

Righting Wrongs with Writs¹

This seminar covers both state and federal courts, so this material will cover writ practice in both the state courts and the Eighth Circuit Court of Appeals.

I. State Writs

The jurisdiction of the Courts of Appeals and the Supreme Court are defined by the Missouri Constitution. Article V, Section 4 of the Missouri Constitution authorizes the Missouri Supreme Court to grant extraordinary original remedial writs. Traditional writs of error have been abolished in civil cases. Mo. Rev. Stat. § 512.010.

At the current time, there are 5 types of writs which may be filed in the Missouri Court of Appeals as well as the Missouri Supreme Court.

1. Prohibition
2. Mandamus
3. Habeas corpus
4. Quo warranto
5. Certiorari

It is common for attorneys to denominate their writs incorrectly, specifically their writs for prohibition and mandamus. However, this confusion has been recognized by the courts. In St. Louis Little Rock Hosp., Inc. v. Gaertner, 682 S.W.2d 148, 148 (Mo. Ct. App. 1984), the Court stated the “distinction between mandamus and prohibition is at best blurred, at worst nonexistent, and the subject matter to which the two writs apply overlap to a great extent.” In fact, if you incorrectly denominate your petition, the Courts can still grant relief. Enke v. Anderson, 733 S.W.2d 462 (Mo. Ct. App. 1987). In some cases, if a party has directly appealed an interlocutory order which should have been reviewed via a writ, the Courts have converted an inappropriate direct appeal to a determination of the matter as if it had been filed as a writ. State v. Larson, 79 S.W.3d 891, 892 (Mo. 2002).

Proceedings in mandamus in are governed under Rule 84.22 to Rule 84.26 of the Missouri Rules of Appellate Procedure and Rule 94.01 et seq of the Missouri Rules of Civil Procedure. Mo. R. Civ. Pro. 94.01. Proceedings in prohibition are governed under Rule 84.22 to Rule 84.26 and Rule 97. Mo. R. Civ. Pro. R. 97.01.

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Q. Can I file a writ if I can also appeal?

No. Rule 84.22(a) provides that no original remedial writ may issue when adequate relief can be afforded by an appeal.

Q. What are the different types of writs and how do I know what I should denominate the writ application?

A writ of prohibition is used when you are asking a higher court to prohibit a lower court from taking a certain action. The cases for prohibition are usually couched in terms of the trial court lacking subject matter jurisdiction over a cause of action or personal jurisdiction over a party. A writ of prohibition is also appropriate when a trial court is threatening to take action that your client meritoriously believes is not authorized by law.²

Writs of prohibition are appropriate in cases where you are seeking an order to prevent a judge from:

- 1) Proceeding in an action in the wrong county (improper venue) (State ex rel. Linthicum v. Calvin, 57 S.W.3d 855 (Mo. 2001).
- 2) Entering an injunction when he has no authority to issue an injunction
- 3) Compelling disclosure of documents in the discovery process you seek to restrict
- 4) Dismissing a criminal case since the State has no right to appeal.

² Although this writ is used when you believed the trial court is committing error serious enough to warrant interlocutory relief, this does not mean that your pleadings should be reduced to personal attacks. Staff counsel for the district courts repeatedly comment that documents filed in their Courts, by attorneys, contain inappropriate attacks on judicial officers. There is a right way and a wrong way to say that you believe a trial judge has made a mistake. Remember your ethical obligation to be courteous to the bench when drafting your petition and suggestions in support.

Writs of mandamus are used to compel a public official, a corporate officer, or a judicial officer to perform a MINISTERIAL duty that he or she is required to perform.

Writs of mandamus are appropriate in cases where you are seeking an order to compel a judge to enforce a clearly existing right for your client or a ministerial act. A ministerial act is defined as an act the “law directs the official to perform upon a given set of facts, independent of what the officer may think of the propriety or impropriety of doing the act in a particular case.” Jones v. Carnahan, 965 S.W.2d 209, 213 (Mo. Ct. App. 1998). For example, if a judge is not enforcing the clear terms of a statute, mandamus may be appropriate. Specific types of actions which may compel a mandamus action:

- 1) Seeking the higher court to order the trial court to grant a change of judge if the request was appropriately made. State ex rel. Cohen v. Riley, 994 S.W.2d 546, 549 (Mo. 1999)
- 2) Seeking a higher court to order a change of venue if a motion for a change of venue was appropriately requested.
- 3) Seeking a declaration that a lower court has failed to make a discretionary decision. Brown-Forman Distillers Corp. v. Stewart, 520 S.W.2d 1, 6 (Mo. 1975).
- 4) Seeking a declaration that the trial court abused the discretion awarded to it. State ex rel. Knight Oil Co. v. Vardeman, 409 S.W.2d 672 (Mo. 1966)
- 5) Seeking an order to compel the trial court to vacate an order seeking privileged documents. St. Louis Little Rock Hosp., Inc. v. Gaertner, 682 S.W.2d 146, 148 (Mo. Ct. App. 1984).
- 6) Seeking an order to vacate sustained objections in discovery. State ex rel. Southwestern Bell Publ'ns v. Ryan, 754 S.W.2d 30, 31 (Mo. Ct. App. 1988).
- 7) A criminal defendant seeking an order compelling compliance with a defendant's constitutional right to a speedy trial. Mo. Rev. Stat. § 545.780.2.

Note: mandamus is not available to enforce contractual rights. State ex rel. St. Joseph Hosp. v. Fenner, 726 S.W.2d 393, 395 (Mo. Ct. App. 1987). Mandamus is also not appropriate to challenge the validity or constitutionality of a statute. State ex rel. Mason v. County Legislature, 75 S.W.3d 884, 888 (Mo. Ct. App. 2002).

Q. How do I caption my writ petition and associated documents?

Writs of prohibition and mandamus are directed to the judge or officer of the lower court of agency whom you believe has exceeded its authority or whom you are asking the Court to compel to do an action. (On a side note, commissioners should never be the Respondent in a writ action – the Judge who signs off on the underlying orders should be the respondent). Therefore, your writ petition has a caption that reads as follows:

IN THE MISSOURI COURT OF APPEALS EASTERN DISTRICT OF MISSOURI	
STATE OF MISSOURI, ex rel.)
JANE DOE (your client),) Appeal No.
Relator,)
)
v.)
)
HONORABLE JOHN DOE, Circuit Court Judge)
of ABC County,)
Respondent.)

The unusual caption layout is a remnant of the old days. When you file a Petition for Writ, you are representing the RELATOR. If you are responding to the writ, you are representing the JUDGE. Rule 94.02 (mandamus), Rule 97.02 (prohibition).

Q. What are the requirements for the issuance of a writ or prohibition or mandamus?

The first requirement, which is usually not an issue, is that the person filing the writ must have standing to file the writ. For prohibition, that person is usually a party in the case below. For mandamus, the person should be authorized under the statute which grants mandamus authority or vests a right in a person.

The second requirement is that there must be no other effective remedy available to redress the wrong. State ex rel. Kelcor, Inc. v. Nooney Realty Trust, Inc., 966 S.W.2d 399, 402 (Mo. Ct. App. 1998).

Q. I have the right type of case for a writ, does that guarantee me the Court of Appeals will grant a writ?

Unfortunately, no. Writ relief is still discretionary with the Court of Appeals. The Courts have denied mandamus writs because they deem the writ relief futile (State ex rel. Hermitage R-IV Sch. Dist. v. Hickory County R-I Sch. Dist., 558 S.W.2d 667, 670 (Mo. 1977)). Writs are to only issue with the “sound discretion of the court.” State ex rel. Ballenger v. Franklin, 114 S.W.3d 883, 85 (Mo. Ct. App. 2003). They are to be used with great care. They should not be issued in close cases. They can not be used as a substitute for appeal. state ex rel. T.J.H. v. Bills, 504 S.W.2d 76, 78-79 (Mo. 1974).

Q. Can I get attorney’s fees on a writ of prohibition or mandamus?

The assessment of costs on writs of mandamus is covered by Mo. Rev. Stat. § 529.060. Section 529.060 states:

§ 529.060. Damages recovered

In case a verdict shall be found for the person suing out such writ, or judgment be given for him on motion to dismiss, or by nihil dicit, or for want of a replication or other pleading, he shall recover his damages and costs, in such manner as he might do in a civil action for a false return, and the same may be levied by execution, as in other cases.

See State ex rel. Dahl v. Lange, 661 S.W.2d 7, 8 (Mo. 1983). The American Rule pertaining to attorney’s fees applies in prohibition actions. State ex rel. Duddy v. Lasky, 451 S.W.2d 352, 356 (Mo. Ct. App. 1970). It also applies in mandamus actions, except for false returns under § 529.060. State ex rel. Raine v. Schriro, 914 S.W.2d 56, 58 (Mo. Ct. App. 1996). The Courts have also rejected the “collateral litigation” exception to the American Rule in writ actions. City of Cottleville v. St. Charles County, 91 S.W.3d 148, 151 (Mo. Ct. App. 2002).

Q. I know I want to file a writ in the Court of Appeals. What do I need to file?

Prior to filing your writ, you need to carefully review Rule 94 (mandamus) and Rule 97 (prohibition). There are at least seven items which need to be filed with the writ application. (Keep in mind, all items, including block quotes, should be DOUBLE SPACED and at least 13 point font – the Supreme Court will reject your filing if you violate this rule).

1. The writ summary page. See Form 16 (page 460 of the 2005 Missouri Court Rules). You can download this form on the Eastern District Court of Appeals website, accessible through www.osca.state.mo.us. Click on ABC's of Appellate Practice and then click on Appendices – Downloadable Forms. I have also provided a copy after this question.
* Note, your writ summary, exclusive of caption, should be ONE page only. The Supreme Court will allow you to single space this sheet
2. The Petition for Writ of Prohibition or Mandamus. This will look like a regular petition. Make sure you plead the necessary elements for your writ. For example, in a mandamus you should plead your client has a clearly exercisable right which has been ignored. Your petition should give a statement of the facts, a statement of the relief you are seeking, and reasons why the writ should be issued by the Court.
3. A copy of all orders, documents or other items which are essential to an understanding of the matters in the petition.
4. The exhibits – The exhibits should be set forth separately and numbered consecutively. Rule 94.03 and Rule 97.03.
5. Index of exhibits which identifies the exhibits by number or letter and page and the exhibits should be adequately described.
6. Suggestions in support of the petition. This is required. Rule 97.03 and Rule 94.03.
7. Proof of service. – You MUST serve the judge – he or she is now a party. The Supreme Court requests that fax numbers for each attorney be provided on the proof of service.
8. \$70.00 filing fee (check with the clerk prior to filing to make sure the fee has not been raised).
9. Review the local rules. The Western District prefers to receive a copy of the writ package in electronic format as well as printed.

In the Eastern District Court of Appeals, an original + 5 copies of writ applications must be filed. In the Supreme Court, an original + 7 copies should be filed.

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

STATE OF MISSOURI)
ex rel.)
)
)
_____)
[Petitioner,] [Relator,])
)
vs.) No. _____)
)
_____)
Respondent.)

WRIT SUMMARY

Identity of parties and their attorneys in the underlying action, if any: _____

Nature of the underlying action, if any: _____

Action of Respondent being challenged, including date thereof: _____

Relief sought by Relator or Petitioner: _____

Date case set for trial, if set, and date of any other event bearing upon relief sought (e.g., date of deposition or motion hearing):

Date, court and disposition of any previous or pending writ proceeding concerning the action or related matter: _____

Q. I have been served with a petition for a writ. Now what do I do?

Initially, you do not have to do anything. However, you have 10 days to file suggestions in opposition. Rule 84.24(c). In the Eastern and Western Districts of the Court of Appeals Petitions for Writs of Prohibition and Mandamus are assigned to a two judge panel consisting of a presiding judge and one other judge. The second judge changes monthly. In the event of a disagreement, a third judge, selected by rotation is added to the writ division. Rule 84.23. In the Supreme Court, each member of the Supreme Court votes on whether a writ petition should receive further attention.

If the Court is interested in more information they will most likely request counsel for the Respondent to file Suggestions in Opposition. If time is of the essence or an error is apparent to the Court, the Court may grant a preliminary order in prohibition (Rule 97.05) or Preliminary Order in Mandamus (Rule 94.05). These preliminary orders will also be granted if, after reviewing the Suggestions in Opposition, the Court decides it wants to hear the matter. The Court may also issue a peremptory writ or deny the writ petition outright.

Both preliminary orders will require the Respondent to file an answer within a specified time. **It is VERY IMPORTANT that you file an answer to the writ petition (suggestions in opposition are not enough).** Failure to file an answer to a writ petition will result in a writ being granted by default. State of Missouri ex rel. Gehres v. Hon. Nancy Schneider, 144 S.W.3d 903 (Mo. Ct. App. 2004).

Q. My writ was summarily denied (without a preliminary order or briefing schedule). Now what?

There is no right to file a request for transfer for a denial at this state. You will have to refile your writ application in the Missouri Supreme Court. Also, keep in mind that denials of applications for writs reflect only that the Court used its discretionary powers. The doctrines of res judicata and collateral estoppel do not apply to court rulings which deny applications for writs without opinion. Lewis v. Lewis, 930 S.W.2d 475 (Mo. Ct. App. 1996).

Q. Do we get oral argument on writs?

The initial phase of writ practice does not involve oral arguments. If the Court decides it wants to address the merits of the writ application, the Court will set a briefing schedule and a date for oral argument. Briefs for these writs are addressed below.

Q. I have a preliminary order and I have a briefing schedule, now what?

- 1) Make sure you have filed an answer to the petition for writ of prohibition.
- 2) Review Rule 84.04 for the contents of the brief. NOTE: The Points Relied On are structured differently for writs than for traditional appeals. Rule 84.04(d). Your brief must meet the requirements of Rule 84.24(i). Therefore, your brief should have:
 - a. A jurisdictional statement
 - b. Statement of Facts
 - c. Points relied on
 - d. Argument for each point
 - e. Conclusion
 - f. Certificate of Service
 - g. Appendix
- 3) There is no record on appeal. The petition and answer, the suggestions, and the exhibits form the record on appeal. Rule 84.24(g).

NOTE: The Eastern District has often relied on rule 84.24(j) to dispense with the need for a briefing schedule and oral argument and immediately addresses the merits of the writ. See State ex rel. Nixon v. Weber, 108 S.W.3d 110 (Mo. Ct. App. 2003).

Q. What happens to the proceedings below while the writ is pending?

Rule 84.24(b) specifically states that the filing of a writ petition does not alter the authority of the trial court to act in the proceedings below. The Court of Appeals does have authority to grant an interim stay, upon application. The basis for this authority is not always clear. Rule 97.05 is the only Supreme Court Rule that mentions the authority of an appellate court to grant a stay on a remedial writ in a prohibition matter.

Q. I don't like the result I received from the Court of Appeals on my pending writ and I had a preliminary order and a briefing schedule. Now what?

The test is whether the Court of Appeals issues an opinion. If an opinion was issued, a motion for rehearing or an application for transfer may now be filed pursuant to Rule 84.17 and Rule 83. See Rule 84.24(n). HOWEVER, if the preliminary order is quashed without an opinion, you must file a new petition in the Missouri Supreme Court.

HABEAS CORPUS WRITS

Q. What is a writ for habeas corpus?

Habeas corpus is a proceedings used to test the legality of a person's restrain or to remove a person from the unlawful custody of another. The writ is used in prisoner litigation to challenge the legality of confinement. It is also used by a person being held for contempt of court. Finally, it is also used by guardians or custodians of a child being held by another unlawfully. Prisoners also use this writ to challenge prison conditions which are cruel and unusual, to challenge the legality of extradition proceedings, and to deal with mental health issues of prisoners.

Q. What is required to be filed in a petition for writ of habeas corpus?

The same structure is followed for filing a petition for writ of habeas corpus. However, The Eastern District of Missouri also requires that a Writ Service Information Sheet be filed. A copy of the Writ Service Information Sheet is on the Eastern District website in the same location as the writ summary form.

The procedures for filing writs of habeas corpus are contained in Rule 91 and Chapter 532. Keep in mind, in the case of a criminal conviction a proceeding under Rule 24.035 (where there is a guilty plea) or Rule 29.15 (where there is a conviction after trial) must be used instead of habeas corpus if the Rule provides for relief. These proceedings are considered collateral proceedings and issues which could have been raised initially should not be raised in a habeas action.

Q. Who are the parties?

The person filing the suit is the petitioner and the person holding the petitioner or child or other person is the Respondent.

Q. What does the caption look like?

The caption is governed by Rule 91.01.

IN THE MISSOURI COURT OF APPEALS EASTERN DISTRICT	
IN RE: (name of person at issue)	
Petitioner (movant))
v.) Appeal No.
Respondent (entity with person at issue))

Q. How do I use it to stop extradition on criminal matters?

Section 548.101 sets forth the prisoner’s rights on a governor’s warrant. However, if the extradition is valid, habeas corpus will not be issued. Rule 91.23.

Habeas corpus may also provide relief if the defendant is confined under unacceptable conditions. McIntosh v. Haynes, 545 S.W.2d 647 (Mo. 1977). If your client wants to challenge a revocation of probation, habeas corpus is the proper remedy. State ex rel. Simmons v. White, 866 S.W.2d 443, 445 (Mo. 1993). Issues regarding people held incompetent to stand trial must be raised via habeas corpus. Mo. Rev. Stat. § 552.020.

Proceedings in federal court for habeas corpus are governed by 28 U.S.C. § 2254. There are specific court rules for 2254 proceedings which should be followed. Under 28 U.S.C. § 2242, an application for writ of habeas corpus in federal courts must be in writing and verified via signature of the prisoner or attorney. An in forma pauperis motion may also be attached, pursuant to 28 U.S.C. § 1915.

Q. How do I use a writ of habeas corpus in a child custody proceeding?

First, it is important to note that the writ should be directed to the Circuit Court first. Procedures for the Court of Appeals are addressed in this handout.

Any proceeding which affects a child’s custody (probate, juvenile, family court, etc.) may be subject to a writ of habeas corpus. Habeas corpus is appropriate if the Circuit Court entered an order which is deemed by the Court to be invalid or void. In re Cook, 691 S.W.2d 243 (Mo. 1985). This procedure can not be used in lieu of a motion to modify custody. In re Wakefield, 283 S.W.2d 467 (Mo. 1955)(outlining the distinction between motions to modify and habeas corpus remedies).

Q. Can I force the Department of Corrections or Sheriff to bring a particular person to Court if they are confined?

Yes, pursuant to Mo. Rev. Stat. § 491.230. The remedy is called a *habeas corpus ad prosquendum*. This petition should originate in the Circuit Court. However, if the writ is denied, you can refile in the Court of Appeals. There are loopholes which must be met – such as showing substantial and irreparable justice will be done. The statute leaves little discretion for the trial court to bring an offender from the Department of Corrections, if the offender is a party. The statute does not allow the action to be filed if the incarcerated is only a witness in a civil proceeding.

CERTIORARI

Q. When is certiorari appropriate in Missouri courts?

Certiorari is used to bring a record of a judicial body, such as the Circuit Court in front of a higher court in order to determine whether a trial court acted outside of its jurisdiction.

This procedure is also used to correct the lower court record while a case is on appeal. Mo. R. App. Pro. 84.03.

Q. What is required to file this writ?

The rules require that an affidavit be filed detailing the defects of the record and that you gave the other side at least 24 hours notice of your intent to file this motion. Rule 84.03.

Writs as a matter of right

Q. Are there any writs which are not discretionary?

Writs for quo warranto proceedings and certiorari proceedings which are initiated by the attorney general or prosecuting attorney are writs of right. State ex rel. Nixon v. Jaynes, 73 S.W.3d 623, 624 (Mo. 2002) (certiorari) and State ex inf. Danforth v. Merrell, 530 S.W.2d 209, 214-15 (Mo. 1975) (quo warranto).

Writ for habeas corpus is a writ of right, however there must be a showing of probable cause. State v. Cerny, 286 S.W.2d 804, 806 (Mo. 1956). The Petitioner must show that restraint of liberty is illegal or improper. McKown v. Mitchell, 869 S.W.2d 765, 767 (Mo. Ct. App. 1993)

QUO WARRANTO

Q. What is a writ of quo warranto and when do I use it?

Unless you are a prosecuting attorney or the attorney general of the state, you can not file this writ. Rule 98.02.

A petition for a writ of quo warranto is a civil action that is used to challenge whether a person is lawfully holding public office. Peach v. Goins, 575 S.W.2d 175 (Mo. 1978). Chapter 531 of the Mo. Rev. Statutes and Rule 98 address quo warranto proceedings. This writ may be used to test whether an elected official is properly exercising powers vested in him or her. NOTE: If impeachment proceedings are in process, quo warranto may not be used. Mo. Const. Art. VII, § 4. State ex inf. Nixon v. Moriarity, 893 S.W.2d 806 (Mo. 1995).

Article V § 4 of the Missouri Constitution authorizes circuit and appellate courts to address this writ.

Quo warranto may also be used against public or private corporations, cities, and other entities if there is a question about the legality of the formation.

Q. What are my remedies if I am successful on this writ?

The Court will enter an order removing the person from the office. The Court can also impose fines and other sanctions.

Q. How is the caption structured?

Unlike other writs, the caption is structured as set forth in Rule 98.02. The structure depends on whether you are the attorney general or prosecuting attorney for your county.

Q. Can I intervene in a quo warranto proceeding?

Yes. While you can not start the process, Rule 98.02(b)(1) provides for persons with a special interest may be involved in the proceedings. State ex rel. City of O'Fallon v. Collier Bldg. Corp., 726 S.W.2d 339 (Mo. Ct. App. 1986).

II. Federal writs

Q. I want to go to the Supreme Court of the United States, how do I file a writ of certiorari?

Unless you are appointed as a CJA attorney, you must be licensed to practice law in the Supreme Court. The details for filing a petition for cert in a paid case are quite complicated and involving printing your petition on booklets.

The Supreme Court website, <http://www.supremecourtus.gov/> , has plenty of information and contact numbers to answer questions regarding this process.

Q. What is the “All Writs Act”?

The All Writs Act, 28 U.S.C. § 1651, provides the mechanism for the federal court to issue writs. Under the All Writs Act, federal courts “may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” 28 U.S.C. § 1651. However, writs of coram nobis, coram vobis, audita querela, bills of review, and scire facis have been abolished. Fed. R. Civ. Pro. 60. The Rules also provide that in cases which have been removed from state court to federal court, the writ of mandamus has been abolished. Fed. R. Civ. Pro. 80(b). Mandamus is still available under specific statutory authorization.

The All Writs Act should be used only in exceptional cases where there is an abuse of discretion or usurpation of judicial power. La Buy v. Howes Leather Co., 352 U.S. 249 (1957).

Q. Can federal courts act under the All Writs Act to force a case to be removed to federal court?

There is a circuit split on this issue. The Tenth Circuit, in Hillman v. Webley, 115 F.3d 1461 (10th Cir. 1997) says no. The Seventh Circuit says yes. In re VMS Securities Litigation, 103 F.3d 1317 (7th Cir. 1996). One should read the extensive annotations on 28 U.S.C. § 1651 and the Anti-Injunction Act, 28 U.S.C. § 2283 for more guidance.

Q. Which controls, the All Writs Act or the specific statute?

28 U.S.C. § 1651 exists as a catch-all empowering federal courts to act. If there is a particular statute which governs your case, that statute controls. United States v. Cabiness, 278 F. Sup. 2d 478 (E.D. Pa. 2003).

Special Rules for the Districts

The WRIT SUMMARY is REQUIRED in all districts. Don't forget it. Form 16.

The Eastern District requires an original plus 5 copies (including exhibits) for each document you file. Special Rule 410. In addition, in habeas corpus proceedings the Petitioner must file and complete the Writ Service Information Form. All motions on writs must meet these copy requirements as well

The Western District requires a party to file an original and 3 copies. Special Rule XII. In addition, the Western District permits the filing of CD-ROM or floppy disk of all documents pertaining to the writ. Special Rule XXXVII. However, motions on writs require only an original copy in the Southern District. Exhibits must be filed in envelopes with a complete index. A separate index must also be filed. Special Rule IV.

The Southern District requires the filing of an original and 4 copies. Special Rule 2.

The Supreme Court requires an original plus 7 copies of all documents related to writ proceedings, except for habeas corpus writs. Mo. R. App. Pro. 30.11.

If you have questions about procedure, call the Court and ask to speak with Staff Counsel. The phone numbers for the Court of Appeals are:

- 1) Eastern District 314-539-4324
- 2) Southern District 417-895-6811
- 3) Western District 816-889-3600