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PERSPECTIVE

Writs in the pandemic era of litigation

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Most litigators know the value of an appeal. The case is over and the trial court has entered judgment, but the results are unsatisfying. Perhaps there was an erroneous jury instruction or some vital piece of evidence was improperly precluded that caused the case to be lost. Whatever the circumstances, final judgment has been entered and the decision is to live with the consequences or take up an appeal.

But what happens if there is an unfavorable ruling in the middle of the case? As opposed to an appeal, a writ is an opportunity to right a wrong before judgment and with enough time to alter the course of the litigation. Writs are especially useful tools now, as many trials have been put on an indefinite hold due to the pandemic. With a writ, a party has the opportunity to course correct without waiting what could be years for that final judgment.

Navigating the writ process can be tricky, however, as writs suffer from less direction than their appellate counterpart. Below are some tips for undertaking and executing a successful writ to the Court of Appeal.

Why a Writ?

A “writ” is an order the reviewing court issues to an inferior tribunal. The writ review process allows for appellate court review of nonappealable trial court rul-

ings. As such, it provides an opportunity for review before final judgment. Most commonly, the petitioner is the party seeking relief and the prevailing party is referred to as the real party in interest. The respondent is the inferior tribunal that made the error (typically the trial court) and its role is that of a neutral party and it is generally not permitted to respond.

One question to ask in deciding to take up a writ is whether the issue is critical to the case. Issues likely to be cured in the course of litigation are much less likely to be disturbed by the Court of Appeal. Moreover, some rulings may only be challenged by writ, such as a ruling on the disqualification of a judge. Code Civ. Proc. Section 170.3. Conversely, some rulings are immediately appealable, such as a ruling on an anti-SLAPP motion. Code Civ. Proc. Section 425.16(i).

The most advantageous difference between a writ and an appeal is that a writ allows the parties swift review without waiting for final judgment. However, this advantage does have one drawback. Appeals are heard as a matter of right while writs are completely discretionary. In other words, the appellate court is required to review a party’s timely appeal and provide an opinion. In contrast, even if a trial court ruling is incorrect, the appellate court is not required to grant immediate writ review.

Ultimately, most issues can still be taken up on appeal af-

ter the conclusion of the matter. However, it can be difficult and expensive to litigate a case to conclusion before then attempting to “unring the bell” with an appeal. Another benefit of a writ is that an issue which is summarily denied may still be appealed later if necessary.

What Makes a Successful Writ?

Writ relief is an extraordinary resource issued in relatively few situations at the discretion of the court. Because of this, it is important for the drafter to pique the Court of Appeal’s interest in order to succeed. While there are many ways to do this, such as focusing on novel, engaging, and/or widely relevant issues, the Court of Appeal requires a base showing of no adequate remedy at law and irreparable harm.

California Code of Civil Procedure Section 1086 states that a “writ must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law.” Consequently, one of the first points to argue in any writ is why there is no adequate remedy at law. An appeal is usually considered an adequate remedy at law, so the argument that a successful writ will avoid an appeal is not often helpful. However, where an order is not appealable, but is reviewable only upon appeal from a subsequent judgment, factors such as expense of proceeding with a trial and prejudice resulting from delay may be taken into account

to establish that an appeal is an inadequate remedy.

The writ must also demonstrate irreparable harm. While normal litigation costs or waiting for trial alone may not be considered irreparable harm, the disclosure of privileged information or the loss of a home or business generally are. Matters regarding public entities and of first impression or public importance are more likely to obtain writ relief, as are questions of law.

In writing the writ, the goal should be clarity but also brevity. The writ should focus on the issue or issues presented to the court and why the relief requested is necessary. While rare, it may also be helpful to enlist the opposing party in support of the writ, if possible. There may be some rulings so fundamental to a case that both sides agree a writ is necessary before litigating the case any further.

A writ is made up of two substantive sections: the petition (similar to a complaint and with a prayer for relief) and the memorandum of points and authorities. The writ must be supported by evidence and verified, and the two most important exhibits should be the trial court’s order and a transcript of the proceedings. See California Rules of Court, rule 8.486. A writ ordinarily should not bring in new evidence not introduced in the trial court, but some courts will consider additional evidence in the interests of justice under Code of Civil Procedure section 909. *Campbell v. Superior*

Court, 159 Cal. App. 4th 635, 647 (2008). Like an appeal, a writ requires a certificate of interested parties, a certificate of compliance, and adherence to formatting rules. See California Rules of Court, rule 8.204.

A writ may also ask for a stay to maintain the status quo while the writ is being decided. This can have the effect of speeding up the writ decision process but can also have the opposite effect and result in a summary denial. It is advisable to seek a stay in the trial court first. Any request for stay must be prominently marked on the cover of the petition, along with the contact information for the trial court judge, and an explanation why the stay is necessary. California Rules of Court, rule 8.486(a)(7).

Statutory vs.

Common Law Writs

The most important distinction between writs is whether it is a statutory or common law writ, which will impact filing deadlines.

Perhaps obviously, statutory writs are those that are authorized by statute. The statute will define the deadline by which a writ must be filed. Common statutory writs and deadlines are:

Writ from a motion to disqualify a judge — within 10 days (Code Civ. Proc. Section 170.3(d)); writ from a motion to change venue — within 20 days (Code Civ. Proc. Section 400); writ from a motion for summary adjudication or denial of motion for summary judgment — within 20 days (Code Civ. Proc. Section 437c(m)(1)); and a writ from a motion for good faith settlement determination — within 20 days (Code Civ. Proc. Section 877.6(e)).

Most statutes calculate the deadline from the service of

written notice of entry of the court's order. When notice of entry is served by mail, some deadlines may be extended pursuant to Code of Civil Procedure Section 1013. Further, some statutes provide for discretionary extensions by the trial court.

By contrast, common law writs are those that are not authorized by statute. No specific deadline is identified for a common law writ. However, the rule is that there should be no delay in filing, and the general consensus is that 60 days from the date of entry of judgment, order, or decision being challenged is the outer limit for filing. *Volkswagen of America, Inc. v. Superior Court*, 94 Cal. App. 4th 695, 701 (2001).

Historically, common law writs were divided into writs of mandate, writs of prohibition, and writs of certiorari. Now, the Court of Appeal will generally construe a writ based on the relief sought and not the title used. *Anderson v. Superior Court*, 213 Cal. App. 3d 1321, 1324 (1989). Further, there is no rule against titling a writ as a “writ of mandate, prohibition, or certiorari” in an abundance of caution.

Common law writs frequently encountered are overruling of a demurrer (*Babb v. Superior Court (Huntington)*, 3 Cal. 3d 841, 851 (1971)); an order denying certification of a class action (*Blue Chip Stamps v. Superior Court*, 18 Cal. 3d 381, 387, n.4 (1976)); or order regarding significant discovery motions related to the production of privileged information (*City of Petaluma v. Superior Court (Walters)*, 248 Cal. App. 4th 1023, 1030-31 (2016)).

Regardless of the type of writ, a short discussion in the writ petition of the timeliness of filing the writ is a good idea.

Ultimate Outcomes

When faced with a writ, the Court of Appeal has three options. It can summarily deny the writ, issue an alternative writ, or issue a peremptory writ. To summarily deny the writ is self-explanatory, the Court of Appeal will deny the writ without any further briefing or a hearing, and it is not required to provide a reason for the denial. Consequently, it is important to put any and all persuasive information into the writ and not count on an opportunity to reply or argue. A summary denial is by far the most common response to a writ from the Court of Appeal, and often, the real party in interest will take no action in response to a writ until invited to do so by the Court of Appeal.

The alternative and peremptory writs are defined by Code of Civil Procedure Section 1087. An alternative writ orders the

party to whom it is directed to take action or refrain from taking action or to show cause why it should not be required to do so. It is akin to an order to show cause. A peremptory writ is similar to a ruling and orders the party to take some action or refrain from doing so. A peremptory writ may issue in the first instance with notice to the parties, however this is rare.

Though a lesser used tool than the appeal, there are many benefits of a writ, particularly today. A writ not only expedites judicial review, but it can also promote settlement and prevent lengthy post-judgment litigation, including the threat of re-trial many years down the road when memories are foggy and evidence is stale. The unique challenge of practicing under the cloud of court closures and unexpected delays underscores the benefit and importance of writs in today's litigation. ■

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