FILING A RULE 8.450 (FORMERLY 38) WRIT PETITION IN THREE EASY STEPS

January 11, 2006

(rules updated April 9, 2008 with assistance from Nicole Schmidt, FDAP law clerk)

JANET G. SHERWOOD
Attorney at Law
5643 Paradise Drive, #12
Corte Madera, California 94925
(415) 924-0585

ALAN SIRACO
AMY GRIGSBY
Staff Attorneys
First District Appellate Project
730 Harrison Street, Suite 201
San Francisco, California 94107
(415) 495-3119
alan@fdap.org
agrigsby@fdap.org

KEVIN C. THURBER
Attorney at Law
734 Polhemus Road
San Mateo, California 94402
(650) 212-7252

TABLE OF CONTENTS

Page

WHEN IS A RULE 8.450 WRIT PETITION NECESSARY? 1

HOW IS A RULE 8.450 WRIT PETITION FILED? 1

WHAT HAPPENS AFTER THE PETITION IS FILED? 5

WHAT TYPES OF ISSUES CAN/SHOULD BE RAISED IN A RULE 8.450 WRIT PETITION? 6

STANDARDS OF REVIEW AND STANDARDS OF PREJUDICE 8

CONFIDENTIALITY 13

WHAT IF COUNSEL FINDS NO ISSUE, AND THE CLIENT STILL WANTS TO FILE A WRIT PETITION? 14

COURT ADDRESSES 14

APPELLATE PROJECT TELEPHONE NUMBERS 15

FAQS 17

JUDICIAL COUNCIL FORMS 27

SAMPLE PETITIONS 33

WHEN IS A RULE 8.450 WRIT PETITION NECESSARY?

Writ review must be sought of ANY order made at ANY hearing at which a 366.26 hearing is set, including a disposition hearing where services were denied (*In re Rebekah R*. (1994) 27 Cal.App.4th 1638, 1646), or any review hearing under Welfare and Institutions Code sections 366.21, 366.22 or 366.3 (also known as the 6-, 12-, 18-month and post-permanency review hearings). (*In re Rashad B.* (1999) 76 Cal.App.4th 442, 447-448.) This writ is governed entirely by rules 8.450 and 8.452 of the California Rules of Court.

The failure to seek writ review of these orders forfeits any further review in a subsequent appeal. (Welf. and Inst. Code § 366.26, subd. (*l*).) It is trial counsel's duty to ensure that this avenue of review is not forfeited; i.e., it is trial counsel's to file the Notice of Intent and the writ petition. (Cal. Rules of Court, rule 8.450(c).)

HOW IS A RULE 8.450 WRIT PETITION FILED?

Step One: File a Notice Of Intent To File Writ And Request For Record in the Juvenile Court.

What?

It's as easy as using the Judicial Council form JV-820. This form is attached and it is also available at the Judicial Council's website in fillable .pdf format. Go to http://www.courtinfo.ca.gov/forms and select "juvenile" forms in the window, then scroll down to JV-820.

The adult client must sign the Notice, but the appellate court can excuse the use of counsel's signature for an adult client upon a showing of good cause. (Rule 8.450(e).) If you are unable to have the client sign the notice of intent, a declaration should be provided to the Court of Appeal with the filed Notice containing your signature, explaining why you could not get the client's. (*Suzanne J. v. Superior Court* (1996) 46 Cal.App.4th 785; *Lisa S. v. Superior Court* (1998) 62 Cal.App.4th 604 [counsel's declaration that he had discussed filing the

writ with his client on numerous occasions and had the client's authority and consent to file does not show "good cause"].) A defective Notice can result in immediate dismissal, which "is final as to the court" depriving the court of jurisdiction to rehear the matter. "The sole remedy at that stage is to petition for a writ of habeas corpus, establishing good cause for the client's failure to sign the notice." (California Juvenile Dependency Practice (CEB 2005) § 10.98, p. 570.)

Where?

The Notice of Intent is filed with the clerk of the juvenile court. (California Juvenile Dependency Practice, *supra*, § 10.96, p. 567.)

When?

The Notice of Intent must be filed within 7 days of the date of the order setting the 366.26 hearing if your client was present in court OR within 12 days from mailing if the client received notice of the setting order by mail. (Rule 8.450(e).) The date of the order is the date the court orally sets the section 366.26 hearing orally or the date a written order issues setting the hearing, whichever is earliest, except where the order is initially made by a referee who was not sitting as a temporary judge. (Rule 8.450(e).) In the latter case, the time is calculated from the date the referee's order becomes final under rule 5.540(c). (Rule 8.450(e).) The juvenile court cannot extend this time. A late Notice will forfeit review, unless the Court of Appeal grants relief on a showing of exceptionally good cause. A premature Notice will not prejudice the client. Therefore, it is safest to file the Notice 7 days from the date of the setting hearing, and to this end, obtain a signed Notice of Intent early in the case to keep in your file.

Step Two: Review the record and augment it if necessary.

Clerk's preparation of the record

The clerk of the superior court serves the Notice and request on the parties of record and the Court of Appeal. (Rule 8.450(f).) The juvenile court clerk and court reporters must immediately begin preparation of the record. (Rule

8.450(g).)

The record

The record must include all reports, notices of hearing, jurisdictional findings and minute orders contained in the juvenile court file, including any transcript of a sound or video recording, the Notice of Intent and proof of service; and all items listed in rule 8.404(a). (Rule 8.450(g); *Rayna R. v. Superior Court* (1993) 20 Cal.App.4th 1398, 1405 [the record must be "adequate to permit review of the ruling"].)

Filing of the record

The Court of Appeal will notify you when the record has been filed, and it will provide a due date for the writ petition. (California Juvenile Dependency Practice, *supra*, § 10.99, p. 571.)

Augmenting the record

If the record prepared by the clerk is not sufficient, file a motion to augment it in the Court of Appeal. Don't use the informal provisions of rule 3.1304(b) – it's too slow. A motion to augment must be filed within 5 days unless the record is more than 300 pages, in which case it must be filed within 7 days, or if the record is more than 600 pages, in which case it must be filed within 10 days. (Rule 8.456(f).) Motions to augment are governed by Rule 8.155 and sometimes by local appellate court rule. (E.g. First District Local rule 6.) Local appellate rules are available at the Judicial Council's website: http://www.courtinfo.ca.gov/courts/courtsofappeal/1stDistrict/localrules.htm). This step can be circumvented by designating additional record in your Notice of Intent -- e.g., exhibits and/or motions that you filed. If the record is still inadequate, file missing records as exhibits to your writ petition.

The court may extend time for filing briefs up to 15 days to permit augmentation of the record. (Rule 8.452(f).) Unless the order granting the augmentation motion explicitly grants an extension of time, you must file an

application for an extension of time. Forms used by each appellate district can be accessed at http://www.courtinfo.ca.gov/courts/courtsofappeal/ . An extension of time is considered a favor, so a stamped, addressed envelope for each party should be provided to the appellate court with any request for an extension.

Step Three: File the writ petition.

What?

Again, the Judicial Council provides a form for the petition. JV-825 is attached and can be obtained in fillable .pdf format at http://www.courtinfo.ca.gov/forms/ just as the Notice of Intent. If you use this form, you will ensure including all the necessary components listed in rule 8.452(a).

You must attach a Memorandum of Points and Authorities which can be assembled from brief-bank arguments or independent research and writing as necessary. The statement of facts may be combined with statement of the case but must be a full and fair recitation of material facts supported by reference to the record or risk default. (Rule 8.452(b); *Cresse S. v. Superior Court* (1996) 50 Cal.App.4th 947.) The memorandum must also set forth each error under a separate argumentative heading (rule 8.452(b)) and should include a statement of the standard of review applicable to the error (substantial evidence, abuse of discretion or independent review are the most common). (*Angela C. v. Superior Court* (1995) 36 Cal.App.4th 758.)

Where?

The Petition is filed in the Court of Appeal and served on all parties, including the juvenile court. (Rule 8.452(c).) Addresses for the appellate district courts are at the end of these materials.

When?

The petition must be received in the Court of Appeal 10 days from the date

of the filing of the record. (Rule 8.452(c).) Rule 8.25 (the appellate mailbox rule) does not apply, and the petition is not timely even if it is in the mail on the due date. (*Roxanne v. Superior Court* (1995)35 Cal.App.4th 1008.)

Decisional law in the First District is somewhat unsettled as to whether the time for filing the petition is jurisdictional . (See, *Karl S. v. Superior Court* (1995) 34 Cal.App.4th 1397 and *Jonathan M. v. Superior Court* (1995) 39 Cal.App.4th 1826.) Since an untimely petition can forfeit any appellate review of the issues raised (*Anthony D. v. Superior Court* (1998)63 Cal.App.4th 149), you must request an extension of time if there is any doubt the petition will be received by the court by the due date.

WHAT HAPPENS AFTER THE PETITION IS FILED?

Opposition

Opposition must be filed and served within 10 days (15 days if the petition was served by mail), or within 10 days of receiving a request for a response from the reviewing court, unless a shorter time is designated by the court. (Rule 8.452(c).)

The rules do not provide for any "reply" to the opposition.

Submission and decision

Rule 8.452(i) requires the Court of Appeal to issue a written opinion deciding the petition on its merits "absent exceptional circumstances," which necessitates the issuance of an order to show cause ("OSC") or an alternative writ. (Rule 8.452(e)). *But see, Maribel M. v. Superior Court* (1998) 61 Cal.App.4th 1469 [declaring this provision of the rule unconstitutional].) Some courts do not issue an OSC in a rule 38 writ proceeding. Instead, the order setting oral argument is the functional equivalent of an OSC. (California Juvenile Dependency Practice, *supra*, § 10.98, p. 578.)

If the petition is not summarily denied, the reviewing court will generally

hear oral argument within 30 days after the response is filed or due to be filed, unless the court extends the time for good cause. (Rule 8.452(h); *Joyce G. v. Superior Court* (1995) 38 Cal.App.4th 1501.) Counsel may waive oral argument.

"If the writ or order stays or prohibits" imminent proceedings or addresses "any other urgent situation," the reviewing court clerk must make a reasonable effort to notify the juvenile court clerk of the court's decision by telephone. The juvenile court clerk must then notify the judge "or officer most directly concerned." (Rule 8.452(i).)

Finality and further review

A summary denial is final immediately. A petition for review in the California Supreme Court must be filed within 10 days. A decision after the issuance of an order to show cause or alternative writ, is final in 30 days. A Petition for Rehearing may be filed in the Court of Appeal within 15 days and a Petition for Review in the Supreme Court may be filed within 40 days. Instructions and models for these petitions can be found in *Appeals and Writs in Criminal Cases* (CEB, January 2005) §§ 1E.38-1E.52, pp. 253-274.)

WHAT TYPES OF ISSUES CAN/SHOULD BE RAISED IN RULE 38 WRIT PETITIONS?

In a rule 8.450 writ proceeding, cognizable issues include "any issue the disposition of which would necessarily include reversal of an order sefting a permanent planning hearing." (10 Witkin, *Summary of California Law*, (9th ed.) (2004 Supp.) § 638B, pp. 826-827.)

1. Stay of the section 366 .26 hearing: "The reviewing court may stay the hearing set under Welfare and Institutions Code section 366.26, but must require an exceptional showing of good cause." (Rule 8.452(g).) It may be easier to secure a continuance in the juvenile court than a stay in the court of appeal.

2. If the 366.26 hearing is set at disposition:

a. jurisdictional issues may be raised (*Kimberly R. v. Superior Court* (2002) 96 Cal.App.4th 1067);

b. failure to make required disposition findings or challenges to the sufficiency of the evidence may be raised (*In re Marquis D*. (1995) 38 Cal.App.4th 1813; *In re Jasmine D*. (2000) 82 Cal.App.4th 282);

c. erroneous denial of services may be raised (*Renee J. v. Superior Court* (2002) 96 Cal.App.4th 1450);

3. If the 366.26 hearing is set after services have been terminated:

a. the failure to provide reasonable services can be raised (*In re Elizabeth* R. (1995) 35 Cal.App.4th 1774 [generally]; *Robin V. v. Superior Court* (1995) 33 Cal.App.4th 1158 [incarcerated parent]) Note: it may be wiser to argue that there was faulty implementation of a reunification plan that originally appeared to be sufficient, rather than challenge the original plan. At least two courts have held the a plan approved at a previous hearing may not be challenged by means of a writ taken from a subsequent review hearing. (*Steve J. v. Superior Court* (1994) 35 Cal.App.4th 798; *John F. v. Superior Court* (1996) 43 Cal.App.4th 400; see also *In re Daniel K*. (61 Cal.App.4th 661, 668);

b. erroneous termination of services can be raised (*Daria D. v. Superior Court* (1998) 61 Cal.App.4th 606)

c. ICWA notice issues can be raised (*Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 217)

4. If the 366.26 hearing is set at a section 388 hearing, erroneous denial of the 388 petition can be raised (*In re Anthony B*. (1999) 72 Cal.App.4th 1017; *In re Clifton V*. (2001) 93 Cal.App.4th 1400)

STANDARDS OF REVIEW AND STANDARDS OF PREJUDICE

De Novo or Independent Review

Often considered the most favorable standard from petitioner's standpoint, this standard requires the reviewing court to stand in the shoes of the trial court.

It is applicable to all legal or mixed factual/legal questions (*People v. Cole* (2004) 33 Cal.4th 1158, 1217-1218; *Ghirardo v. Antonioli* (1994) 8 Cal. 4th 791, 799-801), including statutory construction and constitutionality (*People v. Health Laboratories of North America, Inc.* (2001) 87 Cal.App.4th 442, 445), whether procedural due process has been afforded (*C.V.C. v. Superior Court* (1973) 29 Cal.App.3d 909, 919-920 [distinguishing standard afforded the substantive issue from the usual standard on mandamus review]), wether the facts establish a basis for relief under the statutory provisions (*In re Ryan D*. (2002) 100 Cal.App.4th 854, 861-862 [a modified substantial evidence test]), and though not usually done, it should be applied to summary denial of a section 388 petition without hearing (see, *In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1416).

Though used interchangeably, technically, "[i]ndependent review is not the equivalent of de novo review 'in which a reviewing court makes an original appraisal of all the evidence to decide whether or not it believes' the outcome should have been different." (*In re George T.* (2004) 33 Cal.4th 620, 634.) It is, rather an independent review of the record, with deference to the found facts, assuming they are supported by substantial evidence, for legal error. (*Ibid*.) A de novo standard requires the court's "independent judgment on the evidence." (*C.V.C. v. Superior Court*, *supra*, 29 Cal.App.3d at p. 920; *In re Ryan D*., *supra*, 100 Cal.App.4th at pp. 861-862 .)

Substantial Evidence

A common standard used to attack judgments and rulings goes to the facts upon which those judgments, rulings or orders are based. It essentially asks whether the juvenile court's findings is support by some "substantial" evidence. It does not permit the reviewing court to weigh conflicting defense evidence

against the Department's, nor does it (usually) ask whether the evidence is sufficient to convince the appellate court that the material facts satisfied the burden of proof applicable in the trial court. The substantial evidence standard may be applied to any finding or order. (*See e.g.*, *In re Rocco M.* (1991) 1 Cal.App.4th 814, 820 [jurisdiction]; *In re Jasmine C.*, *supra*, 106 Cal.App.4th 177 [disposition/case plan]; *Robert L. v. Superior Court* (1996) 45 Cal.App.4th 619, 625 [dependency review hearings]; *In re Alvin R*., *supra*, 108 Cal.App.4th 962 [reasonable services finding]. *See also*, *Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872 [decision on a section 388 petition].)

The appellate court is bound by the fact finder's conclusion rejecting petitioner's hypothesis and believing evidence supporting respondent's as the more reasonable hypothesis. On appeal, the court cannot weigh conflicts or disputes in the evidence. (*In re Ryan. N*. (2001) 92 Cal.App.4th 1359, 1371-1373; *In re Jasmine C.* (1999) 70 Cal.App.4th 71, 75; *In re Albert B.* (1989) 215 Cal.App.3d 361, 375.) Some court's reviewing dispositional orders, have however adopted the rule that "[w]hen applying the substantial evidence test, however, we bear in mind the heightened burden of proof. (*In re Kristin H*. (1996) 46 Cal.App.4th 1635, 1654, 54 Cal. Rptr. 2d 722.) 'Under this burden of proof, "evidence must be so clear as to leave no substantial doubt. It must be sufficiently strong to command the unhesitating assent of every reasonable mind." [Citation.]' (*In re Monica C.*, *supra*, 31 Cal.App.4th at p. 306.)" (*In re Alvin R.* (2003) 108 Cal.App.4th 962, 971.)

Substantial evidence is not just "*any* evidence. [Citations.] A decision supported by a mere scintilla of evidence need not be affirmed on appeal. [Citation.]" (*In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1393.) Substantial evidence is evidence which is "of ponderable legal significance . . . reasonable in nature, credible, and of solid value." (*People v. Johnson* (1980) 26 Cal.3d 557, 576; *In re Jasmine C.* (2003) 106 Cal.App.4th 177, 180; *In re Jasmine C.*, *supra*, 70 Cal.App.4th at p. 75; *In re Lynna B.* (1979) 92 Cal.App.3d 682, 695.) "'While substantial evidence may consist of inferences, such inferences must be "a product of logic and reason" and "must rest on the evidence" [citation]; *inferences that are the result of mere speculation or conjecture cannot support a finding* [citations].'" (*In re Savannah M.*, *supra*, 131 Cal.App.4th, at pp. 1393-1394, italics in original. *Accord*, *People v. Ruiz* (1990) 217 Cal.App.3d 574, 583 [inferences

warranting deference on appeal must be reasonable conclusions from the evidence, not based upon suspicion, imagination, speculation or conjecture]; *Krause v. Apodaca* (1960) 186 Cal.App.2d 413, 418 [same].)

Abuse of Discretion

The most common standard to be found in juvenile dependency cases, it has a factual and a legal component. The trial judge's exercise of discretion can be attacked on both points. If even one is fatally flawed, error is established.

> "The reviewing court must consider all the evidence, draw all reasonable inferences, and resolve all evidentiary conflicts, in a light most favorable to the trial court's ruling. [Citation.] The precise test is whether any rational trier of fact could conclude that the trial court order advanced the best interests of the child. [Citation.] We are required to uphold the ruling if it is correct on any basis, regardless of whether it is the ground relied upon by the trial judge. [Citation.]" [Citation.] The trial court is accorded wide discretion and its determination will not be disturbed on appeal absent "a manifest showing of abuse." [Citation.]

(*In re Robert L.* (1993) 21 Cal.App.4th 1057, 1067, quoting *In re Marriage of Carlson* (1991) 229 Cal.App.3d 1330, 1337 and *Gudelj v. Gudelj* (1953) 41 Cal.2d 202, 208.)

> "The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised ex gratia, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice."

(*Robert L.*, *supra*, quoting *Bailey v. Taaffe* (1866) 29 Cal. 422, 424. *Accord*, *People* v. *Williams* (1998) 17 Cal.4th 148, 158-160.)

"We find no authority distinguishing between insufficient evidence

> and abuse of discretion. It would seem obvious that, if there were no evidence to support the decision, there would be an abuse of discretion. But we do not think that it follows that there can be no abuse of discretion if there be any evidence to support the decision. It is certainly true that there could be a case where the decision is obviously not for the best interests of the child, even though there is some evidence to support it."

(*Robert L.*, *supra*, at p. 1066, quoting *Stack v. Stack* (1961) 189 Cal.App.2d 357, 368.)

> [N]either we nor the juvenile court can rely upon factual assumptions--gleaned from SSA's "regular supervisorial practices" to establish clear and convincing evidence. SSA is not a machine; it is a team which includes numerous individual caseworkers--each of whom is expected to give individual attention to the needs of each case. The fact that most social workers do things a certain way does not establish clear and convincing evidence that even those social workers always act that way--let alone that another social worker necessarily did so in connection with the case at issue. If SSA wishes the court to consider certain actions of the social worker as evidence in a particular case, then SSA must introduce evidence that those actions took place in that case. The court cannot merely assume it. [¶] Of course, we are mindful of the basic requirement that we indulge all inferences in favor of the factual conclusions reached by the trial court. (*In re Katrina C.* (1988) 201 Cal. App. 3d 540, 547 [247 Cal. Rptr. 784].) But those conclusions must be based upon substantial evidence which appears in the record, not upon the court's own unarticulated assumptions.

(*David B. v. Superior Court* (2004) 123 Cal.App.4th 768, 794-795.)

"If the trial court is mistaken about the scope of its discretion, the mistaken position may be 'reasonable', i.e., one as to which reasonable judges could differ. [Citation.] But if the trial court acts in accord with its mistaken view the action is nonetheless error; it is wrong on the law." (*City of Sacramento v. Drew* (1989) 207

Cal.App.3d 1287, 1298. *Accord*, *People v. Marquez* (1983) 143 Cal.App.3d 797, 803 ["an erroneous understanding by the trial court of its discretionary power is not a true exercise of discretion"].)

Prejudice

Unless you are able to show a constitutional error, you will be required to show actual prejudice from the error. Prejudice is undue harm (i.e. that which goes beyond an adverse decision resulting from a properly conducted proceeding. (*See*, *People v. Yu* (1983) 143 Cal.App.3d 358, 377.)

Reversible error per se – i.e. not subject to a harmless error analysis under any standard is reserved for a tiny group of errors. The only two that might apply in dependency cases are: (1) a complete denial of counsel (*Gideon v. Wainwright* (1963) 372 U.S. 335 [9 L.Ed.2d 799, 83 S.Ct. 792]); and (2) a biased judicial officer (*Tumey v. Ohio* (1927) 273 U.S. 510 [71 L.Ed. 749, 47 S.Ct. 437]). Though these cases arose in the criminal context with full 6th Amendment protections, the principles could be carried over into dependency proceedings. (*See*, *In re Richard W.* (1979) 91 Cal.App.3d 960 [biased judicial officer]; *Adoption of Richardson* (1967) 251 Cal.App.2d 222 [same]; *In re O.S*. (2002) 102 Cal.App.4th 1402, 1407 [constitutional right to counsel]; *In re Laura H*. (1992) 8 Cal.App.4th 1689, 1694, fn.5 [same]. *See also*, *In re Daijah T*. (2000) 83 Cal.App.4th 666, 675-676 [denial of statutory right to a hearing reversed without harmless error analysis]; *In re Matthew P*. (1999) 71 Cal.App.4th 841 [same]. *But see*, *In re Stacy T*. (1997) 51 Cal.App.4th 1415 [application of *Chapman* harmless error standard].) A couple of errors unique to dependency cases that have been held reversible per se are the non-consensual and erroneous appointment of a guardian ad litem for a parent (*In re C.G.* (2005) 129 Cal.App.4th 127) and the late discovery of a social worker's report for a review hearing (*Judith P. v. Superior Court* (2002) 102 Cal.App.4th 535.)

Federal harmless error, reserved for constitutional error – prejudice presumed under *Chapman v. California* (1967) 386 U.S. 18, 23 [17 L.Ed.2d 705, 87 S.Ct. 824], unless respondent can show the error was harmless beyond a reasonable doubt, i.e. that the result was "surely unattributable to the error."

(*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [124 L.Ed.2d 182, 113 S.Ct. 2078].) This error can be applied to any error that implicates federal due process protections. It has been applied to the denial of a contested hearing (*see*, *In re Stacy T.*, *supra*, 51 Cal.App.4th 1415) and inadequate notice of hearing (*In re Angela C.* (2002) 99 Cal.App.4th 389). *But see*, *In re Meranda P*. (1997) 56 Cal. App. 4th 1143, 1158, fn.9 [questioning applicability of *Chapman* to dependency cases in general].)

Finally, the standard for statutory error under state law, and the one most frequently applied to errors in dependency cases: an error is prejudicial and requires reversal only when the reviewing court is of the opinion that it is "reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800; *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715.) "[A] 'probability' in this context does not mean more likely than not, but merely a 'reasonable chance,' more than an 'abstract possibility.'" (*Ibid*.) Under this standard counsel will have to discuss how the error harmed his/her client's ability to achieve a just result. This is probably the most important part of the argument, and the part on which counsel should usually spend the most time.

CONFIDENTIALITY

The record in all juvenile proceedings, including the petition and any response in rule 8.450 proceedings maybe inspected only by court personnel, the parties, their attorneys, and other persons designated by the court; and all records "shall protect the anonymity of the parties." The court may also limit or prohibit public admission at oral argument. (Rule 8.400(b).) Thus, the last names of parties should be excluded from all filings. Parties (and even non-parties) are best identified by first name and the initial letter of the last name (e.g., "Mary C.") or by a descriptive term (e.g., "mother" or "foster mother"). "If the first name is unusual or other circumstances would defeat the objective of anonymity, the party's initials may be used." (Rule 8.400(b)(2).)

WHAT IF COUNSEL FINDS NO ISSUE, AND THE CLIENT STILL WANTS TO FILE A WRIT PETITION?

Counsel is under no duty to file a meritless writ petition. Counsel should explain the writ requirement and provide the client with any forms that may assist the client in proceeding in pro per. (*Sue E. v. Superior Court* (1997) 54 Cal.App.4th 399.) If trial counsel finds no issue after filing of a Notice of Intent, counsel should consult with the local appellate project. Also, counsel has no duty to file a writ petition in the absence of client authorization. (*Janice J. v. Superior Court* (1997) 55 Cal.App.4th 690.)

COURT ADDRESSES

California Supreme Court
350 McAllister Street
San Francisco, California 94102

First District Court of Appeal
350 McAllister Street
San Francisco, California 94102

Second District Court of Appeal (Divisions 1 - 5, 7 & 8)
Ronald Reagan State Building
300 So. Spring Street, 2nd Floor
Los Angeles, California 90013
Second District Court of Appeal (Division 6)
Court Place
200 East Santa Clara Street
Ventura, California 93001

Third District Court of Appeal
900 N Street
Room 400
Sacramento, California 95814-4869

Fourth District Court of Appeal
Division One
750 B Street, Suite 300
San Diego, California 92101

Fourth District Court of Appeal
Division Two
3389 Twelfth Street
Riverside, California 92501

Fourth District Court of Appeal
Division Three
925 N. Spurgeon Street
Santa Ana, California 92701-3724
Mailing Address:
PO Box 22055
Santa Ana, California 92702

Fifth District Court of Appeal
2525 Capitol Street
Fresno, California 93721

Sixth District Court of Appeal
333 W. Santa Clara Street
Suite 1060
San Jose, California 95113

APPELLATE PROJECT TELEPHONE NUMBERS

First District Appellate Project
415-495-3119
http://www.fdap.org/

California Appellate Project, LA (Second District)
213-243-0300
http://www.lacap.com/

Central California Appellate Program (Third and Fifth Districts)
916-441-3792
http://www.capcentral.org/

Appellate Defenders (Fourth District)
619-696-0282
http://www.adi-sandiego.com/

Sixth District Appellate Program
408-241-6171
http://www.sdap.org/

Frequently Asked Questions
About the Preparation and Filing of Rule 8.450 Writs

1. What are the criteria I should use to decide if I have to do a writ? What makes a writ "frivolous"? Is it my decision alone, or do I have to file something if my client insists?

    A. Counsel is not required to file a frivolous writ petition (Sue E. v. Superior Court (1997) 54 Cal.App.4th 399) or in the absence of client authorization (Janice J. v. Superior Court (1997) 55 Cal.App.4th 690). Prior to filing the Notice of Intent, counsel should advise the client regarding the procedure and assist with a pro per filing. If a Notice of Intent has been filed, and counsel subsequently concludes there is no merit to the petition, counsel should consult with the local appellate project.

2. I heard that my client has to sign the "Notice of Intent" to file a writ form, but I can't get to my client in time to file the Notice timely. What should I do?

    A. There is no legal or logical barrier to having a client sign a Notice of Intent at the first meeting, to be filed in the event it becomes necessary. In addition, the appellate court can excuse the use of counsel's signature for an adult client upon a showing of good cause, provided in counsel's declaration accompanying the Notice. (Rule 8.450(e); Lisa S. v. Superior Court (1998) 62 Cal.App.4th 604.)

3. Does my client have to sign the actual writ if they signed the "Notice of Intent" form, or can I sign that (like the Judicial Council form seems to offer)?

    A. <u>Counsel can sign the actual petition. (Rule 8.450(c)) Compare, Rule 8.450(e) expressly requiring the party to sign the Notice of Intent.)</u>

4. After a filed my writ I received an "Order to Show Cause" from the Appellate Court indicating that the Superior Count needed to respond as to "why this writ should not be granted". Does that mean anything about their view of the merits of my writ?

   A. If the Court intends to decide the petition on its merit, it must either issue an OSC. However, some courts simply issue an oral argument notice after receipt of response.

5. What information needs to be on the cover of my writ? What if I don't have some of that information yet (like the Appellate Court number)?

   A. The cover should be red cover stock. It should have the title of the court, the case name and number, including the trial court number, the court and judicial officer the petition is taken from, your name, bar number and address, and it should be entitled, "Petition for Extraordinary Writ (Cal. Rules of Ct., rule 38)." (See Rule 8.40(b) and (d) and Rule 8.204(b)(10) for format of covers in the Court of Appeal.) You can find the appellate case number on the Notice of Filing of the Record. If you cannot find that, simply call the appellate court clerk. Most deputy clerks are very helpful.

6. Who are the "Real Parties in Interest" for a Rule 8.450 writ?

   A. The Department.

7. Tell me about the format of the document:

   a. Are there particular fonts or font sizes that I may use or that I must not use?

      A. All self-drafted documents must be done in at least 13 point roman or the equivalent if proportional type; Courier 12-point is also permitted if the brief is typewritten. Larger is better within reason. (See Rule 8.204.)

b. Must the Memorandum of Points and Authorities be single paged, double spaced … even if it is an attachment to the Judicial Council form?

A. All self-drafted lines must be at least 1.5 spaced. (See Rule 8.204.)

c. Are footnotes supposed to be double spaced too?

A. No, but they must be in the same sized font as the main body of the brief. (See Rule 8.204.)

d. Are there particular margin requirements that I must follow?

A. All self-drafted documents must have 1.5 inch margins on the sides and 1 inch margins, top and bottom. The brief is to be permanently bound at the left side – either with staples (covered) or velo-binding. (See Rule 8.204.)

8. Is it true that I should not use the children's last names in my document? What about my client's last name? How is my client supposed to sign the form without using his or her last name?

A. According to Rule 8.400, only a last initial should be used. The Notice of Intent is filed with the Juvenile Court. It is true that the record will have last names in them, but your document should comply with Rule 8.400.

9. How can I respect the confidentiality of the children (and not get in trouble myself) if I am required to serve children 10 and over, when I must show their address on the Proof of Service?

A. You may provide the child's first name and last initial, and indicate: "Child's full name and address withheld to ensure confidentiality (Rule 8.400)." The same with your client.

10. There is factual information that I need to reference that is not contained in the Court's Transcript or Reporter's Transcript? Do I have to do a "Motion to Augment", or can I just call the Clerk and point out the deficiency and ask them to correct this oversight? If I have to do the motion, how do I do it? Is there a Judicial Council form for that too?

    A. It is best to go directly to an augment motion rather than an informal request to the Juvenile Court, because time is short. A motion to augment must be filed within 5 days of the record being filed unless the record is more than 300 pages, in which case it must be filed within 7 days, or unless the record is more than 600 pages, in which case it must be filed within 10 days. (Rule 8.452(f).) Some districts have forms (e.g. the Second District). Check the district's page at the judicial counsel's website: http://www.courtinfo.ca.gov/courts/courtsofappeal You can also get sample motions at appellate project websites, or by calling your local appellate project.

    You can also designate additional record in your Notice of Intent -- e.g., exhibits and/or motions that you filed, that may be outside the "normal" record. If, after an augment motion, the record is still inadequate, file missing records as exhibits to your writ petition.

11. I once heard that I can appeal "orders" but not "findings", and the issue in my case has to do with the "finding of reasonable services". How do I challenge that? (Or should I not concern myself with such minutia?)

    A. Orders must be supported by valid findings. You are challenging the order made at the review hearing on the basis that the finding of reasonable services was erroneous (e.g. not supported by substantial evidence).

12. I heard that I am suppose to be clear in my writ about citing the "standard for review". Isn't the standard of review going to be the same in every Rule 8.450 writ? Do they really want me to recite them "rules" like this that they know far better than I do?

    A. A brief statement of the standard of review will be a helpful guide for the court. Indeed, the court staff assigned to the case may not be familiar with the applicable standard of review in your case. See the extensive discussion in the materials.

13. Tactically speaking, should I challenge every possible issue (e.g. the "sufficiency of the evidence") even if I seriously doubt any possible success on those issues? Or should I stick to the "winner" issues and not cloud the writ with "loser" issues?

    A. This is a judgment call. Certainly, it will not help to include frivolous issues, but failure to include a colorable claim will forfeit review of that claim forever. On the other hand, you may have a very compelling theme to the chief errors in your case, and cluttering the brief with marginal errors unrelated to that theme may not be desirable.

14. To what extent must I argue law and facts as to why the "extraordinary" relief of a writ should be granted in this case? Isn't it sufficient that this is a Rule 8.450 writ reviewing court orders that are required to be challenged by Rule 8.450 Writs alone?

    A. It is sufficient that you are raising errors that may only be raised in this vehicle. However, often you will be required to discuss under a prejudice heading how your client was harmed by the error. (See the materials under "Standards of Prejudice.")

15. If I use the Judicial Council Form to file my writ, which of the items such as "Table of Contents", "Table of Authorities", "Word Count" and such need to accompany my writ? Do those items need to be paginated, or made with headers or footers to be used with the form?

    A. Though the rules to do appear to require them, the tables are usually paginated with "i, ii, iii, etc." and included prior to the body of the document itself. The certification of word count is often inserted on a separate page after the signature page and before the Proof of Service, but this practice varies.

16. What "facts" need to be in the "Petition" portion of the writ, versus what facts need to be in my "Statement of Facts and the Case" in my Memorandum of Points and Authorities?

    A. The facts stated in the Judicial Council form should be limited those that state the elements of the claim. The facts in the P&As can be more detailed, but should still be limited to facts material to the claims raised. (See Rule 8.452(a) and (b).)

17. How much detail is needed in my "Statement of Facts and the Case"? For instance, must I recite the date and outcome of every hearing in the case from the date of removal up to the contested 18FR … or can I "cut to the chase" and just put in the facts relevant to the issues I am addressing?

    A. The basic procedural history of the case should be set out, including any facts material to your claims, but immaterial details can and should be omitted. (See Rule 8.452(a) and (b).)

18. What are the acceptable ways to cite to the official record? Can I just cite "CT" or "RT" and page number, or do I need more (like line number and/or volume number)?

    A. Starting this year, we are supposed to include volume # in our RT cites. So, "CT 5" for page 5 of the Clerk's Transcript and "RT I, p. 5" for page 5 of volume I of the Reporter's Transcript are fine. Line numbers are unnecessary.

19. Can I recite a list of facts in a paragraph and include one long cite at the end of that paragraph? Or must I put a cite after each fact and/or each fact?

    A. The latter is preferred, according to staff at the Court of Appeal, though dense testimony on a couple of pages may lend itself to a single citation at the end of a paragraph.

20. How many copies of the writ should I make?

    A. 4 copies for the Court of Appeal, 1 copy for the Juvenile Court, 1 copy for the Department, 1 copy for any other party, 1 copy for your client and 1 copy for you.

21. Where can I find the contact information for the Appellate Court that I need to file my writ (so that I can ask questions like hours and directions)?

    A. http://www.courtinfo.ca.gov/courts/courtsofappeal

22. How long after filing my writ should I expect to hear about the outcome?

    A. The court must decide a case within 90 days of submission either after oral argument or without it. The timelines prior to submission are not regulated by anything by the court's internal practices.

23. Do I have to use the "California Style Manual" for format? Or will my writ's success suffer if I use, for instance, the "Blue Book"?

> A. The California Rules of Court makes the California Style Manual the presumptive authority on style. It can be purchased through West's http://west.thomson.com/product/12231786/product.asp for approximately $17.00. However, consistent reasonably informative citations will get the job done.

24. As I do my Memorandum of Points and Authorities, in how much detail do I need to "explore" each relevant case? Can I merely indicate that cases "X", "Y" and "Z" stand for a particular proposition? Must I always discuss each case I sight separately, talking about its facts and issues, and then relating them to my case?

> A. The P&A's for a writ are no different than those for a motion. If you are addressing an issue of first impression, more discussion will be needed. If you are setting forth an established rule or standard, a single sentence with a citation should be sufficient.

25. Can I write a "standard" writ with a "standard" Memorandum of Points and Authorities challenging, for instance, "reasonable services", and then just plug in case numbers, record citations, and party names? (Come on! One "reasonable services" challenge is just like another one when it comes to the case law cited.)

> A. Boilerplate and form arguments can be useful, as long as they are tailored and applied to the case at hand. The Court of Appeal will not usually independently search for error and argument if you don't present it.

26. When is it advisable to ask for oral argument? (I get the distinct feeling they don't want to hear from me!)

> A. Many appellate judges have expressly stated that they appreciate oral argument if it is used well. Do not plan to get up there and regurgitate your brief. One justices has publicly stated that he takes it as a concession if appellant does not ask for oral argument. However, he appears to be in a very small minority. Again, this is a judgment call, but counsel may consider whether the issue or the case presents a particularly interesting issue or unusually poignant injustice. Sometimes oral argument is advisable for the purpose of client control. You will likely only get 5 minutes, so . . .

27. I challenged a procedural due process type issue – the failure of the Court and/or Agency to do something they had to do under statute and case law. The decision by the Appellate Court was a four-page recitation of all of the "facts" least favorable to my client and a finding that "under the totality of the circumstances" they could not say that there was error? (Or they said that the error was "harmless"!) This is incredibly aggravating! Should I have done something differently?

> A. Not necessarily. The only reason you took the writ was because you lost in the Juvenile Court. The Court of Appeal is bound to uphold a trial court decision if it can. Sometimes, there is no getting over the bad facts of your case.

28. What (and where) are rules about responding to my writ? Why does it seem that the County gets to respond to my detailed brief with a "letter brief"? Can I reply to their response (by letter brief)?

> A. There are no provisions for replies in Rule 8.450 writs. Respondent can rely on thin briefs, because the presumption of correctness is in their favor.

29. I have a paid ticket for an expensive vacation in the next two weeks. Isn't there a "good cause" exception to the due date for this writ? (Will the justices cancel their vacations to read my writ too?)

A. Likely, the justices will take your petition with them on vacation. Extensions may be granted for good cause, but they will be difficult to get in this context. These writs are a bad deal for everyone, because they place expediency at the forefront. They are the result of politics, not law. Until we successfully lobby the Legislature to change WIC 366.36, subd. (l), we and our clients are stuck with this sole mechanism for review.