

**ARTICLE**

**IS MY CASE *MANDAMUSABLE*? A GUIDE TO  
THE CURRENT STATE OF TEXAS  
MANDAMUS LAW**

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I. Introduction. . . . . 145

II. Jurisdiction. . . . . 146

III. The Two-Prong Standard for Mandamus Relief. . . . . 148

    A. Clear Abuse of Discretion . . . . . 148

    B. Adequate Remedy at Law. . . . . 149

IV. Common Reasons for the Denial of Mandamus Relief . . . . . 151

    A. Compliance with Texas Rule of Appellate Procedure 52 . . . 151

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1. Adequate Record . . . . .	151
2. Certification . . . . .	152
B. Disputed Areas of Fact . . . . .	153
C. Predicate Request . . . . .	153
D. Delay . . . . .	153
E. Other Remedies Available . . . . .	154
V. When Is Mandamus Review Appropriate?: A Non-Exhaustive List of Recent Issues Subject to Mandamus . . . . .	155
A. Discovery . . . . .	155
1. Discovery Orders . . . . .	155
2. Setting Aside a Valid Discovery Agreement Without Good Cause . . . . .	157
3. Order Abating All Discovery . . . . .	158
4. Discovery Sanctions . . . . .	158
5. Presuit Discovery . . . . .	159
B. Disqualification and Conflicts of Interest . . . . .	160
1. Trial Court Judge . . . . .	160
2. Trial Counsel . . . . .	161
C. Venue . . . . .	161
1. Mandatory Venue . . . . .	162
2. Texas Rule of Civil Procedure 87 . . . . .	162
3. Exceptional Circumstances . . . . .	162
D. Plea in Abatement . . . . .	163
E. Plea to the Jurisdiction . . . . .	165
F. Temporary Restraining Order . . . . .	166
G. Temporary Injunction . . . . .	167
H. Motion for Continuance . . . . .	168
I. Gag Orders . . . . .	169
J. Severance/Consolidation . . . . .	170
K. Ruling on Pending Motions . . . . .	170
L. Void Order . . . . .	172
M. Arbitration . . . . .	172
1. Order Denying Motion to Compel Arbitration . . . . .	172
2. Order Granting Motion to Compel Arbitration . . . . .	173
3. Other Orders . . . . .	174
N. Elections . . . . .	175

2014]	<i>A GUIDE TO THE CURRENT STATE OF TEXAS MANDAMUS LAW</i>	145
	O. Contractual Matters . . . . .	175
	P. Appointment of Guardian Ad Litem . . . . .	176
	Q. Contempt . . . . .	176
	R. Motion for New Trial . . . . .	176
	S. Family Law Proceedings . . . . .	179
	T. Criminal Proceedings . . . . .	180
VI.	Conclusion: How Mandamus Law Is Affecting Trial Practice . . .	181

## I. INTRODUCTION

Like many developments of the common law, the role of a petition for writ of mandamus has evolved over time.<sup>1</sup> Over a decade ago, when attorneys questioned if they were entitled to mandamus relief, the usual answer was never.<sup>2</sup> Attorneys considered mandamus relief to be a “matter of judicial discretion, not a matter of right.”<sup>3</sup> Filing a petition for writ of mandamus by no means guaranteed the court would grant relief.<sup>4</sup> In fact, a 1998 study of how often the Supreme Court of Texas granted mandamus relief in the previous ten years concluded that relators<sup>5</sup> had on average a 10.3% chance of receiving their requested relief.<sup>6</sup>

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1. A petition for writ of mandamus is an original appellate proceeding that seeks extraordinary relief. *See* TEX. R. APP. P. 52.1 (providing jurisdiction to the Supreme Court of Texas and the Texas Courts of Appeals). It is a court order or “judicial writ directed at an individual, official, or board to whom it is addressed to perform some specific legal duty to which the relator is entitled under legal right to have performed.” *In re Kuster*, 363 S.W.3d 287, 290 (Tex. App.—Amarillo 2012, orig. proceeding) (citing *Crowley v. Carter*, 192 S.W.2d 787, 790 (Tex. Civ. App.—Fort Worth 1496, orig. proceeding)); *see also* TEX. R. APP. P. 52.2 (designating the parties involved in a mandamus action). “A writ of mandamus allows a party to appeal a court’s ruling before final judgment and is appropriate only when the party’s inability to appeal before final judgment substantially deprives him of his rights.” William E. Barker, *The Only Guarantee Is There Are No Guarantees: The Texas Supreme Court’s Inability to Establish a Mandamus Standard*, 44 HOUS. L. REV. 703, 704–05 (2007).

2. Dean M. Swanda, *Mandamus: The Discretionary Interlocutory Appeal*, 11 APP. ADVOC. no. 4, 1998, at 9, 9 (commenting on judicial discretion and mandamus relief).

3. *See id.* (stressing that attorneys believed mandamus to be an act of judicial discretion); *see also* *Rivercenter Assocs. v. Rivera*, 858 S.W.2d 366, 367 (Tex. 1993) (orig. proceeding) (citing *Callahan v. Giles*, 137 Tex. 571, 155 S.W.2d 793 (1941) (original proceeding)) (reiterating that mandamus is not a right).

4. *See, e.g.*, Dean M. Swanda, *Mandamus: The Discretionary Interlocutory Appeal*, 11 APP. ADVOC. no. 4, 1998, at 9, 9 (discussing mandamus relief and judicial discretion).

5. *See* TEX. R. APP. P. 52.2 (defining relator as the party seeking mandamus relief).

6. Eugene A. Cook, *Ten Year Analysis of Supreme Court Activity*, 11 APP. ADVOC. no. 4, 1998, at 3, 5 (noting that in 1997, only 27 out of 326 petitions were granted, meaning relators had an eight-percent chance of success with mandamus proceedings).

However, with the passage of time, courts have become more willing to grant mandamus relief in cases where a trial court makes an improper ruling.<sup>7</sup> Some surmise this change is attributed, at least in part, to the Supreme Court of Texas's 2004 expansion of mandamus relief.<sup>8</sup>

This Article attempts to serve as a practical guide categorizing those issues that the supreme court and the intermediate appellate courts have determined warrant mandamus relief.<sup>9</sup> In doing so, this Article provides an overview of the current state of the law in Texas regarding the availability of mandamus relief. This Article is not intended to provide insight into the prospect of obtaining mandamus relief. The purpose is to highlight the trial court errors that appellate courts have found warranted mandamus relief.

Part I delineates where courts derive their mandamus jurisdiction. Part II defines the requirements that must be met for a writ of mandamus to issue. Part III discusses the common reasons why courts deny mandamus relief. Part IV explores issues and trends among different areas of the law where courts have decided mandamus relief is appropriate. Finally, Part V addresses how current mandamus rulings are affecting the practice of law.

## II. JURISDICTION

The Supreme Court of Texas and intermediate appellate courts first derive jurisdiction to issue mandamus relief from constitutional provisions.<sup>10</sup> The constitutional grant of authority to the supreme court is

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7. See generally Karen S. Precella & Ryan Paulsen, *Mandamus: The Hurdles to Relief*, Presentation at the State Bar of Texas Civil Appellate Practice 101 (Sept. 5, 2012), available at <http://www.haynesboone.com/files/Uploads/Documents/Attorney%20Publications/Mandamus-the-Hurdles-to-Relief.pdf> (exploring the ways in which a party may obtain mandamus relief).

8. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 138–39 (Tex. 2004) (orig. proceeding) (expanding the court's mandamus jurisdiction); Peter S. Poland, *Mandamus and the Contemporary Supreme Court: A Whole New World or Back to the Past?*, 11 APP. ADVOC. no. 1, 2010, at 56, 56 (citing several supreme court cases to support the theory that the court is expanding mandamus relief); Edward C. Dawson, *Texas Supreme Court Holds that Trial Courts Must Give Reasons for Granting New Trials*, 47 HOUS. LAWYER 28, 31 (2009) (noting that the Court is increasing the scope of mandamus review beyond its origins as a remedy designed to correct clear abuses of discretion); see also *In re U.S. Auto. Ass'n*, 307 S.W.3d 299, 314 (Tex. 2010) (orig. proceeding) (overturning the trial court's denial of summary judgment and departing from the general rule excluding mandamus review of a trial court's denial of summary judgment).

9. See, e.g., Charles W. "Rocky" Rhodes, *Demystifying the Extraordinary Writ: Substantive and Procedural Requirements for the Issuance of Mandamus*, 29 ST. MARY'S L.J. 525, 547–48 (1998) (explaining the confusion generated from applying mandamus concepts to a particular controversy by providing an overview of Texas mandamus law at the time and categorizing court opinions based on the type of order or ruling challenged).

10. See TEX. CONST. art. V, § 3 (giving mandamus authority to the Supreme Court of Texas); *id.* § 6 (authorizing the courts of appeals to exercise mandamus power).

found in Article V, Section 3 of the Texas Constitution, which confers on the court broad jurisdiction to issue mandamus relief “as may be necessary to enforce its jurisdiction.”<sup>11</sup> The courts of appeals’ constitutional grant of authority comes from Article V, Section 6, which provides that the courts “shall have such other jurisdiction, original and appellate, as may be prescribed by law.”<sup>12</sup>

The supreme court and the courts of appeals receive statutory mandamus authority from a number of statutes. First, the Texas Government Code authorizes the supreme court to issue writs of mandamus “against a statutory county court judge, a statutory probate court judge, a district judge, a court of appeals or a justice of a court of appeals, or any officer of state government except the governor, the court of criminal appeals, or a judge of the court of criminal appeals.”<sup>13</sup>

The Texas Government Code also allows a court of appeals to “issue a writ of mandamus and all other writs necessary to enforce the jurisdiction of the court” against a district or county court judge in the court of appeals district or a district court judge “who is acting as a magistrate at a court of inquiry under [c]hapter 52, [of the] Code of Criminal Procedure, in the court of appeals district.”<sup>14</sup> Furthermore, as discussed more in-depth later in the article, various statutes specifically authorize the supreme court and courts of appeals to issue writs of mandamus.<sup>15</sup>

Attorneys seeking mandamus relief ponder whether they should first seek relief from the court of appeals or go straight to the supreme court. The supreme court has concurrent jurisdiction with the courts of appeals to grant mandamus relief; however, the Texas Rules of Appellate Procedure (TRAP) mandate that a relator must first seek relief in a court of appeals.<sup>16</sup> Regardless of these appellate procedural rules, the courts of

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11. *Id.* § 3.

12. *Id.* § 6.

13. TEX. GOV'T CODE ANN. § 22.002(a) (West Supp. 2013) (providing writ power to the Supreme Court of Texas).

14. *Id.* §§ 22.221 (a), (b) (West 2004).

15. *See generally* TEX. CIV. PRAC. & REM. CODE ANN. § 15.0642 (West 2002) (authorizing mandamus relief to enforce mandatory venue provisions); TEX. ELEC. CODE ANN. § 273.061 (West 2010) (allowing for mandamus “in connection with the holding of an election or a political party convention”); TEX. R. CIV. P. 173.7 (enabling parties to seek mandamus relief based on the appointment of a guardian ad litem).

16. *See* TEX. R. APP. P. 52.3(e) (mandating that relief must first be sought in intermediate appellate courts); *see also* GOV'T §§ 22.220(a), (b) (establishing concurrent jurisdiction and when the supreme court may be petitioned); *id.* § 22.221 (describing the extent of writ power in the supreme court and the courts of appeal).

appeals may be bypassed if “compelling reasons” exist for the supreme court to grant mandamus relief.<sup>17</sup>

### III. THE TWO-PRONG STANDARD FOR MANDAMUS RELIEF

*Walker v. Packer*<sup>18</sup> established the two-prong test that courts apply to petitions for writ of mandamus.<sup>19</sup> Under this standard, the trial court must have abused its discretion, and as a result, the relator must have been left without an adequate remedy on appeal.<sup>20</sup>

#### A. Clear Abuse of Discretion

A “reviewing court may not substitute its judgment for that of the trial court” with regard to resolving matters committed to the trial court’s discretion of factual issues.<sup>21</sup> The relator must establish there is only one result that the trial court could have reasonably reached.<sup>22</sup> Because reasonable minds differ, the fact that one court would have decided the case differently will not give rise to an abuse of discretion “unless it is shown to be arbitrary and unreasonable.”<sup>23</sup> “A trial court has no ‘discretion’ in determining what the law is or applying the law to the facts.”<sup>24</sup> To satisfy the abuse of discretion standard on a factual issue, the relator must show there is only one result that the trial court could have reasonably reached.<sup>25</sup> Furthermore, the court abuses its discretion when the court misapplies the relevant law.<sup>26</sup>

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17. See TEX. R. APP. P. 52.3(e) (outlining the statement of jurisdiction required for mandamus petitions); *In re State Bar of Tex.*, 113 S.W.3d 730, 732–33 (Tex. 2003) (orig. proceeding) (explaining that compelling reasons existed in this case as a result of jurisdictional matters relating to the Board of Disciplinary Appeals’ authority to revoke an attorney’s license).

18. *Walker v. Packer*, 827 S.W.2d 833 (Tex. 1992) (orig. proceeding).

19. See *Walker*, 827 S.W.2d at 839–40 (providing that a party must establish that the trial court abused its discretion and that the party has no adequate remedy by appeal).

20. *Id.* at 839 (“Mandamus issues only to correct a clear abuse of discretion or the violation of a duty imposed by law when there is no other adequate remedy by law.” (quoting *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985))); see also *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135 (Tex. 2004) (orig. proceeding) (finding that two requirements must be met in order to receive mandamus relief).

21. *Walker*, 827 S.W.2d at 839 (citing *Flores v. Fourth Court of Appeals*, 777 S.W.2d 38, 41–42 (Tex. 1989)).

22. *Id.* at 840 (citing *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985) (orig. proceeding)).

23. *Id.* (citing *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985) (orig. proceeding)).

24. *Id.* (“[A] clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion . . .”).

25. See *id.* (noting the no adequate remedy by appeal requirement is well-settled).

26. See *id.* (instructing that a misapplication of the law constitutes an abuse of discretion).

### B. *Adequate Remedy at Law*

Mandamus relief will not issue when “the law has provided another plain, adequate, and complete remedy.”<sup>27</sup> It is a “‘fundamental tenet’ of mandamus practice” that an alternative appellate remedy must not exist before a court may grant mandamus relief.<sup>28</sup>

The general rule is that mandamus relief will not issue to correct a mere incidental trial court ruling when relator has an adequate remedy by appeal.<sup>29</sup> “The reluctance to issue extraordinary writs to correct incidental trial court rulings can be traced to a desire to prevent parties from attempting to use the writ as a substitute for an authorized appeal.”<sup>30</sup>

Since the supreme court issued *Walker*, intermediate appellate courts have employed a more categorized approach to determining whether mandamus relief is available.<sup>31</sup> Under this approach, the question of whether a trial court’s ruling qualifies for mandamus relief depends on whether the ruling falls within a category identified by the supreme court as lacking an adequate appellate remedy.<sup>32</sup> In *In re Prudential Insurance Co. of America*,<sup>33</sup> the supreme court distinguished between mandamus review of incidental interlocutory trial court rulings and significant rulings; the court explained that mandamus review of incidental rulings “unduly interferes with trial court proceedings, distracts appellate court attention to issues that are unimportant both to the ultimate disposition of the case at hand and to the uniform development of the law, and adds unproductively to the expense and delay of civil litigation.”<sup>34</sup> The court has consistently maintained that mandamus relief seeks to avoid interlocutory appeals of harmless trial court errors.<sup>35</sup>

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27. *Aycock v. Clark*, 94 Tex. 375, 60 S.W. 665, 666 (1901); *see also* *Canadian Helicopters v. Wittig*, 876 S.W.2d 304, 305–06 (Tex. 1994) (orig. proceeding) (affirming that mandamus relief must be the exclusive remedy for the parties); *Holloway v. Fifth Court of Appeals*, 767 S.W.2d 680, 684 (Tex. 1989) (orig. proceeding) (noting that parties must have no other available appellate relief).

28. *In re State Bar of Tex.*, 113 S.W.3d 730, 734 (Tex. 2003) (orig. proceeding) (quoting *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding)).

29. *In re Entergy Corp.*, 142 S.W.3d 316, 320–21 (Tex. 2004) (orig. proceeding) (explaining the reasoning behind the rule is courts want mandamus relief to be available to those parties who otherwise have no adequate remedy without the possibility of mandamus relief).

30. *Id.* at 320 (citations omitted).

31. *See, e.g., In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 464–69 (Tex. 2008) (orig. proceeding) (analyzing whether mandamus relief was available and applying the two-step approach from *Walker*).

32. *See Walker*, 827 S.W.2d at 843 (explaining how to determine the existence of an adequate appeal, which would prevent mandamus relief from issuing).

33. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124 (Tex. 2004) (orig. proceeding).

34. *Id.* at 136.

35. *See In re AIU Ins. Co.*, 148 S.W.3d 109, 118 (Tex. 2004) (orig. proceeding) (supporting the

In 2004, the court instituted a balancing test to determine whether a party has an adequate remedy by appeal, and it recognized that the adequacy of an appeal depends heavily on the facts involved in each case.<sup>36</sup> In conducting the balancing test, courts should look to a number of factors, including whether mandamus will: (1) preserve a relator's "substantive and procedural rights from impairment or loss[;]" (2) "allow the appellate courts to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgments[;]" and (3) prevent the waste of public and private resources invested in proceedings that would eventually be reversed.<sup>37</sup>

The supreme court expressly rejected the application of rigid rules in deciding whether a remedy on appeal is adequate.<sup>38</sup> The court reasoned that any formulaic rules or categorizations contradict the purpose of mandamus—to provide flexibility to parties and courts.<sup>39</sup> Overall, the message from *Prudential* is that the determination of whether an appellate remedy is adequate depends heavily on the circumstances of each case.<sup>40</sup>

The supreme court echoed this sentiment after *Prudential* when it provided: "There is no definitive list of when an appeal will be 'adequate,' as it depends on a careful balance of the case-specific benefits and detriments of delaying or interrupting a particular proceeding."<sup>41</sup> Thus, the court declined to provide a definitive explanation of what constitutes an adequate remedy by appeal.<sup>42</sup>

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court's prior decisions stating that interlocutory appeals of harmless error should not be the focus of mandamus relief); *Walker*, 827 S.W.2d at 843 (indicating the court's disapproval of issuing mandamus relief to correct what would have been harmless error on appeal).

36. See *Prudential*, 148 S.W.3d at 136 (issuing a fact-dependent analysis for application to the question of adequate remedy on appeal).

37. See *id.* (favoring a more encompassing approach than previously applied in mandamus relief analysis).

38. See *id.* ("[R]igid rules are necessarily inconsistent with the flexibility that is in the remedy's principal virtue.").

39. See *id.* (writing on the negatives of formula-driven analysis).

40. See *id.* at 137 (clarifying that a more wholesome approach should be applied when discerning whether there is an adequate remedy on appeal).

41. *In re Gulf Exploration, LLC*, 289 S.W.3d 836, 842 (Tex. 2009) (orig. proceeding) (footnote omitted) (affirming the evaluative measures espoused in *Prudential*).

42. *In re Ford Motor Co.*, 165 S.W.3d 315, 317 (Tex. 2005) (orig. proceeding) (per curiam) (failing to fully explain the boundaries of when a party has an adequate remedy by appeal). See generally Richard E. Flint, *The Evolving Standard for Granting Mandamus Relief in the Texas Supreme Court: One More "Mile Marker Down the Road of No Return"*, 39 ST. MARY'S L.J. 3, 131–38 (2007) (discussing the *Prudential* balancing test in practice).



## IV. COMMON REASONS FOR THE DENIAL OF MANDAMUS RELIEF

A. *Compliance with Texas Rule of Appellate Procedure 52*

TRAP 52 discusses all original proceedings and sets out the procedural requirements that must be met when a relator files a petition for writ of mandamus.<sup>43</sup> Failure to comply with TRAP 52 can result in the denial of the petition.<sup>44</sup>

## 1. Adequate Record

The most common reason for a court to deny a petition based on a procedural defect is the failure to provide an adequate record.<sup>45</sup> It is the lawyer's responsibility to assemble an adequate record in a timely fashion. First, the rules specifically require that the relator must provide a copy of the order at issue.<sup>46</sup> While there are some occasions in which it might be appropriate to review a trial court's oral ruling, the general rule is the relator must present the court with a signed order from the trial court.<sup>47</sup> The court of appeals in *In re Bledsoe*<sup>48</sup> explained that while parties are not encouraged to file a petition for writ of mandamus based on a trial court's oral ruling, an oral ruling may be considered if the record reflects there was an enforceable order.<sup>49</sup>

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43. See TEX. R. APP. P. 52 (creating rules for original proceedings).

44. See *id.* (providing rules for mandamus petitions); see also *In re 24R, Inc.*, 324 S.W.3d 564, 568 (Tex. 2010) (orig. proceeding) (per curiam) (entertaining the real party's argument that relator failed to comply with rule 52.7(a) and therefore waived a right to mandamus relief); *In re Lynd Co.*, 195 S.W.3d 682, 684 n.1 (Tex. 2006) (orig. proceeding) (reviewing the real party's claim that the relator did not comport with rule 52.7(a) and should therefore be denied mandamus relief); *In re Smith*, 279 S.W.3d 714 (Tex. App.—Amarillo 2007, orig. proceeding) (denying mandamus relief when the petitioner failed to accompany the petition with an appendix); see also TEX. R. APP. P. 52.3 (listing the requirements for the form and contents of the petition for mandamus); *In re Hartigan*, 107 S.W.3d 684, 688 (Tex. App.—San Antonio 2003, orig. proceeding [mand. denied]) (refusing to issue mandamus when the relator "failed to provide the court with either substantive analysis of her legal contentions or citation to authority supporting her contentions on the fraudulent inducement issue").

45. See TEX. R. APP. P. 52.3(k)(1)(A) (stating that "a sworn copy of any order complained of, or any other document showing the matter complained of" is necessary for the petition); *id.* R. 52.7(a) (requiring an original record be provided); *Walker v. Packer*, 827 S.W.2d 833, 837 (Tex. 1992) (orig. proceeding) (stressing that without a complete record, the court cannot determine what the trial court reviewed in reaching its conclusion).

46. TEX. R. APP. P. 52.3(k)(1)(A) (demanding evidence of the order at issue).

47. See *In re Bledsoe*, 41 S.W.3d 807, 811 (Tex. App.—Fort Worth 2001, orig. proceeding) (limiting mandamus relief when there is no written order provided to when the parties can show "the court's ruling is a clear, specific, and enforceable order that is adequately shown by the record").

48. *In re Bledsoe*, 41 S.W.3d 807 (Tex. App.—Fort Worth 2001, orig. proceeding).

49. See *id.* at 811 (emphasizing the importance of an accurate record); see also *In re Nabors*, 276 S.W.3d 190, 192 n.3 (Tex. App.—Houston [14th Dist.] 2009, orig. proceeding) (holding that an oral

TRAP 52.7(a) requires a relator to file with the petition “a certified or sworn copy of every document that is material to the relator’s claim for relief and that was filed in any underlying proceeding.”<sup>50</sup> For practical purposes, this usually refers to motions, orders, and other documents that are relied on or discussed in the petition for writ of mandamus.

Also, TRAP 52.7(a)(2) requires the filing of “a properly authenticated transcript of any relevant testimony from any underlying proceeding, including any exhibits offered in evidence, or a statement that no testimony was adduced in connection with the matter complained.”<sup>51</sup> Although this rule only specifically requires that a transcript be provided of any relevant testimony, courts have relied upon this rule to impose sanctions when a reporter’s record has not been filed in part or in whole, and a party has misled the court in the absence of the reporter’s record.<sup>52</sup> Parties are generally encouraged to file at a minimum the reporter’s record from the hearing complained of because this gives direct insight into the arguments made at the hearing and the trial court’s concerns or reasoning for a ruling, even if testimony was not actually adduced at the hearing.

## 2. Certification

TRAP 52.3(j) requires relator to file a separate certification indicating that the person filing the petition reviewed it and established all factual statements are supported by competent evidence either in the appendix or the record.<sup>53</sup> The relator must comply with the requirement of TRAP 52.3(j), or the petition may be denied on that basis alone.<sup>54</sup>

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ruling clearly shown in the reporter’s record is sufficient); *In re Mata*, 212 S.W.3d 597, 604 (Tex. App.—Austin 2006, orig. proceeding) (deciding an oral ruling is sufficient if reflected clearly in the record); *In re Bill Heard Chevrolet, Ltd.*, 209 S.W.3d 311, 314–15 (Tex. App.—Houston [1st Dist.] 2006, orig. proceeding) (asserting that the oral ruling must be found in the reporter’s record).

50. TEX. R. APP. P. 52.7(a)(1).

51. *Id.* R. 52.7(a)(2).

52. See *In re ADT Sec. Servs., S.A. de C.V.*, No. 04-08-00799-CV, 2009 WL 260577, at \*4–5 (Tex. App.—San Antonio Feb. 4, 2009, orig. proceeding [mand. denied]) (per curiam) (mem. op., not designated for publication) (allowing sanctions when a party misled the court).

53. TEX. R. APP. P. 52.3(j) (requiring the relator to “review . . . the petition and conclude . . . that every factual statement in the petition is supported by competent evidence included in the appendix or record”).

54. See, e.g., *In re Jordan*, No. 05-12-00185-CV, 2012 WL 506579, at \*1 (Tex. App.—Dallas Apr. 3, 2012, orig. proceeding) (mem. op.) (concluding that strict compliance with the rule is required or mandamus relief will be denied); *In re Butler*, 270 S.W.3d 757, 758 (Tex. App.—Dallas 2008, orig. proceeding) (finding the factual statements did not meet the requirements of the rules, and therefore, mandamus relief was denied).

### B. *Disputed Areas of Fact*

Mandamus relief will not issue if the right to relief turns on an issue of fact.<sup>55</sup> However, appellate courts are not prevented from issuing mandamus relief if the existence of a question of fact is wholly irrelevant to any issue before the court or is a matter that cannot be litigated in the case.<sup>56</sup>

### C. *Predicate Request*

As a general rule, mandamus is not available to compel a trial court to act if the action has not first been requested and then refused by the trial court.<sup>57</sup> When the request to the trial court would be futile, parties are excused from this requirement because the refusal would be a mere formality.<sup>58</sup>

### D. *Delay*

An unexplained delay in seeking relief from a trial court's order can result in a summary denial of a petition.<sup>59</sup> "Although mandamus is not an equitable remedy, its issuance is largely controlled by equitable

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55. See *Brady v. Fourteenth Court of Appeals*, 795 S.W.2d 712, 714 (Tex. 1990) (orig. proceeding) ("It is well established Texas law that an appellate court may not deal with disputed areas of fact in an original mandamus proceeding." (citing *West v. Solito*, 563 S.W.2d 240, 245 (Tex. 1978); *Dikeman v. Snell*, 490 S.W.2d 183, 186–87 (Tex. 1973))); see also *In re Angelini*, 186 S.W.3d 558, 559 (Tex. 2006) (orig. proceeding) (denying mandamus relief due to the existence of issues of fact regarding a candidate's filings to run for a position on the Fourth Court of Appeals); *In re Ford Motor Co.*, 988 S.W.2d 714, 722 (Tex. 1998) (orig. proceeding) (discussing issues of fact regarding "who is responsible for the car's changed condition that precludes us from granting mandamus relief"); *In re Elamex, S.A. de C.V.*, 367 S.W.3d 891, 900 (Tex. App.—El Paso 2012, orig. proceeding) (indicating that mandamus relief was not available due to a question of fact).

56. See, e.g., *Jones v. Robison*, 104 Tex. 70, 133 S.W. 879, 881 (Tex. 1911) (issuing mandamus relief despite a possible fact question because "that question could not be litigated in this case . . . and would be wholly irrelevant to any issue before this court").

57. See *In re Perritt*, 992 S.W.2d 444, 446 (Tex. 1999) (orig. proceeding) (per curiam) (holding that a party's right to mandamus relief generally requires a predicate request to the trial court for action and refusal of that request); *Terrazas v. Ramirez*, 829 S.W.2d 712, 714 (Tex. 1991) (orig. proceeding) (stating that the trial court should be approached first); *Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 556 (Tex. 1990) (orig. proceeding) (justifying the idea that the trial court should have the chance to act first).

58. See *Terrazas*, 829 S.W.2d at 725 (recognizing that the court has previously allowed parties to seek mandamus relief when they did not first present a request to the trial court because the demand would otherwise be futile (citing *Stoner v. Massey*, 586 S.W.2d 843 (Tex. 1979) (orig. proceeding))).

59. See generally Richard E. Flint, *The Evolving Standard for Granting Mandamus Relief in the Texas Supreme Court: One More "Mile Marker Down the Road of No Return"*, 39 ST. MARY'S L.J. 3, 6 n.5 (2007) (expressing that "mandamus is a legal remedy" influenced by equitable principles (citing *Rivercenter Assocs. v. Rivera*, 858 S.W.2d 366, 367 (Tex. 1993) (orig. proceeding))).

principles.”<sup>60</sup> When determining whether relator’s delay in seeking relief prevents the award of mandamus relief, courts often analogize to the doctrine of laches.<sup>61</sup> “A party asserting the defense of laches must show: (1) unreasonable delay by the other party in asserting its rights, and (2) harm resulting to the party as a result of the delay.”<sup>62</sup> If there has been a delay between the date the trial court entered the order complained of and the filing of the petition, relator should explain why there was a delay.<sup>63</sup>

#### E. *Other Remedies Available*

As previously mentioned, for a mandamus to be issued, a relator must have no other adequate remedy at law.<sup>64</sup> Often, mandamus filings are denied because other remedies are available, such as filing an interlocutory appeal.<sup>65</sup> Likewise, if the relator is responsible for the inadequacy of its appeal, mandamus relief will not be available.<sup>66</sup>

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60. *Rivercenter Assocs. v. Rivera*, 858 S.W.2d 366, 367 (Tex. 1993) (orig. proceeding) (noting that parties who delay in exercising their rights can prevent courts from issuing mandamus relief for that very reason (quoting *Callahan v. Giles*, 137 Tex. 571, 576, 155 S.W.2d 793, 795 (1941) (orig. proceeding))). *See generally In re Whipple*, 373 S.W.3d 119 (Tex. App.—San Antonio 2012, orig. proceeding) (holding that mandamus would not issue to prohibit the disclosure of an agent’s mental health records, which the trial court ordered to be produced approximately 17 months before the mandamus petition was filed).

61. *See In re N. Natural Gas Co.*, 327 S.W.3d 181, 188 (Tex. App.—San Antonio 2010, orig. proceeding [mand. denied]) (looking to the common law doctrine of laches to discuss waiver of mandamus relief as a result of the relator’s delay); *In re Hinterlong*, 109 S.W.3d 611, 620 (Tex. App.—Fort Worth 2003, orig. proceeding [mand. denied]) (“In determining if a relator’s delay in seeking a writ of mandamus is a barrier to issuance of the writ, a court may analogize to the doctrine of laches, which bars equitable relief.”); *Sanchez v. Hester*, 911 S.W.2d 173, 177 (Tex. App.—Corpus Christi 1995, orig. proceeding) (finding that the parties were not harmed by the seven-month delay).

62. *In re Coronado Energy E & P Co., LLC*, 341 S.W.3d 479, 483 (Tex. App.—San Antonio 2011, orig. proceeding [mand. denied]) (citations omitted) (applying the equitable doctrine of laches).

63. *See, e.g., Hinterlong*, 109 S.W.3d at 620 (suggesting that the relator is responsible for explaining the delay).

64. *In re State Bar of Tex.*, 113 S.W.3d 730, 734 (Tex. 2003) (orig. proceeding) (reiterating the importance that there be no other remedy available to the petitioner other than mandamus relief).

65. *See, e.g., In re Hydro Mgmt. Sys., LLC*, No. 04-09-00808-CV, 2009 WL 5062320 at \*1 (Tex. App.—San Antonio Dec. 23, 2009, orig. proceeding) (per curiam) (mem. op.) (denying mandamus because an interlocutory appeal is available from a trial court’s denial of a motion to compel arbitration under the Federal Arbitration Act).

66. *In re Ford Motor Co.*, 988 S.W.2d 714, 722 (Tex. 1998) (orig. proceeding) (citing *Rivercenter Assocs. v. Rivera*, 858 S.W.2d 366, 367 (Tex. 1993) (orig. proceeding)); *cf. In re Nat’l Health Ins. Co.*, 109 S.W.3d 552, 555 (Tex. App.—Tyler 2002, orig. proceeding) (holding that an unreasonable delay in filing a mandamus petition was not due to the relator’s fault, but instead was the result of the inability to obtain certified copies of court documents to file with petition).

## V. WHEN IS MANDAMUS REVIEW APPROPRIATE?: A NON-EXHAUSTIVE LIST OF RECENT ISSUES SUBJECT TO MANDAMUS

As the supreme court stated, there is no definitive or exhaustive list of situations when mandamus relief is appropriate and when an appeal may be inadequate because “it depends on a careful balance of the case-specific benefits and detriments of delaying or interrupting a particular proceeding.”<sup>67</sup> However, this Article attempts to serve as a guide for litigants and practitioners to recognize issues that courts have recently determined warrant mandamus relief. The following section will provide a non-exhaustive list of issues, spanning across different areas of the law, where courts have deemed mandamus relief is appropriate.

### A. *Discovery*

#### 1. Discovery Orders

Generally, the trial court has the discretion to determine the scope of discovery; however, the trial court must impose reasonable discovery limits.<sup>68</sup> A trial court’s discovery order that requires production beyond what the procedural rules permit is an abuse of discretion.<sup>69</sup> In a discovery context, there are general categories of rulings that courts have found to lack an adequate remedy on appeal when the trial court abuses its discretion.<sup>70</sup>

The first category is when the appellate court is unable to correct a trial court’s discovery error.<sup>71</sup> For instance, such relief is available when a trial court erroneously orders the discovery of trade secrets absent a showing of

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67. *In re Gulf Exploration, LLC*, 289 S.W.3d 836, 842 (Tex. 2009) (orig. proceeding) (reviewing the idea that there should be a balancing test applied to determine adequate remedy on appeal).

68. *See In re Deere & Co.*, 299 S.W.3d 819, 820 (Tex. 2009) (orig. proceeding) (per curiam) (noting that discovery orders should be limited to the relevant time frame).

69. *In re Dana Corp.*, 138 S.W.3d 298, 301 (Tex. 2004) (orig. proceeding) (per curiam) (clarifying that a “threshold showing of applicability must be made before a party can be ordered to produce multiple decades” worth of discovery); *see also* TEX. R. CIV. P. 192.3 (providing the scope of discovery for the district and county courts).

70. *See Walker v. Packer*, 827 S.W.2d 833, 843–44 (Tex. 1992) (orig. proceeding) (delineating the instances in the discovery setting where parties will have no adequate remedy by appeal).

71. *See id.* at 843 (declaring that there is an inadequate remedy on appeal when the trial court abuses its discretion by requiring disclosure of privileged information); *see also Dana*, 138 S.W.3d at 301 (finding there to be no adequate remedy on appeal when a trial court commits error which cannot be corrected on appeal (citing *Texaco, Inc. v. Sanderson*, 898 S.W.2d 813, 815 (Tex. 1995) (orig. proceeding)); *In re Colonial Pipeline Co.*, 968 S.W.2d 938, 941 (Tex. 1998) (orig. proceeding) (per curiam) (listing the reasons from *Walker* when an appellate court may not be able to cure the errors of the trial court).

necessity.<sup>72</sup> Additionally, “when the trial court erroneously allows the disclosure of privileged” documents, mandamus relief is warranted because the trial court’s error cannot later be remedied on appeal.<sup>73</sup> However, the supreme court has clarified that mandamus review may not be appropriate when the privileged or confidential information is “so innocuous or incidental that the burden of reviewing an order to produce them outweighs the benefits of such a review.”<sup>74</sup>

Likewise, an appellate court would not be able to cure the trial court’s discovery order when the trial court orders the production of “patently irrelevant or duplicative documents[,]” which constitutes harassment or inflicts such a burden on the producing party that it far outweighs any benefit the requesting party may obtain by the discovery.<sup>75</sup> Also, within this same category is an order compelling discovery that is overly broad.<sup>76</sup> Finally, some courts have permitted mandamus review of a trial court’s ruling on the location of a deposition.<sup>77</sup>

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72. See *In re Cont'l Gen. Tire, Inc.*, 979 S.W.2d 609, 615 (Tex. 1998) (orig. proceeding) (holding that the trial court abused its discretion in forcing Continental to produce documents containing trade secrets, and therefore, Continental was entitled to mandamus relief); accord *In re Bass*, 113 S.W.3d 735, 746 (Tex. 2003) (orig. proceeding) (finding that no adequate remedy by appeal existed).

73. *Walker*, 827 S.W.2d at 843 (asserting when a trial court orders production of privileged documents that “materially affect the rights of the aggrieved party[.]” there is no adequate remedy on appeal (citing *West v. Solito*, 563 S.W.2d 240 (Tex. 1978); *Automatic Drilling Machs. v. Miller*, 515 S.W.2d 256 (Tex. 1974))); see also *In re Living Ctrs. of Tex., Inc.*, 175 S.W.3d 253, 256 (Tex. 2005) (orig. proceeding) (holding mandamus relief appropriate to protect confidential documents from discovery); *In re E.I. DuPont de Nemours*, 136 S.W.3d 218, 222–23 (Tex. 2004) (orig. proceeding) (per curiam) (granting mandamus relief to correct the abuse of discretion when the relevant documents are found to be privileged); *In re Bridgestone/Firestone, Inc.*, 106 S.W.3d 730, 734 (Tex. 2003) (orig. proceeding) (overturning the trial court’s order to produce documents because the court found them to be privileged).

74. *In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 469 (Tex. 2008) (orig. proceeding).

75. See *In re CSX Corp.*, 124 S.W.3d 149, 153 (Tex. 2003) (orig. proceeding) (per curiam) (protecting parties from “fishing expeditions” (quoting *Walker v. Packer*, 827 S.W.2d 833, 843 (Tex. 1992) (orig. proceeding))); see also TEX. R. CIV. P. 192.3 (outlining the permissible scope of discovery).

76. See *In re Deere & Co.*, 299 S.W.3d 819, 820 (Tex. 2009) (orig. proceeding) (per curiam) (construing orders under TRCP 192.3 to determine whether they are too broad and finding that the “trial court made a proper effort to narrow discovery”); *Dana*, 138 S.W.3d at 304 (ordering the trial court to modify its discovery order to limit the discovery of insurance policies from 1945 to the present instead of all policies from 1930 to the present); *CSX*, 124 S.W.3d at 153 (concluding that a discovery order requiring production of documents from an unreasonably long period of time is overbroad and subject to mandamus relief); *In re Am. Optical Corp.*, 988 S.W.2d 711, 713 (Tex. 1998) (orig. proceeding) (per curiam) (holding that a discovery order requiring production of “virtually all documents regarding its products for a fifty-year period” was overly broad, and thus mandamus relief was appropriate).

77. See *Wal-Mart Stores, Inc. v. Street*, 754 S.W.2d 153, 155 (Tex. 1988) (granting mandamus relief to compel the location of a deposition); *Grass v. Golden*, 153 S.W.3d 659, 663 (Tex. App.—Tyler 2004, orig. proceeding) (finding the trial court’s order to be in conflict with TRCP 192.2, and

The second category of mandamus relief in the discovery context is when a “party’s ability to present a viable claim or defense is severely compromised or vitiated by the [trial court’s] erroneous discovery ruling.”<sup>78</sup> This occurs when the party “is effectively denied the ability to develop the merits of its case.”<sup>79</sup>

Finally, mandamus relief is granted when the trial court denies a party discovery and the missing discovery is omitted from the appellate record, thereby preventing the appellate court from being able to determine whether the trial court’s error was harmful or not.<sup>80</sup>

## 2. Setting Aside a Valid Discovery Agreement Without Good Cause

When a trial court, without good cause, sets aside an agreement entered into by the parties and defines the scope of permissible discovery—limiting the cost and accountability of litigating a dispute—the court has abused its discretion.<sup>81</sup> The supreme court has concluded that mandamus review is warranted in this situation because delaying review until appeal—when one party relied on the agreed discovery procedure

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thereby entitling the relator to mandamus relief), *mand. dismissed*, No. 12-04-00151-CV, 2004 WL 3021876 (Tex. App.—Tyler Dec. 30, 2004) (mem. op) (rendering a prior conditionally granted mandamus moot); *In re Rogers*, 43 S.W.3d 20, 29 (Tex. App.—Amarillo 2001, orig. proceeding) (stating the order was at odds with the rules and conditionally granting the writ of mandamus); *cf. In re N.E. Indep. Sch. Dist.*, No. 04-13-00248-CV, 2013 WL 2247485, at \*1 (Tex. App.—San Antonio May 22, 2013, orig. proceeding) (per curiam) (mem. op.) (declining to conduct mandamus review of a trial court’s order regarding the location of a deposition because the relator failed to establish that the trial court’s ruling was more than an incidental ruling warranting mandamus relief).

78. *In re Colonial Pipeline Co.*, 968 S.W.2d 938, 941 (Tex. 1998) (orig. proceeding) (upholding the premise that mandamus relief is available when the denial of a discovery order affects the party’s ability to present their claims); *see also Walker*, 827 S.W.2d at 843 (presenting the second situation in which mandamus relief is warranted in the discovery context).

79. *Colonial Pipeline*, 968 S.W.2d at 941; *Walker*, 827 S.W.2d 833, 843 (Tex. 1992) (noting that it’s an abuse of discretion, and there is a lack of adequate remedy on appeal, when the trial court begins “striking pleadings, dismissing an action, or rendering default judgment” (citing *TransAm. Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 919 (Tex. 1991))); *see also In re Allied Chem. Corp.*, 227 S.W.3d 652, 658 (Tex. 2007) (orig. proceeding) (summarizing the court’s review of discovery orders).

80. *See, e.g., Colonial Pipeline*, 968 S.W.2d at 941 (citing *Walker*, 827 S.W.2d at 843–44) (upholding the premise that the court can hear mandamus petitions when a trial court “disallows discovery”—preventing it from becoming part of the appellate record).

81. *See In re BP Prods. N. Am., Inc.*, 244 S.W.3d 840, 848 (Tex. 2008) (orig. proceeding) (finding that the trial court had “no valid basis for ignoring the parties’ agreement”); *see also* TEX. R. CIV. P. 191.2 (recognizing that parties may conference over discovery matters). The term “good cause” has different meanings throughout Texas caselaw; in this instance, the term represents the idea that the burdens and benefits should be weighed to determine if good cause exists to order production. *See generally In re Weekley Homes*, 295 S.W.3d 309, 317 (Tex. 2009) (orig. proceeding) (comparing the federal rule and the Texas rule and finding both require the balancing of relevant factors to determine whether there was good cause).

and had partially performed its obligations—would defeat the purpose of the discovery agreement.<sup>82</sup> In furtherance of its analysis of why mandamus relief is warranted in such a case, the court relied on public policy interests such as encouraging parties to resolve discovery conflicts without court orders and concluded the benefits to mandamus relief outweigh the detriments.<sup>83</sup>

### 3. Order Abating All Discovery

In *In re Van Waters & Rogers, Inc.*,<sup>84</sup> the supreme court held that the trial court's order abating virtually all discovery in a seven-year-old mass tort case warranted mandamus relief.<sup>85</sup> The court concluded that the order denied the defendants "discovery that goes to the heart of the litigation," and the prolonged abatement of discovery threatened the loss of critical evidence.<sup>86</sup> Therefore, the court held there was no adequate remedy by appeal from the order abating the discovery.<sup>87</sup>

### 4. Discovery Sanctions

Generally, a party has an adequate remedy by appeal from a trial court's order awarding attorney's fees or sanctions related to discovery because Texas Rule of Civil Procedure (TRCP) 215.2 provides that such an award is subject to review on appeal from a final judgment.<sup>88</sup> However, an appeal is not adequate when a trial court "imposes a monetary penalty on a party's prospective exercise of its legal rights."<sup>89</sup> In *In re Ford*,<sup>90</sup> the court

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82. See *BP Prods.*, 244 S.W.3d at 846 ("An easy disregard for partially performed agreements would discourage parties from committing to discovery agreements for fear that the other party would avail itself of the benefit of the bargain and then attempt to avoid its own obligations.")

83. See *id.* at 848–49 (granting mandamus to further the general public policy idea that parties should amicably resolve disputes throughout litigation when possible).

84. *In re Van Waters & Rogers, Inc.*, 62 S.W.3d 197 (Tex. 2001) (orig. proceeding) (per curiam).

85. See *id.* at 201 (condemning the trial court's action because there was a serious loss of evidence at issue).

86. *Id.*

87. See *id.* (finding no adequate remedy by appeal when the loss of evidence was at issue and the trial court abused its discretion in abating discovery). See generally *Walker v. Packer*, 827 S.W.2d 833, 839–44 (Tex. 1992) (orig. proceeding) (declaring the requirements for mandamus to issue: (1) a clear abuse of discretion on the part of the trial court, and (2) the party's lack of an adequate remedy on appeal to correct the abuse of discretion).

88. See TEX. R. CIV. P. 215.2 (introducing the situations in which courts can authorize sanctions for "failure to comply with [an] [o]rder or with [a] [d]iscovery request"); *In re Ford Motor Co.*, 988 S.W.2d 714, 722 (Tex. 1998) (orig. proceeding) ("Under [r]ule 215, the trial court must predicate its award of attorney's fees on a party's abuse of the discovery process or other sanctionable conduct.")

89. See *Ford Motor*, 988 S.W.2d at 722 ("If a party's sole relief were to pay the penalty and recover it in an eventual appeal, the party would need to consider whether mandamus relief, if obtained, would be worth the price.")



held that Ford lacked an adequate remedy by appeal from an order imposing discovery sanctions against Ford for seeking mandamus relief.<sup>91</sup> The court concluded:

A monetary penalty for seeking mandamus relief takes something that cannot be restored by appeal: the unfettered right to seek any relief that may be available by mandamus. The most [an] appeal can restore is the penalty improperly imposed; it cannot free the party of the chilling effect the penalty has on the exercise of the party's legal rights.<sup>92</sup>

Mandamus relief may be available to parties when the court orders discovery sanctions to be paid prior to the final judgment.<sup>93</sup> However, when the court defers payment of discovery sanctions until the final judgment in the case, the party has an adequate remedy by appeal because it presents no barrier to continuing the current suit.<sup>94</sup> The court noted a just discovery sanctions order (1) must be directed toward remedying the prejudice caused to the innocent party, and (2) "should fit the crime."<sup>95</sup>

#### 5. Presuit Discovery

Mandamus relief is available when a trial court orders a pre-suit deposition without making the findings required by TRCP 202.4.<sup>96</sup> TRCP

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90. *In re Ford Motor Co.*, 988 S.W.2d 714 (Tex. 1998) (orig. proceeding).

91. *Id.* at 723.

92. *Id.* at 722.

93. *See Braden v. Downey*, 811 S.W.2d 922, 929 (Tex. 1991) (orig. proceeding) (opining that when parties must pay discovery sanctions prior to the final judgment, there might be some barrier to continuing the suit, and therefore, mandamus relief is warranted); *TransAm. Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991) (orig. proceeding) (deciding the relator had no adequate remedy by appeal because discovery sanctions were to be paid before the final judgment, thereby entitling the relator to mandamus relief).

94. *See Braden*, 811 S.W.2d at 929 (presuming that a party could appeal a final judgment if the court delayed payment until the final disposition of the parties and issues at hand, but finding that the relator did not have an adequate remedy by appeal). *See generally* Lisa Ann Mokry, Note, *Discovery Sanctions Must Be "Just," Consistent with Due Process, and Are Subject to Mandamus Review*, *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913 (Tex. 1991), 23 TEX. TECH L. REV. 617 (1992) (discussing the imposition of discovery sanctions and mandamus relief).

95. *In re SCI Tex. Funeral Servs., Inc.*, 236 S.W.3d 759, 761 (Tex. 2007) (orig. proceeding) (per curiam) (quoting *TransAm. Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991)).

96. TEX. R. CIV. P. 202.4 (delineating the requirements for an order authorizing a pre-suit deposition); *In re Does*, 337 S.W.3d 862, 865 (Tex. 2011) (orig. proceeding) (per curiam) (finding that the trial court abused its discretion "in failing to follow [r]ule 202"); *see also In re CSX Corp.*, 124 S.W.3d 149, 152 (Tex. 1992) (orig. proceeding) (per curiam) (clarifying that when a trial court does not follow the rules of procedure, it constitutes an abuse of discretion, which can be remedied by a petition for writ of mandamus); *In re Univ. of Tex. Health Ctr. at Tyler*, 198 S.W.3d 392, 396 (Tex. App.—Texarkana 2006, orig. proceeding) (citing *Huie v. DeShazo*, 922 S.W.2d 920, 927–28 (Tex. 1996)) (noting that departures from the rules of civil procedure amount to an abuse of discretion).

202.4(a) requires the trial court to find that:

- (1) allowing the petitioner to take the requested deposition may prevent a failure or delay of justice in an anticipated suit; or
- (2) the likely benefit of allowing the petitioner to take the requested deposition to investigate a potential claim outweighs the burden or expense of the procedure.<sup>97</sup>

If the trial court fails to make the required findings, it is an abuse of discretion to order the pre-suit deposition, and mandamus relief is available because the party to a TRCP 202 proceeding lacks an adequate remedy by appeal.<sup>98</sup>

## B. *Disqualification and Conflicts of Interest*

### 1. Trial Court Judge

There are various reasons why a trial court judge may be removed from a case, such as a constitutional or statutory disqualification, a statutory strike, or recusal.<sup>99</sup> However, not all of these rulings are subject to mandamus review.<sup>100</sup> When a trial court judge continues to sit in violation of the Constitution, or when the judge is statutorily disqualified, mandamus relief is available to compel the judge's mandatory disqualification without showing the party lacks an adequate remedy by appeal.<sup>101</sup> However, mandamus relief is not available to review an order

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97. TEX. R. CIV. P. 202.4(a).

98. See *In re Does*, 337 S.W.3d 862, 865 (Tex. 2011) (orig. proceeding) (per curiam) (citing *In re Jorden*, 249 S.W.3d 416, 420 (Tex. 2008) (orig. proceeding) (finding that the remedy for noncompliance in TRCP 202.5 "affords relators no relief from their complaint," and the abuse of discretion by the trial court prompts mandamus relief); see also TEX. R. CIV. P. 202.4 (discussing depositions)).

99. See TEX. CONST. art. V, § 11 (warning that disqualification results when a presiding judge "may be interested, or where either of the parties may be connected with the judge, either by affinity of consanguinity[,] . . . or when the judge shall have been counsel in the case"); TEX. GOV'T CODE ANN. § 74.053(d) (West 2013) (providing a statutory strike for recusing a judge); TEX. R. APP. P. 16.1–3 (listing the grounds for recusal); TEX. R. CIV. P. 18a (organizing the procedure for recusal and disqualification); *id.* R. 18b (enumerating the possible bases for recusal and disqualification).

100. See *In re Union Pac. Res. Co.*, 969 S.W.2d 427, 428–29 (Tex. 1998) (orig. proceeding) (differentiating between a void order, which results from disqualified judges or judges who should have recused themselves, and a voidable order—when recusal was referred to the presiding judge to review and the judge was allowed to hear the case).

101. See *id.* at 428 (authorizing mandamus review without a showing that the party lacks adequate remedy by appeal when the trial judge continues to sit in violation of constitutional proscription or when the trial judge is mandatorily disqualified under section 74.053(d)); TEX. R. CIV. P. 18a(j)(2) ("An order granting or denying a motion to disqualify may be reviewed by mandamus and may be appealed in accordance with other law.").

denying a motion to recuse a trial court judge.<sup>102</sup> Instead, TRCP 18a(j)(1) expressly provides for appellate review of an order denying the motion to recuse only after a final judgment.<sup>103</sup>

## 2. Trial Counsel

The supreme court has continuously held that mandamus relief is appropriate to correct an erroneous order disqualifying counsel because there is no adequate remedy by appeal to correct the error.<sup>104</sup> In *National Medical Enterprises v. Godbey*,<sup>105</sup> the court held that waiting to appeal an order denying a party's motion to disqualify counsel does not adequately remedy the injury to the party that must defend the litigation or the injury to the legal profession.<sup>106</sup>

## C. Venue

Outside the ambit of mandatory venue determinations under section 15.0642 of the Texas Civil Practice and Remedies Code (TCPRC), venue determinations are generally not subject to mandamus review.<sup>107</sup>

102. See TEX. R. CIV. P. 18a(j)(1)(A)–(B) (prohibiting mandamus relief from an order denying a motion to recuse); *Union Pac.*, 969 S.W.2d at 428 (refusing to review a recusal motion as a basis for mandamus relief).

103. TEX. R. CIV. P. 18a(j)(1)(A)–(B) (“An order denying a motion to recuse may be reviewed only for abuse of discretion on appeal from the final judgment,” and “[a]n order granting a motion to recuse is final and cannot be reviewed by appeal, mandamus, or otherwise.”).

104. *Nat'l Med. Enter., Inc. v. Godbey*, 924 S.W.2d 123, 133 (Tex. 1996) (orig. proceeding) (stating that to be entitled to mandamus relief, the relator must establish a clear abuse of discretion by disqualifying counsel); see also *In re Guar. Ins. Servs.*, 343 S.W.3d 130, 132–35 (Tex. 2011) (orig. proceeding) (per curiam) (discussing the difference in disqualification standards between lawyers and non-lawyers); *In re EPIC Holdings, Inc.*, 985 S.W.2d 41, 54 (Tex. 1998) (orig. proceeding) (issuing mandamus to correct an abuse of discretion in disqualifying attorneys); cf. *In re Columbia Valley Healthcare Sys.*, 320 S.W.3d 819, 828–29 (Tex. 2010) (orig. proceeding) (holding disqualification of the firm was necessary where a legal assistant was not properly screened from a legal matter that she had worked on at former firm); *In re Sanders*, 153 S.W.3d 54, 56 (Tex. 2004) (orig. proceeding) (per curiam) (identifying that the disqualification of an attorney under the lawyer–witness rule was not warranted); *In re Nitla S.A.*, 92 S.W.3d 419, 423 (Tex. 2002) (orig. proceeding) (per curiam) (finding the disqualification of counsel unnecessary where a less severe measure could cure the alleged harm); *In re Garza*, 373 S.W.3d 115, 118 (Tex. App.—San Antonio 2012, orig. proceeding) (asserting that an attorney's previous role as the notary who witnessed a signing of the earlier deed neither rendered her testimony necessary, nor provided grounds to support the motion to disqualify).

105. *Nat'l Med. Enter., Inc. v. Godbey*, 924 S.W.2d 123 (Tex. 1996) (orig. proceeding).

106. See *id.* at 132–33 (contending that motions to disqualify counsel can be reviewed by mandamus).

107. See *In re Team Rocket, LP*, 256 S.W.3d 257, 259–63 (Tex. 2008) (orig. proceeding) (noting that venue orders are not usually subject to mandamus relief because they are interlocutory in nature); see also TEX. CIV. PRAC. & REM. CODE ANN. § 15.0642 (West 2002) (justifying the use of mandamus to enforce mandatory venue provisions).

However, as discussed below, the supreme court has granted relief both when the trial court violates TRCP 87 and in some other matters involving extraordinary circumstances.<sup>108</sup>

### 1. Mandatory Venue

The TCPRC specifically authorizes mandamus relief to enforce the mandatory venue provisions.<sup>109</sup> In *In re Missouri Pacific Railroad Co.*,<sup>110</sup> the supreme court concluded that a showing of an inadequate appellate remedy is not a requirement for mandamus relief under section 15.0642 when mandatory venue is at issue.<sup>111</sup> Therefore, “the focus of a mandamus proceeding under section 15.0642 is whether the trial court abused its discretion.”<sup>112</sup> However, the statute imposes strict time restrictions on the filing of a petition for writ of mandamus by requiring that petitions be filed “before the later of (1) the 90th day before the date the trial starts; or (2) the 10th day after the date the party receives notice of the trial setting.”<sup>113</sup>

### 2. Texas Rule of Civil Procedure 87

TRCP 87 lays out the procedural requirements for a determination regarding motions to transfer venue.<sup>114</sup> Mandamus relief is granted when a trial court fails to follow rule 87.<sup>115</sup>

### 3. Exceptional Circumstances

In *In re Masonite*,<sup>116</sup> after denying the motion to transfer venue, the trial court on its own motion severed the claims of the non-resident homeowners and transferred the cases to the counties of their respective

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108. TEX. R. CIV. P. 87.

109. CIV. PRAC. & REM. § 15.0642.

110. *In re Mo. Pac. R.R. Co.*, 998 S.W.2d 212 (Tex. 1999) (orig. proceeding).

111. See CIV. PRAC. & REM. § 15.0642 (protecting the right of mandamus to enforce mandatory venue provisions); *Mo. Pac.*, 998 S.W.2d at 216 (interpreting the statute to not require an inadequate appellate remedy for mandamus relief to issue when “mandatory venue mandamus under section 15.0642” is at issue).

112. *Mo. Pac.*, 998 S.W.2d at 216.

113. CIV. PRAC. & REM. § 15.0642.

114. See TEX. R. CIV. P. 87 (discussing the components a trial judge must consider in a motion to transfer venue hearing).

115. See *In re Team Rocket, LP*, 256 S.W.3d 257, 262–63 (Tex. 2008) (orig. proceeding) (citing TEX. R. CIV. P. 87(5)) (holding that the trial court violated rule 87(5), and therefore abused its discretion).

116. *In re Masonite Corp.*, 997 S.W.2d 194 (Tex. 1999) (orig. proceeding).

residences—not the venue the defendant requested.<sup>117</sup> The court concluded that while venue determinations are not typically subject to mandamus, this case presented exceptional circumstances warranting mandamus relief.<sup>118</sup> The court determined the exceptional circumstances were that the trial court wrongfully burdened fourteen other courts in fourteen other counties, hundreds of potential jurors in those counties, and thousands of taxpayer dollars.<sup>119</sup>

*Union Carbide Corp. v. Moye*<sup>120</sup> presents another case involving exceptional circumstances warranting mandamus review.<sup>121</sup> On the day of the hearing on the motion to transfer venue, the trial court ordered no live testimony would be permitted.<sup>122</sup> Union Carbide then sought a continuance so it could supplement the record with affidavits and other discovery.<sup>123</sup> The trial court denied the continuance and the motion to transfer venue.<sup>124</sup> The supreme court concluded, “Justice require[d] that Union Carbide be afforded a reasonable opportunity to supplement the venue record with appropriate affidavits and discovery products prior to the trial court’s ruling on the venue motion.”<sup>125</sup> As a result, the court granted mandamus relief.<sup>126</sup>

#### D. *Plea in Abatement*

A plea in abatement is an incidental trial court ruling that usually does not support mandamus relief.<sup>127</sup> The only exception to this general rule is

117. *See id.* at 199 (criticizing the trial court for wasting judicial resources and stating this was not an “ordinary situation where a trial erroneously denies a motion to transfer venue motion”).

118. *See id.* (citing *Can. Helicopters v. Wittig*, 876 S.W.2d 304 (Tex. 1994)) (claiming that the current decision does not override earlier decisions, which declared that a party must show no adequate appellate remedy before receiving mandamus relief).

119. *See id.* (“Appeal may be adequate for a particular party, but it is no remedy at all for the irreversible waste of judicial and public resources that would be required here if mandamus does not issue.”).

120. *Union Carbide Corp. v. Moye*, 798 S.W.2d 792 (Tex. 1990) (orig. proceeding).

121. *See id.* at 796 (defining the exceptional circumstances in the case as an unfair surprise when the defendant had less than twenty-four hours to respond to a motion).

122. *See id.* at 793 (reporting that the defendants argued for additional time to supplement their pleadings).

123. *Id.* (moving for a continuance after the court denied the admittance of any oral testimony so that Union Carbide could bring in additional evidence).

124. *Id.*

125. *See id.* (asserting that the trial court abused its discretion in not allowing Union Carbide more time).

126. *See id.* (finding that in addition to the abuse of discretion, the exceptional circumstances rendered no adequate remedy on appeal for Union Carbide).

127. *Abor v. Black*, 695 S.W.2d 564, 566–67 (Tex. 1985) (orig. proceeding) (stating no disregard for ministerial duty or abuse of discretion in the case at-hand; therefore, the relator had an

when a trial court actively interferes with another trial court exercising dominant jurisdiction.<sup>128</sup>

The general common law rule is that a trial court acquires dominant jurisdiction when a suit is first filed in that court.<sup>129</sup> If a second suit is subsequently filed in another court involving the same controversy and the same parties, and the two courts have concurrent jurisdiction, “a dilatory plea in abatement is the proper method for drawing a court’s attention to another court’s possible dominant jurisdiction.”<sup>130</sup> Accordingly, mandamus relief is available when there is a conflict in jurisdiction where one of the trial courts issues an order that “actively interferes with the exercise of jurisdiction by a court possessing dominant jurisdiction.”<sup>131</sup>

However, even when there is no “active interference” with another court’s dominant jurisdiction, the Fourth Court of Appeals has held mandamus relief is appropriate.<sup>132</sup> In *In re ExxonMobil Products Co.*,<sup>133</sup> the

adequate remedy on appeal); *accord In re Puig*, 351 S.W.3d 301, 306 (Tex. 2011) (orig. proceeding) (per curiam) (stating that pleas in abatement do not usually warrant mandamus relief).

128. *See Puig*, 351 S.W.3d at 306 (citing *Perry v. Del Rio*, 66 S.W.3d 239, 258 (Tex. 2001) (orig. proceeding)) (describing situations where mandamus relief may be available, such as when the court interferes with another court’s dominant jurisdiction).

129. *See Wyatt v. Shaw Plumbing Co.*, 760 S.W.2d 245, 248 (Tex. 1988) (“When an inherent interrelation of the subject matter exists in two pending lawsuits, a plea in abatement in the second action must be granted.”); *Curtis v. Gibbs*, 511 S.W.2d 263, 267 (Tex. 1974) (orig. proceeding) (reiterating the old principle that the court who first acquires jurisdiction retains it, barring other circumstances).

130. *Puig*, 351 S.W.3d at 305.

131. *Id.* at 306 (citations omitted); *see also Perry v. Del Rio*, 66 S.W.3d 239, 258 (Tex. 2001) (orig. proceeding) (restating the principle that mandamus will issue when one court interferes with another’s dominant jurisdiction and granting mandamus to the relator to abate other proceedings); *Curtis*, 511 S.W.2d at 266–68 (discussing a child custody and support order filed in one court and then a subsequent modification filed in another county, and issuing mandamus to compel the second proceeding to be dismissed). Appellate courts have frequently declined to grant mandamus relief unless the relator established a conflict of jurisdiction in accordance with *Abor*. *See generally In re Brown*, No. 06-10-00108-CV, 2010 WL 4880675, at \*1–2 (Tex. App.—Texarkana Nov. 30, 2010, orig. proceeding) (mem. op.) (“It’s only when one court interferes with the jurisdiction of the other that mandamus becomes an appropriate remedy.”); *In re Akins*, No. 09-09-00447-CV, 2009 WL 3763776, at \*1–2 (Tex. App.—Beaumont Nov. 12, 2009, orig. proceeding) (per curiam) (mem. op.) (authorizing mandamus when a trial court interferes with the dominant jurisdiction of another); *In re Barnes*, No. 04-07-00864-CV, 2007 WL 4375222, at \*1 (Tex. App.—San Antonio Dec. 17, 2007, orig. proceeding [mand. denied]) (per curiam) (mem. op.) (“The exception is when one court actively interferes with another court’s jurisdiction.” (citing *In re SWEPI, LP*, 85 S.W.3d 800, 809 (Tex. 2002); *Hall v. Lawlis*, 907 S.W.2d 493, 494 (Tex. 1995))).

132. *In re ExxonMobil Prod. Co.*, 340 S.W.3d 852, 857 (Tex. App.—San Antonio 2011, orig. proceeding [mand. denied]) (finding that the relator lacked adequate remedy on appeal to correct the trial court’s abuse of discretion).

133. *In re ExxonMobil Prod. Co.*, 340 S.W.3d 852 (Tex. App.—San Antonio 2011, orig. proceeding [mand. denied]).

court balanced the factors outlined in *Prudential* and determined that although there was no trial court order actively interfering with the second trial court, mandamus relief was still appropriate because ExxonMobil lacked an adequate remedy by appeal.<sup>134</sup> The court concluded the holding in *Abor v. Black*<sup>135</sup>—which limited mandamus relief to conflicts of jurisdiction in plea in abatement cases—“is an example of the type of rigid rule that *Prudential* rejected.”<sup>136</sup> “Limiting mandamus relief as per *Abor* precludes the flexibility of the remedy in plea in abatement cases because *Abor*’s holding fails to account for any case-by-case consideration of the benefits and detriments of mandamus review.”<sup>137</sup>

#### E. Plea to the Jurisdiction

A ruling on a plea to the jurisdiction usually qualifies as an incidental trial court ruling that is not subject to mandamus review.<sup>138</sup> An exception to this rule is when a trial court denies a plea to the jurisdiction and renders an order that directly interferes with another court’s jurisdiction.<sup>139</sup> In *In re SWEPI*,<sup>140</sup> the court issued mandamus relief after the probate court issued an order transferring a suit from another court to it without statutory authority to do so, thereby actively interfering with the other court’s jurisdiction over the case.<sup>141</sup>

134. *See id.* at 857–59 (citing *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124 (Tex. 2004) (orig. proceeding)) (looking to the benefits and the detriments of granting mandamus and determining the relator lacked an adequate remedy on appeal).

135. *Abor v. Black*, 695 S.W.2d 564, 567 (Tex. 1985) (orig. proceeding).

136. *ExxonMobil*, 340 S.W.3d at 858. (citing *Abor*, 695 S.W.2d at 567); *see also In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (giving courts discretion in weighing the factors for and against granting mandamus).

137. *ExxonMobil*, 340 S.W.3d at 858.

138. *See In re Entergy Corp.*, 142 S.W.3d 316, 320–21 (Tex. 2004) (orig. proceeding) (describing the policy reasons restricting mandamus review); *Bell Helicopter Textron, Inc. v. Walker*, 787 S.W.2d 954, 955 (Tex. 1990) (orig. proceeding) (per curiam) (refusing to grant mandamus after concluding that the relator had an adequate appellate remedy from the trial court’s ruling (citing *Abor*, 695 S.W.2d at 566–67)); *Pope v. Ferguson*, 445 S.W.2d 950, 954 (Tex. 1969) (orig. proceeding), *cert. denied*, 397 U.S. 997 (1970) (reiterating that the court does not issue mandamus for incidental trial court rulings).

139. *See In re SWEPI, LP*, 85 S.W.3d 800, 808–09 (Tex. 2002) (orig. proceeding) (issuing mandamus and finding that the probate court erroneously thought it had jurisdiction, which interfered with the jurisdiction of a county court); *see also In re State Bar of Tex.*, 113 S.W.3d 730, 734 (Tex. 2003) (orig. proceeding) (reviewing the applicability of mandamus to situations where the trial court interferes with the jurisdiction of another); *In re La.-Pac. Corp.*, 112 S.W.3d 185, 190 (Tex. App.—Beaumont 2003, orig. proceeding) (“Where the outcome of a presently-pending workers’ compensation proceeding would preclude liability in the parallel litigation, there is no adequate remedy by appeal.”).

140. *In re SWEPI, LP*, 85 S.W.3d 800 (Tex. 2002) (orig. proceeding).

141. *See id.* at 809 (necessitating mandamus relief to correct interference).

A second exception to the general rule that a plea to the jurisdiction is not subject to mandamus review is when an agency has exclusive jurisdiction over a dispute.<sup>142</sup> The court reasoned that allowing the trial court to proceed when an agency has exclusive jurisdiction would disrupt the orderly processes of government.<sup>143</sup> Furthermore, the hardship occasioned by postponing appellate review “warrants an exception to our general proscription against using mandamus to correct incidental trial court rulings.”<sup>144</sup>

#### F. *Temporary Restraining Order*

A temporary restraining order is generally not appealable because of its interlocutory nature; however, courts have found mandamus to be an appropriate remedy for a trial court's erroneous grant or denial of a temporary restraining order.<sup>145</sup> For example, in *In re Office of Attorney General*,<sup>146</sup> the supreme court held that mandamus was available to vacate a trial court's temporary restraining order that violated TRCP 680 and 684.<sup>147</sup> In that case, the “original and first amended orders were granted ex parte,” but the court did not “explain why they were granted without

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142. *In re Sw. Bell Tel. Co., LP*, 235 S.W.3d 619, 624 (Tex. 2007) (orig. proceeding) (noting that the Public Utilities Commission had exclusive jurisdiction and granting mandamus to instruct the trial court to vacate its orders and dismiss the claims); *In re State Bar of Tex.*, 113 S.W.3d 730, 734 (Tex. 2003) (orig. proceeding) (concluding that appellate relief was inadequate because the trial court issued an order that interfered with the Board of Disciplinary Appeals' continuing jurisdiction); see also *In re Liberty Mut. Fire Ins. Co.*, 295 S.W.3d 327, 328 (Tex. 2009) (orig. proceeding) (per curiam) (holding that because the Workers' Compensation Division had exclusive jurisdiction to first determine the dispute administratively, the trial court's failure to grant a plea to the jurisdiction was correctible by mandamus).

143. *Acord Entergy*, 142 S.W.3d at 321 (expressing the idea that mandamus can be used to compel acts when non-compliance can affect the operation of government (quoting *State v. Sewell*, 487 S.W.2d 716, 719 (Tex. 1972))).

144. *Id.*

145. *In re Office of Atty. Gen.*, 257 S.W.3d 695, 697–98 (Tex. 2008) (orig. proceeding) (per curiam) (approving the petition for mandamus based on the trial court's abuse of discretion in regard to a temporary restraining order because the relator lacked adequate remedy on appeal); *In re Tex. Natural Res. Conservation Comm'n*, 85 S.W.3d 201, 207 (Tex. 2002) (orig. proceeding) (holding mandamus relief was available to remedy a temporary restraining order that violated a 14-day time limit for such orders); *In re Spiritas Ranch Enters.*, 218 S.W.3d 887, 898–99 (Tex. App.—Fort Worth 2007, orig. proceeding) (holding mandamus relief available to vacate the denial of a temporary restraining order that would have preserved the relator's right to arbitration before property was annexed).

146. *In re Office of Atty. Gen.*, 257 S.W.3d 695 (Tex. 2008) (orig. proceeding) (per curiam).

147. *Id.* at 697–98 (concluding that the trial court's misapplication of the law and relator's unavailability of appeal warranted mandamus relief); see also TEX. R. CIV. P. 680 (providing the requirements for a court to grant a temporary restraining order); *id.* R. 684 (requiring bond for a temporary restraining order).



notice” as required under rule 680.<sup>148</sup> The supreme court also held that mandamus is available when a temporary restraining order is issued and waiting to appeal would leave the parties without adequate remedy on appeal because of the timely nature of elections.<sup>149</sup> In *In re Newton*,<sup>150</sup> the court held that temporary restraining orders are generally not appealable; notwithstanding this general principle, when an election concludes before any proceedings in the trial court can be appealed, relators are left without adequate appellate remedy and can seek mandamus relief.<sup>151</sup>

### G. Temporary Injunction

A temporary injunction is an appealable interlocutory order.<sup>152</sup> The supreme court held that mandamus is appropriate to review a temporary injunction when an accelerated appeal<sup>153</sup> would be inadequate.<sup>154</sup> In *In re Francis*,<sup>155</sup> the court stated that “[w]hen a candidate has been denied a place on the ballot due to official error,” the court typically grants mandamus relief.<sup>156</sup> The court conditionally granted the petition for writ of mandamus and directed the trial court to vacate the temporary injunction order that excluded the candidate from the ballot.<sup>157</sup>

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148. *See Atty. Gen.*, 257 S.W.3d at 697–98 (citing *Tex. Natural Res.*, 85 S.W.3d at 205) (finding that the attorney general had no adequate remedy on appeal because temporary restraining orders are not appealable and that the agency could lose federal funding if it complied with the court’s order); *see also* TEX. R. CIV. P. 680 (mandating that irreparable loss or harm be shown before a temporary injunction may be issued).

149. *See* *Sears v. Bayoud*, 786 S.W.2d 248, 249–50 (Tex. 1990) (orig. proceeding) (finding immediate review necessary due to the election circumstances); *Thiel v. Harris Cnty. Dem. Exec. Comm.*, 534 S.W.2d 891, 895 (Tex. 1976) (orig. proceeding) (“Although this application was not made to the court of civil appeals, it was entertained . . . [because] it has statewide application . . .”); *see also* *In re Newton*, 146 S.W.3d 648, 652–53 (Tex. 2004) (orig. proceeding) (concluding that the timing of elections would leave the party without adequate remedy on appeal).

150. *In re Newton*, 146 S.W.3d 648 (Tex. 2004) (orig. proceeding).

151. *See id.* at 652–53 (granting mandamus relief in this situation because the parties could not correct the trial court’s abuse of discretion on appeal as the election would have already transpired).

152. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a) (West Supp. 2013) (“A person may appeal from an interlocutory order of a district court, county court at law, or county court that . . . grants or refuses a temporary injunction . . .”).

153. *See* TEX. R. APP. P. 28.1 (promulgating the requirements of an accelerated appeal).

154. *See, e.g., In re Francis*, 186 S.W.3d 534, 538 (Tex. 2006) (orig. proceeding) (clarifying that an accelerated appeal will be inadequate when the issue would otherwise become moot); *Rep. Party v. Dietz*, 940 S.W.2d 86, 93–94 (Tex. 1997) (orig. proceeding) (holding mandamus review was proper because the urgency and statewide application of the injunction necessitated immediate review).

155. *In re Francis*, 186 S.W.3d 534 (Tex. 2006) (orig. proceeding).

156. *Id.* at 543 (citing *Davis v. Taylor*, 930 S.W.2d 581, 583 (Tex. 1996) (orig. proceeding)).

157. *See id.* (directing the trial court to allow the candidate to correct a defect that prevented him from securing a place on the ballot).

#### H. *Motion for Continuance*

Ordinarily, the denial of a motion for continuance is an incidental trial court ruling that is not reviewable by mandamus.<sup>158</sup> Occasionally, courts review a trial court's ruling on a motion for continuance.<sup>159</sup> For example, in *General Motors Corp. v. Gayle*,<sup>160</sup> the court acknowledged that a trial court's order denying a motion for continuance is an incidental trial ruling that is not reviewable by mandamus, and in the absence of any other error, the court "would not grant extraordinary relief merely to revise a trial judge's scheduling order, however perverse."<sup>161</sup> Nonetheless, the court concluded the case presented "special circumstances" because the court already had to remedy another trial court error subject to mandamus review in the same action before it.<sup>162</sup> As a result, the court concluded that it should correct the trial court's error in denying the motion for continuance in order to promote judicial efficiency and use of resources.<sup>163</sup>

Additionally, in *In re Ford Motor Co.*,<sup>164</sup> the supreme court granted mandamus relief from the trial court's denial of a legislative continuance.<sup>165</sup> TCPRC section 30.003 requires a trial court to grant a motion for continuance if a lawyer-legislator is retained more than thirty days before the date a civil case is set for trial, and the lawyer-legislator will

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158. See *Gen. Motors Corp. v. Gayle*, 951 S.W.2d 469, 477 (Tex. 1997) (orig. proceeding) (pointing to the special circumstances that warranted mandamus review of a crash-test order).

159. See *In re Ford Motor Co.*, 165 S.W.3d 315, 322 (Tex. 2005) (orig. proceeding) (per curiam) (citing *In re Prudential Ins. Co. of Am.*, 198 S.W.3d 124, 136–37 (Tex. 2004) (orig. proceeding) (upholding the need for legislative continuances as a public policy concern and issuing mandamus for the Texas cases to be stayed pending the action in Tennessee); *Gayle*, 951 S.W.2d at 477 (citing General Motors' claim that the motion for continuance would cause no undue delay to the plaintiffs and that the trial court knew the case was not ready to proceed to trial); see also *In re Oliver*, No. 10-05-00213-CV, 2005 WL 1531712, at \*3 (Tex. App.—Waco June 29, 2005, orig. proceeding) (per curiam) (mem. op.) (granting mandamus relief from a trial court's denial of a motion for continuance in a family law proceeding where such denial required the relator to proceed with her claim for increased child support without a necessary expert); *In re N. Am. Refractories Co.*, 71 S.W.3d 391, 394 (Tex. App.—Beaumont 2001, orig. proceeding) (granting mandamus relief when the trial court violated a local rule by denying a motion for continuance despite the fact that the party's attorney timely filed a vacation letter per the rule).

160. *Gen. Motors Corp. v. Gayle*, 951 S.W.2d 469 (Tex. 1997) (orig. proceeding).

161. *Id.* at 477.

162. See *id.* (adjudicating the denial of a jury trial by the trial court, which is subject to mandamus review).

163. See *id.* (noting the special circumstances warranting the court to rule on a denial of a motion for continuance).

164. *In re Ford Motor Co.*, 165 S.W.3d 315 (Tex. 2005) (orig. proceeding) (per curiam).

165. See *id.* at 322 (justifying mandamus relief based on the need for lawyers in the legislature).

be attending the legislative session.<sup>166</sup> A party will not have an adequate appellate remedy when a trial court abuses its discretion “by denying a motion for legislative continuance.”<sup>167</sup>

Furthermore, the court granted mandamus relief when a party’s attorney was in federal court, and the hearing in state court could not proceed without an attorney.<sup>168</sup> The court noted the trial court’s denial of the motion for continuance effectively deprived the relator of representation at the temporary orders hearing in the divorce proceeding.<sup>169</sup> The court concluded that, under the facts of the case, mandamus relief was appropriate because “the trial court’s issuance of temporary orders” following the denial of the motion for continuance was not subject to interlocutory appeal.<sup>170</sup>

### I. *Gag Orders*

The supreme court has held that mandamus relief is also appropriate to review a gag order.<sup>171</sup> The court in *Kennedy v. Eden*<sup>172</sup> explained that parties have no adequate legal remedy from a gag order because a relator would be restrained in speech, and the harm suffered from the order could not be repaired on appeal.<sup>173</sup>

166. See TEX. CIV. PRAC. & REM. CODE ANN. § 30.003 (West 2008) (stipulating a lawyer-legislator must file an affidavit “stating the grounds for the continuance”); *Ford*, 165 S.W.3d at 317–18 (announcing the importance of the legislative continuance in section 30.003).

167. See *Ford*, 165 S.W.3d at 322 (quoting *Waites v. Sondock*, 561 S.W.2d 772, 774–76 (Tex. 1977)) (discussing the *Waites* exception to the motion for a legislative continuance, which states the trial court must issue the continuance unless doing so would result in impairment of a right).

168. See, e.g., *Dancy v. Daggett*, 815 S.W.2d 548, 549 (Tex. 1991) (orig. proceeding) (per curiam) (finding the trial court abused its discretion by violating the local docketing rules and that the relator was entitled to mandamus relief because the temporary order was interlocutory in nature and not appealable).

169. See *id.* (questioning a trial judge’s decision to reset a hearing for the next morning after a motion by counsel stated that he was in a federal criminal trial and would not be able to make the divorce hearing).

170. See *id.* (finding the party had no adequate remedy on appeal after the trial court abused its discretion).

171. See *Kennedy v. Eden*, 837 S.W.2d 98, 98–99 (Tex. 1992) (orig. proceeding) (per curiam) (stating that the trial court abused its discretion in banning a party from attending any depositions and that the gag order left the relator with no adequate remedy on appeal; therefore, mandamus relief was justified); see also *Grigsby v. Coker*, 904 S.W.2d 619, 621 (Tex. 1995) (orig. proceeding) (ordering mandamus relief because the trial court misapplied the relevant law—which is an abuse of discretion—and left the party without adequate remedy on appeal).

172. *Kennedy v. Eden*, 837 S.W.2d 98 (Tex. 1992) (orig. proceeding).

173. See *id.* at 98–99 (explaining that the gag order restrained freedom of speech).

J. *Severance/Consolidation*

Mandamus is appropriate to review a trial court's decision on a motion to sever.<sup>174</sup> In *In re State*,<sup>175</sup> the court held mandamus relief was warranted from an order severing the case into eight separate suits.<sup>176</sup> The court concluded that the relators lacked an adequate remedy by appeal "because of the enormous waste of judicial and public resources that compliance with the trial court's order would entail. Requiring eight separate suits here, when only one is proper, would be a clear waste of the resources of the State, the landowners, and the courts."<sup>177</sup>

Most consolidation orders do not threaten a party's substantial rights; as a result, mandamus relief is not usually available to the parties.<sup>178</sup> However, if "extraordinary circumstances" are present that render an ordinary appeal inadequate, the court has allowed mandamus relief from such an order.<sup>179</sup> For example, in *Van Waters*, the court concluded such "extraordinary circumstances" were present because "an appellate court could not remedy the likely juror confusion in a consolidated trial of . . . twenty plaintiffs' claims."<sup>180</sup> The court concluded that "[w]hatever advantage may be gained in judicial economy or avoidance of repetitive costs is overwhelmed by the greater danger an unfair trial would pose to the integrity of the judicial process."<sup>181</sup>

K. *Ruling on Pending Motions*

Mandamus relief may issue to force a trial court to perform the ministerial act of considering and ruling on a party's properly filed

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174. See, e.g., *In re State*, 355 S.W.3d 611, 614–15 (Tex. 2011) (orig. proceeding) (looking to the surrounding circumstances and finding that in light of the trial court's abuse of discretion in "breaking up a deeply interrelated set of legal and factual issues," the appellate remedy was inadequate); *In re Liu*, 290 S.W.3d 515, 518, 520–24 (Tex. App.—Texarkana 2009, orig. proceeding) (establishing that there was no abuse of discretion and, as a result, declining to issue mandamus relief); *In re Allstate Cty. Mut. Ins. Co.*, 209 S.W.3d 742, 746–47 (Tex. App.—Tyler 2006, orig. proceeding) (issuing mandamus on the motion to sever, but not on the motion to abate), *mand. dismissed*, No. 12-06-00164-CV, 2006 WL 3735116 (per curiam) (mem. op.).

175. *In re State*, 355 S.W.3d 611 (Tex. 2011) (orig. proceeding).

176. See *id.* at 615 (reporting that the eight issues were astoundingly similar and contained much of the same factual basis).

177. *Id.*

178. See, e.g., *Van Waters*, 145 S.W.3d at 210–11 (finding that consolidation orders usually do not substantively impair a party's claims).

179. See *id.* (outlining that when "exceptional circumstances" exist, mandamus can issue to correct a consolidation order that would affect a party's substantial right).

180. *Van Waters*, 145 S.W.3d at 211.

181. *Id.*

motion.<sup>182</sup> In order to be entitled to mandamus relief, the relator “must establish the trial court: (1) had a legal duty to perform a nondiscretionary act[;] (2) was asked to perform the act[;] and (3) failed or refused to do so.”<sup>183</sup> Mandamus relief is only available if the record indicates that a properly filed motion has awaited disposition by the trial court for an unreasonable amount of time.<sup>184</sup> What courts consider a reasonable amount of time is dependent on the circumstances of each case.<sup>185</sup> Such considerations can include the trial court’s actual knowledge of the pending motion, the trial court’s overt refusal to rule on the motion, the volume of the trial court’s docket, and the “existence of other judicial and administrative matters that the trial court must first address.”<sup>186</sup> Clearly, a trial court has the “inherent authority to control its own docket,” and it need not set hearings according to a party’s request.<sup>187</sup>

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182. *See, e.g.,* *Safety-Kleen Corp. v. Garcia*, 945 S.W.2d 268, 269 (Tex. App.—San Antonio 1997, orig. proceeding) (authorizing the use of mandamus to compel a ministerial duty). *See generally* *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding) (extending mandamus to correct abuses of discretion and not just for ministerial duties); *Wortham v. Walker*, 133 Tex. 255, 128 S.W.2d 1138, 1150 (1939) (noting that a ministerial act must be something over which the court has no discretion; therefore, mandamus will issue to compel non-discretionary matters); *Arberry v. Beavers*, 6 Tex. 457, 472–73 (1851) (exploring the confines of ministerial duties and finding that mandamus was erroneously awarded in the court of appeals).

183. *See, e.g., In re Molina*, 94 S.W.3d 885, 886 (Tex. App.—San Antonio 2003, orig. proceeding) (per curiam) (denoting the procedure the Fourth Court of Appeals uses to determine whether mandamus will issue).

184. *See Safety-Kleen*, 945 S.W.2d at 269 (discussing one of the trial court’s responsibilities to issue a timely ruling on a party’s motion); *cf. In re Villareal*, 96 S.W.3d 708, 711 (Tex. App.—Amarillo 2003, orig. proceeding) (finding that the trial court’s four-month delay in reviewing the petition for habeas corpus did not warrant mandamus because it did not constitute unreasonable delay).

185. *See, e.g., In re Chavez*, 62 S.W.3d 225, 228–29 (Tex. App.—Amarillo 2001, orig. proceeding) (noting that “the complexity of the motion in question” would be relevant in determining whether the trial court acted within a reasonable time in addition to “the number of other cases, motions, or issues pending on the trial court’s docket, . . . [and those that] have pending on its docket longer than that at bar”).

186. *See id.* (seeking to provide explanations for what could be seen as a delay in time, but that actually indicates the court was acting reasonably); *see also In re Shredder Co, LLC*, 225 S.W.3d 676, 679–80 (Tex. App.—El Paso 2006, orig. proceeding) (issuing mandamus relief to compel the trial court to rule on a motion to compel arbitration that had been pending for roughly six months); *In re Cash*, 99 S.W.3d 286, 288 (Tex. App.—Texarkana 2003, orig. proceeding) (holding that the trial court abused its discretion when it failed to make a ruling on the relator’s motion for DNA testing, which had been pending for nearly five months); *In re Ramirez*, 994 S.W.2d 682, 684 (Tex. App.—San Antonio 1998, orig. proceeding) (concluding that the trial court abused its discretion by failing to consider the relator’s motion for default judgment, which had been pending for eighteen months).

187. *See, e.g., In re Mendoza*, 131 S.W.3d 167, 168 (Tex. App.—San Antonio 2004, orig. proceeding) (citing *Chavez*, 62 S.W.3d at 225) (noting that the relator had failed to file necessary documents with the court of appeals and that he had not “provided this court with grounds to usurp the trial court’s inherent authority to control its own docket[,]” and therefore denying mandamus relief).

### L. *Void Order*

When a trial court issues an order that is void because it is beyond its jurisdiction, mandamus relief is appropriate.<sup>188</sup> However, “the mere fact that an action by a court . . . is contrary to a statute, constitutional provision[,] or rule of civil or appellate procedure makes it [not void, but] ‘voidable’ or erroneous.”<sup>189</sup> When a trial court issues an order after its plenary power has expired, the order is void and constitutes an abuse of discretion.<sup>190</sup> Whenever an order is void, there is no requirement that the relator show it lacks an adequate remedy by appeal.<sup>191</sup>

### M. *Arbitration*

#### 1. Order Denying Motion to Compel Arbitration

Before the 2009 amendment to the Texas Arbitration Act (TAA),<sup>192</sup> parties wanting to appeal an order refusing to compel mandatory arbitration would usually file two distinct appellate proceedings.<sup>193</sup> Under the TAA, a party had to file “an interlocutory appeal of an order denying

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188. See generally *In re Sw. Bell Tel. Co.*, 35 S.W.3d 602, 605 (Tex. 2000) (orig. proceeding) (per curiam) (finding the venue order void because it was issued outside of the court’s plenary power, and it, therefore, amounted to an abuse of discretion); *In re Dickason*, 987 S.W.2d 570, 571 (Tex. 1998) (orig. proceeding) (per curiam) (“Mandamus is appropriate to set aside an order for new trial that is granted after the court’s plenary power expires and that is, therefore, void.” (citing *Porter v. Vick*, 888 S.W.2d 789, 789–90 (Tex. 1994); *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 918 (Tex. 1985))); *Bd. of Disciplinary App. v. McFall*, 888 S.W.2d 471, 472–73 (Tex. 1994) (orig. proceeding) (per curiam) (granting mandamus to correct a void order, which was an abuse of discretion and left the party with no adequate on appeal); Karen S. Precella & Ryan Paulsen, *Mandamus: The Hurdles to Relief*, Presentation at the State Bar of Texas Civil Appellate Practice 101, at 26–27 (Sept. 5, 2012), available at <http://www.haynesboone.com/files/Uploads/Documents/Attorney%20Publications/Mandamus-the-Hurdles-to-Relief.pdf> (providing a list of different situations that result in void orders).

189. See *In re Masonite Corp.*, 997 S.W.2d 194, 198 (Tex. 1999) (orig. proceeding).

190. See *Sw. Bell*, 35 S.W.3d at 605 (citing *HCA Health Servs. of Tex., Inc. v. Salinas*, 838 S.W.2d 246, 248 (Tex. 1992) (orig. proceeding) (declaring the trial court’s plenary power extends thirty days past the motion to transfer venue; therefore, any modification of the order must occur within the thirty-day period or else the trial court abuses its discretion); see also *In re Daredia*, 317 S.W.3d 247, 250 (Tex. 2010) (orig. proceeding) (per curiam) (granting mandamus to correct the abuse of discretion by the trial court because Daredia had no adequate remedy at law).

191. See *Sw. Bell*, 35 S.W.3d at 605 (repeating that “the relator need not show it did not have an adequate appellate remedy” when the order is void); see also *McFall*, 888 S.W.2d at 472–73 (citing *Crouch v. Craik*, 888 S.W.2d 311, 314 (Tex. 1963)) (“A writ of mandamus . . . [is] appropriate when a district court issues an order beyond its jurisdiction.”).

192. Act of May 27, 2009, 81st Leg., R.S., ch. 820, §§ 1–3, 2009 Tex. Gen. Laws 2061, 2061 (codified at TEX. CIV. PRAC. & REM. CODE ANN. § 51.016 (West Supp. 2013)).

193. See *CMH Homes v. Perez*, 340 S.W.3d 444, 448 (Tex. 2011) (noting the prior procedure for appealing an order denying arbitration).

arbitration.”<sup>194</sup> However, under the Federal Arbitration Act (FAA),<sup>195</sup> a party could only challenge an order denying arbitration by filing a petition for writ of mandamus.<sup>196</sup> Thus, parallel proceedings, despite being unnecessarily expensive and cumbersome, became the common procedure in Texas arbitration disputes when parties did not know which arbitration act applied.<sup>197</sup> Then in 2009, the legislature enacted TCPRC section 51.016, allowing for interlocutory appeals of an order “under the same circumstances that an appeal from a federal district court’s order or decision would be permitted by 9 U.S.C. [s]ection 16.”<sup>198</sup> The enactment of section 51.016 remedied the need to pursue parallel proceedings and “enacted a policy change that promotes efficiency and common sense.”<sup>199</sup>

## 2. Order Granting Motion to Compel Arbitration

Generally, mandamus relief is unavailable to review an order compelling arbitration.<sup>200</sup> In *In re Gulf Exploration, LLC*,<sup>201</sup> the court explained that because both the TAA and the FAA exclude immediate review by interlocutory appeal of orders compelling arbitration, any balancing of the benefits and detriments “must tilt strongly against mandamus review.”<sup>202</sup> The court concluded while an incorrect order compelling arbitration may cause the parties to waste valuable resources in arbitration, these

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194. See *CMH Homes*, 340 S.W.3d at 448 (explaining the procedure under the TAA); see also TEX. CIV. PRAC. & REM. CODE ANN. § 171.098(a)(1) (West 2011) (“A party may appeal a judgment . . . denying an application to compel arbitration.”).

195. 9 U.S.C. §§ 1–16 (2012) (supplying the most recent requirements of the Federal Arbitration Act).

196. See *Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266, 271–72 (Tex. 1992) (explaining that the proceedings in federal court required challenges to orders for arbitration to be brought via petition for mandamus); see also *In re NEXT Fin. Grp.*, 271 S.W.3d 263, 266 (Tex. 2008) (orig. proceeding) (per curiam) (challenging the order by filing a petition for writ of mandamus); Richard E. Flint, *The Evolving Standard for Granting Mandamus Relief in the Texas Supreme Court: One More “Mile Marker Down the Road of No Return”*, 39 ST. MARY’S L.J. 3, 100–03 (2007) (detailing the parallel proceedings process).

197. See *CMH Homes*, 340 S.W.3d at 448 (bemoaning the parallel proceedings that occurred prior to the legislature’s amendment to the TAA and describing the confusion parties faced prior to the amendment).

198. *Id.* (quoting CIV. PRAC. & REM. § 51.016); see also Act of May 27, 2009, 81st Leg., R.S., ch. 820, §§ 1–3, 2009 Tex. Gen. Laws 2061, 2061 (codified at CIV. PRAC. & REM. § 51.016) (creating the appeal process).

199. *CMH Homes*, 340 S.W.3d at 451.

200. *In re Gulf Exploration, LLC*, 289 S.W.3d 836, 842 (Tex. 2009) (orig. proceeding) (“In the context of orders compelling arbitration, even if a petitioner can meet the first requirement, mandamus is generally unavailable because it can rarely meet the second [requirement of inadequate remedy on appeal].”).

201. *In re Gulf Exploration, LLC*, 289 S.W.3d 836 (Tex. 2009) (orig. proceeding).

202. *Id.* at 842.

circumstances standing alone do not render a final appeal inadequate.<sup>203</sup> However, the court noted when there were counterbalancing legislative mandates, the court granted mandamus relief from an order compelling arbitration because the order “threatened to undermine the legislative workers['] compensation system as a whole.”<sup>204</sup>

### 3. Other Orders

Nonetheless, interlocutory appeals are not available to remedy all issues regarding arbitration—the supreme court recently held that an interlocutory appeal of an order appointing an arbitrator is not permitted by section 51.016.<sup>205</sup> The court noted that prior to the adoption of section 51.016, an order appointing an arbitrator under the FAA was reviewable by mandamus, and the enactment of section 51.016 is of no effect on the availability of mandamus relief because it does not authorize an interlocutory appeal from an order appointing an arbitrator.<sup>206</sup> Therefore, mandamus relief remains available to review an order under the FAA that appoints an arbitrator.<sup>207</sup>

Additionally, the court granted mandamus relief to enforce a mandatory venue provision under section 171.096(c) and ordered the trial court to transfer venue to the county where the arbitration hearing was held.<sup>208</sup>

Finally, courts of appeals have concluded mandamus is available to remedy a trial court's order that improperly defers ruling on a motion to compel arbitration.<sup>209</sup>

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203. *See id.* (emphasizing that economic factors are not always definitive regarding the inadequacy of a final appeal).

204. *See id.* at 843 (“[S]uch conflicts are few[;] so the balance will generally tilt toward reviewing orders compelling arbitration only on final appeal.” (citing *In re Poly-America, LP*, 262 S.W.3d 337, 352 (Tex. 2008) (orig. proceeding))).

205. *CMH Homes*, 340 S.W.3d at 452; *see also* CIV. PRAC. & REM. § 51.016 (allowing an appeal from a judgment or interlocutory order).

206. *CMH Homes*, 340 S.W.3d at 452.

207. *Id.*; *see also In re Serv. Corp. Intern.*, 355 S.W.3d 662, 663 (Tex. 2011) (orig. proceeding) (holding that the trial court's appointment of an arbitrator was an abuse of discretion from which there was no adequate remedy by appeal).

208. *See In re Lopez*, 372 S.W.3d 174, 176–77 (Tex. 2012) (orig. proceeding) (directing the trial court to comply with the mandatory venue provision as noncompliance is an abuse of discretion); CIV. PRAC. & REM. § 171.096 (West 2011) (instructing parties where to file the initial application).

209. *See, e.g., In re Heritage Bldg. Sys., Inc.* 185 S.W.3d 539, 542–43 (Tex. App.—Beaumont 2006, orig. proceeding) (granting mandamus where the trial court ordered mediation despite an arbitration agreement); *In re Champion Techs.*, 173 S.W.3d 595, 599 (Tex. App.—Eastland 2005, orig. proceeding) (awarding mandamus where the trial court deferred its ruling on the arbitration motion); *In re MHI Partnership, Ltd.*, 7 S.W.3d 918, 923 (Tex. App.—Houston [1st Dist.] 1999, orig. proceeding) (finding mandamus relief necessary when the trial court had no discretion to defer the motion compelling arbitration).



## N. Elections

Section 273.061 of the Texas Election Code expressly authorizes both the supreme court and the courts of appeals to issue a writ of mandamus “to compel the performance of any duty imposed by law in connection with the holding of an election or a political party convention, regardless of whether the person responsible for performing the duty is a public officer.”<sup>210</sup> Courts have granted mandamus relief in numerous cases where the duty imposed by the Election Code has not been followed.<sup>211</sup>

## O. Contractual Matters

Finally, the court has held that mandamus relief may be granted to compel a trial court to enforce a contractual right when it refuses to do so.<sup>212</sup> A non-exhaustive list of examples of those contractual rights is as follows: (1) when parties agree to submit to an appraisal process to determine the value of the loss of the vehicle,<sup>213</sup> (2) a contractual jury-waiver provision,<sup>214</sup> and (3) a binding forum-selection clause.<sup>215</sup>

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210. TEX. ELEC. CODE ANN. § 273.061 (West 2010).

211. See, e.g., *In re Vela*, 399 S.W.3d 265, 266 (Tex. App.—San Antonio 2012, orig. proceeding) (authorizing mandamus relief after determining the candidate for mayor was improperly declared ineligible under section 145.003(f) of the Election Code); *In re Dupont*, 142 S.W.3d 528, 532 (Tex. App.—Fort Worth 2004, orig. proceeding) (granting mandamus relief to compel a chairperson to comply with section 145.037 of the Election Code); *In re Triantaphyllis*, 68 S.W.3d 861, 869–70 (Tex. App.—Houston [14th Dist.] 2002, orig. proceeding [mand. denied]) (granting mandamus relief to compel party officials to remove a judge’s name from the general primary ballot); cf. *In re Link*, 45 S.W.3d 149, 156 (Tex. App.—Tyler 2000, orig. proceeding) (concluding that mandamus relief was appropriate to compel the commissioners to comply with section 152.072 of the Local Government Code). But see *In re Palomo*, 366 S.W.3d 193, 194 (Tex. 2012) (orig. proceeding) (issuing mandamus relief after determining that “the county chair did not violate any duty imposed by law,” and therefore, the court of appeals improperly granted mandamus relief).

212. See *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 138 (Tex. 2004) (orig. proceeding) (“Even if Prudential could somehow obtain reversal based on the denial of its contractual right, it would already have lost a part of it by having been subject to the procedure it agreed to waive.”).

213. See *In re Allstate Cnty. Mutual Ins. Co.*, 85 S.W.3d 193, 195–96 (Tex. 2002) (orig. proceeding) (dictating that appraisal clauses are enforceable against the parties and the trial court abuses its discretion in refusing to apply such clauses, but finding in this case it was an arbitration agreement, which warranted mandamus relief to correct the trial court’s error).

214. See *Prudential*, 148 S.W.3d at 138 (permitting mandamus to issue when a pre-suit jury waiver was not properly enforced by the court); see also *In re Frank Motor Co.*, 361 S.W.3d 628, 630–32 (Tex. 2012) (orig. proceeding) (emphasizing that the trial court has no discretion in applying relevant, applicable law to the facts, and when it refuses to do so it commits an abuse of discretion); *In re Bank of Am.*, 278 S.W.3d 342, 346 (Tex. 2009) (orig. proceeding) (per curiam) (determining the party asserting that a jury waiver is valid is not under a burden “to prove that the waiver was executed knowingly and voluntarily[.]” which, in turn, warranted issuing mandamus to compel the court to withdraw its opinion asserting such a burden).

215. See *In re Pirelli Tire, LLC*, 247 S.W.3d 670, 679 (Tex. 2007) (orig. proceeding) (citing

P. *Appointment of Guardian Ad Litem*

TRCP 173.7 expressly authorizes a party to seek mandamus relief from an order appointing a guardian ad litem or directing a guardian ad litem's participation in the litigation.<sup>216</sup>

Q. *Contempt*

Only an order holding a party in contempt that involves confinement can be reviewed by writ of habeas corpus; therefore, the only possible relief from a contempt order that does not involve confinement is by way of a petition for writ of mandamus.<sup>217</sup> Nevertheless, the supreme court held that mandamus review is appropriate when the relator is confined, but the Texas Court of Criminal Appeals has declined to exercise jurisdiction, leaving the relator without an adequate remedy by appeal.<sup>218</sup>

R. *Motion for New Trial*

In Texas, there has been a long-standing practice of trial courts maintaining significant authority to grant a new trial without the necessity of explaining the reason.<sup>219</sup> In 2009, the court issued *In re Columbia*,<sup>220</sup> the first opinion in a trilogy of Supreme Court of Texas cases that began modifying mandamus relief from the grant of a motion for new trial following a jury trial.<sup>221</sup> For the first time in *Columbia*, the supreme court held that a trial court must specify the reasons for disregarding the jury's

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*Prudential*, 148 S.W.3d at 138) (holding the court will correct an abuse of discretion when the trial court refuses to enforce a binding, enforceable forum-selection clause because the error cannot be repaired on appeal); see also *In re ADM Inv. Servs., Inc.*, 304 S.W.3d 371, 374–75 (Tex. 2010) (orig. proceeding) (reviewing the court's repeated grants of mandamus to enforce mandatory forum-selection clauses).

216. See TEX. R. CIV. P. 173.7 (instructing how to challenge a guardian ad litem appointment).

217. See *In re Long*, 984 S.W.2d 623, 625 (Tex. 1999) (orig. proceeding) (per curiam) (citing *Rosser v. Squier*, 902 S.W.2d 962, 962 (Tex. 1995)) (explaining that orders not imposing confinement are not subject to habeas corpus review, and therefore mandamus relief is appropriate).

218. See *In re Reece*, 341 S.W.3d 360, 373–76 (Tex. 2011) (orig. proceeding) (noting that “the relator’s liberty interests are threatened without a remaining procedural safeguard for challenging his confinement” and finding that it warrants the supreme court exercising its mandamus powers due to the severe abuse of discretion and lack of adequate remedy on appeal).

219. See *In re Columbia Med. Ctr.*, 290 S.W.3d 204, 213 (Tex. 2009) (orig. proceeding) (acknowledging significant discretion afforded trial courts when granting a motion for a new trial).

220. *In re Columbia Med. Ctr.*, 290 S.W.3d 204 (Tex. 2009) (orig. proceeding).

221. See *Columbia*, 290 S.W.3d at 209, 213 (Tex. 2009) (orig. proceeding) (balancing the factors in the case and deciding mandamus was warranted). For the “trilogy” of cases, as this article refers to them, see *In re Toyota Motor Sales, Inc.*, 407 S.W.3d 746 (Tex. 2013) (orig. proceeding); *In re United Scaffolding Inc.*, 377 S.W.3d 685 (Tex. 2012) (orig. proceeding); *Columbia*, 290 S.W.3d at 204.

verdict in the order granting a motion for new trial.<sup>222</sup> Specifically, the court explained that “[t]he reasons should be clearly identified and reasonably specific. Broad statements such as ‘in the interest of justice’ are not sufficiently specific.”<sup>223</sup> Accordingly, when a trial court fails to specify the reasons for granting a new trial in the order, mandamus relief is appropriate to require the trial court to do so.<sup>224</sup>

In 2012, the supreme court issued its second opinion in the trilogy; in *In re United Scaffolding, Inc.*,<sup>225</sup> the court analyzed its holding in *Columbia* and provided further guidance regarding the review of a trial court’s order granting a new trial.<sup>226</sup> But again, the court focused on the specificity of the order, not whether the substance of the trial court’s reasons should be reviewed.<sup>227</sup> The court provided that in determining “how detailed a trial court’s” order granting a new trial needs to be, in addition to the “level of review” to be used, “we must both afford jury verdicts appropriate regard and respect trial courts’ significant discretion in these matters.”<sup>228</sup> The court noted that in *Columbia*, it “focused . . . not on the length or detail of the reasons a trial court gives, but on how well those reasons serve the general purpose of assuring the parties that the jury’s decision was set aside only after careful thought and for valid reasons.”<sup>229</sup>

The court acknowledged *Columbia* only “touched on the substance of” the trial court’s reason for ordering a new trial by explaining what that reason cannot be—the trial court’s substitution of its “judgment for that of the jury.”<sup>230</sup> The court continued:

In light of these considerations, we hold that a trial court does not abuse its discretion so long as its stated reason for granting a new trial (1) is a reason for which a new trial is legally appropriate (such as a well-defined legal standard or a defect that probably resulted in an improper verdict); and (2) is specific enough to indicate that the trial court did not simply parrot a pro forma template, but rather derived

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222. See *Columbia*, 290 S.W.3d at 212–13 (arguing it was an abuse of discretion for the trial court to not specifically state its reasons for granting a motion for a new trial).

223. *Id.* at 215.

224. See *id.* at 213 (citing public frustration as one of the main concerns).

225. *In re United Scaffolding, Inc.*, 377 S.W.3d 685 (Tex. 2012) (orig. proceeding).

226. See *id.* at 687–89 (expounding on the “new-trial order requirements”).

227. See *id.* at 689 (opting to focus more on the detail of the order than the reasoning).

228. *Id.* at 688–89.

229. *Id.* at 688 (citing *Columbia*, 290 S.W.3d at 213).

230. *Id.* (“That purpose will be satisfied so long as the order provides a cogent and reasonably specific explanation of the reasoning that led the court to conclude that a new trial was warranted.”).

the articulated reasons from the particular facts and circumstances of the case at hand.<sup>231</sup>

It gave examples of when an order granting a new trial may rise to the level of an abuse of discretion: (1) “if the given reason, specific or not, is not one for which a new trial is legally valid,” (2) “if the articulated reasons plainly state that the trial court merely substituted its own judgment for the jury’s,” or (3) “if the order, though rubber-stamped with a valid new-trial rationale, provides little or no insight into the judge’s reasoning.”<sup>232</sup> The court imposed a two-part test: “The order must indicate that the trial judge considered the specific facts and circumstances of the case at hand and explain how the evidence (or lack of evidence) undermines the jury’s findings.”<sup>233</sup> The court concluded that a new trial order will not be sufficient if it merely recites a legal standard, such as the statement that one of the jury’s findings is against the great weight and preponderance of the evidence, or if it fails to provide “no more than a pro forma template rather than” an actual analysis.<sup>234</sup>

The supreme court recently decided the third case in the trilogy.<sup>235</sup> *In re Toyota Motor Sales, Inc.*<sup>236</sup> addressed the issue of whether mandamus review extended to reviewing the validity of the trial court’s reasons for granting a new trial.<sup>237</sup> The order granting a new trial contained facially-valid reasons for granting a new trial after the jury trial had concluded.<sup>238</sup> Until the issuance of *Toyota*, courts had declined to conduct a merit-based review of new trial orders.<sup>239</sup> The court concluded, “[H]aving already

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231. *Id.* at 688–89.

232. *Id.* at 689.

233. *Id.*

234. *Id.*

235. See *In re Toyota Motor Sales, Inc.*, 407 S.W.3d 746, 749 (Tex. 2013) (orig. proceeding) (hearing the petition for writ of mandamus on whether mandamus should be extended to a merit-based review of the trial court’s motion for new trial).

236. *In re Toyota Motor Sales, Inc.*, 407 S.W.3d 746 (Tex. 2013) (orig. proceeding).

237. *Toyota*, 407 S.W.3d at 749.

238. See *id.* (noting that the order granting the motion for new trial contained the court’s reasons for granting the new trial).

239. For a sample of intermediate appellate court cases in which the court held it would not conduct a merit-based review, see *In re Discount Tire Co. of Tex.*, 04-12-00850-CV, 2013 WL 241953 (Tex. App.—San Antonio Jan. 23, 2013, orig. proceeding [mand. pending]) (per curiam) (mem. op.); *In re Heard*, No. 13-11-00589-CV, 2011 WL 5006216 (Tex. App.—Corpus Christi Oct. 18, 2011 [mand. denied]) (per curiam) (mem. op.); *In re State Farm Mut. Auto. Ins. Co.*, 04-11-00708-CV, 2011 WL 4830177 (Tex. App.—San Antonio Oct. 12, 2011, orig. proceeding [mand. stayed]) (mem. op.), *abrogated by, Toyota*, 407 S.W.3d at 746; *In re Whataburger Rests., LP*, No. 08-10-00250-CV, 2010 WL 4983563 (Tex. App.—El Paso Dec. 8, 2010, orig. proceeding [mand. stayed]) (mem. op.), *abrogated by, Toyota*, 407 S.W.3d at 746.

decided that new trial orders must meet these requirements and that noncompliant orders will be subject to mandamus review, it would make sense to conclude now that the correctness or validity of the orders' articulated reasons cannot also be evaluated."<sup>240</sup> It determined that disallowing a merit-based review would work against the requirements in *Columbia* and render them "mere formalities, lacking any substantive 'checks' by appellate courts to ensure that the discretion to grant new trials has been exercised appropriately."<sup>241</sup> The court concluded that even if the order complies with procedural requirements, the order cannot stand so long as the trial court's reasoning is not supported by the record.<sup>242</sup> The decision in *Toyota* finalizes the trilogy regarding new trial orders after a jury trial—a merit-based review of such orders is now subject to mandamus review.<sup>243</sup>

### S. *Family Law Proceedings*

Mandamus relief is regularly available to remedy a trial court's error in a family law proceeding.<sup>244</sup> This is because in cases involving child custody, "[j]ustice demands a speedy resolution," and appeal is frequently inadequate to protect the rights of parents and children.<sup>245</sup> First, mandamus is proper to review a temporary order in a suit affecting the parent-child relationship when the temporary order is an abuse of the trial court's discretion.<sup>246</sup> Specifically, temporary orders issued in violation of section 156.006 of the Family Code are an example of those temporary orders subject to mandamus.<sup>247</sup> Additionally, temporary orders issued in

240. *Toyota*, 407 S.W.3d at 758.

241. *Id.* See generally *In re Columbia*, 290 S.W.3d 204 (Tex. 2009) (orig. proceeding) (providing the requirements discussed in *Toyota*).

242. *Toyota*, 407 S.W.3d at 758–59.

243. *Id.* at 759.

244. See *In re Derzapf*, 219 S.W.3d 327, 335 (Tex. 2007) (orig. proceeding) (per curiam) (granting mandamus relief because the relator was deprived of an adequate remedy on appeal when the trial court abused its discretion in divesting a legally-fit parent of custody); cf. *In re Tex. Dep't of Family & Prot. Servs.*, 210 S.W.3d 609, 613 (Tex. 2006) (orig. proceeding) (examining whether there was an abuse of discretion to determine if mandamus would issue).

245. *Tex. Dep't*, 210 S.W.3d at 613 (quoting *Proffer v. Yates*, 734 S.W.2d 671, 673 (Tex. 1987)).

246. See *Dancy v. Daggett*, 815 S.W.2d 548, 549 (Tex. 1991) (orig. proceeding) (per curiam) (holding that mandamus is an appropriate remedy because "the trial court's issuance of temporary orders is not subject to interlocutory appeal"); see also *Derzapf*, 219 S.W.3d at 334–35 (granting mandamus relief from a temporary order granting grandparents access to their grandchild); *Little v. Daggett*, 858 S.W.2d 368, 369 (Tex. 1993) (orig. proceeding) (per curiam) (holding that mandamus relief was a proper remedy because a temporary order granting visitation is not appealable).

247. TEX. FAM. CODE ANN. § 156.006 (West Supp. 2013) (providing for temporary orders regarding the care and custody of children); *In re Sanchez*, 228 S.W.3d 214, 217–18 (Tex. App.—San Antonio 2007, orig. proceeding) (evaluating whether a temporary order was subject to mandamus

a grandparent access suit when the grandparent has failed to meet the standard set out in section 153.433 are included in those temporary orders that are mandamusable.<sup>248</sup>

Second, mandamus relief is appropriate to order a trial court to comply with the Uniform Child Custody Jurisdiction & Enforcement Act's (UCCJEA) jurisdictional mandates.<sup>249</sup> Furthermore, with regard to venue, when a trial court has a mandatory duty to transfer a suit under section 155.201 of the Family Code to another Texas court and fails to do so, mandamus relief is appropriate to compel the trial court to do so.<sup>250</sup> Additionally, when a trial court improperly strikes an intervention in a suit affecting the parent-child relationship, mandamus relief has been granted to correct the error.<sup>251</sup> Finally, mandamus relief has been granted when a trial court denies a party's request that it decline to exercise its jurisdiction because it is an inconvenient forum under section 152.207 of the Family Code.<sup>252</sup>

#### T. *Criminal Proceedings*

Availability of mandamus relief in criminal cases is quite limited. To obtain such relief, the relator must establish: (1) the act sought to be compelled is ministerial, and (2) there is no other adequate remedy at law.<sup>253</sup> Thus, the standard is different from that in civil cases because it

relief and finding that it was); *In re Ostrofsky*, 112 S.W.3d 925, 932 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding) (finding the trial court abused its discretion by granting temporary orders).

248. See *Derzappf*, 219 S.W.3d at 333 (holding that a parent lacks adequate remedy by appeal when a trial court errs in awarding a grandparent access).

249. See FAM. §§ 152.001–.317 (West 2008 & Supp. 2013); *Powell v. Stover*, 165 S.W.3d 322, 324–25 (Tex. 2005) (applying mandamus to the UCCJEA); see also *In re Dean*, 393 S.W.3d 741, 750 (Tex. 2012) (reiterating the availability of mandamus to enforce the UCCJEA).

250. See FAM. § 155.201 (West 2008) (requiring the mandatory transfer of venue); *Proffer v. Yates*, 734 S.W.2d 671, 672–73 (Tex. 1987) (orig. proceeding) (per curiam) (discussing the mandatory venue provisions and the ability of mandamus to enforce them).

251. See *In re Chester*, 398 S.W.3d 795, 800 (Tex. App.—San Antonio 2011, orig. proceeding) (granting mandamus); *In re S.B.*, No. 02-11-00081-CV, 2011 WL 856963, at\* 3 (Tex. App.—Fort Worth Mar. 11, 2011, orig. proceeding) (holding that the relators lacked adequate remedy by appeal from the trial court's order striking their intervention).

252. See FAM. § 152.207 (West 2008) (stating the inconvenient forum provisions); *In re Alanis*, 350 S.W.3d 322, 328 (Tex. App.—San Antonio 2011, orig. proceeding) (arguing that the trial court should have denied “jurisdiction based on inconvenient forum”).

253. See, e.g., *In re State ex. rel. Weeks*, 391 S.W.3d 117, 122 (Tex. Crim. App. 2013) (orig. proceeding) (granting mandamus to compel the trial court to submit jury instructions as requested, a ministerial act it previously refused to perform); *State ex. rel. Young v. Sixth Judicial District Court of Appeals*, 236 S.W.3d 207, 210 (Tex. Crim. App. 2007) (issuing mandamus for a ruling on a motion); *Dickens v. Second Court of Appeals*, 727 S.W.2d 542, 548 (Tex. Crim. App. 1987) (orig. proceeding) (granting mandamus to correct the mandamus issued).

requires that the act sought to be compelled is ministerial rather than discretionary. The ministerial duty requirement “is satisfied if the relator can show he has a *clear* right to the relief sought—that is to say, when the facts and circumstances dictate but one rational decision under unequivocal, well-settled (i.e., from extant statutory, constitutional, or case law sources), and clearly controlling legal principles.”<sup>254</sup>

However, the Court of Criminal Appeals recently departed from the historically stringent standard when it granted a petition for writ of mandamus filed by the State regarding the trial court’s rulings on a jury charge.<sup>255</sup> In granting mandamus relief, the court ordered the trial court to submit an appropriate jury charge.<sup>256</sup> The court’s opinion was extraordinary not only because it interfered with “an ongoing capital murder trial,” but also because it stated that there would be no adequate appellate remedy because “it would be too speculative.”<sup>257</sup> The court also held that it could review on mandamus a “trial court’s non-ministerial act of deciding what jury charges should be given in light of the evidence.”<sup>258</sup> While this particular decision favored the State, it also has beneficial implications for the defense side of a criminal case.<sup>259</sup>

## VI. CONCLUSION: HOW MANDAMUS LAW IS AFFECTING TRIAL PRACTICE

Considering the evolving trends regarding petitions for writ of mandamus in Texas, attorneys now have more options for remedying a trial court’s error prior to appeal. However, the decision of when and whether to pursue a petition for writ of mandamus should be considered before an attorney attends a hearing that could result in an erroneous ruling by the trial court. Knowing the burden that will be imposed on a party when seeking such mandamus relief prior to a hearing with the trial

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254. *See Young*, 236 S.W.3d at 210 (granting mandamus in regard to a jury charge).

255. *Weeks*, 391 S.W.3d at 126 (finding no adequate remedy at law and basing mandamus on performance of a ministerial duty).

256. *See id.* at 125–26 (arguing that the jury charge should reflect the prosecution’s burden).

257. *See id.* at 123–24 (“This remedy is too uncertain to constitute an adequate remedy.”); Cynthia Hujar Orr, *Way Opened for Mid-Trial Review of Trial Court Rulings*, VOICE FOR THE DEFENSE ONLINE (Feb. 12, 2013), available at <http://www.voiceforthedefenseonline.com/story/way-opened-mid-trial-review-trial-court-rulings> (commenting on the seemingly unlikely result of *Weeks*).

258. *Weeks*, 391 S.W.3d at 125–26 (extending review).

259. Cynthia Hujar Orr, *Way Opened for Mid-Trial Review of Trial Court Rulings*, VOICE FOR THE DEFENSE ONLINE (Feb. 12, 2013), available at <http://www.voiceforthedefenseonline.com/story/way-opened-mid-trial-review-trial-court-rulings> (“If an appeal is too speculative for the State, then it is also true for the defendant who has an interest in the particular jury he strategically selected and in its proper charge.”).

court is essential to both guiding the trial court to make the correct ruling and to protect the record for a potential petition for writ of mandamus.<sup>260</sup> As with an ordinary appeal, a proper record and an appropriate order are essential to obtaining mandamus relief. Finally, timely seeking such relief from a trial court's ruling is a necessity. As a result, "[w]hen these situations present themselves, it is crucial to at least begin planning for the possibility of a mandamus proceeding."<sup>261</sup> While preparation for the potential of filing a petition for writ of mandamus is important, it is usually a better tactic to not threaten the trial judge that mandamus relief will be sought if you do not receive the ruling you want.

Finally, knowledge of the availability of mandamus relief is equally valuable to both plaintiff and defense attorneys and can be utilized to varying degrees in both civil and criminal cases. As the Supreme Court of Texas expands the availability of mandamus relief, it creates more opportunities for litigants to construct strong arguments for mandamus relief on issues that the court has not previously granted. As previously discussed, recent decisions by the court have changed more than 150 years of precedent and "have [had] implications for Texas trial practice at both the trial and appellate [court] levels."<sup>262</sup> As courts continue down this path of expanding mandamus relief, practitioners with knowledge of the availability of such relief will be in a far better position than those without.

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260. *See id.* (advising attorneys to be competent at trial).

261. *Id.*

262. *See generally* Edward C. Dawson, *Texas Supreme Court Holds that Trial Courts Must Give Reasons for Granting New Trials*, Vol. 47, HOUS. LAWYER 28, 31 (2009) (noting the impact the decisions have had on mandamus jurisprudence).