

Survey of Mandamus Decisions-When You Need Error Correction Before Appeal!-The Nuts, Bolts, and Persuasion!



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Agenda

- 1. Practical Practice Tips
 - a. Jurisdiction
 - b. Temp. Relief
 - c. Clear and Concise Statement/Argument
 - d. Elements of Proof/Standards
 - e. Certified petition, order, record
- 2. Statistics
- 3. Cases

Practical Practice Tips (PPT)

- Supreme Court Writ Jurisdiction and Power-
Does Chosen Writ Apply to Issues and Facts??
("Square Peg-Round Hole": Deny).

Tex. Gov't Code Ann. § 22.002

(West Supp. 2017);

writs of "procedendo," "certiorari," "quo
warranto," "mandamus," "injunction," "habeas
corpus," etc.

PPT

- Courts of Appeals Writ Jurisdiction and Power-
Does Chosen Writ Apply to Issues and Facts??
 (“Square Peg-Round Hole”: Deny).

Tex. Gov’t Code Ann. § 22.221 (West Supp. 2017);

“writs of mandamus and other writs necessary to enforce [its] jurisdiction. . . ,” **concurrently** with the Supreme Court, “writ of habeas corpus. . . .”

- See also Tex. Election Code Ann. § 273.061 (West 2010), mandamus to “compel any duty. . . in connection with. . . an election. . . .”; Tex. Const. art V, § 6.

PPT-Caution:Concurrent Jurisdiction-Not really!

“The Supreme Court of Texas shares mandamus jurisdiction with the courts of appeals. *See* Tex. Gov't Code § § 22.002(b), 22.221. Although a relator may file a petition for writ of mandamus directly with this Court, these petitions usually originate in the lower courts. ‘If [a] petition is filed in the Supreme Court without first being presented to the court of appeals, the petition must state the compelling reason why the petition was not first presented to the court of appeals.’ Tex. R. App. P. 52.3(e).” *State v. Naylor*, 466 S.W.3d 783, 793-94)Tex. 2015) (futility is not sufficient).

PPT

■ Mandamus Petition, Motion for Temporary Relief, and Response-**Make it clear and to the point!**

1. **Concise** Statement of Facts Supported by Cites to the Record (i.e., appendix or record).

TRAP 52.3 (g)

2. **Clear and Concise** Argument with Authorities and Cites to the Record. TRAP 52.3 (h)

PPT

- Fully Present the Case for Both Elements of Mandamus (Again, Cite to Appendix or Record):
 1. The Trial Court Abused Its Discretion, and,
 2. There Is No Adequate Remedy by Appeal.

PPT

- Petition Must be Properly Certified:
- “The person filing the petition must certify that he or she has reviewed the petition and concluded that every factual statement in the petition is supported by competent evidence included in the appendix or record.” TRAP 52.3 (j)
- Dismissal Without Above Language!
See *In re Butler*, 270 S.W.3d 757 (Tex. App.-Dallas 2008, orig. proceeding).

PPT

Appendix and Record-

1. Appendix Must Contain ”a certified or sworn copy of any order complained of, or any other document showing the matter complained of. . . .”

TRAP 52.3 (k) (1); *In re Cullar* 320 S.W. 3d 560 (Tex. App.-Dallas 2010, orig. proceeding).

2. Record-Relator Must File “a certified or sworn copy of every document that is material” and “a properly authenticated transcript of. . . relevant

testimony. . . .” TRAP 52.7; *In re Cullar*, 320 S.W.3d 560, 566 (Tex. App.-Dallas 2010, orig. proceeding).

In Re Sean D. Clancy (Dallas- February 11, 2019)

- Clancy sought mandamus to compel the T.C. to vacate certain orders and to allow offer of evidence.
- COA observed **record did not include certified or sworn copy** of the T.C.'s order, reporter's record of the hearings, or petitions and motions as required by TRAP 52.3(j). Petition dismissed.

Mandamus Standards-General

- Ministerial Act- 1) legal duty to perform a non-discretionary act, 2) demand for performance, and 3) refusal to act. *O'Connor v. First Court of Appeals*, 837 S.W.2d 94, 97 (Tex. 1992). See also, *In re State ex rel. Weeks*, 391 .W. 3d 117 (Tex. Crim. App. 2013).
- Action of Trial Court- To correct a clear abuse of discretion or violation of duty imposed by law when no adequate remedy by appeal. *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992); *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004).

Texas Supreme Court



Supreme Court Mandamus Statistics

Texas Supreme Court Mandamus Statistics: Past Five Fiscal Years[↵]

FISCAL YEAR [↵]	2020 [↵]	2019 [↵]	2018 [↵]	2017 [↵]	2016 [↵]	2015 [↵]
New petitions [↵]	225 [↵]	209 [↵]	209 [↵]	187 [↵]	188 [↵]	220 [↵]
Total dispositions [↵]	219 [↵]	214 [↵]	217 [↵]	181 [↵]	194 [↵]	225 [↵]
Petitions denied [↵]	74.9% [↵] (164) [↵]	80.8% [↵]	76.5% [↵]	79% [↵]	79.9% [↵]	72% [↵]
Petitions granted [↵]	5.5% [↵] (12) [↵]	3.3% [↵]	6.9% [↵]	6.6% [↵]	6.7% [↵]	7.5% [↵]

The Battle Ground (*Maybe*)- Adequacy of Appellate Remedy



Mandamus Standards-Adequate Remedy by Appeal (ARBA)

Former Rigid Rule- *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992). “ The requirement that mandamus issue only where there is no adequate remedy by appeal is sound, and we reaffirm it today. . . . We further hold that an appellate remedy is not inadequate merely because it may involve more expense or delay than obtaining an extraordinary writ. As we observed in *Iley v. Hughes*, the ‘*delay in getting questions decided through the appellate process ... will not justify intervention by appellate courts through the extraordinary writ of mandamus. Interference is justified only when parties stand to lose their substantial rights.*’ 158 Tex. at 368, 311 S.W.2d at 652.” (emphasis added).

ARBA

Current Practical and “Prudential” Approach to ARBA- ”Mandamus review of *significant rulings in exceptional cases* may be essential to preserve important substantive and procedural rights...,...to give needed and helpful direction..., and spare ...parties...time and money wasted enduring...improperly conducted proceedings.” *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004) (emphasis added) (contractual jury waiver-No ARBA).

Diocese of Lubbock v. Guerrero

(624 S.W.3d 563 (Tex. 2021). (Justice Blacklock concurred.
Justice Boyd dissented))

“[T]he ecclesiastical abstention doctrine deprives the trial court of jurisdiction over Guerrero's suit [and] it is *inextricably intertwined* with the Diocese's internal directive to investigate its clergy and would necessarily require the court to evaluate the Diocese's application of Canon Law.”

In re Facebook, Inc.

(625 S.W.3d 80 (Tex. 2021). (Justice Blacklock delivered the Court's opinion.).

*Three cases: Plaintiffs claim they were *victims of sex trafficking* and became entangled with their abusers through Facebook postings.

*Rule 91a: Denied FB motion under Section 230 of “*Communications Decency Act.*”

*SCOTX: Allowed action for “knowingly or intentionally benefiting from participation in a human-trafficking venture” TEX. CIV. PRAC. & REM. CODE § 98.002.

In re Academy, Ltd.

625 S.W.3d 19 (TEX. 2021).

- *Extraordinary step*: mandamus from the denial of motion for summary judgment.
- Suits vs. Retailer-sold gun to Mass Murderer-2017 at the First Baptist Church in Sutherland Springs.
- Academy claimed a “shield” from liability for the sale of a firearm by the Protection of Lawful Commerce in Arms Act (PLCAA). TC Denied.
- SCOTX: “requiring Academy to ‘proceed[] to trial—regardless of the outcome—would defeat the substantive right’ granted by the PLCAA.”

In re Copart, Inc.

619 S.W.3d 710 (Tex. 2021).

- Motion to Compel Arbitration.
- Motion for Discovery: TC Granted.
- SCOTX: Concluded TC abused its discretion since the *Real Party's motion and affidavit did not demonstrate any colorable basis or reason to believe that the requested discovery would be material in establishing the agreement's existence and enforceability.*

In re Abbott,

628 S.W.3d 288 (Tex. 2021);

- The Court exercised its mandamus power to direct a district court to *withdraw its temporary restraining order (TRO)* prohibiting the Texas House of Representatives (House) from physically compelling its members to enter the House chambers to conduct business. (Interesting Comments by SCOTX).
- *“The district court reached [its] conclusion based on an ex parte presentation from Plaintiffs, not based on the adversarial process on which our legal system depends for the resolution of such questions.”*

Civility

Justice Anthony Kennedy graphically explained civility in a speech to the American Bar Association in 1997. He said in part, “[Civility . . .] is not some bumper-sticker slogan, ‘Have you hugged your adversary today?’ Civility is the mark of an accomplished and superb professional, but it is even more than this. It is an end in itself. Civility has deep roots in the idea of respect for the individual.”

DEEDS, NOT WORDS

- “We can be excellent without being arrogant,
- successful without being boastful,
- tenacious without being contentious,
- self-critical without being defensive.”
- “[A]t the end of the race there is a prize called reputation and ... our reputation is based on deeds, not words.”

Curry, Judge Richard L. “Lawyers of Conscience Enforce the Unenforceable.” *Illinois Bar Journal* 75 (1986): 120-21.