

RESOLUTION 01-04-2006

DIGEST

Writ Review: Extension of Time to Petition

Amends Code of Civil Procedure section 1008 to extend the time to petition for a writ of review upon the filing of a motion for reconsideration.

SECTION/COMMITTEE REPORT

COMMITTEE ON APPELLATE COURTS

APPROVE AS AMENDED

This Resolution proposes an amendment that would, in effect, toll the commencement of the time for filing a petition for extraordinary writ in cases in which a party serves and files a valid motion for reconsideration of a prior, nonappealable order that is subject to review only by writ. The proposed amendment would delay the commencement of the time for filing a petition for writ in such instances until the earlier of either (1) the date of service of written notice of entry of the order on the application for reconsideration, or (2) 45 days after the filing of the application itself. The Committee supports extending the time for the filing of a writ petition where a valid motion for reconsideration has been filed, but anticipates problems in employing the second of the two alternate dates.

Delaying the commencement of the time for filing a petition for writ to a date 45 days after the date that the motion for reconsideration was filed would create a potential anomaly. While in the vast majority of cases, a court will have ruled on a motion for reconsideration within 45 days from its filing, there is no guaranty of that given crowded dockets and the required statutory notice period for motions. The proposed 45-day period might well lead to situations in which a reconsideration motion is still pending when the period within which to file the petition for writ begins or even ends.

For example, due to the apparent backlog in the law and motion departments of the San Diego County Superior Court (Vista Branch), a party cannot even get a hearing date on a motion sooner than four months out, which date would be well after the proposed 45-day tolling period for commencing the time within which a petition for writ must be filed. In such a case, a party would be required to forgo either the motion for reconsideration or the possibility of timely seeking writ review of the prior order. Even in counties in which a party is able to secure an earlier hearing date on a motion for reconsideration, a delay of 45 days for the commencement of the period within which a party must seek writ review may still be insufficient in order to accommodate the purposes of the proposed amendment.

The Committee believes that setting the tolling period for the commencement of the time within which writ review must be sought to a single date calculated strictly from service of the ruling on reconsideration provides greater clarity and parallels the similar provision extending the time for filing a notice of appeal when there has been a valid motion for reconsideration under rule 3(d)(1) of the California Rules of Court. Accordingly, the Committee supports the Resolution if amended to delete the second alternate, and provide that the time to petition for writ review “shall not commence until service of a written notice of entry of the order on a valid application for reconsideration.”

This position is only that of the State Bar of California's Committee on Appellate Courts. This position has not been adopted by the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California. Committee activities relating to this position are funded from voluntary sources.

AMENDED TO ADOPT ABOVE RECOMMENDATION

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure § 1008 to read as follows:

- 1 §1008
2 (a) When an application for an order has been made to a judge, or to a court, and re-
3 fused in whole or in part, or granted, or granted conditionally, or on terms, any party af-
4 fected by the order may, within 10 days after service upon the party of written notice of en-
5 try of the order and based upon new or different facts, circumstances, or law, make applica-
6 tion to the same judge or court that made the order, to reconsider the matter and modify,
7 amend, or revoke the prior order. The party making the application shall state by affidavit
8 what application was made before, when and to what judge, what order or decisions were
9 made, and what new or different facts, circumstances, or law are claimed to be shown.
10 (b) A party who originally made an application for an order which was refused in
11 whole or part, or granted conditionally or on terms, may make a subsequent application for
12 the same order upon new or different facts, circumstances, or law, in which case it shall be
13 shown by affidavit what application was made before, when and to what judge, what order
14 or decisions were made, and what new or different facts, circumstances, or law are claimed
15 to be shown. For a failure to comply with this subdivision, any order made on a subsequent
16 application may be revoked or set aside on ex parte motion.
17 (c) If a court at any time determines that there has been a change of law that warrants
18 it to reconsider a prior order it entered, it may do so on its own motion and enter a different
19 order.
20 (d) A violation of this section may be punished as a contempt and with sanctions as
21 allowed by Section 128.7. In addition, an order made contrary to this section may be re-
22 voked by the judge or commissioner who made it, or vacated by a judge of the court in
23 which the action or proceeding is pending.
24 (e) This section specifies the court's jurisdiction with regard to applications for re-
25 consideration of its orders and renewals of previous motions, and applies to all applications
26 to reconsider any order of a judge or court, or for the renewal of a previous motion, whether
27 the order deciding the previous matter or motion is interim or final. No application to recon-
28 sider any order or for the renewal of a previous motion may be considered by any judge or
29 court unless made according to this section.
30 (f) For the purposes of this section, an alleged new or different law shall not include
31 a later enacted statute without a retroactive application.

32 (g) This section applies to all applications for interim orders.
33 (h) When an order is subject to review by extraordinary writ and a party files and
34 serves a valid application under subdivision (a) for reconsideration of that order, the time to
35 petition for writ review shall not commence until the date of service upon the party filing the
36 petition of written notice of entry of the order on the application for reconsideration.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Sacramento County Bar Association

STATEMENT OF REASONS

Existing law: Several statutes provide that certain orders may be reviewed by extraordinary writ within specified times, *e.g.*, Code of Civil Procedure §§ 170.3(d) (disqualification of judge; 10 days); 400 (change of venue; 20 days, 10-day extension); 437c(m)(1) (denial of summary judgment or order on motion for summary adjudication; 10 days, 20-day extension). If no statute specifies a time to seek writ review of an order, by analogy to appeal, a party must ordinarily file a petition within 60 days after service of notice of entry of the order. *Volkswagen of America, Inc. v. Super.Ct.* (2001) 94 Cal.App.4th 695, 701.

The time is not extended by a motion for reconsideration in the trial court. *Bensimon v. Super.Ct.* (2003) 114 CA4th 1257, 1258-1259; *Schmidt v. Super.Ct.* (1989) 207 Cal.App.3d 56, 61.

This Resolution: Would amend § 1008 to add subdivision (h) providing that, if a party timely files a proper motion to reconsider an order, the time to petition for writ review of that order does not begin to run until service of written notice of entry of the order on reconsideration or 45 days after filing the reconsideration motion, whichever is earlier.

The Problem: In *Bensimon* and *Schmidt*, the courts held that a statutory time to petition for writ review of an order denying summary judgment is not extended by a motion for reconsideration under § 1008. Yet, a timely, proper motion to reconsider under § 1008 *does* extend the time to appeal. Cal. Rules of Court, rule 3(d).

This is anomalous. There is no logical reason why a motion for reconsideration should extend the time to appeal but not the time to petition for a writ. Extraordinary writ petitions are simply alternative modes of appellate review. *Powers v. City of Richmond*, 10 Cal.4th 85 (1995). Non-appealable orders may be reviewed only by writ petition, and the Legislature may constitutionally provide that even some final judgments may be reviewed only by writ. *Id.*; *Leone v. Medical Bd. of California* (2000) 22 Cal.4th 660.

Because various statutes provide many different times to petition for writ review, and there is a different filing period altogether when no statutory time is provided, the resolution does not directly extend the time to petition. Instead, it would delay commencement of the time to petition, whatever that period may be.

Under California Rules of Court, rule 3, the time to appeal is extended to as much as 90 days after filing a motion for reconsideration. Writ review, however, should be prompt. Therefore, the resolution proposes that the time to file a writ petition should start either upon service of notice of entry of the order on the motion to reconsider or 45 days after the motion was filed, whichever is earlier. This should provide sufficient time for the trial court to consider and rule on the motion to reconsider while still affording reasonably speedy writ review.

IMPACT STATEMENT

This resolution affects statutes providing times to petition for writ review of an order, as it would effectively extend those times.

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