STRATEGIC USE OF MANDAMUS PROCEEDINGS

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I. Introduction.

This paper provides an overview of mandamus practice in the Texas appellate courts, as well as practical advice for trial lawyers in deciding whether to incur the expense of seeking mandamus relief.

II. Mandamus History, Authority, & Jurisdiction.

The writ of mandamus dates back to English common law. Richard E. Flint, *The Evolving Standard for Granting Mandamus Relief in the Texas Supreme Court: One More "Mile Marker Down the Road of No Return",* 39 ST. MARY'S L.J. 3, 10–32 (2007) [hereinafter Flint, *The Evolving Standard*]. As early as 1615, Lord Coke wielded the writ to restore an ousted burgess—James Bagg—to his position. *Id.* (citing Blackstone and Bagg's Case); Bagg's Case (1615), 77 Eng. Rep. 1271 (K.B.). The writ was then cemented in American jurisprudence within years of the country's formation and discussed at length in the 1803 landmark case, *Marbury v. Madison.* 5 U.S. 137 (1803). In *Marbury,* the Supreme Court of the United States defined the writ of mandamus, quoting William Blackstone and Lord Mansfield:

> Blackstone, in the 3d volume of his Commentaries, page 110[] defines a mandamus to be "a command issuing in the king's name from the court of king's bench, and directed to any person, corporation, or inferior court of judicature within the king's dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court of king's bench has previously determined, or at least supposes, to be consonant to right and justice."
> Lord Mansfield, in 3 Burrow, 1266. in the case of The King v. Baker et al., states, with much precision and explicitness the cases in which this writ may be used.
> "Whenever," says that very able judge, "there is a right to execute an office, perform a service, or exercise a franchise, (more especially if it be in a matter of public concern, or attended with profit,) and a person is kept out of possession, or dispossessed of such right, and has no other specific legal remedy, this court ought to assist by mandamus, upon reasons of justice, as the writ expresses, and upon reasons of public policy, to preserve peace, order and good government." In the same case he says, "this writ ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one."

Marbury, 5 U.S. at 167–69. The Court went on to hold that the legislation granting the Supreme Court the authority to issue writs of mandamus against public officers in original proceedings was unconstitutional, as the United States Constitution provided only appellate jurisdiction in such matters. *Id.* at 175–76 ("Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper, and therefore seems not to belong to appellate, but to original jurisdiction."). Nonetheless, the Supreme Court acknowledged the existence and legitimacy of the writ early in the country's history. *Id.* at 175.

Against this backdrop, the Republic of Texas formed and empowered its own Supreme Court. The Republic's Constitution created "one Supreme Court, and such inferior courts as the Congress may, from time to time, ordain and establish," giving the Texas Supreme Court "appellate jurisdiction only." TEX. CONST. art. 4 §§ 1, 8, 13 (1836). Although this arguably created the same dilemma presented in *Marbury*—namely, that the Texas Supreme Court could not hear original mandamus proceedings—the Republic's Constitution explicitly allowed Congress to "introduce, by statute, the common law of England." TEX. CONST. art. IV, § 13 (1836). Soon thereafter, the 1836 Texas Legislature passed a statute giving the Texas Supreme Court the authority to "grant writs of habeas corpus, and all other remedial writs and process granted by said judges, by virtue of their office, agreeably to the principles and usages of law." Act of Dec. 15, 1836, 1st Cong., R.S., § 8, 1836 Repub. Tex. Laws 79, 80, *reprinted in* 1 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 1139–40 (Austin, Gammel Book Co. 1898); Flint, *The Evolving Standard*, *supra,* at 49 n.145 (noting that the legislation was passed before the court met for the first time in 1840).

When Texas became a state in 1845, the Constitution itself was revised to give the Texas Supreme Court the power to "issue the writ of habeas corpus, and under such regulations as may be prescribed by law, [to] issue writs of mandamus, and such other writs as shall be necessary to enforce its own jurisdiction; and also compel a judge of the

district court to proceed to trial and judgment in a cause." TEX. CONST. art. IV, § 3 (1845). This was soon accompanied by legislation providing additional detail regarding the organization of the courts system. Act of May 12, 1846, 1st Leg., R.S., §§ 3, 21 1846 Tex. Gen. Laws 249, 255, *reprinted in* 2 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 1555-63 (Austin, Gammel Book Co. 1898); Act of March 26, 1913, 33d Leg., R.S., ch. 55, § 1, 1913 Tex. Gen. Laws 107, 108, *repealed by* Act of May 17, 1985, 69th Leg., R.S., ch. 480, 1985 Tex. Gen. Laws 1720, 2048 (recodifying statutes to the Texas Government Code), *reprinted in* 16 H.P.N. Gammel, *The Laws of Texas 1913–1914*, at 118 (Austin, Gammel Book Co. 1914) ("The Supreme Court, or any justice thereof, shall have the power to issue writ of habeas corpus as may be prescribed by law; and the said court, or the justice thereof, may issue writs of mandamus, . . . and said court may issue writs of quo warranto or mandamus agreeable to the principles of law regulating such writs against any district judge, or Court of Civil Appeals or judge of a Court of Civil Appeals, or officer of the State government, except the Governor of the State."); Flint, *The Evolving Standard*, *supra,* at 48–61.

Although the Texas Constitution and statutes have been revised since 1845, the scope of the courts' mandamus authority remains largely the same. *Compare* Act of March 26, 1913, 33d Leg., R.S., ch. 55, § 1, 1913 Tex. Gen. Laws 107, 108, *and* TEX. CONST. art. IV, § 3 (1845), *with* TEX. GOV. CODE § 22.002, *and* TEX. CONST. art. IV, § 3 (2017). The current Texas Constitution authorizes the Texas Supreme Court to "issue the writs of mandamus, procedendo, certiorari and such other writs, as may be necessary to enforce its jurisdiction," and allows the Legislature to "confer original jurisdiction on the Supreme Court to issue writs of quo warranto and mandamus in such cases as may be specified, except as against the Governor of the State." TEX. CONST. art. V, § 3(a). The Government Code similarly permits the Texas Supreme Court to "issue writs of . . . mandamus agreeable to the principles of law regulating those writs, against a statutory county court judge, a statutory probate court judge, a district judge, a court of appeals or a justice of a court of appeals, or any officer of state government except the governor, the court of criminal appeals, or a judge of the court of criminal appeals." TEX. GOV'T CODE § 22.002 (a). The Code also details the scope of the mandamus power for lower courts, providing that "[e]ach court of appeals . . . may issue a writ of mandamus and all other writs necessary to enforce the jurisdiction of the court," as well as "all writs of mandamus, agreeable to the principles of law regulating those writs, against a (1) judge of a district or county court in the court of appeals district; or (2) judge of a district court who is acting as a magistrate at a court of inquiry under Chapter 52, Code of Criminal Procedure, in the court of appeals district." TEX. GOV'T CODE §§ 22.221(a), (b). However, "[o]nly the supreme court has the authority to issue a writ of mandamus . . . against any of the officers of the executive departments of the government of this state to order or compel the performance of a judicial, ministerial, or discretionary act or duty that, by state law, the officer or officers are authorized to perform." TEX. GOV'T CODE § 22.002(c).

The writ of mandamus is thus engrained in Texas and American jurisprudence, and provides the Texas Supreme Court and courts of appeals with broad authority to command "any person, corporation, or inferior court . . . to do some particular thing therein specified . . . which the court . . . has previously determined, or at least supposes, to be consonant to right and justice." *Marbury*, 5 U.S. at 167–69 (quoting Blackstone); *In re Reece*, 341 S.W.3d 360, 373–74 (Tex. 2011) (orig. proceeding) ("Unlike our habeas jurisdiction, our constitutional and statutory grant of mandamus jurisdiction is broad; this Court possesses general original jurisdiction to issue writs of mandamus."); *see also* TEX. GOV'T CODE §§ 22.002, 22.221 (permitting the courts to issue writs of mandamus "agreeable to the principles of law regulating those writs). However, this authority must be invoked through the proper procedures.

III. Mandamus Procedure.

The majority of the procedures governing petitions for mandamus relief are set forth in Texas Rule of Appellate Procedure 52. TEX. R. APP. P. 52. Many of the formalities regarding the form and contents of the petition mirror those required for a traditional appellate brief. *Compare* TEX. R. APP. P. 38.1 (requisites for appellant's brief on direct appeal from a trial court judgment), *and* 55.2 (listing requirements for form of brief on the merits before the Texas Supreme Court), *with* TEX. R. APP. P. 52.3 (listing requirements for form and contents of petition for writ of mandamus). Consequently, the areas in which mandamus procedure differs from the norm often act as stumbling blocks for the unwary. Justice Marialyn Barnard et. al., *Is My Case Mandamusable?: A Guide to the Current State of Texas Mandamus Law,* 45 ST. MARY'S L.J. 143, 151–54 (2014) (discussing common reasons for denial of mandamus relief).

A. Mandamus Record.

Among the relevant procedural requirements, a relator must file an adequate mandamus record. TEX. R. APP. P. 52.3(k), 52.7(1). First, the appendix to the petition must include "a certified or sworn copy of any order complained of;" "any order or opinion of the court of appeals," if applicable; and "the text of any rule . . . or other law (excluding case law) on which the argument is based." TEX. R. APP. P. 52.3(k). Although Texas's courts discourage writ petitions based on oral pronouncements—preferring instead a written "*copy* of any order complained of"—the courts will not refuse to consider such a petition "if the [trial] court's ruling is a clear, specific, and enforceable order that is adequately shown by the record." *Id.* (emphasis added); *In re Bledsoe*, 41 S.W.3d 807, 811 (Tex. App.—Fort Worth 2001, orig. proceeding).

The relator is responsible for filing "a certified or sworn copy of every document that is material to the relator's claim for relief and that was filed in any underlying proceeding" and "a properly authenticated transcript of any relevant testimony from any underlying proceeding, including any exhibits offered in evidence, or a statement that no testimony was adduced in connection with the matter complained." TEX. R. APP. P. 52.7(1). Justice Marialyn Barnard of the Fourth Court of Appeals has noted that the failure to provide these documents is "[t]he most common reason for a court to deny a petition based on a procedural defect." Justice Barnard et al., *supra,* at 151.

Even the pivotal Texas Supreme Court case, *Walker v. Parker*, was hindered by an inadequate record. 827 S.W.2d 833, 837 (Tex. 1992) (orig. proceeding). There, the Walkers' petition for mandamus relief addressed multiple discovery disputes, one of which involved a motion to compel St. Paul Hospital to respond to the Walkers' request for production. *Id.* at 836–37. However, the Walkers failed to provide the Texas Supreme Court with a transcript (formerly referred to as a "statement of facts") of the evidentiary hearing on the motion to compel. *Id.* at 837. The Court noted that "[a]s the parties seeking relief, the Walkers had the burden of providing this Court with a sufficient record to establish their right to mandamus relief," including "not only a petition and affidavit, but also a statement of facts from the hearing." *Id.* If the transcript was not available or no evidence was presented at the hearing, the Walkers were required to state as much in their petition. *Id.* at 837 n.3. Without this record, the Court could not "determine on what basis the trial judge and the special master reached their conclusions," and thus could not "assess whether or not the trial court's order was correct" or determine whether "the court's order, if incorrect, constituted a clear abuse of discretion." *Id.* at 837. Thus, without the adequate record, the Walkers' petition for mandamus relief against St. Paul was denied. *Id.*

The presence of such a rudimentary error in this landmark, high-profile case highlights the need for attention to detail when compiling a mandamus record. A failure to comply with the requirements of Texas Rule of Appellate Procedure 52 can tragically undermine all or portions of a petition for mandamus relief right out of the gate.

B. Certification.

The "person filing the petition must [also] 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." TEX. R. APP. P. 52.3(j). A court will deny a petition for mandamus relief if the relator fails to strictly comply with this requirement. For example, in *In re Butler*, the relators' attorney certified as follows:

> I have reviewed the foregoing Petition for Writ of Mandamus and the factual statements contained therein are to my knowledge true and correct

In re Butler, 270 S.W.3d 757, 758 (Tex. App.—Dallas 2008, orig. proceeding). The Dallas Court of Appeals rejected this certification as insufficient. *Id.* The court noted that Rule 52.3(j) requires a relator to certify that the factual statements are supported by competent evidence *in the appendix or record*; not simply within his or her personal knowledge. *Id*. Consequently, the petition for mandamus relief was denied. *Id.*; *see also In re Jordan,* No. 05-12-00185-CV, 2012 WL 506579, at *1 (Tex. App.—Dallas Feb. 16, 2012, orig. proceeding) (mem. op.) (denying petition solely because "the certification in relator's petition does not satisfy the Texas Rules of Appellate

Procedure"). Thus, as with the mandamus record, a relator must pay close attention to the certification requirement in the Texas Rules of Appellate Procedure to ensure that the petition is not undermined by a procedural error.

C. Request for Performance.

Although the majority of the procedural requirements for mandamus are set forth in the Rules of Appellate Procedure, there are judicially-created predicates to mandamus relief as well. Most notably, a party must make a request for performance from the relevant court or governmental official prior to seeking mandamus relief. *In re Perritt,* 992 S.W.2d 444, 446 (Tex. 1999) (orig. proceeding) (per curiam) ("A party's right to mandamus relief generally requires a predicate request for some action and a refusal of that request."); *Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 556 (Tex. 1990) (orig. proceeding). However, this requirement is relaxed "[o]n rare occasions . . . when the circumstances confir[m] that the request would have been futile and the refusal little more than a formality." *Perritt,* 992 S.W.2d at 446 (internal citations omitted)

For example, in *In re Perritt*, a group of individuals who ate at a Golden Corral franchise owned by Bill Wayne and Ann Perritt sued the Perritts and the Golden Corral Corporation, claiming they became sick after eating at the establishment. *Id.* at 445. The Perritts moved to recuse the trial judge, and the presiding judge of the relevant administrative region assigned the recusal hearing to former judge Bill Stephens. *Id.* Golden Corral objected to Judge Stephens under Texas Government Code section 74.053—which allows each party one unqualified objection to a judge assigned to a trial court under Chapter 74. *Id.* However, Judge Stephens overruled the objection, claiming he was assigned under Rule 18a—regarding hearings on motions for recusal—rather than under Chapter 74. *Id.* The Perritts challenged Judge Stephens' ruling, unsuccessfully filing a petition for writ of mandamus with the court of appeals before seeking mandamus relief from the Texas Supreme Court. *Id.* at 445–46.

The Texas Supreme Court began by noting that Golden Corral—not the Perritts—objected to Judge Stephens, and thus the Perritts never requested performance, nor were they refused the legal action they sought to compel via mandamus. *Id.* at 446. Nonetheless, the Court held that the Perritts qualified for the rare exception to the rule. *Id*. Golden Corral filed an unqualified, timely objection under Texas Government Code section 74.053, and such objection served to automatically disqualify Judge Stephens if he was indeed subject to such objections under Chapter 74. *Id.* "Had the Perritts filed their own formal objection to Judge Stephens, it would have added nothing for the court's consideration" because it "would have been the same as Golden Corral's." *Id.* Any request by the Perritts "would have been futile and the refusal little more than a formality." *Id.* Thus, the Perritts were not required to separately request the action complained of; the procedural predicate was waived. *Id.*

As the Texas Supreme Court emphasized, however, the Perritts' case is the rare exception. *Id.* at 446. Generally, a relator must make a request for performance and be denied the same prior to seeking mandamus relief. *Axelson*, 798 S.W.2d at 556. This requirement will only be overlooked if the request would be futile—in the eyes of the court, not those of the frustrated litigant. *Perritt,* 992 S.W.2d at 446 (Tex. 1999). The best practice, then, is to assume that a request for performance is required prior to filing a writ of mandamus. Quite simply, the substantive standard for the "extraordinary writ" is high enough without risking procedural barriers to recovery.

D. Presentment to Court of Appeals.

In cases in which the supreme court and the courts of appeals have concurrent jurisdiction, Texas Rule of Appellate Procedure 52.3(e) requires the request for relief to be first presented in the court of appeals unless "compelling reasons" exist. TEX. R. APP. P. 52.3(e). *See also In re In re State Bar of Tex.*, 113 S.W.3d 730, 732-35 (Tex. 2003) (orig. proceeding). The situations in which "compelling reasons" exist are very narrow and typically only found when the interests in speedy and final resolution are significant, such as in an election case. *See, e.g.*, *In re Newton*, 146 S.W.3d 648, 649-51 (Tex. 2004) (orig. proceeding). Futility—a subjective belief that a particular court of appeals would not grant relief—is not a "compelling reason." *State v. Naylor*, 466 S.W.3d 783, 794 (Tex. 2015) (denying a companion mandamus because issue was not first presented to court of appeals).

E. Filing Deadlines.

While a litigant seeking to appeal a trial court's judgment usually has 30 days to file a notice of appeal, there is no corresponding hard and fast deadline to file most1 petitions for writ of mandamus.2 See CMH Homes v. Perez, 340 S.W.3d 444, 453 (Tex. 2011) ("[T]here is no fixed deadline for filing original proceedings in the Texas Rules of Appellate Procedure."). Although mandamus is not an equitable remedy, its issuance is controlled largely by equitable principles. *In re Int'l Profit Assocs., Inc.*, 274 S.W.3d 672, 676 (Tex. 2009) (orig. proceeding) (per curiam). One such principle is that "'equity aids the diligent and not those who slumber on their rights.'" *Id.* (quoting *Rivercenter Assocs. v. Rivera*, 858 S.W.2d 366, 367 (Tex. 1993) (orig. proceeding). Thus, any delay in filing of a mandamus petition may cause the appellate court to deny relief unless the relator can justify the delay. *Id.*

Appellate courts will examine the reason for any delay in filing a mandamus petition on a case-by-case basis. The Texas Supreme Court has reviewed a four-month delay, concluded that unjustified delay showed that the relator did not diligently pursue its rights, and denied mandamus relief. *Rivercenter*, 858 S.W.2d at 367. That same court has also concluded that a delay of six months was justified based on the record. *In re SCI Tex. Funeral Servs., Inc.*, 236 S.W.3d 759, 761 (Tex. 2007) (orig. proceeding) (per curiam).

IV. The Mandamus Standard.

Mandamus relief is appropriate when a lower court or government official clearly abuses its discretion or fails to perform a non-discretionary duty, and there is no adequate remedy at law.[1] *Walker*, 827 S.W.2d at 839 ("Mandamus issues only to correct a clear abuse of discretion or the violation of a duty imposed by law when there is no other adequate remedy by law."); *see also In re Keenan*, 501 S.W.3d 74, 76 (Tex. 2016) (orig. proceeding) (per curiam) ("A writ of mandamus will only issue if the trial court clearly abused its discretion and relator has no adequate remedy by appeal."); *In re Woodfill*, 470 S.W.3d 473, 475 (Tex. 2015) (orig. proceeding) (per curiam); *In re Olshan Found. Repair Co., LLC,* 328 S.W.3d 883, 887 (Tex. 2010) (orig. proceeding). This two-pronged standard was cemented in the 1992 Texas Supreme Court case, *Walker v. Packer,* although its interpretation has changed over the years. Justice Barnard et al., *supra,* at 148 ("Walker v. Packer established the two-prong test that courts apply to petitions for writ of mandamus.").

A. Clear Abuse of Discretion.

Originally, "the writ of mandamus issued only to compel the performance of a ministerial act or duty." *Walker*, 827 S.W.2d at 839. Although the Texas Supreme Court acknowledged that "the writ may issue in a proper case to correct a clear abuse of discretion," the Court did not actually issue a writ regarding a matter of discretion until 1956. *Womack v. Berry,* 291 S.W.2d 677, 682 (Tex. 1956) (orig. proceeding) (noting that "[w]hile no Texas case has been found in which the writ issued to correct the action of an officer or tribunal in a matter of discretion, the cited cases recognize the exception to the general rule," then issuing a writ to correct an abuse of discretion); *see also Walker*, 827 S.W.2d at 839 (citing *Womack* and stating that "[s]ince the 1950's, however, this Court has used the writ to correct a 'clear abuse of discretion' committed by the trial court"); Richard E. Flint, *Mandamus Review of the Granting of the Motion for New Trial: Lost in the Thicket,* 45 ST. MARY'S L.J. 575, 613 (2014) [hereinafter Flint, *Lost in the Thicket*] ("In the 1956 case of Womack v. Berry, the court issued a writ of mandamus to correct a discretionary action of a trial judge for the first time."). Since then, the Court has regularly granted mandamus relief to correct abuses of discretion. *Walker*, 827 S.W.2d at 839; Flint, *Lost in the Thicket, supra,* at 615–16.

In practice, the "clear abuse of discretion" standard is equivalent to the parallel "abuse of discretion" standard used in traditional appellate review. *Walker*, 827 S.W.2d at 839–40 (defining "clear abuse of discretion" in mandamus context); *Brookshire Bros., Ltd. v. Aldridge*, 438 S.W.3d 9, 27 (Tex. 2014) (quoting *Walker* for abuse of

[1] Although a writ of mandamus may be directed at a government official outside the judiciary, the most common form of mandamus—and the one focused on in this article—is that of a writ directed to a lower court. *See, e.g.,* TEX. GOV'T CODE § 22.002(c) ("[o]nly the supreme court has the authority to issue a writ of mandamus . . . against any of the officers of the executive departments of the government of this state to order or compel the performance of a judicial, ministerial, or discretionary act or duty that, by state law, the officer or officers are authorized to perform.").

discretion standard in analysis of direct appeal); *Iliff v. Iliff*, 339 S.W.3d 74, 78 (Tex. 2011) (same); *Samlowski v. Wooten*, 332 S.W.3d 404, 411 (Tex. 2011) (same); Dean M. Swanda, *Mandamus: The Discretionary Interlocutory Appeal*, 11 APP. ADVOC. 9, 10 (1998) ("As a practical matter, case law shows that an 'abuse of discretion' is a term of art that means, in the context of a mandamus proceeding, run-of-the-mill trial court error."). The Texas Supreme Court clarified the meaning of the phrase in *Walker v. Packer:*

> A trial court clearly abuses its discretion if "it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law." This standard, however, has different applications in different circumstances.
>
> With respect to resolution of factual issues or matters committed to the trial court's discretion, for example, the reviewing court may not substitute its judgment for that of the trial court. The relator must establish that the trial court could reasonably have reached only one decision. Even if the reviewing court would have decided the issue differently, it cannot disturb the trial court's decision unless it is shown to be arbitrary and unreasonable.
>
> On the other hand, review of a trial court's determination of the legal principles controlling its ruling is much less deferential. A trial court 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, and may result in appellate reversal by extraordinary writ.

Walker, 827 S.W.2d at 839–40. Thus, a trial court abuses its discretion, satisfying the first prong of the mandamus analysis, if the court either misinterprets or misapplies the law, or issues an arbitrary or unreasonable ruling on a factual dispute. *Id.*

B. Inadequate Remedy by Appeal.

In contrast to the relatively recent development of the "abuse of discretion" prong of mandamus analysis, Texas courts have required that a relator lack an adequate appellate remedy for more than a century. *Walker*, 827 S.W.2d at 840 (detailing the history of the requirement, and citing cases back to 1890); *Screwmen's Benev. Ass'n v. Benson,* 13 S.W. 379, 380 (Tex. 1890) ("the writ of *mandamus* is a remedy of the last resort. It is universally held that if a party have an adequate common-law or statutory remedy he cannot resort to this writ, and the rule has been repeatedly announced in this court"). Yet, the standard for determining what qualifies as "adequate" has changed. *Walker*, 827 S.W.2d at 840.

1. History of Inadequate Remedy Requirement.

In the 1920s, the Texas Supreme Court held that "[t]o supersede the remedy by mandamus authorized by the organic law, and specially provided by statute, there must exist, not only a remedy by appeal, but the appeal provided for must be competent to afford relief on the very subject matter of the application, equally convenient, beneficial, and effective as mandamus." *Cleveland v. Ward*, 285 S.W. 1063, 1068 (Tex. 1926) (orig. proceeding), *disapproved of by Walker,* 827 S.W.2d 833. However, this lenient standard remained largely unused for decades until it was revived in *Jampole v. Touchy* in 1984 to justify mandamus relief in the discovery context. *Jampole v. Touchy*, 673 S.W.2d 569, 576 (Tex. 1984) (orig. proceeding), *disapproved of by Walker,* 827 S.W.2d 833.

Soon after *Jampole*, Texas's appellate courts were bombarded with mandamus petitions. *Joachim v. Chambers*, 815 S.W.2d 234, 244 n.4 (Tex. 1991) (orig. proceeding) (Gonzalez, J., dissenting) (stating that "[s]ince *Jampole v. Touchy,* 673 S.W.2d 569 (Tex. 1984), there has been a veritable explosion in the number of mandamus filed in our courts," and citing figures showing that the number of mandamus filings more than tripled between 1983 and 1990); *see also Nat'l Union Fire Ins. Co. v. Ninth Court of Appeals,* 864 S.W.2d 58, 63 (Tex. 1993) (orig. proceeding) (Phillips, C.J., dissenting) ("The total number of mandamus actions we passed upon in the last five years is nearly twice as great as the number during the preceding five year period.").

The Texas Supreme Court thus reined in the scope of mandamus relief in *Walker v. Packer.* 827 S.W.2d at 842. The Court clarified that "an appellate remedy is not inadequate merely because it may involve more expense or delay than obtaining an extraordinary writ," and disapproved of *Cleveland, Jampole,* and all similar prior cases holding to this lenient definition of inadequacy. *Id.* Emphasizing the need for "strict adherence to traditional mandamus standards," the *Walker* Court then recognized that "[t]here are many situations where a party will not have an adequate appellate remedy from a clearly erroneous ruling, and appellate courts will continue to issue the extraordinary writ." *Id.*at 843. The Court articulated three specific scenarios in which mandamus relief would be available to correct a discovery order. *Id.* at 843–44. This ushered in the categorical approach to determining the adequacy of appellate relief, creating a framework that remained in place for the next decade. *In re McAllen Med. Ctr., Inc.,* 275 S.W.3d 458, 468–69 (Tex. 2008) (orig. proceeding) (describing *Walker* rule and categorical approach).

In 2004 however, the Texas Supreme Court departed from *Walker* and replaced the categorical approach with an ad-hoc costs/benefits analysis. *In re Prudential Ins. Co. of Am.,* 148 S.W.3d 124 (Tex. 2004) (orig. proceeding).

2. *Prudential & AIU.*

In *In re Prudential*, Francesco and Jane Secchi leased space in a Dallas shopping center from Prudential Insurance Co., intending to open a restaurant. *Prudential,* 148 S.W.3d at 127. Although the Secchis had an eighth-grade education, they had successfully executed similar restaurant leases for two other eating establishments in the Dallas area, and they relied on their attorney to negotiate with Prudential. *Id.* Jane then reviewed the final draft of the proposed lease, as she understood English better than Francesco. *Id.* The lease contained a jury waiver, but Jane did not notice the provision at the time of execution. *Id.* at 127–28.

Within a year of signing the lease, the Secchis sued Prudential, claiming that they could not operate their restaurant in the shopping center due to a sewage smell. *Id.* at 128. The Secchis demanded a jury trial, but Prudential moved to quash the jury demand based on the contractual jury waiver. *Id.* The trial court denied the motion to quash as well as Prudential's motion for reconsideration. *Id.* at 129. The court held that contractual jury waivers were against public policy in Texas, and that the specific waiver at issue was unenforceable because it was inconspicuous, not knowingly made, and could not be enforced in an action to rescind the lease, among other reasons. *Id.* Prudential petitioned for mandamus relief from the court of appeals, but the court held that Prudential had not established its right to the relief requested. *Id.* The Texas Supreme Court disagreed, issuing a landmark opinion that reframed—or at least attempted to reframe—the entire analysis of mandamus review.

The Court first rejected the Secchis' argument that the contractual jury waiver was unenforceable. *Id.* at 136. Thus, the trial court abused its discretion by refusing to enforce the jury waiver. *Id.* The Court then turned to whether Prudential had an adequate remedy by appeal. *Id.*

Remarkably—despite the centuries of case law using and applying the phrase "adequate remedy"—the Court stated that "[t]he operative word, 'adequate,' has no comprehensive definition." *Id.* at 136. Rather, the Court held that the word "is simply a proxy for the careful balance of jurisprudential considerations that determine when appellate courts will use original mandamus proceedings to review the actions of lower courts." *Id.* at 136.

The Court then went on to define the undefinable word, holding—without reference to any precedent—that "[a]n appellate remedy is 'adequate' when any benefits to mandamus review are outweighed by the detriments." *Id*. The Court further stated that the determination as to whether a relator lacked an adequate remedy was not "abstract or formulaic," and "resists categorization, as our own decisions demonstrate." *Id*. Ironically however, the Court's decisions demonstrated no such thing; at the time *Prudential* was issued, the categorical approach had prevailed for more than a decade. *See In re McAllen Med. Ctr., Inc.,* 275 S.W.3d 458, 468–69 (Tex. 2008) (orig. proceeding) (describing *Walker* rule and categorical approach); *Walker*, 827 S.W.2d at 839. Nonetheless, the Court proceeded to explain numerous private and public considerations favoring mandamus relief, including the parties' "expense and delay," the "waste of judicial and public resources," the "complete lack of authority for the trial court's order, and the impact on the legal system," as well as a preference for mandamus relief over the "legislative enlargement of interlocutory appeals." *Id.* at 136–37.

The Court then abruptly returned to the categorical approach to mandamus relief, holding that "whether a pre-suit waiver of trial by jury is enforceable . . . fits well within the types of issues for which mandamus review is not only appropriate but necessary." *Id.* at 138. The Court cited numerous opinions from the courts of appeals that held jury trial orders were reviewable by mandamus, and noted that this was consistent with the use of mandamus to enforce other contractual rights regarding trial procedure. *Id.* at 139–40. Thus, the Court conditionally granted mandamus relief. *Id.* at 140–41.

The same day *Prudential* was issued, the Court also handed down *In re AIU Insurance Co.,* granting mandamus relief to enforce a forum-selection clause. 148 S.W.3d 109 (Tex. 2004) (orig. proceeding). The Texas Supreme Court provided an extensive analysis of the adequacy of appellate relief in the case, even citing many of the same concerns mentioned in *Prudential* regarding unnecessary expense, delay, and the waste of judicial resources. *Id.* at 115–18. Yet, unlike *Prudential*, the Court mentioned nothing about the ad-hoc costs/benefits analysis, but instead justified its holding based on *Walker* and the recognized categories warranting mandamus review. *Id.*

In *AIU,* AIU Insurance Company contracted with Louis Dreyfus Corporation to provide pollution liability coverage. *Id.* at 110–11. At the time of the contract's execution, AIU, Dreyfus, and Dreyfus's broker all listed New York addresses. *Id.* at 111. The insurance policy thus contained a forum-selection clause agreeing that all disputes and litigation would be resolved in the State of New York. *Id.* Subsequently, a Texas subsidiary of Dreyfus was sued in Hidalgo County for alleged environmental contamination. *Id.* AIU disputed coverage, and Dreyfus sought a declaratory judgment against AIU in Hidalgo County on the coverage issue. *Id.* AIU moved to dismiss based on the forum-selection clause, filing a parallel declaratory judgment action in New York. *Id.* The trial court denied AIU's motion to dismiss, and AIU petitioned for a writ of mandamus. *Id.* The Texas Supreme Court held that the forum-selection clause was valid and enforceable, and that the trial court abused its discretion by denying AIU's motion to dismiss. *Id.* at 114–15.

The Court then turned to the adequacy of AIU's appellate remedy. *Id.* at 115. The Court began by noting that, although it had not categorically ruled on the availability of mandamus relief to enforce forum-selection clauses, it had "consistently granted mandamus relief to enforce another type of forum-selection clause, an arbitration agreement," if the agreement to arbitrate was not otherwise subject to interlocutory appeal. *Id*. Thus, rather than rejecting the categorical approach to mandamus relief, the Texas Supreme Court situated *AIU* within this framework. *Id.* Similarly, while Dreyfus cited "the seminal decision in *Walker v. Packer* for the proposition that 'mere' additional cost and delay will not render an appellate remedy inadequate," the Court stated that this "characterization gives *Walker v. Packer* and its principles short shrift." *Id.* at 116. The Court affirmed *Walker's* disapproval of the use of mandamus relief to avoid "'mere' additional cost and delay," but noted that "[c]lear harassment" that imposes a disproportionate burden on the relator was not tolerated under *Walker. Id.* at 116–17. The Court thus characterized AIU's situation as harassment, noting that the breach of the forum-selection clause benefitted only the breaching party and "add[ed] a layer of expense that would otherwise not exist," thereby motivating "the breaching party . . . to protract proceedings to encourage a favorable settlement." *Id.* at 117–18. Furthermore, a failure to enforce a valid forum-selection clause was automatically reversible, thus leading to "a meaningless waste of judicial resources" if the error were not corrected by mandamus." *Id.* at 118. For these reasons, the Court granted the writ of mandamus, noting that such relief was available to "enforc[e] contractual agreements that substantively or procedurally affect proceedings in our courts." *Id.*

AIU thus did not adopt or apply the *Prudential* analysis, but appeared to justify its holding within the categorical *Walker* framework. *Id.* at 115. In fact, even *Prudential* itself couched its ultimate holding within the categorical framework, noting that mandamus relief was available to enforce contractual rights relating to trial procedure. *Prudential*, 148 S.W.3d at 138–41. This foreshadowed the limited practical effect of *Prudential's* purportedly wide-sweeping holding.

3. Mandamus Review Since *Prudential*.

Since *Prudential*, the Texas Supreme Court has continued to rely primarily on *Walker,* granting mandamus relief when cases fall within the recognized categories lacking an adequate remedy by appeal. *See, e.g., Olshan Found. Repair,* 328 S.W.3d at 888; *In re Deere & Co.,* 299 S.W.3d 819 (Tex. 2009) (orig. proceeding) (per curiam);

In re Cerberus Capital Mgmt., L.P., 164 S.W.3d 379, 383 (Tex. 2005) (orig. proceeding) (per curiam); *In re Sanders*, 153 S.W.3d 54 (Tex. 2004) (orig. proceeding) (per curiam); *In re Ford Motor Co.,* 165 S.W.3d 315, 322 (Tex. 2005) (mem. op.) (orig. proceeding). Even in instances where *Prudential* is cited, the decisions largely pay lip service to the *Prudential* analysis before situating the case within the *Walker* categories. *Olshan Found. Repair,* 328 S.W.3d at 888 (citing both *Prudential* and *Walker* for the mandamus standards*,* then citing a pre-*Prudential* case for the categorical rule that "we have determined that relators have no adequate remedy by appeal when a trial judge erroneously refuses to compel arbitration"); *In re Gen. Elec. Capital Corp.,* 203 S.W.3d 314, 317 (Tex. 2006) (orig. proceeding) (per curiam) (granting mandamus regarding waiver of jury trial); *In re D. Wilson Const. Co.,* 196 S.W.3d 774, 780 (Tex. 2006) (orig. proceeding) (citing *Jack B. Anglin Co.* and summarily stating that "[m]andamus is proper to correct a clear abuse of discretion when there is no adequate remedy by appeal, as when a party is erroneously denied its contracted-for arbitration rights under the FAA," with no mention of *Prudential* (internal citations omitted)); *see also Prudential,* 148 S.W.3d at 127 (citing *Walker* categories to support enforcement of contractual jury waiver); *AIU,* 148 S.W.3d at 115 (citing case law regarding *Walker* categories to enforce forum selection clause).

The impact of *Prudential,* then, is primarily in those cases falling outside the *Walker* categories. *See, e.g., In re J.B. Hunt Transp., Inc.,* 492 S.W.3d 287 (Tex. 2016) (orig. proceeding) (abrogating its pre-*Prudential* precedent to hold that mandamus relief was available to correct an erroneous ruling on a plea in abatement in a dominant-jurisdiction case). In such cases, the *Prudential* decision authorized the courts to consider delay, expense, and the waste of judicial resources as grounds for characterizing an appellate remedy inadequate. *Prudential,* 148 S.W.3dd at 136–38. "Mandamus review is not—and should not be—an easily wielded tool, but such review of significant rulings in exceptional cases may be essential to, among other things, 'spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings.'" *J.B. Hunt Transp., Inc.*, 492 S.W.3d at 299.

V. Common Mandamus Cases.

Although there are a wide variety of cases warranting mandamus review, they tend to fall into predefined categories which the courts have recognized as lacking an adequate remedy by appeal. *See McAllen Med. Ctr.,* 275 S.W.3d at 465–68. For all the reasons explained *supra,* the Texas Supreme Court now denies the existence of this categorical framework, instead holding that "[t]here is no definitive list of when an appeal will be 'adequate,' as it depends on a careful balance of the case-specific benefits and detriments of delaying or interrupting a particular proceeding." *In re Gulf Expl., LLC,* 289 S.W.3d 836, 842 (Tex. 2009) (orig. proceeding). In reality however, Texas courts have continued to summarily hold that there is no adequate remedy by appeal in cases otherwise qualifying under the *Walker* categories. *See, e.g., Olshan Found. Repair,* 328 S.W.3d at 888; *Deere,* 299 S.W.3d at 820–21; *Cerberus Capital Mgmt.,* 164 S.W.3d at 383; *Sanders*, 153 S.W.3d at 56–58; *Ford Motor,* 165 S.W.3d at 322. Although the Texas Supreme Court has cautioned that there may be a factual scenario in which a case would not warrant mandamus relief under the *Prudential* analysis even though it would have categorically qualified under *Walker*, this statement is theoretical and the Court has yet to identify such a situation.

With this context in mind, Texas courts have commonly granted mandamus relief for trial court orders regarding the following legal issues:

- Arbitration agreements;
- Agreements to submit an issue to appraisers;
- Contractual jury waivers;
- Forum-selection clauses;
- Attorney disqualification;
- Judicial disqualification;
- Legislative continuances;
- Election-related issues;
- Discovery orders compelling production with no time limitation;
- Orders prohibiting discovery of basic allegations or key evidence;
- Contempt orders;
- Severances;
- Temporary restraining orders;

- Temporary injunctions;
- Order terminating or interfering with parental rights; and
- New trial orders.

McAllen Med. Ctr., 275 S.W.3d at 465–68 (listing twelve instances as well as numerous discovery situations in which the party is recognized to have an inadequate remedy by appeal); 2 Justice Adele Hedges & Kim J. Askew, *Texas Practice Guide: Civil Pretrial* §§ 11:12–43 (2016). This list is not exhaustive, and will almost certainly continue to expand in light of the liberal mandamus standards set forth in *Prudential.* Meanwhile, the recognized *Walker* categories supporting mandamus relief are not going anywhere.

A. Discovery

Soon after the Texas Supreme Court began issuing writs of mandamus to correct abuses of discretion in the 1950s, it was presented with challenges to allegedly erroneous discovery orders. As early as 1959 the Texas Supreme Court granted mandamus relief to protect a relator's tax return from discovery. *Crane v. Tunks*, 328 S.W.2d 434, 440–41 (Tex. 1959), *disapproved of by Walker v. Packer,* 827 S.W.2d 833 (Tex. 1992).[2] This is not surprising; even today, discovery orders continue to represent a large portion of the total mandamus petitions submitted to Texas's appellate courts.

Generally, the Texas Supreme Court has stated that mandamus relief is justified in the discovery context when the trial court issues an overbroad order; when "privileged information or trade secrets would be revealed or production of patently irrelevant or duplicative documents;" when an order "impose[es] a disproportionate burden on one party far out of proportion to any benefit to the other;" when the court issues a restrictive order that "severely compromise[s] or vitiate[s]" a "party's ability to . . . develop the merits of its case;" or when "the trial court's discovery order disallows discovery" altogether. *McAllen Med. Ctr.,* 275 S.W.3d at 465–68 (listing numerous discovery situations in which the party is recognized to have an inadequate remedy by appeal); *In re Allied Chem. Corp.,* 227 S.W.3d 652, 658 (Tex. 2007) (orig. proceeding); *In re Colonial Pipeline Co.,* 968 S.W.2d 938, 941 (Tex. 1998) (orig. proceeding) (per curiam).

Regarding overbroad discovery orders, Texas's courts have granted relief where a trial court orders discovery beyond that permitted by the Rules of Civil Procedure. *In re Nat'l Lloyds Ins. Co.,* 507 S.W.3d 219, 223 (Tex. 2016) (orig. proceeding) ("A discovery order that compels production beyond the rules of procedure is an abuse of discretion for which mandamus is the proper remedy."); *In re CSX Corp.,* 124 S.W.3d 149, 152 (Tex. 2003) (orig. proceeding) (per curiam). For example, in *In re Deere & Co.,* the Texas Supreme Court granted mandamus relief to correct a trial court order requiring John Deere to produce all customer complaints for 30 product lines similar to the one at issue in the case, with no time limit on the relevant documents. 299 S.W.3d at 820–21. Again, in *Russell v. Young*, the Texas Supreme Court granted mandamus relief where a trial court erroneously compelled the discovery of documents from a potential witness for impeachment purposes. 452 S.W.2d 434, 435 (Tex. 1970) (orig. proceeding). The Court noted that the witness was not a party to the suit, the records had nothing to do with the underlying litigation, and the discovery was sought solely to show the witness's potential bias. *Id.* at 435–37. Because the witness had neither taken the stand nor had his deposition introduced into evidence, there was "nothing yet to impeach." *Id.* at 437. Thus, in both *Russell* and *Deere,* the trial court erroneously ordered discovery outside the scope of the Texas Rules of Civil Procedure.

On the opposite end of a spectrum, the Texas Supreme Court has granted mandamus relief to correct an unwarranted restriction of discovery as well. In *In re Allied Chemical Corp.*, nearly 2,000 plaintiffs sued 30 defendants for exposure to a "toxic soup" of unidentified chemicals allegedly leaking from the defendants' pesticide-related facilities. 227 S.W.3d at 654. The defendants asked for medical experts connecting the plaintiffs' diseases to the alleged emissions from the defendants' products, but the plaintiffs refused to respond. *Id.* at 654–57. Although

[2] *Walker* disapproved of *Crane* "[t]o the extent that [*Crane*] impl[ied] that a remedy by appeal is inadequate merely because it might involve more delay or cost than mandamus." *Walker*, 827 S.W.2d at 842. Ironically, this has arguably come full circle given the *Prudential* decision. *Prudential,* 148 S.W.3dd at 136–38 (acknowledging delay and expense as grounds for holding an appellate remedy to be inadequate).

the defendants moved to compel on multiple occasions, the trial court instead prematurely set the case for trial. *Id* at 654–57. The Texas Supreme Court granted mandamus relief, holding that there was "too little time between adequate responses and trial for the defendants to have a fair chance to mount a defense." *Id.* at 657–58. The Court explained that the burden on the 30 defendants who were forced to "prepare in the dark for 1,900 claims" was out of proportion to the benefit the plaintiffs received by having more time to respond. *Id.* at 658. Furthermore, keeping any groundless cases on the court's docket wasted judicial resources. *Id.* To make matters worse, the basic information requested went to the heart of the claims, and without it the defense could not prepare a viable defense. *Id.* The Court referenced *Able Supply Co. v. Moye*—which involved nearly identical facts—and stated that it had "repeatedly granted mandamus in mass toxic tort cases when plaintiffs have refused to produce basic information like this." *Id.* at 656–57; *Able Supply Co. v. Moye*, 898 S.W.2d 766, 771 (Tex. 1995) (orig. proceeding). Thus, mandamus relief was warranted. *Allied Chemical Corp.,* 227 S.W.3d at 656–57.

Notably, the post-*Prudential* discovery cases discussed above relied primarily on precedent, *not* the costs/benefits *Prudential* analysis. *Deere,* 299 S.W.3d at 820–21 (relying primarily on *In re CSX,* with no *Prudential* analysis); *Allied Chemical Corp.*, 227 S.W.3d at 654–62 (relying on *Able Supply Co,* with no *Prudential* analysis). Yet, the leniency of the *Prudential* analysis—particularly *Prudential's* focus on delay, costs, and judicial waste—would only seem to strengthen the grounds for justifying mandamus review of a discovery order. Regardless, under both *Walker* and *Prudential*, overbroad and unnecessarily restrictive discovery orders are reviewable by a writ of mandamus.

B. Disqualification or Recusal of Judge.

Mandamus relief is also available to compel the removal of a judge, if the judge is disqualified under the provisions of the Texas Constitution, or struck in accordance with the state's statutes. *See* TEX. CONST. art. V, § 11; TEX. GOV'T CODE § 74.053; *In re Union Pac. Res. Co.*, 969 S.W.2d 427, 428 (Tex. 1998) (orig. proceeding). However, mandamus is *not* available to review a trial court order on a motion to recuse a judge under the Texas Rules of Civil Procedure. TEX. R. CIV. P. 18a, 18b; *Union Pac. Res.*, 969 S.W.2d at 428. The Texas Supreme Court explained and demonstrated this distinction in *In re Union Pacific Resources Company*. 969 S.W.2d at 428.

There, Jeffrey Lee and Gena Jo Monroe filed a personal injury suit against Union Pacific. *Id.* at 427. The Monroes moved to recuse the judge—Max Bennett—claiming that the law firm representing Union Pacific was also representing Judge Bennett in an unrelated lawsuit. *Id.* Judge Blackmon heard and denied the recusal motion. *Id.* at 428. The court of appeals granted mandamus relief, and Union Pacific sought a writ from the Texas Supreme Court. *Id.*

The Court began by explaining the different bases for removal of a judge, noting that "[j]udges may be removed from a particular case either because they are constitutionally disqualified, because they are subject to a statutory strike, or because they are recused under rules promulgated by this Court." *Id.* In the first two instances, the disqualification is mandatory, and any subsequent acts by the disqualified judge are void. *Id.* Thus, mandamus will issue to compel the judge's removal and the inadequacy of an appellate remedy is categorically presumed. *Id.*

However, an erroneous denial of a recusal motion is not fundamental error, and does not render void any subsequent actions by the judge. *Id.* In fact, the Texas Rules of Civil Procedure explicitly provide for the review of an order denying a motion to recuse "*on appeal from the final judgment*." *Id.*; TEX. R. CIV. P. 18a(j) (emphasis added). Although an erroneous denial of a recusal motion may be reversible, the Texas Supreme Court noted that "[t]his procedure is no different than the correction of any trial court error through the normal appellate process" and does not render an appellate remedy inadequate. *Union Pac. Res.,* 969 S.W.2d at 428. Thus, the trial court's denial of the Monroes' motion to recuse Judge Bennett—even if erroneous—did not render Judge Bennett's actions void, and the Monroes did not lack an adequate remedy by appeal. *Id.* at 429.

The Texas Supreme Court reaffirmed this holding under the new *Prudential* standard in *In re McKee,* 248 S.W.3d 164 (Tex. 2007) (orig. proceeding) (per curiam). There, Dr. McKee sued Kennedy & Minshew, P.C. for legal malpractice. *Id.* at 164. After several judges recused themselves from the case, a new judge was elected to the relevant state court: Judge Blake. *Id.* Judge Blake did not recuse herself, but Kennedy & Minshew moved for recusal.

Id. at 164–65. Presiding Judge Ovard—who had previously recused himself from the case—assigned Judge Kupper to hear the recusal motion regarding Judge Blake. *Id.* at 165. Judge Kupper granted the motion and recused Judge Blake. *Id.* Dr. McKee then sought a writ of mandamus, arguing that the recusal was invalid because Judge Ovard's assignment of Judge Kupper was void based on his own prior recusal from the case. *Id.*

The Texas Supreme Court downplayed the web of recusals, instead holding that "[w]e see no meaningful distinction between our holding in *In re Union Pacific Resources Co.* and the situation presented here." *Id.* at 165. The Court reiterated the rule in *Union Pacific,* that "mandamus is not available for the denial of a motion to recuse." *Id.* However, the Court acknowledged that "[o]ur mandamus standards have evolved since *In re Union Pacific Resources Co.,*" and that "[w]e now ask whether 'any benefits to mandamus review are outweighed by the detriments,'" in accordance with *Prudential. Id.* Yet, after quoting the standard for the new analysis, the Court summarily concluded that "there is no significant benefit to mandamus relief" and no "extraordinary circumstances," warranting mandamus relief. *Id.* at 165.

Thus—under both the *Walker* categories and the *Prudential* analysis—mandamus relief is available to compel removal of a judge who is constitutionally or statutorily disqualified, but unavailable to recuse a judge under the Texas Rules of Civil Procedure.

C. Disqualification of an Attorney.

The availability of mandamus relief for an order disqualifying an attorney is slightly different. Because the disqualification of an attorney is a "severe remedy that can cause immediate and palpable harm by depriving the party of its chosen counsel and disrupting court proceedings," mandamus will issue to correct an erroneous order disqualifying an attorney, regardless of the reason for the disqualification. *Cerberus Capital Mgmt.,* 164 S.W.3d at 382 (internal quotations omitted).

For example, in *In re Cerberus Capital Management,* WSNet hired Vinson & Elkins to draft a purchase agreement on January 26, 2001, but decided to abandon the purchase two days later. 164 S.W.3d at 380. In February 2002, a group of WSNet shareholders filed a shareholder derivative suit against the company. *Id.* The shareholders asked Vinson & Elkins to represent them in the case. *Id.* at 381. Vinson & Elkins contacted the general counsel of WSNet, and WSNet waived the conflict; first verbally, then in writing. *Id.* Only after securing this waiver did Vinson & Elkins appear on the shareholders' behalf in March 2002. *Id.*

While the suit was pending, WSNet filed bankruptcy, and the case was removed to bankruptcy court before being remanded to state court. *Id.* In November 2003, the bankruptcy trustee moved to disqualify Vinson & Elkins based on the alleged conflict of interest. *Id.* at 381–82. The trial court granted the motion and disqualified the firm. *Id.* at 382. Vinson & Elkins sought a writ of mandamus first from the court of appeals, then from the Texas Supreme Court. *Id.* After analyzing WSNet's waiver of the conflict, the Texas Supreme Court held that the waiver was valid and that the trial court abused its discretion by disqualifying Vinson & Elkins. *Id.* at 382–83. The Court then summarily held that "[m]andamus is appropriate to correct an erroneous order disqualifying counsel because there is no adequate remedy by appeal." *Id.* at 383. The Court granted a writ of mandamus ordering the trial court to vacate its order. *Id.* at 383.

Thus, as the Texas Supreme Court demonstrated in *Cerberus,* an order erroneously disqualifying counsel is subject to mandamus review and causes "immediate and palpable harm" that cannot be remedied by appeal. *Id.* at 382–83. This longstanding, categorical rule continues to hold, even after *Prudential. Cerberus,* 164 S.W.3d at 382–83 (decided in 2005, one year after *Prudential*, with no mention of the *Prudential* analysis).

D. Enforcement of Contractual Agreements Regarding Trial Procedure.

Another common issue warranting mandamus relief is a trial court's failure to enforce a contractual agreement regarding trial procedure. For example, the Texas Supreme Court has issued writs of mandamus to enforce the following common contractual provisions:

- an agreement to arbitrate;
- an agreement to submit an issue to appraisers;
- an agreement to waive a jury trial; and
- an agreement to resolve the dispute in a particular forum.

Olshan Found. Repair, 328 S.W.3d at 888 (enforcement of arbitration agreement); *Gen. Elec. Capital Corp.,* 203 S.W.3d at 317 (enforcement of jury trial waiver); *D. Wilson Const.,* 196 S.W.3d at 780 (enforcement of arbitration agreement); *Prudential,* 148 S.W.3d at 127 (enforcement of contractual jury waiver); *AIU,* 148 S.W.3d at 115–18 (enforcement of forum-selection clause); *In re Allstate Cnty Mut. Ins. Co.,* 85 S.W.3d 193, 196 (Tex. 2002) (orig. proceeding) (enforcement of appraisal provision).

Agreements to arbitrate, in particular, have been a frequent topic in mandamus proceedings. *See* Justice Barnard et. al., *supra,* at 173 (discussing availability of mandamus for various orders relating to arbitration). Prior to 2009, orders refusing to compel arbitration under the Federal Arbitration Act were subject to mandamus review. *Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266, 272–73 (Tex. 1992) (orig. proceeding) (categorically enforcing arbitration agreement). In 2009, the Texas Legislature enacted Texas Civil Practice & Remedies Code section 51.016, providing interlocutory appeal in matters subject to the Federal Arbitration Act for which an appeal would be available under federal law. TEX. CIV. PRAC. & REM. CODE § 51.016; *In re Santander Consumer USA, Inc.,* 445 S.W.3d 216, 219–22 (Tex. App.—Houston [1st Dist.] 2013, orig. proceeding) (discussing legislative history). Orders denying a motion to compel arbitration under the Texas Arbitration Act were already subject to interlocutory appeal under the Texas Civil Practice & Remedies Code. TEX. CIV. PRAC. & REM. CODE § 171.098. Thus, now, if a motion to compel arbitration is denied, the statutory provisions allowing interlocutory appeal serve as an appellate remedy that precludes mandamus review. *Santander Consumer USA,* 445 S.W.3d at 219–22 (denying mandamus review of order regarding FAA arbitration amendment in light of appellate remedy via interlocutory appeal).

Meanwhile, a motion granting arbitration is generally not subject to mandamus review. *Gulf Expl.,* 289 S.W.3d at 842 ("In the context of orders compelling arbitration, even if a petitioner can meet the first requirement, mandamus is generally unavailable because it can rarely meet the second."); *In re Palacios,* 221 S.W.3d 564, 565 (Tex. 2006) (orig. proceeding) (denying mandamus relief for order staying proceeding for arbitration, and noting that the mandamus burden was "particularly heavy" in such instances, though not "entirely precluded). However, if a trial court neither grants nor denies a motion to compel arbitration, but otherwise abuses its discretion in a form not subject to interlocutory appeal—*e.g.,* by deferring a ruling on arbitration—mandamus relief is still available. *See In re Valerus Compression Servs., LP,* No. 14-14-00019-CV, 2015 WL 2169656, at *2 (Tex. App.—Houston [14th Dist.] May 7, 2015, orig. proceeding) (mem. op.) ("We therefore hold that the trial court's order deferring a ruling on the motion to compel arbitration is not reviewable by interlocutory appeal."); *see also CMH Homes v. Perez*, 340 S.W.3d 444, 454 (Tex. 2011) (holding that mandamus review was available for order appointing an arbitrator, though not commenting on the merits of the petition).

Apart from arbitration agreements, mandamus review is also available for a trial court's failure to enforce other contractual provisions relating to trial procedure. Both *Prudential* and *AIU* demonstrate this use of mandamus relief. *Prudential,* 148 S.W.3d at 127; *AIU,* 148 S.W.3d at 115–18. As discussed *supra,* the Texas Supreme Court issued a writ of mandamus to enforce a contractual jury waiver in *Prudential*, and granted relief to enforce a forum-selection clause in *AIU*. *Id.* In fact—ironically—some cases have cited *Prudential* and *AIU* for the rule that agreements regarding trial procedure are categorically subject to mandamus review, instead of conducting the ad-hoc costs/benefits analysis that *Prudential* originated. *See, e.g., In re AutoNation, Inc.,* 228 S.W.3d 663, 667 (Tex. 2007) (orig. proceeding) (citing *AIU* for the categorical rule that "[m]andamus relief is available to enforce forum-selection clauses," with no mention of the *Prudential* costs/benefits analysis); *Gen. Elec. Capital Corp.,* 203 S.W.3d at 317 (citing *Prudential* only for rule that mandamus is available to enforce a contractual jury waiver, with no mention of *Prudential* costs/benefits analysis). In general, then, contractual provisions regarding trial procedure are enforceable—under both *Walker* and *Prudential*—where interlocutory appeal is not otherwise available.

E. Severances.

Generally, an improper ruling on a motion to sever creates "a waste of public and judicial resources" for which appeal "is no remedy at all." *In re Energy Res. Tech. GOM, Inc.,* No. 14-12-00835-CV, 2012 WL 4754006, at *2 (Tex. App.—Houston [14th Dist.] Oct. 4, 2012, orig. proceeding) (mem. op.). Thus, "[m]andamus may be an appropriate avenue by which a party may seek review of a trial court's order regarding severance." *In re Buck*, No. 13-15-00434-CV, 2015 WL 5655708, at *1 (Tex. App.—Corpus Christi Sept. 24, 2015, orig. proceeding) (mem. op.).

For example, in *In re State,* the Texas Supreme Court conducted the full *Prudential* analysis to determine if a trial court's erroneous order granting a motion to sever a case into eight separate suits warranted mandamus relief. 355 S.W.3d 611, 615 (Tex. 2011) (orig. proceeding). Ultimately, the Court held that "the enormous waste of judicial and public resources that compliance with the trial court's order would entail . . . would be a clear waste of the resources of the State, the landowners, and the courts," rendering the appellate remedy inadequate. *Id.* at 615.

Even without the *Prudential* analysis however, some courts of appeals have held that an order granting or denying severance categorically qualifies for mandamus relief where the trial court has abused its discretion. *See, e.g., In re Old Am. Cnty Mut. Fire Ins. Co.,* No. 13-11-00412-CV, 2012 WL 506570, at *3 (Tex. App.—Corpus Christi Feb. 16, 2012, orig. proceeding) (mem. op.) ("Appeal is an inadequate remedy when a trial court's failure to sever contractual and extra-contractual claims constitutes an abuse of discretion."); *In re Hochheim Prairie Farm Mut. Ins. Ass'n,* 296 S.W.3d 907, 911 (Tex. App.—Corpus Christi 2009, orig. proceeding) (quoting *Prudential* analysis but then stating that "[a]ppeal may be an inadequate remedy when a trial court's failure to sever constitutes an abuse of discretion"); *In re Allstate,* 232 S.W.3d 340, 342 (Tex. App.—Tyler 2007, orig. proceeding).

For example, in *In re Allstate Insurance Company,* Glenn and Helen Nerren sued Allstate after a tree fell on the Nerrens' RV and Allstate paid only a small portion of the damages. 232 S.W.3d 340, 342 (Tex. App.—Tyler 2007, orig. proceeding). The Nerrens asserted a claim for breach of contract, along with extra-contractual claims. *Id.* Allstate moved to sever the extra-contractual claims, and to abate the causes of action until the breach of contract claim had been adjudicated. *Id.* The trial court denied Allstate's motion. *Id.* Allstate then offered to settle with the Nerrens, but was unsuccessful. *Id.* The trial court still refused to reconsider the motion to sever, causing Allstate to seek mandamus relief. *Id.*

The Tyler Court of Appeals quoted the mandamus standard, then summarily held that "[a]ppeal is an inadequate remedy when a trial court's failure to sever contractual and extra-contractual claims constitutes an abuse of discretion," and "[t]he same rule applies to a trial court's failure to abate." *Id.* The Tyler Court noted that when an insurer has offered to settle a claim, evidence of the offer should be excluded from the breach of contract action but admitted to disprove bad faith for the extra-contractual claims. *Id.* at 343. Thus, the trial court should have severed the claims to protect both parties' interests. *Id.* Regarding abatement, the Tyler Court recognized that many of its sister courts of appeals held abatement to be mandatory when a court severs contractual and extra-contractual claims. *Id.* at 344. Although the Tyler Court of Appeals did not adhere to this blanket rule, it nonetheless held that abatement was necessary to prevent duplicative discovery expenses that could be prevented if the breach of contract claim was decided in Allstate's favor. *Id.* Moreover, some evidence discoverable with regard to the extra-contractual claims was privileged with regard to the breach of contract claim. *Id.* Thus, the Tyler Court of Appeals conditionally granted mandamus relief. *Id.*

As the case law above demonstrate, a trial court's order regarding severance of a case generally warrants mandamus review—whether under the categorical *Walker* rule or the *Prudential* costs/benefits analysis.

F. Contempt Orders.

Contempt orders are not appealable; "the only possible relief is a writ of mandamus" or a writ of habeas corpus. *In re Reece*, 341 S.W.3d 360, 370 (Tex. 2011) (orig. proceeding); *In re Long,* 984 S.W.2d 623, 625 (Tex. 1999) (orig. proceeding). Traditionally, the Texas Supreme Court held that contempt orders involving confinement could only be reviewed by a writ of habeas corpus, and contempt orders not involving confinement were limited to

review via a writ of mandamus. *See Long,* 984 S.W.2d at 625; *In Interest of K.M.M*, No. 14-15-00204-CV, 2016 WL 6108097, at *2 (Tex. App.—Houston [14th Dist.] Oct. 18, 2016, orig. proceeding [mand. pending]) (mem. op). However, the Court has since held that, if the Court of Criminal Appeals refuses to hear a petition for habeas corpus regarding a contempt order involving confinement, the writ of mandamus will fill the "statutory gap" by providing an avenue for review. *Reece*, 341 S.W.3d at 363 ("Because we lack habeas jurisdiction in this case, the relator pursued relief by filing the instant petition for writ of mandamus to challenge his confinement. . . . [B]ecause the underlying suit is civil in nature, and the Court of Criminal Appeals declined to grant the relator leave to file a habeas petition in that court, we hold the relator has no adequate remedy by appeal and therefore mandamus is the appropriate remedy to correct the trial court's abuse of discretion.").

This holding merely emphasizes the importance of the writ process in reviewing contempt orders; there are *no* alternative remedies—adequate or otherwise—by which a relator can seek review. *See id.*; *Long,* 984 S.W.2d at 625. Thus, even after *Prudential*, Texas courts have continued to categorially recognize the inadequacy of an appellate remedy for contempt orders. *In re Gabrielova*, No. 08-16-00276-CV, 2016 WL 7369193, at *2 (Tex. App.—El Paso Dec. 20, 2016, orig. proceeding) (holding that "[A]n order of contempt is not appealable. . . . A petition for writ of mandamus is the appropriate mechanism for review when the contemnor has not been confined," and granting mandamus relief in case involving contempt order with no mention of *Prudential* analysis); *K.M.M*, 2016 WL 6108097, at *2 ("Decisions in contempt proceedings are not appealable, even if the contempt order is being appealed along with a judgment that is appealable." (internal citations omitted)); *In re Choice! Energy, L.P.,* 325 S.W.3d 805, 808 (Tex. App.—Houston [14th Dist.] 2010, orig. proceeding) (granting mandamus relief regarding contempt order without discussion of the adequacy of an appellate remedy).

G. New Trial Orders.

Mandamus review of a new trial order is yet another contentious expansion of mandamus law—though it can only partially be blamed on *Prudential*. The expansion came in a 5-4 decision from the Texas Supreme Court issued in 2009: *In re Columbia Medical Center of Las Colinas,* 290 S.W.3d 204 (Tex. 2009) (orig. proceeding).

There, Wendy Creech sued Columbia Medical Center along with several related defendants after her husband died in a Columbia hospital. *Id.* at 206. The jury returned a verdict for Columbia. *Id.* The trial court granted the motion "in the interests of justice and fairness," and ordered a new trial as to three defendants, including Columbia. *Id.* Columbia sought a writ of mandamus directing the trial court to either explain more fully why it granted a new trial or to enter judgment on the verdict. *Id.*

The Dallas Court of Appeals denied mandamus relief, quoting two Texas Supreme Court cases for the rule that the trial court's "in the interests of justice and fairness" explanation was sufficient. *In re Columbia Med. Ctr. of Las Colinas,* 290 S.W.3d 238 (Tex. App.—Dallas 2006, orig. proceeding) (mem. op.). Indeed, the cases cited by the Dallas Court—*In re Volkswagen of Am., Inc.,* 22 S.W.3d 462 (Tex. 2000) (orig. proceeding) and *In re Bayerische Motoren Werke, AG,* 8 S.W.3d 326 (Tex. 2000) (orig. proceeding)—were identical to Columbia's case in all relevant respects, as the relators sought mandamus relief to force a trial court to explain its new trial order beyond the phrase "in the interest of justice." *Id.*

Notably, Justice Hecht dissented from the denial of mandamus in both cases. *In re Volkswagen of Am., Inc.,* 22 S.W.3d 462 (Tex. 2000) (orig. proceeding) (Hecht, J., dissenting); *In re Bayerische Motoren Werke, AG,* 8 S.W.3d 326 (Tex. 2000) (orig. proceeding) (Hecht, J., dissenting). Now, Justice Hecht was able to join the majority of the Texas Supreme Court in addressing the same issue and holding that mandamus relief was warranted. *Columbia Med. Ctr.,* 290 S.W.3d at 206.

The Texas Supreme Court recognized that its "decisions have approved the practice of trial courts failing to specify reasons for setting aside jury verdicts," and that its precedent did not support "appellate review of orders granting new trials" except in instances where there was "a void order or a conflict in jury answers," neither of which was present in Columbia's case. *Id.* at 208. Thus, historically, the Texas Supreme Court had held that there was neither an abuse of discretion when a trial court justified its new trial order as "in the interests of justice," nor was there an inadequate remedy by appeal.

Nonetheless, quoting extensively from *Prudential*, the Court held that "[o]n balance, the significance of the issue—protection of the right to jury trial—convinces us that the circumstances are exceptional and mandamus review is justified." *Id.* at 209. The Texas Supreme Court explained that—as in *Prudential*—the trial court's order was not subject to interlocutory review and would be extremely hard to establish as reversible error on direct appeal. *Id.* Moreover, even if Columbia obtained a second favorable jury verdict or rendered judgment on appeal, it would still have been subjected to the delay and expense of a second trial. *Id.* at 209–10. Thus, the Court held that Columbia lacked an adequate remedy by appeal. *Id.* at 210.

The Court then proceeded to analyze whether the trial court was required to justify its order granting a new trial. *Id.* Comparing the trial court's reversal of a jury verdict to an appellate court's reversal of the same, the Texas Supreme Court noted that the appellate court was required to detail the reasons for its rejection of a jury's verdict. *Id.* at 210–11. Although the Court acknowledged that trial courts and appellate courts are governed by different standards, and that appellate courts have less discretion, the Texas Supreme Court nevertheless saw "no meaningful difference to the parties between an appellate court reversing a judgment based on a jury verdict and a trial court setting the verdict aside or disregarding it." *Id.* at 211–12. The Court held that "[a] trial court's actions in refusing to disclose the reasons it set aside or disregarded a jury verdict is no less arbitrary to the parties and public than if an appellate court did so." *Id.* at 212–13. This "fail[ure] to give its reasons for disregarding the jury verdict as to Columbia was arbitrary and an abuse of discretion." *Id.* The Court conditionally issued a writ of mandamus directing the trial court to state the reasons it ordered a new trial. *Id.* at 215.

Only three years later, the Texas Supreme Court reaffirmed and extended *Columbia*—this time with Justices Medina, Green, and Chief Justice Jefferson in the majority. *In re United Scaffolding, Inc.,* 377 S.W.3d 685, 686 (Tex. 2012) (orig. proceeding). In *In re United Scaffolding,* the trial court granted a motion for new trial, giving the following reasons:

> A. The jury's answer to question number three (3) is against the great weight and preponderance of the evidence; *and/or*
> B. The great weight and preponderance of the evidence supports a finding that the determined negligence of Defendant was a proximate cause of injury in the past to Plaintiff, James Levine; *and/or*
> C. The great weight and preponderance of the evidence supports a finding that the determined negligence of Defendant supports an award of past damages; *and/or*
> D. In the interest of justice and fairness.

Id. at 687. The Texas Supreme Court held that this was insufficient. *Id.* at 688–90.

Although the Court acknowledged that trial courts do not have the luxury of an appellate record and should not be governed by the same standard as appellate courts, the Court nonetheless required the new trial order to demonstrate that "the jury's decision was set aside only after careful thought and for valid reasons." *Id.* at 688. Thus, the Court held that "a trial court does not abuse its discretion so long as its stated reason for granting a new trial (1) is a reason for which a new trial is legally appropriate (such as a well-defined legal standard or a defect that probably resulted in an improper verdict); and (2) is specific enough to indicate that the trial court did not simply parrot a pro forma template, but rather derived the articulated reasons from the particular facts and circumstances of the case at hand." *Id.* at 688–89. Furthermore, even if the reason given is valid, the order must provide "insight into the judge's reasoning." *Id.* Applying this new standard to the trial court's order, the Court noted that the use of "and/or" created the possibility that the sole reasoning for the order was "in the interest of justice and fairness." *Id.* at 689–90. Thus, the trial court's failure to specify acceptable reasons was an abuse of discretion warranting mandamus relief. *Id.* at 690.

The Court went even further the following year in *In re Toyota Motor Sales.* 407 S.W.3d 746, 748 (Tex. 2013) (orig. proceeding). There, the trial court granted a new trial after Toyota violated a limine order. *Id.* at 755. The order stated that a new trial was required "in the interest of justice" both because a limiting instruction would be insufficient to remedy the harm and to sanction Toyota for the violation. *Id.* The Texas Supreme Court accepted

Toyota's petition for a writ of mandamus, holding that "[o]n mandamus review, an appellate court may conduct a merits-based review of the reasons given for granting a new trial." *Id.* at 762.

The Court openly acknowledged that "[i]n the decades leading up to *Columbia,* our jurisprudence gave trial courts broad deference in granting new trials and . . . [w]e generally precluded review of new trial orders, except in two narrow instances." *Id.* at 755. However, after discussing the holdings in *Columbia* and *United Scaffolding,* the Court described the case before it as "the next step in that progression," holding that appellate courts must be able to review the merits of a new trial order to ensure that the trial court's articulated reasons are supported by the evidence. *Id.* at 757–58. The Court then proceeded to conduct a merits-based review of the new trial order regarding Toyota's violation of the limine order, finding that the plaintiff's attorney had actually been responsible for violating the limine order initially, and admitting the relevant evidence into the record. *Id.* at 760–62. The Court thus conditionally granted a writ of mandamus ordering the trial court to withdraw its order granting a new trial and to render judgment on the verdict. *Id.* at 762.

As these cases demonstrate, the Texas Supreme Court has grown increasingly willing to review new trial orders via mandamus. A trial court's failure to provide a "legally appropriate" justification for granting the new trial—supported by the record with specific references to the facts and circumstances of the case—will be considered an abuse of discretion with no adequate remedy by appeal. *Toyota Motor Sales,* 407 S.W.3d at 755–62; *United Scaffolding,* 377 S.W.3d at 688.

H. Void Orders.

Typically, courts will vacate by mandamus a void order even without a showing of no adequate remedy at law. *E.g.*, *In re Sw. Bell Tel. Co.*, 35 S.W.3d 602, 605 (Tex. 2000) (orig. proceeding) (order issued outside trial court's plenary power); *see also In re Daredia*, 317 S.W.3d 247, 250 (Tex. 2010) (orig. proceeding) (per curiam); *In re John G. and Marie Stella Kennedy Mem. Found.*, 315 S.W.3d 519, 522 (Tex. 2010) (orig. proceeding).

I. Sanctions Orders.

Mandamus is available for relief from "death penalty" sanctions when the sanction are imposed by an order that is not a final and appealable judgment. *Walker*, 927 S.W.2d at 843; *GTE Commc'ns Sys. Corp. v. Tanner*, 856 S.W.2d 725, 732 (Tex. 1993) (orig. proceeding). The discovery sanction must be such that it effectively precludes a decision on the merits of a party's claims. *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 920 (Tex. 1991) (orig. proceeding).

J. Refusal to Rule.

Mandamus relief is available if the trial court refuses to rule on pretrial motions that were properly presented to it within a reasonable time. *E.g.*, *In re Amir-Sharif*, 357 S.W.3d 180, 181 (Tex. App.—Dallas 2012, orig. proceeding). Considering and ruling upon a motion is a ministerial act, and mandamus may issue from a trial court's refusal to perform such an act. *See O'Donniley v. Golden*, 860 S.W.2d 267, 269-70 (Tex. App.—Tyler 1993, orig. proceeding).

VI. Factual Disputes Preclude Mandamus Relief

Mandamus is not available for the resolution of contested factual disputes. *See Brady v. Fourteenth Court of Appeals*, 795 S.W.2d 712, 714 (Tex. 1990) (orig. proceeding) (court of appeals cannot resolve factual questions involving inconsistent affidavits and documents in mandamus proceeding); *see also In re Angelini*, 186 S.W.3d 558, 559-60 (Tex. 2006) (orig. proceeding) (alleged defects in election filing presented factual disputes precluding mandamus relief); *Grant v. Thirteenth Court of Appeals*, 888 S.W.2d 466, 468 (Tex. 1994) (orig. proceeding) ("This Court cannot resolve the conflicting factual assertions by the parties concerning waiver [of attorney disqualification].").

VII. Temporary Relief

An appellate court can stay an underlying proceeding or grant other temporary relief while considering the mandamus petition whether a party requests it or not. Texas Rule of Appellate Procedure 52.10(b) provides, "[t]he court —on motion of any party or on its own initiative —may without notice grant any just relief pending the court's action on the petition. As a condition of granting temporary relief, the court may require a bond to protect the parties who will be affected by the relief. Unless vacated or modified, an order granting temporary relief is effective until the case is finally decided." TEX. R. APP. P. 52.10(d).

If the relator seeks temporary relief while the appellate court is deciding the mandamus petition, Texas Rule of Appellate Procedure 52.10(a) authorizes the relator to "file a motion to stay any underlying proceedings or for any other temporary relief pending the court's action on the petition. The relator must notify or make a diligent effort to notify all parties by expedited means (such as by telephone or fax) that a motion for temporary relief has been or will be filed and must certify to the court that the relator has complied with this paragraph before temporary relief will be granted." TEX. R. APP. P. 52.10(a).

An original proceeding must be filed before an appellate court can grant temporary relief under Texas Rule of Appellate Procedure 52.10. Until an appropriate petition is filed, there is "no dispute" before the appellate court. *See In re Kelleher*, 999 S.W.2d 51, 52 (Tex. App.—Amarillo 1999, orig. proceeding).

VIII. Practical Considerations Before Filing Mandamus

Before deciding to seek mandamus review, a practitioner should weigh a number of different issues. The most significant consideration is the likelihood of achieving mandamus relief. Although complete statistics from the intermediate courts of appeals are not available, statistics for the supreme court show an average grant rate of about 5%.

Fiscal Year	Grant Rate
2012	3%
2013	0%
2014	2%
2015	6%
2016	6%
2017	6%
2018	7%
2019	3%
2020	9%
2021	10%
Average	**5%**

Practitioners must balance this low rate of review with the expense of mandamus. A mandamus proceeding can often cost as much as an appeal following final judgment. While the filing fees for mandamus are not significant, the attorneys' fees to prepare the mandamus petition (and staff costs to prepare the record) can become a barrier for immediate review in many cases.

Because of the expense, a practitioner should ask themselves: would the potential mandamus concern a legal principle that might warrant discretionary review? Is the record sufficiently developed to establish the essential elements for mandamus relief? What effect will this have for the ongoing litigation? These are some of the strategies that we will discuss at the life presentation.