PETITIONS FOR WRIT OF MANDATE: WHEN TO FILE THEM AND WHAT TO SAY

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I. Introduction

As appellate counsel, we are all familiar with petitions for writs of habeas corpus. However, it is somewhat less common to encounter a situation which calls for the filing of a petition for a writ of mandate, traditionally known as a writ of mandamus. (See Civ. Proc. Code, sec. 1084.) Nevertheless, these petitions are extremely useful tools which can be used to obtain relief for your client that might otherwise be unavailable.

II. What is a Petition for Writ of Mandate?

"A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the 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 that inferior tribunal, corporation, board, or person." (Civ. Proc. Code, sec. 1085, subd. (a).)

When a court issues a writ of mandate, it may be an alternative or a peremptory writ. (Civ. Proc. Code, sec. 1087.) An alternative writ commands the lower court to either do the act required to be performed, or show cause at a specified time and place why it has not been done. (*Ibid.*) The issuance of a peremptory writ occurs after the lower court fails to show

cause. It does not require the party to show cause why the act in question has not been performed. (*Ibid.*)

Sometimes, counsel will conflate writs of mandate with writs of prohibition. They are not the same. A writ of prohibition restrains the lower court from performing an act. They may be requested together, for example when counsel is asking the higher court to restrain the lower court from taking a particular action and at the same time to compel it to take a different action. (See, *e.g, Curry v. Superior Court* (2013) 217 Cal.App.4th 580; *Lee v. Superior Court* (2009) 177 Cal.App.4th 1108.)

III. When is a Petition for Writ of Mandate Necessary?

A writ of mandate is proper if the court's discretion can be exercised in only one way. (*Hurtado v. Superior Court* (1974) 11 Cal.3d 574, 579; *Flores v. Department of Corrections* (2014) 224 Cal.App.4th 199, 208.) Additionally, a writ of mandate is proper when the duty of the court to which the writ is directed is absolute. (See *Butler v. Superior Court* (2002) 104 Cal. App. 4th 979, 982 [writ of mandate proper because trial court failed to comply with appellate court's remand instructions].) If on remand the trial court does not follow the instructions of the Court of Appeal, that failure may be challenged by an immediate petition for writ of mandate since the trial court has no discretion to enter a different judgment. (*Hampton v. Superior Court* (1952) 38 Cal.2d 652, 656; accord, *People v. Lewis* (2004) 33 Cal.4th 214, 228.) A trial court is under a legal duty to apply the proper law, and it may be directed to perform that duty by writ of mandate. (*Hurtado, ibid.*; *Babb v. Superior Court* (1971) 3 Cal. 3d 841, 851.)

A petition for writ of mandate is also properly filed when a court abuses its discretion. However, a writ of mandate to compel the exercise of discretion in a particular manner by a court may only be taken when the facts support only one decision. (*Nathanson v. Superior Court* (1974) 12 Cal.3d 355, 361.) The burden is on the petitioner to make a clear showing that the trial court abused its discretion before an appellate court will reverse an order of the trial court. (*Big Bear Municipal Water Dist. v. Superior Court* (1969) 269 Cal.App.2d 919, 925.)

A. <u>When Trial Counsel Should File a Petition for Writ of Mandate</u>

Some superior court actions, or failures to act as the case may be, are not appealable following judgment. Instead, they may only be challenged by way of a writ. Unfortunately, trial counsel sometimes is unaware of this and by the time appellate counsel is appointed, it is too late to raise the issue. Some examples of common superior court actions which *must* be challenged by writ are:

1. Denial of motion to suppress *if* review is desired prior to trial. (Pen. Code, sec. 1538.5, subd. (i).)

2. Finding of minor's unfitness for adjudication in juvenile court. (Welf. & Inst. Code, sec. 707; Cal. Rules of Court, rule 5.770(g); *People v. Superior Court (Jones)* (1998) 18 Cal.4th 667, 678; *Juan G. v. Superior Court* (2012) 209 Cal.App.4th 1480.)

3. Denial of motion for judicial disqualification under Code of Civil Procedure section 170.6. (Civ. Proc. Code, sec. 170.3, subd. (d); see *People v. Mena* (2012)

54 Cal.4th 146, 156.)

These actions are not appealable. Therefore, if trial counsel did not pursue a writ, they are not reviewable.

B. <u>In the Court of Appeal</u>

Appellate counsel will more commonly encounter situations where a petition for writ of mandate must be filed in the Court of Appeal. Some examples of situations most likely to occur are:

1. Where a certificate of probable cause has been denied, the appeal is not operative and the denial of the certificate must be reviewed by a writ of mandate. (*In re Brown* (1973) 9 Cal.3d 679, 683; *People v. Johnson* (2009) 47 Cal.4th 668, 676; *People v. Brown* (2010) 181 Cal.App.4th 356, 362.)[1]

2. Where the defendant is challenging the superior court's grant or denial of writ petition challenging the trial judge's action. (See, e.g. *People v. Superior Court (Clements)* (1988) 200 Cal.App.3d 491, 495.)

3. Actions challenging the validity of a statute or ordinance (see *Pryor v. Municipal Court* (1979) 25 Cal.3d 238)

4. Denial of a demurrer (see, e.g. *In re Goer* (1980) 108 Cal.App.3d 1002, 1004.)

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[1] For this reason, it is always important to state on the notice of appeal that the defendant is also appealing the sentence. This will cause the appeal to be operative notwithstanding the lack of a certificate of probable cause.

IV. What are the Necessary Elements of a Petition for Writ of Mandate?

A. The Petitioner Must Have a Beneficial Interest

The writ must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law. (Civ. Proc. Code, sec. 1086; *Brown v. Superior Court* (1971) 5 Cal.3d 509, 514;) "To establish a beneficial interest, the petitioner must show he or she has some special interest to be served or some particular right to be preserved or protected through issuance of the writ. [Citation.]" (*Waste Management of Alameda County, Inc. v. County of Alameda* (2000) 79 Cal.App.4th 1223, 1232; accord, *Brown v. Crandall* (2011) 198 Cal.App.4th 1, 8.) There is, however, an exception to this requirement when the question is one of public right and the object is to procure the enforcement of a public duty. (*Green v. Obledo* (1981) 29 Cal.3d 126, 144; see *Hector F. v. El Centro Elementary School District* (2014) 227 Cal.App.4th 331, 339.) A defendant in a criminal case clearly has a beneficial interest.

Typically, each petitioner must file his or her own petition. A party cannot simply join in the petition of another. (See *Bridget A. v. Superior Court* (2007) 148 Cal.App.4th 285, 300, fn. 5.) However, if there is a sufficient number of petitioners with a significant interest in a particular matter, class actions in writ proceedings may be permissible. (See, e.g. *Mooney v. Picket* (1971) 4 Cal.3d 669, 671; *Riese v. St. Mary's Hospital & Med. Ctr.* (1987) 209 Cal.App.3d 1303.) A writ will only be granted if it is necessary to protect a substantial right and it is shown that substantial damage will be suffered if the writ is denied. (*Parker v. Bowron* (1953) 40 Cal.2d 344, 351.)

B. Respondent Must Have a Clear and Present Ministerial Duty

As stated above, "[a] writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the 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 that inferior tribunal, corporation, board, or person." (Civ. Proc. Code, sec. 1085, subd. (a); see *Payne v. Superior Court* (1976) 17 Cal.3d 908, 925; accord, *Hagopian v. State of California* (2014) 223 Cal.App.4th 349, 373.) The burden is on the petitioner to establish a clear, present, and usually ministerial duty on the part of the respondent. (See *Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal. 4th 525, 539–540.) A "ministerial duty" is one imposed upon respondent by statute, state or federal constitution, or case law. Some examples include:

1. Return of property obtained by an illegal search and seizure (*Porno, Inc. v. Municipal Court* (1973) 33 Cal. App. 3d 122, 124, fn.2);

2. Requiring court to quash invalidly issued search warrant (*Dunn v. Municipal Court* (1963) 220 Cal. App. 2d 858, 863);

3. A judge's disqualification of himself or herself after a motion made pursuant to Code of Civil Procedure Section 170.6 (*Solberg v. Superior Court* (1977) 19 Cal.3d 182, 186-189;

4. The provision of a criminal defendant with a speedy trial (*People v.*

Wilson (1963) 60 Cal. 2d 139, 144);

5. The enforcement of rights of an incarcerated prisoner (see *Payne v. Superior Court, supra,* 17 Cal.3d at p. 927);

6. The transfer of a minor to an adult court upon a proper showing of his or her unfitness for juvenile court (*People v. Chi Ko Wong* (1976) 18 Cal.3d 698, 713);

7. The grant or denial of a subpoena upon a proper request and showing (*Demarest v. Superior Court* (1980) 103 Cal. App. 3d 791, 792);

8. The grant of a change of venue motion upon a proper showing (see, e.g., *Bunnell v. Superior Court* (1975) 13 Cal. 3d 592, 608.)

C. The Court Must Have Refused to Perform the Duty

The petitioner must have actually made a demand that the court perform the duty (*Neal v. State* (1960) 55 Cal.2d 11, overruled on other grounds in *People v. Correa* (2012) 54 Cal. 4th 331.) Obviously, the court must have *actually* refused to perform the duty. (*Meskell v. Culver City Unified School Dist*. (1970) 12 Cal. App. 3d 815, 823.)

D. Specify the Objection Made in the Trial Court

The petition must set forth the procedural history of the case in the lower court. Generally, there must have been an objection in the trial court, or the petition must show why the failure to object is excusable on the ground that to do so would have been futile. (*People v. Davis* (2014) 226 Cal.App.4th 1353, 1371.)

E. There Must be no Other Adequate Remedy at Law

A writ of mandate may be issued only when there is not a plain, speedy, and adequate remedy in the ordinary course of law. (Civ. Proc. Code, secs. 1086, 1103, subd. (a); *Phelan v. Superior Court* (1950) 35 Cal.2d 363, 366; accord, *Dhillon v. John Muir Health* (2017) 2 Cal.5th 1109, 1119; *Roe v. Superior Court* (2015) 243 Cal.App.4th 138, 149.) A writ of mandate or prohibition will not issue if an adequate remedy exists in the ordinary course of law. (See *Nguyen v. Superior Court* (2007) 150 Cal.App.4th 1006, 1009-1010.) General allegations to that effect, without reference to any facts, are not sufficient to sustain the burden of showing that the remedy of appeal would be inadequate. (*Phelan, supra,* at p. 370.) The petitioner has the burden of informing the court why an ordinary appeal is insufficient and why extraordinary relief is necessary. (See Civ. Proc. Code, secs. 1086, 1103; *Villery v. Department of Corrections & Rehabilitation* (2016) 246 Cal.App.4th 407, 414-416.)

"Where an order is not appealable, but is reviewable only upon appeal from a later judgment, various factors must be considered in evaluating the adequacy of the appellate remedy. Such factors include, without being limited to, the expense of proceeding with trial,

prejudice resulting from delay, inordinate pretrial expenses, and the possibility the asserted error might not infect the trial, and the possibility the asserted error might be corrected in a lower tribunal before or during trial. A remedy is not inadequate merely because more time would be consumed by pursuing it through the ordinary course of law than would be required in the use of an extraordinary writ." (*Provencher v. Municipal Court* (1978) 83 Cal.App.3d 132, 133-134 [all internal quotations and citations omitted.]"

F. Request for a Stay

If a writ of mandate or order to show cause is issued, superior court proceedings are not automatically stayed. A stay must be issued by the reviewing court. (Cal. Rules of Court, rule 8.486(a)(7).) Be sure to ask for one to avoid any risk of the trial court proceeding with the case and ultimately rendering moot the issue raised by the petition. The petition must of course explain why the matter is urgent and why a stay is necessary.

G. Prayer for Relief

Typically, the prayer asks the court to grant an alternative writ, issue the writ, and grant any other relief deemed appropriate in the interest of justice. If a stay is requested, this should also be specified.

H. Verification

Petitions filed on behalf of a defendant must be verified by the party claiming a beneficial interest. (See Civ. Proc. Code secs. 1086, 1103; Cal. Rules of Court, rule 8.486(a)(4), 8.932(b)(4); see *People v. Superior Court (Alvarado)* (1989) 207 Cal.App.3d 464, 470.) Sometimes, the petitioner is unable to verify the petition. For example, in many

criminal cases in the Court of Appeal, the petitioner is incarcerated outside of the district. In this case, the attorney may verify the petition as long as the facts are within his or her knowledge, and he or she states why the petitioner could not personally verify the petition. (Civ. Proc. Code, sec. 446.)

The verification may not be made "on information and belief" as this is hearsay and is insufficient to verify facts. (See *Star Motor Imports, Inc. v. Superior Court* (1979) 88 Cal.App.3d 201, 204.) Instead, the verification should state something like: "All facts alleged in the above petition for a writ of mandate, not otherwise supported by citations to the record, are true of my own personal knowledge." However, a verification made solely on information and belief may be accepted by a court if the "petitioner has otherwise supplied a sufficient record of the underlying facts and trial court proceedings" to permit review. (*Pacific Gas & Electric Co. v. Superior Court* (1983) 145 Cal.App.3d 253, 255, fn. 1; accord, *Fall River Joint Unified School Dist. v. Superior Court* (1988) 206 Cal.App.3d 431, 436.)

V. Preparation of the Petition

Note that the format and content requirements are the same whether the petition is being filed in the Court of Appeal or in the California Supreme Court. (See Cal. Rules of Court, rules 8.40, 8.486.)

A. Format

1. If the petition is filed in paper form, it must have a red cover. (Cal. Rules of Court, rule 8.40(b).)

2. The cover must include the name, mailing address, telephone number, fax number, email address and State Bar number of each attorney filing or joining in the petition. (Cal. Rules of Court, rule 8.40(c).)

B. Contents (Cal. Rules of Court, rule 8.486(a))

California Rules of Court, rule 8.486 sets forth the requirements for petitions for writs of mandate. Rule 8.486(a) enumerates the required contents of the petition, which must include:

(1) an explanation of why the reviewing court should issue the writ as an original matter;

(2) a disclosure of the name of any real party in interest, such as a judge, court, board, or other officer acting in a public capacity;

(3) if there is a pending appeal, the cover must state "Related Appeal Pending" and the first paragraph of the petition must state the appeal's title, trial court docket number and any reviewing court docket number, and if the petition was filed under Penal Code section 1238.5, the date the notice of appeal was filed;

(4) verification;

(5) memorandum (there is no need for a statement of facts as they should be alleged in the petition);

(6) if produced by computer, the brief may not exceed 14,000 words, including footnotes, but excluding tables, cover information, Certificate of Interested Entities or

Persons required under rule 8.208, a certificate of word count, signature block, and any attachments/exhibits;

(7) if a temporary stay is requested, the petition MUST:

(a) explain the urgency

(b) display "STAY REQUESTED" on the cover and identify the nature and date of the proceeding or act sought to be stayed; and

(c) state the trial court and department involved and name and telephone number of the trial judge whose order the petition seeks to stay. This must either appear on the cover or at the beginning of the text.

C. <u>Supporting Documents</u> (Cal. Rules of Court, rule 8.486(b))

The petition must be accompanied by an adequate record. This must include:

1. The ruling from which relief is sought;

2. All documents and exhibits submitted to the trial court in support and in opposition of the petitioner's position;

3. Any other documents submitted to the trial court that are necessary for a complete understanding of the ruling under review;

4. A reporter's transcript of the oral proceedings in which the ruling under review was made.

If the documents in numbers 1 through 3 are not available, the petition must include a declaration explaining the urgency, why the documents are unavailable; and a fair summary of their substance.

If the transcript of the oral proceedings in which the ruling was made is unavailable, the petition must include a declaration stating why it is not available and fairly summarizing the proceedings, including the arguments of the parties and any statement by the court. The declaration must also state that the transcript was ordered, when it was ordered, and when it is expected to be filed. That date must be before any action requested of the reviewing court other than the issuance of a temporary stay.

If the petition does not include the required record or explanations or does not present facts sufficient to excuse the failure to submit them, the court may summarily deny a stay request, the petition, or both. (Cal. Rules of Court, rule 8.486(b)(4).)

D. Form of Supporting Documents (Cal. Rules of Court, rule 8.486(c)

The exhibits must be in proper form:

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

2. They must be index-tabbed.

3. They must begin with a table of contents listing each document.

If the above requirements are not met, the clerk must still file them, but the court may notify petitioner that it may strike or summarily deny the petition if the exhibits are not brought into compliance within a stated time. It must not be less than five days. (Cal. Rules of Court, rule 8.486(c)(2).)

VI. What is the Time Period in Which a Petition Must be Filed?

When determining the deadline for filing a petition for writ of mandate, first check

the statute that relates to the issue being raised in the writ. Sometimes, a specific time period is given in the statute. For example, a writ seeking review of the denial of a motion brought under Penal Code section 995 must be filed within 15 days after the motion is denied. (Pen. Code, sec. 999a.) A writ from the denial of a motion to suppress evidence must be filed within 30 days of the denial of the motion. (Pen. Code, sec. 1538.5, subds. (i), (o).)

Absent a statutory time limit, there is no general statutory time limit on the application for writs. (See *State v. Superior Court of San Mateo County* (1968) 263 Cal. App. 2d 396, 399.) In cases where there is no statutory deadline, the petition should be filed within 30 days when challenging an action in a misdemeanor case, or within 60 days in a felony case. (*American Property Management Corp. v. Superior Court* (2012) 206 Cal. App. 4th 491, 499; *People v. Superior Court (Brent)* (1992) 2 Cal.App.4th 675, 682; *People v. Municipal Court (Mercer)* (1979) 99 Cal.App.3d 749, 752.) These are the time limits within which a notice of appeal must be filed. (See *Labor & Workforce Development Agency v. Superior Court* (2018) 19 Cal.App.5th 12, 24 [writ petition should be filed within period applicable to appeals]; Cal. Rules of Court, rules 8.853(a), 8.308(a).) Unnecessary delay may be grounds for denial of the writ. (*Mercer, ibid*.) If the petition was not filed until after the relevant deadlines, the explanation for the delay must be alleged in the petition. (*Ibid.*) The reason for this is that regardless of the delay, the court has jurisdiction to consider the petition. (See, e.g. *People v. Superior Court (Troyer)* (2015) 240 Cal.App.4th 654, 670-671; see *People v. Superior Court (Clements), supra,* 200 Cal.App.3d at p. 496 ["Where . . . there is no statutory time in which a petition must be filed, the approach of the Supreme Court to

the timeliness of a petition has been one of laches. 'Laches requires an unreasonable delay in filing the petition plus prejudice to real party.'"].)

If the issue has become moot, a writ of mandate should not be filed since the issuance of the writ would be an idle act. (*Genser v. McElvy* (1969) 276 Cal.App.2d 709, 711; accord, *Traverso ex rel. Dept. of Transportation* (1996) 46 Cal.App.4th 1197, 1210.) Mootness for purposes of a petition for writ of mandate may occur when the decision or order has been vacated (*Crestlawn Memorial Park Association v. Sobieski* (1962) 210 Cal.App.2d 43, 47), or when the respondent has already complied or is willing to comply with the petitioner's demands, since "[n]o purpose would be served in directing the doing of that which has already been done." (*Bruce v. Gregory* (1967) 65 Cal.2d 666, 671; see *Environmental Protection Information Center, Inc., v. State Board of Forestry* (1993) 20 Cal.App.4th 27, 32.) Nevertheless, the court has inherent discretion to resolve a substantive issue that has become moot as to the specific parties who raised the issue if the issue is one of broad public interest that is likely to recur. (See *Nathan G. v. Clovis Unified School Dist.* (2014) 224 Cal.App.4th 1393, 1397, fn. 4; see also *Mitchell v. United National Ins. Co.* (2005) 127 Cal.App.4th 457, 470.)

VII. Filing and Service of the Petition (Cal. Rules of Court, rule 8.486(e))

California Rules of Court, rule 8.486(e)(1) and (e)(2) specifies what to serve on whom. If the respondent is the superior court or a judge of the superior court, the petition and one set of supporting documents must be served on any named real party in interest, but only the petition need be served on the respondent. If the respondent is *not* the superior court

or a judge of the superior court, both the petition and a set of supporting documents must be served on the respondent as well as on any named real party in interest.

The proof of service must give the telephone number of each attorney served. (Cal. Rules of Court, rule 8.486(e)(3).) If the proof of service is defective, the clerk must file the petition anyway, but if the petitioner is given notice by the court of the defect and fails to file a corrected proof of service within five days, the court may strike the petition or impose a lesser sanction. (Cal. Rules of Court, rule 8.486(e)(5).)

A. In What Court Should a Petition for Writ of Mandate be Filed?

Petitions for writ of mandate may be filed in the superior court, Court of Appeal, or the California Supreme Court. (Cal. Const., art. VI, sec. 10; Civ. Proc. Code, secs. 1085, 1103.) Obviously, it depends on the ruling sought to be challenged. Absent a showing of exceptional circumstances, an appellate court will not exercise its jurisdiction if the petition for a writ of mandate could have been made first to a lower court. (*Funeral Dir. Assn. v. Bd. of Funeral Dirs*. (1943) 22 Cal. 2d 104, 110; *Cohen v. Superior Court* (1968) 267 Cal. App. 2d 268, 270, 274.) Thus, if a petitioner for a writ of mandate files in an appellate court, but could have lawfully petitioned a lower court in the first instance, the petition must set forth the circumstances that render it proper for the writ to issue originally from the reviewing court. (Cal. Rules of Court, rule 8.486(a)(1).)

1. Appellate Division of the Superior Court - In misdemeanor and infraction cases the appellate division of the superior court has jurisdiction to entertain petitions for writs of mandate or prohibition. (Cal. Const., art. VI, sec. 10; Civ. Proc. Code,

secs. 1085, subd. (b), 1103, subd. (b); see, e.g. *Brant v. Superior Court* (2003) 108 Cal.App.4th 100 [petition for writ of mandate entertained in appellate division of superior court after trial court denied discovery motion in misdemeanor case].)

2. Superior Court - Superior courts have jurisdiction over petitions for writs of mandate and prohibition where the case is pending before a magistrate. (See, e.g. *People v. Superior Court (Jimenez)* (2002) 28 Cal.4th 798 [peremptory challenge to magistrate].) When the superior court has original jurisdiction in a writ proceeding, as opposed to the appellate division, the court conducts the proceeding pursuant to its general powers and the petition is decided by a single judge rather than by a panel of judges sitting as the appellate division. (*Rosenberg v. Superior Court* (1998) 67 Cal.App.4th 860, 870.) The magistrate's decision may not be reviewed by the same judge who conducted the preliminary hearing as magistrate. (Pen. Code, sec. 859c.)

3. Court of Appeal - After there has been an arraignment on the information or indictment in felony cases, the Court of Appeal has jurisdiction to hear petitions for writs of mandate or prohibition. (Cal. Const., art. VI, secs. 10-11; Civ. Proc. Code, sec. 1084.) An appellate court will exercise its original jurisdiction in the first instance to issue a writ of mandate, in order to resolve issues of great public import whose prompt resolution is necessary. (See *JSM Tuscany, LLC v. Superior Court* (2011) 193 Cal.App.4th 1222, 1235–1236; *Corbett v. Superior Court* (2002) 101 Cal. App. 4th 649, 657.)

4. Supreme Court - the Supreme Court has original jurisdiction in

proceedings for extraordinary relief in the nature of mandamus. (Cal. Const., art. VI, sec. 10; see *e.g.*, *Vandermost v. Bowen* (2012) 53 Cal. 4th 421, 448–464 .) As with Courts of Appeal, the Supreme Court exercises its original jurisdiction in mandate proceedings only in cases in which the issues presented are of great public importance and require prompt resolution. (See *California Redevelopment Association v. Matosantos* (2011) 53 Cal. 4th 231, 252–253; *Bramberg v. Jones* (1999) 20 Cal. 4th 1045, 1054–1055; *Legislature v. Eu* (1991) 54 Cal. 3d 492, 500; *Wenke v. Hitchcock* (1972) 6 Cal. 3d 746, 750.)

B. Electronic Filing of Writs

California Rules of Court, rules 8.70 through 8.79 govern the electronic filing of documents. In the Court of Appeal, petitions for writ of mandate must be served electronically unless good cause is shown to do otherwise. (See Cal. Rules of Court, rule 8.71(a).) Each Court of Appeal has its own local rules, so it is always advisable to consult the rules before filing. In the Sixth District, the local rule regarding electronic filing is Rule 2 and it can be found on the Court's website.

1. General Responsibilities of Person Filing

Rule 8.74 outlines the responsibilities of the person electronically filing the document. Again, always check the local court rules to make sure your petition is in compliance. The format must be text-searchable while maintaining original document formatting. (Cal. Rules of Court, rule 8.74(b)(2)(A).) Page numbering must begin with the cover page, though the page number need not appear on the cover page. (Cal. Rules of Court, rule 8.74(b)(3).)

2. Signatures

There was a time when the Sixth District required an original signature on all filed documents. That is no longer the rule. If a document which must be signed under penalty of perjury is filed electronically, it will be deemed to have been signed if the declarant has signed a printed form of the document prior to filing. (Cal. Rules of Court, rule 8.75(a)(1).) Your signature on an electronically filed document is a certification that the original signed document is available on request. (Cal. Rules of Court, rule 8.75(a)(2).) If a party or the court demands production of the original signed document, it must be made available for inspection and copying within five days of service of the demand. (Cal. Rules of Court, rule 8.74(a)(3), (a)(4).)

3. Acknowledgment of Receipt by the Court

The Court should confirm that it has received the electronically filed writ and that it has either accepted or rejected it for filing. (Cal. Rules of Court, rule 8.77(a)(4).) If no such confirmation is received, you should verify that it was received and filed since there is no presumption that it was filed. (Cal. Rules of Court, rule 8.77(a)(4).)

C. Paper Filing of Writs

Because electronic filing is required, writs should never be filed in paper format. However, if for some reason there exists good cause to do so, the paper filing must meet the requirements set forth in California Rules of Court, rules 8.44(b)(3) and 8.486(c)(3).

VIII. What Happens After the Petition is Filed in the Court of Appeal?

California Rules of Court, rule 8.487 sets forth the procedure to be followed after a

petition is filed.

A. The respondent or any real party in interest may serve and file a preliminary opposition within 10 days. (Cal. Rules of Court, rule 8.487(a)(1).) It must contain a memorandum and a statement of any material fact not included in the petition. (Cal. Rules of Court, rule 8.487(a)(2).)

B. Within 10 days of the date on which the preliminary opposition is filed, the petitioner may serve and file a reply. (Cal. Rules of Court, rule 8.487(a)(3).)

C. The court may "grant or deny a request for temporary stay, deny the petition, issue an alternative writ or order to show cause, or notify the parties that it is considering issuing a peremptory writ in the first instance" without requesting preliminary opposition or waiting for a reply. (Cal. Rules of Court, rule 8.487(a)(4).)

D. If the court issues an order to show cause, it has resolved the issue of whether there is an adequate remedy at law, and the court may then decide the writ petition on its merits. (*People v. Superior Court (Sanchez)* (2014) 223 Cal.App.4th 567, 571.)

E. "Suggestive Notices"

It is possible for a reviewing court to issue a peremptory writ in the first instance, without having first issued an alternative writ or order to show cause, and without providing an opportunity for oral argument. (Civ. Proc. Code, sec. 1088; *Campbell v. Superior Court* (2008) 159 Cal.App.4th 635, 647; *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 178.) "A court may issue a peremptory writ in the first instance 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 where there is an unusual urgency requiring acceleration of the normal process. …" (*Campbell, ibid.* [internal quotations and citations omitted]; *Certainteed Corp. v. Superior Court* (2014) 222 Cal.App.4th 1053, 1062.)

If the petitioner is seeking a peremptory writ in the first instance, he or she must give notice to the opposing party and the court. Normally this is done by requesting a peremptory writ in the prayer of the petition. (See Civ. Proc. Code, sec. 1088; *Palma, supra,* 36 Cal.3d at p.180; see *Brown, Winfield & Canzoneri, Inc. v. Superior Court* (2010) 47 Cal.4th 1233, 1238.)

If it is the court that initiates the *Palma* procedure, it must send notice to all parties. The opposing party must receive notice at least 10 calendar days before a peremptory writ may be issued. (Civ. Proc. Code, sec. 1088; *Palma, supra,* 36 Cal.3d at p. 178; see *Brown, Winfield & Canzoneri, Inc., supra,* 47 Cal.4th at p. 1239.) A "suggestive" *Palma* notice typically contains the following:

1. Notice that the Court of Appeal intends to issue a peremptory writ in the first instance granting the relief requested by the petitioneer;

2. A discussion of the merits of the writ petition, with a suggestion that the trial court erred as claimed by the petitioner;

3. A specific grant to the trial court of "power and jurisdiction" to change the disputed interim order and enter in its place a new order consistent with the views of the

appellate court, in which the writ petition will be vacated as moot; and

4. A solicitation of opposition to the issuance of a peremptory writ in the first instance in the event the trial court elects not to follow the appellate court's recommendation. (See *Brown, Winfield & Canzoneri, Inc., supra,* 47 Cal.4th at p. 1238.)

This procedure should be used only when "it appears that the petition and opposing papers on file adequately address the issues raised by the petition, that no factual dispute exists, and that the additional briefing that would follow issuance of an alternative writ is unnecessary to disposition of the petition." (*Palma, supra,* 36 Cal.3d at p. 178.)

A suggestive *Palma* order is not the same as a peremptory writ, which requires notice and an opportunity for opposition.

> Although a suggestive *Palma* notice may be styled as an order, such a notice in no way commands or otherwise obligates the lower court to follow the course of action suggested by the appellate court. Rather, a suggestive *Palma* notice is analagous to a tentative ruling, in that it sets forth the appellate court's preliminary conclusions with respect to the merits of the writ petition – conclusions that, similar to those reflected in a tentative ruling, are not binding upon either the trial court or the appellate court.

(*Brown, Winfield & Canzoneri, Inc., supra,* 47 Cal.4th at p. 1238.) The court does not have to hear oral argument, but it *must* give the opposing party an opportunity to respond. (Cal. Rules of Court, rule 8.487(a)(4), 8.933(a)(4).) If the trial court quickly vacates, modifies or reconsiders the challenged ruling before the party adversely affected has had an opportunity to file an opposition in response to the *Palma* notice, the Court of Appeal will dismiss the writ petition. (*Id.,* at pp. 1238-1239.)

IX. What Remedies are Available Following the Grant or Denial of a Petition for

Writ of Mandate?

If a petition for writ of mandate is denied, the petitioner may file a petition for review in the California Supreme Court. (Cal. Rules of Court, rule 8.500(a)(1).) As with any other Court of Appeal decision, the Supreme Court may order review:

(A) When necessary to secure uniformity of decision or to settle an important question of law;

(B) When the Court of Appeal lacked jurisdiction;

(C) When the Court of Appeal decision lacked the concurrence of sufficient qualified justices; or

(D) For the purpose of transferring the matter to the Court of Appeal for such proceedings as the Supreme Court may order.

(Cal. Rules of Court, rule 8.500(b).)

The petition for review must be filed within 10 days after the Court of Appeal decision denying the writ is final. (Cal. Rules of Court, rule 8.500(e).) Orders denying or dismissing the petition without issuing an alternative writ, order to show cause, or writ of review, and orders denying or dismissing such a petition as moot after issuance of an alternative writ, order to show cause, or writ of review are final when filed. (Cal. Rules of Court, rule 8.490(b)(1).) All other decisions in writ proceedings are final 30 days after the decision is filed, except:

1. If necessary to prevent mootness or frustration of the relief granted or to otherwise promote the interests of justice, the court may order early finality in that court

of a decision granting a petition for a writ within its original jurisdiction or denying such a petition after issuing an alternative writ, order to show cause, or writ of review. The decision may provide for finality in that court on filing or within a stated period of less than 30 days.

2. If a Court of Appeal certifies its opinion for publication or partial publication after filing its decision and before the decision becomes final in that court, the 30 days or other finality period ordered under (A) runs from the filing date of the order for publication.

3. If an order modifying a decision changes the appellate judgment, the 30 days or other finality period ordered under (A) runs from the filing date of the modification order.

Although a petition for review is the preferred vehicle for seeking review of the denial of a writ petition (see *Hagan v. Superior Court* (1962) 67 Cal.2d 767, 769, overruled on other grounds in *Kowis v. Howard* (1992) 3 Cal.4th 888, 896), the Supreme Court also has jurisdiction to entertain an original writ petition. (Cal. Const., art. VI, sec. 10; see *Hagan, ibid.*) The Supreme Court exercises its original jurisdiction in mandate proceedings only in cases in which the issues presented are of great public importance and require prompt resolution. (*California Redevelopment Association v. Matosantos, supra,* 53 Cal.4th at pp. 252–253; *Bramberg v. Jones*, *supra,* 20 Cal. 4th at pp. 1054–1055; *Legislature v. Eu , supra,* 54 Cal. 3d at p. 500; *Wenke v. Hitchcock, supra,* 6 Cal.3d at p. 750.)

X. Res Judicata

A summary denial of a petition for writ of mandate is not res judicata (*People v.*

Durrett (1985) 164 Cal.App.3d 947, 955), nor is it law of the case. (*People v. Jones* (2011) 61 Cal.4th 346, 370, fn. 4.) The same is true if the court denies the petition with a brief statement but without an alternative writ, oral argument, or full written opinion. (See *Kowis v. Howard, supra,* 3 Cal.4th 888.) If the court actually issues an opinion, that opinion is the law of the case. (*People v. Veitch* (1982) 128 Cal.App.3d 460, 465.)