What Every Lawyer Should Know about Responding to a Writ Petition
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What Every Lawyer Should Know about Responding to a Writ Petition

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When your client is served with a writ petition, you must decide whether and how to respond. The rules governing writs are complex, and it therefore may make sense to consult an experienced appellate practitioner to help decide whether it is worth your time and your client's money to file a response.

1. Should I file a preliminary response to the writ petition?
When a petitioner files a writ petition, the "respondent" is the lower court that made the alleged error. The party who prevailed in the trial court is the "real party in interest." The respondent court does not file any response to the writ petition. However, depending on the circumstances, the real party may wish to do so.

Unless the court of appeal requests it, the real party need not file any opposition to a writ petition. However, the real party always has the right to file a preliminary opposition if it chooses. In light of the fact that "[a]pproximately 90 percent of petitions seeking extraordinary relief are denied" out of hand (*Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1271), the real party must decide whether it is worth the time and expense of filing a response.

Filing an unsolicited preliminary opposition risks drawing attention to the writ petition. However, you should consider filing a preliminary opposition where it appears that the petition has a greater than usual chance of success.

The opposition should focus only on important matters that the court of appeal will not know if the real party doesn't tell it—e.g., that the petitioner has left out or misstated key facts, or failed to include important parts of the record. Likewise, an opposition can draw the court's attention to the fact that the petitioner has an adequate remedy at law (e.g., that the petitioner may appeal directly from the challenged order and obtain a stay of enforcement pending the appeal). The key is brevity; a preliminary opposition should hit only the major points. Save the detail for later; if the court issues an alternative writ or order to show cause, you will have a chance to file a full-fledged brief. At the preliminary opposition stage, however, you just want to let the reviewing court know why it should summarily deny the petition.

2. If I decide to file a preliminary opposition, what should it look like, and when is it due?
A preliminary opposition is not subject to formal format requirements. It may look like an appellate brief or a simple letter. If you choose to file a brief, it should be bound in a red cover (Cal. R. of Ct. 44(c)(1)) titled "Preliminary Opposition" and follow the rules applicable to appellate briefs. However, many attorneys prefer to file letters rather than formal preliminary oppositions. This widely used and generally accepted practice has the benefit of providing a shorter form for focusing the court's attention on the key flaws in the writ petition.

If the real party elects to present a preliminary opposition, it must be filed within 10 days after the filing of the writ petition. (Cal. R. of Ct. 56 (g)(1).) The deadline for filing the opposition is not subject to the five-day extension for mailing under Civil Procedure Sec. 1013.

Remember: Any responses to a writ petition must actually be filed in the appellate court clerk's office before expiration of the applicable deadlines. The provisions of Rule 40.1(b)(3) of the California Rules of Court that allow parties to meet filing deadlines by using priority or overnight mail *do not* apply to writ proceedings. (*See* Cal. R. of Ct. 40.1(b)(4) [specifically excluding original writ proceedings].)

3. What happens if I don't file a preliminary opposition?
Even if you don't file a preliminary opposition, the likely result is that the reviewing court will summarily deny the writ petition. If the court is interested in the issues presented by the writ, it will issue one of several documents:

(i) *Palma* notice: If the reviewing court is considering granting a peremptory writ in the first instance, it must first notify the parties that it is considering doing so. (*Palma v. U.S. Industrial Fasteners, Inc*. (1984) 36 Cal.3d 171, 180.) If the court fails to issue a *Palma* notice before issuing a peremptory writ in the first instance, the writ is void. (*Kernes v. Superior Court* (2000) 77 Cal.App.4th 525, 530-531.) While the *Palma* notice is generally intended to give the real party an opportunity to file a response, the California Supreme Court has made it clear that the response need not be a formal "return." (*Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1241, 1258.) Moreover, in "'exceptional circumstances requiring immediate action,'" the *Palma* notice need not even provide the real party with an opportunity to file a response. (*Kernes, supra*, 77 Cal.App.4th at pp. 530-531.)

(ii) "Suggestive" *Palma* notice: This is a *Palma* notice strongly suggesting that the court of appeal will grant a peremptory writ. It all but tells the real party not to bother filing a response (while nominally giving it the chance to do so).

(iii) Alternative writ or order to show cause: This means the reviewing court has determined the petitioner has no adequate legal remedy and that writ relief is therefore the only adequate avenue for review. (*Robbins v. Superior Court* (1985) 38 Cal.3d 199, 205.) It commands the trial court to do as requested by the petitioner or show cause why not (although in reality, it's the real party who has to show cause). However, this order is not a determination that the petitioner is correct on the merits.

The real party files a "return." (Code Civ. Proc., Sec. 1089, 1105; Cal. R. of Ct. 56(h)(1).) The parties are entitled to present oral argument, and at the end of the proceedings the court *must* issue a written opinion. (Cal. Const. Article VI, Sec. 14.) Whether a reviewing court issues an "alternative writ" or an "order to show cause" is largely a matter of court preference. Substantively, your response will be the same.

4. What does the response look like?
If the reviewing court issues an alternative writ or order to show cause, generally it will order that the real party file a "return." The return is a formal pleading—a verified answer (including admissions, denials, and/or affirmative defenses), demurrer, or both. The return must respond to the formal allegations of the writ petition to be valid. (See *County of San Bernardino v. Superior Court* (1994) 30 Cal.App.4th 378, 382, fn. 6.)

In addition, the return should be accompanied by points and authorities that follow the format for appellate briefs (i.e., tables and headings). The return must be no longer than 14,000 words.

The court generally will specify when the return or requested opposition is due. If the court fails to specify a deadline, the real party must file and serve its response within 30 days after the court issues the alternative writ, order to show cause, or *Palma* notice. (Cal. R. of Ct. 56 (h)(2).)

5. What orders might the court of appeal issue?
Ultimately, the court of appeal can respond to a writ petition in different ways:

(i) Summary denial: This is a short order denying the petition, usually without stating reasons. This is the most common response to a writ petition.

(ii) Peremptory writ: This is the reviewing court's ultimate order directing that the trial court vacate the disputed order. A peremptory writ may issue after a hearing on an alternative writ or in the first instance (i.e., without any alternative writ). (*See* Code Civ. Proc., Secs. 1087, 1088, 1104, 1105.) Issuance of a peremptory writ without an alternative writ is unusual and is reserved for special circumstances justifying the acceleration of the normal writ process or where the petitioner's entitlement to relief is "so obvious that no purpose could reasonably be served by plenary consideration of the issue." (*Alexander v. Superior Court* (1993) 5 Cal.4th 1218, 1223, disapproved on another ground in *Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 724.)

(iii) Full opinion granting or denying the requested relief: Where a peremptory writ issues in the first instance or where an alternative writ or order to show cause issues, the reviewing court is required to issue a written opinion because the matter has become a "cause." (Cal. Const. Article VI, Sec. 14.) The court's written opinion must state the grounds on which the decision is based.

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