

# **SUCCEEDING IN MANDAMUS REVIEW**

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**CHAPTER 13**



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## SUCCEEDING IN MANDAMUS REVIEW

By Jane M.N. Webre

Mandamus is an “extraordinary remedy” designed to correct a lower court’s clear abuse of discretion under circumstances where there is no adequate remedy by appeal. Procedurally, mandamus proceedings are relatively streamlined and efficient, and their disposition is relatively speedy. The first part of this paper discusses the basic procedural aspects of mandamus: what you have to file and what it has to say. The last section of this paper discusses the sorts of cases in which the courts have granted mandamus review recently. Finally, Appendix A is a table of most of the mandamus opinions issued recently by the Texas courts, sorted by issue.

### I. FILING REQUIREMENTS

Texas Rule of Appellate Procedure 52 sets out the filing requirements for mandamus actions and other original proceedings. The filing “package” should include the following items: (1) the petition; (2) the appendix; (3) a record; (4) a request for temporary relief, if desired, together with a certification that you have given notice of the request to all other parties by telephone or fax; and (5) a filing fee.

#### A. The Petition

Following are the required components of a Petition for Writ of Mandamus:

1. Identity of parties and counsel Tex. R. App. P. 52.3(a).

You must list all parties plus the names and addresses of their counsel. You should identify the parties by their “mandamus” titles: the “Relator” is the party seeking relief; the “Real Parties in Interest” are persons whose interests would be directly affected by the relief sought; and the “Respondent” is the person against whom the relief is sought, whether a judge, court, tribunal, office or other person. Under the old rules, the style of a mandamus proceeding was “[Relator] v. [Respondent].” Since September 1, 1997, however, the style should be “In re [Relator].” Tex. R. App. P. 52.1.

2. Table of Contents Tex. R. App. P. 52.3(b).

The Table of Contents must include some indication of the subject matter of each issue or point. You should also include sub-headings under those issues or points to give a helpful summary for the judges or briefing attorneys reviewing the petition.

3. Index of Authorities Tex. R. App. P. 52.3(c).

4. Statement of the Case Tex. R. App. P. 52.3(d).

The Statement of the Case is not the Statement of Facts. It is intended to explain the procedural history of the case, not the particular facts at issue. The elements of the short (no more than one page) Statement of the Case all reflect its purpose:

- a. A concise description of the nature of the underlying proceeding (e.g., oil and gas case, family law case);
- b. The name of the judge (if the respondent is a judge), the designation of the court in which the judge is sitting, and the county in which the court is located. If the respondent is some other official, include the designation and location of the office held.
- c. A concise description of the action from which the relator seeks relief;
- d. If the original proceeding seeks habeas corpus, a statement concerning how and where the relator is being deprived of liberty;
- e. If the petition is being filed in the Supreme Court after a petition requesting the same relief was filed in the court of appeals: (1) the date the petition was filed in the court of appeals; (2) the district of the court of appeals and the names of the justices who participated in the decision; (3) the author of any opinion for the court of appeals and the author of any separate opinion; (4) the citation of the court’s opinion, if available, or a statement that the opinion was unpublished; and (5) the disposition of the case by the court of appeals and the date of the court of appeals’ order.

5. Statement of Jurisdiction. Tex. R. App. P. 52.3(e).

The section should include a concise statement -- without argument -- of the basis for the court’s jurisdiction. This is a little bit more complicated than it sounds. Mandamus proceedings can invoke various statutory bases for jurisdiction to issue writs against various officials in various contexts.

a. Concurrent jurisdiction in the Supreme Court and courts of appeals

If the Supreme Court and courts of appeals share concurrent jurisdiction, the petition must first be presented to the court of appeals unless there is a compelling reason not to do so. Tex. R. App. P. 52.3(e). If not presented first to the court of appeals,

the petition to the Supreme Court must explain the compelling interest. Tex. R. App. P. 52.3(e). This exception is rarely applicable, but has been invoked in election contests and the like, which often combine hot-potato political issues and short time deadlines. *See, e.g., In re the Texas Senate*, 36 S.W.3d 119 (Tex. 2000) (determining whether Texas Senate could elect acting lieutenant governor by secret ballot); *In re Republican Party of Texas v. Deitz*, 940 S.W.2d 86 (Tex. 1997) and 924 S.W.2d 932 (Tex. 1996) (per curiam) (determining whether gay civil rights group could have a booth at the Republican convention); *LaRouche v. Hannah*, 822 S.W.2d 632 (Tex. 1992) (determining whether Lyndon LaRouche's name would appear on ballot in Democratic primary as candidate for president).

*b. Supreme Court has broad jurisdiction to issue writs*

The Supreme Court may issue mandamus against a district judge, a court of appeals or a justice of a court of appeals, officers of state government except the governor, the court of criminal appeals, or a justice of the court of criminal appeals. Tex. Govt. Code § 22.002(a). The Supreme Court has exclusive jurisdiction to issue mandamus against members of the executive branch where necessary to “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. Govt. Code § 22.002(c). That provision has been interpreted strictly, and the Supreme Court has in fact exercised its exclusive jurisdiction to mandamus various state officials in the executive branch. *A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668 (Tex. 1995) (comptroller); *Houston Chronicle Pub. Co. v. Mattox*, 767 S.W.2d 695 (Tex. 1989) (attorney general); *Jessen Assocs., Inc. v. Bullock*, 531 S.W.2d 593 (Tex. 1975) (comptroller); *Gordon v. Lake*, 356 S.W.2d 138 (Tex. 1962) (secretary of state); *Manion v. Lockhart*, 114 S.W.2d 216 (Tex. 1938).

Though the Supreme Court lacks general jurisdiction to issue writs of mandamus against district or county officers other than judges -- like court clerks, court reporters, constables, justices of the peace -- the Court always has jurisdiction to issue writs to protect its jurisdiction. Tex. Const. Art. V, § 3.

*c. Court of Appeals has more limited jurisdiction*

The courts of appeals have more limited mandamus jurisdiction than the Supreme Court. Except for some specific subject matters, discussed below, courts of appeals may issue writs of mandamus only (1) to enforce the jurisdiction of the court; or (2) against district court or county court judges. Tex. Govt. Code 22.221(a), (b).

County and district clerks, court reporters, masters and justices of the peace are not “judges”, and the courts of appeals has no mandamus jurisdiction over them unless necessary to enforce its jurisdiction. *In re Coronado*, 980 S.W.2d 691 (Tex. App.--San Antonio 1998, orig. proceeding) (denying mandamus against district clerk because writ not necessary to enforce court's jurisdiction); *Click v. Tyra*, 867 S.W.2d 406 (Tex. App.-- Houston [14<sup>th</sup> Dist] 1993, orig. proceeding) (granting leave to file petition for writ of mandamus against district clerk to protect jurisdiction).

At least two courts of appeals have held that a sitting district judge is not a “district judge” within the courts' mandamus jurisdiction when acting in his capacity as a presiding judge of a judicial administrative region. *In re Hettler*, 110 S.W.3d 152, 154 (Tex. App.—Amarillo 2003, orig. proceeding) (holding that court lacked mandamus jurisdiction over district judge acting in his capacity as presiding judge of administrative region when assigning judges or scheduling disqualification hearings); *In re Torres*, 130 S.W.3d 409, 414 (Tex. App.—Corpus Christi 2004, orig. proceeding).

A court of appeals does not have jurisdiction to issue a mandamus writ directed at a litigant or the litigant's counsel. The jurisdiction is limited to the trial judge, and does not reach parties or counsel. *In re Aaron*, 2003 WL 21919346 \*3-4 (Tex. App.—Amarillo 2003, orig. proceeding) (not for publication) (dismissing petition as to relief sought against party and counsel, because § 22.221 “authorizes the court to issue writs of mandamus to judges, not parties or their counsel”).

*d. Mandamus jurisdiction over elections*

The Supreme Court and courts of appeals have concurrent jurisdiction over election contests. Specifically, they have jurisdiction to “compel the performance of any duty imposed by law in connection with the holding of an election or a political party convention, regardless of whether the person responsible for performing the duty is a public officer.” Tex. Elec. Code § 273.061. As is discussed above, ordinarily a party should seek relief in the court of appeals first in situations of concurrent jurisdiction. Tex. R. App. P. 52.3(e). In election cases, there is more likely to be a compelling reason to seek relief directly from the Supreme Court, rather than going to the court of appeals first.

*e. Other bases for mandamus jurisdiction*

Various other statutes provide bases for mandamus jurisdiction regarding particular subject matters. Following is a list of some of those subject-matter-specific statutory bases. If you are dealing with enforcement of other specific statutory rights, it would

be wise to check your statute to determine if it includes a mandamus right to enforce any of its provisions.

*Venue* Tex. Civ. Prac. & Rem. Code § 15.0642 makes mandamus available to enforce mandatory venue provisions. If a trial court refuses to transfer venue to what you maintain is a mandatory venue, you can mandamus that decision. This is a change from typical practice: ordinarily, a venue determination would be an incidental trial ruling that is not reviewable on mandamus. You can't wait forever to seek your mandamus relief, though. You must file the mandamus proceeding by the later of (1) 90 days before trial starts, or (2) 10 days after receiving notice of the trial setting. While the venue statute provides for mandamus jurisdiction over the trial court's decisions regarding mandatory venue, it expressly disclaims such jurisdiction over a trial court's decision regarding transfers of venue for the convenience of the parties and witnesses. Tex. Civ. Prac. & Rem. Code § 15.002(c).

The venue mandamus provision states that mandamus is available to enforce mandatory venue provisions "of this chapter," Tex. Civ. Prac. & Rem. Code § 15.0642. Another provision in the venue chapter provides that actions governed by statutes with mandatory venue provisions must be brought in the county required by the statute. § 15.016. At least one court of appeals has interpreted those sections together, and held that mandamus is available to enforce mandatory venue provisions contained in some other statute. *In re Texas Windstorm Ins. Assoc.*, 121 S.W.3d 821, 822 (Tex. App.—Beaumont 2003, orig. proceeding).

Though venue decisions are generally reviewable by mandamus only if they fall within the scope of § 15.0642, some courts have held that errors in venue procedure may be reviewed by mandamus. See *In re Shell Oil Co.*, 128 S.W.3d 694, 696 (Tex. App.—Beaumont 2004, orig. proceeding) (granting mandamus after trial court issued second venue determination in violation of Tex. R. Civ. P. 87); *Henderson v. O'Neill*, 797 S.W.2d 905, 905 (Tex. 1990) (mandamus available to enforce Rule 87 notice requirements where "the record indicates that the trial court made no attempt to follow the applicable rule and, in fact, acknowledged its deviation from the required procedure"). But see *In re Shell Oil Co.*, 128 S.W.3d at 697-701 (Burgess, J., dissenting from the grant of mandamus and collecting contrary authority).

*Attorney Discipline* Tex. R. Disc. P. 3.09 gives the Supreme Court mandamus jurisdiction to enforce judgments in disciplinary proceedings.

*Public housing* Appellate courts have mandamus jurisdiction to enforce the duties of housing authorities. Tex. Loc. Govt. Code § 392.101.

*Texas Judicial Council* Appellate courts have mandamus jurisdiction to enforce the duties attendant

to the Texas Judicial Council. Tex. Govt. Code § 71.035.

*State-Issued Bonds* Various statutory provisions allow appellate courts to issue writs of mandamus against officials who are not satisfying state-issued bonds. Tex. Water Code § 17.028; Tex. Agric. Code § 58.036; Tex. Agric. Code § 252.062.

*Open Meetings and Records* Appellate courts have mandamus jurisdiction to enforce certain requirements of the Open Meetings Act and the Open Records Act. Tex. Govt. Code §§ 551.142, 552.321.

6. *Issues Presented*. Tex. R. App. P. 52.3(f).

The petition must state concisely all issues or points presented for relief. The rule states that the "statement of an issue or point will be treated as covering every subsidiary question that is fairly included."

7. *Statement of Facts* Tex. R. App. P. 52.3(g).

The petition must state "concisely and without argument" the facts pertinent to the issues presented. You also need to include citations to the appendix or record in support of your statement of facts.

The statement of facts is an important part of a mandamus petition, so pay some attention to it. Many advocates don't give sufficient factual background, so the court may find it hard to identify the issues and how they fit in. Many advocates color the facts heavily in their favor, and argue disputed fact questions. Because appellate courts may not resolve fact disputes in a mandamus proceeding, that alone could result in a denial of your petition. *Davenport v. Garcia*, 834 S.W.2d 4, 24 (Tex. 1992).

8. *Argument* Tex. R. App. P. 52.3(h).

The petition must include a "clear and concise" argument for the contentions made, with appropriate citations to caselaw and the record or appendix. This is where you set out the grounds for your entitlement to mandamus.

There are two independent elements to prove entitlement to mandamus relief in a typical case: a clear abuse of discretion and a lack of adequate remedy by appeal. *Walker v. Packer*, 837 S.W.2d 833 (Tex. 1992). Your argument section should address both separately, completely, and with specificity.

a. *Clear abuse of discretion*

The "clear abuse of discretion" element focuses on the trial court's interpretation and application of law to the facts. This section of argument will depend on the substantive law of your particular subject matter, and the answer will not be unique to mandamus practice. The standards for measuring whether there has been an abuse of discretion, however, are unique to mandamus practice.

A trial court abuses its discretion if it acts without reference to any guiding rules or principles of law. *McGough v. First Court of Appeals*, 842 S.W.2d 637, 640 (Tex. 1992) (per curiam). “With respect to resolution of factual issues or matters committed to the trial court’s discretion, for example, the relator must establish that the trial court could reasonably have reached only one decision.” *Walker v. Packer*, 827 S.W.2d 833, 839-840 (Tex. 1992). A trial court, however, “has no ‘discretion’ in determining what the law is or applying the law to the facts. Thus, a clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion....” *Id.* at 840.

A trial court does not abuse its discretion in relying on existing law, even if the appellate court on mandamus overrules the precedent the trial court relied upon. *In re Smith Barney, Inc.*, 975 S.W.2d 593, 599 (Tex. 1998); *In re Gillespie*, 124 S.W.3d 699, 704 (Tex. App.—Houston [14<sup>th</sup> Dist] 2003, orig. proceeding). The argument goes like this: a trial court cannot be said to have abused its discretion by following existing law, even if that law should be changed or is no longer valid. In a mandamus proceeding, therefore, an appellate court may overrule existing precedent, but if it does so it should deny mandamus relief and allow the lower court to reconsider the underlying order in light of the opinion.

#### b. Trial court failure to rule

A trial court may abuse its discretion by failing to rule. If a party files a motion, and the trial court delays unreasonably in holding a hearing or ruling on the motion, mandamus may issue. The appellate court cannot tell the trial court how to rule, but it can issue a writ of mandamus requiring the court to rule. *In re Salazar*, 134 S.W.3d 357, 358 (Tex. App.—Waco 2003, orig. proceeding) (conditionally granting mandamus to require trial court to rule on relator’s motion to enforce Rule 11 agreement, which had been pending seven months; Rule 11 agreement superseded previous mandamus ordering same trial court to rule on motion to compel discovery); *In re Holleman*, 2004 WL 1393582 (Tex. App.—San Antonio 2004, orig. proceeding) (not for publication) (granting mandamus because trial court had not ruled on motion for default judgment for four months); *In re American Media Consolidated*, 121 S.W.3d 70, 73 (Tex. App.—San Antonio 2003, orig. proceeding) (“A trial court’s refusal to rule on motion for summary judgment within a reasonable time after it is filed and heard may amount to an abuse of discretion, and entitle the complaining party to a writ of mandamus compelling the trial judge to rule”).

#### c. Lack of adequate remedy by appeal

Mandamus will not issue if the relator has an adequate remedy by appeal, even if that remedy will be expensive or time-consuming. *Walker v. Packer*, 827 S.W.2d 833 (Tex. 1992). The *Walker v. Packer* Court stated specifically that it is not enough “to show merely the delay, inconvenience or expense of an appeal.” 827 S.W.2d at 843. The magic phrase is that mandamus will not issue to correct “incidental trial rulings.” What sort of orders will come within the *Walker v. Packer* standard will vary depending on the subject matter of the case.

Some sorts of orders, by definition, are going to meet the “lack of adequate remedy by appeal” standard. For example, an order granting or denying a motion to compel arbitration will satisfy the lack of adequate remedy, and the only inquiry on mandamus will be abuse of discretion. *Freis v. Canales*, 877 S.W.2d 283, 284 (Tex. 1994); *In re Oakwood Mobile Homes*, 987 S.W.2d 571 (Tex. 1999). The same is true for orders regarding disqualification of counsel; the only inquiry will be abuse of discretion, because there is a lack of adequate remedy by appeal whatever the ruling. *In re Bank of America*, 45 S.W.3d 245 (Tex. App.—Houston [1st Dist.] 2001, orig. proceeding) (issuing mandamus to order disqualification of counsel after trial court denied it); *In re Nitla*, 92 S.W.3d 419 (Tex. 2002) (granting mandamus because counsel should not have been disqualified). Likewise, an court’s order refusing to remove himself from a case in the face of a Government Code objection is reviewable on mandamus. *Dunn v. Street*, 938 S.W.2d 33, 34-35 (Tex. 1997); *In re Naylor*, 120 S.W.3d 498, 501 (Tex. App.—Texarkana 2003, prig. proceeding).

There may also be instances where one part of a trial court’s order is reviewable on mandamus but another part is not. See *In re SupportKids, Inc.*, 124 S.W.3d 804, 809 (Tex. App.—Houston [1<sup>st</sup> Dist] 2003, orig. proceeding) (granting mandamus to undo improper discovery order, but holding that attorneys fees award in same order could be adequately reviewed on appeal).

In discovery cases, mandamus is available to provide relief from the following sorts of orders: (1) the trial court erroneously compels disclosure of privileged information which will materially affect the rights of the aggrieved party; (2) the party’s ability to present a viable claim or remedy at trial is vitiated or severely compromised by the trial court’s discovery error; (3) the trial court disallows discovery and the missing discovery cannot be made part of the appellate record; and (4) the discovery ordered is overly broad and unduly burdensome or constitutes a “fishing expedition”. *Walker v. Packer*, 827 S.W.2d at 843-844; *Dillard Dept. Stores v. Hall*, 909 S.W.2d 491, 492 (Tex. 1995) ( per curiam) (“[R]equest for document production may not be used simply to explore”); *K-Mart*

*Corp. v. Sanderson*, 937 S.W.2d 429, 431 (Tex. 1996) (“We reject the notion that any discovery device can be used to ‘fish’”) *In re American Optical Corp.*, 988 S.W.2d 711, 713 (Tex. 1998) (per curiam) (This Court has repeatedly emphasized that discovery may not be used as a fishing expedition.”).

As a practical matter, it is much more difficult to show lack of adequate remedy by appeal if you are denied discovery than if you are the party ordered to produce: “vitiated or severely compromised” is a tough standard to meet. Courts not only rarely grant mandamus relief in such cases, they rarely even issue opinions discussing them.

The *Walker v. Packer* “vitiated or severely compromised” standard is applied not only in discovery disputes, but in other contexts as well. For example, the Supreme Court has used that as the standard for determining whether to undo a consolidation of asbestos cases for trial. *In re Ethyl Corp.*, 975 S.W.2d 606, 617 (Tex. 1998). It has also been used to review the propriety of an order declining to abate a lawsuit to honor a statutory notice period. *In re Kimball Homes Texas, Inc.*, 969 S.W.2d 522 (Tex. App.--Houston [14<sup>th</sup> Dist] 1998, orig. proceeding). It has also been invoked to determine whether a party has an adequate remedy by appeal from a sanctions order. *In re McCall*, 967 S.W.2d 934 (Tex. App.--Corpus Christi 1998, orig. proceeding). The Supreme Court has previously held that sanctions orders are reviewable by mandamus, and a relator lacks adequate remedy by appeal, only if the monetary sanctions are so severe that they threaten a party’s continuation of litigation. *Braden v. Downey*, 811 S.W.2d 922 (Tex. 1991). The *In re McCall* opinion discussed both standards.

#### d. Void orders

In addition to the two-prong abuse of discretion/lack of adequate remedy by appeal standard, mandamus may issue to set aside a void order. *In re Southwestern Bell Telephone Co.*, 35 S.W.3d 602, 605 (Tex. 2000); *In re Miranda*, \_\_\_ S.W.3d \_\_\_, 2004 WL 594956 \* 2 (Tex. App.—El Paso Mar. 25, 2004, orig. proceeding) (granting mandamus to undo order setting aside judgment, because order was issued outside trial court’s plenary power and was therefore void); *In re Nasir*, \_\_\_ S.W.3d \_\_\_, 2004 WL 594978 \*2 (Tex. App.—El Paso Mar. 25, 2004, orig. proceeding) (same).

#### 9. Prayer Tex. R. App. P. 52.3(i).

The prayer should clearly state the relief sought. In particular, if you are asking the court for temporary relief, state that clearly in the prayer as a separate item from the ultimate mandamus relief you want. To avoid confusion, however, it is probably a better idea to have

your request for temporary relief in a separate motion rather than in your petition.

#### 10. Verification Tex. R. App. P. 52.3.

All factual statements must be verified by someone with personal knowledge who is competent to testify. The order complained of (to be included in the appendix) and the various additional pleadings and orders included in the record must be sworn or certified. Rule 52.3(j)(1)(A); 52.7(a). If you are unable to get certified copies of them, you can kill two birds with one stone and prove them up in the verification. It is probably better, however, to have a separate affidavit proving up the appendix and record.

#### 11. Certificate of Service Tex. R. App. P. 9.3(d).

Make sure you put the name and address of each person served, the method and date of service, and the name of the party represented if the person served is a lawyer.

#### 12. Page limits and form Tex. R. App. P. 52.6.

Petitions for writ of mandamus and responses to them may be no more than 50 pages -- 15 pages in the Supreme Court -- exclusive of the identity of parties and counsel, the table of contents, the index of authorities, the statement of the case, the statement of jurisdiction, the issues presented, the signature, proof of service, and the appendix. A reply may be no longer than 8 pages. You cannot use the appendix to get around the page limits, such as including your trial brief so as not to have to include that briefing in your petition. Tex. R. App. P. 52.3(j).

The form of a petition must follow the general briefing rules set out in Tex. R. App. P. 9.4, regarding binding, font size, margins, etc. They mean it: the Courts will strike a petition that does not meet those requirements. *In re Central Power & Light*, 41 Tex. Sup. Ct. J. 713 (Tex. Apr. 30, 1998) (striking brief and allowing 14 days to redraw).

There is no specific cover color specified for particular appellate filings, but dark blue, red, black, and plastic covers are prohibited (because they will not show the file-stamp). Tex. R. App. P. 9.4(f). I generally use light blue if I am relator and buff if I am real party in interest. If you want oral argument, you must put that on the cover of your first brief, just like in an appeal. Tex. R. App. P. 9.4(g). The cover must also include the style of the case, as well as the name, address, fax and phone number, and State Bar number of counsel filing the brief. *Id.*

### B. The Appendix

The appendix should not be confused with the record. The appendix has a very few, critical components and is often attached to the petition itself with tabs. The record is the generally-voluminous

universe of relevant documents that is always separately bound. The items that must be included in the appendix for a mandamus proceeding are: (1) certified or sworn copy of the order complained of, or any other document showing the matter complained of (such as a reporter's record indicating the judge's ruling); (2) any court of appeals order or opinion, if the mandamus proceeding is filed in the Supreme Court; and (3) the text of any statute or law on which the argument is based. In addition, you may include other relevant items, such as a copy of an affidavit supporting a claim of privilege, or a copy of a contract containing the disputed arbitration provision. Tex. R. App. P. 52.3(j).

What to do if the order is oral only, and there is no written order memorializing it? In the past, Texas courts have been split on whether to grant mandamus relief based on an oral order that is proved up solely by a reporter's record. See *Skeen v. Tunnell*, 768 S.W.2d 765 (Tex. App.--Tyler 1989, orig. proceeding); *Frink v. Blackstock*, 813 S.W.2d 602 (Tex. App.--Houston [1<sup>st</sup> Dist] 1991, orig. proceeding). Such cases, however, were decided under the *old* rule, which required a "certified or sworn copy of the order complained of..." Tex. R. App. P. 121(a)(2)(C) (repealed). The new rule requires a "certified or sworn copy of the order complained of, or any other document showing the matter complained of." Tex. R. App. P. 52.3(j)(1)(A). Its plain language seems to allow mandamus where there is not a written order. And, at least one court of appeals has held that since the rule change, "it seems clear that if a court's ruling is adequately shown by the reporter's record, then a formal written order is now unnecessary." *In re Perritt*, 973 S.W.2d 776, 779 (Tex. App.--Texarkana 1998, orig. proceeding).

That is not to say that a written order is never necessary. In one case the trial court signed a written order of severance, then later held a hearing where he stated that he was "going to overrule the severance." The judge never signed a written order overruling the severance or vacating the first written order. *In re Colony Ins.*, 978 S.W.2d 746 (Tex. App.--Dallas 1998, orig. proceeding). The Relator filed a mandamus proceeding complaining of the second, oral order denying severance. The court of appeals held that the oral order was insufficient to vacate the earlier, written order, which "remains the definitive ruling on Colony's motion to sever." Distinguishing the facts from *Perritt*, discussed above, the court held that the oral ruling did not "adequately show" the second ruling on the motion to sever.

Very recently, the Waco court of appeals held that a letter by the trial court stating that he "will withdraw my ruling and the order previously signed" was sufficient to set aside a previously signed summary judgment order. *In re Helena Chemical Co.*, 134

S.W.3d 378, 379 (Tex. App.—Waco 2003, orig. proceeding). Chief Justice Gray dissented based on his determination that the letter lacked sufficient indicia of formality, such as whether it included language indicating a present act (letter stated: "I will withdraw" judgment). The majority noted that the Supreme Court had admonished courts to look at the entire record to determine whether a trial court intended an order to be final, *Lehman v. Har-Con Corp.*, 39 S.W.3d 191, 195, 205-206 (Tex. 2001), and determined that the record here made clear that the trial court intended to withdraw the summary judgment by the letter, no matter how imperfectly phrased the letter was.

### C. The Record

The record should include the following items: (1) a certified or sworn copy of every document that is material to relator's claim "*that was filed in the underlying proceeding*" (you can only include items presented to the trial court); and (2) a transcript of any testimony, with exhibits, or a statement that there was no evidence adduced at hearing. Tex. R. App. P. 52.7(a). Supplementation is permitted. Tex. R. App. P. 52.7(b). The items in the record need to be certified or sworn. If you can't get certified copies, include an affidavit of counsel proving them up. If you have a reporter's record, include the court reporter certification pages, together with any hearings exhibits.

You should bind the record separately from the petition, and include tabs and an index for the court's convenience. While you need to file a multiple copies of your mandamus petition, the rules only require you to file the original record. Tex. R. App. P. 9.3(c). For the convenience of the court, however, it may be advisable to file additional copies; ask the clerk in advance what they prefer.

There is no particular magic to what you should include in the record, although you need for it to be very complete. A party may be subject to sanctions for filing a record that is misleading because it is incomplete. Tex. R. App. P. 52.11. In addition, failure to provide a sufficient record, alone, is grounds to deny relief. See *In re Wofford*, 1999 WL 153748 (Tex. App.--Amarillo Mar. 11, 1999, orig. proceeding) (not for publication); *In re Marin*, 1998 WL 541525 (Tex. App.--Amarillo Aug. 24, 1998, orig. proceeding) (not for publication).

The potentially tricky element of a mandamus record is dealing with documents for which a privilege is asserted. How do you get them from the trial court to the appellate court still under seal for *in camera* inspection, if necessary, without waiving the privilege? In all likelihood, you tendered the documents under seal to the trial court, who conducted an *in camera* inspection before rejecting the privilege claim and ordering them produced. One way to accomplish the

filing would be to ask the trial court to forward the documents under seal to the court of appeals. *See In re Earth Tech Environment & Infrastructure, Inc.*, 1999 WL 82428 (Tex. App.--Houston [1<sup>st</sup> Dist] 1999, orig. proceeding) (not for publication). Another way would be to retrieve them from the trial court yourself and file them, still under seal, with the court of appeals. If you are going to submit them under seal to the appellate court yourself, you should get an order from the court of appeals authorizing the filing under seal. At least one court of appeals takes the position that documents filed without a sealing order are public documents. James Spamer, *Internal Procedures at the Dallas Court of Appeals*, Advanced Civil Trial and Appellate Advocacy (SMU CLE April 1996). Whatever you do, make sure your paper trail is well documented, with written orders from one court or another setting out clearly how the documents should be handled and confirming that they should remain under seal. If the trial court is sending them directly to the appellate court, let the appellate court clerk know they are coming, and that they should remain under seal.

#### D. The Motion for Temporary Relief

In some cases, you may be requesting immediate temporary relief, pending the appellate court's ultimate disposition of the mandamus petition on the merits. Tex. R. App. P. 52.10. For example, if you have been ordered to produce certain documents within ten days, you would ask the appellate court to stay that order pending determination of whether you are entitled to mandamus relief on the grounds that the documents are privileged. In that situation, temporary relief keeps you from being in contempt of the order complained of.

A motion for temporary relief can be separate or included in your petition, but it is probably best to have a separate motion, to avoid confusion and ensure that the immediate need does not get lost in the shuffle. To that end, it is wise to highlight your need for temporary relief as much as possible. For example, in your filing letter you should note in a separate paragraph that you are seeking temporary relief, and provide specific information as to the exact relief sought and the applicable deadlines (such as the production date or hearing date). In the motion, be as specific as possible. Give the court dates, and identify what specific trial court action or order you want stayed. Don't just ask for a stay of all proceedings in the trial court; you don't need that much relief, and you aren't likely to get it.

You can no longer file your mandamus petition and motion for temporary relief by hand delivery, but serve your opposing counsel by slow boat, all in hopes that the court will give you temporary relief before your opponent even knows you filed a mandamus petition. If you seek temporary relief, you are required to notify all parties by "expedited means" -- like

telephone, fax, or hand delivery -- that you are seeking temporary relief. You must also include a Certificate of Compliance in your motion that you have done so. Tex. R. App. P. 52.10(a).

The scope of relief available on a temporary basis is fairly broad: the rule authorizes "any just relief." Tex. R. App. P. 52.10(b). As a condition of granting temporary relief, however, the court may order the relator to post a bond. *Id.* Any party may file a motion to reconsider the grant of temporary relief at any time. Tex. R. App. P. 52.10(c).

#### E. Response

A party may file a response to a petition for writ of mandamus, but it is not mandatory. Tex. R. App. P. 52.4. The appellate court will not issue mandamus relief, however, until a response has been filed or requested by the court. The general requirements for the response are the same as for the petition, but the following items are not required unless the petition misstates something: (1) identity of parties and counsel; (2) statement of the case; (3) statement of issues; (4) statement of facts; and (5) statement of jurisdiction.

The rule states that the response "must be confined to the issues or points presented in the petition." *Id.* That does not mean, however, that a response should ignore defenses that the petition did not address. The defenses available will vary case by case, but the following areas are often fruitful:

- (1) The existence of material disputed fact issues. *Brady v. Fourteenth Court of Appeals*, 795 S.W.2d 712, 714 (Tex. 1990) (with respect to factual determinations made by the trial court, the reviewing court on mandamus may not substitute its judgment for the trial court's.; *Walker*, 827 S.W.2d at 839.
- (2) Delay by relator in seeking relief. *Rivercenter Assoc. v. Rivera*, 858 S.W.2d 366, 367 (Tex. 1993); *In re Smith*, 2004 WL 308664 (Tex. App.—Eastland 2004, orig. proceeding) (not for publication) (noting that "it is well settled that mandamus relief may be denied where a party inexplicably delays asserting its rights").
- (3) Incomplete record. *See* Tex. R. App. P. 52.11; *In re Wofford*, 1999 WL 153748 (Tex. App.--Amarillo 1999, orig. proceeding) (not for publication) (failure to provide a sufficient record, alone, is grounds to deny mandamus relief); *In re Marin*, 1998 WL 541525 (Tex. App.--Amarillo 1998, orig. proceeding) (not for publication) (same).
- (4) Existence of adequate remedy by appeal. (This element is discussed at length starting at page 5 above.)

**F. Reply to the Response**

The relator may file a reply to the response, but the court need not wait for it before acting on the petition. Tex. R. App. P. 52.5. If you intend to file a reply, therefore, do it sooner rather than later. The reply can be no longer than 8 pages. Tex. R. App. P. 52.6.

**G. Full Briefing in the Supreme Court**

If the petition is pending in the Supreme Court, and the Court is “of the tentative opinion that relator is entitled to the relief sought,” then the Court may request full briefing on the merits. Tex. R. App. P. 52.8(b)(2). This is a new step, added because the petition and response in the Supreme Court may be only 15 pages long. Tex. R. App. P. 52.6. The particulars of the briefs are set out in Tex. R. App. P. 55, and are the same as briefs on the merits in the Supreme Court in ordinary appeals. The court may not issue an opinion granting relief, however, until a response has been filed or requested. Tex. R. App. P. 52.4, 52.8(b)(1).

**H. Oral Argument**

The appellate court may set the case for oral argument before issuing an opinion, but need not. Tex. R. App. P. 52.8(b)(4), (c). Remember, if you want argument, you must request it on the cover of your petition. Tex. R. App. P. 9.4(g).

**I. Opinions**

The appellate court need not issue an opinion to deny relief. Tex. R. App. P. 52.8(d). To grant relief, however, the court must issue an opinion. *Id.* The court of appeals may not order its opinion published after the Supreme Court has ruled on the same subject matter. Tex. R. App. P. 52.8(d).

**J. Sanctions**

There is a very tough sanctions provision in the mandamus rule. Tex. R. App. P. 52.11. A party or lawyer may be subject to sanctions for not acting in good faith, as indicated by the following activity: (1) filing a clearly groundless petition; (2) bringing a petition solely for purposes of delay; (3) grossly misstating or omitting important facts; or (4) filing a record that is misleading because of omissions. This provision is in fact being enforced. *See In re Thompson*, 1999 WL 80713 (Tex. App.--Dallas 1999, orig. proceeding) (not for publication) (sua sponte ordering relator to show cause why sanctions should not issue for filing groundless petition); *In re Cotton*, 972 S.W.2d 768 (Tex. App.--Corpus Christi 1998, orig. proceeding) (sanctioning relator \$5,000 for filing groundless petition and misleading record); *In re Lincoln*, 114 S.W.3d 724, 728 (Tex. App.—Austin, 2003, orig. proceeding) (issuing show cause order to

sanction relator and counsel for engaging “in a pattern of filing baseless motions and petitions”).

**K. Motions for Rehearing**

You can file one. Tex. R. App. P. 52.9. Any party may file a motion for rehearing within 15 days of the final order, and the motion must “clearly state the points relied on for the rehearing.” The court will not grant the motion for rehearing unless a response is filed or requested. It cannot be longer than 15 pages. A motion for rehearing in the court of appeals is not a prerequisite to seeking relief in the Supreme Court. *Mendoza v. Eighth Court of Appeals*, 917 S.W.2d 787 (Tex. 1996) (per curiam).

**II. WHAT SORTS OF CASES WIN?**

Appellate courts are more likely to grant mandamus relief in certain types of cases than others. There are certain types of orders where there is little dispute that the trial court abused its discretion, and appeal is not an adequate remedy. For example, if a trial court orders you to produce a bunch of privileged material, an appellate court is likely to grant mandamus relief from that order. *See In re Valero Energy Corp.*, 973 S.W.2d 453 (Tex. App.--Houston [14<sup>th</sup> Dist] 1998, orig. proceeding); *In re Bloomfield Mfg. Co.*, 977 S.W.2d 389 (Tex. App.--San Antonio 1998, orig. proceeding). Or, if the trial court refuses to enforce an arbitration agreement, appellate courts are likely to grant mandamus relief. *See In re Oakwood Mobile Homes, Inc.*, 987 S.W.2d 571 (Tex. 1999) (per curiam); *In re Weekley Homes*, 985 S.W.2d 111 (Tex. App.--San Antonio 1998, orig. proceeding). Or, if a visiting judge refuses to disqualify herself in response to a Government Code strike, appellate courts are likely to issue mandamus. *See In re Perritt*, 992 S.W.2d 444 (Tex. 1999) (per curiam); *Mitchell Energy Corp. v. Ashworth*, 943 S.W.2d 436 (Tex. 1997).

The great unknown in mandamus practice is divining what other sorts of orders will warrant mandamus relief. The determining factor in that inquiry is most often the adequacy of remedy by appeal. The Supreme Court made it clear in *Walker v. Packer* that an expensive and unnecessary trial, or the delay of an ordinary appeal, does not render that remedy inadequate. The *Walker v. Packer* Court disapproved of previous mandamus opinions “to the extent that they imply that a remedy by appeal is inadequate merely because it might involve more delay or cost than mandamus.” 827 S.W.2d at 842.

In the years since *Walker v. Packer*, appellate courts have from time to time carved little exceptions into that fairly bright line. A few years ago, the Supreme Court granted mandamus relief in two cases involving special appearances. *National Industrial Sand Ass’n. v. Gibson*, 897 S.W.2d 769 (Tex. 1995); *CSR Ltd. v. Link*, 925 S.W.2d 591 (Tex. 1996). The

Court had previously held that in certain “extraordinary circumstances” appeal might be inadequate to review orders overruling special appearances. *Canadian Helicopters Ltd. v. Wittig*, 876 S.W.2d 304 (Tex. 1994). In *National Sand* the Court found such “extraordinary circumstances” because the trial court acted with such disregard for guiding principles governing special appearances. In *CSR Ltd* the Court found “extraordinary circumstances” in “concerns of judicial economy in mass tort litigation combined with the magnitude of the potential risk for mass tort action against the defendant....” Though the Legislature mooted the debate by providing for interlocutory appeals of denials of special appearances -- Tex. Civ. Prac. & Rem. Code § 51.014(a)(7) -- the special appearance cases illustrate that “mere delay or cost” can give rise to mandamus relief if presented in a way that captures the Court’s imagination.

Just looking at the Court’s mandamus opinions over the last eighteen months or so, it is difficult to ascertain much of a pattern, except vis-à-vis discovery. The Court issued opinions in seven discovery cases, two arbitration cases, and six cases presenting miscellaneous issues including attorney disqualification, local elections, and administrative agency jurisdiction. (These cases are all abstracted in the attached Appendix A, listed by subject matter category. The Supreme Court cases are listed first within each category, followed by court of appeals cases.)

The Court not only decided significantly more discovery mandamus cases than any other category, but it granted the writ in six of the seven cases it decided. In the one case where writ was denied, the Court noted that the petition was premature because the actual scope of discovery had not been ordered yet. That sends a clear signal to the trial court and the parties that the Court will look closely at the substance of the discovery order, once issued, so it had better stay within the bounds of acceptable discovery.



## APPENDIX A

<b>Arbitration</b>		
<i>In re Wood</i> , ___ S.W.3d ___, 2004 WL 1535237 (Tex. July 9, 2004)(orig. proceeding)	Trial court sent class action claims to arbitration. Court of appeals granted mandamus and sent back to trial court.	Writ conditionally granted. Arbitrator should decide whether class claims are arbitrable and whether to certify the class.
<i>In re First Tx. Homes, Inc.</i> , 120 S.W.3d 868 (Tex. 2003)(orig. proceeding)	Trial court ordered some, but not all, claims to arbitration.	Writ conditionally granted. Arbitration clause applied to “all” claims arising out of construction contract.
<i>In re Palm Harbor Homes, Inc.</i> , 129 S.W.3d 636 (Tex. App. – Houston [1 <sup>st</sup> Dist.] 2004, orig. proceeding)	Trial court refused to compel arbitration.	Writ denied. Arbitration agreement void for lack of mutuality where one party has unilateral right to opt out.
<i>In re Bunzl USA, Inc.</i> , ___ S.W.3d ___, 2004 WL 42615 (Tex. App. – El Paso Jan. 8, 2004, orig. proceeding)	Trial court refused to compel arbitration in employment case.	Writ denied. Parties did not intend to be bound by arbitration agreement absent both parties’ signatures.
<i>In re Merrill Lynch Trust Co.</i> , 123 S.W.3d. 549 (Tex. App. – San Antonio 2003, orig. proceeding)	Trial court denied motion to compel arbitration.	Writ denied. Trustee as non-signatory of arbitration agreement could not enforce it.
<i>Feldman/Matz, et al. v. Settlement Capital Corp.</i> , ___ S.W.3d ___, 2004 WL 1555207 (Tex. App. – Houston [14 <sup>th</sup> Dist.] July 13, 2004, orig. proceeding)	Trial court sent claims to arbitration but retained claim for injunction.	Writ conditionally granted. Trial court cannot retain injunction request when claims sent to arbitration. Clause stating that either party “may” compel arbitration is mandatory.
<i>Rogers, et al. v. Maida, et al.</i> , 126 S.W.3d 643 (Tex. App. – Beaumont 2004, orig. proceeding)	Trial court denied motion to compel arbitration and refused to conduct evidentiary hearing on disputed evidence.	Writ conditionally granted. Court properly declined to compel arbitration in the face of evidence of duress, but abuse of discretion to deny evidentiary hearing.

<p><i>In re Adhi-Lakshmi Corp.</i>, ___ S.W.3d ___, 2004 WL 1299993 (Tex. App. – Beaumont June 10, 2004, orig. proceeding)</p> <p><i>In re Paris Packaging, Inc.</i>, 136 S.W.3d 723 (Tex. App. – Texarkana 2004, orig. proceeding)</p> <p><i>Granite Const. Co. v. Beaty</i>, 130 S.W.3d 362 (Tex. App. – Beaumont 2004, orig. proceeding)</p> <p><i>In re GTE Mobilnet of South Texas Lt. P’ship.</i>, 123 S.W.3d 795 (Tex. App. – Beaumont 2003, orig. proceeding)</p> <p><i>In re Media Arts Group, Inc.</i>, 116 S.W.3d 900 (Tex. App. – Houston [14<sup>th</sup> Dist.] 2003, orig. proceeding)</p> <p><i>In re Whitfield</i>, 115 S.W.3d 753 (Tex. App. – Beaumont 2003, orig. proceeding)</p> <p><i>In re Neutral Posture, Inc.</i>, 135 S.W.3d 725 (Tex. App. – Houston [1<sup>st</sup> Dist.] 2003, orig. proceeding)</p>	<p>In all of these cases, trial courts denied motions to compel arbitration.</p>	<p>Writs conditionally GRANTED in all cases. Courts of appeals found that claims were within the scope of arbitration provisions, and defenses such as waiver and unconscionability were inapplicable.</p>
<b>Discovery</b>		
<p><i>In re Ford Motor Co.</i>, 124 S.W.3d 147 (Tex. 2003)(orig. proceeding)</p>	<p>Trial court ordered production of database.</p>	<p>Writ denied. Because scope and procedures of production not yet determined, mandamus premature.</p>
<p><i>In re Bridgestone/Firestone, Inc.</i>, 106 S.W.3d 730 (Tex. 2003)(orig. proceeding)</p>	<p>Trial court ordered production of formula for tire manufacture.</p>	<p>Writ conditionally granted. Court held that trade secret privilege applied.</p>
<p><i>In re Bass</i>, 113 S.W.3d 735 (Tex. 2003)(orig. proceeding)</p>	<p>Trial court ordered production of geological seismic data.</p>	<p>Writ conditionally granted. Seismic data were trade secrets entitled to protection of privilege.</p>
<p><i>In re CSX Corp.</i>, 124 S.W.3d 149 (Tex. 2003)(orig. proceeding)</p>	<p>Trial court ordered former employer to produce information about safety practices for 30 years.</p>	<p>Writ conditionally granted. Request was overbroad because it was not reasonably limited in time.</p>
<p><i>In re Kuntz</i>, 124 S.W.3d 179 (Tex. 2003)(orig. proceeding)</p>	<p>Trial court ordered husband to produce letters of recommendation to his client to establish whether assets subject to property division with wife.</p>	<p>Writ conditionally granted. Husband did not have “possession or control” of letters, because they belonged to entity; or access to documents was insufficient.</p>

<i>In re DuPont de Nemours &amp; Co.</i> , 136 S.W.3d 218 (Tex. 2004)(orig. proceeding)	Trial court ordered asbestos manufacturer to produce documents despite privilege claims.	Writ conditionally granted. Affidavit listing names of legal department personnel historically satisfied prima facie case of attorney-client and attorney work product privileges.
<i>In re Dana Corp.</i> , ___ S.W.3d ___, 2004 WL 1304407 (Tex. June 11, 2004, orig. proceeding)	Trial court ordered asbestos manufacturer to produce insurance policies back to 1930 and knowledgeable witness.	Writ conditionally granted. Order overbroad in time because earliest claims go back to 1945. Party may discover information beyond existence and contents of policy only under general scope of discovery rule. No abuse of discretion in order to produce witness.
<i>In re Supportkids, Inc.</i> , 124 S.W.3d 804 (Tex. App. – Houston [1 <sup>st</sup> Dist.] 2003, orig. proceeding)	Trial court ordered party to identify all persons with whom it contracted as a sanction and also awarded attorneys fees.	Writ conditionally granted. Sanction does not meet <i>TransAmerican</i> standard. There was adequate remedy by appeal as to award of fees.
<i>In re Western Star Trucks US, Inc.</i> , 112 S.W.3d 756 (Tex. App. – Eastland 2003, orig. proceeding)	Trial court ordered out-of-state witness deposed in Texas and held parties jointly and severally liable as discovery sanction.	Writ conditionally granted. It is an abuse of discretion to order witness to appear in county other than those listed in Tex. R. Civ. P. 199.2(b)(2). Sanction was improper under <i>TransAmerican</i> standard.
<i>In re Hochheim Prairie Farm Mutual Ins. Assn.</i> , 115 S.W.3d 793 (Tex. App. – Beaumont 2003, orig. proceeding)	Trial court ordered adjuster, insurer and claims supervisor to provide pre-suit discovery.	Writ conditionally granted. The facts do not satisfy standards of Tex. R. Civ. P. 202 for pre-suit discovery.
<i>In re McGuire</i> , 134 S.W.3d 406 (Tex. App. – Waco 2004, orig. proceeding)	Trial court, as a sanction, prohibited party from opposing claims.	Writ conditionally granted. These are death penalty sanctions and are not warranted as a first measure. In addition, the order was void because it was rendered outside the multi-county district in which suit was pending.
<i>In re Greyhound Lines, Inc.</i> , ___ S.W.3d ___, 2004 WL 730736 (Tex. App. – San Antonio April 7, 2004, orig. proceeding)	Trial court ordered production of documents, but never signed promised second order limiting discovery.	Writ conditionally granted in part. Discovery must be reasonably limited in time and geography. Discovery regarding other employees should be limited to similarly-situated employees.
<i>Waste Mgmt. of Tx., Inc., v. Blackwell</i> , 130 S.W.3d 337 (Tex. App. – Houston [14 <sup>th</sup> Dist.] 2004, orig. proceeding)	Trial court ordered production of certain documents relating to environmental audits.	Writ denied. Defendant's affidavit factually did not satisfy elements of state Environmental, Health and Safety Audit Privilege Act.
<i>In re Morse</i> , ___ S.W.3d ___, 2004 WL 1403367 (Tex. App. – Amarillo June 22, 2004, orig. proceeding)	Trial court refused to require defendant to disclose potential parties and shareholders.	Writ conditionally granted. Information required under discovery rules.

<i>In re Arriola</i> , ___ S.W.3d ___, 2004 WL 1244289 (Tex. App. – Corpus Christi 2004, orig. proceeding)	Trial court refused to order production of nursing home records regarding resident alleged to have assaulted plaintiff.	Writ conditionally granted. Documents fall within “abuse and neglect” exception to medical records privilege, and go to heart of plaintiff’s claims against nursing home.
<i>In re Lowe’s Co. Inc.</i> , 134 S.W.3d 876 (Tex. App. – Houston [14 <sup>th</sup> Dist.] 2004, orig. proceeding)	Trial court ordered defendant in slip-and-fall case to produce witness for deposition to testify about database to “trend” injuries in store.	Writ conditionally granted. Store required to produce witness but not database itself. Database not limited in time or geography, so request for it is overbroad.
<i>In re Norris</i> , 2004 WL 912664 (Tex. App. – Fort Worth 2004, orig. proceeding)(not for publication)	Trial court barred defendant from disclosing discoverable medical records to co-counsel.	Writ conditionally granted. There is no basis for limiting counsel’s access to discovery. Such a limitation would impair counsel’s ability to represent client.
<i>In re Reynolds Metals Co.</i> , 2004 WL 794535 (Tex. App. – Houston [14 <sup>th</sup> Dist.] 2004, orig. proceeding)(not for publication)	Trial court ordered defendant to produce documents.	Writ conditionally granted. Requests overbroad because not limited in time to period of plaintiff’s exposure. Relator did not need to present evidence to establish overbreadth.
<i>In re Arden</i> , 2004 WL 576064 (Tex. App. – El Paso 2004, orig. proceeding)(not for publication)	Trial court ordered production of insured motorist’s statement to his own insurance adjuster.	Mandamus issued because statement protected by attorney-client privilege.
<b>Medical Malpractice</b>		
<i>In re Woman’s Hosp. of Tx.</i> , ___ S.W.3d ___, 2004 WL 422583, Tex. March 5, 2004, orig. proceeding)	Ten consolidated mandamus actions. Trial courts all declined to dismiss suits despite inadequate expert reports.	Writ denied. Three justices dissented (Hecht, Owen, Brister) and would hold that dismissal is mandatory, ministerial duty. Note: seven cases discussed below grant mandamus on identical facts.
<i>In re Schneider</i> , 134 S.W.3d 866 (Tex. App. – Houston [14 <sup>th</sup> Dist] 2004, orig. proceeding)	Trial court refused to dismiss medical malpractice case based on inadequate expert report.	Writ denied. There is an adequate remedy by appeal. Court strongly relied on <i>In re Woman’s Hospital</i> discussed above.
<i>In re Tenet Hosp. Ltd.</i> , 116 S.W.3d 821 (Tex. App. – El Paso 2003, orig. proceeding)	Trial court refused to dismiss medical malpractice suit despite insufficient expert report.	Writ conditionally granted. Court held that trial court has ministerial duty to dismiss suit for failure to file sufficient report. Tex. Rev. Civ. Stat. Ann. art. 4590i, § 13.01(e)(now Tex. Civ. Prac. & Rem. Code § 74.351).
<i>In re Smith</i> , 2004 WL 308664 (Tex. App. – Eastland 2004, orig. proceeding)(not for publication)	Trial court refused to dismiss medical malpractice suit despite insufficient expert report.	Writ conditionally granted. Dismissing suit with prejudice is ministerial duty where expert report insufficient.

<i>In re Vaughan</i> , 2004 WL 308665 (Tex. App. – Eastland 2004, orig. proceeding)(not for publication)	Trial court refused to dismiss medical malpractice suit despite insufficient expert report.	Writ conditionally granted. Dismissing suit with prejudice is ministerial duty where expert report insufficient.
<i>In re Highland Pines Nursing Home</i> , 2004 WL 100403 (Tex. App. – Tyler 2004)(not for publication)	Trial court refused to dismiss medical malpractice suit despite insufficient expert report.	Writ conditionally granted. Dismissing suit with prejudice is ministerial duty where expert report insufficient.
<i>In Re Watumull</i> , 127 S.W.3d 351 (Tex. App. – Dallas 2004, orig. proceeding)	Trial court refused to dismiss medical malpractice suit despite lack of timely filed cost bond or expert report.	Writ conditionally granted. Dismissing suit with prejudice is ministerial duty where no cost bond timely filed or expert report is insufficient.
<i>In re Miller</i> , 133 S.W.3d 816 (Tex. App. – Beaumont 2004, orig. proceeding)	Trial court ordered defendant doctor to give deposition in medical malpractice case.	Writ conditionally granted. Tex. Civ. Prac. & Rem Code § 74.351 bars a plaintiff from taking defendant doctor’s deposition until after plaintiff files expert report.
<i>In re Windisch</i> , ___ S.W.3d ___, 2004 WL 1176658 (Tex. App. – Amarillo 2004, orig. proceeding.	Trial court refused to dismiss medical malpractice case.	Writ conditionally granted. Where expert report is inadequate, dismissal of medical malpractice case is mandatory and ministerial.
<b>Elections</b>		
<i>In Re Fitzgerald</i> , ___ S.W.3d ___, 2004 WL 1622220 (Tex. July 12, 2004)	County judge refused to call election on incorporation of city because proposed boundaries did not reflect historic boundaries of city.	Writ conditionally granted. County judge had ministerial duty to call election if petition and population qualify.
<i>In re Porter</i> , 126 S.W.3d 708 (Tex. App. – Dallas 2004, orig. proceeding)	City council refused to call recall election.	Writ conditionally granted. Under City Charter at issue, city council has ministerial duty to call recall election after city secretary certifies recall petitions as sufficient.
<i>In Re Suson</i> , 120 S.W.3d 477 (Tex. App. – Corpus Christi 2003, orig. proceeding)	City secretary refused to deliver recall petition because of lack of qualified signatures.	Writ conditionally granted. Charter did not expressly grant secretary or council right to review signatures. Mandamus issued to require secretary to submit petition to council. Members subject to recall can sue to challenge signatures.
<i>In Re Gorman</i> , 2003 WL 22233529 (Tex. App. – Dallas 2003, orig. proceeding)(not for publication)	County commissioner’s court refused to order local option election on sale of alcoholic beverages.	Writ conditionally granted. Ordering election is ministerial duty, and agreements of counsel to delay election are void.
<i>In re Roof</i> , 130 S.W.3d 414 (Tex. App. – Houston [14 <sup>th</sup> Dist.] 2004, orig. proceeding)	City secretary refused to certify petition to amend charter, which would trigger election.	Writ conditionally granted. City secretary had ministerial duty to certify petition.
<b>Judges &amp; Lawyers</b>		

<i>In re Mitcham</i> , 133 S.W.3d 274 (Tex. 2004) (orig. proceeding)	Trial court denied disqualification of law firm based on agreement with former client.	Writ conditionally granted. To avoid conflict because of a new lawyer, firm signed agreement that it would maintain TXU's confidentiality and not sue TXU. Lawyer later left firm and firm sued TXU. Court held that: (1) prohibition against suing TXU ended when lawyer left firm, but (2) agreement not to disclose confidences prohibited firm from suing TXU in perpetuity.
<i>In re Torres</i> , 130 S.W.3d 409 (Tex. App. – Corpus Christi 2004, orig. proceeding)	Presiding judge of administration region assigned judge to hear recusal motion.	Writ denied. Court of appeals has no jurisdiction to issue mandamus against district judge acting in his capacity as presiding judge of administrative region.
<i>In re Lincoln</i> , 114 S.W.3d 724 (Tex. App. – Austin 2003, orig. proceeding)	Presiding judge denied motion to recuse judge sued by one of parties.	Writ denied. Suing judge is not basis for recusal of that judge. Show cause order issued because of frivolous mandamus petition.
<i>In re Moore</i> , ___ S.W.3d ___, 2004 WL 583868 (Tex. App. – Tyler Mar. 24, 2004, orig. proceeding)	Trial court disqualified attorney who refused to identify third party who paid his fee, and ordered attorney to disgorge part of fee.	Writ conditionally granted in part. Refusal to identify source of fees does not give rise to an inference of unethical conduct sufficient to support disqualification. No abuse of discretion in order to disgorge fees because fee paid in violation of temporary orders.
<i>In re Slusser</i> , 136 S.W.3d 245 (Tex. App. – San Antonio 2004, orig. proceeding)	Trial court disqualified plaintiff's counsel, who had acquired a contingent fee interest in real property that was the subject of suit.	Writ conditionally granted. When a lawyer is a material witness in a case, he may be disqualified, lent a mere statement of intent to call the lawyer is insufficient.
<i>In re Naylor</i> , 120 S.W.3d 498 (Tex. App. – Texarkana 2003, orig. proceeding)	Trial judge granted party's objection to judge.	Writ denied. Mandamus is not proper vehicle to challenge judge's decision to remove himself, even if decision was unwarranted.
<i>In re Works</i> , 118 S.W.3d 906 (Tex. App. – Texarkana 2003, orig. proceeding)	Trial court refused to disqualify counsel.	Writ denied. Lawyer had previously represented husband and wife in auto accident case. Lawyer could represent wife in contest to husband's will because matters not substantially related.
<i>In re Southwestern Bell Yellow Pages, Inc.</i> , ___ S.W.3d ___, June 2, 2004 WL 1195832 (Tex. App. – San Antonio 2004, orig. proceeding)	Trial court disqualified firm that was representing corporate affiliate of opponent in another suit.	Writ conditionally granted. Where matters are not substantially related, disqualification of counsel not warranted absent showing of actual prejudice from the conflict.

<i>In re Daniels</i> , ___ S.W.3d ___, 2004 WL 782614 (Tex. App. – San Antonio Apr. 14, 2004, orig. proceeding)	Trial court refused to allow counsel to withdraw in divorce action.	Writ conditionally granted. Counsel had reasonable grounds to withdraw because client had not paid his fee as agreed, and because of conflict between attorney and client’s mother.
<b>Void Orders</b>		
<i>In re De La Garza</i> , ___ S.W.3d ___; 2004 WL 296972 (Tex. App. – Corpus Christi Feb. 17, 2004, orig. proceeding)	Trial court issued judgment after bankruptcy stay	Writ conditionally granted. Judgment issued in violation of bankruptcy stay is void.
<i>In re Harris County Hospital District Auxiliary, Inc.</i> ; 127 S.W.3d 155 (Tex. App. – Houston [1 <sup>st</sup> Dist] 2003, orig. proceeding)	Motion to reinstate granted after plenary power ended.	Writ conditionally granted. Order setting aside dismissal is void if issued after plenary power ends.
<i>In re Bank of America</i> , 2003 WL 22310800 (Tex. App.—Houston [1 <sup>st</sup> Dist] 2003, orig. proceeding)(not for publication)	Lender ordered to transfer title to vehicle.	Writ conditionally granted. Court had no jurisdiction to order transfer of title, because suit was not <i>in rem</i> , and owners of vehicle were not before the court. Order was therefore void.
<i>In re Parker</i> , 117 S.W.3d 484 (Tex. App. – Texarkana 2003, orig. proceeding)	Final decree of divorce vacated after plenary power expired	Writ conditionally granted. Order issued after expiration of court’s plenary power is void.
<i>In re Nasir</i> , ___ S.W.3d ___, 2004 WL 594978 (Tex. App. – El Paso, March 25, 2004, orig. proceeding)	Motion for reconsideration granted after plenary power expired.	Writ conditionally granted. Order issued after expiration of court’s plenary power is void.
<i>In re Miranda</i> , ___ S.W.3d ___, 2004 WL 594956 (Tex. App. – El Paso, March 25, 2004, orig. proceeding)	Motion for reconsideration granted after plenary power expired.	Writ conditionally granted. Order issued after expiration of court’s plenary power is void.
<i>In re Velte</i> , __ S.W.3d __, 2004 WL 742357 (Tex. App. – Austin Apr. 8, 2004, orig. proceeding)	Trial court sanctioned plaintiffs attorney after plenary power expired.	Writ conditionally granted. The fact that a sanctions motion was pending when final summary judgment rendered does not prevent judgment from being final.
<i>In re Helena Chem. Co.</i> , 134 S.W.3d 378 (Tex. App. – Waco 2003, orig. proceeding)	Trial court rendered summary judgment, sent letter purporting to withdraw order, and months later, rendered contrary order.	Writ denied. Letter was effective to set aside judgment, so later order was within plenary power.
<i>In re Gillespie</i> , 124 S.W.3d 699 (Tex. App. – Houston [14 <sup>th</sup> Dist.] 2004, orig. proceeding)	Trial court treated request for finding and conclusions as extending plenary power and rendered a new judgment more than 30 days after judgment.	Writ denied without prejudice. Court overruled case that held request for findings and conclusions extended plenary power but held not abuse of discretion to rely on overruled case. Order nonetheless void.

<i>In re Vlasak</i> , ___ S.W.3d ___, 2004 WL 1336289 (Tex. App. – San Antonio June 16, 2004, orig. proceeding)	Trial court set aside default judgment after plenary power expired.	Writ conditionally granted. Judgment final even though court lacked personal jurisdiction over defendant. Void order subject to mandamus.
<b>Miscellaneous</b>		
<i>In re Crow-Billingsley Air Park, Ltd.</i> , 98 S.W.3d 178 (Tex. 2003)(orig. proceeding)	Trial court disallowed enforcement of judgment that was on appeal but had not been superseded.	Writ conditionally granted. Trial court has jurisdiction over enforcement proceedings, even though judgment on appeal.
<i>In re Forlenza</i> , ___ S.W.3d ___, 2004 WL 1536009 (Tex. 2004)(orig. proceeding)	Trial court retained jurisdiction over child custody dispute. Court of appeals ordered dismissal.	Writ conditionally granted. Children had sufficient connection with Texas to justify continuing jurisdiction here.
<i>In re Entergy Corp.</i> , ___ S.W.3d ___, 2004 WL 1443864 (Tex. June 25, 2004, orig. proceeding)	Trial court denied motions to dismiss or abate suit involving settlement of issues in electric utility deregulation.	Writ conditionally granted. Public Utility Commission has exclusive jurisdiction over dispute. Special circumstances justify mandamus.
<i>In re Kansas City Southern Indus.</i> , ___ S.W.3d ___, 2004 WL 1488523 (Tex. July 2, 2004, orig. proceeding)	Trial court ordered leftover settlement funds paid into registry of court.	Writ denied. Without discussing merits of order, court determined there was an adequate remedy by appeal.
<i>In re Texas Windstorm Ins. Assn.</i> , 121 S.W.3d 821 (Tex. App. – Beaumont 2003, orig. proceeding)	Trial court denied motion to transfer venue.	Writ conditionally granted. Mandatory venue provision of other statute applicable to procedures of Chapter 15, including right to mandamus. Tex. Civ. Prac. & Rem. Code § 15.0642.
<i>In re Shell Oil Co.</i> , 128 S.W.3d 694 (Tex. App. – Beaumont 2004, orig. proceeding)	Trial court granted second venue motion after ruling on first.	Writ conditionally granted. Venue rulings are not generally reviewable on mandamus, because they are incidental trial rulings. Exception when venue procedures not followed.
<i>In Re Holleman</i> , 2004 WL 1393582 (Tex. App. – San Antonio 2004, orig. proceeding)	Trial court had not ruled on motion for default judgment for four months.	Writ conditionally granted. Trial court must rule on motions within a reasonable time.
<i>In re Salazar</i> , 134 S.W.3d 357 (Tex. App. – Waco 2003, orig. proceeding)	Trial court had not ruled on motion to enforce Rule 11 agreement.	Writ conditionally granted. Trial court must rule on motions within a reasonable time.
<i>In re American Media Consol.</i> , 121 S.W.3d 70 (Tex. App. – San Antonio 2003, orig. proceeding)	Trial court did not rule on summary judgment motion promptly.	Writ denied. Though trial court must rule on motion within a reasonable time, motion for summary judgment filed more than 2 years after suit filed and less than one month from trial. No abuse of discretion in failure to rule, where denial of motion would trigger interlocutory appeal and delay trial.

<i>In re Arthur Andersen LLP</i> , 121 S.W.3d 471 (Tex. App. – Houston [14 <sup>th</sup> Dist.] 2003, orig. proceeding)	Trial court refused to allow joinder of potentially responsible third parties.	Writ conditionally granted. Court held there was no adequate remedy by appeal because defendant may be foreclosed from later seeking contribution from third parties.
<i>In re Martin</i> , ___ S.W.3d ___, 2004 WL 1071477 (Tex. App. – Beaumont May 13, 2004, orig. proceeding)	Trial court struck third party petition.	Writ denied. Trial court should have granted leave to file, but third party plaintiffs have adequate remedy by appeal.
<i>In re Providian Nat'l Bank</i> , 2004 WL 354834 (Tex. App. – Beaumont 2004, orig. proceeding)(not for publication)	Trial court granted default judgment on counterclaim for collection suit; borrower then begins execution efforts on default judgment.	Writ conditionally granted. No answer is required on counterclaim, so default was an abuse of discretion. No adequate remedy by appeal where execution efforts begin.
<i>In re Lerma</i> , ___ S.W.3d ___, 2004, 2004 WL 1078084 (Tex. App. – El Paso May 13, 2004, orig. proceeding)	Trial court rendered judgment for attorney for unpaid fees. Relator both appealed and sought mandamus relief.	Writ denied. There is an adequate remedy by appeal when the appeal is pending simultaneously.
<i>In re Kenedy Mem. Found.</i> , ___ S.W.3d ___, 2004 WL 1335849 (Tex. App. – Corpus Christi June 16, 2004, orig. proceeding)	Statutory probate court judge transferred pending bills of review to his court.	Writ conditionally granted. Court lacked jurisdiction to order transfers because estates were not “pending.”
<i>In re H&amp;R Block</i> , ___ S.W.3d ___, 2004 WL 575211 (Tex. App. – Corpus Christi Mar. 24, 2004, orig. proceeding)	Trial court denied motion for continuance.	Writ denied. No abuse of discretion in continuing class certification hearing until after resolving partial summary judgment. It was abuse of discretion not to decide special appearance first, but there was an adequate remedy by appeal.
<i>In re Amfels, Inc.</i> , 129 S.W.3d 810 (Tex. App. – Corpus Christi-Edinburg, 2004, orig. proceeding)	Trial courts refused to transfer cases pursuant to order of transfer.	Writ denied. Remedy for failure to comply with transfer order is petition to local administrative judge.
<i>In re Stark</i> , 126 S.W.3d 635 (Tex. App. – Beaumont 2004, orig. proceeding)	Trial court transferred and consolidated suits with administration of estate.	Writ denied. Court determined that statutory county court had jurisdiction over all claims; and district court was authorized by local rules to transfer claims to statutory county court.
<i>In re Dyer Custom Installation, Inc.</i> , 133 S.W.3d 878 (Tex. App. – Dallas 2004, orig. proceeding)	Trial court granted shareholder right to inspect corporate books and records.	Writ conditionally granted. shareholder not entitled to access if for improper purpose. Jury trial necessary to determine whether purpose proper.