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SHOULD YOU SEEK WRIT REVIEW? CALIFORNIA AND FEDERAL STANDARDS FOR GRANTING MANDAMUS RELIEF



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It's a common conversation, and one you've probably had.

A client reeling from an adverse ruling wants to go straight to the appellate court for relief. You explain that most interlocutory rulings aren't immediately appealable, and that review will have to wait until the end of the case. The client asks if there's some other option—and suddenly, you're in the position of assessing whether this might be the rare case where the Court of Appeal or Ninth Circuit would grant a writ petition allowing discretionary review.

Most practitioners know that writ petitions are an uphill battle in both federal and state court, but they may not know exactly what it takes to get a petition granted. This article provides an overview of the standards in the Ninth Circuit and the California Court of Appeal, to help inform the decision about whether pursuing writ relief is worthwhile.

Writ review generally

The general rule is that an appeal lies only from a state court "judgment" that is "final" (Code Civ. Proc., § 904.1, subd. (a)(1)) or from a federal district court's "final decision" (28 U.S.C. § 1291). As a result, most interlocutory rulings are not immediately appealable. For example, there is no appeal from an order compelling discovery or dismissing some causes of action but not others. Instead, such rulings may be reviewed as part of an appeal from an eventual final judgment at the end of the case.

Writ review provides a safety valve from this final judgment rule. It gives appellate courts discretion to immediately review a non-appealable ruling, rather than forcing the aggrieved party to wait until entry of a final judgment. But such review is disruptive—a writ petition is effectively a request to skip ahead of the long queue of appeals from final judgments, requiring the appellate panel to put aside its regular work for a matter that the petitioner contends is too urgent to wait. As one court put it, writ review raises the specter of "appellate gridlock." (*Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 127 (*Omaha Indemnity*)). In most cases, the appellate courts conclude that they need not jump in to provide immediate review because "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." (*Science Applications Internat. Corp. v. Superior Court* (1995) 39 Cal.App.4th 1095, 1100.)

To minimize the disruption, and to restrict discretionary review to truly deserving cases, the Ninth Circuit and the California Court of Appeal have each developed standards for granting writ relief. Under either set of standards, the odds of obtaining writ relief are exceedingly low: On average, the California Court of Appeal grants fewer than 10 percent of the writ petitions it receives in civil cases (the percentage varies by district and division); the percentage is even lower in the Ninth Circuit.

Standards for granting mandamus in the Ninth Circuit

The Ninth Circuit considers mandamus relief "a 'drastic and extraordinary' remedy.' " (*In re Bozic* (9th Cir. 2018) 888 F.3d 1048, 1052 (*Bozic*).) To determine whether this "drastic" remedy is warranted, the Ninth Circuit adheres to a five-factor test first developed in *Bauman v. U.S. Dist. Court*

(9th Cir. 1977) 557 F.2d 650. The “*Bauman factors*” are:

- (1) Does the petitioner have “other adequate means, such as a direct appeal, to attain the relief he or she desires”?
- (2) Absent immediate relief, will the petitioner be “damaged or prejudiced in a way not correctable on appeal”?
- (3) Is the district court’s order “clearly erroneous as a matter of law”?
- (4) Did the district court’s order make “an ‘oft-repeated error,’ or ‘manifest[] a persistent disregard of the federal rules’”?
- (5) Does the district court’s order “raise[] new and important problems, or legal issues of first impression”?

(*Bozic* at p. 1052.)

There are a few situations that may warrant writ relief under these standards, such as discovery orders that raise “particularly important questions of first impression, especially when [the court is] called upon to define the scope of an important privilege.” (*Perry v. Schwarzenegger* (9th Cir. 2010) 591 F.3d 1147, 1157.) And where the district court has erroneously denied a jury trial, the Ninth Circuit may grant writ relief regardless of the *Bauman* factors. (*In re County of Orange* (9th Cir. 2015) 784 F.3d 520, 526.)

But writ relief in the Ninth Circuit is exceedingly rare. The much more common outcome is for the Ninth Circuit to deny writ relief under the *Bauman* factors. The recent decision in *Bozic, supra*, 888 F.3d 1048, drives this home. In *Bozic*, the plaintiff petitioned for writ relief after the district court transferred her putative class action from one federal district to another; she requested that the case be transferred back to the originating district. The Ninth Circuit denied writ relief even though it agreed that the district court had clearly erred and even though it acknowledged that the petition presented a matter of first impression. (*Id.* at p. 1052.)

Bozic reasoned that “if clear legal error were sufficient for mandamus relief, every erroneous interlocutory order would warrant issuance of the writ.” (*Bozic, supra*, 888 F.3d at pp. 1054-1055.) The remaining *Bauman* factors avoid opening that floodgate. The petitioner in *Bozic* did not face a sufficiently “imminent injury” from the

erroneous transfer order because (1) regardless of what district her case was in, it likely would be stayed pending resolution of an earlier-filed class action, and (2) if the potential stay were lifted, the petitioner could move in the district court to have her case transferred back to the originating district “in reliance on” the Ninth Circuit’s explanation that the transfer order was erroneous—or seek writ relief if the transfer were then denied, when “any potential injury from her case remaining in the Eastern District would be far less speculative.” (*Id.* at p. 1056.)

The *Bauman* factors’ focus on the nature of the harm also generally precludes writ relief from the erroneous denial of summary judgment because the Ninth Circuit does not consider the burden and expense of an unnecessary trial to be irreparable harm. (See, e.g., *In re Cement Antitrust Litigation* (MDL No. 296) (9th Cir. 1982) 688 F.2d 1297, 1303.) Indeed, one treatise cautions that seeking writ review from an order denying summary judgment might even be “considered frivolous and risk sanctions.” (Goelz & Batalden, *Federal Ninth Circuit Civil Appellate Practice* (The Rutter Group 2018) ¶ 13:155, p. 13-30; see also *In re Nordstrom, Inc.* (9th Cir. 2013) 719 F.3d 1128, 1129.)

The Ninth Circuit’s high bar for writ relief does not mean, however, that interlocutory review is wholly off the table. To obtain review of a significant adverse ruling in circumstances not meeting the *Bauman* factors, consider whether certification for an immediate appeal might be available under (1) 28 U.S.C. § 1292(b), which allows the district court to certify for immediate appeal an order involving “a controlling question of law as to which there is substantial ground for difference of opinion,” if “an immediate appeal from the order may materially advance the ultimate termination of the litigation,” or (2) Federal Rule of Civil Procedure 54(b), which allows the district court to enter a “final judgment” as to fewer than all claims or parties where there is “no just reason for delay.”

Standards for granting writ review in the California Court of Appeal

There is no uniformly-applied equivalent of the *Bauman* factors in California’s state courts. Instead, the Courts of Appeal use an array of criteria in determining whether a case warrants writ relief.

California appellate courts most commonly grant writ review where the petitioner has no other adequate remedy at law (usually meaning no right to immediate appeal) and will suffer “irreparable injury” if the writ is not granted. (E.g., *Omaha Indemnity, supra*, 209 Cal.App.3d at pp. 1274-1275.)

Other factors favoring writ relief are that

- (1) the petition presents a significant, novel issue;
- (2) there is a conflict in the law requiring resolution;
- (3) the trial court’s ruling was clearly erroneous; and
- (4) the challenged order “deprived petitioner of an opportunity to present a substantial portion of his cause of action.”

(*Id.* at pp. 1273-1274.)

Applying these considerations, California appellate courts have granted writ relief as to a broad range of rulings, including discovery orders requiring disclosure of privileged information and attorney disqualification rulings. Unlike the Ninth Circuit, California courts also will sometimes grant writ relief to avoid an unnecessary trial or retrial—for example, reversing an order that erroneously overruled a demurrer or dismissed a plaintiff’s key claims on the eve of trial. (E.g., *Knowles v. Superior Court* (2004) 118 Cal.App.4th 1290, 1294-1295; *Jasmine Networks, Inc. v. Superior Court* (2009) 180 Cal.App.4th 980, 988-989.)

In some procedural settings, writ petitions are

authorized by statute. For example, California’s summary judgment statute expressly authorizes writ petitions challenging summary judgment and summary adjudication rulings. (Code Civ. Proc., § 437c, subd. (m)(1); see generally Eisenberg, Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2018) ¶ 15:97 et seq., p. 15-53 et seq.) Indeed, sometimes the statutorily-authorized writ petition is the only possible appellate remedy. (Eisenberg, *supra*, at ¶ 15:96.2, pp. 15-50 to 15-51.) Although writ procedure is beyond the scope of this article, practitioners should be aware that courts generally consider the short deadlines for statutory writ petitions to be jurisdictional. (*Id.*, ¶ 15:90, p. 15-48.) This means that even if an adverse ruling is a reasonable candidate for writ relief, timing constraints may affect the feasibility of a petition.



Appellate specialists sometimes say that most of their writ practice is telling clients not to waste their money on writ petitions that have no realistic chance of success. But deserving cases do exist in the California courts, and occasionally even in the Ninth Circuit. Being able to discern these is half the battle.

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