CHAPTER 10: EXTRAORDINARY WRITS—CIVIL

A. Introduction.

An extraordinary writ petition is a different way to ask an appellate court to review the actions or inactions of a lower tribunal. Writ petitions can only be used in very rare, or "extraordinary," circumstances, where there is no other adequate remedy or ability to appeal. *See* Florida Rule of Appellate Procedure 9.100. In civil cases, writs are most commonly used to: compel a judge or other official to perform a ministerial act he or she refuses, but is required, to do (writs of mandamus); prevent a lower tribunal from performing an act it has no jurisdiction to do (writs of prohibition); or challenge non-final orders that cannot otherwise be immediately appealed (writs of certiorari). An extraordinary writ petition can be filed, provided certain criteria are satisfied, with the appellate court while the case is still going on in the lower tribunal.

Filing a writ petition usually does not stay (stop) the proceedings in the lower tribunal. Rather, to stay the lower tribunal proceedings during the writ proceeding, a party would normally have to also move for and be granted a stay. Stay motions are discussed in Chapter 11 of this Handbook. *See also* Florida Rule of Appellate Procedure 9.310.

An extraordinary writ petition is not the same as an appeal. First, the parties to a petition have different titles than in an appeal. In an appeal, the appealing party is the "appellant," and the opposing party is the "appellee." In contrast, in a writ proceeding, the party petitioning the appellate court is called the "petitioner," and the opposing party is called the "respondent." A writ proceeding is begun by filing the petition, which is like the initial brief, directly with the appellate court (unlike an appeal, which begins by filing a notice of appeal in the lower tribunal). The writ petition is filed in the appellate court and served on the opposing parties. Depending on the type of writ, the deadline is usually 30 days from the date the challenged order was entered or action performed.

In addition, in some types of writ proceedings, such as when a party files a petition for writ of mandamus or prohibition, the judge in the lower tribunal must also be (a) named as a respondent in the body of the petition, but **not** in the case name (caption), and (b) served with a copy of the petition for writ mandamus or prohibition. In the case of a petition for writ of certiorari, the lower tribunal judge is not named as a party at all, but is served with a copy of the petition. In contrast, in a regular appeal, the lower tribunal judge is not named as a party nor served with the documents filed in the appeal.

Extraordinary writs are called extraordinary because they are very unusual. Appellate courts do not grant petitions for extraordinary writs except in very special circumstances. It is very hard to meet the requirements for an extraordinary writ. Even if all the requirements are met, the appellate court can still deny the writ and not decide the issues raised in the petition. Extraordinary writ petitions are used by the appellate courts only to fix a miscarriage of justice that cannot be fixed any other way.

B. Types of Extraordinary Writs in Civil Cases.

There are many different kinds of extraordinary writs. Each one serves a different purpose, and each is proper only in specific circumstances.

1. Writ of Mandamus.

If a lower tribunal judge or other official is required by law to perform a duty and refuses or fails to perform it, a party can file a petition for writ of mandamus. An appellate court may issue a writ of mandamus to force the lower tribunal, or another government officer, to perform an official duty. The requirements for a writ of mandamus are:

(1) The petitioner must have a clear legal right to have the trial judge or other officer perform a specific act or duty;

(2) The lower tribunal judge or other government officer must have a clear legal, ministerial duty to perform the action; and

(3) The petitioner must have no other adequate legal remedy.

The appellate court can only issue a writ of mandamus when the duty to be performed is a ministerial act. An act is ministerial when the lower tribunal or office has no discretion. Discretion is the freedom to choose to do or not do something. So, an act is ministerial when the law requires it to be done, without any choice by the official. Sometimes an act might be part ministerial and part discretionary. In such cases, mandamus could be used to make an official do an act or make a decision (if it is a required ministerial act), but not how to do the act nor what decision to make (which is usually for the official to decide, i.e., discretionary).

For example, an appellate court may issue a writ of mandamus to require a clerk of a lower tribunal to accept a particular document for filing if the clerk is required to accept it, but has refused to accept it. An appellate court may issue a writ of mandamus to require a city to produce for inspection and copying, public records which the petitioner has requested and the city has refused to produce. An appellate court may also issue a writ of mandamus to require a lower tribunal to hold a hearing within a certain amount of time. But an appellate court cannot use the writ to tell the lower tribunal how to decide the case because that would be forcing the official to use his discretion in a certain way.

2. Writ of Prohibition.

Prohibition is a writ used to stop a lower tribunal from doing something that it does not have jurisdiction to do. In other words, it is used to stop a lower tribunal from doing something unlawful or improper. District courts of appeal can issue writs of prohibition to lower courts or state agencies. The Florida Supreme Court, on the other hand, can issue writs of prohibition to lower courts, but not to state agencies.

The petition for writ of prohibition must be filed before the lower tribunal takes the action that the petitioner wants to prevent. An appellate court cannot grant prohibition to undo something

that already has been done. It can only grant prohibition to prevent something that has not been done yet. In addition, the petitioner must show (1) there are no disputed facts and (2) the lower tribunal has no jurisdiction to do the thing the petitioner is trying to prevent.

If the appellate court issues an order to show cause why relief should not be granted in a prohibition proceeding, it stays the proceedings below. However, an order merely directing the respondent to file a response to the petition in a prohibition proceeding generally does not stay the lower tribunal proceedings. A stay puts all of the lower tribunal proceedings on hold until the appellate court makes a decision. *See* Chapter 11 of this Handbook (stays).

3. Writ of Certiorari.

Certiorari, also called "cert," lets an appellate court review a non-final order of the lower tribunal that departs from the essential requirements of law when there is no other means of appeal. It allows the appellate court to decide whether the lower tribunal is handling the proceedings in a regular way and according to the law. Certiorari gives the appellate court the power to reach down and stop a miscarriage of justice where no other remedy exists. Unlike the district courts of appeal, the Florida Supreme Court does not have jurisdiction to grant writs of common law certiorari. To get a writ of certiorari, a petitioner must show:

(1) The action of the lower tribunal is a material departure from the essential requirements of law. This requires more than just an error by the lower tribunal. Departure from the essential requirements of law means there is a violation of a clearly established principle of law. This violation results in a real miscarriage of justice or a denial of due process. Clearly established law can come from many sources, including controlling case law, rules of court, statutes and constitutional law.

(2) The error will cause the petitioner irreparable harm throughout the remainder of the proceedings. The irreparable harm must be more than the time and expense of an unnecessary

trial. An example of irreparable harm is an order violating a party's constitutional rights that cannot be fixed by an appeal at the end of a case. Such an order might be a broad "gag order" preventing the plaintiffs and their attorneys from discussing their case with the media with no showing that the gag order was necessary to protect the fairness of the proceedings. Another example is an order allowing temporary visitation by a grandmother over the objection of a mother, and setting a future hearing to determine permanent visitation rights. This type of order would violate the mother's constitutional right to privacy. A later determination could not change the violation that already would have taken place.

(3) There is no adequate remedy by appeal from a final judgment. This is another aspect of irreparable harm. If the error is something that the appellate court can fix in an appeal at the end of the case, the appellate court will not grant a writ of certiorari because there is no irreparable harm. For example, a denial of a trial by jury when the petitioner is entitled to a jury trial does not cause irreparable harm that cannot be fixed on appeal. This is because an appellate court can order a new trial following an appeal at the end of the case.

In civil cases, an area where certiorari is often requested is discovery. Discovery is the process before trial in which the parties exchange factual information through depositions, interrogatories, and production of documents. Not every incorrect discovery order creates certiorari jurisdiction. However, certiorari is sometimes granted when a court orders a party to provide information that the party should not have to provide, or what is called privileged information. A discovery order that requires a party to produce irrelevant documents does not necessarily cause irreparable harm. Certiorari is hardly ever granted just because the documents ordered to be produced are irrelevant. However, an order granting discovery of privileged material can cause irreparable harm, because once the party turns over information it should not have to disclose, it is impossible to get the information back. This is often referred to as a "cat out of the

bag" situation. An order denying discovery is usually not reviewable by certiorari. There are only a few times when an appellate court might issue a writ of certiorari following such an order. For example, certiorari might be proper if the order does not allow discovery from a key witness where there would be no realistic way to determine after judgment what that witness would have said or how it would have affected the case.

In addition, with very few exceptions, certiorari will not be granted to review the denial of a motion to dismiss. This is because an appeal at the end of the case is an adequate remedy.

If a party petitions for a writ of certiorari and the appellate court denies it without an opinion, that does not end the entire case. The rest of the case continues in the lower tribunal. On a final note, party who plans to file a certiorari petition with the appellate court will often also file an emergency motion to stay in the lower tribunal, asking it to stop or "stay" the challenged order during the certiorari proceeding. As discussed in Chapter 11 of this Handbook on stays, if the trial court denies the motion, the party can then ask the appellate court to issue the stay. See Florida Rule of Appellate Procedure 9.310(a)&(f).

4. Writ of Quo Warranto.

The State of Florida gives its citizens and taxpayers certain rights or privileges. Quo warranto is used by citizens to test their abilities to use those rights or privileges. For example, a petition for writ of quo warranto has been used to dispute the inclusion of certain lands in a municipality. Quo warranto stopped the City of Coral Gables from exercising jurisdiction over part of Key Biscayne. Quo warranto has also been used to decide whether the Florida Legislature's override of the governor's veto is constitutional. Citizens and taxpayers are the people who can ask for the writ of quo warranto to enforce their public rights. Members of the general public do not need to show any real or personal interest in the enforcement of a public right. They just need

to show that there is a public interest in the right. Quo warranto is a very unusual writ that is hardly ever used.

5. All Writs.

The term "all writs" refers to the power of a district court of appeal to issue any writ necessary or proper to the complete exercise of its jurisdiction. This includes the power to direct the lower tribunal to carry out the appellate court's mandate, or to follow the instructions in the appellate court's decision after an appeal. All writs jurisdiction is not a separate basis to seek review in the appellate court. In other words, without an ongoing case in the appellate court, over which the appellate court already has jurisdiction, a party cannot ask for "all writs" jurisdiction. All writs jurisdiction exists only in connection with an existing case. The purpose of all writs jurisdiction is to protect the appellate court's already existing jurisdiction in a case. Some have tried to use all writs jurisdiction to get the Florida Supreme Court to review a district court of appeal's decision, such as a "per curiam" affirmance without a written opinion. But the Florida Supreme Court does not have all writs jurisdiction to review that kind of decision.

C. Important Appellate Rules.

Which of the Florida courts have jurisdiction to issue extraordinary writs is discussed in Florida Rule of Appellate Procedure 9.030. That Rule explains which Florida courts have jurisdiction to issue extraordinary writs. Rule 9.030(a)(3) describes the Florida Supreme Court's ability to issue extraordinary writs. The Florida Supreme Court can issue writs of prohibition to courts. It can also issue all writs necessary to the complete exercise of its jurisdiction, in other words, any writ that would allow the Florida Supreme Court to do its job. The Florida Supreme Court can also issue writs of mandamus and quo warranto to state officers and state agencies. Finally, the Florida Supreme Court can issue writs of habeas corpus.

Florida Rule of Appellate Procedure 9.030(b)(3) explains the jurisdiction of the district courts of appeal to issue extraordinary writs. District courts of appeal can issue writs of mandamus, prohibition, quo warranto, and certiorari. These courts can also issue all writs needed to the complete exercise of their own jurisdiction. Finally, judges of district courts of appeal can issue certain writs of habeas corpus.

Florida Rule of Appellate Procedure 9.030(c)(2) allows circuit courts to issue writs of certiorari to review non-final orders of county courts. It also allows circuit courts to issue writs of mandamus, prohibition, quo warranto, and habeas corpus. Like the other courts, circuit courts can also issue all writs needed to the complete exercise of their own jurisdiction.

D. Procedure for Extraordinary Writs.

1. The Contents of a Petition.

Unlike an appeal, a petition for an extraordinary writ does not start by filing a notice of appeal. It starts by filing a petition. The petition is like the initial brief. It contains all of the legal arguments. Florida Rule of Appellate Procedure 9.100 states what a petition must include:

(a). The basis for invoking the jurisdiction of the court. In this part of the petition, the party should explain to the court why it has the power to grant the requested writ. The party should include the citation to the appellate rule that grants this power.

(b). The facts on which the petitioner relies. The party should set out, as clearly and briefly as it can, the facts in the record that show the party is entitled to the writ it is asking the court to grant.

(c). The nature of the relief sought. In this section, the party must tell the court what it wants the court to do. For example, a petition for writ of mandamus might ask the appellate court to order the lower tribunal to hold a hearing, or overturn an order of the lower tribunal.

(d). Legal argument in support of the petition and appropriate citations of authority. In this part of the petition, the party must state its arguments and identify the cases, statutes, rules, or constitutional provisions that support the arguments.

(e). The Appendix that Must Accompany the Petition.

If a party is asking the appellate court for an order directed to a lower tribunal, it must also provide the appellate court with an appendix. The appendix must be prepared as described in Florida Rule of Appellate Procedure 9.220. It should have an index along with a copy of the lower tribunal's order that the party wants reviewed. The index should list, in order of the date they were filed below, the documents in the appendix and the pages where they appear. The appendix can also have copies of other parts of the record and other authorities. In the case of a petition for writ, the appendix needs to be separately bound and separated from the petition. It can either be completely separate, or it can be separated by a divider or tab.

When writing the statement of facts, the party should refer to the pages in the appendix that support the facts. For example, if the statement of facts includes something that a witness testified to at a hearing, the party should give the page of the transcript in the appendix where that testimony appears. A party should not hold back information that hurts its position or material that the opposing party is likely to cite. To do so may expose that party to a sanction or penalty from the appellate court.

3. Page Length and Filing.

A petition for a writ cannot be longer than 50 pages. The requirements for the margins and fonts are the same as the requirements for an appellate brief. A certificate of compliance is also required. This tells the court that the party has complied with the requirements of the appellate rules. A certificate of service is also required. This shows that the party has served a copy of the petition on all opposing parties, and also sent a copy to the trial judge.

The petition is filed directly in the appellate court. If a party files the petition in the wrong court, the court has the power to transfer it to the right court, not to dismiss it. A filing fee of generally $300 is required unless the party has been determined to be indigent. The party should call the appellate court clerk's office to confirm that court's filing fee.

4. Responding to Petitions.

If a party receives a petition for an extraordinary writ from the opposing party, it does not need to file a response. A response is only necessary if the appellate court issues an order requiring one. Because petitions for extraordinary writs are rarely granted, the appellate court will often deny the petition without a response from the other side. Sometimes the appellate court will issue an order to respond. In other cases, the court will issue an order to show cause. An order to show cause requires the respondent to serve a response explaining why the writ should not be granted. Neither a petition nor an order to show cause automatically stops the proceedings in the lower tribunal. The only exception relates to petitions for writs of prohibition. If the court issues an order to show cause after a petition for writ of prohibition, the lower tribunal cannot take further action unless the appellate court either says it can or decides the case.

5. Time Limits.

There are important time limits to remember. A petition for writ of prohibition must be filed before the lower tribunal takes the action the petitioner wants to stop.

There is a 30-day time limit for filing a petition for writ of certiorari. The time runs from the date the lower tribunal's order was rendered. The 30-day time limit may apply even if the petition being filed is called something else. For example, let's say that a party calls its petition a petition for writ of mandamus, and does not file it until after 30 days. If the appellate court decides that it is really a petition for writ of certiorari, it will be too late for the appellate court to review

the action of the lower tribunal because the petition was filed more than 30 days after the rendition of the lower tribunal's order. The appellate court will deny an untimely petition.

Another important part to remember is that filing a motion for rehearing of a non-final order in the lower tribunal does not extend, or "toll," the time for filing the petition. If a party wants to file a petition for a writ of certiorari asking the appellate court to review a lower tribunal's order, and the party moves for rehearing or reconsideration in the lower tribunal, the time for filing a petition still runs from the date of the original order. It does not run from the date of rehearing. The 30-day time limit for a petition for writ of certiorari cannot be extended.

E. Conclusion.

An extraordinary writ will not be granted to fix an ordinary mistake in the middle of a case. A party should carefully think about whether to file a petition for an extraordinary writ. A petition for an extraordinary writ should only be filed if a party truly believes that there has been a miscarriage of justice that simply cannot be fixed later or any other way.