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At Writ's End

By Terry Anastassiou and Thomas H. Clarke Jr.

It may not happen for years, or it could happen in your first case, but almost all trial attorneys with a civil practice who elicit a good result from the law-and-motion or discovery departments are served eventually with a petition for writ of mandate. The practitioner must decide whether and how to respond. Two of the most significant factors to take into account are the statistics on success (miniscule) and the expense of a formal response (decidedly not miniscule). When appropriate, a short, informal preliminary opposition is often highly effective.

Petitions for extraordinary relief, such as mandamus, may be brought to seek immediate review of almost any order issuing from the trial court, and California attorneys certainly take advantage of the procedure. According to Judicial Council statistics, between 1998 and 2006, 70,000 original proceedings were filed in the California Court of Appeal, 24,000 of which were in civil litigation. Of petitions in civil cases, only 7.3 percent are considered on the merits — the remainder receive a summary denial without the court's reaching the merits.

A petition for extraordinary relief begins in the Court of Appeal by being screened by the research staff. The staff looks for a compelling reason to burden the court with the issue(s) raised in the writ — extraordinary potential for harm arising from an obvious error and/or (rarest of all) an important issue of law on which the court has not spoken. Only a small percentage of petitions survive this initial screening process.

Meanwhile, the practitioner on whom the petition has been served has 10 days to decide how to respond. No opposition or answer is required unless and until the Court of Appeal requests it. Furthermore, the court cannot issue a peremptory writ ("Please do it now, Superior Court ... ") without serving a *Palma* notice that such a writ is being considered and providing an opportunity to file a response. *Palma v. United States Industrial Fasteners Inc.*, 36 Cal.3d 171 (1984).

On the other hand, the reality is that serving a full-blown opposition before the court requests a response may lend credibility to the petition; at a minimum, it may beg the question: If the real party went to this time and expense to respond, of what is it afraid?

So why respond at all until you have to do so? There may be strategic reasons for responding immediately. Just as many litigators file petitions to show their opponents and the trial court that they mean business, parties receiving a writ may want to show that they are not intimidated by such hardball, time-consuming tactics. Also, a petition for writ of mandate hanging over a case may unduly influence the proceedings in some manner, which is usually not desirable.

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A key to deciding whether to address the petition before requested is to ascertain whether the petitioner may have overreached in attempting to obtain the court's attention. This can happen because of the showing a petitioner must make to elicit the Court of Appeal's immediate intervention, and the manner in which some petitioners try to make such a showing. Their goal is to grab attention by relating a trial court action that is not merely erroneous but also so odd or wrong as to create a sense of cognitive dissonance in the research staff. For instance, in a recent case, a *Palma* notice was elicited by a petition for writ of mandate whose first sentence read, "Petitioner is forced to bring this petition for extraordinary relief because the Superior Court has ordered punitive damages stricken from his complaint for 'failure' to do something that the California Supreme Court says he didn't have to do in the first place."

When a petition makes this sort of claim, which in a case is neither true nor relevant, the responding attorney has an option that can be as effective as full-blown opposition without the expense, and without the peril, of lending the petition weight: filing a preliminary opposition.

A preliminary opposition must include a "memorandum" and a statement of any fact not included in the petition. Thus, a preliminary opposition should be extremely short, limited to identifying the author and party they represent, contain an offer to provide full briefing on the merits if the court so desires (that is, this is not our opposition on the merits), and then set forth a memorandum on the single fact or legal authority that blows the petition out of the water.

For instance, in the example above, if the trial attorney had not raised the Supreme Court authority mentioned, the opposition can point out, "As a preliminary matter, however, we wish to note that petitioners' counsel did not cite this authority before the trial court. [Citation to Transcript] The argument was therefore waived in the trial court. [Citation to Authority]."

And walk away. If the trial counsel did not, in fact, cite the controlling authority, and the record reflects it, preliminary opposition like this may elicit a denial so quickly that they may seem to cross the opposition in the mail.

This option works best, if at all, when the preliminary opposition can establish that the petitioner has either overreached or attempted to mislead the court. Recently, shortly before trial of a complex litigation, trial defense counsel moved to decertify a class. In an unreported telephone conference to discuss this and various other motions, the trial court stated that it was deferring any ruling on decertification until testimony had been taken from class representatives during the first week of trial.

The following day, the defendants served a petition for writ of mandate asking the Court of Appeal to order the trial court to decertify the class based, in part, on a representation that the it had unilaterally taken the motion to decertify off calendar.

This representation prompted the sort of cognitive dissonance that can grab the court's attention: How could a trial court unilaterally refuse to consider such an important motion?

Of course, the statement was not true — the court had deferred ruling until relevant evidence had been adduced; it had not inexplicably dropped the matter. So the following response was filed with the Court of Appeal:

"We are counsel for real parties in interest herein. We are in receipt of [the] petition for writ of mandate, prohibition, etc., and would be happy to provide opposition on the merits should the Court so require. However, we write at this time simply to clarify one matter appearing in the petition.

"[The petition] makes it appear

that the trial court removed [petitioners'] motion to decertify the class action from calendar without permitting [petitioner] to present its argument that recently-issued appellate authority compelled decertification. I participated in the telephone conference at issue and want to note for the Court's benefit that the motion had been scheduled for the first day of trial, and the trial court deferred the motion without prejudice to [Petitioners'] renewing precisely the same motion after evidence on the issue had been taken in open court. [This] is reflected in the discussion on 2008, appearing in [the] appendix of exhibits at pages __."

Obviously this took very little time. The response was hand-delivered to the court before close of business the day after the petition was filed. Shortly thereafter, the Court of Appeal issued a minute order denying the petition on the ground that the record did not reflect that the trial court had either denied or refused to rule on the class decertification issue, and therefore the petitioners could not show that the court's exercise of its extraordinary powers was either necessary or appropriate.

Not every petition for writ of mandate you receive offers this sort of opportunity for "clarification." Just as most California attorneys would not dream of filing a civil petition based on authority they had not offered first to the trial court, most California attorneys would not attempt the sort of inaccurate factual representation that is reflected in this example. However, if you do receive a petition that includes a gift like this, one of the simplest and least expensive ways of dealing with it is to acknowledge the gift to the Court of Appeal. The results can be positive — and swift.

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