

Mandamus

"we command"

LANDYE BENNETT

BLUMSTEIN LLP

A T T O R N E Y S

Christine N. Moore | Partner

Practicing in Appellate Law and General Litigation

cmoore@lbblawyers.com

Suite 3500

1300 Southwest Fifth Avenue

Portland, Oregon 97201

503-224-4100 (w)

503-224-4133 (f)

ORS 34.110

- A writ of mandamus may be issued to any inferior court * * * to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust or station; but though the writ may require such court * * * to exercise judgment, or proceed to the discharge of any functions, **it shall not control judicial discretion.** The writ shall not be issued in any case **where there is a plain, speedy and adequate remedy in the ordinary course of the law.**

Do I have a plain, speedy, and adequate remedy?

- An adequate remedy is one that "affords any and all relief to which the relator is entitled." *State ex rel. Anderson v. Miller*, 320 Or 316 (1994).
- An appeal usually affords a plain, speedy, and adequate remedy.
- Suffering the burden of litigation, such as delay and expense, is not sufficient injury to justify mandamus. *State ex rel. Automotive Emporium, Inc. v. Murchison*, 289 Or 265 (1980).

Legal issues the Court has considered appropriate for mandamus:

- Venue
- Personal jurisdiction
- Double jeopardy
- Discovery - Disclosure of privileged information, protective orders, allowing or prohibiting depositions of certain persons.
- Refusal to order witness in criminal case to testify
- Orders barring press, public or attorneys from attending judicial proceedings

When do I file a petition?

- Obtain an order first unless it's an emergency. *Brewer v. Beers*, 280 Or 251 (1977).
- No rule governs when a petition must be filed.
- Laches is a bar to mandamus, "must act promptly." *Paine v. Wells*, 89 Or 695 (1918).
- Delay, unless "satisfactorily explained," may equate denial, "particularly when the delay has been prejudicial to the rights of the respondent." *State ex rel Fidanque v. Paulus*, 297 Or 711 (1984).
- Generally, follow 30-day appeal period. *Nelson v. Baker*, 112 Or 79, 94-95 (1924); *State ex rel Redden v. Van Hoomissen*, 281 Or 647, 649 (1978).

What should I include in the petition?

- Petition for Writ: ORAP 11.05(2); ORAP 5.05(4)(c)-(h); Appendix 11.05; ORS 34.130
- Memorandum of Law: ORAP 11.05(3); ORAP 7.10(1)-(2)
- Excerpt of Record: ORAP 11.05(3); ORAP 5.50(6)
- Don't forget to seek a stay from the lower court! ORS 34.130(5).

How do I respond to a petition?

- An adverse party may file a memorandum in opposition within 14 days. ORAP 11.10(1).
- Form of memorandum must comply with ORAP 7.10(1) and (2).
- Relator may not file a reply unless the court has requested one.

What does the court do with the petition?

- The court considers the petition and opposition without oral argument unless otherwise ordered. ORAP 11.10(2).
- If court accepts jurisdiction, it will issue an order allowing petition. If not, the court denies the petition.
- Court will also issue with the order an alternative writ of mandamus. Generally, lower court given a time frame in which to comply or show cause for not doing so. ORS 34.150(2).
- If the inferior court performs the act at issue in the petition, relator must notify the court. ORAP 11.10(5).

What happens if the inferior court does not comply?

- Relator must file an opening brief within 28 days after issuance of the writ. ORAP 11.15(1)(a). MOETs allowed.
- Adverse party has 28 days to file an answering brief. ORAP 11.15(2).
- Reply brief: Must request leave to file within 7 days after the filing of the answering brief. ORAP 11.15(3).
- Briefs must conform with ORAP 5.35 - 5.50.

What is a peremptory writ of mandamus?

- The Final Command!
- If relator entitled to peremptory writ, court administrator issues writ. May be combined with appellate judgment. ORAP 11.17; ORS 34.150(3).