Standing Out from the Crowd:

Successfully Obtaining Writ Relief from Discovery Orders

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Imagine a case where the trial court has just issued a discovery order compelling a party to produce highly confidential information, including e-mail correspondence between the party and its attorney. Compliance with the order not only risks revealing privileged information, but it also severely jeopardizes the party's ability to present its case at trial. Can this potentially devastating discovery order be challenged, and, if so, how likely is it that a reviewing court will grant relief?

In California, interlocutory or interim trial court orders such as discovery rulings are not directly appealable. *See Committee for Responsible Planning v. City of Indian Wells*, 225 Cal. App. 3d 191, 195 (1990) (explaining that California law "allows an appeal to be taken only from a final judgment, not from an interlocutory judgment").

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Thus, a litigant is often faced with a single option to challenge an adverse discovery order: seeking discretionary review before the Court of Appeal by filing a petition for an extraordinary writ of mandate or prohibition to prevent enforcement of the order. Writ petitions are granted only in extraordinary cases; indeed, a successful petition is a rare exception to a general rule against immediate appellate review of discovery orders. It is therefore important to understand both the reasons why obtaining writ relief is so difficult and the types of petitions that stand out from the crowd and persuade a court to grant immediate appellate relief.

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— Requirements for Writ Relief —

To obtain writ relief, a petitioner must first demonstrate that no "adequate remedy" at law exists. (Code Civ. Proc. § 1086.) In most cases, petitioners can meet this requirement by noting the discovery order cannot be immediately appealed. *See, e.g., Omaha Indemnity Co. v. Superior Court*, 209 Cal. App. 3d 1266, 1274-75 (1989). Second, the petitioner must establish the trial court abused its discretion in issuing the challenged order. *See Apple Computer, Inc. v. Superior Court*, 126 Cal. App. 4th 1253, 1263 (2005). Finally, courts require that the petitioner have standing, or a personal stake in the challenged ruling. *Schmier v. Supreme Court*, 78 Cal. App. 4th 703, 707-708 (2000).

In the specific case of discovery orders, writ relief is especially rare. Appellate courts review such orders only in exceptional circumstances. *People v. Superior Court*, 94 Cal. App. 4th 980, 987 (2001); *see Johnson v. Superior Court*, 80 Cal. App. 4th 1050, 1060 (2000) ("Writ proceedings are not the favored method for reviewing discovery orders"). Thus, it is insufficient to show merely that the trial court abused its discretion. Rather, petitioner must establish the particular discovery issue is one of widespread importance and can be resolved *only* through extraordinary writ review. As one court of appeal instructed last year:

> "Writ review of discovery rulings is generally limited to situations where (1) the issues presented are of first impression and of general importance to the trial courts and to the profession, (2) the order denying discovery prevents a party from having a fair opportunity to litigate his or her case, or (3) the ruling compelling discovery would violate a privilege." *OXY Resources California LLC v. Superior Court*, 115 Cal. App. 4th 874, 886 (2004).

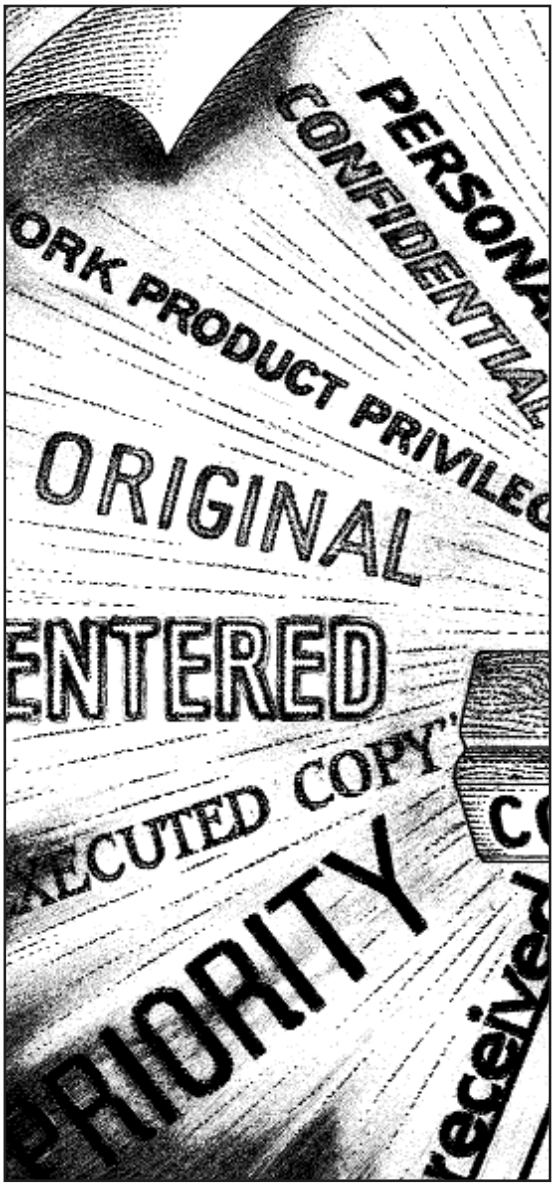
As a procedural matter, California litigants may file either a writ of mandate or a writ of prohibition to challenge an adverse discovery order. A writ of mandate directs a trial court to correct an abuse of discretion. (See Code

Civ. Proc. § 1085.) A writ of prohibition prevents a threatened act in excess of the trial court's jurisdiction. (*See* Code Civ. Proc. § 1102.) In practice, however, the distinction between the writ of mandate and the writ of prohibition has blurred in recent years. Writ relief will rarely (if ever) be denied because the petitioner sought the wrong form of relief. *See, e.g., Anderson v. Superior Court*, 213 Cal. App. 3d 1321, 1324 n. 2 (1989) (construing petition entitled "Petition for Writ of Review or Other Appropriate Extraordinary Relief" as petition for writ of mandate). For this reason, recent decisions have approved the practice of filing petitions entitled "Petition for Writ of Mandate, Prohibition or Other Appropriate Relief." *See Barmas, Inc. v. Superior Court*, 92 Cal. App. 4th 372, 374 (2001).

The Crowd: Many Writ Petitions are Filed, Few are Granted

It has long been true that courts "deny the vast majority of [writ] petitions [they] see." *Science Applications Int'l Corp. v. Superior Court*, 39 Cal. App. 4th 1095, 1100 (1995). However, the likelihood of obtaining writ review has decreased in recent years, due to a surge in the number of petitions filed in California appellate courts. According to the 2004 Court Statistics Report prepared by the Judicial Council of California, the number of writ petitions in civil cases rose by more than four percent in the 2002-2003 court year. (*See* Administrative Office of the Courts, 2004 *Judicial Council Statistics Report*, vi, 23, 25-26.) A total of 8,606 writ petitions were filed in the appellate courts — 3,000 of them in civil cases. (*Id*. at 26.)

Despite the large number of petitions, courts agreed to hear an extremely small number of them. During the 2002-2003 fiscal year, writ review was granted in only 824



cases (approximately 9% of the total number of petitions). (*Id*. at 26-27.) The rate of review in civil cases was even lower. Courts granted review in only 228 civil cases, or 7.6% of the 3,000 petitions filed. (*Id*. at 35.)

In some courts, writ review was granted even less frequently. The Third District reviewed only 37 of the 884 writ petitions it received in 2002-2003, so that a petitioner's chance of having a petition heard on the merits stood at just 4%. (*Id*. at 32, 35.) The Sixth District was even less friendly, summarily denying 410, or *98.6%*, of the 453 writ petitions filed there in 2002-2003. (*Id*.) This was a significant drop from 2001-2002, when the Sixth District agreed to hear 12.7% of the writ petitions submitted. (*Id*. at 33, 35.)

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Although courts rarely explain their reasons for refusing to hear writ petitions, their most common stated reasons for declining writ review include facilitating efficient resolution of the case in the trial court, avoiding piecemeal litigation, and preserving the distinction between trial and appellate courts. As one court explained:

> "[I]f it were granted at the drop of a hat, [writ review] would interfere with an orderly administration of justice at the trial and appellate levels.... If the rule were otherwise, in every ordinary action a defendant whenever he chose could halt the proceeding in the trial court by applying for a writ...to stop the ordinary progress of the action toward a judgment until a reviewing tribunal passed upon an intermediate question that had arisen. If such were the rule, reviewing courts would in innumerable cases be converted from appellate courts to [de facto trial courts]." *Omaha Indemnity Co., supra*, 209 Cal. App. 3d at 1272.

Other courts instruct that they refuse to hear writ petitions because any error may later be cured by the trial court, and a subsequent appeal may in any event provide a sufficient remedy. "In reality, perhaps the most fundamental reason for denying writ relief [from discovery orders] 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." *Science Applications Int'l Corp., supra*, 39 Cal. 4th at 1100.

Moreover, even if a court is persuaded to hear the merits of a writ petition, it may nonetheless affirm the trial court's order. *See, e.g., Glen C. v. Superior Court*, 78 Cal. App. 4th 570, 586 (2000) (deciding to review writ petition on its merits but finding trial court's order was properly issued); *Schmier, supra*, 78 Cal. App. 4th at 707-08 (reviewing petition for writ of mandate but denying relief because petitioner failed to establish standing). Thus, because a court's decision to review a writ petition does not guarantee the court will ultimately grant *relief*, the chance of actually reversing an adverse discovery order by filing a writ petition is even smaller than recent court statistics suggest.

Standing Out: Making the Case for Writ Relief

Because the likelihood of obtaining extraordinary writ relief has decreased even further in recent years, it is more important than ever to understand the types of writ petitions which are more likely to succeed.

In the discovery arena, the most likely vehicle for obtaining writ relief is a petition challenging an order requiring production of information protected by a privilege. Unlike the typical discovery order, where any alleged error is likely to be cured by the trial court at a later point in the proceeding, obtaining reversal of a final judgment based on disclosure of privileged information cannot undo the damage associated with producing the information in the first place. A recent case highlighted the point:

> "Interlocutory review by writ is the only adequate remedy where a court orders production of documents which may be subject to a privilege, since once privileged matter has been disclosed there is no way to undo the harm which consists in the very disclosure. The attorney-client privilege deserves a particularly high degree of protection in this regard since it is a legislatively created privilege protecting important public policy interests, particularly the confidential relationship of attorney and client and their freedom to discuss matters in confidence." *OXY Resources California LLC, supra*, 115 Cal. App. 4th at 886-87.

Thus, recent decisions have confirmed that a writ petition is more likely to succeed if the challenged order compels production of privileged information. *See Venture Law Group v. Superior Court*, 118 Cal. App. 4th 96, 101 (2004) (reversing order compelling discovery of privileged documents).

Courts will also grant writ relief from discovery orders raising issues of first impression, particularly where an issue affects the general public and not just the parties to a particular case. *See Oceanside Union School Dist. v. Superior Court*, 58 Cal. 2d 180, 185-86 n. 4 (1962). One emerging avenue of discovery likely to produce such novel issues is electronic discovery. For example, in *Toshiba America Electronic Components, Inc. v. Superior Court*, 124 Cal. App. 4th 762 (2004), the court agreed to review a trial court order compelling the defendant to produce information stored on backup computer tapes, without requiring the plaintiff to bear any cost of recovering the information. In explaining the need for writ review, the court observed that "California courts have not ruled upon the question of which party should pay when it is necessary to translate electronic data compilations [to respond] to a discovery request." *Id.* at 767. Because the cost of translating such information is often "exorbitant," the court found petitioner "raise[d] practical concerns" that are "bound to arise with increasing frequency," and thus the issue raised was

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"sufficiently novel and important to justify review by extraordinary writ." *Id*. Ultimately, the court granted writ relief, directing the trial court to order plaintiff to bear any reasonable expenses associated with translating the computerized data. *Id*. at 773.

Similarly, in *Cuadra v. Millan*, 17 Cal. 4th 855 (1998), the California Supreme Court affirmed a court of appeal decision granting writ relief from an order made by a Labor Commissioner on petitioner's backpay claims. *Id*. at 871. The Court held writ relief was appropriate because the commissioner's policy of calculating backpay from the date a claim is heard rather than the date a claim is filed "affects a substantial segment of the workforce so that…prompt resolution [of the issue] is clearly in the public interest." *Id*. Thus, the Court granted extraordinary relief not just because the commissioner's policy constituted an abuse of discretion, but because the disputed issue affected a large portion of the general public. *Id*.

Writ relief is also more likely in cases involving certain types of discovery devices. In cases challenging rulings related to requests for admission, for example, courts "do not apply the rule that a reviewing court should rarely interfere with pretrial discovery orders" because "requests for admissions are more closely akin to summary adjudication procedures than to orthodox discovery." *Hansen v. Superior Court*, 149 Cal. App. 3d 823, 827-28 (1983). Instead, courts follow the "general principle" that, although writ petitions are inappropriate "to control a court's discretion, in unusual circumstances the writ will lie where, under the facts, that discretion can be exercised in only one way." *Id*. at 828. Courts may also grant writ relief to limit the use of particular discovery devices. In *Bailey v. Superior Court*, 79 Cal. App. 3d 444 (1978), the trial court ordered plaintiff to conduct a videotaped re-enactment of an accident pursuant to Code of Civil Procedure section 2031, the statute governing requests for production of tangible things. *Id*. at 446. The court of appeal issued a writ of mandate directing the trial court to vacate its order, holding the California Legislature intended the deposition, rather than the request for production, to serve as the exclusive method for testimonial discovery such as re-enactments. *Id*. at 447.

Making Informed Decisions Regarding Writ Review

Obtaining writ review of a discovery order, and then securing relief if the appellate court agrees to hear the merits of a petition, remains one of the more daunting tasks a litigant will encounter. To increase the chances of obtaining writ relief, the petition must convince the court that immediate appellate review is necessary, either because complying with discovery would result in disclosure of privileged information or because the case presents a discovery issue of first impression.

In light of the long odds against obtaining writ relief, counsel should pursue such relief only after careful consideration of the relative costs and benefits. Writ petitions are often expensive because the petitioner must file not only a legal memorandum outlining the necessity of extraordinary relief, but also detailed exhibits documenting the trial court proceeding that produced the challenged order. Because courts so rarely grant review, the expected return from a writ petition is typically quite small. Moreover, the denial of a writ petition may strengthen the resolve of opposing counsel and thus impede settlement negotiations. Finally, the filing of a writ petition may alienate the trial judge who will hear the remaining proceedings in the case.

Given these considerations, counsel should ordinarily file a writ petition challenging an adverse discovery ruling only in the exceptional case where enforcement of an erroneous order threatens to cause irreparable damage to a party.