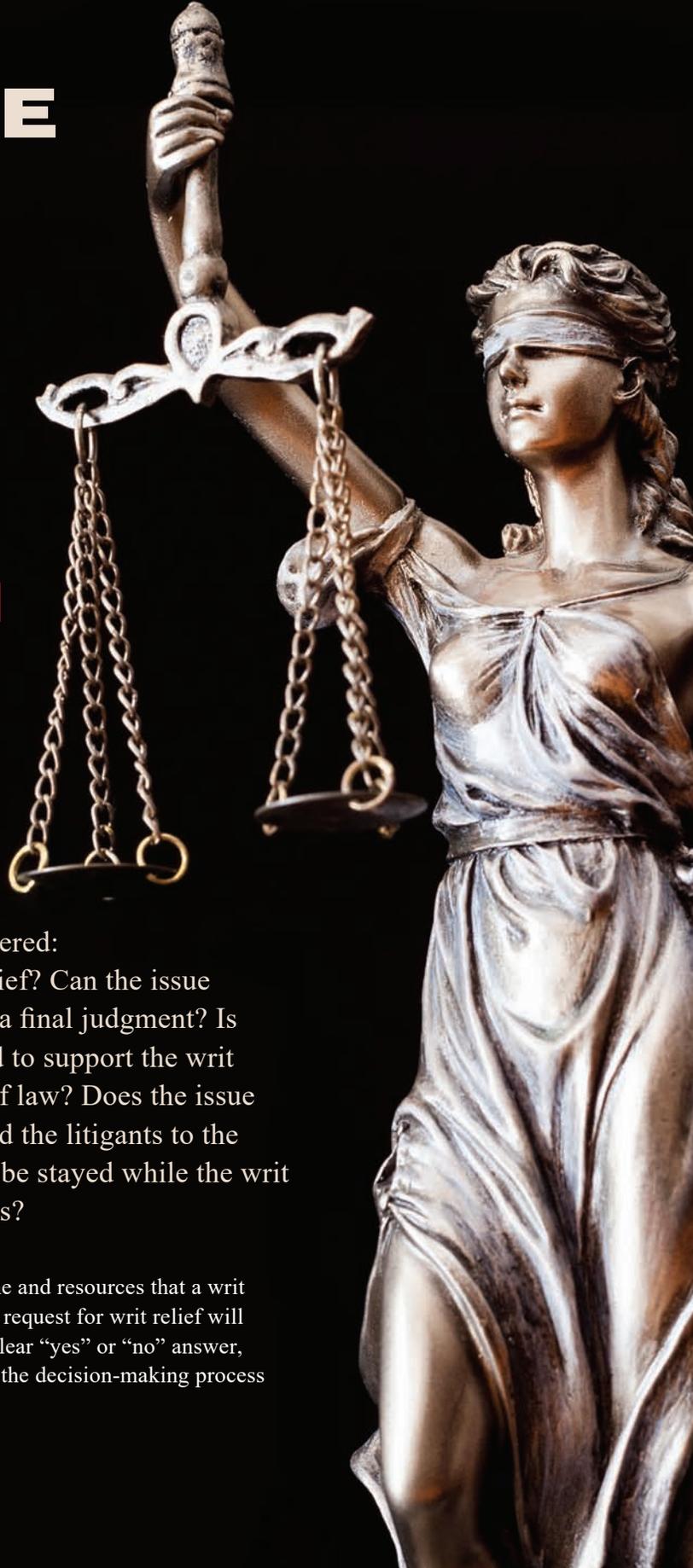


# TAKING THE MYSTERY OUT OF WRIT PRACTICE

BY PAUL GEORGESON, ESQ., AND DEBBIE LEONARD, ESQ.

An ubiquitous question that often plagues lawyers is whether it is worthwhile to file a petition for writ of mandamus or prohibition to seek review of an erroneous interlocutory district court decision. Many factors should be considered: Does the issue warrant extraordinary relief? Can the issue be sufficiently reviewed on appeal from a final judgment? Is the factual record adequately established to support the writ petition? Is the issue purely a question of law? Does the issue have statewide public importance beyond the litigants to the case? Can the district court proceedings be stayed while the writ petition is pending in the appellate courts?

If the answer to these questions is “yes,” the time and resources that a writ petition will consume may be worthwhile. If “no,” a request for writ relief will unlikely be successful. Because there is usually no clear “yes” or “no” answer, this article is designed to assist the practitioner with the decision-making process to determine whether or not to file a writ petition.





## Source and Scope of Authority

Article 6, Section 4 of the Nevada Constitution provides the Nevada Supreme Court and Court of Appeals with original jurisdiction to issue writs of mandamus and prohibition. NRS Chapter 34 and NRAP 21 set forth the applicable procedures.<sup>1</sup> A writ of mandamus is available to compel the performance of an act that the law requires or to control an arbitrary or capricious exercise of discretion. A writ of prohibition is the counterpart to a writ of mandamus; it can be used to stop the district court (or another tribunal, corporation, board or person exercising judicial functions) from acting when such proceedings are either without, or in excess of, the court's jurisdiction.<sup>2</sup>

These types of writs are considered extraordinary remedies. The court has complete and exclusive discretion to consider and issue them. In applying for a writ, the petitioner must strictly comply with all requirements in NRAP 21 and meet its burden to demonstrate that extraordinary relief is warranted.

Extraordinary writ relief is only available if there is no plain, speedy and adequate remedy in the ordinary course of law. The right to appeal a final judgment is generally considered an adequate legal remedy that precludes writ relief. Therefore, the court generally declines to entertain writ petitions where the decision from a lower court is appealable. That is true even when immediate appeal is not available (such as with an interlocutory order), but the order at issue may ultimately

be challenged on appeal from a final judgment. The court will generally refuse to consider a writ petition that would resolve only part of the underlying action. Notwithstanding all of these general pronouncements, the court can and does intervene when there is special urgency or strong necessity.

## Writ Statistics

Nevada's appellate courts publish annual statistics regarding their case load and case disposition. The Supreme Court resolved 396 writ petitions in 2015. Of those, 161 were filed by pro se litigants and 235 were filed by attorneys. The Supreme Court denied 312, dismissed 24 and granted (or granted in part) 38 writ petitions. In 2015, its first year of existence, the Court of Appeals resolved 30 original

proceedings, nine of which were filed by attorneys and 21 of which were pro se. It granted only one of those petitions. For the past decade, the percentage of writ petitions granted by the Supreme Court has hovered around 10 percent, making writ relief truly extraordinary. As these statistics demonstrate, on the basis of raw numbers, the likelihood that a writ petition might be heard by the court, much less granted, is not very high.

However, a few observations are worth noting. When the court places the writ petition on its en banc track, the odds of the writ being granted increase considerably. This is because the en banc court only considers matters of first impression or of statewide public

*When the court places the writ petition on its en banc track, the odds of the writ being granted increase considerably.*

*continued on page 16*

# TAKING THE MYSTERY OUT OF WRIT PRACTICE

importance. If the court believes the subject matter of the writ could settle existing law or establish new law, writ relief is more likely.

Similarly, nearly half of the writ petitions in which the court hears oral argument are successful. The court will only schedule argument in those cases that matter the most to the state as a whole, rather than to the individual litigants. If your writ petition is scheduled for oral argument, it is a good sign that the court deems the subject matter important.

The court summarily denies most writ petitions without any discussion or analysis. While not dispositive, an order that directs the respondent to answer is a sign that the writ petition has at least withstood the fate of most requests for extraordinary relief.

*If your writ petition is scheduled for oral argument, it is a good sign that the court deems the subject matter important.*

## Recent Decisions

It is difficult, if not impossible, to predict whether or not the court will hear or issue a writ. A review of the court's recent jurisprudence, however, can provide some guidance as to the types of cases that the court is more inclined to consider worthy of writ relief.

- **Judicial Economy**

The court has noted that the interests of judicial economy are of primary importance in deciding whether or not to issue a writ.<sup>3</sup> Therefore, the court is more likely to consider and issue a writ if judicial resources will be wasted absent the grant of extraordinary relief.

- **Substantial Legal Issues of General Importance**

The court may be reluctant to entertain a writ petition that will only affect the specific issues of the parties to a lawsuit. Therefore, you will increase your chances of having your writ heard if you demonstrate that issuance of the writ will provide guidance to the lower courts on issues of general importance affecting other current and future litigants.<sup>4</sup>

- **Clarification of the Law**

The court is more likely to act upon a writ when it believes that an important issue of law needs clarification.<sup>5</sup> Therefore, if the legal issues that underlie your writ are matters of first impression, you will increase your chances of having your writ heard and considered.

- **Conflicting Decisions in Lower Courts**

Just as the U.S. Supreme Court looks to conflicts among the circuits in determining whether to grant certiorari, the Nevada appellate courts are more likely to issue a writ when there is a conflict among the state's district courts.<sup>6</sup> When different district courts have reached different conclusions of statewide importance, the Nevada Supreme Court may decide to step in to resolve the issue.

- **Purely Legal Issues**

Even though the court has original jurisdiction to issue writs, the court generally prefers not to wade into disputed issues of fact. As the court

regularly acknowledges, the district courts are in a better position to resolve factual disputes. Therefore, in addressing writ petitions, the court prefers to address pure questions of law.<sup>7</sup>

- **Irreparable Injury**

A showing of irreparable harm is not technically a requirement for obtaining a writ. However, the court is more likely to issue a writ if the petitioner will be irreparably injured absent the court's extraordinary relief.<sup>8</sup> Litigation expenses and delay do not constitute irreparable harm to justify writ relief.<sup>9</sup>

- **Discovery Issues Involving Privileged Communications**

The court typically refuses to issue writs for discovery issues. However, an exception lies when there are issues of attorney-client privilege at hand.<sup>10</sup>

## Conclusion

Writ relief is extraordinary and is granted only in limited circumstances. Make sure to carefully analyze the order you want reviewed to ensure that it is a good candidate. Follow the proper procedures and review the case law to help guide you in the petition drafting process. **NL**

*Many thanks to Scott Lachman of Weinberg Wheeler Hudgins Gunn & Dial in Las Vegas for his compilation of court statistics related to writ petitions.*

1. See generally, NRS 34.150-310 (writs of mandamus); NRS 34.320-350 (writs of prohibition).
2. See generally the following cases that discuss the applicable standards for writ relief: *Oxbow Constr., LLC v. Eighth Judicial Dist. Court*, 130 Nev. Adv. Op. 86, 335 P.3d 1234 (2014); *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 88 P.3d 840 (2004); *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 818 P.2d 849 (1991).
3. *Helfstein v. Eighth Judicial Dist. Court*, 131 Nev. Adv. Op. 91, 362 P.3d 91, 94 (2015); *Smith v. Eighth Judicial Dist. Court*, 113 Nev. 1343, 1345, 950 P.2d 280, 281 (1997).
4. See *Poulos v. Eighth Judicial Dist. Court*, 98 Nev. 453, 455, 652 P.2d 1177, 1178 (1982).
5. *Smith*, 113 Nev. at 1345, 950 P.2d at 281.
6. See *State v. Eighth Judicial Dist. Court*, 116 Nev. 127, 134, 994 P.2d 692, 697 (2000).
7. *Poulos v. Eighth Judicial Dist. Court*, 98 Nev. 453, 455, 652 P.2d 1177, 1178 (1982).
8. *Id.*
9. *Fritz Hansen A/S v. Eighth Judicial Dist. Court*, 116 Nev. 650, 658, 6 P.3d 982, 986-87 (2000).
10. See *Coyote Springs Inv., LLC v. Eighth Judicial Dist. Court*, 131 Nev. Adv. Op. 18, 347 P.3d 267, 268 (2015); *C.S.A.A. v. Eighth Judicial Dist. Court*, 106 Nev. 197, 198, 788 P.2d 1367, 1368 (1990).



**PAUL GEORGESON**

is a partner at McDonald Carano Wilson and practices primarily in the areas of commercial litigation, construction law and appellate law. He is a member of the firm's Appellate Practice Group and regularly handles appeals and writ proceedings in state and federal courts.



**DEBBIE LEONARD**

is a partner at McDonald Carano Wilson LLP, where her practice focuses on appeals before Nevada's appellate courts, the Ninth Circuit Court of Appeals and administrative agencies. She served as the 2013-2014 chair of the state bar's Appellate Litigation Section and is lead editor of the 2016 edition of the Nevada Appellate Practice Manual.

# Workers' Comp is not PI

**Neeman & Mills**  
 Attorneys at Law  
 Est. 2001

**Jeffrey S. Neeman & Jason D. Mills**

**Accepting Your Workers' Compensation Referrals**

Workers' Compensation cases involve numerous statutory and regulatory issues not encountered in a personal injury case. These issues pose serious pitfalls for not only your client, but also your own professional liability. Let our skilled Workers' Compensation team handle your clients' Workers' Compensation claims.

If your Workers' Comp referral also involves a PI claim and you'd prefer to keep it, we'll handle the Workers' Comp case only.

**OFFERING YOU GENEROUS  
 FEE SPLITTING ARRANGEMENTS  
 UNDER RPC 1.5(E)**

1201 S. Maryland Parkway • Las Vegas, Nevada 89104  
 info@neemanmills.com • Hablamos Español

**(702) 822-4444**