Writ of Mandate Outline[1]

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I. What is a petition for writ of mandate?

A. **Mandate (aka "Mandamus**,") is an "extraordinary" remedy provided by a court sitting in equity. In a mandate proceeding, the petitioner asks the superior or appellate court to direct an inferior judicial or administrative body to do something.

B. Confusing, because "petition for writ of mandate" describes **two completely different proceedings**:

1. Interlocutory proceedings in *appellate* court usually seeking order for trial court to change its pre-judgment ruling

2. Types of writs discussed here, are writs from the *superior* court to an administrative body such as a local housing authority, the Department of Housing and Community Development, a city council or board of supervisors acting in an administrative capacity, the Department of Health Services, the Department of Social Services, the Employment Development Department, a County Board of Education, a County Personnel Board or the like, to the agency to take some action such as reversing an administrative order.

For a full description of distinctions between the types of civil writ proceedings, consult **California Civil Writ Practice, CEB Practice Guide, 4th Ed., April 2012.**

II. Difference between Administrative Mandate (CCP §1094.5) and Ordinary Mandate (§ 1085).

A. Ordinary mandate is a traditional remedy by which a court compels an inferior tribunal to perform a legally required duty. The authorizing statute is CCP §1085

B. Administrative mandate is a statutory remedy which enables a petitioner to challenge **an administrative decision after an adjudicatory hearing** in which the agency performs a fact finding function. The authorizing statute is §1094.5

III. Deciding Which Type of Writ to File (or Both) Depends on the type of administrative proceeding and your goals

[1] **The following outline is based in part on one initially prepared by the late Sue Ochs.**

A. What was the Underlying Proceeding you are challenging? Some proceedings are not considered adjudicatory, such as California Environmental Quality Act [CEQA] hearings, and you can only file under §1085. Others, like fair hearings in welfare, including GA, or health or housing authority hearings, are adjudicatory, and a review of that decision is available under CCP § 1094.5.

B. Your goals.

1. If goal is solely to secure relief for an individual client, you should file a §1094.5 petition**.**

2. If broader goal is to change agency policy, then you need to file §1085 writ as well. You should also consider other remedies, and consult "Choice of Relief in California State Court Suits," available at Western Center's web site (wclp.org) or from the author (rrothschild@wclp.org).

3. Can combine the two. *Conlan v. Bonta, 102 Cal.App.4th 745, 751-52 (2002).* May want to do so even if only first goal is key to your client because government may offer to trade you individual relief for dropping policy aspect of suit.

IV. Administrative mandate - Nuts and Bolts (Note: §1094.5 is a comprehensive statute which covers all facets of an administrative writ proceeding. **Do not ever file a petition for administrative mandate without first reading 1094.5 carefully!). Included in your materials is a non-exhaustive list of the key provisions of the writ statutes.**

A. Pre-filing

1. Administrative hearing. Administrative mandate is only available to a petitioner who has had an agency hearing since the purpose of the remedy is to challenge the validity of an adjudicatory decision after hearing. For discussion of hearing procedure in welfare cases (applicable in part to other areas as well), *see* Ch. XIV of CalWORKs: A Comprehensive Guide to Welfare and Related Medi-Cal Issues for California Families, available from Western Center.

But § 1094.5 applies when hearing is "required" which is not the same as when hearing is held. Therefore, administrative mandate appropriate when agency should have held a hearing but did not. Pomona College v. Superior Court 45 Cal.App.4th 1716, 1729 (1996)

2. Must exhaust administrative remedies. This means not only that you have to go through the hearing process, but also that generally you can't litigate an

issue that you could have, but did not, raise at the administrative hearing. While there are exceptions to this rule, listed below, do not count on these exceptions applying:

i. the agency indulges in unreasonable delay
ii. the subject matter lies outside the administrative agency's jurisdiction
iii. pursuit of an administrative remedy would result in irreparable harm
iv. the agency is incapable of granting an adequate remedy
v. resort to the administrative process would be futile because it is clear what the agency's decision would be. This exception is very limited. In re Joshua S. 41 Cal.4th 261, 274 (2007) (futility exception doesn't excuse litigant from raising invalidity of regulation in administrative proceeding)
vi. where important questions of constitutional law or public policy governing agency authority are tendered.

Public Employment Relations Bd. v. Superior Court 13 Cal.App.4th 1816, 1827 (1993). You need to timely request your administrative hearing, include all possible arguments, and ensure that you have created a complete administrative record. Otherwise, think carefully about use of your resources on a writ if remedies have not been exhausted.

3. Get everything you can in the administrative record.

i. §1094.5(e) prohibits introduction of extra-record evidence except for evidence that could not have been introduced at administrative hearing in exercise of reasonable diligence.

ii. Use administrative agency redetermination or rehearing procedure to augment the record before filing writ.

iii. Where §1085 proceeding is based on action taken after administrative hearing, the same rules apply. Western States Petroleum Assn. v. Superior Court, 9 Cal.4th 559 (1995); Poverty Resistance Center v. Hart, 213 Cal.App.3d 295, 302 (1989) (General Relief grant amount challenge limited to evidence before Board of Supervisors). However, if you are challenging the fairness of the proceeding itself, then extra-record evidence (and even discovery) may be permitted, even under § 1094.5. Western States Petroleum Assn., 9 Cal.4th at 575, n 5.

4. Pre-filing demand letter often good idea, particularly with large agencies, because one part of the agency might not know what the other part has

been doing. Also, could be a prerequisite for award of attorneys' fees under § 1021.5. Graham v. DaimlerChrysler Corp., 34 Cal.4th 553 (2004).

5. Make sure you know if there is a deadline to file the writ petition.

   i. Statute of limitation often found in other statutes. *E.g.*, Welf. & Inst.Code §10962 (one year for health and welfare writs against state).

   ii. If suit is against local agency, such as county or housing authority, §1094.6 may govern: suit must be filed 90 days after challenged decision becomes final. (Applies to GA). But 90 days don't start until local agency notifies the party, as required by CCP §1094.6(f), that deadline is governed by §1094.6. Donnellan v. City of Novato, 86 Cal.App.4th 1097, 1102 (2001).

   iii. Catchall for suits challenging state administrative adjudications is 30 days after reconsideration period runs out. Gov. Code §§11523, 11521.

B. Filing a §1094.5 Suit: Elements of the Verified Petition

1. The parties. Your client is the petitioner and the defendant agency is called the respondent. In health, welfare and housing cases, there usually is not a real party interest; in UIB cases, the employer is the real party in interest, even if the case is against EDD.

2. Substantive facts: what the respondent agency did to your client to get her involved in the administrative process. Helpful to give the judge some factual detail to (a) create a strong first impression of your client's plight; and (2) not have to devote too much of your limited 15 pages for your opening brief to reciting the facts.

3. Procedural facts: what the administrative law judge ruled, what (in a health or welfare case) the director ruled, etc. Attach copies of any written rulings/hearing decisions.

4. that the petition is brought under §1094.5 and (in health and welfare cases) under Welfare & Institutions Code §10962 which provides that no filing fee shall be required. This means you don't have to file Waiver of Fee Request form, but be prepared to bring along a copy of the statute to the filing clerk. Some clerks take the position that §10962 only excuses filing fee, not other costs, so may have to file the fee waiver form later. The Fee Waiver should specify you're asking for waiver of all costs, including costs of obtaining administrative record. The waiver form is at:

http://www.courts.ca.gov/documents/fw001.pdf.

5. that respondent prejudicially abused her discretion as described in the following paragraphs: [state why the respondent's decision was wrong; see **Section VI** of Outline, below].

6. that petitioner is beneficially interested in the outcome of the proceeding and that there are no adequate alternative remedies at law.

7. that petitioner has exhausted all administrative remedies.

8. Prayer for relief. You should ask for:

   i. a stay of enforcement of the respondent's decision if, as in a welfare or housing termination case, the client needs one. See CCP §§ 1094.5(g) and (h) for grounds for stay.

   ii. a writ of mandate commanding the respondent to set aside the decision.

   iii. prejudgment interest (if applicable).

   iv. costs of suit, including attorneys' fees

   v. The petition must be verified by the client, unless she lives outside the county where your office is located or facts within knowledge of attorney. In those cases, the attorney may verify the petition. §§1086, 446.

9. **Be sure to check the local Superior Court rules governing filing, service of writs, and how to proceed for writ relief. This may be the local rules governing law and motion. See, e.g., Sacramento Superior Court Local Rules on Writ Procedure: http://www.saccourt.ca.gov/civil/docs/writ-procedural-guide.pdf.**

C. Service:

1. You need to serve the petition just as you would serve summons and complaint on any public entity. §416.50. You need not prepare a summons unless you are combining the writ petition with a complaint for declaratory and injunctive relief.

2. If you are seeking an alternative writ, you need to serve first and then attach a proof of service to your petition. §1107. If you do not seek an

alternative writ, you may file the petition before serving it; in that case, lodge proof with court. CCP §1088.5. Most local rules require reasonably prompt service.

D. Obtaining the Record – At the time you file the Petition, make formal request to have administrative record prepared. There may be a fee, unless exempted. See Sample request in the materials. Consider whether you need to move to augment the record, based on the criteria

E. Proceeding to Hearing by Noticed Motion. Two ways to proceed: noticed motion or by alternative writ. Proceeding by motion is preferred by the courts to an *ex parte* proceeding, and is also much easier. (For how to proceed by alternative writ, *see* CEB, California Administrative Mandamus §§11.44 et seq. (3d ed. updated May 1994)). To proceed by motion, you

1. File notice of motion and motion - can be done any time after record is prepared and respondent has answered (must answer within 30 days of receipt of record. §1089.5).

2. File Memorandum of points and authorities. Limited to 15 pages unless leave of court to file longer memo. If combined with a § 1085, file any declarations and exhibits to support your case.

3. File Proposed Order that a writ be granted commanding respondent to set aside her decision and specifying whatever other relief you have won.

4. Lodge administrative record or make sure opposing counsel does.

5. Make a request for a statement of decision, *see* §632, <u>before</u> the hearing if there are likely to be disputed facts, you are not sure that you will win in the trial court, and you may want to appeal if you lose. Otherwise, if you later appeal, the appellate courts will presume that all factual findings that could have been made against you were made against you.

6. Reply brief and oral argument same as with any motion

7. Read tentative decision, usually posted by the court the afternoon before oral hearing date. Decide whether to challenge.

F. Post - Hearing if you win:

1. Prepare a Judgment Granting Peremptory Writ of Mandamus which:

   a. Orders that a writ be granted commanding respondent to set aside her decision and specifying whatever other relief you have won.

b. Awards costs, if there are any.

c. Awards attorneys' fees in an amount to be determined.

2. Prepare a Peremptory Writ of Mandamus for the court to sign ordering the director to do whatever is required by the judgment.

i. Prepare a notice of entry of judgment, which is useful if you think the respondent might appeal. Under Rule 2(a) of the California Rules of Court, a party must appeal within 60 days of notice of entry of judgment.

ii. Negotiate with the opposing counsel over the amount of the fees; if unsuccessful, file a motion for fees. Under Cal. R. Ct. 870.2(b), a fee motion must be brought within the time for filing a notice of appeal, i.e., 60 days from notice of entry of judgment, though you can usually obtain an extension of the deadline.

Fee awards to prevailing petitioners are mandatory under Welfare and Institutions Code § 10962. Other fee shifting statutes to consider are the private attorney general statute--Code of Civil Procedure § 1021.5--and 42 U.S.C. §1988, which awards fees for vindicating federal rights.

G. Post-Hearing if you lose:

1. Decide whether to appeal. If you do appeal, consult Rules 1 - 5.2 of the California Rules of Court and either the Rutter Group or CEB practice books on civil appeals.

2. File notice of appeal in Superior Court from judgment denying writ of mandate within 60 days of notice of entry of judgment. Remember to appeal from judgment, not earlier minute order or ruling from bench. Within 10 days, either pay filing fee or obtain fee waiver based on indigency. Cal. R. Ct., R. 1(c), (d).

3. Within 10 days of filing notice of appeal, file in Superior Court notice to prepare Reporter's Transcript, and either notice to prepare Clerk's Transcript or election under Rule 5.1 to proceed by Joint or Appellants' Appendix.

V. §1085 Writs - Nuts and Bolts

A. Timing –

1. §1085 does not have a statute of limitations, so you look to the substantive law or one of the catch-all statutes, such as § 338 (three years to bring suit to enforce a liability created by statute).

2. Most §1085 suits are attacks on ongoing policies. In such cases, there is no statute of limitations problem. *See* Howard Jarvis Taxpayers Association v. City of La Habra, 25 Cal.4th 809 (2001) (plaintiff not barred from challenging tax ordinance that was enacted more than three years earlier because the tax was being continuously collected).

B. Elements of a Petition

1. The petitioner is beneficially interested in the outcome. Unlike in §1094.5 suits, the scope of standing under §1085 is as broad as imaginable. Where ""the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty…'" the petitioner "'need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced …'" Green v. Obledo, 29 Cal.3d 126, 144 (1981). Thus, your client, or any interested citizen, has standing to challenge an illegal policy even if the suit becomes moot for her or even if she challenges a portion of the policy that does not apply to her.

2. Respondent has a ministerial (non-discretionary) duty to follow the law, and is breaking it.

3. There are no plain, speedy and adequate alternative remedies at law.

b. Combined §§1094.5 and 1085 writs. Petitioners are entitled to seek both in the same action. Conlan v. Bonta, 102 Cal.App.4th 745, 751-52 (2002)

c. Discovery may be available, where there are "facts in dispute." Bright Devpmt. v. City of Tracy (1993) 20 Cal.App.4th 783, 795

d. Bring case to "trial" just as with a §1094.5 case - noticed motion procedure

VI. GROUNDS FOR ATTACKING THE ADMINISTRATIVE DECISION IN A MANDATE PROCEEDING

Section 1094.5(b) contains five different theories under which to attack an administrative decision. The four you will probably use most often are:

A. error of law
B. denial of a fair trial

C. decision not supported by findings
D. findings not supported by evidence

A. ERROR OF LAW

Common errors of law are:

1. Application of the wrong substantive standard in making the agency decision

2. application of an invalid regulation (and here there is an overlap with ordinary mandamus under §1085); §1094.5 can be used to mount an attack on a rule or regulation

3. A reviewing court always exercises de novo review in regard to questions of law. That means the reviewing court does not defer in any way to the agency's interpretation of the law. Ruth v. Kizer 8 Cal.App.4th 380, 385 (1992).

B. DENIAL OF FAIR TRIAL

This category includes all types of procedural and substantive due process violations. Both constitutional due process standards and any procedural statutes or regulations are relevant. Substantive due process violations fall under this category as well. For example, the failure to maintain and apply objective, written, ascertainable standards resulting in arbitrary and capricious administration of the agency program denies the petitioner a "fair trial." Other "fair trial" issues are agency use of irrebuttable presumptions, interference with petitioner's right to put on her case at the administrative level, biased fact finders, etc.

C. DECISION NOT SUPPORTED BY FINDINGS-- FINDINGS NOT SUPPORTED BY EVIDENCE

1. Be careful in identifying "findings." Do not automatically accept the labels that the agency uses in its written decision. A "finding" is any determination of disputed fact and can be implicit or explicit. This is important, especially where you are dealing with irrebuttable presumptions.

   i. One situation where you will frequently find that the decision is not supported by the findings is in benefits and Medi-Cal cases when the Director of DSS or DHS alternates (reverses) a decision after the ALJ has found in favor of the appellant. As the Supreme

Court stated in Topanga Assn. for a Scenic Community v. County of Los Angeles 11 Cal.3d 506, 515 (1974) :

"[I]mplicit in section 1094.5 is a requirement that the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order."

If that bridge is missing, you should prevail.

2. Standard of Review for Factual Issues

Section 1094.5(c) distinguishes between cases in which the Court exercises its independent judgment and other cases. "Independent judgment" is a higher level of scrutiny. It applies to cases which involve fundamental rights In such cases "abuse of discretion is established if the [reviewing] court determines that the findings are not supported by the weight of the evidence. In all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record."

Thus, the difference between independent review cases and others is that in the former type the Court re-weighs the evidence. In the latter type, the Court defers to the lower tribunal if its decision is supported by substantial evidence even if there is contrary evidence which outweighs it.

Independent review is applicable in most benefits cases. *See, e.g.*, Frink v. Prod, 31 Cal.3d 166 (1982) (independent judgment required for both applicants and recipients in cases under former Aid to Totally Disabled program); Cooper v. Kizer, 230 Cal.App.3d 1291, 1299 (1991) (same standard of review in Medi-Cal cases); Berlin v. McMahon, 26 Cal.App.4th 66, 72 (1994) (independent judgment applied to review reduction in AFDC benefits).

However, Fukuda v. City of Angels 20 Cal.4th 805 (1999), holds that even in independent judgment cases:

There is a strong presumption that the administrative findings of fact are correct, and

The burden of proving that the findings are incorrect– that is, the findings are contrary to the weight of the evidence-- is on the petitioner.

VII. OTHER PROCEDURAL ISSUES UNDER SECTION 1094.5

A. Augmenting the Record

The record can only be augmented without remand when the independent judgment standard applies. In all other cases, the new evidence must first be presented to the agency.

B. Section 1094.5(g) provides for stays prior to the litigation of the petition and pending appeal.

i. This provision is important if your client is about to lose her benefits or suffer some penalty.

ii. Standards for the grant of stay (see C.C.P. § 1094.5 (g) and (h):

i. The stay is in the public interest

a. Balance petitioner's interest in stay vs. effect, if any, on the public.

b. Petitioner is likely to prevail on the merits of her petition for writ of mandate.