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WHEN TO SEEK A WRIT OF PROHIBITION

The writ of prohibition allows a party to seek review of a trial court decision in an exceptional situation where a direct appeal will not work. Occasionally, a trial lawyer will ask me to evaluate whether his or her particular case calls for the writ. I begin such analysis with caution. First, a writ of prohibition does not issue as a matter of right.[1] The reviewing court has sole discretion over whether to grant the writ. Second, the writ is extraordinary and should be used with great caution and only in cases of extreme necessity.[2] Third, if the relator has an adequate remedy by appeal, prohibition will be denied.[3] Because of these rules, reviewing courts deny most writ petitions. And the relator in such cases must pay the lawyer substantial fees for drafting the writ petition and supporting suggestions. Still, prohibition can be a useful tool in a proper case. This article explores some general types of cases when a writ of prohibition may be appropriate.

Traditionally, Missouri appellate courts used jurisdictional language in discussing writs of prohibition.[4] The appellate court customarily would issue the writ to prevent the lower court from "exceeding its jurisdiction." But the courts often used the term "jurisdiction" ambiguously.[5] With some minor variations, courts now hold generally that writs of prohibition may issue when the cases fall into one of three categories: (1) where there is a usurpation of judicial power because the trial court lacks either personal or subject matter jurisdiction; (2) where there exists a clear excess of

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[1] *State ex rel. Bugg v. Daniels*, 274 S.W.3d 502, 504 (Mo.Ct.App. 2008).
[2] *State ex rel. Brantingham v. Grate*, 205 S.W.3d 317, 319 (Mo.Ct.App. 2006).
[3] *State ex rel. Baldwin v. Dandurand*, 785 S.W.2d 547, 549 (Mo.Ct.App. 1990).
[4] *State ex rel. Henley v. Bickel*, 285 S.W.3d 327, 330 (Mo. 2009).
[5] *State ex rel. Lester E. Cox Medical Center v. Wieland*, 985 S.W.2d 924, 926, n. 4 (Mo.Ct.App. 1999).

jurisdiction or abuse of discretion such that the trial court lacks the power to act as contemplated; or (3) where there is no adequate remedy by appeal.[6] These three categories still leave considerable room for interpretation.

To prepare this article, I have reviewed Missouri case law and come up with some specific kinds of cases where writs are commonly issued. This list is not meant to be exhaustive. Instead, I am merely trying to suggest five common scenarios where the writ may be proper.

(1) **The trial court abuses its discretion during discovery**. Prohibition is the proper remedy for an abuse of discretion during discovery.[7] The role of the reviewing court in such a case is limited to insuring the trial court is not acting arbitrarily or unjustly.[8] This kind of review of the discovery process appears to be the most common ground for granting a writ. For instance, a reviewing court may issue a writ to prevent the trial court from ordering a party to produce documents or respond to discovery that is annoying, unduly burdensome, expensive or oppressive.[9] Or the court may issue a writ to prevent a party from having to produce information protected by privilege or work product immunity.[10]

(2) **The trial court abuses its discretion in granting or denying a motion to change venue**. Prohibition also is the proper remedy to prevent an abuse of discretion in denying or granting a motion to change venue. An abuse of discretion occurs when the circuit court misapplies the applicable venue statutes.[11] Because prohibition is a preventive remedy, a reviewing court should employ prohibition when the circuit court erroneously grants or denies transfer, but the transfer is not complete.[12] If the transfer has already taken place, the reviewing court should issue a writ of mandamus to the

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[6] *State ex rel. Williams v. Lohmar,* 162 S.W.3d 131, 133 (Mo.Ct.App. 2005), citing *State ex rel. Director of Revenue v. Mobley*, 49 S.W.3d 178, 179 (Mo. 2001). See also, *State ex rel. Bugg v. Daniels*, 274 S.W.3d at 504.
[7] *State ex rel. Ford Motor Company v. Messina*, 71 S.W.3d 602, 607 (Mo. 2002).
[8] *State ex rel. Soete v. Weinstock*, 916 S.W.2d 861, 863 (Mo.Ct.App. 1996).
[9] *State ex rel. Ford Motor Company v. Messina*, 71 S.W.3d at 608-09 (issuing writ to prevent depositions of senior managers).
[10] *State ex rel. M. Humphrey v. Provaznik*, 854 S.W.2d 810 (Mo.Ct.App. 1993) (issuing writ to protect work product immunity).
[11] *State ex rel. Missouri Public Service Commission v. Joyce*, 258 S.W.3d 58, 61 (Mo. 2008).
[12] *Id.* at 60.

presiding judge of the receiving court. The writ should direct the presiding judge of the receiving court to re-transfer the case.[13]

(3) **The trial court denies a motion to dismiss a lawsuit against a defendant with immunity**. Prohibition is an appropriate remedy when it appears from the facts pleaded that the defendant is immune from the lawsuit as a matter of law.[14] Under this rule, the Eastern District issued a writ to prevent needless litigation against defendants protected by official immunity.[15] Similarly, a trial court was prohibited from proceeding with a wrongful death action against a decedent's co-workers for acts taken in the course and scope of their employment. The Western District concluded that prohibition was the appropriate remedy in that case, at least in part, because the co-workers were immune from the wrongful death suit under workers compensation law.[16]

(4) **The trial court takes or threatens action when it lacks subject matter jurisdiction**. Generally, prohibition may be used as a remedy to correct or prevent judicial proceedings that lack subject matter jurisdiction. The Western District applied this rule in the case just mentioned where a writ of prohibition was issued to prevent the wrongful death suit against decedent's co-workers. The court issued the writ, not just because of the immunity of the co-workers, but also to prevent the trial court from exercising subject matter jurisdiction over a matter within the exclusive jurisdiction of the Labor and Industrial Relations Commission.[17] Similarly, the Western District applied this same rule to prevent a trial court from intervening in an arbitration proceeding prior to an award. The trial court had no subject matter jurisdiction to hear a pre-award petition or to order the recusal of an arbitrator for alleged bias.[18]

(5) **By denying a motion to dismiss, the trial court subjects the defendant to unnecessary, inconvenient and expensive litigation**. When reviewing the denial of a motion to dismiss, the Missouri Supreme Court held that its decision to issue a writ of prohibition was not dependent on any

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[13] *Id.*
[14] *State ex rel. Larkin v. Oxenhandler*, 159 S.W.3d 417, 420 (Mo.Ct.App. 2005).
[15] *State ex rel. Conway v. Dowd*, 922 S.W.2d 461, 463 (Mo.Ct.App. 1996).
[16] *State ex rel. Larkin v. Oxenhandler*, 159 S.W.3d at 420.
[17] *Id*. at 421.
[18] *State ex rel. Telecom Management, Inc. v. O'Malley*, 965 S.W.2d 215, 220 (Mo.Ct.App. 1998).

jurisdictional analysis. If a party cannot state facts sufficient to justify court action or relief, the Court held it is fundamentally unjust to force the other party to suffer the considerable expense and inconvenience of litigation. It is also a waste of judicial resources.[19] The Court then issued the writ in a case where a wife who rode as a passenger in a vehicle driven by her husband was sued on a theory of vicarious liability. The Court held that the facts pleaded did not meet the elements of a recognized cause of action.[20] This holding appeared to open the door to a possible writ whenever a plaintiff raises a claim that moves into uncharted territory. Judge Zel M. Fischer wrote a dissenting opinion.[21]

Conclusion

The decision to apply for a writ of prohibition should never be taken lightly. In deciding whether to recommend such action to a client, the lawyer must weigh the cost of the writ proceeding, the likelihood of success, and the potential benefit of the writ on the underlying litigation. This article nonetheless shows that writs may be possible in certain types of cases. Appellate courts may issue writs to review: (1) discovery disputes; (2) venue decisions; (3) lawsuits against parties with immunity; (4) cases where the trial court lacks subject matter jurisdiction; or (5) cases where the continuation of the lawsuit would subject the defendant to unnecessary, inconvenient or expensive litigation. Of course, each case is different and must be evaluated on its own merits. The lawyer must decide whether his or her case is truly one of extreme necessity where an extraordinary writ is justified. Yet if your lawsuit raises one of these kinds of issues, you may wish to consider the merits of a writ proceeding.

[19] *State ex. rel. Henley v. Bickel*, 285 S.W.3d 327, 330 (Mo. 2009).
[20] *Id.* at 333.
[21] *Id.* at 333-35 (Fischer, J., dissenting).

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