Exhaust All Measures Before Filing Petition for Writ Relief

By Paul D. Fogel and Benjamin G. Shatz

Given their limited resources, today's appellate courts understandably are reluctant to turn their attention away from deciding appeals to consider writ petitions. After all, writ relief is an extraordinary remedy that courts seldom grant, and giving plenary consideration to writ petitions allows parties to jump to the head of the appellate waiting line, often pushing aside those who have patiently been waiting their turn for review.

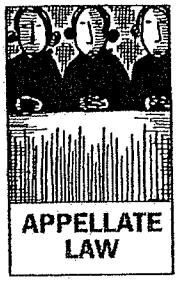
These factors, along with the discretionary nature of writ review, allow courts to be unwavering in demanding that writ petitioners show they lack any alternative to relief — and that a writ is their only effective remedy.

The 9th U.S. Circuit Court of Appeals recently broadcast this message loud and clear in *Cole v. United States District Court (D. Idaho)*, 366 F.3d 813 (9th Cir. May 4, 2004), when it denied an otherwise meritorious and compelling mandamus petition solely because the petitioners had failed to seek district court review of a magistrate judge's order.

The result was a harsh one, but it serves as a reminder that those who come knocking on the Court of Appeals' door should first make sure their own house is in order.

In *Cole*, three female Idaho workers filed a discrimination and harassment lawsuit against their former employer in federal district court in the state of Washington, which later was transferred to the District of Idaho.

Their lead counsel was a California attorney, admitted pro hac vice to the District of Idaho. After the District Court set a trial date, the defendants moved to



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disqualify the plaintiffs' California attorney because of an apparent conflict of interest. (Both the District Court motion papers and the 9th Circuit petition were filed under seal, and the 9th Circuit did not disclose the details in its opinion except insofar as they were necessary to the procedural issue before the court.)

The District Court referred the disqualification motion to a magistrate judge who, after a hearing, ordered the plaintiffs and their attorney to submit affidavits in camera so the magistrate judge would have additional evidence to decide the motion. The plaintiffs supplied the requested affidavit, but their attorney informed the magistrate judge that he "respectfully declined" to do so.

The magistrate judge then issued an order rejecting all of the defendant's arguments for disqualification but granting the motion anyway (and in the process, revoking the attorney's pro hac vice admission), on the ground that the attorney had willfully failed to obey the magistrate judge's order to furnish the affidavit.

This was a significant blow to the plaintiffs in that it meant they could no longer be represented by someone who had spent six years working on the case and who had developed a good rapport with them.

Rather than seek reconsideration of the magistrate judge's order in the District Court, however, the plaintiffs filed a petition for writ of mandamus in the 9th Circuit under Federal Rule of Appellate Procedure 21.

Plaintiffs no doubt thought their chances of obtaining writ relief were high because they satisfied at least two of the five factors relevant to obtaining such relief under *Bauman v. United States District Court (N.D. Cal.)*, 557 F.2d 650 (9th Cir. 1977): 1) the order erroneously imposed the severe sanction of disqualification for counsel's noncompliance with a court order when the magistrate judge had rejected the defendant's asserted grounds for disqualification; and 2) an appeal after judgment would not be an adequate remedy.

Armed with *Bauman*, the plaintiffs in *Cole* also undoubtedly took comfort in knowing that mandamus generally lies to obtain reversal of a disqualification order. *Christensen v. United States District Court (C.D. Cal.)*, 844 F.2d 694 (9th Cir. 1988).

Indeed, *Cole* agreed with the plaintiffs on all these points. It found they had shown irreparable harm in that they could not obtain meaningful relief from an erroneous disqualification order on appeal after judgment.

As the court noted, "[a]bsent mandamus relief, a counsel's wrongful disqualification, which cannot be immediately appealed, can cause great harm to a litigant." And it found the order constituted "clear error" because the magistrate judge had imposed the sanction of disqualification without notice or an opportunity to be heard.

Indeed, he had ordered disqualification not as a result of the motion — as noted, he rejected the reasons the defendant urged for disqualification — but as a sua sponte sanction.

Further, although *Cole* doubted the disqualified attorney had a good excuse for failing to furnish the requested affidavit, it noted that due process required notice and an opportunity to be heard before the magistrate judge could issue the severe sanction he imposed. *See Martens v. Thomann*, 273 F.3d 159 (9th Cir. 2001) (District Court's revocation of pro hac vice status reversed for procedural defects in failing to provide a fair notice and opportunity to be heard).

As the 9th Circuit saw it, the magistrate judge should have ordered the attorney to show cause why he should not be disqualified from remaining as counsel. This clear error "point[ed] strongly in favor of granting the petition."

Despite this strong showing, in the end, *Cole* refused to issue the writ because the plaintiffs had failed to demonstrate compliance with another critical *Bauman* factor — the absence of any alternative to mandamus relief.

Indeed, *Cole* noted, the U.S. Supreme Court has emphasized compliance with this factor. *See Kerr v. United States District Court (N.D. Cal.)*, 426 U.S. 394 (1976) (mandamus petitioner must show "no other adequate means" to obtain relief); accord Cal. Code Civ. Proc. Sections 1068, 1086, 1103 (absence of remedy at law is a prerequisite to writ relief).

Thus, despite strong showings on two *Bauman* factors (and the discounting of two others as inapplicable — the magistrate judge's order was not an oft-repeated one that manifested a persistent disregard of the federal rules, nor did it raise new and important issues of first impression), *Cole* found the plaintiffs' failure to seek District Court reconsideration of the order doomed their petition.

Cole noted that such reconsideration is an "absolute right." See 28 U.S.C. Section 636(b)(1)(A) (authorizing District Court reconsideration of magistrate judge orders); Fed. R. Civ. Proc. 72(a) (authorizing objections to magistrate judge orders). And the plaintiffs' failure to exercise this right, *Cole* held, outweighed their satisfaction of the two other *Bauman* factors.

As *Cole* put it, if it were to "ignore this simple and direct route ... for review ... we would be placing our court, rather than the district court, in the role of supervising the magistrate judge's decisions."

In other words, the court found the plaintiffs "had a ready route and were obligated to travel it." Their failure to take that "trip" "gravely weaken[ed]" their showing for relief, because "the need to show the lack of an available remedy absent a writ of mandamus goes to the heart of [the] extraordinary remedy which should be sparingly employed."

Indeed, this same rationale applies to magistrate judge orders outside the writ context. For example, the 9th Circuit has held that the failure to seek District Court reconsideration of a magistrate judge's order can cause a waiver on appeal. *Phillips v. GMC*, 307 F.3d 1206 (2002) (failure to object to magistrate judge's discovery order waived right to claim error in the order in an appeal after final judgment); *Simpson v. Lear Astronics Corp.*, 77 F.3d 1170 (1996) (same, magistrate judge-imposed discovery sanctions).

And, *Cole* noted, other circuits' mandamus decisions had effectively presaged its holding. *United States v. Ecker*, 923 F.2d 7 (1st Cir. 1991) (writ relief denied because party failed to seek reconsideration of magistrate judge's order, noting the "near-absolute jurisdictional requirement that magistrates' orders be reviewed in the first instance by the district court"); *Califano v. Moynahan*, 596 F.2d 1320 (6th Cir. 1979) (same; court will not use mandamus to require a district judge "to do that which he was never asked to do in a proper way in the first place").

The lesson from *Cole* is clear: Because District Court review of a magistrate judge's order is available as a matter of right, parties must invoke that right before seeking extraordinary circuit review by way of mandamus. The failure to do so will all but doom even the most compelling petitions for writ relief.

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