

**INTRODUCTION TO MANDAMUS
AND OTHER ORIGINAL PROCEEDINGS**

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CHAPTER 10

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Introduction to Mandamus and other Original Proceedings

by Frank Gilstrap

There are several helpful reference works available on mandamus practice in Texas. Some are listed in the bibliography, and I have borrowed freely from all of them. This paper is not a reference work or a how-to guide. Rather, it is an overview. It is intended to give the practitioner a general understanding of mandamus and other original proceedings. The particulars can then be learned—as they usually are—in response to a case.

I. THE FUNCTION AND ORIGIN OF MANDAMUS

The writ of mandamus is an ancient, common law procedure that has been adapted to meet a modern need—to obtain appellate review of trial court rulings before final judgment.

A. The function of mandamus

Texas, like most American jurisdictions, follows the final judgment rule. Under this rule, only a final judgment can be appealed.¹ But there can be many

¹ See generally *Northeast Indep. School Dist. v. Aldridge*, 400 S.W.2d 893, 895 (Tex.1966) (“We have steadfastly adhered through the years to the rule . . . that an appeal may be prosecuted only from a final judgment and that to be final a judgment must dispose of all issues and parties in a case.”); *Lehmann v. Har-Con Corp.*, 39

reasons to review a case before final judgment.² Moreover, the need for such review has increased as litigation has become more common and more complex.³ Two procedures have been developed to meet this need.

The first procedure is the interlocutory appeal. By statute, the legislature has designated about a dozen categories of interlocutory orders that can be appealed even though they do not constitute final judgments. These appeals are treated as “accelerated appeals” under Rule 28 of the Rules of Appellate Procedure, and they are outside the scope of this paper.⁴

The second procedure involves the writ of mandamus. Here a party to a suit files a new proceeding in a higher court. In that new proceeding he asks the court to issue a writ—usually a writ of mandamus—ordering the lower court to take some action. Strictly speaking, this

S.W.3d 191, 195 (Tex.2001) (“Though its origins are obscure and its rationale has varied over time, the general rule, with a few mostly statutory exceptions, is that an appeal may be taken only from a final judgment.”).

² See generally 16 WRIGHT, MILLER & COOPER, FEDERAL PRACTICE & PROCEDURE JURISDICTION 2d § 3920 (1996).

³ See generally 6 MCDONALD & CARLSON, TEXAS CIVIL PRACTICE (2d ed. 1988) (hereinafter “MCDONALD & CARLSON”) Vol. 6, § 35.1, p.878.

⁴ See generally Frank Gilstrap, *Interlocutory and Accelerated Appeals for Trial Lawyers*, STATE BAR OF TEXAS, ADVANCED CIVIL TRIAL COURSE (Fall 2004).

procedure is not an appeal. It originates in the higher court, and for that reason, it is called an “original proceeding.” But it can effectively result in appellate review of the lower court action, just as in an appeal.

B. The ancient writs

The modern mandamus remedy is a descendant of ancient common law procedures for obtaining a writ. A writ is a court order directed to an official or other party that may or may not be before the court. For example, a writ of execution directs the sheriff or constable to seize and sell property to satisfy a judgment issued by the court. Similarly, a writ of injunction directs a person to refrain from some action.

In theory, several kinds of writs can be the subject of an original proceeding in an appellate court. These are as follows:

- **Mandamus:** In Latin, “mandamus,” means “we command,”⁵ and at common law the writ was issued in the name of the King to enforce his command.⁶ In modern practice, the writ of mandamus “is an order of a court directed to a person—usually a public official or an inferior court—

commanding the person to perform a legal duty required by law.”⁷

- **Habeas Corpus:** “Habeas corpus” is Latin for “you have the body.”⁸ The writ was, and is, used to bring a party, in person, before the court.⁹ Today, its primary function is to obtain a person’s release from unlawful imprisonment¹⁰ or to question a bond.¹¹
- **Injunction and Prohibition:** The writ of prohibition is issued by an upper court to prohibit a lower court from exercising jurisdiction that “it

⁷ See generally MCDONALD & CARLSON, § 35.1, p.871.

⁸ *State ex rel Marberry v. Macht*, 665 N.W.2d 155, 161 n.8 (Wis.Sup.Ct.2003).

⁹ BLACK’S, p.638.

¹⁰ See generally *Hurst v. Cook*, 777 P.2d 1029, 1033-35 (Utah Sup.Ct.1989); *Archer v. State*, 851 S.W.2d 157, 159 (Tenn.Sup.Ct.1993). See generally MCDONALD & CARLSON, § 36; WILLIAM V. DORSANEO, E. LEE PARSLEY, & JULIE CARROTHERS PARSLEY, TEXAS LITIGATION GUIDE (2002) (hereinafter “DORSANEO”), vol. 10, § 152.03[5]; O’CONNOR’S TEXAS CIVIL APPEALS (2004-2005) (hereinafter “O’CONNOR”), ch.20 subch. E.

¹¹ See e.g. *Ex parte Clark*, 813 S.W.2d 696, 697 (Tex.App.—Houston [1st Dist] 1991, orig. proceeding); *Ex parte Reese*, 666 S.W.2d 675, 677 (Tex.App.—Fort Worth 1984, orig. proceeding).

⁵ BLACK’S LAW DICTIONARY (5th ed. 1979), p.866 (hereinafter “BLACK’S”).

⁶ See generally *State ex rel Lyons v. McDowell*, 57 A.2d 94, 96-97 (Del.Sup.Ct.1947).

has no lawful right to exercise.”¹² A writ of injunction is directed to a defendant in the suit (or to a party made a defendant for that purpose), forbidding him from doing some act.¹³ Insofar as appellate courts are concerned, two the writs are similar in nature, except that a writ of prohibition is normally directed against a judge of a lower court while a writ of injunction is normally directed against a party.¹⁴

- **Procedendo:** The writ of procedendo—Latin for “proceeding”—was issued to command a lower court to proceed to judgment in a pending case.¹⁵ Today it can be used to compel a lower court to execute a judgment.¹⁶ But the procedure is not used in Texas; mandamus serves the same purpose.¹⁷

¹² See generally MCDONALD & CARLSON, § 37.4, p.1011.

¹³ BLACK’S, p.705.

¹⁴ See generally JEREMY C. WICKER, TEXAS CIVIL TRIAL AND APPELLATE PROCEDURE (1999), Vol. 3 § 24.6; MCDONALD & CARLSON §§ 37.4-37.5; DORSANEO § 152.03[2] & [3]; O’CONNOR, ch.20, subch. C & D.

¹⁵ BLACK’S, p.1083; See also MCDONALD & CARLSON § 37.7, p.1016.

¹⁶ See generally MCDONALD & CARLSON, § 37.7, p.1016.

¹⁷ See *id* at § 37.7. See also DORSANEO § 152.03[4].

- **Certiorari and Error:** The writ of certiorari was “issued by a superior to an inferior court requiring the latter to produce a certified record of a particular case tried therein [so that] the court issuing the writ may inspect the proceedings and determine whether there have been any irregularities.”¹⁸ Today, this procedure is used to obtain review before the United States Supreme Court, and in Texas to obtain review of Justice Court proceedings.¹⁹ Otherwise the procedure is not used in Texas.²⁰ However, a similar procedure—the writ of error—was used to obtain review by the Texas Supreme Court until September 1, 1997.

- **Quo Warranto:** “Quo warranto” is Latin for “by what warrant.” At common law, the writ of quo warranto was issued “against him who claimed or usurped any office, franchise, or liberty, to inquire *by what authority* he supported his claim.”²¹ Today, it is used to test the legality of the exercise of power by a public official or by a corporation.²² Thus, it can be used to restore a

¹⁸ BLACK’S, p.207.

¹⁹ See TEX.R.CIV.P. 575-591.

²⁰ See generally MCDONALD & CARLSON §37.8; DORSANEO § 152.03[4].

²¹ BLACK’S, p.1131 (emphasis in original).

²² See generally MCDONALD & CARLSON § 37.9.

person to public office²³ or to challenge the validity of a city charter²⁴ or of an annexation²⁵ or other act of by a municipal corporation. Only the State of Texas, not a private party, can seek a writ of quo warranto.²⁶

These writs are sometimes referred to as “extraordinary writs,” or “extraordinary proceedings” or “extraordinary remedies” to distinguish them from the ordinary remedy of filing suit.²⁷ They can also be distinguished from “ancillary writs” issued during the course of an existing suit.²⁸

II. THE JURISDICTIONAL FRAMEWORK

²³ See e.g. *Sheppard v. Thomas*, 101 S.W.3d 577, 583 (Tex.App.—Houston [1st Dist.] 2003, orig. proceeding).

²⁴ See *Brennan v. City of Weatherford*, 50 Tex. 30, 1880 WL 9314, at *4 (1880).

²⁵ See e.g. *Alexander Oil Co. v. City of Seguin*, 825 S.W.2d 434, 436 (Tex.1991).

²⁶ See *Fuller Springs v. City of Lufkin*, 513 S.W.2d 17, 19 (Tex.1974).

²⁷ BLACK’S, p.527. See e.g. TEX.R.APP.P. 52.1 (“An original appellate proceeding seeking extraordinary relief . . .”); *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex.1992) (“Mandamus is intended to be an extraordinary remedy, available only in limited circumstances.”).

²⁸ Thus, part VI of the Rules of Civil Procedure involves “Ancillary Proceedings” including attachment, execution, garnishment, receivership and sequestration.

At common law, the power to issue a writ of mandamus, as well as other writs, was inherent in the courts. While Texas courts may retain a vestige of that inherent jurisdiction,²⁹ their power to issue writs of mandamus arises almost exclusively from the Texas Constitution and from statutes. These provisions identify both the courts that may issue the “extraordinary writs” and the persons subject to the writs.

A. The power to issue the writ

1. Constitutional power

The Texas Constitution gives the Texas Supreme Court the power “to issue writs of habeas corpus”³⁰ and to issue other writs “as may be necessary to enforce its jurisdiction.”³¹

The Constitution also gives the district courts jurisdiction over all actions, proceedings, and remedies that are not exclusively allocated to other courts.³² This necessarily includes the power to issue mandamus and other writs. In addition the Constitution expressly gives district courts “the power to issue writs necessary to enforce their jurisdiction.”³³

²⁹ See generally MCDONALD & CARLSON § 35.8, pp.889-890; DORSANEO § 152.02[3], p.152-16.

³⁰ TEX. CONST. art. 5 § 3.

³¹ *Id.*

³² *Id.* art. 5 § 8.

³³ *Id.*

2. Statutory power

Under the Texas Constitution the legislature can give the courts the power to issue mandamus beyond the above constitutional limits. Thus, the legislature can “confer original jurisdiction” on both the Supreme Court and on the courts of appeals.³⁴ The legislature also has broad power to establish other courts and to fix their jurisdiction.³⁵

The principal legislative grants of jurisdiction to the appellate courts are found in Chapter 22 of the Government Code. Section 22.002 sets forth the original jurisdiction of the Supreme Court, and Section 22.221 sets forth the original jurisdiction of the courts of appeals. These provisions allow these courts to issue the “extraordinary writs” described in part I B above. These provisions are broad, but there are limits as to the persons against whom the writ may issue, which are addressed in part II B below.

Under these provisions, the Supreme Court (or a justice thereof) may issue “writs of procedendo and certiorari and all writs of quo warranto and mandamus agreeable to the principles of law

regulating those writs.”³⁶ It can also issue a writ of mandamus to compel certain judges “to proceed to trial and judgment.”³⁷ Finally the Supreme Court can issue “writs of mandamus or injunction or any other mandatory or compulsory writ or process, against any [public official].”³⁸

Similarly, a court of appeals, or a justice thereof, can issue “all writs of mandamus, agreeable to the principles of law regulating those writs,”³⁹ as well as “writs necessary to enforce the jurisdiction of the court.”⁴⁰

Both the Supreme Court and the court of appeals can issue a writ of habeas corpus when a person is restrained as a result of an order issued by a judge in a civil case.⁴¹

Both a district court and a constitutional county court can grant a writ of mandamus “necessary to the enforcement of that court’s jurisdiction.”⁴²

Finally, in addition to these general grants of jurisdiction, the legislature has also made a number of special grants of

³⁴ *Id.* art. 3 § 3(a) (The legislature has the power “to confer original jurisdiction on the Supreme Court to issue writs of quo warranto and mandamus in such cases as may be specified, except against the Governor of the State.”).

³⁵ *Id.* art. 5 § 1.

³⁶ TEX. GOV’T CODE § 22.002(a).

³⁷ *Id.* § 22.002(b)

³⁸ *Id.* § 22.002(c).

³⁹ *Id.* § 22.221(b).

⁴⁰ *Id.* § 22.221(a)

⁴¹ *Id.* § 22.002(e) & 22.221(b).

⁴² *Id.* §§ 24.011 & 26.051.

jurisdiction involving particular kinds of cases. A list of such statutory grants (not necessarily complete) is found in Table 1 at the end of this paper.

B. Persons subject to the writ

Under the above statutory provisions, the appellate courts may issue writs of mandamus against judges and against a variety of public officials.

1. Judges subject to the writ

Not all appellate courts can issue writs of mandamus to all judges. The Supreme Court has the power to issue writs against —

- a court of appeals (or a justice thereof)
- a district judge
- a statutory county court judge
- a statutory probate court judge.⁴³

The Supreme Court can also order the latter three categories of trial judges to proceed to trial and judgment.⁴⁴ But the Supreme Court cannot issue a writ against the Court of Criminal Appeals or one of its judges.⁴⁵

The court of appeals has the power to issue a writ against—

- a district court judge

⁴³ *Id.* § 22.002(a).

⁴⁴ *Id.* § 22.002(b).

⁴⁵ *Id.* § 22.002(a).

- a county court judge.⁴⁶

Finally, a district court (but not a court of appeals) can issue a writ of mandamus against a justice of the peace.⁴⁷

2. Concurrent jurisdiction

Both the Supreme Court and a court of appeals have the power to issue a writ of mandamus to a district judge. Also, both the Supreme Court and a court of appeals have the power to issue a writ of habeas corpus where a party is restrained “due to an order issued by any civil court or judge thereof on account of the violation of any order, decree, or judgment rendered by such court . . .”⁴⁸

When both courts have concurrent jurisdiction, a request for a writ may not be presented to the Supreme Court unless the court of appeals has first ruled on the request.⁴⁹

3. Other officials

Judges are not the only public officials subject to the writ of mandamus. However, mandamus standards are different where the target of the writ is a non-judicial official, and the rules are sometimes complex.⁵⁰ For example, the

⁴⁶ *Id.* § 22.221(b).

⁴⁷ *See generally* MCDONALD & CARLSON § 35.5, p.887 & n.7.

⁴⁸ TEX.GOV'T CODE § 22.002(c)(3).

⁴⁹ Rule 52.3(c), TEX.R.APP.P.

Supreme Court has the power to issue a writ against “any officer of state government except the governor.”⁵¹ The Supreme Court also has the exclusive power to issue a writ against officers of the executive department of the State of Texas.⁵² District Courts have the power to mandamus the County Commissioner’s Court and other county officials.⁵³

III. LEGAL STANDARD FOR ISSUANCE OF MANDAMUS

The Supreme Court explained the standard for issuing a writ of mandamus in *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex.1992). Historically, the writ of mandamus “issued only to compel performance of a ministerial act or duty.” *Id.* at 839. That is still the standard today with regard to issuance of a writ of mandamus against an official other than a judge. If the official has any discretion as to whether to take an act, the act is not “ministerial,” and mandamus cannot be issued.⁵⁴ For judges, however, the standard is different.

⁵⁰ See generally MCDONALD & CARLSON § 35.21, p.910-913; DORSANEO 152.003 [1][c][v]; O’CONNOR, ch. 20 ¶ b §4.2, p.284.

⁵¹ TEX. GOV’T CODE § 22.002(a).

⁵² *Id.* § 22.002(c).

⁵³ See generally MCDONALD & CARLSON § 35.5, p.887.

⁵⁴ See generally MCDONALD & CARLSON §§ 35:10-35:11, pp.892-894; DORSANEO § 152.03[1][b][ii][A]; O’CONNOR § 3.4 (1), p.282.

It has long been the law that a writ of mandamus may be issued “to correct ‘a clear abuse of discretion committed by the trial court.’ ” *Walker*, 827 S.W.2d at 839. Also, it has long been the rule that “mandamus will not issue where there is ‘a clear and adequate remedy at law, such as a normal appeal.’ ” *Id.* at 840.⁵⁵

These two requirements are vague, and over the years, the Supreme Court’s view of what constitutes a “clear abuse of discretion” or an “adequate remedy by appeal” has varied. In *Walker*, the Supreme Court reviewed the historical development of both principles and formulated a standard for each. That opinion constitutes a benchmark against which all subsequent cases have been measured.

A. Clear abuse of discretion

Beginning in the 1950’s, the Texas Supreme Court began issuing writs of mandamus to compel discretionary acts by judges. *Walker*, 827 S.W.3d at 839. The standard, which is still applicable, is that mandamus will issue “to correct a ‘clear abuse of discretion’ committed by the trial court.” *Id.*⁵⁶

The *Walker* court held that “[a] trial court clearly abuses its discretion if ‘it reaches a decision so arbitrary and unreasonable as to amount to a clear and

⁵⁵ quoting *State v. Walker*, 679 S.W.2d 484, 485 (Tex.1984).

⁵⁶ See generally DORSANEO § 152.03[1][b][i][A].

prejudicial error of law.’ ” *Id.* at 839.⁵⁷ This language is vague, and as the Court admitted, it has “different applications in different circumstances.” *Id.*⁵⁸ The Court did, however, draw one helpful distinction.

As to fact questions or “matters committed to the trial court’s discretion,” the reviewing court “may not substitute its judgment for that of the trial court.” *Id.* But review of the trial court’s determination “of the legal principles controlling its ruling is much less differential.” *Id.* Thus, “a clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion.” *Id.*⁵⁹

B. Absence of adequate remedy by appeal

As for the need to show the absence of an “adequate remedy by appeal,” the *Walker* court noted that earlier opinions sometimes “have not focused on this requirement when applying a mandamus review of discovery orders.” *Id.* at 840-841. At the same time, the court had been more consistent “in mandamus proceedings involving other types of pre-trial orders.” *Id.* at 842. The court then reaffirmed this requirement for all kinds of cases, including those involving

⁵⁷ quoting *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex.1985).

⁵⁸ See generally MCDONALD & CARLSON § 35:13, pp.896-901.

⁵⁹ See generally MCDONALD & CARLSON § 35:16-35:17, pp.904-906; O’CONNOR § 3.4 (2), p.282.

discovery orders, and it disapproved earlier cases to the contrary.

The *Walker* court also held that “an appellate remedy is not inadequate merely because it may involve more expense or delay than obtaining an extraordinary writ.” *Id.* at 842. Here too, the Court disavowed earlier cases that might have been based on a more lenient standard. *Id.* At the same time, it noted that there would continue to be “many situations where a party will not have an adequate appellate remedy from a clearly erroneous ruling.” *Id.* at 843.⁶⁰

IV. ISSUES FOR WHICH MANDAMUS WILL BE APPROPRIATE.

In theory, a writ of mandamus may issue in any kind of case so long as there is a clear abuse of discretion and no adequate remedy by appeal. While commentators occasionally list categories of cases in which mandamus will issue, these listings should be used with caution. Even so, there are some kinds of cases that are entirely appropriate for mandamus relief. Two examples are the cases in parts A and B below. The other categories should be viewed as illustrative only.

A. Discovery

Walker v. Packer was a discovery case. In deciding that case, the Supreme Court

⁶⁰ See generally MCDONALD & CARLSON § 35:14, pp.901-903; DORSANEO § 152.03[1][b][i][c].

noted that, an adequate remedy by appeal would not be present when —

- the appellate court will not be able to cure the trial court’s discovery error. *Walker*, 827 S.W.2d at 843. This might occur when the trial court erroneously orders the disclosure of privileged information or trade secrets. *Id.*⁶¹
- “a discovery order compels the production of blatantly irrelevant or duplicative documents, such as that it clearly constitutes harassment or imposes a burden on the producing party far out of proportion to any benefits that may be obtained by requesting parties.” *Id.*⁶²
- the refusal to allow discovery will severely compromise the parties’ ability to present a viable claim or defense at trial. This would include imposition of discovery sanctions “which have the effect of precluding a decision on the merits of a party’s claims.” *Id.*⁶³

⁶¹ See e.g. *D.N.S. v. Schattman*, 937 S.W.2d 151, 158-159 (Tex.App.—Fort Worth 1997, orig. proceeding). See generally MCDONALD & CARLSON § 35:23, pp.915-916; DORSANEO § 152.03[1][c][i][E]; O’CONNOR § 3.5 (1) (1), p.283.

⁶² See e.g. *MCI Telecommunications Corp. v. Crowley*, 899 S.W.2d 399, 403-404 (Tex. App.—Fort Worth 1995, orig. proceeding). See generally MCDONALD & CARLSON § 35:24, p.917.

⁶³ See e.g. *In re Allstate County Mutual Ins. Co.*, 85 S.W.3d 193, 196 (Tex.2002). See

- the discovery is refused and the disallowed discovery “cannot be made part of the appellate record of the trial court after proper request refuses to make it a part of the record.” *Id.*⁶⁴

B. Arbitration orders

Under Section 171.098 of the Civil Practice & Remedies Code, a party has a right to an interlocutory appeal of a trial judge’s order granting or denying a motion to compel arbitration⁶⁵ or granting or denying a motion to confirm an arbitration award.⁶⁶ But this statute only applies to an arbitration agreement that is covered by the Texas General Arbitration Act. It does not apply to enforcement of an arbitration provision under the Federal Arbitration Act.⁶⁷

generally MCDONALD & CARLSON § 35:27, pp.921-924; O’CONNOR § 3.5 (1)(2).

⁶⁴ See e.g. *Gustafson v. Chambers*, 871 S.W.2d 938, 945 (Tex.App.—Houston [1st Dist.] 1994, orig. proceeding). See generally MCDONALD & CARLSON § 35:26, pp.918-920; O’CONNOR § 3.5 (1)(3), p.283.

⁶⁵ TEX. CIV. PRAC. & REM. CODE § 171.098 (a)(1) & (2) (permitting interlocutory appeal of “an application to compel arbitration” or “an application to stay arbitration.”).

⁶⁶ *Id.* § 171.098 (a)(3)-(5) (permitting interlocutory appeal of an order “confirming or denying confirmation of an award,” or “modifying or correcting an award” or “vacating an award without directing a rehearing.”).

⁶⁷ See generally DORSANEO § 152.03[1][c][i][G].

An order granting or denying a motion to compel arbitration under the federal act can be enforced by a writ of mandamus in state court.⁶⁸ Indeed, in cases where both the federal and state arbitration acts are invoked, there may be parallel proceedings in the court of appeals, that is, an interlocutory appeal of the order under the state act and a mandamus proceeding to enforce the federal act.⁶⁹ Under these circumstances, the two proceedings should be consolidated in the court of appeals.⁷⁰

C. Pretrial orders

Prior to 1997, the Supreme Court held that appeal from a final judgment was an adequate remedy for the improper denial of a special appearance and denied mandamus petitions in such cases.⁷¹ But it made an exception in “[m]ass tort litigation [which] places a significant strain on a defendant’s resources and creates considerable pressure to settle the case regardless of the underlying merits.”

⁷² In 1997, an order granting or denying

a special appearance was made subject to interlocutory appeal.⁷³

Parties have also obtained mandamus relief to review the following types of pretrial orders:

- an order that improperly consolidates mass tort claims;⁷⁴
- a denial of a plea of forum non conveniens in a mass tort case;⁷⁵
- a severance order;⁷⁶
- an order of non-suit;⁷⁷
- an order granting separate trials;⁷⁸
- an order denying a motion for continuance;⁷⁹

⁶⁸ *Jack B. Aglin Co. v. Tipps*, 842 S.W.2d 266, 271-272 (Tex.1992).

⁶⁹ *Id.*

⁷⁰ *In re Valero Energy Corp.*, 968 S.W.2d 916 (Tex.1998).

⁷¹ See e.g. *Canadian Helicopters, Ltd. v. Witty*, 876 S.W.2d 304 (Tex.1994).

⁷² *CSR Ltd. v. Link*, 925 S.W.2d 591, 596 (Tex.1996).

⁷³ TEX.CIV.PRAC. & REM. CODE § 51.014(a)(7).

⁷⁴ See *In re Van Waters & Rogers, Inc.*, 62 S.W.3d 197, 201 (Tex.2001).

⁷⁵ See *In re E.I. du Pont de Nemours and Co.*, 92 S.W.3d 517, 524 (Tex.2002).

⁷⁶ See *Liberty Nat’l Fire Ins. Co. v. Akin*, 927 S.W.2d 627, 630 (Tex.1996).

⁷⁷ See *Hooks v. Fourth Court of App.*, 808 S.W.2d 56, 59 (Tex.1991).

⁷⁸ See *In re Bradle*, 83 S.W.3d 923, 928 (Tex.App.—Austin 2002, orig. proceeding).

⁷⁹ See *Union Carbide Corp. v. Moye*, 798 S.W.2d 792, 793 (Tex.1990).

- an order refusing to enforce a waiver of a jury trial in a lease;⁸⁰ and
- an order enforcing a forum selection clause entitling a party to be sued in another state⁸¹

D. Attorneys fees and sanctions

The court may issue a writ of mandamus to remedy an erroneous award of sanctions and/or attorney's fees by the trial court.⁸² The same is true of orders awarding monetary sanctions.⁸³

E. Disqualification and recusal

Mandamus may be used to remove a judge through disqualification⁸⁴ or

through recusal.⁸⁵ It can also be used to review an order disqualifying counsel.⁸⁶

F. Motions for new trial

Generally, an action for mandamus does not lie from an order granting a motion for a new trial.⁸⁷ A writ of mandamus will issue if the trial court grants a motion for a new trial after its plenary power has expired.⁸⁸ Mandamus is also appropriate when the trial court has

⁸⁰ See *In re Prudential Ins. Co. of Am. and Four Partners, L.L.C.*, No. 02-0690, 2004 WL 1966015 (Tex. Sept. 3, 2004).

⁸¹ See *In re AIU Ins. Co.*, No. 02-0648, 2004 WL 1966010 (Tex. Sept. 3, 2004).

⁸² See *In re Ford Motor Co.*, 988 S.W.2d 714, 723 (Tex.1998); *In re Supportkids, Inc.*, 124 S.W.3d 804, 807-809 (Tex.App.—Houston [1st Dist.] 2003, orig. proceeding); *Tarrant County Hospital Dist. v. Henry*, 52 S.W.3d 434, 453-454 (Tex.App.—Fort Worth 2001, orig. proceeding). See generally DORSANEO § 152.03[1][c][i][F].

⁸³ See *In re Bennett*, 960 S.W.2d 35, 40 (Tex.1997); *In re Velte*, 2004 WL 742357, at *3 (Tex.App.—Austin 2004, orig. proceeding). See generally O'Connor § 4.3 (14), p.287.

⁸⁴ See *In re O'Connor*, 92 S.W.3d 446, 450 (Tex.2002).

⁸⁵ See *In re Healthmark Partners, LLC*, 2004 WL 1899953, at *1 (Tex.App.—Houston [14th Dist.], orig. proceeding). See generally O'CONNOR § 4.3 (5), p.285.

⁸⁶ See *In re Southwestern Bell Yellow Pages, Inc.*, 2004 WL 1195832 (Tex.App.—San Antonio, orig. proceeding); *In re Reed*, 137 S.W.3d 676, 678 (Tex.App.—San Antonio 2004, orig. proceeding) (criminal context). See generally O'CONNOR § 4.3 (6), p.286.

⁸⁷ See generally MCDONALD & CARLSON § 35:28, p.934-935. But see *In re Bayerische Motoren Werke*, 8 S.W.3d 326 (Tex.2000); *In re Volkswagen of America, Inc.*, 22 S.W.3d 462 (Tex.2000).

⁸⁸ See *In re Garcia*, 94 S.W. 3d 832 (Tex. App.—Corpus Christi 2002, orig. proceeding)("If the trial court erroneously reinstates a case after it loses jurisdiction, the ruling can be challenged by mandamus."). See also *In re Jackson Person & Assoc., Inc.*, 94 S.W.3d 815 (Tex. App.—San Antonio 2002, orig. proceeding); *In re Strickland*, 2002 WL 58482 (Tex. App.—Houston [1st Dist.] 2002, orig. proceeding)

granted a new trial because the jury's answers were conflicting.⁸⁹

G. Void orders

Mandamus is proper when a trial court's order is void.⁹⁰ Further, "when attacking a void order by mandamus, it is to necessary to show no adequate remedy at law exists."⁹¹

V. PREREQUISITES TO MANDAMUS RELIEF

A. A signed order

A writ of mandamus is used to review a lower court's order. Before the 1997 amendments to the Rules of Appellate Procedure, mandamus would not issue unless the lower court had actually signed an order. But now, a formal written order is no longer necessary.⁹²

⁸⁹ See *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 918 (Tex.1985); *Johnson v. Seventh Court of Appeals*, 162 Tex. 613, 350 S.W.2d 330, 331 (1961). See also MCDONALD & CARLSON § 35:28@, p.935.

⁹⁰ See *In re Simpson*, 2002 WL 27745 (Tex. App.—Houston [1st Dist.] 2002, orig. proceeding) ("Mandamus relief may be afforded where the trial court's order is void.").

⁹¹ *Sharpe v. Roman Catholic Diocese of Dallas*, 2001 WL 15974 (Tex. App.—Dallas 2001, no pet.).

⁹² Rule TEX. R. APP. P. 52.3 (j)(1)(a). See also *In re Perritt*, 973 S.W.2d 776, 779 (Tex.App.—Texarkana, orig. proceeding).

B. No fact dispute

The right to mandamus cannot depend on disputed facts. If there are material fact disputes, relief by mandamus is inappropriate.⁹³

C. Timeliness

There is no set time in which a petition for mandamus must be brought, but the equitable doctrine of laches is sometimes applied.⁹⁴

D. Concurrent jurisdiction

"If the Supreme Court and the court of appeals have concurrent jurisdiction, the petition must be presented first to the court of appeals unless there is a compelling reason not to do so." Rule 52.3(e). The Supreme Court has found a "compelling reason" in only a few cases.⁹⁵

See generally MCDONALD & CARLSON § 35:18, pp.906-907.

⁹³ See generally O'CONNOR § 3.2, p.281.

⁹⁴ See e.g. *Rivercenter Assoc. v. Rivera*, 858 S.W.2d 366, 367-368 (Tex.1993); *Porth v. Currie*, 613 S.W.2d 534, 537 (Tex.Civ.App.—Tyler 1981, orig. proceeding). See generally MCDONALD & CARLSON § 35:19, p.907.

⁹⁵ See e.g. *In re State Bar of Texas*, 113 S.W.3d 703, 735 (Tex.2003) (finding a compelling reason in a district court's interference in the regulation of the legal practice); *Bird v. Rothstein*, 930 S.W.2d 586, 587-588 (Tex.1996) (imminence of election served as a compelling reason to confront issue of whether candidate should be placed on ballot); *Davis v. Taylor*, 930

VI. PROCEDURE

The procedure for seeking mandamus is found in Rule 52 of the Rules of Appellate Procedure, which is entitled “Original Proceedings.” This provision is broad and it applies to any “original appellate proceeding seeking extraordinary relief—such as writ of habeas corpus, mandamus, prohibition, injunction, or quo warranto.” Rule 52.1.

A. Parties

Rule 52.2 sets forth the three parties to every original proceeding, as follows:

- **Relator:** In any original proceeding, except for habeas corpus, the party seeking the relief is called a relator.
- **Respondent:** This is the person against whom relief is sought. Usually this is a judge or some other public official that is refusing to take an action. The writ, if issued, will be directed to the respondent and will direct the respondent to take some act.
- **Real party in interest:** This is the party opposing the requested relief.

In a typical mandamus proceeding, the relator and the real party in interest are parties to a suit, and the respondent is the judge of that suit. When the judge refuses to issue an order, the relator seeks a writ from a higher court directing the judge (the respondent) to take the

action. The party who opposes issuance of the writ is the real party in interest. Rule 52.3(d).

B. Style

Prior to the 1997 amendments to the Rules of Appellate Procedure, the mandamus proceeding was styled like any ordinary proceeding. For example, in a case where Paul Payne, the plaintiff, sues Don Davis, the defendant, and in which J. Johnson is the judge, a petition for mandamus filed by the defendant would be styled as follows: *Don Davis, Relator v. The Hon. J. Johnson, Respondent*. Paul Payne, the real party in interest, would not be named in the style.

This was unsatisfactory both to the relator who did not want to be seen as suing his judge and to the judge who did not want to be seen as being sued by a party in his court. Now, after rule changes in federal court (1996) and in state court (1997) the case would be styled as follows: *In re Don Davis, Relator*. See Rule 52.1.⁹⁶

C. Petition

The petition should be filed in strict conformity to Rule 52.3. “All factual statements in the petition must be verified by affidavit made on personal knowledge.” Rule 52.3. The structure of petition is much like an appellate brief. There is a statement of the case and, a statement of jurisdiction. See Rule 52.3

S.W.2d 581, 582 (Tex.1996) (same); *La Rouché v. Hannah*, 822 S.W.2d 632, 634-635 (Tex.1992) (same).

⁹⁶ See generally, 16A WRIGHT, MILLER & COOPER, § 3967.1.

(d) & (e).⁹⁷ There must be a statement of issues, a statement of facts, an argument, a prayer, and an appendix. Rule 52.3 (f) - (j).

D. Record

The relator must also file “a certified or sworn copy” of every material document filed in the court below and “a properly authenticated transcript of any relevant testimony . . . including any exhibits.” Rule 52.7. If there was no testimony, there must be “a statement that no testimony was induced” and that must be “properly authenticated.” *Id.* The record can be supplemented, and copies must be provided to all parties with a table of contents. *Id.*

E. Temporary relief

The relator may move to stay any underlying proceeding or for any other temporary relief pending action on the mandamus. The court may grant such relief and may require the relator to post a bond. Rule 52.10.⁹⁸

F. The court’s ruling

The court can deny the petition without requesting a response, or it can request a response and then deny relief. In those cases, it does not have to issue an opinion. Rule 52.8 (a) & (d). The court

cannot grant relief without first requesting a response, and if it grants relief it must issue an opinion. Rule 52.8 (b) & (d). Oral argument is optional. Rule 52.8 (c).

G. The writ.

The court is required to “make an appropriate order.” Rule 52.8(c). The actual writ is almost never issued. Rather, the court of appeals, in its opinion will say, as a matter of comity to the lower court judge, that the writ will issue unless the lower court takes the directed action.⁹⁹

H. The motion for rehearing

Any party can move for rehearing within 15 day after the order on the petition for mandamus. Rule 52.9. No response must be filed unless the court requests. The court will not grant a motion for rehearing without first requesting a response. *Id.*

⁹⁷ If the petition is to the Supreme Court, the petition must state that it has been first presented to the court of appeals, or it must state the compelling reason for going directly to the Supreme Court. Rule 52.3(e).

⁹⁸ See generally DORSANEO § 152.04 [5][f].

⁹⁹ See generally MCDONALD & CARLSON § 35:1, p.879

Table 1: Special Mandamus Statutes

Here is a list, not necessarily complete, of statutes allowing issuance of a writ of mandamus in particular situations.

- TEX. CONST. art. 3 § 28 (The Texas Supreme Court “shall have jurisdiction to compel [the Legislative Redistricting Board] to perform its duties in accordance with the provisions of this section by writ of mandamus or other extraordinary writs conformable to the usages of law.”).¹⁰⁰
- CIV. PRAC. & REM. CODE § 15.0642 (mandamus to enforce mandatory venue provision).
- AGRICULTURE CODE § 58.036 (mandamus to compel payment of general obligation bonds and revenue bonds issued by Texas Agricultural Finance Authority and to compel performance of authority board or commissioner of agriculture of duties as to agricultural finance authority).
- GOV’T CODE § 74.163 (a)(4) (Rule for operation of judicial panel on multidistrict litigation must “provide for appellate review of certain or all panel orders by an extraordinary writ.”). *See infra*.
- GOV’T CODE § 71.035 (requiring attorney general to file and prosecute action for mandamus on behalf of Texas Government Council to obtain “statistics and other pertinent information” from “judges and court officials.”).
- 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.”).
- GOV’T CODE 465.028 (Pledges and agreements of the state of Texas to owners of bonds “may be enforced in the State Supreme Court by Mandamus or other appropriate proceeding.”).
- GOV’T CODE 1205.002 (b) (“This chapter does not prohibit an issuer from applying to the Texas Supreme Court for writ of mandamus to the attorney general for the approval of a bond, and the court is authorized to issue the writ.”).¹⁰¹
- NAT. RES. CODE § 85.258 (Under Section 85.241 of the Natural Resources Code “[a]ny interested person” may sue the Natural Resource Commission to test the

¹⁰⁰ See e.g. *Mauzy v. Legislative Redistricting Board*, 471 S.W.2d 570, 575 (Tex.1971).

¹⁰¹ formerly TEX. REV. CIV. STAT. art. 717 n.1 (repealed).

validity of “the conservation laws of this state” or the orders of the Commission. Under Section 85.245 notice must be given to the Commission, and under Section 85.244 no injunctive relief may be granted “unless notice is given to the commission and a hearing is held as provided in this subchapter.” *Id.* § 85.244. “The court of appeals and its judges have the jurisdiction to issue writs of prohibition, mandamus, and injunction to prevent the enforcement of any order or judgment of a trial court or judge who grants any type of injunctive relief without notice and hearing in violation of Sections 85.244 and 85.245.”

- TAX CODE § 33.71 (A court in a delinquent tax suit may appoint a master. TAX CODE § 33.71 (a). A pretrial ruling of such a master “from which a mandamus is sought must be appealed to the referring court before the initiation of mandamus proceedings before the court of appeals.” *Id.* § 33.71 (g)).
- TEX. REV. CIV. STAT. art. 5190.6 (“If the department refuses to approve the bond issue solely on the basis of law, the corporation may seek a writ of mandamus from the Supreme Court, and for this purpose the chair of the department shall be considered a state officer as provided in Section 22.002, Government Code.”).
- TEX. R. JUD. ADMIN. 5.5 (“A presiding judge’s order granting or denying a motion or request for appointment of a pretrial judge may be reviewed only by the Supreme Court in an original mandamus proceeding.”).
- TEX. R. JUD. ADMIN. 13.9 (Decision of panel on multidistrict litigation may be reviewed only by Supreme Court in an original proceeding.).
- TEX. R. DISC. PROC. § 3.09 (“The trial court shall promptly enter judgment after the close of evidence (in the case of a nonjury trial) or after the return of the jury’s verdict. Mandamus lies in the Supreme Court of Texas to enforce this provision, upon the petition of either the Respondent or the Chief Disciplinary Counsel.”).

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