"TO WRIT OR NOT TO WRIT?  
TAKING THE DRAMA OUT OF DECIDING TO FILE A  
PETITION FOR WRIT OF MANDATE

JAMES E. FRIEDHOFER  
OF COUNSEL  
HATCH & PARENT A.L.C  
110 WEST “C” STREET, SUITE 2200  
SAN DIEGO, CALIFORNIA 92101  
PHONE: (619) 702-6100  
FAX: (619) 239-4333  
JFRIEDHOFER@HATCHPARENT.COM
To Writ or Not to Writ?
Taking the Drama Out of Deciding to File a Petition for Writ of Mandate

James E. Friedhofer
Hatch & Parent, ALC

Act I: “Though this be madness, there is method in’t”

Few aspects of litigation are as mysterious as the criteria an appellate court uses in granting or denying a petition for writ of mandate, prohibition, or certiorari. Yet, uncertainty concerning writ success should not deter a party from using this powerful pre-trial procedural option. A writ filing can set the stage for the most dramatic reversals in litigation that can occur outside of the actual jury trial. A writ filing can stop litigation in its tracks until an important legal issue is resolved. A successful writ petition can annul a devastating ruling and reverse the trial judge, all in a matter of weeks.

This paper aims to take some of the mystery and drama out of a decision to file a writ petition. The different types of writs are discussed and distinguished. Objective criteria from a complete review of six-months of California writ filings will suggest some optimal circumstances for succeeding on a writ petition. Special attention will be paid to cases involving public entities as parties. The resulting checklist of issues that routinely succeed may be used as a predictor when questions arise as to whether filing a writ petition is worth the use of resources.

Any study of writ petitions must acknowledge at the outset a cruel truth: the vast majority of petitions are denied summarily, most with no more a single sentence of appellate comment. As the Fourth Appellate District, Division One, put it: “We deny the vast majority of petitions we see and we rarely explain why.” (Science Application International Corp. v. Superior Court (Dept. of General Services) (1995) 39 Cal.App.4th 1095, 1100.) Various statistics put the general “success” rate for a writ petition at around 8-10%. (See Omaha Indem. Co. v. Superior Court (Greinke) (1989) 209 Cal.App.3d 1271, Court Statistics Report, Statewide Caseload Trends, 1993-94 Through 2002-2003 (Judicial Council of California, Administrative Office of the Courts).) Judicial economy plays a considerable role in the selection of petitions for review on the merits:

In reality, perhaps the most fundamental reason for denying writ relief is the case is still with the trial court and there is a good likelihood purported error will be either mooted or cured by the time of judgment.

Yet, all writ petitions are not created equal. Close study reveals that certain issues and cases result in significantly higher success rates. The challenge is to understand when a particular issue is and is not in one of the preferred groupings.
Public entities have a special reason to consider the writ option in litigation. As will be seen, the very nature of the issues commonly facing such entities lends itself well to satisfying prerequisites for writ review of adverse Superior Court pre-trial orders. A robust writ practice can succeed over time and can save litigants and the public significant amounts in monetary and time resources.

**Act II: “There are more things in heaven and earth, Horatio, than are dreamt of in your philosophy”**

**The General Nature of Writs**

Writ petitions may be filed for mandate, prohibition, or certiorari. A petition for writ of mandate asks the reviewing court to do something (Code Civ. Proc. § 1085); a writ of prohibition to stop something (Code Civ. Proc. § 1102); and a writ of certiorari to review and undo something (Code Civ. Proc. § 1068).

The precise nature of the writ used is no longer of any great importance. (See Anderson v. Superior Court (1989) 1321, 1324, fn. 2.) This paper addresses writ petitions for mandate, prohibition, and certiorari – so long as they are of the variety that is filed in the Court of Appeal to review an order of the Superior Court. These writs are considered “extraordinary” appellate relief, because their review is discretionary and allow a party to “cut in line” ahead of those involved in traditional appeals. Other types of writ petitions can and are filed in other circumstances, but those are outside of this paper’s scope.

Writ petitions fall into two general categories: statutory writs and common law writs. Identifying the type of category that is involved is the first step of writ procedure.

**Statutory Writs**

The Legislature has codified certain orders and circumstances as being expressly authorized to be addressed by writ review. Significantly, such statutory authorization does not guarantee that the Court of Appeal will review the merits of a writ petition. The appellate court still retains the discretion to accept the writ or not. Indeed, practical experience indicates that some statutory bases for review fare no better at acceptance than do their common law cousins.

The number of statutes authorizing writ filings evolves at the Legislature’s preference. Though the procedure of filing writ petitions is not the focus of this paper, it is important to note that such statutes also govern the time in which a petition must be filed. Below is a listing of the most commonly recognized statutory writs, which authorize a filing following an adverse order being issued by the trial court:

- Motion to Quash Service; Stay or Dismiss for Inconvenient Forum; Dismiss for Delay in Prosecution (Code Civ. Proc. § 418.10(c)).

- Grant or Denial of Superior Court Motion to Change Venue (Code Civ. Proc. § 400).
Denial of a Motion for Summary Judgment; Violation of Summary Judgment Motion Procedures; Grant or Denial of Motion for Summary Adjudication (Code Civ. Proc. § 437(c)).

Grant or Denial of Motion to Expunge Lis Pendens (Code Civ. Proc. § 405.39).

Order Concerning Coordinating Actions (Code Civ. Proc. § 404.6).


“Good Faith” Settlement (Code Civ. Proc. § 877.6(e)).


Judgments or Orders in Juvenile Dependency Proceedings (various provision of the Welfare and Institutions Code).

Monetary Sanctions Judgment or Order of $5000 or Less (Code Civ. Proc. § 904.1(a)(11)-(12)).

Public Records Act (Govt. Code § 6259(c)).

**Common Law Writs**

As its name implies, a common law writ is one that is permitted to be filed, but arises from an order on a motion that is not expressed authorized by statute for extraordinary review. Equitable filing deadlines apply, as opposed to the strict deadlines for filing statutory writs.

Common law has defined a number of principles that guide and control the disposition of these writ petitions. It must appear that there is “not a plain, speedy, and adequate remedy in the ordinary course of law,” which usually means that there is no right of appellate review from the challenged order. (Code Civ. Proc. § 1086.) A writ petitioner usually must show that it will suffer some “irreparable injury” if the writ is not granted. (Omaha Indem. Co. v. Superior Court (Greinke), supra, 209 Cal.App.3d at 1274-1275.) A writ petition sometimes will be granted without these two prerequisites if it presents an issue of great public importance requiring prompt resolution, or if a constitutional right is implicated. (See Anderson v. Superior Court, supra, 213 Cal.App.3d at 1328; Silva v. Superior Court (Heerhartz) (1993) 14 Cal.App.4th 562, 573.)

While hundreds if not thousands of appellate opinions involve common law writ petitions, few comment on the appellate court process for selecting and rejecting the same for review. One notable exception is the Fourth District, Division Three, opinion in Omaha Indem. Co. v. Superior Court (Greinke), supra. Counsel who contemplate filing a writ petition would be well-advised to review pages 1271-1274 of this opinion, which represents perhaps the most detailed and colorful discussion in California common law about writ procedure. This discourse begins with candid admissions that practical information about writs is hard to come by:
Case law has done little to explain why appellate courts deny writ petitions. . . .

* * *

Just as case law has been disappointing as a source of information concerning the mysteries of the writ, so have attempts to impart information by hierophants of appellate practice. Those who have tried to extract a coherent set of rules from cases and treatises on writs have found it easier to comprehend a “washing bill in Babylonic cuneiform.” (Gilbert & Sullivan, Pirates of Penzance (1879).)

(Id., 209 Cal.App.3d at 1272.)

Yet, this opinion offers more than clever terms of phrases. It articulates as a first rule of writ acceptance that appellate courts “will not use their scarce resources to second-guess every ruling and order of the trial.” Further:

Writ relief, if it were granted at the drop of a hat, would interfere with the orderly administration of justice at the trial and appellate levels. Reviewing courts have been cautioned to guard against the tendency to take “... too lax a view of the "extraordinary nature" of prerogative writs . . .” [citation omitted] lest they run 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. [Citations omitted.]

(Id.) According to this appellate court, arguments discouraging use of writ review include: (1) liberal usage of extraordinary review would result in appellate gridlock; (2) the Court of Appeal is generally in a better position to address an important issue on appeal than in expedited writ proceedings; and (3) the importance of some issues may diminish over time as the case proceeds to trial. (Id., 209 Cal.App.3d at 1272-1273.) Factors favoring acceptance of writs include: (1) issues of widespread importance are involved, (2) significant and novel constitutional issues are involved; (3) conflicting trial court interpretations of the law are in need of resolution; (4) trial court orders that are clearly erroneous and prejudicial are involved; (5) the petitioner could not obtain the sought relief by a later direct appeal; and (6) the petitioner could suffer harm or prejudice that could not be corrected in a direct appeal. (Id., 209 Cal.App.3d at 1273-1274.)

The Omaha Indemnity opinion is of great help, but still does not answer completely the most mysterious questions for the appellate practitioner. What realistic chance does my petition have of being granted? What goes on in the mind of the appellate court to grant one petition and deny nine others? Do all appellate courts look at writ petitions the same way? How can one determine what substantive law issues are more "writ worthy" than others. (See Hernandez v. Superior Court (Neal) (2004) 115 Cal.App.4th 1242, 1244.)

Rather than to reiterate what others have said, this paper attempts to identify what is "writ worthy" through new empirical research by looking at each petition that was addressed on the merits in a given time period.
Act III: “Take arms against a sea of troubles”

Like Hamlet before them, hundreds of lawyers last year took up “arms against a sea of troubles,” and took their disputes over a trial court order to the Court of Appeals in writ petitions. It is now possible to determine how many writ petitions were addressed on their merits in a given time period, and on what basis. This is because online legal research resources now allow access to both published and unpublished appellate decisions.

For this paper, a comprehensive study was undertaken of the published and unpublished results on writ petitions statewide that were resolved during the six-month time period from April 1, 2004 until September 30, 2004. A broad term search displayed all opinions in which the Superior Court was a Respondent—a hallmark of writ proceedings. The listed results were culled to eliminate the large number of juvenile dependency opinions, so that the ordinary and routine appellate acceptance of those matters did not skew the other statistics.

The opinions remaining on the list were reviewed, and the following categories of information were logged: date of opinion issuance; case name and citation; issuing court by Appellate District and Division (if applicable); whether a petition was granted or denied; whether a petition was published or unpublished; whether a case was criminal or non-criminal; whether a case involved a statutory or a common law writ; a general notation as to the issue involved, and what type of parties were involved as Petitioners or Respondents, particularly noting if a State or Local Public Entity was involved as a party. Finally, a few cases (6) were eliminated that were found to be mere companion cases of other criminal writ petitions.

Statewide, during the time period reviewed, 104 writ of mandate petitions (non-juvenile dependency) were resolved on the merits by the Courts of Appeal. 79 (76%) of this number involved non-criminal matters; 25 (24%) involved criminal matters. Of the 79 non-criminal matters, 22 (21%) involved public entity parties.

Not all of these appellate decisions were published. In fact, the ratio of published opinions to the total number of cases was surprising low, considering the fact that writ petitions ordinarily are thought to involve matters of great public significance. Only 45 out of 104 (43%) writ opinions were published. Non-criminal cases were published 65% of the time. Non-criminal cases involving public entities had an even lower publication rate, at just 46%. Criminal law opinions were published in only 20% of the cases.

Because accurate figures for the gross numbers of mandate writ petitions filed in the targeted time period are not easily available, the commonly-assumed writ petition acceptance rate of approximately 10% could not be tested. Yet, if that percentage figure is accurate, approximately 1,000 petitions for writ of mandate (non-juvenile) were filed statewide in the targeted six-month period. That number is lower than the historic numbers for all “original proceedings” in the Courts of Appeal in any given year. (See Court Statistics Report, Statewide Caseload Trends, 1993-94 Through 2002-2003 (Judicial Council of California, Administrative Office of the Courts).) Yet, the disparity can be explained by the fact that the six-month study was based upon a subset of all of the appellate original proceedings during that time.
What can be stated with some confidence is that more mandate writ petitions are being addressed on their merits than one might have been able to appreciate in the past. The published opinions that lawyers typically read represent far less than half of the number granted. In sum, writ relief may not actually be quite as elusive as was previously thought.

The results are even more enlightening for public entity litigants. Roughly 2 out of every 10 writ petitions accepted involved a public entity. Roughly 1 in 10 of all published writ opinions during this time period involved a public entity. These include:


Notice also that three of these published public entity writ cases were later accepted for review by the California Supreme Court, further indicating an appreciation of the importance of public entity issues.

Act IV: “Madness in great ones must not unwatched go”

The research results also are useful for predicting where and how the most successful writ petitions are filed.

**Location, Location, Location**

One of the most surprising results involved where successful writ petitions were being filed. Aspiring writ petitioners found the Fourth Appellate District to be an extremely welcoming forum during the time period studied. 18 petitions were accepted in the Fourth District, Division 1 (Imperial and San Diego Counties). The Fourth District, Division Three, matched that number at 17 (Orange County). Yet those filing in Fourth District, Division Two (Inyo, Riverside, and San Bernardino Counties), were not so welcomed, with only 4 petitions accepted.
Because appellate courts have varying numbers of justices assigned to them, gross numbers may not reveal any particular court attitude towards writ petitions. Yet, the First District (Bay Area and Northern Coastal Counties) is notable for the extremely low amount of petitions accepted—only 6 over a six-month period. That number is a mere 15% of the number accepted in the Fourth District.

The Second District also had commendable numbers as a whole (32), but still not outpacing their southern neighbors in the Fourth. 11 were accepted in the Third, 8 in the Fifth, and 5 in the Sixth. 3 of the cases were heard in the California Supreme Court.

The lesson to be learned is that Southern California appears to be a better location to spend resources on a writ petition. Yet, some level of comfort at least can come from the fact that 3 out of the 6 writ petitions accepted in the First District involved public entities.

**Statutory Writs**

29 of the reviewed opinions were identified as being connected with a statutory basis for writ review. 10 of these involved granted or denied motions for summary judgment or summary adjudication. Yet, it would be a mistake to assume that Code of Civil Procedure § 437c will get a writ petitioner into the appellate court every time. Experience shows that a large number of petitions are filed every year on this statutory basis, making only 10 being granted in a six-month period seem like a much smaller number. Indeed, most of the successful summary judgment writ petitions involved additional writ petition “hooks” such as issues of widespread public importance, vicarious liability, insurance coverage, or procedural errors by the Superior Court in handling the motion.

Judicial disqualification under Code of Civil Procedure sections 170.3 and 170.6 was the subject of 2 petitions. Venue was an issue in 3 petitions. Lis Pendens was an issue in 2 petitions. Significant to all public entities, there were 2 petitions regarding application of the Public Records Act. Considering that all of these “statutory writ” matters come up infrequently in litigation, the relatively high number of acceptances indicates some possible appellate favor for these areas.

**Discovery**

Common knowledge suggests that writ petitions from discovery orders are generally unsuccessful. Yet, 15% of the accepted writ petitions involved a discovery issue. The key to understanding this is to look at what type of discovery order was involved. The largest number (5) involved a reversal of an order to produce privileged documents. Criminal defendants’ access to discovery was also a frequent subject (4). The rest mostly involved discovery that had been stayed, or discovery that had been curtailed as a sanction, or subpoenas that had not been properly issued.
Access to Courts

Extraordinary appellate relief is commonly used to prevent a party from having to go to a trial without adequately prepared counsel, or without a lawyer at all. *(Hernandez v. Superior Court (Neal) supra, 115 Cal.App.4th at 1244.)* Several different types of writ petitions may be best analyzed together under the general theme of addressing a litigant’s access to courts. 5 petitions involved questions of whether a litigant’s lawyer would be disqualified for conflict or other ethical reasons. 3 other matters involved the barriers on a vexatious litigant’s access, the right to a jury trial, and the ability to proceed in forma pauperis. Whether or not matters were properly sent to arbitration also attracted a good deal of judicial attention, with 4 such petitions being accepted.

Judicial Economy

Another theme that appeared to repeat was appellate concern that trial litigation proceed in a manner that promoted judicial economy and efficiency. In this respect, modern Courts of Appeal appear to have moved away from a contrary approach in earlier times. Over 30 years ago, the California Supreme Court expressed its opinion that using extraordinary appellate review to address rulings on pleading should be done with “extreme reluctance.” *(Babb v. Superior Court (Babb v. Superior Court (Huntington) (1971) 3 Cal.3d 841, 851.)* The new statistics suggest otherwise. 3 cases were heard involving orders on demurrers. 2 others involved other concerns about the state of a party’s pleadings, including allegations of punitive damages. 1 involved a class certification.

Attorney Sanctions

Appellate courts showed sensitivity to attorneys who had been sanctioned. Regardless of whether the sanction was eventually reversed, 3 cases were at least accepted to address the issue.

The Big Picture

Even if an order is otherwise appealable, writ review is permissible where the petition raises a novel issue of law. *(Elden v. Superior Court (Elden) (1997) 53 Cal.App.4th 1497, 1504.)* Additionally, issues of widespread public importance are traditional settings for writ petitions. The reviewed time period was no exception. 1 case involved the public safety issue of whether a physician should be suspended from practicing medicine while his Medical Board review took place. 1 case involved voting issues. 1 involved a question of environmental quality. 4 regarded novel matters of statutory interpretation or of insurance coverage.

The biggest surprise in this area, however, is how few writ petitions were granted primarily on the basis of how their results would affect non-parties. While many of the cases in the other categories discussed above probably also fit this description somewhat, the amount of the pure “Big Picture” petitions accepted was less than or at about 10%.
This statistic may send an important message to would-be writ petitioners. The threshold level for an appellate court to consider an issue to be of “widespread importance” may be more difficult to meet than previously thought. There may be some evidence that appellate courts feel that important issues are best considered and resolved in the ordinary, more leisurely, course of traditional appellate litigation, echoing the sentiments of the *Omaha Indemnity* court.

**Act V: “These words, like daggers, enter in mine ears”**

Nothing stings quite like a Herculean writ petition effort ending with the simple words from the Court of Appeal, “Writ Denied.” No amount of research, strategizing, or number-crunching can change the plain fact that the majority of writ petitions that any lawyer or public entity files will suffer this ignominious fate.

Yet, not all “final acts” of the drama of extraordinary appellate relief are tragic. As shown above, over two hundred writ petitions are reviewed on their merits in California every year. **And 97 out of the 106 writ petitions in a six-month period ended up being granted.**

Objective evidence shows that public entity parties frequently are allowed to reach the merits of their writ petitions. This factor, coupled with the “issue” factors highlighted above, can help a public entity to better decide “when to writ, and when to quit.” Careful selection of when and where to file a petition for mandate can make all the difference.