TEXAS SUPREME COURT MANDAMUS UPDATE

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CHAPTER 3

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SELECTED PUBLICATIONS

Chutes and Ladders: Unusual Paths In and Out of the Appellate Courts, State Bar of Texas, Advanced Civil Appellate Practice Course, Sept. 2003.
Interlocutory Appeals, Mandamus, and Other Extraordinary Remedies, State Bar of Texas, Advanced Civil Trial Course, Fall 2003.
Help! The Other Side Has Filed a Petition for Review — What Do I Do Now? State Bar of Texas, Practice Before the Supreme Court of Texas, April 2003.
The 2002 Amendments to the Texas Rules of Appellate Procedure With Commentary, 15 APPELLATE ADVOCATE 5 (Fall 2002) (co-author with Prof. William V. Dorsaneo III and W. Wendell Hall).
Appellate Sanctions, State Bar of Texas, Civil Appellate Practice Boot Camp, Sept. 2002 (co-author).
Texas Supreme Court Practice, State Bar of Texas, Advanced Personal Injury Law Course, Summer 2002.
Drafting Issues in the Texas Supreme Court, State Bar of Texas, Advanced Civil Appellate Practice Course, Sept. 2001.
The Civil Amicus Brief, 13 APPELLATE ADVOCATE 4 (Fall 2000).
Simplicity, Simplicity, Simplicity! Techniques for Presenting Complicated Facts and Issues Simply, State Bar of Texas, Advanced Civil Appellate Practice Course, Sept. 2000.
Petitions for Review: Frequently Asked Questions, 12 APPELLATE ADVOCATE 3 (June 1999).

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TEXAS SUPREME COURT MANDAMUS UPDATE

By Pamela Stanton Baron

I. INTRODUCTION AND SCOPE

This paper focuses on recent mandamus trends and cases in the Texas Supreme Court. The objectives are to (1) discuss key differences between mandamus practice in the Supreme Court as opposed to the courts of appeals; (2) provide a statistical overview of the Court's mandamus docket; and (3) summarize briefly the Court's mandamus jurisprudence over the last seven years. The paper is not a primer on the general laws governing issuance of the writ of mandamus, nor does it provide a "how to" guide to mandamus filings. Readers seeking assistance with these matters should consult another paper by the author: Pamela Stanton Baron, *Interlocutory Appeals, Mandamus, and Other Extraordinary Remedies*, State Bar of Texas, Advanced Civil Trial Course, Fall 2003.

II. DIFFERENCES BETWEEN MANDAMUS PRACTICE IN THE TEXAS SUPREME COURT AND THE COURTS OF APPEALS

Parties before the Texas Supreme Court in a mandamus proceeding should be aware that there are significant differences between mandamus practice in that Court and in the courts of appeals. While the most significant differences are those of attitude and procedure, practitioners should also be aware that there are some differences in jurisdiction as well.

A. Differences in attitudes and procedures

It is both easier and harder to obtain mandamus relief in the Texas Supreme Court as opposed to the courts of appeals. It is easier because the Supreme Court takes a more flexible approach to mandamus review. As a general matter, courts of appeals will not extend the use of mandamus beyond well-recognized situations in which appeal is not an adequate remedy, such as when the trial court's order requires disclosure of privileged documents, or disqualifies a party's attorney, or refuses to send a case to arbitration. Generally, the courts of appeals will look for a body of cases indicating that mandamus relief is appropriate in a given situation before they will interfere with the trial court through issuance of the writ.

In contrast, the Supreme Court's approach to mandamus is less rigid. At times, the Court will follow traditional mandamus doctrine such as that set out in *Walker v. Packer*, 827 S.W.2d 833, 842 (Tex. 1982) ("an appellate remedy is not inadequate merely because it may involve more expense or delay than obtaining an extraordinary writ"), and *Abor v. Black*, 695 S.W.2d 564, 567 (Tex. 1985) (court will not issue mandamus to correct incidental trial rulings, including pleas to the jurisdiction, pleas in abatement, motions for summary judgment, motions for instructed verdict, motions for j.n.o.v., and motions for new trial, as well as "a myriad of interlocutory orders and judgments"). At other times, the Court is more pragmatic and is willing to interfere by issuance of the writ when allowing the order to stand would waste the resources of the court and the parties. *See, e.g.*, *In re Masonite Corp.*, 997 S.W.2d 194, 196 (Tex. 1999) ("exceptional circumstances" made appeal inadequate from trial court's venue decision because the 16 resulting trials, all with built-in reversible error, would strain resources of the judiciary, the public, and the parties). In short, the Texas Supreme Court is more open to arguments that urge expanded or creative uses of the writ of mandamus.

Although the attitude of the Court may be more expansive, its internal procedures for determining whether to accept a mandamus case are fairly stringent. The Court employs a staff attorney to handle original proceedings. When a mandamus petition is filed accompanied by a request for emergency relief, the petition is forwarded to the mandamus attorney for review and presentation to the justices. *See* Marla Broaddus, *Original Proceedings in the Supreme Court of Texas,* State Bar of Texas, Practice

Before the Texas Supreme Court at 4-7 (April 2003). If time permits, the mandamus attorney will prepare a study memo for the justices to review with the petition. *Id.* If time constraints do not permit, the mandamus attorney will present the matter orally to the justices. *Id.* If no emergency relief is requested, the mandamus petition is handled like a petition for review and is distributed to the justices with a vote sheet providing that the mandamus petition will be automatically denied thirty days later unless one or more justices ask for a response or to discuss the case at conference. *Id.*

The Court requires the affirmative vote of five justices — a majority of the Court — to grant emergency relief or to accept the mandamus case and set it for argument and opinion. *See* Andrew Weber, *Internal Procedures of the Supreme Court*, State Bar of Texas, Practice Before the Texas Supreme Court Ch. 3 at 4-5 (April 2003). This extraordinary vote requirement applies only to extraordinary writs — to grant a petition for review and set for argument takes only the affirmative vote of four justices. *See id.* at 2, 4-5.

In addition to the higher vote requirement, practitioners should also be aware that the Court imposes another requirement — that the issue presented be important to the jurisprudence of the state. *Walker v. Packer*, 827 S.W.2d 833, 839 n.7 (Tex. 1992). The phrase "of importance to the jurisprudence of the state" is not explicitly defined by rule or statute. Tex. R. App. P. 56, however, lists factors the Supreme Court considers in deciding whether to grant a petition for review:

> Among the factors the Supreme Court considers in deciding whether to grant a petition for review are the following:
> (1) whether the justices of the court of appeals disagree on an important point of law;
> (2) whether there is a conflict between the courts of appeals on an important point of law;
> (3) whether a case involves the construction or validity of a statute;
> (4) whether a case involves constitutional issues;
> (5) whether the court of appeals appears to have committed an error of law of such importance to the state's jurisprudence that it should be corrected; and
> (6) whether the court of appeals has decided an important question of state law that should be, but has not been, resolved by the Supreme Court.

Tex. R. App. P. 56.1(a). Additionally, Tex. R. App. P. 47 provides insight into what is "important" in its setting of standards for the court of appeals to employ in determining whether no to designate an opinion as a memorandum opinion; such a designation is prohibited when:

> (a) establishes a new rule of law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases; (b) involves issues of constitutional law or other legal issue important to the jurisprudence of Texas; (c) criticizes existing law; or (d) resolves an apparent conflict of authority.

See also Maritime Overseas v. Ellis, 40 Tex. Sup. Ct. J. 110 (Nov. 15, 1996) (Hecht, J., dissenting to denial of application for writ of error) (factors to consider include the size of the damage award, the importance of the central legal issue, the fact that the central legal issue had not been authoritatively addressed (presumably by the Texas Supreme Court), the existence of dissents and conflicts in the court of appeals, the granting of a similar issue in a pending case, the fact that the case was well briefed by capable counsel, and the existence of error in the court of appeals' judgment).

Whether the Supreme Court really applies this standard in mandamus actions is subject to question. Particularly in discovery cases, where the issues presented are extremely fact specific, the Court's writing is less likely to establish generally applicable rules of law. The same is true in sanctions cases, where the Court evaluates individual discovery histories to determine whether the sanctions imposed are just. Nonetheless, even in these types of cases, relator should suggest reasons a grant is important to the jurisprudence of the state. The real party in interest should argue the converse position.

B. Differences in jurisdiction

The mandamus jurisdiction of the courts of appeals and the Texas Supreme Court overlap substantially. Both exercised concurrent mandamus jurisdiction over district and county judges, including probate judges. Tex. Gov't Code §§ 22.002(a), 22.221; *Qwest Microwave, Inc. v. Bedard*, 756 S.W.2d 426, 441 (Tex. App.—Dallas 1988, orig. proceeding) (probate court is county court within meaning of Tex. Gov't Code § 22.22-1(b)).

Court reporters, county and district clerks, family law masters, and justices of the peace are not judges. *See Pat Walker & Co. v. Johnson*, 623 S.W.2d 306, 308 (Tex. 1981, orig. proceeding) (Supreme Court lacks direct mandamus jurisdiction over county clerks, district clerks, court reporters, constables, and justices of the peace); *Summit Savings Ass'n v. Garcia*, 727 S.W.2d 106, 107 (Tex. App.—San Antonio 1987, orig. proceeding) (court of appeals has no jurisdiction to issue mandamus against district clerk); *Welder v. Fritz*, 750 S.W.2d 930, 932 (Tex. App.—Corpus Christi 1988, orig. proceeding) (mandamus will not lie against family law master); *Easton v. Franks*, 842 S.W.2d 772, 773 (Tex. App.—Houston [1st Dist. 1992, orig. proceeding) (justice of peace not subject to mandamus jurisdiction). Mandamus may issue against these other court officers, however, if necessary to enforce the jurisdiction of the court. Tex. Const. art. V, § 3; *see Lesiker v. Anthony*, 750 S.W.2d 338, 339 (Tex. App.—Houston [1st Dist.] 1988, orig. proceeding) (may issue writs to protect jurisdiction over pending proceeding); *Click v. Tyra*, 867 S.W.2d 406, 407 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding) (granted leave to file petition for writ of mandamus against district clerk to protect appellate jurisdiction and "to insure integrity of appellate process").

Both the Supreme Court and the courts of appeals may issue mandamus in connection with the holding of an election or a political party convention, even if the respondent is not a public officer. Tex. Elec. Code. § 273.061.

While the overlap in jurisdiction is great, there are a few important differences, discussed below.

1. Presentment requirement

a. Petition must first be presented to court of appeals

If the Supreme Court and the court of appeals share concurrent jurisdiction over the original proceeding, ordinarily the petition must first be presented to the court of appeals. Tex. R. App. P. 52.3(e); *see In re Chaney & Assoc., Inc.*, 41 Tex. Sup. Ct. J. 612 (Apr. 16, 1998) (denying petition with notation to Tex. R. App. P. 52.3(e)); *In re Wyatt*, 41 Tex. Sup. Ct. J. 156 (Dec. 11, 1997) (same).

b. Exceptions to the presentment requirement

If not first presented to the court of appeals, the petition to the Supreme Court must state a compelling reason for the omission. Tex. R. App. P. 52.3(e).

This exception is a narrow one, most often recognized in election cases, where the time constraints of the election or printing of ballots preclude a review at both the court of appeals and the Supreme Court. *See, e.g., LaRouche v. Hannah*, 822 S.W.2d 632 (Tex. 1992, orig. proceeding); *Sears v. Bayoud*, 786 S.W.2d 248, 249 & 250 n.1 (Tex. 1990, orig. proceeding) (urgency of time constraints of election justified failure to file first in the court of appeals). It is also apparently possible to skip review by the court of appeals when the case is of statewide importance and time is of the essence, as in the recent redistricting case. *Perry v. Del Rio*, 66 S.W.3d 239, 257 (Tex. 2001) (impending federal court deadline justified first review in the Supreme Court).

In a few instances, the Supreme Court has granted relief by mandamus for what should have been an interlocutory appeal to the court of appeals.

In *Republican Party of Texas v. Dietz*, 940 S.W.2d 86 (Tex. 1997), and 924 S.W.2d 932 (Tex. 1996) (per curiam), at issue was whether the Republican Party could bar from its convention participation by an organization of homosexual Republicans. The trial court had issued a temporary injunction grounded on violation of the organization's free speech rights and on breach of contract.

Because the order was not based on the constitutionality of a state statute, the Supreme Court did not have direct appeal jurisdiction. Nonetheless, it did not require the Republican Party to seek relief from the Third Court of Appeals in Austin. An interlocutory appeal is available for review of temporary injunctions; like class certifications, review is final in the court of appeals. The Supreme Court gave a number of reasons why mandamus review was available: (1) because of the "unique and compelling circumstances" of the case; (2) the state's highest court should determine issues of statewide importance involving a statewide political convention; (3) the case involves First Amendment Rights of the Republican Party (although not reached by the Court); (4) the case could become moot unless immediate court action was taken; and (5) "the quick eruption and short time frame of this constitutional controversy compelled mandamus review."

The court seems to take a similar approach in cases involving state sports championships and similar competitions. The Supreme Court reviewed by mandamus what looked very much like a temporary injunction in *In re University Interscholastic League*, 20 S.W.3d 690 (Tex. 2000) (per curiam). There the court did not offer a jurisdictional explanation for its ordering the trial court to vacate an order that, among other things, directed the UIL to advance a certain baseball team in the state tournament. *See also In re Lubbock Indep. School Dist.*, No. 02-0308, 45 Tex. Sup. Ct. J. 550 (order issued April 10, 2002) (without argument and opinion, Supreme Court orders district court to dissolve injunction declaring a winner of a state academic competition; no interlocutory appeal had been taken to the court of appeals).

2. <u>Cases in which the Supreme Court has jurisdiction but the courts of appeals do not</u>

a. Writs issued to officers of state government, including officers of the executive departments

In addition to mandamus authority over district and county judges, the Supreme Court (but not the court of appeals) is also statutorily authorized to issue mandamus against a court of appeals or a justice of the court of appeals, and officers of state government except the governor, the court of criminal appeals, or a justice of that court. Tex. Gov't Code § 22.002(a).

In some situations, not only does the Supreme Court have mandamus jurisdiction to the exclusion of the court of appeals, it has exclusive original jurisdiction preventing the district courts from exercising their general mandamus jurisdiction:

The Supreme Court has exclusive writ jurisdiction over officers of the executive departments. By statute:

> Only the supreme court has the authority to issue a writ of mandamus or injunction, or any other mandatory or compulsory writ or process, against any of the officers of the executive departments of the government of this state to order or compel the performance of a judicial, ministerial, or discretionary act or duty that, by state law, the officer or officers are authorized to perform.

Tex. Gov't Code § 22.002(c).

Under this statute, "when a relator seeks to compel an executive officer to perform duties imposed by law, generally this [Supreme] Court alone is the proper forum." *A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 672 (Tex. 1995). The Texas Constitution identifies six executive officers (other than the governor, over whom the court may not exercise jurisdiction); these are: the lieutenant governor, the secretary of state, the comptroller of public accounts, the treasurer, the commissioner of the general land office, and the attorney general. Tex. Const. art. IV, § 1; *A & T Consultants*, 904 S.W.2d at 672. It appears that the list of six officers is exclusive; the court will not entertain exclusive original writ jurisdiction over other officers of state government. *See City of Arlington v. Nadig*, 960 S.W.2d 641 (Tex. 1997) (per curiam) ("we do not have exclusive mandamus jurisdiction over the TWCC executive director or over the Subsequent Injury Fund administrator"); *Betts v. Johnson*, 96 Tex. 360, 73 S.W. 4, 5 (Tex. 1903) (orig. proceeding) (court does not have exclusive jurisdiction over members of state boards).

The Supreme Court has thus held that it alone could issue mandamus to require the six constitutionally-designated executive officers to

release documents under the Texas Open Records Act. *A & T Consultants*, 904 S.W.2d at 673. It has also exercised exclusive original jurisdiction over these officers in other contexts. *Houston Chronicle Pub. Co. v. Mattox*, 767 S.W.2d 695 (Tex. 1989) (orig. proceeding) (seeking to compel the attorney general to render an open records opinion); *Jessen Assocs., Inc. v. Bullock*, 531 S.W.2d 593 (Tex. 1975) (orig. proceeding) (seeking to compel the comptroller to issue a warrant for payment of architects' services); *Bullock v. Calvert*, 480 S.W.2d 367 (Tex. 1972) (orig. proceeding) (seeking to require the comptroller to pay the costs of a party primary election); *Trinity River Auth. v. Carr*, 386 S.W.2d 790 (Tex. 1965) (orig. proceeding) (seeking to force the attorney general to approve a river authority's revenue bonds); *Gordon v. Lake*, 163 Tex. 392, 356 S.W.2d 138 (Tex. 1962) (orig. proceeding) (seeking to compel the secretary of state to file a corporate charter); *County of Cameron v. Wilson*, 160 Tex. 25, 326 S.W.2d 162 (Tex. 1959) (orig. proceeding) (seeking to require the attorney general to approve the issuance of county revenue bonds); *Union Cent. Life Ins. Co. v. Mann*, 138 Tex. 242, 158 S.W.2d 477 (Tex. 1941) (orig. proceeding) (seeking to force the attorney general and comptroller to refund illegally-assessed taxes the petitioner had paid on policy premiums it received); *Manion v. Lockhart*, 131 Tex. 175, 114 S.W.2d 216 (Tex. 1938) (orig. proceeding) (seeking to compel the treasurer to pay escheated funds to an heir); *Corsicana Cotton Mills, Inc. v. Sheppard*, 123 Tex. 352, 71 S.W.2d 247 (Tex. 1934) (orig. proceeding) (seeking to compel the comptroller and treasurer to refund erroneously paid franchise taxes); *Jernigan v. Finley*, 90 Tex. 205, 38 S.W. 24 (Tex. 1896) (orig. proceeding) (seeking to force the comptroller to issue a warrant for county school funds).

If a writ proceeding is filed against these six officers in district court, the district court must dismiss the petition for want of jurisdiction. *A & T Consultants*, 904 S.W.2d at 673.

b. Mandamus jurisdiction over state boards or commissions when time is of the essence on a matter of importance

The Texas Supreme Court has exclusive mandamus jurisdiction over executive officers; it has non-exclusive original jurisdiction over other officers of state government. Tex. Gov't Code § 22.002. The Court recently held that state officers over which it exercises mandamus jurisdiction include state boards and commissions, like the Public Utility Commission. *In re TXU*, 63S.W.3d 130 (Tex. 2001).

In *TXU*, the utility sought mandamus relief from an interim agency order directly in the Texas Supreme Court; it later filed an administrative appeal in district court. The justices disagreed on whether the court could, or should, exercise mandamus jurisdiction under these circumstances. A majority of the court, however, voted to deny mandamus relief. Four separate opinions issued: (1) Chief Justice Phillips, joined by Justice Enoch and Justice Godbey, sitting by assignment, recognized that the court had mandamus jurisdiction over state commissions but held that TXU had an adequate remedy in the district court administrative appeal; (2) Justice Baker and Rodriguez held that the court lacked mandamus jurisdiction over state commissions; (3) Justice Brister, sitting by assignment, reached the merits without addressing the jurisdictional issue and opined that TXU was not entitled to relief; and (4) Justice Hecht, joined by Justices Owen and Jefferson, dissented on the grounds that the court had jurisdiction over state commission orders because the proceeding "involves questions which are of general public interest and call for a speedy determination" and on the grounds that TXU was entitled to relief on the merits.

The effect of the four opinions may be that the Texas Supreme Court will entertain mandamus actions over state board and commission orders when time is of the essence and the remedies in the lower court are not adequate.

c. Mandamus jurisdiction over the Legislative Redistricting Board

Under Tex. Const. art. III, § 28, the Supreme Court may issue mandamus to require performance of duties by Legislative Redistricting

Board. In *Mauzy v. Legislative Redistricting Board*, 471 S.W.2d 570, 575 (Tex. 1971, orig. proceeding), the Supreme Court exercised original jurisdiction over a mandamus proceeding against the redistricting board filed first in that court without addressing whether its jurisdiction was exclusive. Because four of the five members of the board are executive officers over which the court exercises exclusive jurisdiction (the Lieutenant Governor, the Attorney General, the Comptroller of Public Accounts and the Commissioner of the General Land Office), presumably the court's jurisdiction over the board is also exclusive.

d. Mandamus jurisdiction over multidistrict litigation transfer orders

Under Judicial Administrative Rule 11, cases across the state may be consolidated for pretrial proceedings. The order of the presiding judge granting or denying a request for appointment of a pretrial judge is reviewable by mandamus to the Supreme Court. The rule does not state that such jurisdiction is exclusive, and there are no reported cases addressing this issue.

Further, newly-enacted House Bill 4 creates a judicial panel on multidistrict litigation with the authority to transfer and consolidate cases. The Texas Supreme Court is required to adopt rules allowing some or all of the orders of the judicial panel on multidistrict litigation to be subject to appellate review by extraordinary writ, presumably mandamus. Tex. Civ. Prac. & Rem. Code § 74.163(a)(1) (eff. Sept. 1, 2003). The Court has adopted new Rule of Judicial Administration 13.9, which provides that decisions of the panel on multi-district litigation may be reviewed only by Supreme Court may in an original proceeding.

e. Cases involving issuance and payment of certain bonds

Many statutes provide for mandamus in the Supreme Court to enforce the obligations of state officials with respect to public debt. Tex. Agric. Code § 58.036 ("Payment of the bonds and performance by the [Texas Agricultural Finance Authority] or the [Agricultural] commissioner of its or his functions and duties under this chapter and the Texas Constitution may be enforced in the state supreme court by mandamus or other appropriate proceeding."); Tex. Gov't Code § 404.126(d) ("Payment of the notes and performance of official duties prescribed by the state constitution and by this subchapter may be enforced in the state supreme court by mandamus or other appropriate proceeding."); Tex. Gov't Code § 465.028 ("The [Texas National Research Laboratory Commission] or any financing corporation, as applicable, may include this pledge and agreement of the state in an agreement with the owners of those bonds. Payment of the bonds and performance by the commission or any financing corporation, as applicable, of its functions and duties under this section and the Texas Constitution may be enforced in the state supreme court by mandamus or other appropriate proceeding."); Tex. Gov't Code § 1205.002(b) ("This chapter does not prohibit an issuer from applying to the Texas Supreme Court for a writ of mandamus to the attorney general for the approval of a bond, and the court is authorized to issue the writ.").

f. Mandamus jurisdiction over certain disciplinary proceedings

Mandamus may be taken to the Supreme Court to enforce a rule governing trial court judgments and action by the Supreme Court clerk in disciplinary proceedings to determine whether or not the actions of an attorney constituted professional misconduct. Tex. R. Disc. Proc. 3.09.

III. STATISTICAL OVERVIEW OF RECENT MANDAMUS ACTIVITY

The Court disposes of about 260 mandamus petitions each term. Of these, it "accepts" (*i.e.*, either sets for argument or issues an opinion without argument in the case) only about 5%. For those wanting more precise numbers, according to the Office of Court Administration, the Court accepted 14 of 264 petitions (5.3%) in fiscal year 2003; 20 of 269 petitions (7.4%) in fiscal year 2002; and 7 of 246 petitions (2.8%) in fiscal year 2001.

The number of opinions varies, and it must be remembered that some of the mandamus petitions that are accepted for review do not reach opinion

because of settlement, bankruptcy, or mootness. Official statistics show the Court issuing 3 opinions in fiscal year 2003, 9 in fiscal year 2002, and 7 in fiscal year 2001. The opinions overwhelmingly granted mandamus relief. Of the 19 opinions, 16 conditionally granted relief, two denied relief, and one case was dismissed.

Motions for rehearing of the denial of a petition are almost never successful. In the three years ended August 31, 2003, the Court disposed of 95 motions for rehearing, granting only one.

IV. SUMMARY OF RECENT MANDAMUS ACTIVITY BY SUBJECT AREA

The remainder of the paper summarizes mandamus cases in which the Court has taken some affirmative action from September 1, 1997 through February 16, 2004, a seven and one-half year period. The list includes: (1) mandamus cases that the Court has accepted and set for oral argument, which are pending and awaiting decision; (2) cases that the Court accepted but which settled or were otherwise dismissed or abated prior to issuance of an opinion; (3) cases in which the Court issued a deciding opinion; (4) cases in which one or more justices filed a concurring or dissenting opinion to the denial of a mandamus petition; and (5) cases in which one or more justices, without opinion, noted a dissent to the denial of the mandamus petition. The cases are organized by subject matter and are in roughly chronological order.

By far the largest area of activity was discovery, encompassing 31 of the 108 cases reviewed below. This amounts to almost one-third of the Court's mandamus docket. Arbitration issues and venue and jurisdiction issues occupied the next largest share, with each category presenting 19 cases, or roughly one-fifth of the docket.

A. Agreements governing forum: arbitration, forum selection, and jury waivers

1. <u>Arbitration</u>

a. Enforceability/Constitutionality

In re Heineken USA, Inc., No. 01-0898. This case was argued September 25, 2005, and was subsequently dismissed by agreement of the parties. At issue was the constitutionality of a provision of the Alcoholic Beverage Code mandating arbitration of certain breaches of distributorship agreements.

In re Halliburton Co., 80 S.W.3d 566 (Tex. 2002), *cert. denied*, 123 S.Ct. 901 (2003). Arbitration provision between employer and at-will employee meets the requirements for altering at-will employment contract, is not unconscionable, and is enforceable under contract law when employer notified employee of arbitration agreement and informed him that continuing employment constituted acceptance.

In re American Homestar of Lancaster, Inc., 50 S.W.3d 480 (Tex. 2001). Home buyers required to arbitrate warranty claims brought against seller and manufacturer of manufactured home. The Court holds that the policy favoring arbitration is not trumped by the Magnuson-Moss Act.

In re L&L Kempwood Assocs., L.P., 9 S.W.3d 125 (Tex. 1999) (per curiam). The Federal Arbitration Act applies if interstate commerce is involved or affected; there does not have to be a substantial effect on interstate commerce.

In re Oakwood Mobile Homes, Inc., 987 S.W.2d 571 (Tex. 1999) (per curiam). Mandamus granted. Trial court abused its discretion in refusing to order case to arbitration. Fact that seller represented to buyer that the sale of the mobile home would not go through unless plaintiffs signed arbitration agreement does not show that the agreement was induced by fraud, in the absence of evidence that such representations were false, and does not show duress or unconscionability.

b. Enforceability by or against non-signatories

In re Doskocil Mfg. Co., 02-0665. This case was granted and set for argument but subsequently abated and then dismissed. The question before the court involved enforceability of an arbitration agreement signed by the decedent. The trial court enforced the agreement with respect to the survival claims, which were brought on behalf of the decedent, but not with respect to the wrongful death claims brought by relatives of the decedent who did not sign the arbitration agreement. The company argued that the agreement should be

enforceable as to the wrongful death claims because they are derivative claims and the beneficiaries stand in the shoes of the decedent.

In re Weekley Homes, L.P., No. 03-0309. This case was argued on December 10, 2003, and is awaiting opinion. A family brought various personal injury and property damage claims against Weekly Homes, which countered that all claims were subject to an agreement to arbitrate. The trial court ordered arbitration of the claims brought by the parents but not non-contractual claims filed by the children, who did not execute the agreement to arbitrate. The Supreme Court will decide whether the children's claims are subject to arbitration.

In re X.L. Ins. Co., 988 S.W.2d 741 (Tex. 1999) (per curiam). In dismissing the case as moot because of settlement, the Court expresses no view on whether an insurance company, which had not signed an arbitration agreement, could nevertheless be compelled to arbitrate its cross-claim against a co-insurer, which had an arbitration agreement with the common insured.

c. Scope

In re First Texas Homes Inc., 120 S.W.3d 868 (Tex. 2003, orig. proceeding) (per curiam). A contract to purchase a new home contained an agreement to arbitrate "all disputes." Under this provision, arbitration was required not just for contract claims, but also extra-contractual claims, including alleged violations of the Fair Housing Act.

In re J.D. Edwards World Solutions Co., 87 S.W.3d 546 (Tex. 2002) (per curiam). Court holds agreement in which parties agreed to arbitrate all disputes "involving" the underlying contract requires arbitration of the claim that the original agreement procured by fraudulent inducement.

In re Firstmerit Bank, N.A., 52 S.W.3d 749 (Tex. 2001). Because all of the plaintiffs' claims were within the broad scope of the arbitration agreement, their claims relating to the purchase of a mobile home must be arbitrated.

d. Waiver of right

In re Service Corp. Int'l, 85 S.W.3d 171 (Tex. 2002) (per curiam). Trial court abused its discretion in refusing to order arbitration of state law claims. Fact that defendants sought to include plaintiffs in federal class action, sought to stay discovery, and sought order barring claims in state court prior to requesting arbitration did not waive the right to arbitrate.

In re Bruce Terminix Co., 988 S.W.2d 702 (Tex. 1998) (per curiam). The trial court erred in refusing to compel arbitration. Whether a party has waived the right to arbitration is a question of law and there is a strong presumption against waiver. No waiver occurs when the party filed an answer, served discovery requests, then requested arbitration six months after suit was filed.

e. Arbitrators

In re Louisiana Pacific Corp., 972 S.W.2d 63 (Tex. 1998) (per curiam). The trial court abused its discretion in appointing an arbitrator for a party after the party withdrew its original designation and named an arbitrator.

f. Appellate review

In re Valero Energy Corp., 968 S.W.2d 916 (Tex. 1998) (per curiam). Mandamus denied without prejudice. After the trial court refused to order arbitration, relator brought both an interlocutory appeal and a mandamus action in the court of appeals. Although the court of appeals denied mandamus relief, the appeal was still pending. Because Valero might get the relief it sought through the interlocutory appeal, the mandamus action in the Supreme Court was premature and dismissed without prejudice to refiling.

2. <u>Forum selection</u>

In re AIU Insurance Co., No. 02-0648. This case, argued September 3, 2002, is pending and awaiting opinion. The issue before the court is whether a mandatory forum selection clause in a pollution liability policy, requiring all suits to be filed in the State of New York, is enforceable.

In re GNC Franchising, Inc., 22 S.W.3d 929 (Tex. 2000) (Hecht, J., dissenting to denial of petition for writ of mandamus joined by Owen, J.). The dissenters state that mandamus should issue to enforce a contractual forum selection clause. Allegations of fraud in other parts of the contract should not vitiate the forum agreement. There is

no adequate remedy on appeal, as the case will have been litigated in a forum not agreed to at expense to the litigants and the state's limited judicial resources.

3. Other waivers of or limitations on the right to traditional trial by jury

In re The Prudential Insurance Co. of America, No. 02-0690. This case, argued April 2, 2003, is pending and awaiting opinion. The issue before the court is whether a provision in a lease waiving the right to trial by jury is enforceable.

In re Allstate County Mut. Ins. Co., 85 S.W.3d 193 (Tex. 2002). Trial court abused its discretion in refusing to order appraisal of totaled vehicle's value pursuant to an appraisal provision in the insurance policy. The appraisal provision was not an unenforceable arbitration provision.

B. Pre-trial: Jurisdiction, venue, and prerequisites to suit

1. Jurisdiction

a. Court vs. agency

In re Entergy Corp., No. 03-0024. This case, argued November 12, 2003, is pending and awaiting opinion. In this class action, ratepayers sued Entergy alleging breach of a merger agreement approved by and issued as an order by the Public Utility Commission. This case presents three mandamus issues: (1) whether the PUC has exclusive jurisdiction over the issues raised in the case because they required the factfinder to set rates; (2) alternatively, whether the PUC has primary jurisdiction and the trial court abused its discretion in refusing to abate; and (3) whether mandatory venue for any action lies in Travis County.

In re State Bar of Texas, 113 S.W.3d 730 (Tex. 2003). A district court may not vacate a Board of Disciplinary Appeals order suspending an attorney from practicing law after the Supreme Court has affirmed that order.

In re TXU Electric Co., 67 S.W.3d 130 (Tex. 2001). The utility sought mandamus relief from an interim agency order directly in the Texas Supreme Court; it later filed an administrative appeal in district court. The justices disagreed on whether the court could, or should, exercise mandamus jurisdiction under these circumstances. A majority of the court, however, voted to deny mandamus relief. Four separate opinions issued: (1) Chief Justice Phillips, joined by Justice Enoch and Justice Godbey, sitting by assignment, recognized that the court had mandamus jurisdiction over state commissions but held that TXU had an adequate remedy in the district court administrative appeal; (2) Justice Baker and Rodriguez held that the court lacked mandamus jurisdiction over state commissions; (3) Justice Brister, sitting by assignment, reached the merits without addressing the jurisdictional issue and opined that TXU was not entitled to relief; and (4) Justice Hecht, joined by Justices Owen and Jefferson, dissented on the grounds that the court had jurisdiction over state commission orders because the proceeding "involves questions which are of general public interest and call for a speedy determination" and on the grounds that TXU was entitled to relief on the merits.

In re State Bar of Texas, 960 S.W.2d 651 (Tex. 1997) (per curiam). A county court at law had no jurisdiction to interfere with ongoing state bar disciplinary proceeding by enjoining the proceedings.

b. Statutory probate courts

In re SWEPI, L.P., 85 S.W.3d 800 (Tex. 2002). A suit concerning royalty payments owned by a partnership in which a decedent's estate was a former partner is not "appertaining to or incident to an estate" under Prob. Code § 5B. Because the probate court's power to transfer was limited to actions appertaining to or incident to an estate, the probate court acted beyond its authority in ordering the transfer to itself of the royalty case.

In re Houston Northwest Partners, Ltd., No. 03-0252 (court of appeals' opinion at 98 S.W.3d 777 (Tex. App.—Austin 2003)). This case was argued on November 19, 2003 with two other cases presenting similar issues, and is pending and awaiting opinion. The issue is whether the statutory probate court of Travis County could exercise its power under the Probate Code to transfer to itself a personal injury action from a district court of Harris County notwithstanding provisions in the Civil Practice and Remedies

Code that would make venue proper in Harris County but not Travis County.

In re Graham, 971 S.W.2d 56 (Tex. 1998). Divorce proceeding involving a ward of the statutory probate court is a matter appertaining and incident to the ward's estate and the probate court has authority to transfer the divorce proceedings to itself from the district court.

c. Other jurisdiction issues

In re Forlenza, No. 03-0299. This case was argued December 1, 2003, and is awaiting decision. This is a suit for modification of a child custody order entered into by agreement in 1997. Since that time, the father and children have moved to various states. At issue is whether the trial court had continuing jurisdiction over the child custody order. The trial court held it did have continuing jurisdiction, and the court of appeals held that the trial court had abused its discretion in exercising jurisdiction.

Perry v. Del Rio, 66 S.W.3d 239 (Tex. 2001). Dominant jurisdiction cannot be conferred on a court by the filing of a claim, either by an original or amended pleading, unless the claim was ripe when the filing was made. Redistricting case did not become ripe until the regular session of the Legislature after the decennial census adjourned. Mandamus is appropriate to prevent a court from interfering with a court possessing dominant jurisdiction; further, the inefficiency of competing trials and the uncertainty that will attend two appeals and a final appeal to the Supreme Court pose an intolerable risk to completing the process within the limited time remaining under federal law to complete the process.

2. <u>Venue</u>

In re Southwestern Bell Tel Co., 35 S.W.3d 602 (Tex. 2000) (per curiam). A trial court's order transferring venue as to two defendants, when one of them had (unknown to the court) filed for bankruptcy is not effective as to the party in bankruptcy because of the automatic stay provision but was effective as to the non-bankrupt party. The trial court's plenary power over that part of the transfer order dealing with the non-bankrupt party expired 30 days after the order was signed and was not extended during the period of the automatic bankruptcy stay. The trial court's order setting aside the venue order as to the non-bankrupt party more than one year after it was signed was thus beyond the court's plenary power and void. The relator is not required to show lack of an adequate remedy be appeal when complaining of a void order.

In re Missouri Pacific R.R. Co., 998 S.W.2d 212 (Tex. 1999). Mandamus granted under Tex. Civ. Prac. & Rem. Code § 15.0642, allowing mandamus review of mandatory venue. Under the statute, relator need show only an abuse of discretion and not lack of an adequate remedy by appeal. Under FELA mandatory venue statute, a defendant may have more than one principal office, but it may not be subordinate to another Texas office, it must have decision makers who conduct the daily affairs of the company, and a mere agent or representative is not enough.

In re Masonite Corp., 997 S.W.2d 194 (Tex. 1999). Mandamus granted; Court holds that the trial court abused its discretion in transferring "on its own motion" cases as to which venue was improper to the plaintiffs' counties of residence rather than the county requested by the defendant. The majority found "exceptional circumstances" making appeal inadequate because the 16 resulting trials, all with built-in reversible error, would strain resources of the judiciary, the public, and the parties. The dissent criticizes this conclusion, arguing that the majority's decision conflicts with *Walker v. Packer*, involves ordinary rather than extraordinary circumstances, potentially makes any reversible error of the trial court subject to mandamus review, and conflicts with the legislative scheme denying interlocutory review of most venue decisions but making erroneous decision reversible without a showing of harm.

In re Continental Airlines, Inc., 988 S.W.2d 733 (Tex. 1998). A suit seeking declaratory relief was not essentially a suit for injunctive relief subject to mandatory venue requirements. The controversy may be resolved by declaratory relief, the pleadings do not support a permanent injunction, and courts will not reform the pleadings to add a claim for injunctive relief.

3. Forum non conveniens

In re Du Pont de Nemours and Co., 92 S.W.3d 517 (Tex. 2002). The trial court abused its discretion in refusing to dismiss the case pursuant to the forum non coveniens statute, Tex. Civ. Prac. & Rem. Code § 71.052. The statute, which the Court holds is mandatory, requires dismissal of asbestos claims commenced after August 1, 1995, that arose outside of Texas at a time when plaintiffs were not residents of the state.

In re Smith Barney, Inc., 975 S.W.2d 593 (Tex. 1998). Mandamus denied. The trial court did not abuse its discretion in following a writ refused case. The Court, however, went on to examine and overrule the prior decision, which held that foreign corporations authorized to do business in Texas were statutorily accorded the right to sue in Texas, regardless of whether the action had any other connection with the state. The Court held that these suits were subject to the doctrine of *forum non conveniens* and sent the case back to the trial court to reconsider its prior ruling of non-dismissal.

4. Abatement

In re I.B.M Corp., No. 02-0632. The Court set this case for argument and later dismissed the proceeding as moot. The issue before the Court was whether the trial court abused its discretion in refusing to abate the class action for failure to provide the required notice under the DTPA.

In re Texas Workers Compensation Fund, 997 S.W.2d 247 (Tex. 1999) (Hecht, J., dissenting to denial of petition for writ of mandamus joined by Owen, J.). The dissenters would grant mandamus to compel the trial court to abate an action against the Texas Workers Compensation Insurance Fund for denial of benefits until the TWCC has ruled on whether such benefits should be paid.

In re Alford Chevrolet-Geo, 997 S.W.2d 173 (Tex. 1999). In this class action under the DTPA, the defendant was not entitled to mandamus relief based on argument that the case should be abated because the notice was insufficient. The notice properly demanded settlement on behalf of the entire class rather than the named plaintiffs seeking class certification.

5. Expert reports

In re American Medical Facilities, Inc., 41 Tex. Sup. Ct. J. 1323 (Aug. 14, 1998) (Hecht and Owen, JJ., noting dissent to denial of rehearing). Two justices dissented to denying rehearing of the denial of mandamus in this case presenting two issues: (1) whether the trial court can grant an extension to allow the plaintiff to comply with mandatory expert report requirement under § 13.01 of 4590i; and (2) whether the report must show causation as well as negligence.

C. Discovery

1. Discovery of insurance

In re Senior Living Properties, LLC, No. 02-0087. This case, argued September 18, 2002, was subsequently abated. The issue before the court is whether discovery of any relevant insurance policies is limited to the existence and content of the policy or whether depositions may inquire into erosion of benefits under the policy as well as the number of pending claims competing for payment under the insurance policy.

In re Sabine Valley Center, 986 S.W.2d 612 (Tex. 1999) (per curiam). Plaintiff may not discover evidence of insurance purchased by a governmental unit under the Tort Claims Act. The Act precludes discovery of insurance in all cases in which the governmental unit may be held vicariously liable for the acts of an employee.

2. Trade secret

In re Kuntz, 47 Tex. Sup. Ct. J. 168 (Dec. 19, 2003). In this case, Hal Kuntz had access to documents that were sought in discovery. Although he had access, his employer had actual physical possession, and the document belonged to the employer's client, who claimed the documents were protected by trade secret privilege. The Supreme Court held that the employee's mere access to the documents did not amount to "possession, custody, or control" that would require him to produce the documents for discovery. Justice Hecht wrote separately, stating that he would also reach the issue of whether the documents were privileged and would hold that they were trade secret information.

In re Bass, 113 S.W.3d 735 (Tex. 2003). Discovery of trade secret information denied. Geological seismic data are trade secrets; the non-participating royalty interest owners failed to establish the existence of a claim against the mineral estate owner justifying discovery of the trade secret data.

In re Bridgestone/Firestone, Inc., 106 S.W.3d 730 (Tex. 2003). Court denies discovery of skim stock formula of tire manufacturer on grounds that the plaintiffs failed to show how access to Firestone's skim stock formula is necessary for a fair adjudication of their claims. Justice O'Neill filed a separate concurring opinion in which she argued that the Court should adopt a more detailed test for gaining discovery of trade secret information in a particular case. She would nonetheless deny discovery because (1) the plaintiffs have only shown that the formula would be "highly probative and relevant," and (2) plaintiffs could use alternative proof that the finished tires contained material different from that called for in the skim-stock formula or show that the composition of tires manufactured at Firestone's Decatur plant differed from that of tires manufactured at its other plants.

In re Continental General Tire, 979 S.W.2d 609 (Tex. 1998). When a party resisting discovery establishes that the requested information is a trade secret under Rule 507, the burden shifts to the requesting party to establish that the information is necessary for a fair adjudication of its claim or defense. If the requesting party meets this burden then the trial court should ordinarily compel disclosure of the information pursuant to an appropriate protective order. The party seeking discovery did not meet its burden in this case.

3. Other privileges

In re State of Texas, No. 03-0433. This case was originally set for argument on January 16, 2003, but argument was postponed and the case was later dismissed as moot. The issue related to discovery in the state's proposed class action settlement with Farmer's Insurance Group and whether the intervenors, as members of the proposed class, should have access to documents that the trial court reviewed in camera and determined should be subject to review by intervenors' counsel.

In re The Brown Schools Rehabilitation Ctr., No. 02-1183. Justice Schneider notes his dissent to the grant of emergency relief in this case involving disclosure of documents that the relator claimed were privileged. The case was eventually dismissed on motion of the parties.

In re CI Host, Inc., 92 S.W.3d 517 (Tex. 2002). Court denies mandamus relief without prejudice. In this case, CI sought to bar discovery of all computer back up tapes, although it admitted at oral argument that parts of the tapes were discoverable. In its opinion, the Court urges CI to seek a more limited protective order in the trial court for only those parts of the tapes protected under the Electronic Communications Privacy Act.

In re Crown Life Ins. Co., No. 02-0385. Justices Hecht, Owen, and Jefferson noted their dissent to the denial of the petition for writ of mandamus. The issue presented was whether the trial court abused its discretion "by ordering the disclosure of confidential information relating to Crown Life's attorneys' fees and other litigation expenses when the information to be disclosed is privileged and 'patently irrelevant.'"

In re University of Texas Health Ctr., 33 S.W.3d 822 (Tex. 2000) (per curiam). The defendant did not waive the statutory medical peer review committee privilege for documents received, maintained, or developed by the committee when it voluntarily produced certain information about the committee's recommendations.

In re Avila, 22 S.W.3d 349 (Tex. 2000) (Hecht, J., dissenting to denial of petition for writ of mandamus). Justice Hecht would grant the petition and would hold that a plaintiff is not required to disclose that her attorney referred her to a medical professional for treatment.

In re Texas Farmers Ins. Exchange, 12 S.W.3d 807 (Tex. 2000) (Hecht, J., dissenting to denial of motion for rehearing of petition for writ of mandamus, joined by Owen, J.). The dissenters would grant writ and hold that the trial court abused its discretion in ordering an insurance company to produce a confidential report of its attorney hired to investigate the claim.

In re Union Pacific Resources Co., 22 S.W.3d 338 (Tex. 2000) (per curiam). The Court granted mandamus to require the court of appeals to vacate its mandamus issued against the trial court. The trial court did not abuse its discretion in refusing to order production of settlement amounts from unrelated litigation. Although the party seeking to oppose discovery has the burden to plead and prove its exception, not all exceptions, particularly relevance, require the party to produce evidence.

In re Bay Area Citizens Against Lawsuit Abuse, 982 S.W.2d 371 (Tex. 1998). Trial court order requiring this non-profit organization to disclose the names of its contributors violated the First Amendment, protecting association rights.

In re Texas Parks and Wildlife Dep't, No. 98-0076. The Court granted this case and set it for argument to decide whether the department had a statutory privilege not to disclose boating accident reports. Prior to argument, the case settled.

4. Scope; burdensomeness

In re CSX Corp., 47 Tex. Sup. Ct. J. 24 (Oct. 3, 2003) (per curiam). The Court holds that a request to identify all safety employees who worked for the company over a thirty-year period was overly broad and lacked reasonable limitations on time and subject matter. In this case, the request exceeded the amount of time the plaintiff had worked for the company.

In re Ford Motor Co., 03-0705, 46 Tex. Sup. Ct. J. 1106 (Aug. 22, 2003) (per curiam). Ford sought relief from a trial court order requiring Ford to produce certain databases for examination by the plaintiffs' counsel and experts. The Court denied mandamus relief as premature because the order did not provide specific search procedures but stated only that the trial court would direct such procedures in the event the parties are unable to agree. Because the parties had not agreed and the trial court had not yet directed the search method, the request for mandamus relief was premature.

In re Ernst & Young, No. 02-0446. This case was settlement after argument. At issue was whether the trial court abused its discretion by ordering Ernst & Young to produce all malpractice complaints against it over a period exceeding seven years.

In re Van Waters & Rogers, Inc., 62 S.W.3d 197 (Tex. 2001) (per curiam). The trial court's blanket abatement of discovery in this mass tort case limiting discovery to twenty plaintiffs and claims selected by their attorneys was an abuse of discretion.

In re Anadarko Petroleum Corp., No. 99-1308. Justice Hecht noted his dissent to the denial of the petition for writ of mandamus. The petition complained that the trial court had abused its discretion in ordering Anadarko to respond to extensive discovery requests propounded by the Ector County tax authority. The petition asserted that the requests were burdensome and sought information that was not relevant to any statutory basis for valuing the property at issue.

In re Alford Chevrolet-Geo, 997 S.W.2d 173 (Tex. 1999). In this class action under the DTPA, the defendant was not entitled to an order bifurcating class and merits discovery. The defendant did not, in the trial court, clearly identify the specific matters and discovery requests that they asserted were irrelevant or overbroad in relation to any threshold issues and explain the basis for those contentions. The defendant also did not produce any evidence that their existing discovery obligations were unduly burdensome, but argued only in the most general terms that all merits discovery should be abated until a decision on certification. The trial court did not abuse its discretion in refusing to limit discovery based on the record made before it.

In re Van Waters & Rogers, Inc., 988 S.W.2d 740 (Tex. 1998) (per curiam). Mandamus denied to allow the trial court an opportunity to reconsider its order denying discovery except as to 20 plaintiffs in first trial grouping in light of the Court's decision in *In re Colonial Pipeline*.

In re American Optical Corp., 988 S.W.2d 711 (Tex. 1998) (per curiam). The trial court abused its discretion in ordering the defendant to produce "virtually all documents regarding its products for a 50-year period." The production requests were not tied to the particular products the plaintiffs claimed to have used or periods during which that use may have occurred.

In re Jerry's Chevrolet-Buick, Inc., 977 S.W.2d 565 (Tex. 1998) (Gonzalez, J., dissenting to denial of petition for writ of mandamus, joined

by Hecht, J.). The dissenters would grant the mandamus petition and adopt a standard for discovery of net worth information, requiring the plaintiff to make a preliminary showing of a factual basis for actual damages and a prima facie showing of entitlement to exemplary damages.

In re Colonial Pipeline Co., 968 S.W.2d 938 (Tex. 1998) (per curiam). Mandamus granted in toxic tort litigation brought by 3,275 plaintiffs. The trial court abused its discretion in: (1) abating discovery as to all but 10 plaintiffs until those first 10 claims were resolved; (2) requiring defendants to create an inventory of all materials produced in discovery in three related cases; and (3) permitting the initial group of plaintiffs to tender their discovery no later than the time of their depositions.

5. Legislative privilege

In re De la Garza, 92 S.W.3d 416 (Tex. 2001) (per curiam). At issue was whether trial court abused its discretion in refusing to quash subpoenas served on the mayor and four councilman of Harlingen seeking their testimony concerning information provided to them in connection with a rezoning request. The Supreme Court remanded the case in light of *In re Perry*, in which the Court held that persons acting in a legislative capacity generally may not be compelled to testify about legislative activities.

In re Perry, 60 S.W.3d 857 (Tex. 2001). Legislative immunity protects the Legislative Redistricting Board members and their aides from discovery/deposition. In apportioning legislative districts under the state constitution, the LRB is acting in a legislative capacity. Immunity encompasses an evidentiary and testimonial privilege, which is not overcome in this case by a showing of extraordinary circumstances.

6. Apex depositions

In re Daisy Mfg. Co., 17 S.W.3d 654 (Tex. 2000) (per curiam). In order to take an apex deposition, a party must show, after making a good faith effort to obtain the discovery through less intrusive methods, that: (1) there is a reasonable indication that the official's deposition is calculated to lead to the discovery of admissible evidence, and (2) the less-intrusive methods are unsatisfactory, insufficient or inadequate. Here, the party seeking discovery failed to make that showing.

In re Alcatel USA, Inc., 11 S.W.3d 173 (Tex. 2000). The trial court abused its discretion in permitting the depositions of two high-level Samsung executives. The court of appeals incorrectly stated the *Crown Central* test for determining whether an apex deposition – it collapsed the two-part test into a single test of whether the corporate official has unique or superior knowledge that is unavailable through less intrusive means. The way it should work is as follows: First, the party seeking the deposition must show that the executive has unique or superior knowledge. This means more than the executive makes high-level policy decisions. The party must show that the executive has unique knowledge relevant to the case or has knowledge that is superior to others in quantity or quality. Some knowledge of relevant information, such as being in the loop on reports, is not enough. If this showing is not made, the deposition is quashed and the party seeking discovery must pursue less intrusive means, like depositions of other corporate officials or interrogatories to the executive. The party seeking the apex deposition may then come back to the trial court to show that the deposition is calculated to lead to the discovery of admissible evidence and that the less intrusive means have been unsatisfactory, insufficient, or inadequate.

7. Sanctions

In re Ford Motor Co., 988 S.W.2d 714 (Tex. 1998). An insured's claim file compiled by its insurer is not protected by privilege. Ford then did not abuse the discovery process in obtaining a copy of the claim file. The trial court abused its discretion in awarding sanctions and in awarding attorneys' fees for any challenge to its sanctions order (whether or not the challenge was unsuccessful). Ford has an adequate remedy by appeal from the trial court's order excluding evidence from the claims file because Ford is not prevented from defending against the claims. The unconditional award of attorneys' fees, however, must be remedied by mandamus because the penalty affects the decision of the party to pursue

an appeal. The dissenters would find that payment of $25,000 in appellate attorneys' fees would not impair Ford's ability to prosecute its case and that Ford has an adequate remedy by appeal.

D. Other trial procedure

1. Consolidation

In re Bristol-Myers Squibb Co., 975 S.W.2d 601 (Tex. 1998). In these breast implant cases, the Court applied .criteria comparable to the Maryland factors listed in *In re Ethyl Corp*. to determine whether the trial court's consolidation order was appropriate. Under the existing record, the manufacturers did not establish how the differences among the consolidated claims would materially affect the fairness of the trial.

In re Ethyl Corp., 975 S.W.2d 606 (Tex. 1998). The Court applied the Maryland factors to determine whether the consolidation of asbestos cases for trial was appropriate, weighing the following factors to balance the risk of prejudice and confusion against the economy of scale: (1) common worksites; (2) similar occupation; (3) similar time of exposure; (4) type of disease; (5) living or dead plaintiffs; (6) discovery status; (7) identity of counsel; and (8) type of cancer. While recognizing that there was little similarity on these questions in this case, the Court nonetheless held that the trial court did not abuse its discretion "because the record is silent with regard to many factors that would inform our decision on the commonality or conversely the dissimilarity of these claims."

2. Validity of signature on court order

In re Barber, 982 S.W.2d 364 (Tex. 1998). A trial judge's signature stamp, applied under the judge's authority and at his direction, constituted valid signature on an order to set aside a default judgment and to grant a new trial. The stamping need not occur in the judge's presence. The dissent argued that the stamp must be applied in the judge's presence to avoid the possibility of the inadvertent stamping of orders that the trial court had not approved or even ordered.

3. New trial

Volkswagen of America, Inc. v. Ramirez, No. 02-0557 (court of appeals' opinion at 79 S.W.3d 113 (Tex. App.—Corpus Christi 2000, pet. granted)). This case, argued April 23, 2003, is not before the court on writ of mandamus. However, it was previously, when the trial court granted a new trial "in the interest of justice" after a jury verdict finding that the plaintiff should take nothing against the car manufacturer. The grant of new trial is traditionally not subject to review by mandamus, and the Supreme Court denied the writ, *In re Volkswagen of America, Inc.*, 22 S.W.3d 462 (Tex.) (Hecht, J., dissenting to denial of petition for writ of mandamus, joined by Owen, J.), *cert. denied*, 531 U.S. 940 (2000). The dissenters would require trial courts to state specific reasons for the grant of a new trial to permit appellate court review. After retrial, the trial court rendered judgment against the manufacturer for $17 million. Among the issues before the court is whether the trial court properly granted the new trial.

In re Bayerische Motoren Werken, 8 S.W.3d 326 (Tex. 2000) (Hecht, J., dissenting to denial of petition for writ of mandamus, joined by Owen, J.). The dissenters would grant the writ and hold that a trial court that grants a new trial "in the interest of justice and fairness" must provide a reasoned explanation for granting the new trial.

In re Dickason, 987 S.W.2d 570 (Tex. 1998) (per curiam). An order granting a new trial signed after the trial court's plenary power had expired was void. The trial court's plenary power extended only thirty days after the trial court's order overruling the motion for new trial.

4. Injunctions/TROs

In re TNRCC, 85 S.W.3d 210 (Tex. 2002). Mandamus will issue to correct a district court's improper extension of a temporary restraining order by forty-two days without the restrained party's consent. The extension did not convert the TRO into a temporary injunction subject to interlocutory appeal.

In re University Interscholastic League, 20 S.W.3d 690 (Tex. 2000) (per curiam). The trial court was directed to vacate its orders: (1) requiring the UIL to hold a baseball playoff game

between Robstown High School and Roma High School; (2) finding the UIL in contempt because the UIL did not schedule the game as ordered; and (3) declaring Robstown, rather than Roma, the winner of the unplayed game. A trial court abuses its discretion by interfering with a UIL decision concerning high school baseball playoff games in the absence of a violation of some constitutional right.

In re Texas Board of Pardons and Paroles, 989 S.W.2d 360 (Tex. 1998) (Hecht, J., concurring in order dismissing as moot, joined by Owen, J.). The concurring justices explain that, although the Court would appear to have civil jurisdiction over the procedures used by the Board, in this action the expiration of the trial court's TRO affecting the Board's procedures rendered the action moot.

5. <u>Sanctions</u>

In re Bennett, 960 S.W.2d 35 (Tex. 1997). The trial court retained plenary power to impose sanctions after nonsuit but before the order of dismissal was signed. The trial court also retained power to hear and decide sanctions for pre-removal conduct after the case had been removed to federal court. The trial court did not abuse its discretion in imposing a $10,000 sanction on lawyers who filed multiple suits, then dismissed all but one, which was assigned to the judge the plaintiffs wanted. Counsel had notice and an opportunity to respond and no due process violation occurred.

E. Attorneys and Judges

1. <u>Disqualification or recusal of judge</u>

In re O'Connor, 92 S.W.3d 446 (Tex. 2002) (per curiam). When a divorce action and a modification proceeding involve the same matter in controversy, the trial judge is disqualified from presiding over the modification proceeding if a lawyer with whom the judge previously practiced law served during that association as a lawyer in the divorce action.

In re Canales, 52 S.W.3d 698 (Tex. 2001). Under visiting judge statute, objection must be made before the first hearing over which the visiting judge presides in a case rather than to a particular assignment order. A party waives the objection by failing to object to the original assignment then objecting to a second assignment order continuing the visiting judge's authority over a case after two pretrial hearings have already been held.

In re Rio Grande Valley Gas Co., 8 S.W.3d 303 (Tex. 1999) (Hecht, J., dissenting to denial of petition for writ of mandamus joined by Owen, J.). The dissenters would grant mandamus relief and hold that a local rule permitting the transfer of cases by the local administrative judge should not be permitted to interfere with the procedures for hearing recusal motions set forth in Rule 18a, nor should it nullify the assignment of a case to a judge by the presiding judge of the administrative judicial region.

In re Perritt, 992 S.W.2d 444 (Tex. 1999) (per curiam). A visiting judge appointed to hear a recusal motion is subject to Tex. Gov't Code § 74.053, giving parties one objection to a retired judge.

In re Houston Lighting & Power Co., 976 S.W.2d 671 (Tex. 1998) (per curiam). When a judge was assigned as a visiting judge to a particular district court at the same time the case was transferred by the administrative judge to the "visiting" judge's court, a party's objection under Tex. Gov't Code § 74.053 was ineffective and mooted by the transfer.

In re Union Pacific Resources Co., 969 S.W.2d 427 (Tex. 1998). The court of appeals should not have issued mandamus requiring the recusal of the trial judge. The Supreme Court distinguished mandatory disqualification and statutory strikes, where an erroneous failure to remove the judge results in the remainder of the trial being void, from recusal. Recusal may be grounds for reversal, but it may be waived, and therefore does not void subsequent acts of the trial judge. There is an adequate remedy by appeal. Concurring, Justice Hecht states that there may be cases where the refusal to recuse is so wrong as to allow mandamus relief. He also expresses the opinion that, while trial judges may testify concerning facts at the recusal hearing, their role should be kept to a minimum and should not extend to opinions on impartiality.

2. Disqualification of counsel

In re Nitla S.A., 92 S.W.3d 419 (Tex. 2002) (per curiam). Disqualification of counsel was not required when counsel reviewed privileged documents that the trial court ordered the opposing party to produce in the absence of proof of actual prejudice and that other measures could not cure the alleged harm.

In re George, 28 S.W.3d 511 (Tex. 2000). After counsel was disqualified, successor attorney's access to work product would be limited to protect confidential information obtained while prior counsel had represented the opposing party. The Supreme Court announces a procedure for whether the new attorney may gain access to prior disqualified attorney's work product: (1) the court begins with a rebuttable presumption that the work product contains confidential information; (2) the burden is on the party seeking access to rebut the presumption by showing it is "substantially unlikely" that the item of work product contains confidential information; (3) the disqualified attorney must produce an inventory of the work product; (4) work product unrelated to the prior representation will not generally contain confidential information; depositions and case summaries are unlikely to contain work product; legal research on procedural or evidentiary issues is unlikely to contain work product; (5) the trial court may conduct in camera inspection or hear other evidence; and (6) any doubts about whether the work product contains confidential information are resolved in favor of the presumption.

In re Users Sys. Servs., 22 S.W.3d 331 (Tex. 1999). Mandamus granted; Supreme Court holds that the court of appeals improperly ordered disqualification of an attorney (and her law firm) after she talked to an opposing party who had signed a letter stating he was no longer represented by counsel. Rule 4.02 of the Tex. Disc. R. Prof. Conduct does not require the attorney to contact the opposing party's former counsel nor to wait until counsel has formally withdrawn. Justice Baker, concurring, would uphold the trial court's decision not to disqualify based on delay in seeking disqualification.

In re Epic Holdings, Inc., 985 S.W.2d 41 (Tex. 1998). The Court grants mandamus to require disqualification of former Johnson & Gibbs lawyers and their new firms. Johnson & Gibbs had represented the company in formation while these attorneys were there and that representation extended to the company's CEO, who is a defendant in the current suit in which the former lawyers represent the plaintiff. The matter is not only substantially related and adverse, but also it appears from trial testimony that the lawyers are attacking their prior firm's work product. Under Tex. R. Disc. R. Prof. Conduct 1.09, disqualification is required.

In re American Home Products Corp., 985 S.W.2d 68 (Tex. 1998). Mandamus granted to require disqualification of an attorney who hired a "paralegal" previously employed by the opposing party in litigation. Co-counsel, however, was not disqualified on the record. To disqualify co-counsel, it must be shown that there was contact or communication between the tainted nonlawyer and co-counsel. Then the burden shifts to the party opposing disqualification to show that there was no reasonable prospect that confidential information was disclosed and in fact no confidential information was disclosed. Alternatively, the party seeking disqualification may show imputed knowledge by proving substantive conversations between disqualified counsel and co-counsel, joint preparation for trial, and apparent receipt by co-counsel of confidential information. This creates a rebuttable presumption that confidential information was passed, that may be countered by probative and material evidence that no confidential information was disclosed.

In re Meador, 968 S.W.2d 346 (Tex. 1998) (per curiam). The court of appeals abused its discretion in requiring disqualification of an attorney. The trial court may exercise discretion in determining whether to disqualify an attorney who had received the opponent's privileged materials outside the normal course of discovery. The trial court may consider a number of factors listed by the court in its opinion.

3. Withdrawal of counsel

In re D.A.S., 973 S.W.2d 296 (Tex. 1998) (per curiam). The *Anders* procedure used in criminal cases would apply to state civil juvenile

delinquency cases in which appointed counsel wished to withdraw from a frivolous appeal.

4. Ad litems

In re Kansas City Southern Industries, Inc., No. 03-0179. This case, argued November 12, 2003, is pending and awaiting opinion. The issue before the Court is whether an ad litem has the authority to sign a settlement on behalf of minors whose existence and whereabouts are unknown. There is also a question of whether mandamus is available to review a trial court order that can be severed and made final, and thus be reviewed through the mechanism of an ordinary appeal.

F. Appellate procedure

1. Supersedeas

In re Crow-Billingsley Air Park, Ltd., 98 S.W.3d 178 (Tex. 2003) (per curiam). A party is entitled to mandamus relief to vacate an order that wrongly denies a prevailing party's attempt to enforce an unsuperseded judgment. The trial court abused its discretion when it refused to hear the motion to enforce the unsuperseded final judgment and dismissed the enforcement motion for want of jurisdiction.

In re South Texas College of Law, 4 S.W.3d 219 (Tex. 1999) (separate opinions on denial of mandamus relief). Justice Owen, concurring, would hold that, pending appeal, South Texas and Texas A&M are not entitled to supersede judgment and injunction of trial court prohibiting them from pursuing affiliation. Under TRAP 24.2(a)(5), the issue is to consider the relative harms. Justice Hecht, dissenting, would disagree on the weighing of the relative harms.

In re Dallas Area Rapid Transit, 967 S.W.2d 358 (Tex. 1998) (per curiam). The trial court abused its discretion in refusing to stay, pending appeal, an order requiring a governmental unit to produce records under the Texas Public Information Act. In the absence of a stay, the appeal would become moot.

2. Effect of bankruptcy

In re Living Ctrs. of America, Inc., 35 S.W.3d 596 (Tex. 2000) (Owen, J., dissenting to denial of petition for writ of mandamus joined by Hecht, J.). The dissenters disagree with the Court’s action in denying mandamus relief while the underlying case is stayed based on bankruptcy. The dissenters would hold that any mandamus proceedings are also stayed, even when the bankruptcy debtor is the relator in the mandamus proceeding.

3. Pauper’s appeals

In re Arroyo, 988 S.W.2d 737 (Tex. 1998) (per curiam). Under 1997 Texas Rules of Appellate Procedure, a pauper challenging trial court’s ruling that sustained contest to free appellate record had an adequate remedy by appeal and may not bring a mandamus action. If the court of appeals finds that the trial court erred in sustaining the contest, then the court of appeals should direct the clerk and reporter to prepare and file a free record and the pauper/appellant can supplement his or her briefing to add points on the merits.

In re Jones, 966 S.W.2d 492 (Tex. 1998) (per curiam). The trial court abused its discretion in sustaining a contest to a pauper’s affidavit on grounds that the pauper had failed to give notice to opposing counsel and to the court reporter. The bailiff had directed the pauper to leave notice with the clerk because the court reporter was in court; opposing counsel received notice when the pauper referenced the affidavit in another filing.

4. Rehearing

In re Yates, 960 S.W.2d 652 (Tex. 1997) (per curiam). The chief justice of the court of appeals did not abuse his discretion in refusing to call for a vote on rehearings en banc. Nothing in the rule or statute requires such action. The chief justice may not, however, prohibit a majority of the court from taking such votes, from hearing en banc cases in which the majority so elects, and from adopting court rules requiring votes on such motions.

G. Election

In re Bell, 91 S.W.3d 784 (Tex. 2002). The court holds that signatures to place a candidate on the ballot are not invalid because the signers omitted their city of residence from their addresses.

In re Sanchez, 81 S.W.3d 794 (Tex. 2002) (per curiam). Texas Election Code section 143.005 permits a home-rule city to set a deadline for filing applications for municipal elections that differs from the deadline contained in the Election Code. In a supplemental opinion on rehearing, the Court rejected several arguments contained in an amicus brief filed by the Secretary of State asserting that the Court's interpretation is contrary to federal election law requirements, the Texas Election Code, and must be approved by the Dept. of Justice under the Voting Rights Act.

In re Gamble, 71 S.W.3d 313 (Tex. 2002). While courts may order equitable relief from a statutory filing deadline, in this case there was no determination that the error on the candidate's application — identifying the wrong district — was due to clerical error. In the absence of such a finding, the trial court had no authority to order equitable relief.

H. Open government

In re City of Georgetown, 53 S.W.3d 328 (Tex. 2001). Under open records statute incorporating privileges under other laws, privileges under the state procedural rules would apply and allow the city to deny disclosure. Reports of consulting experts in anticipation of litigation need not be disclosed under the open records statute.

In re The Texas Senate, 36 S.W.3d 119 (Tex. 2000). Under the Texas Constitution, the Texas Senate was not required to hold a viva voce vote in electing one of their members as lieutenant governor but could do so by secret ballot.

In re Gaylord Broadcasting Co., 22 S.W.3d 848 (Tex. 2000) (Hecht, J., dissenting to denial of petition for writ of mandamus joined by Owen, J.). The issue presented was whether a judge could allow some television stations but not others to film courtroom proceedings. There were allegations that the station denied access was singled out because it had broadcast news stories critical of the judge. The dissenters would hear argument and decide the issue which raises serious constitutional arguments important to the jurisprudence of the State.

In re Dallas Morning News, 10 S.W.3d 298 (Tex. 2000). With numerous separate opinions, eight justices agreed that the court of appeals should not have issued mandamus to bar the trial court from holding a 76a hearing three months after the trial court's plenary power in the case expired. Four of the justices concluded that the trial court had continuing jurisdiction under 76a, even past the period of plenary power, to hold a hearing on whether to unseal court records, whether those records were sealed by the court or by private agreement of the parties. Another four concluded that there was an adequate remedy by appeal after the trial court issued an order after the hearing, and that it was premature to decide the question of whether the trial court had jurisdiction to hold that hearing.

In re Nolo Press, 991 S.W.2d 768 (Tex. 1999). The Supreme Court held that it lacked jurisdiction over this mandamus proceeding seeking disclosure of information by the Unauthorized Practice of Law Committee. Because Nolo argued not just that the information was not confidential but also that the information should not be confidential, the Court referred the matter to its administrative docket for consideration. In its administrative docket, the Court concluded that the UPLC is a judicial agency subject to Rule 12 of the Texas Rules of Judicial Administration, governing when judicial records are public.

In re Dallas Area Rapid Transit, 967 S.W.2d 358 (Tex. 1998) (per curiam). The trial court abused its discretion in refusing to stay, pending appeal, an order requiring a governmental unit to produce records under the Texas Public Information Act. In the absence of a stay, the appeal would become moot.

V. BIBLIOGRAPHY

Pamela Stanton Baron, *Interlocutory Appeals, Mandamus, and Other Extraordinary Remedies*, State Bar of Texas, Advanced Civil Trial Course, Fall 2003.

Marla Broaddus, *Original Proceedings in the Supreme Court of Texas,* State Bar of Texas, Practice Before the Texas Supreme Court (April 2003).

Andrew Weber, *Internal Procedures of the Supreme Court*, State Bar of Texas, Practice Before the Texas Supreme Court (April 2003).