing petition (see Events triggering time period for filing writ petition in court of appeal, above)
Extension of statutory time limit for filing writ petition. See **Extension and Shortening of Time**
Factual allegation showing petition's timeliness, 18.33
Finality of court's decision. See **Finality of Court of Appeal's Decision**
Good faith settlement determination, deadline for filing writ petition to review grant or denial of motion for, 16.50
Mandate. See **Mandate in Courts of Appeal**
Nonstatutory writ petition, time to file, 16.87, 16.129C
Opinion granting or denying petition. See **Opinion by Appellate Court Granting or Denying Writ Petition**
Opposition to writ petition, timing of. See **Opposition to Writ Petition Filed in Court of Appeal**
Oral argument in appellate court, time restrictions on, 24.12
Peremptory writ of prohibition, time for issuance of, 24.38
Preliminary opposition, time to file. See **Preliminary Opposition to Writ Petition Filed in Appellate Courts**
Receipt of writ petition by appellate court, filing effective on, 18.75
Rehearing in court of appeal, time limit for filing answer to petition for, 25.22
Return. See **Return to Alternative Writ in Appellate Court Proceedings**
Service of process. See **Service of Process and Papers**
Statutory time limits for filing writ petition, 17.2, 17.26, 18.62-18.65
Summary denial of writ petition, time limit for petitioning for review by California Supreme Court, 25.30
Summary judgment order, deadline to file writ petition for review of, 16.76
Superior court's final decision on writ petition, time as factor in deciding on appeal of, 11.17
Transfer of case from court of appeal to California Supreme Court before decision, timing of, 24.58
Unlawful detainer action, deadline to file writ petition to review denial of stay in, 16.79
Events triggering time period for filing writ petition in court of appeal
Entry of order triggering time period for filing writ petition, 18.70
Exclusion of day of triggering event and last day if falling on judicial holiday, 18.74

Minute order, mailing of, 18.72
Open court, notice in, 18.73
Service of notice of entry of order, 18.71
Extension of time. See **Extension and Shortening of Time**
In limine ruling, time to file writ petition challenging, 16.146
Judicial notice, timing of request for. See **Judicial Notice**
Limited jurisdiction civil cases. See **Limited Jurisdiction Civil Cases**
Maximum number of days to file writ petition in court of appeal
Discretion of appellate court to consider petitions filed after 60 days, 18.68
Extensions of time under CCP §1013, inapplicability to filing writ petition, 18.65
Jurisdictional, statutory deadlines treated as, 18.64
Laches, applicability to petitions filed after 60 days after issuance of challenged ruling, 18.67
No statutory time limits for filing petition, effect of, 16.87, 16.129C, 18.66-18.68
Order of trial court specifying due date for performance of specific act, effect on filing writ petition, 18.69
Short deadlines, statutes specifying, 18.63
60-day period for filing petition, 16.87, 16.129C, 18.66
Statutes specifying deadline for filing writ petition, 18.62-18.65
Monetary sanction judgment or order of $5000 or less, lack of statutory deadline for filing petition for writ of review, 16.83
Notice triggering time period for filing writ petition (see Events triggering time period for filing writ petition in court of appeal, above)
Public Employment Relations Board's decisions, deadline for filing writ petition for review of, 16.30
Public Records Act, deadline to file extraordinary writ to review trial court order under, 16.16
Public Utilities Commission's decision, deadline for filing petition for writ of review, 16.37
Remittitur, time for issuing, 24.33
Superior court
Absence of special statutory deadline, statute of limitations for filing petition in, 5.73
Alternative writ of mandate or prohibition. See **Alternative Writs of Mandate or Prohibition in Superior Court**
Answer in superior court, time limit for filing after demurrer overruled, 8.43
Attorney fees, time for filing motion, 5.125
Extension of time. See **Extension and Shortening of Time**
Laches, effect on filing of writ petition, 5.74
Lodging record of underlying proceedings with superior court before hearing, time limit for, 7.25
Memorandum of costs, time limit for filing, 5.123
Noticed motion for writ in superior court, time for filing. See **Noticed Motion in Superior Court**
Record of underlying proceedings, timing of request for, 7.15
Replication to answer, time for filing. See **Replication (Petitioner's Reply) in Superior Court**
Special statutory deadline, filing writ petition before expiration of, 5.72
Stay granted by superior court, length of, 6.8
Temporary restraining order (TRO), duration of, 6.31
Traditional mandamus proceedings, statutory deadlines for filing, 3.19
Unlawful detainer action, deadline to file writ petition to review denial of stay in, 16.78
Workers' Compensation Appeals Board's decision, deadline to file petition for writ review of, 16.47

Tort Claims Act. See **Government Claims Act**

Traditional Mandate in Superior Court
See also **Administrative Mandamus in Superior Court**
Generally, 2.1-2.2
Adequate remedy at law (see Remedy at law, lack of plain, speedy, or adequate, below)
Administrative agencies. See **Administrative Agencies' Acts and Decisions, Traditional Mandate to Compel**
Availability of, 3.18
Checklist for choosing between traditional and administrative mandamus, 3.20
Civil rights, enforcement of, 2.56
Consideration of claim by agency, mandate to compel, 2.66
Constitutional law
Joining traditional writ of mandate with claim involving constitutional right, 2.56
Statutory duty, effect of statute's unconstitutionality on petition for mandate to compel, 2.21
Corporations, associations, and officers, traditional mandate to compel performance by, 2.38, 2.54
Deferential substantial evidence standard, court of appeal reviewing superior court's factual findings under, 11.16
Differences between traditional and administrative mandamus. See **Administrative Mandamus in Superior Court**
Elections. See **Election Processes, Traditional Mandate Challenging**
Extra-record evidence, admissibility of. See **Record in Superior Court Writ Proceeding**
Hearings
Expelled union member filing petition to obtain fair hearing, 2.52
Legally required hearings, compelling agency to hold, 2.31

Inspection of records. See **Inspection of Records**
Licenses. See **Licenses and Permits**
Ministerial duty of public officials. See **Public Entities and Officials**
Notice, mandate to compel publication of, 2.67
Pleading traditional and administrative mandamus in the alternative, 3.21
Private organizations and associations, challenging or compelling actions by, 2.55
Professional certificate decisions, challenging of, 2.39
Public entities and officials. See **Public Entities and Officials**
Records
Extra-record evidence. See **Record in Superior Court Writ Proceeding**
Inspection of records. See **Inspection of Records**
Public Records Act. See **Public Records Act**
Tax records, mandate to compel compliance with statutory duties in connection with, 2.59
Remedy at law, lack of plain, speedy, or adequate
Generally, 2.15
Other administrative remedies, effect of availability of, 2.16
Public Records Act, no requirement of inadequate remedy at law to compel disclosure of records under, 2.69
Requirements for issuance of writ
Generally, 2.3, 2.11
Remedy at law (see Remedy at law, lack of plain, speedy, or adequate, above)
Statutorily available relief (see Statutorily available relief, requirement of, below)
Substantial beneficial interest (see Substantial beneficial interest in respondent's performance of duty, requirement that petitioner have, below)
Schools. See **Schools**
Standing to seek writ (see Substantial beneficial interest in respondent's performance of duty, requirement that petitioner have, below)
Statutorily available relief, requirement of
Generally, 2.4
Abuse of discretion, petition for writ of mandate to correct, 2.9
Exercise of discretion by nonjudicial body, entity, official, or employee, mandate to compel, 2.8
Ministerial duty, writ of mandate to compel. See **Public Entities and Officials**
Office, mandate to compel government or private entity to admit individual to legally entitled, 2.10
Statutory authority for, 5.3
Statutory deadlines for filing, 3.19
Statutory payment obligation, mandate to compel, 2.64
Subpoenas, mandate challenging issuance or failure to issue, 2.65
Substantial beneficial interest in respondent's performance of duty, requirement that petitioner have
Generally, 2.12
Losing beneficial interest during mandate proceeding, effect of, 2.14
Public right at stake, relaxation of beneficial interest requirement if, 2.13
Taxes. See **Taxes, Traditional Writ of Mandate Concerning**
Unions. See **Unions, Traditional Mandate to Compel Action by**
Variances, challenging issuance or denial of, 2.41

Transcripts
Petition for writ in appellate court, necessity of transcript for. See **Courts of Appeal**
Record in appellate court writ proceeding, reporter's transcript and opponent's papers as part of, 20.4, 20.9

Transfer of Case from Court of Appeal to California Supreme Court. See **California Supreme Court**

Translations
Exhibits written in foreign language, requirement of English translation for, 5.29

Traverse to Return. See **Return to Alternative Writ in Appellate Court Proceedings**

Trial Court Delay Reduction Act
Effect on superior court writ petitions, 5.120

Trial Court. See **Jury Trial; Superior Court**

Unclean Hands
Defense to writ petition, 7.8

Undertakings. See **Bonds and Undertakings**

Unions, Traditional Mandate to Compel Action by
Arbitration, petition to compel, 2.51
Hearing, expelled union member filing writ to obtain, 2.52
Inspection of records by union member, 2.53
Negotiations with union, mandate compelling governmental entities to enter into, 2.50

United States Supreme Court. See **Certiorari in U.S. Supreme Court**

Unlawful Detainer Action, Writ Petition to Review Denial of Stay in
Generally, 16.78
Deadline to file writ petition, 16.79
Standard of review if writ petition accepted, 16.80

Vacating and Setting Aside
See also **Coram Nobis and Coram Vobis**
Automatic stay, vacating trial court proceedings conducted in violation of, 26.6
Case management order, issuance of mandate to compel trial court to vacate, 16.106
Rehearing, order granting petition vacating court's opinion, 25.25
Superior court's final decision on writ, motion to vacate judgment, 11.4

Variances
Traditional mandate challenging issuance or denial of, 2.41

Venue
Change of venue
Mandate (see Mandate in court of appeal to review grant or denial of motion to change venue (CCP §400), below)
Motion for change of, 8.55
Mandate in court of appeal to review grant or denial of motion to change venue (CCP §400)
Generally, 16.62
Appealability of venue order in limited civil cases, 16.63
Deadline to file petition under CCP §400, 16.64
Standard of review if writ petition accepted, 16.65
Public Utilities Commission's decision, venue for petition for writ review of, 16.38
Superior court, venue for filing writ petition in, 5.75

Verification
Attorney's verification of writ petition, 5.67, 18.44
Court of appeal, writ petition in
Generally, 18.42
Beneficially interested party, verification of petition by, 18.44
Costs in writ petition proceeding, party submitting verified memorandum of, 24.27
Denial of petition based on omission or improper verification. See **Denial of Writ by Appellate Court**
Factual allegations in writ petition in appellate court, verification of, 18.30
Form, verification, 18.48
Maximum length limitations for writ petition in court of appeal, verification excluded from, 18.8
Personal knowledge, verification based on, 18.43
Return to alternative writ. See **Return to Alternative Writ in Appellate Court Proceedings**
State or public officials, verification by. See **Public Entities and Officials**
Supplemental evidence, verification of, 18.46
Supporting documents, verification of, 18.45
Superior court
Generally. See **Drafting Writ Petition for Superior Court**
Alternative writ of mandate and verified compliant for declaratory relief, verified writ petition for, 13.1
Answer to writ petition in superior court, verification of, 8.49
Stay of proceedings. See **Stay of Proceedings Pending Writ Petition in Superior Court**

Waiver
Affirmative defenses, failure to raise in answer resulting in waiver of, 8.48
Notice of court ruling, effect of waiving, 18.73
Oral argument in appellate court, waiver of. See **Oral Argument in Appellate Court**
Review (certiorari) in court of appeal, effect of waiving appeal through neglect on party's right to writ of, 15.33

Websites
Courts of appeal, 18.87

Weekends. See **Saturdays, Sundays, and Holidays**

Witnesses
Alternative writ of mandate or prohibition in superior court, court's discretion to allow oral testimony at hearing on petition for, 9.30

Workers' Compensation Appeals Board (WCAB), Petition for Review of Decisions by
Deadline to file petition for writ of review, 16.47
Exclusive means of obtaining review of WCAB's decisions, special statutory writ of review as, 16.46, 27.7
Standard of review if writ petition accepted, 16.48

Work Product
Discovery order affecting work product, writ review of, 16.122

Zoning and Land Use
Traditional mandate challenging land use decisions, 2.41

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