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DEMYSTIFYING THE EXTRAORDINARY WRIT: SUBSTANTIVE AND PROCEDURAL REQUIREMENTS FOR THE ISSUANCE OF MANDAMUS

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I. INTRODUCTION

In *Walker v. Packer*,[1] the Texas Supreme Court attempted to harmonize Texas jurisprudence regarding the standards for issuing a writ of mandamus.[2] The *Walker* court initially reiterated the maxim that mandamus will issue "'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.'"[3] The court defined "clear abuse of discretion" as "'a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law,'" but noted that the application of the standard depended on the circumstances of a particular case.[4] The court subsequently reaffirmed the "fundamental tenet" of mandamus practice that the extraordinary writ is not available if an appellate remedy is adequate, and also clari-

1. 827 S.W.2d 833 (Tex. 1992).

2. A writ of mandamus is a court order directed to a person commanding that person to perform a legal duty required by law. *See* State v. Westergren, 707 S.W.2d 260, 261 (Tex. App.—Corpus Christi 1986, orig. proceeding). The person against whom the writ is directed can be a judge, court, tribunal, officer, or other person. *See* TEX. R. APP. P. 52.2. In most cases, however, a court issues a writ of mandamus against a lower court or a judge of a lower court. *See* 6 MCDONALD'S TEXAS CIVIL APPELLATE PRACTICE § 35.1, at 655 (Richard Orsinger ed., 1992). This Article primarily considers mandamus proceedings brought against an inferior court or judge thereof unless specified to the contrary.

3. *Walker*, 827 S.W.2d at 839 (quoting Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 917 (Tex. 1985)).

4. *Id.*; *see infra* notes 48–126 and accompanying text.

fied that an appellate remedy is not inadequate merely because an appeal may involve more expense or delay.[5] Rather, because mandamus is an extraordinary proceeding, encompassing an extraordinary remedy reserved for extraordinary cases or circumstances,[6] the writ will issue "'only in situations involving manifest and urgent necessity and not for grievances that may be addressed by other remedies.'"[7]

However, the subsequent application of the *Walker* standards has generated some confusion. Commentators, as well as the justices themselves, have criticized the court for failing to consistently apply the criteria enunciated in *Walker*.[8] Critics have referred to the supreme court's mandamus cases as "confusing, irreconcilable, and unprecedented."[9]

Yet despite the occasional howl from dissenting justices and commentators, much of the supreme court's post-*Walker* case law can be harmonized into a coherent body of law. While the result in

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5. *See Walker*, 827 S.W.2d at 842–43.

6. *See id.* at 842; Deloitte & Touche L.L.P. v. Fourteenth Court of Appeals, 951 S.W.2d 394, 396 (Tex. 1997) (declaring that "[m]andamus is an extraordinary proceeding, encompassing an extraordinary remedy."); CSR Ltd. v. Link, 925 S.W.2d 591, 596 (Tex. 1996) (finding "extraordinary circumstances" in the case, which justified the "extraordinary remedy" of mandamus because of problems inherent in mass tort cases); Polaris Inv. Management Corp. v. Abascal, 892 S.W.2d 860, 861 (Tex. 1995) (denying mandamus relief "because a writ of mandamus is granted only in very narrow and extraordinary circumstances, which are not present here"); *see also* Braden v. Downey, 811 S.W.2d 922, 928 (Tex. 1991) (expressing concern that appellate courts "not embroil themselves unnecessarily in incidental pre-trial rulings" or mandamus "would soon cease to be an extraordinary writ").

7. Walker v. Packer, 827 S.W.2d 833, 840 (Tex. 1992) (quoting Holloway v. Fifth Court of Appeals, 767 S.W.2d 680, 684 (Tex. 1989)).

8. *See, e.g.*, Tilton v. Marshall, 925 S.W.2d 672, 695–96 (Tex. 1996) (Enoch, J., dissenting); *CSR Ltd.*, 925 S.W.2d at 600–01 (Baker, J., dissenting); National Indus. Sand Ass'n v. Gibson, 897 S.W.2d 769, 776–77 (Tex. 1995) (Cornyn, J., dissenting); National Union Fire Ins. Co. v. Ninth Court of Appeals, 864 S.W.2d 58, 62–64 (Tex. 1993) (Phillips, C.J., dissenting); Alan T. Copperman & Lanny D. Ray, Comment, *Mandamus Granted or Mandamus Denied? Confusing Standards to Remedy an Improperly Overruled Special Appearance*, 48 BAYLOR L. REV. 1175, 1180 (1996).

9. Alan T. Copperman & Lanny D. Ray, Comment, *Mandamus Granted or Mandamus Denied? Confusing Standards to Remedy an Improperly Overruled Special Appearance*, 48 BAYLOR L. REV. 1175, 1180 (1996); *see also* Beth K. Neese, Comment, *Texas in the Wake of* Canadian Helicopters: *Are Nonresident Defendants' Due Process Rights Going Down in Flames?*, 34 HOUS. L. REV. 503, 507 (1997) (noting the confusion and inconsistencies created by mandamus law); Lanny D. Ray, Comment, *Dominant Jurisdiction: The Rise and Fall of Exclusive Jurisdiction in Texas*, 48 BAYLOR L. REV. 293, 294–95 (1996) (discussing confusion in applying mandamus in Texas courts).

a particular case may not always be readily predicted, the court's decisions appear to be guided by certain fundamental precepts regarding the availability of mandamus. This Article will examine those precepts in an attempt to demystify Texas mandamus practice. Part II discusses mandamus jurisdiction, and then Part III focuses on the substantive requirements for the issuance of mandamus. Part IV concentrates on the procedural prerequisites for mandamus, including a discussion of the recently amended Texas Rules of Appellate Procedure. This Article concludes in Part V by discussing the most common errors made by practitioners in filing mandamus proceedings.

II. JURISDICTION

Article V, Section 3 of the Texas Constitution provides the constitutional basis for the supreme court's jurisdiction to issue writs of mandamus.[10] This constitutional provision elucidates that the supreme court "may issue the writ[ ] of mandamus . . . and such other writs, as may be necessary to enforce its jurisdiction. The Legislature may confer original jurisdiction on the [Texas] Supreme Court to issue writs of . . . mandamus in such cases as may be specified. . . ."[11] Accordingly, there are two jurisdictional bases for the supreme court to issue mandamus under the state constitution: (1) when mandamus is necessary to enforce the court's appellate jurisdiction, and (2) when original mandamus jurisdiction has been conferred by the legislature.

The legislature has conferred original mandamus jurisdiction on the supreme court in Section 22.002(a) of the Texas Government Code, which provides:

> The supreme court or a justice of the supreme court may 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 the 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.[12]

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10. *See* TEX. CONST. art. V, § 3 (authorizing the supreme court to issue writs of mandamus).

11. *Id.*

12. TEX. GOV'T CODE ANN. § 22.002(a) (Vernon 1988).

The supreme court thus has original jurisdiction to issue writs of mandamus "agreeable to the principles of law" against statutory county and probate court judges, district court judges, courts of appeals and their justices, and most state government officers, but the court cannot issue mandamus against the governor or the court of criminal appeals. The supreme court also lacks original jurisdiction to issue mandamus against either a justice of the peace or a judge of a constitutional county court.[13]

The Texas Constitution also allows the legislature to confer jurisdiction on the courts of appeals to issue mandamus,[14] which the legislature has done in Section 22.221 of the Texas Government Code. Section 22.221(a) provides that a court of appeals "may issue a writ of mandamus and all other writs necessary to enforce the jurisdiction of the court."[15] Under this provision, a court of appeals may issue mandamus to protect its appellate jurisdiction over a cause.[16] In contrast, Section 22.221(b) constitutes the grant of

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13. *See* Pat Walker & Co. v. Johnson, 623 S.W.2d 306, 308 (Tex. 1981). The court in *Pat Walker* interpreted a predecessor statute to Section 22.002(a), which provided that the supreme court could issue writs of mandamus against "'any district judge, or [c]ourt of [a]ppeals or judges thereof, or any officer of the [s]tate [g]overnment except the Governor.'" *Id.* (quoting TEX. REV. CIV. STAT. ANN. art. 1733 (Vernon 1962)). The court concluded that, under this statute, it did not have original jurisdiction to issue a writ of mandamus against any county or district officer, other than a district judge; thus, the court could not issue mandamus relief in an original proceeding brought against the official court reporter of a district court. *See id.* at 308–09.

Because Section 22.002(a) of the Government Code now expressly allows the supreme court to issue mandamus against a statutory county court judge or a statutory probate court judge, the prior prohibition on the supreme court exercising its original jurisdiction against these types of judges no longer exists. *See* TEX. GOV'T CODE ANN. § 22.002(a) (Vernon 1988). The supreme court, however, is still without original jurisdiction to issue mandamus against any other county or district officer not mentioned in Section 22.002(a), unless the issuance of mandamus against such an officer is necessary to enforce the supreme court's appellate jurisdiction over a cause under Article V, Section 3 of the Texas Constitution. *See id.*

14. *See* TEX. CONST. art. V, § 6 (providing that courts of appeals "shall have such other jurisdiction, original and appellate, as may be prescribed by law").

15. TEX. GOV'T CODE ANN. § 22.221(a) (Vernon 1988).

16. *See, e.g.*, Dallas Morning News v. Fifth Court of Appeals, 842 S.W.2d 655, 657–58 (Tex. 1992) (opinion accompanying order overruling motion for leave to file petition for writ of mandamus of Gonzalez, J., joined by Phillips, C.J., and Cook, Hecht, and Cornyn, JJ.) (recognizing that courts of appeals may issue writs of mandamus to safeguard jurisdiction and prevent appeals from becoming moot); Palacio v. Johnson, 663 S.W.2d 490, 491 (Tex. App.—Houston [1st Dist.] 1983, orig. proceeding) (announcing that "[t]his court has jurisdiction to mandamus a court reporter to prepare a statement of facts required to resolve questions raised on appeal, in order to protect our jurisdiction."); Texas Employment

original mandamus jurisdiction to the courts of appeals, allowing the issuance of 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 . . . in the court of appeals district."[17]

Accordingly, both the supreme court and the courts of appeals have concurrent original jurisdiction to issue mandamus against district and statutory county court judges.[18] Under Texas Rule of Appellate Procedure 52.3(e), when the supreme court and a court of appeals have concurrent jurisdiction, "the petition must be presented first to the court of appeals unless there is a compelling reason not to do so."[19] Thus, in the absence of a "compelling reason," the supreme court will not act on a mandamus petition against a district or a statutory county court judge unless the petition was first filed in a court of appeals.[20]

Only in a handful of cases has the supreme court determined that a "compelling reason" justified such a bypass of the court of appeals. These cases almost all involve some type of time-sensitive dispute related to a statewide election or state party convention. For instance, in *Republican Party of Texas v. Dietz*,[21] the supreme

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Comm'n v. Norris, 634 S.W.2d 85, 86 (Tex. App.—Beaumont 1982, no writ) (stating that "[t]his [c]ourt is authorized to issue such writs as may be necessary to protect the jurisdiction of this [c]ourt and to prevent the case from becoming moot.").

17. TEX. GOV'T CODE ANN. § 22.221(b) (Vernon 1988).

18. *See* Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 917 (Tex. 1985). Concurrent jurisdiction is not usually a problem when considering a court's power to issue mandamus to protect its appellate jurisdiction over a cause. Under most circumstances, only the court with appellate jurisdiction over the cause can issue mandamus to protect its jurisdiction. However, under the recent amendments to the Texas Rules of Appellate Procedure, there may be situations in which both a court of appeals and the supreme court have concurrent appellate jurisdiction over a cause. For instance, under Texas Rule of Appellate Procedure 19.2, a court of appeals retains plenary power to vacate or modify its judgment for a period set by rule 19.1, even if a party has filed a petition for review in the state supreme court, thus invoking the supreme court's jurisdiction. *See* TEX. R. APP. P. 19.2. In such a situation, the court of appeals has jurisdiction to modify or vacate its judgment at the same time the supreme court has jurisdiction to review the court of appeals' judgment. *See id.* It would appear that either court could issue mandamus in such a situation if the issuance of mandamus was necessary to protect that court's appellate jurisdiction over the case.

19. TEX. R. APP. P. 52.3(e).

20. *See* Mendoza v. Eighth Court of Appeals, 917 S.W.2d 787, 789 (Tex. 1996).

21. 940 S.W.2d 86 (Tex. 1997).

court concluded that the Republican Party did not have to first seek mandamus relief in the court of appeals to challenge a trial court's injunction prohibiting the party from refusing to provide a booth at the party convention and advertising space in the convention's program to the Log Cabin Republicans (a group supporting equal civil rights for gay and lesbian individuals).[22] The court reasoned that, because the case presented an issue of statewide application that could have become moot without the court's immediate attention, it was not necessary for the Republican Party to first file its mandamus petition in the court of appeals.[23] Similarly, in *Sears v. Bayoud*,[24] the court allowed the relator to file a writ of mandamus in the supreme court because it involved an issue of statewide application, a candidate's eligibility to run for statewide office, that necessitated immediate court review or it could become moot.[25] Consequently, unless the case involves a time-sensitive issue of statewide concern, such as an election dispute, an original proceeding must be filed in the court of appeals before the petition is filed in the supreme court if the court of appeals has jurisdiction over the proceeding.

The legislative grants of original mandamus jurisdiction to the supreme court and the courts of appeals are independent from their appellate jurisdiction.[26] Therefore, any limitations placed by the legislature on a court's appellate jurisdiction do not preclude a court from exercising original mandamus jurisdiction over a particular case. For example, in *Deloitte & Touche L.L.P. v. Fourteenth Court of Appeals*,[27] the supreme court held that it had jurisdiction over Deloitte & Touche's mandamus petition arising from the interlocutory appeal of a class certification decision despite the fact that, under Section 22.225(b)(3) of the Government Code, a writ of

22. *See Republican Party of Tex.*, 940 S.W.2d at 94.

23. *See id.* The district court's injunction was issued on Friday, June 14, 1996, less than a week before the Republican Party of Texas Convention opened on June 20. *See id.* at 88, 94.

24. 786 S.W.2d 248 (Tex. 1991).

25. *See Sears*, 786 S.W.2d at 249–50; *see also* LaRouche v. Hannah, 822 S.W.2d 632, 633–34 (Tex. 1992) (citing *Sears*' rationale that the impending election was a "compelling reason" excusing the plaintiff from first seeking relief in the court of appeals).

26. *See* Deloitte & Touche L.L.P. v. Fourteenth Court of Appeals, 951 S.W.2d 394, 396 (Tex. 1997).

27. 951 S.W.2d 394 (Tex. 1997).

error is not allowed from the supreme court in such a case.[28] The trial court in *Deloitte & Touche* had denied plaintiffs' class certification request; accordingly, the plaintiffs pursued an interlocutory appeal to the court of appeals under Section 51.014(3) of the Civil Practice and Remedies Code.[29] The court of appeals then ordered the class certified.[30] Deloitte & Touche filed an application for writ of error and a petition for writ of mandamus in the supreme court to challenge the court of appeals' decision.[31] The supreme court dismissed the application for writ of error for want of jurisdiction because an appeal of an interlocutory class certification order is final in the court of appeals absent a dissent or a conflict.[32] Therefore, the supreme court was without appellate jurisdiction over the case. However, the supreme court concluded that it still had jurisdiction to consider Deloitte & Touche's mandamus petition.[33]

The court first reasoned that, under Section 22.002(a) of the Government Code, it had mandamus jurisdiction over the courts of appeals.[34] Further, because its original mandamus jurisdiction was not dependent on its appellate jurisdiction,[35] the court concluded that it could exercise mandamus jurisdiction over the case unless

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28. *See Deloitte & Touche*, 951 S.W.2d at 396.

29. *See id.* at 395.

30. *See id.* (citing Weatherly v. Deloitte & Touche, 905 S.W.2d 642, 655 (Tex. App.—Houston [14th Dist.] 1995, writ dism'd w.o.j.)).

31. *See id.*

32. *See* Deloitte & Touche L.L.P. v. Fourteenth Court of Appeals, 951 S.W.2d 394, 395 (Tex. 1997). Section 22.225(b)(3) of the Government Code provides that "a judgment of a court of appeals is conclusive on the law and facts, and a writ of error is not allowed from the supreme court, in . . . interlocutory appeals that are allowed by law." TEX. GOV'T CODE ANN. § 22.225(b)(3) (Vernon Supp. 1998). Section 22.225(c) provides two limited exceptions to the finality of an interlocutory class certification appeal in the court of appeals: (1) if "the justices of the courts of appeals disagree on a question of law material to the decision," or (2) if "one of the courts of appeals holds differently from a prior decision of another court of appeals or of the supreme court." *Id.* § 22.225(c). Because neither of these exceptions were met in *Deloitte & Touche*, the supreme court did not have appellate jurisdiction over the case. *See Deloitte & Touche*, 951 S.W.2d at 395–96.

33. *See Deloitte & Touche*, 951 S.W.2d at 396.

34. *See id.*

35. *See id.* The court based this conclusion on cases such as *National Union Fire Insurance Co. v. Ninth Court of Appeals*, 864 S.W.2d 58 (Tex. 1993), in which the court conditionally issued mandamus to compel the court of appeals to allow the filing of a statement of facts, despite the fact that the supreme court did not yet have appellate jurisdiction over the case. *See id.* at 61–62; *see also* State *ex rel.* Pettit v. Thurmond, 516 S.W.2d 119, 123 (Tex. 1974) (conditionally granting mandamus to compel the trial court to vacate a criminal sentence although the supreme court only has appellate jurisdiction over civil matters).

the legislature had specifically excluded class certification rulings from its mandamus jurisdiction.[36] Because the legislature had not enacted such an exclusion, the court held that it could exercise original mandamus jurisdiction.[37]

However, a determination that a court has jurisdiction to consider a mandamus petition does not end the inquiry. Courts exercise mandamus power "sparingly and deliberately."[38] Under the "principles of law" regulating mandamus, mandamus only issues to correct a clear abuse of discretion when no other adequate remedy at law exists.[39]

III. Substantive Requirements for Mandamus Relief

While mandamus is a legal remedy rather than an equitable remedy, its issuance is largely governed by equitable principles.[40] Thus, in addition to the requirement that the relator[41] establish that the respondent[42] clearly abused its discretion in making its decision,[43] the relator must also demonstrate compliance with certain equitable principles before being entitled to the extraordinary writ. These equitable principles include showing that the relator has no adequate remedy at law,[44] and that the relator has diligently pur-

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36. *See Deloitte & Touche*, 951 S.W.2d at 396.

37. *See* Deloitte & Touche L.L.P. v. Fourteenth Court of Appeals, 951 S.W.2d 394, 396 (Tex. 1997).

38. *Id.* In fact, in *Deloitte & Touche*, the supreme court denied the petition for writ of mandamus after concluding that it had mandamus jurisdiction over the case. *See id.* at 397–98.

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

40. *See* Rivercenter Assocs. v. Rivera, 858 S.W.2d 366, 367 (Tex. 1993); Callahan v. Giles, 137 Tex. 571, 575, 155 S.W.2d 793, 795 (Tex. 1941); McGrew v. Heard, 779 S.W.2d 455, 458 (Tex. App.—Houston [1st Dist.] 1989, orig. proceeding).

41. *See* Tex. R. App. P. 52.2 (defining a relator as the party seeking mandamus relief).

42. *See id.* (explaining that the respondent is the person or entity against whom mandamus relief is sought, whether a judge, court, tribunal, officer, or other person).

43. *See* Walker v. Packer, 827 S.W.2d 833, 839 (Tex. 1992). Historically, mandamus was available only to compel the performance of a ministerial act or duty required by law. *See id.*; *see also* 6 McDonald's Texas Civil Practice § 35.1, at 656 (Richard Orsinger ed., 1992) (stating that "traditionally, mandamus would issue only when the act in question was clearly required by law, was ministerial in character, involved no exercise of discretion, and left no alternatives"). While mandamus is still available to compel purely ministerial duties, this remedy was expanded to correct a trial court's clear abuse of discretion. *See Walker*, 827 S.W.2d at 839.

44. *See infra* notes Part III.B and accompanying text.

sued his or her rights.[45] Moreover, the supreme court will not issue mandamus relief unless it concludes that the error of the lower court was of such importance to the jurisprudence of the state as to require correction.[46]

A. *Clear Abuse of Discretion*

A 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."[47] However, this standard has different applications depending on whether the relator is complaining of the court's resolution of factual issues or matters committed to the trial court's discretion, or whether the relator is complaining of the trial court's determination of legal principles controlling its ruling.[48]

1. Resolution of Factual Matters

In order to establish that a court clearly abused its discretion in the resolution of a factual issue or a matter committed to the trial court's discretion, the relator must establish that the court "could reasonably have reached only one decision."[49] The reviewing court may not substitute its judgment for that of the lower court.[50] Even if the reviewing court would have decided the issue differently, it cannot disturb the lower court's decision unless the decision is shown to be arbitrary and wholly unreasonable.[51]

Careful scrutiny of the supreme court's decisions reveals that two different applications of this abuse-of-discretion standard actually exist: one for reviewing pure factual issues and one for reviewing matters committed to the discretion of the trial court. Although this distinction has never been explicitly recognized by

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45. *See infra* notes Part III.C and accompanying text.

46. *See infra* notes Part III.D and accompanying text.

47. Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 917 (Tex. 1985); *see Walker*, 827 S.W.2d at 839 (quoting *Johnson*, 700 S.W.2d at 917).

48. *See* Walker v. Packer, 827 S.W.2d 833, 839–40 (Tex. 1992).

49. Liberty Nat'l Fire Ins. Co. v. Akin, 927 S.W.2d 627, 629 (Tex. 1996); TransAmerican Natural Gas Corp. v. Flores, 870 S.W.2d 10, 12 (Tex. 1994); GTE Communications Sys. Corp. v. Tanner, 856 S.W.2d 725, 729 (Tex. 1993); *Walker*, 827 S.W.2d at 840; *Johnson*, 700 S.W.2d at 917.

50. *See* Eli Lilly & Co. v. Marshall, 850 S.W.2d 155, 157 (Tex. 1993); *Walker*, 827 S.W.2d at 839; Flores v. Fourth Court of Appeals, 777 S.W.2d 38, 41–42 (Tex. 1989).

51. *See Walker*, 827 S.W.2d at 840.

the court, *Chrysler Corp. v. Blackmon*[52] illustrates both of these applications.

Chrysler sought a writ of mandamus directing the trial court to vacate a "death penalty" sanction in which Chrysler's pleadings were struck and a default judgment was rendered against Chrysler on all issues of liability.[53] The trial court's sanction order included a number of findings of fact.[54] In reviewing the appropriateness of the sanction order, the supreme court considered the deference that should be given to the trial court's findings.[55] The court recognized that the following two approaches were being utilized by the courts of appeals when reviewing a trial court's findings: (1) the legal and factual sufficiency standard of review applicable to appeals of nonjury trials,[56] or (2) the abuse-of-discretion standard enunciated in *Walker*.[57] The supreme court concluded that the correct approach was to apply the abuse-of-discretion standard, distinguishing this standard from the legal and factual sufficiency standard of review.[58]

Despite the supreme court's admonition regarding the distinction between a sufficiency review and the abuse-of-discretion standard, the *Chrysler* court stated that, upon review of the entire record, there was "*no evidence* that would justify the presumption of lack of merit of Chrysler's defense."[59] At another juncture in the opinion, the court further concluded there was "no evidence" to justify a certain presumption made by the trial court.[60] Of course, the references to "no evidence" are consistent with a legal

52. 841 S.W.2d 844 (Tex. 1992).

53. *See Chrysler Corp.*, 841 S.W.2d at 845.

54. *See id.* at 851 & n.13.

55. *See id.* at 851.

56. *See id.* at 852. The San Antonio court of appeals utilized this approach in *Hartford Accident & Indem. Co. v. Abascal*, 831 S.W.2d 559, 560 (Tex. App.—San Antonio 1992, orig. proceeding).

57. *See* Chrysler Corp. v. Blackmon, 841 S.W.2d 844, 852 (Tex. 1992). The Waco court of appeals utilized this approach in its decision in *United States Fidelity & Guaranty Co. v. Rossa*, 830 S.W.2d 668, 672 (Tex. App.—Waco 1992, writ denied).

58. *See Chrysler Corp.*, 841 S.W.2d at 852.

59. *Id.* at 852–53 (emphasis added).

60. *See id.* at 850 (stating "[t]here is no evidence in the record that the missing tests exist or are within Chrysler's possession, custody, or control . . . . This record contains no evidence to justify such a presumption.").

sufficiency review,[61] the very review the supreme court rejected in the course of its decision.

While the supreme court never explained this discrepancy, a logical exegesis exists. When reviewing a lower court's finding on a purely factual matter in a mandamus proceeding, the reviewing court applies a legal sufficiency review to determine whether the lower court abused its discretion in making that finding.[62] However, when the court is reviewing a lower court's ultimate conclusion on a matter committed to the discretion of the trial court, which usually involves a mixed question of law and fact, the reviewing court determines, based on a review of the entire record, whether the conclusion was arbitrary and unreasonable.[63] In such a situation, the reviewing court is not limited to determining whether there is some evidence supporting the underlying factual findings made by the lower court; instead, the court may review the entire record and reweigh the relevant factors, as long as the reviewing court accepts any purely factual findings made by the trial court that are supported by legally sufficient evidence.[64] Thus, in *Chrysler*, the supreme court properly applied a legal sufficiency review to determine that "no evidence" supported certain specific pure fact findings made by the trial court, and then correctly employed the *Walker* abuse-of-discretion standard to determine that the trial court's discretionary sanction order was arbitrary and unreasonable in view of the entire record.

While no Texas authority explicitly recognizing this demarcation exists, the anecdotal evidence is striking. Texas jurisprudence clearly supports the proposition that a legal sufficiency review is to be applied when reviewing a pure factual determination of a lower court. This approach is evidenced by a number of mandamus cases

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61. *See, e.g.*, Robert W. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361, 362–65 (1960); W. Wendell Hall, *Revisiting Standards of Review in Civil Appeals*, 24 ST. MARY'S L.J. 1045, 1132 (1993); William Powers, Jr. & Jack Ratliff, *Another Look at "No Evidence" and "Insufficient Evidence,"* 69 TEX. L. REV. 515, 517–18 (1991).

62. *Cf.* Chrysler Corp. v. Blackmon, 841 S.W.2d 844, 852–53 (Tex. 1992) (applying a legal and factual sufficiency standard of review in determining that "no evidence" supported certain specific pure fact findings made by the trial court).

63. *Cf. Chrysler*, 841 S.W.2d at 852 (holding that lower court's imposition of death penalty sanctions was an abuse of discretion after reviewing the record).

64. *Cf.* Walker v. Packer, 827 S.W.2d 833, 839–40 (Tex. 1992) (stating that reviewing court should examine the entire record to correctly perform an abuse of discretion review).

in which the supreme court has concluded that there was "no evidence" of a particular fact, leading the court to conclude that mandamus relief was justified.[65] Moreover, a reasoned application of the *Walker* abuse-of-discretion standard to a purely factual determination of a lower court is equivalent to a no-evidence review. A clear abuse of discretion under *Walker* occurs when the lower court "could reasonably have reached only one decision."[66] In resolving a purely factual matter, a court can reasonably reach more than one decision if there is conflicting evidence; only if there is no evidence to support the decision does the trial court clearly abuse its discretion by failing to reach the only reasonable decision.[67]

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65. *See, e.g.*, CSR Ltd. v. Link, 925 S.W.2d 591, 596 (Tex. 1996) (finding that "[t]he record contains no evidence that CSR took any act purposefully directed toward selling or distributing the raw asbestos fiber in Texas . . . . The Harris County courts, therefore, cannot exercise personal jurisdiction over CSR consistent with due process."); General Motors Corp. v. Tanner, 892 S.W.2d 862, 864 (Tex. 1995) (reasoning that "[i]n the absence of evidence that the tests would materially alter or destroy the mechanism, the trial court abused its discretion . . . ."); Geary v. Peavy, 878 S.W.2d 602, 604 (Tex. 1994) (acknowledging that "[i]t is undisputed that the girls resided in Minnesota with their father from birth until at least September 2, when [he] died. On this record, we find that Minnesota was the girls' home state on September 3, as there is no direct evidence that [their grandmother] had removed them from the state at that time or, if so, whether they had arrived in Texas."); National Union Fire Ins. Co. v. Ninth Court of Appeals, 864 S.W.2d 58, 61 (Tex. 1993) (concluding that "there is no evidence that National's mistake was deliberate or intentional. Consequently, we hold that National's mistake constitutes a reasonable explanation, and the court of appeals abused its discretion by holding otherwise."); GTE Communications Sys. Corp. v. Tanner, 856 S.W.2d 725, 729 (Tex. 1993) (finding "no evidence that GCSC had constructive possession of the document or a right to compel its production").

66. *Walker*, 827 S.W.2d at 840; *see supra* note 49.

67. The standard in conducting a "no evidence" review is whether reasonable minds could differ. *See* Havner v. E-Z Mart Stores, Inc., 825 S.W.2d 456, 459 (Tex. 1992); Kindred v. Con/Chem, Inc., 650 S.W.2d 61, 63 (Tex. 1983). Stated alternatively, the "no evidence" review standard is whether more than one inference can reasonably be drawn from the evidence. *See* State v. $11,014.00, 820 S.W.2d 783, 785 (Tex. 1991); Ross v. Green, 135 Tex. 103, 118, 139 S.W.2d 565, 572 (Tex. 1940). This is basically the same standard *Walker* applies to the resolution of a factual matter—whether the court could reasonably have reached only one decision. *See Walker*, 827 S.W.2d at 840. If there is no evidence to support an inferior court's finding or order, the inferior court clearly abuses its discretion because there is no factual dispute and there is only one decision that could reasonably have been reached. However, if the evidence in support of the lower court's finding is legally sufficient such that reasonable minds could differ, a factual dispute exists that cannot be resolved by the reviewing court, and the lower court could not abuse its discretion because there is more than one decision that could have been reasonably reached. *See* Davis v. Huey, 571 S.W.2d 859, 862 (Tex. 1978) (explaining that an abuse of discretion does not exist if the trial court bases its decision on conflicting evidence and some evidence reasonably supports the trial court's decision).

Additionally, the supreme court has repeatedly recognized that it cannot resolve conflicting factual assertions by the parties in a mandamus proceeding.[68] For instance, in *Mendoza v. Eighth Court of Appeals*,[69] the trial court, after holding an evidentiary hearing, denied the defendant's motion for sanctions based on the plaintiff counsel's alleged unlawful procurement of the defendant counsel's investigative notebook and videotape.[70] The court of appeals, however, conditionally granted mandamus and directed the trial court to sanction plaintiff's counsel, concluding that a presumption had arisen that plaintiff's counsel had unlawfully obtained confidential information.[71] The supreme court held that the court of appeals erred in granting mandamus relief and conditionally issued mandamus relief against the appellate court.[72] The supreme court concluded that there was conflicting evidence regarding whether plaintiff's counsel had unlawfully obtained the notebook and videotape.[73] Thus, the supreme court reasoned that, because the trial court's resolution of the conflicting evidence could not be disturbed on mandamus, the court of appeals improperly granted mandamus relief.[74]

Chrysler and *Mendoza* were both sanctions cases, but the supreme court applied different standards to review the trial court's ruling in each case. In *Mendoza*, the supreme court held that it could not review the trial court's resolution of a purely factual matter when there was conflicting evidence.[75] The court essentially employed a traditional legal sufficiency review in which it reviewed the evidence to determine whether there was any evidence of probative force to support the lower court's finding.[76]

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68. *See, e.g.*, Grant v. Thirteenth Court of Appeals, 888 S.W.2d 466, 468 (Tex. 1994); Hooks v. Fourth Court of Appeals, 808 S.W.2d 56, 60 (Tex. 1991); Brady v. Fourteenth Court of Appeals, 795 S.W.2d 712, 714 (Tex. 1990).

69. 917 S.W.2d 787 (Tex. 1996).

70. *See Mendoza*, 917 S.W.2d at 788–89.

71. *See id.* at 789.

72. *See id.* at 790.

73. *See id.*

74. *See* Mendoza v. Eighth Court of Appeals, 917 S.W.2d 787, 790 (Tex. 1996).

75. *See id.*

76. *See* Havner v. E-Z Mart Stores, Inc., 825 S.W.2d 456, 459 (Tex. 1992); Southern States Transp., Inc. v. State, 774 S.W.2d 639, 640 (Tex. 1989); *see also* W. Wendell Hall, *Revisiting Standards of Review in Civil Appeals*, 24 ST. MARY'S L.J. 1040, 1133 (1993) (noting that a finding must be upheld "[i]f there is any evidence of probative force to support the finding. . . .").

This standard was the proper method of review in *Mendoza* because the issue to be decided—whether counsel had unlawfully procured the notebook and videotape—was purely a question of fact with conflicting evidence. In contrast, the *Chrysler* court properly reviewed the entire record to determine whether the trial court clearly abused its discretion in issuing a death penalty sanction because the issuance of a discovery sanction is a matter committed to the discretion of the trial court.[77] The supreme court reviewed the pure underlying factual findings of the trial court under a "no evidence" standard, but then reserved for itself, after conducting a review of the entire record, the ultimate determination of whether the sanctions order was arbitrary and unreasonable.[78]

In another sanctions case, *GTE Communications Systems Corp. v. Tanner*,[79] the supreme court similarly reviewed a pure fact finding made by a trial court under a "no evidence" standard and then conducted a review of the entire record to determine that the trial court had abused its discretion in striking a party's pleadings for discovery abuse.[80] The court first evaluated the trial court's finding that the defendant had actual possession, custody, or control of a memorandum.[81] The court considered the plaintiff's proffered evidence, but held that it was "no more than mere surmise," such that there was "no evidence" supporting the finding that the defendant had the memorandum.[82] The supreme court then addressed the issue of whether, even assuming that the defendant did have possession, custody, or control of the memorandum, the trial court's imposition of case determinative sanctions for failing to produce such a document was "just" under Texas Rule of Civil Procedure

77. *See supra* notes 52–64 and accompanying text.

78. *See supra* notes 52–64 and accompanying text.

79. 856 S.W.2d 725 (Tex. 1993).

80. *See GTE Communications*, 856 S.W.2d at 729–30.

81. *See id.* at 728.

82. *Id.* at 729. Under a legal sufficiency review, when the evidence to prove a vital fact "is so weak as to do no more than create a mere surmise or suspicion of its existence, the evidence is no more than a scintilla and, in legal effect, is no evidence." Kindred v. Con/Chem, Inc., 650 S.W.2d 61, 63 (Tex. 1983). Thus, by concluding that the plaintiff's evidence was "no more than mere surmise," the supreme court in *GTE Communications* was essentially conducting a legal sufficiency review. *See GTE Communications*, 856 S.W.2d at 729; *see also* Global Servs., Inc. v. Bianchi, 901 S.W.2d 934, 938 (Tex. 1995) (insisting that there must be "some evidence" that a party has withheld documents from discovery before the imposition of sanctions is proper).

215.[83] The court reasoned that the record did not indicate why lesser sanctions would have been ineffective to remedy any such discovery abuse, leading the court to hold that the record did not justify death penalty sanctions.[84]

In *Remington Arms Co. v. Canales*,[85] the supreme court assessed whether the trial court had abused its discretion by not determining after an evidentiary hearing that good cause existed for the late filing of objections to a discovery request.[86] The supreme court did not disturb any of the trial court's fact findings, but concluded that, under the circumstances of the case, the trial court abused its discretion in failing to find good cause.[87] In another case, *Able Supply Co. v. Moye*,[88] the supreme court considered whether the trial court abused its discretion by ordering that each month only thirty of the three thousand plaintiffs had to answer an interrogatory that had been filed eight years ago.[89] While recognizing that the trial court had broad discretion to manage its docket, the court concluded that the facts and circumstances of the case mandated only one conclusion, and the trial court's failure to reach it was a clear abuse of discretion.[90] In both *Remington Arms* and *Able Supply*, the supreme court correctly reviewed the entire record and reweighed the undisputed facts and circumstances because the determinations involved matters of discretion rather than questions of fact.

Accordingly, while the supreme court has never explicitly recognized a distinction between the application of the abuse-of-discretion standard depending on whether a pure factual issue or a

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83. *See GTE Communications*, 856 S.W.2d at 729.

84. *See* GTE Communications Sys. Corp. v. Tanner, 856 S.W.2d 725, 729–30 (Tex. 1993). In another death penalty sanctions case, the supreme court first disregarded a number of the trial court's findings supporting the sanction order on the ground that the failure to obtain a pretrial ruling on discovery disputes existing before trial waived any claim for sanctions based on that conduct, and then concluded that the remaining findings did not warrant the imposition of such a severe sanction. Remington Arms Co. v. Caldwell, 850 S.W.2d 167, 170–72 (Tex. 1993). Justice Doggett urged in his dissent that the court was not properly applying the abuse-of-discretion standard, but was instead conducting a de novo review. *See id.* at 175 (Doggett, J., dissenting).

85. 837 S.W.2d 624 (Tex. 1992).

86. *See Remington Arms*, 837 S.W.2d at 624–25.

87. *See id.* at 625–26.

88. 898 S.W.2d 766 (Tex. 1995).

89. *See Able Supply*, 898 S.W.2d at 767–78.

90. *See id.* at 770–71.

matter committed to the trial court's discretion is being evaluated, an analysis of the court's decisions reveals a clear demarcation in the operation of the standard. If the court is reviewing a pure factual issue, a legal sufficiency review is appropriate.[91] If the court is considering a matter committed to the trial court's discretion, the court reviews the entire record, reweighing the facts and circumstances in accordance with the trial court's findings on disputed facts, to determine whether the trial court abused its discretion by acting arbitrarily and unreasonably in failing to reach the only reasonable decision.[92] A review of a matter committed to the trial court's discretion is thus less deferential than a review of a pure fact finding made by the trial court, but the reviewing court shows even less deference when considering a legal determination made by the lower court.

2. Determination of Legal Principles

A review of the lower court's determination of the legal principles controlling its ruling is much less deferential than a review of the lower court's resolution of factual matters or matters committed to the trial court's discretion.[93] A lower court "has no discretion in determining what the law is or applying the law to the facts."[94] Therefore, a clear failure by the lower court to analyze or apply the law correctly is an abuse of discretion.[95] Further, because a lower court has no discretion in the determination of the law or the application of the law to the facts, a lower court's erroneous legal conclusion, even in an unsettled area of law, constitutes

91. *See supra* notes 65–67 and accompanying text.

92. *See supra* notes 63–64, 85–90 and accompanying text.

93. *See* Granada Corp. v. First Court of Appeals, 844 S.W.2d 223, 225 (Tex. 1992).

94. Mitchell Energy Corp. v. Ashworth, 943 S.W.2d 436, 437 (Tex. 1997); TransAmerican Natural Gas Corp. v. Flores, 870 S.W.2d 10, 12 (Tex. 1994); *Granada*, 844 S.W.2d at 226; Walker v. Packer, 827 S.W.2d 833, 840 (Tex. 1992).

95. *See* Huie v. DeShazo, 922 S.W.2d 920, 927 (Tex. 1996); *Granada*, 844 S.W.2d at 226; *Walker*, 827 S.W.2d at 840.

an abuse of discretion.[96] The reviewing court simply will not defer to a lower court's judgment on a matter of law.[97]

As a result of the much less deferential standard of review germane to a lower court's determination of "legal principles," identifying the situations in which this standard applies is imperative. There are three basic methods by which a lower court can clearly abuse its discretion in making a legal determination: (1) by failing to apply the proper law or legal standard to the facts of the case, (2) by making an erroneous legal conclusion based on the undisputed facts or circumstances of the case, or (3) by misinterpreting the law.

Walker v. Packer provides a good example of a lower court abusing its discretion by failing to apply the proper legal standard. In *Walker*, the supreme court held that the trial court misapplied the governing law by refusing to require the production of requested documents on the sole basis that the requests, while seeking information at least partially relevant to the lawsuit, were a prohibited attempt to impeach a non-party witness.[98] The supreme court reasoned that the trial court's categorical denial of discovery on this basis was an erroneous legal conclusion constituting a clear abuse of discretion.[99] The court noted, however, that it was not deciding whether the documents were properly discoverable, but only that the trial court erred in denying the discovery on the sole basis that documents sought to impeach a non-party witness were not discoverable.[100] Rather than determining that the trial court clearly abused its discretion in its ultimate determination, the supreme

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96. *See Huie*, 922 S.W.2d at 927–28. The supreme court has held that a trial court incorrectly determined what the law was, thereby "abusing its discretion," by following 100 years of precedent disallowing the discovery of a defendant's net worth when the court decided to overrule that precedent in the course of deciding the relator's mandamus petition. *See* Lunsford v. Morris, 746 S.W.2d 471, 472–73 (Tex. 1988); *see also* National Tank Co. v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993) (modifying the law regarding "anticipation of litigation" but, rather than issuing mandamus relief, the court denied the writ "without prejudice to allow the trial court to reconsider . . . in light of today's opinion"). Accordingly, under the proper circumstances, mandamus may be a proper vehicle to modify or clarify the law in cases in which there is no adequate remedy by appeal. *See id.*

97. *See* National Med. Enters., Inc. v. Godbey, 924 S.W.2d 123, 134 (Tex. 1996).

98. *See Walker*, 827 S.W.2d at 838–40.

99. *See* Walker v. Packer, 827 S.W.2d 833, 840 (Tex. 1992).

100. *See id.* at 839 n.6.

court concluded that the trial court erred by applying an incorrect legal standard to the case.[101]

Similarly, in *Huie v. DeShazo*,[102] the court held that the trial court made an "erroneous legal conclusion" by determining that the attorney-client and work product privileges were inapplicable to pre-litigation communications between a trustee and the trustee's attorney.[103] However, the court did not hold that the trustee's attorney did not have to answer all of the certified questions propounded by the beneficiary, but instead directed the trial court to reconsider the privilege claims in accordance with the correct legal standard.[104]

In another case, *National Union Fire Insurance Co. v. Ninth Court of Appeals*,[105] the supreme court held that the court of appeals committed an error of law in not granting an extension of time to file a statement of facts.[106] Although the granting or denial of such an extension was entirely discretionary with the appellate court under former Texas Rule of Appellate Procedure 54(c), the court of appeals had misapplied legal principles by ruling that the party's motion was deficient because it did not reasonably explain the need for the extension.[107] Thus, while the court of appeals clearly could have reached the same decision on entirely discretionary grounds without being subject to mandamus review, the fact that the appellate court based its discretionary ruling on an incorrect application of legal principles allowed the supreme court to conclude that a clear abuse of discretion occurred.[108]

A lower court can also clearly abuse its discretion by making an erroneous ruling as a matter of law based on the facts and circum-

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101. *See id.* at 840.
102. 922 S.W.2d 920 (Tex. 1996).
103. *See Huie*, 922 S.W.2d at 926–27.
104. *See id.* at 927–28.
105. 864 S.W.2d 58 (Tex. 1993).
106. *See National Union*, 864 S.W.2d at 59–60.
107. *See id.*
108. *See id.* at 60 & n.4. There are several other cases in which the supreme court has held that a lower court abused its discretion by failing to properly apply the correct legal standard, but the reasoning in these cases is often perfunctory. *See, e.g.,* Chapa v. Garcia, 848 S.W.2d 667, 668 (Tex. 1992) (reasoning that the trial court abused its discretion by failing to analyze or apply the law correctly in determining that certain documents were privileged); NCNB Tex. Nat'l Bank v. Coker, 765 S.W.2d 398, 400 (Tex. 1989) (concluding that the trial court's failure to apply the proper standard of law to a motion to disqualify counsel was an abuse of discretion).

stances of the case. In *National Medical Enterprises, Inc. v. Godbey*,[109] the supreme court issued mandamus because the trial court made an error of law in failing to disqualify a law firm.[110] After adopting all of the facts found by the trial court, the supreme court concluded that the ultimate determination of whether the firm was disqualified on the basis of these facts was a question of law, and that no deference should be accorded to the trial court's decision.[111] Similarly, in *Joachim v. Chambers*,[112] the court held that, under the circumstances of the case, a judge could not be called as an expert witness in the case consistent with the Code of Judicial Conduct.[113] While the court did not specify that it was reviewing a question of law, the court clearly conducted a de novo review of all the facts and circumstances of the case to come to its conclusion without affording any deference to the trial court's ruling.[114]

Finally, a lower court clearly abuses its discretion when it misinterprets the law. For example, in *Mitchell Energy Corp. v. Ashworth*,[115] the supreme court concluded that the respondent clearly abused his discretion by misconstruing a statute regarding objec-

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109. 924 S.W.2d 123 (Tex. 1996).

110. *See National Med. Enters.*, 924 S.W.2d at 133.

111. *See id.* at 133–34. Justice Baker dissented, arguing that the court erred by not affording the proper deference to the trial court. *See id.* at 134 (Baker, J., dissenting). Justice Baker urged that the trial court's determination in the case involved a resolution of factual issues such that the trial court could not abuse its discretion unless it failed to reach the only reasonable decision. *See id.* at 136–38.

In reality, the disagreement between the majority and dissent centered on the appropriate application of the abuse-of-discretion standard—whether a pure legal issue was involved such that the trial court had no discretion, or whether a mixed question of law and fact was involved such that the trial court's ruling should be afforded greater deference. The disagreement in this case between the majority and the dissent illustrates the importance of properly identifying the correct application of the abuse-of-discretion standard.

112. 815 S.W.2d 234 (Tex. 1991).

113. *See Joachim*, 815 S.W.2d at 240.

114. *See id.* Later, *Joachim* was cited as authority for the proposition that "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 v. Packer, 827 S.W.2d 833, 840 (Tex. 1992).

The supreme court followed a similar mode in reviewing a trial court's order enjoining the commencement of the state high school baseball tournament in *Eanes Independent School District v. Logue*, 712 S.W.2d 741, 742 (Tex. 1986), and in reviewing whether the inadvertent disclosure of certain privileged documents was involuntary in *Granada Corp. v. First Court of Appeals*, 844 S.W.2d 223, 226–27 (Tex. 1992).

115. 943 S.W.2d 436 (Tex. 1997).

tions to the assignment of judges.[116] Because the interpretation of a statute is a pure question of law, the respondent had no discretion in making his determination on the only issue presented in the mandamus action.[117]

3. Compendium of the Clear Abuse of Discretion Standard

The clear abuse-of-discretion standard is multi-faceted because it "is a function of the distribution of decision-making authority among trial and appellate courts."[118] In accordance with the proper distribution of authority, appellate courts are much more likely to conclude that a trial court abused its discretion in a legal determination, which is usually subject to de novo review, rather than a factual determination or matter committed to the discretion of a trial court.[119] Therefore, appellate courts reviewing lower court rulings as well as practitioners complaining of a lower court ruling should first focus on any legal errors made by the lower court, then consider any matters committed to the court's discretion, and finally address any disputes on purely factual matters.

Initially, the reviewing court should determine whether the lower court made a legal error. As previously mentioned, a legal error is present if the lower court failed to apply the proper law or legal standard to the facts of the case, made an erroneous legal conclusion based on the undisputed facts or circumstances of the case, or misinterpreted the law.[120] The latter two circumstances occur when the ultimate question to be decided (*i.e.*, whether or not an attorney or judge is to be disqualified, the proper interpretation of a statute) is a question of law.[121] In these situations, the reviewing court is to pay no deference to the lower court's determination, but instead conduct a de novo review of the facts and circum-

116. *See Mitchell Energy*, 943 S.W.2d at 437.

117. *See id.*

118. K.D.F. v. Rex, 878 S.W.2d 589, 593 (Tex. 1994).

119. *Cf. In re* J.C.C., 952 S.W.2d 47, 49 (Tex. App.—San Antonio 1997, no writ) (indicating that in applying the abuse of discretion standard, the reviewing court "defer[s] to the trial court's factual determinations while reviewing its legal determinations de novo"); Pony Express Courier Corp. v. Morris, 921 S.W.2d 817, 820 (Tex. App.—San Antonio 1996, no writ) (stating that "by applying the abuse of discretion standard, the reviewing court defers to the trial court's factual determinations while properly fulfilling its role to determine questions of law de novo").

120. *See supra* notes 98–117 and accompanying text.

121. *See supra* notes 109–17 and accompanying text.

stances to reach its own conclusion.[122] However, in conducting this de novo review, the court should resolve any conflict in the underlying facts in a manner consistent with the lower court's findings, provided some evidence to support such an implied or express finding exists.

If the ultimate determination is a mixed question of law and fact, or if it involves a discretionary determination by the lower court, the reviewing court should first determine whether the lower court erred by failing to apply the proper law or legal standard to the case. If the lower court failed to apply the proper legal standard, the lower court abused its discretion even if the ultimate determination made by the lower court could possibly be supported on other grounds.[123] In most cases, the correct remedy for such an abuse is to conditionally issue mandamus and require the lower court to vacate its prior order and then reconsider the matter using the proper legal standard.[124]

If the lower court applied the correct legal standard to a discretionary matter, the next inquiry is whether the court failed to reach the only reasonable decision. The appellate court should review the entire record and reweigh the relevant factors, but it must accept any purely factual findings made or implied by the lower court that are supported by legally sufficient evidence. The reviewing court cannot substitute its judgment for that of the lower court—it can issue mandamus only if it concludes that the lower court's ruling was arbitrary and wholly unreasonable because it failed to reach the only reasonable determination.[125]

The last inquiry is whether the lower court clearly abused its discretion on a pure issue of fact. When an appellate court is asked to review a purely factual determination, the same standards that apply to no evidence challenges should be utilized to determine

122. *See supra* notes 109–17 and accompanying text.

123. *See* National Union Fire Ins. Co. v. Ninth Court of Appeals, 864 S.W.2d 58, 59–60 & n.4 (Tex. 1993) (holding that the appellate court clearly abused its discretion by applying the law incorrectly even though the court of appeals could have reached the same decision on discretionary grounds).

124. *See* Huie v. DeShazo, 922 S.W.2d 920, 926–28 (Tex. 1996); Walker v. Packer, 827 S.W.2d 833, 839–40 (Tex. 1992).

125. *See supra* notes 49–92 and accompanying text.

whether the lower court abused its discretion in making that determination.[126]

This multi-faceted suggested framework corresponds with the supreme court's decisions and should allow practitioners and reviewing courts to properly analyze the controlling application of the abuse-of-discretion standard in a particular case. The analysis can then turn to the adequacy of any potential appellate remedy.

B. *No Adequate Remedy at Law*

Mandamus will not issue when an adequate legal remedy exists, such as an appeal.[127] An appellate remedy is not inadequate merely because it involves more delay or expense than obtaining an extraordinary writ.[128] Thus, the cost or delay of having to go through a trial and a subsequent appeal generally does not make an appellate remedy inadequate.[129] Instead, the extraordinary writ of mandamus will only issue in situations involving "manifest and urgent necessity" for grievances that may not be rectified by other remedies.[130]

While these broad governing principles are easily stated, the application of the concepts to a particular controversy sometimes generates confusion.[131] The best method to alleviate this confusion

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126. *See supra* notes 49–92 and accompanying text.

127. *See Walker*, 827 S.W.2d at 840 (indicating that "[m]andamus will not issue where there is 'a clear and adequate remedy at law, such as a normal appeal.'" (quoting State v. Walker, 679 S.W.2d 484, 485 (Tex. 1984))).

128. *See Walker*, 827 S.W.2d at 842.

129. *See* CSR Ltd. v. Link, 925 S.W.2d 591, 596 (Tex. 1996); Walker v. Packer, 827 S.W.2d 833, 842 (Tex. 1992).

130. *Walker*, 827 S.W.2d at 840 (quoting Holloway v. Fifth Court of Appeals, 767 S.W.2d 680, 684 (Tex. 1989)).

131. *See, e.g.*, Tilton v. Marshall, 925 S.W.2d 672, 695–96 (Tex. 1996) (Enoch, J., dissenting) (criticizing the court for granting mandamus from a plea to jurisdiction); *CSR*, 925 S.W.2d at 600–01 (Baker, J., dissenting) (considering CSR's failure to show how the denial of a special appearance produced irreparable harm); National Indus. Sand Ass'n v. Gibson, 897 S.W.2d 769, 776 (Tex. 1995) (Cornyn, J., dissenting) (insisting that mandamus issue only if appeal from abuse of discretion would result in more than ordinary expense and delay); National Union Fire Ins. Co. v. Ninth Court of Appeals, 864 S.W.2d 58, 62–64 (Tex. 1993) (Phillips, C.J., dissenting) (asserting that an abuse of discretion is immaterial in mandamus when determining if rights can be protected via appellate process); Alan T. Copperman & Lanny D. Ray, Comment, *Mandamus Granted or Mandamus Denied? Confusing Standards to Remedy an Improperly Overruled Special Appearance*, 48 BAYLOR L. REV. 1175, 1180 (1996) (criticizing the Texas Supreme Court decisions for leaving "the practitioner without a workable and predictable standard for mandamus relief").

is to categorize the opinions according to the type of order or ruling challenged.

1. Discovery

Different standards govern the adequacy of the appellate remedy from a discovery order depending on whether the order compels the production of discovery or denies production.

a. Order Compelling Discovery

An appellate remedy is inadequate when the trial court erroneously orders the disclosure of privileged information and the disclosure will materially affect the rights of the aggrieved party.[132] The appellate remedy is inadequate in such a case because, after the privileged documents have been inspected, examined, and reproduced, an appellate court's holding that the trial court abused its discretion in issuing the order would be of no solace to the aggrieved party.[133] The harm from such an order occurs immediately upon disclosure of the privileged information such that an appellate remedy simply comes too late to rectify the damage. Accordingly, a trial court's clear abuse of discretion in ordering the production of documents protected by the attorney-client privilege, the work product privilege, the party communications privilege, the investigative privilege, or any other statutory or evidentiary privilege is correctable by mandamus.[134]

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132. *See Walker*, 827 S.W.2d at 843.

133. *See id.* (citing Crane v. Tunks, 160 Tex. 182, 189, 328 S.W.2d 434, 439 (Tex. 1959)).

134. *See, e.g.,* General Motors Corp. v. Gayle, 951 S.W.2d 469, 476 (Tex. 1997) (finding no adequate remedy by appeal for trial court's order infringing upon the consulting-expert privilege); Memorial Hosp. v. McCown, 927 S.W.2d 1, 12 (Tex. 1996) (concluding that no adequate remedy by appeal exists for an order erroneously requiring the production of documents protected under Texas' statutory medical peer review committee privilege); Huie v. DeShazo, 922 S.W.2d 920, 928 (Tex. 1996) (providing that no adequate remedy by appeal exists when the trial court's order compels the production of information potentially privileged as attorney-client communications and attorney work product); *see also* Ford Motor Co. v. Leggat, 904 S.W.2d 643, 649 (Tex. 1995) (determining that the trial court erroneously ordered the production of documents privileged under the attorney-client and work product privileges); Humphreys v. Caldwell, 888 S.W.2d 469, 471 (Tex. 1994) (considering a violation of the work product privilege); TransAmerican Natural Gas Corp. v. Flores, 870 S.W.2d 10, 12 (Tex. 1994) (holding that mandamus is an appropriate remedy for court orders which violate the attorney-client, work product, and party communication privileges); National Union Fire Ins. Co. v. Valdez, 863 S.W.2d 458, 462 (Tex. 1993) (declaring that the trial court erroneously compelled the production of law firm files protected by

Similarly, mandamus is available if the trial court erroneously orders the production of trade secrets without protections to ensure the confidentiality of the information.[135] Once again, an appellate remedy comes too late to rectify the harm that would befall a party if its trade secrets were disseminated to the general public without adequate protections. Therefore, the extraordinary writ is available to prevent the injury.

While mandamus is usually not available to challenge a discovery order mandating the disclosure of irrelevant documents, mandamus may be available where the order requires the production of "patently irrelevant or duplicative documents" to such an extent that the order clearly constitutes harassment or imposes a burden on the producing party far out of proportion to any potential benefit to the requesting party.[136] In *Hall v. Lawlis*,[137] the Texas Supreme Court concluded that the relator did not have an adequate remedy by appeal when the trial court compelled production of his tax returns without a showing that the tax returns were relevant to the case.[138] Similarly, in *Tilton v. Marshall*,[139] the court granted mandamus relief against a trial court's order requiring the production of "highly personal and private" tithing records of televangelist Robert Tilton that were not relevant to the case.[140] Because of the highly sensitive and personal nature of the documents ordered produced, the court concluded that the trial court's order invaded Tilton's privacy and that, once that privacy was broken, it could not be retrieved later through an appellate remedy.[141]

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the work product privilege); National Tank Co. v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993) (discussing witness statements and party communications privileges); Eli Lilly & Co. v. Marshall, 850 S.W.2d 155, 157–60 (Tex. 1993) (issuing mandamus because information could be rendered confidential by federal regulations).

135. *See* Walker v. Packer, 827 S.W.2d 833, 843 (Tex. 1992).

136. Tilton v. Marshall, 925 S.W.2d 672, 682–83 (Tex. 1996); *see also Walker*, 827 S.W.2d at 843 (stating that mandamus is available if the discovery order compels production of patently irrelevant or duplicative documents which clearly constitutes harassment or which imposes a burden that is disproportionate to any benefit to the requesting party).

137. 907 S.W.2d 493 (Tex. 1995).

138. *See Hall*, 907 S.W.2d at 495; *see also* Sears, Roebuck & Co. v. Ramirez, 824 S.W.2d 558, 559 (Tex. 1992) (finding that mandamus relief was appropriate to correct the trial court's order erroneously requiring the production of tax returns).

139. 925 S.W.2d 672 (Tex. 1996).

140. *See Tilton*, 925 S.W.2d at 683.

141. *See id.* (citing Maresca v. Marks, 362 S.W.2d 299, 301 (Tex. 1962)).

In addition, a discovery order that compels overly broad discovery "well outside the bounds of proper discovery" may be challenged by mandamus. In *K Mart Corp. v. Sanderson*,[142] the Texas Supreme Court concluded that interrogatories requesting information on all criminal conduct that had occurred at K Mart stores across the country for several years were excessively broad and "well outside the bounds of proper discovery" such that K Mart had no adequate remedy by appeal; consequently, the trial court's order compelling answers to these interrogatories was reviewable by mandamus.[143] Likewise, in *Dillard Department Stores, Inc. v. Hall*,[144] the court reasoned that a discovery order requiring Dillard to produce every claims file and incident report in every lawsuit involving a claim of false arrest or excessive use of force for each of 227 stores in twenty states over a period of five years was excessively broad such that mandamus relief was appropriate.[145] In these cases, the hardship and burden of producing a multitude of irrelevant documents simply cannot be corrected on appeal.

As is evident by the preceding cases, mandamus is available to challenge a trial court's erroneous order compelling discovery if the very production of the information causes immediate injury to the relator that cannot be rectified on appeal.[146] Such a situation occurs when the information is privileged, when the information is confidential and not relevant to the case, or when producing the information constitutes severe harassment and a substantial burden. Otherwise, the extraordinary writ is not available to correct a trial court's order compelling discovery, regardless of how erroneous the order may be.

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142. 937 S.W.2d 429 (Tex. 1996).

143. *See K Mart*, 937 S.W.2d at 431–32.

144. 909 S.W.2d 491 (Tex. 1995).

145. *See Dillard*, 909 S.W.2d at 492; *see also* Texaco, Inc. v. Sanderson, 898 S.W.2d 813, 815 (Tex. 1995) (allowing the trial court's order requiring production of all documents written by the corporate safety director concerning safety, toxicology, industrial hygiene, epidemiology, fire protection, and training to be challenged by mandamus); General Motors Corp. v. Lawrence, 651 S.W.2d 732, 734 (Tex. 1983) (finding mandamus appropriate to challenge a court order requiring production of information about all General Motors vehicles for all model years).

146. *See supra* notes 132–45 and accompanying text.

b. Order Denying Discovery

A denial of discovery "going to the heart of a party's case" may render an appellate remedy inadequate.[147] It is not enough to show that an appeal would be inconvenient or expensive; rather, the relator must establish that the order effectively denies the reasonable opportunity to develop the merits of the case, such that the trial would be a waste of judicial resources.[148] For example, in *General Motors Corp. v. Tanner*,[149] the court concluded that the trial court's order precluding the defendant's access to the part of the vehicle that the plaintiff claimed caused his injury effectively denied the defendant a reasonable opportunity to develop the merits of its defense.[150] Accordingly, the appellate remedy was inadequate.[151] Similarly, in *Able Supply*, the court held that the trial court's refusal to compel the plaintiffs to answer an interrogatory requesting the names of any physicians who had attributed a plaintiff's injury to one of the defendants' products precluded the defendants from developing essential elements of their defense.[152] Thus, according to the supreme court, the lower court had erroneously denied discovery going to the heart of the defendants' case, warranting the issuance of mandamus.[153]

On the other hand, in *Polaris Investment Management Corp. v. Abascal*,[154] the court concluded that the trial court's abatement of all discovery related to the plaintiffs who had not yet been set for trial did not warrant mandamus relief because the restriction on discovery was not "of such an egregious nature that it goes to the

147. Walker v. Packer, 827 S.W.2d 833, 843 (Tex. 1992).

148. *See id.*

149. 892 S.W.2d 862 (Tex. 1995).

150. *See Tanner*, 892 S.W.2d at 864.

151. *See id.*

152. *See* Able Supply Co. v. Moye, 898 S.W.2d 766, 771–72 (Tex. 1995).

153. *See id.*; *see also* Thompson v. Davis, 901 S.W.2d 939, 941 (Tex. 1995) (concluding that the trial court's order denying discovery pertaining to the conduct and actions of relator's ex-wife went to the heart of relator's case seeking modification of custody); Chapa v. Garcia, 848 S.W.2d 667, 668 (Tex. 1992) (finding that the denial of discovery materials severely vitiated relator's ability to present a viable claim at trial such that an appellate remedy was inadequate); Granada Corp. v. First Court of Appeals, 844 S.W.2d 223, 226 (Tex. 1992) (determining that the record demonstrated that four memoranda, which the trial court erroneously protected from discovery, were essential to the relator's claim that the corporation defrauded its stockholders).

154. 892 S.W.2d 860 (Tex. 1995).

heart of [the defendant's] case."[155] The court reasoned that the trial court's ruling did not permanently deprive the defendant of substantial rights, apparently because the defendant would later have an opportunity to conduct discovery when those plaintiffs were set for trial.[156] The underlying principle behind this line of cases is that an appellate remedy is inadequate only when a denial of discovery permanently deprives a party of information that effectively precludes the party from developing its case to such an extent that a trial would essentially constitute a worthless endeavor.[157]

Mandamus may also be available "where the trial court disallows discovery and the missing discovery cannot be made part of the appellate record, or the trial court after proper request refuses to make it part of the record, and the reviewing court is unable to evaluate the effect of the trial court's error on the record before it."[158] Such a situation occurred in *Global Services, Inc. v. Bianchi*[159] and *Thompson v. Davis*.[160] In both cases, the court held that the relators had no adequate remedy by appeal from orders prohibiting them from conducting certain discovery because there was no way the "missing" discovery could be made part of the appellate record.[161] Likewise, in *Tom L. Scott, Inc. v. McIlhany*,[162] the court determined that mandamus was the only available remedy because the trial court's protective order shielded the witnesses from deposition, thereby preventing the relator from making any evidence obtained from the witnesses part of the appellate record.[163] An appellate remedy is inadequate in cases in which discovery cannot be made part of the appellate record because an appellate court cannot determine whether the erroneous denial of such discovery was harmful error requiring reversal under Texas

155. *Polaris*, 892 S.W.2d at 862.

156. *See id.*

157. *See supra* notes 147–56 and accompanying text.

158. Walker v. Packer, 827 S.W.2d 833, 843–44 (Tex. 1992).

159. 901 S.W.2d 934 (Tex. 1995).

160. 901 S.W.2d 939 (Tex. 1995).

161. *See Thompson*, 901 S.W.2d at 940; *Global Services*, 901 S.W.2d at 938–39.

162. 798 S.W.2d 556 (Tex. 1990).

163. *See Scott*, 798 S.W.2d at 558.

Rule of Appellate Procedure 44.1(a) without examining the substance of the excluded discovery.[164]

Unless the denial of discovery goes to the heart of a party's case or the discovery cannot be made part of the appellate record, mandamus is not available to challenge a trial court's order denying the production of requested discovery.[165] Accordingly, the court in *Walker* did not issue mandamus relief, despite the supreme court's conclusion that the trial court clearly abused its discretion in denying discovery.[166] Instead, the court held that an appellate remedy could rectify the error in failing to require the production of the requested discovery.[167] As a result, it is usually easier to obtain mandamus relief when a trial court erroneously compels the production of discovery than when a trial court erroneously denies the production of requested discovery.[168]

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164. Under Texas Rule of Appellate Procedure 44.1(a), a trial court's judgment may not be reversed on appeal "on the ground that the trial court made an error of law unless the court of appeals concludes that the error complained of: (1) probably caused the rendition of an improper judgment, or (2) probably prevented the appellant from properly presenting the case to the court of appeals." TEX. R. APP. P. 44.1(a); *see also* TEX. R. APP. P. 66.1 (articulating essentially the same standard for the Texas Supreme Court to reverse a trial court's judgment). It is next to impossible to determine whether a trial court's denial of discovery probably caused the rendition of an improper judgment without reviewing the substance of the excluded discovery. *See* Jampole v. Touchy, 673 S.W.2d 569, 576 (Tex. 1984) (observing that "[b]ecause the evidence exempted from discovery would not appear in the record, the appellate courts would find it impossible to determine whether denying the discovery was harmful."). However, it would appear that, in such a situation, the trial court's order "probably prevented the appellant from properly presenting the case to the court of appeals." TEX. R. APP. P. 44.1(a); *see* TEX. R. APP. P. 61.1 An appellate court could reverse a trial court's judgment on the basis that the trial court's erroneous order precluding certain discovery from being in the appellate record prevented the appellant from properly presenting the case on appeal. Therefore, the supreme court's conclusion that an appellate remedy is inadequate when discovery cannot be made part of the appellate record because harmful error cannot be established may be erroneous. A better justification is probably the monumental waste of judicial resources that would occur if a trial court's judgment was reversed on the sole ground that the trial court should have compelled the production of certain discovery even though the error may not have been harmful. While a litigant's delay or expense in pursing an appeal does not render an appellate remedy inadequate, courts may consider "the most prudent use of judicial resources" in determining whether mandamus is an available remedy. CSR Ltd. v. Link, 925 S.W.2d 591, 597 (Tex. 1996).

165. *See supra* notes 147–64 and accompanying text.

166. *See* Walker v. Packer, 827 S.W.2d 833, 844 (Tex. 1992).

167. *See id.*

168. *See id.* at 846 (Doggett, J., dissenting) (complaining that *Walker* declared mandamus a "one-way street in the Texas courts—our judiciary can help to hide but not to detect").

2. Sanctions

There is no adequate remedy by appeal from the imposition of case determinative sanctions, also known as "death penalty" sanctions, unless the sanctions are imposed simultaneously with a final, appealable judgment.[169] The remedy by appeal in such a situation is inadequate because the conduct of the litigation is irreparably skewed by the sanction.[170] The sanctioned party has to suffer a trial limited in scope to a determination of the other party's unliquidated damages without consideration of the merits of the sanctioned party's position.[171] If the jury awards damages, the sanctioned party will be left with an appeal, not on whether it should be liable, but on whether the sanction was appropriate. The supreme court has reasoned that, because such an appeal is not effective, it does not constitute an adequate legal remedy.[172] Accordingly, mandamus is available to review sanctions that preclude a decision on the merits of a party's claims if the sanctions are not immediately appealable.[173]

On the other hand, mandamus is generally not available when a trial court awards a monetary sanction or assessment of attorney's fees because such a sanction may usually be adequately challenged on appeal.[174] Only if the monetary sanction must be paid prior to final judgment and threatens a party's continuation of the litigation will the sanction be reviewable by the extraordinary writ.[175] In such a situation, an appellate remedy is inadequate because it cannot ensure the sanctioned party's access to the courts.

Of course, if the payment of the monetary sanction is deferred until a final judgment is rendered, the sanctioned party will have an

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169. *See, e.g.*, GTE Communications Sys. Corp. v. Tanner, 856 S.W.2d 725, 732 (Tex. 1993); Remington Arms Co. v. Caldwell, 850 S.W.2d 167, 168 n.2 (Tex. 1993); TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 917 (Tex. 1991).

170. *See TransAmerican*, 811 S.W.2d at 919–20.

171. *See id.*

172. *See id.*

173. Of course, if the sanctions are immediately appealable because they are imposed simultaneously with the rendition of a final, appealable judgment, such as a sanction striking the plaintiff's pleadings and rendering a take nothing judgment in favor of the defendant, an appeal can effectively review the sanction order and mandamus relief would not be available.

174. *See* GTE Communications Sys. Corp. v. Tanner, 856 S.W.2d 725, 732 (Tex. 1993); Braden v. Downey, 811 S.W.2d 922, 929 (Tex. 1991).

175. *See Braden*, 811 S.W.2d at 929.

opportunity to supersede the monetary sanction and perfect an appeal without the sanction having a detrimental effect on the party's access to the court system; therefore, mandamus is not appropriate to review a monetary sanction payable upon rendition of final judgment.[176] Moreover, if the party can pay the sanction without any effect on the party's ability to subsequently appeal the sanctions order, mandamus is not available even if the sanction must be paid prior to final judgment.[177]

3. Arbitration and Settlement Agreements

Mandamus relief is available to a party when a trial court improperly overrules its motion to compel arbitration brought under the Federal Arbitration Act.[178] Because the fundamental purpose of arbitration is to provide a rapid, less expensive alternative to traditional litigation, a party who is erroneously denied arbitration and ordered to proceed to trial has been deprived of the benefits of the contractual arbitration provision for which it bargained.[179] An appellate remedy is illusory because it comes too late to rectify this injury; accordingly, the extraordinary writ is available.

Mandamus relief is also available to a party who is improperly ordered to arbitrate under the Federal Arbitration Act.[180] A party who has been ordered to arbitrate in the absence of its agreement to do so has lost its right to have the dispute resolved by litigation, and an appellate remedy cannot alleviate the loss of this right.[181]

However, different principles govern the availability of mandamus under the Texas Arbitration Act. The Texas Arbitration Act provides for an appeal of an order denying an application to compel arbitration or granting an application to stay arbitration.[182] Because this appeal is an adequate legal remedy, a party improperly denied the right to arbitrate under the Texas Arbitration Act can-

176. *See id.*

177. *See* Susman Godfrey v. Marshall, 832 S.W.2d 105, 109 (Tex. App.—Dallas 1992, orig. proceeding).

178. *See, e.g.*, EZ Pawn Corp. v. Mancias, 934 S.W.2d 87, 88, 91 (Tex. 1996); Cantella & Co. v. Goodwin, 924 S.W.2d 943, 945 (Tex. 1996); Prudential Sec., Inc. v. Marshall, 909 S.W.2d 896, 900 (Tex. 1995); Capital Income Properties-LXXX v. Blackmon, 843 S.W.2d 22, 23 n.1 (Tex. 1992); Jack B. Anglin Co. v. Tipps, 842 S.W.2d 266, 271–72 (Tex. 1992).

179. *See Prudential*, 909 S.W.2d at 900; *Jack B. Anglin Co.*, 842 S.W.2d at 271.

180. *See* Freis v. Canales, 877 S.W.2d 283, 284 (Tex. 1994).

181. *See id.*

182. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 171.098 (Vernon Supp. 1998).

not seek mandamus, but must instead pursue the appeal provided in the Act.[183] An extremely cumbersome procedure therefore exists if a party is challenging an order denying an application to compel arbitration brought under both the federal and state acts. In such a case, the party must pursue parallel proceedings—a writ of mandamus under the federal act and an interlocutory appeal under the state act.[184]

Another dilemma occurs when a party is improperly ordered to arbitrate under the Texas Arbitration Act. While the Texas Arbitration Act provides for an appeal of an order "denying an application to compel arbitration" or "granting an application to stay arbitration," it does not provide for any type of appeal from an order compelling arbitration.[185] Accordingly, several appellate courts have dismissed attempted appeals of orders compelling arbitration under the Texas Arbitration Act for want of jurisdiction.[186] There are two potential methods to circumvent this problem. First, a party desiring review of an order compelling arbitration under the Texas Arbitration Act could seek mandamus and urge that, because an interlocutory appeal is not available, there is no adequate remedy at law to rectify the harm of losing the right to have the dispute resolved by litigation.[187] Second, a party could file a mo-

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183. *See* Jack B. Anglin Co. v. Tipps, 842 S.W.2d 266, 272 (Tex. 1992).

184. *See id.*

185. TEX. CIV. PRAC. & REM. CODE ANN. § 171.098(a) (Vernon Supp. 1998). Under Section 171.098(a):

> A party may appeal a judgment or decree entered under this chapter or an order: (1) denying an application to compel arbitration made under Section 171.021; (2) granting an application to stay arbitration made under Section 171.023; (3) confirming or denying confirmation of an award; (4) modifying or correcting an award; or (5) vacating an award without directing a rehearing.

Id.

186. *See, e.g.*, Lipshy Motorcars, Inc. v. Sovereign Assocs., 944 S.W.2d 68, 69–70 (Tex. App.—Dallas 1997, no writ); Gathe v. Cigna Healthplan of Tex., Inc., 879 S.W.2d 360, 362 (Tex. App.—Houston [14th Dist.] 1994, writ denied); Bethke v. Polyco, Inc., 730 S.W.2d 431, 434 (Tex. App.—Dallas 1987, no writ). However, the Texas Supreme Court has stated that the Texas Arbitration Act permits "a party to appeal an interlocutory order *granting* or denying a request to compel arbitration." *Jack B. Anglin Co.*, 842 S.W.2d at 271–72 (emphasis added). Unfortunately, the court was mistaken; the Texas Arbitration Act does not specifically provide for an interlocutory appeal of an order granting a request to compel arbitration. *See supra* note 185.

187. *Cf.* Freis v. Canales, 877 S.W.2d 283, 284 (Tex. 1994) (declaring that a party has no adequate remedy by appeal if that party is compelled to arbitrate without having agreed to do so).

tion seeking a temporary injunction enjoining the arbitration in the trial court; if the motion is denied, an interlocutory appeal is available from the denial of a motion for temporary injunction that may allow the party to present the merits of its arguments against compelling arbitration to the court of appeals.[188] The best solution may be to pursue both an interlocutory appeal and a mandamus action and allow the appellate court to determine which avenue it will utilize to review the order.

In an extension of its holding that a party has no adequate appellate remedy when a trial court erroneously refuses to compel arbitration under the Federal Arbitration Act, the Texas Supreme Court concluded in *Mantas v. Fifth Court of Appeals*[189] that mandamus is available when an appellate court refuses to abate an appeal pending the resolution of an action to enforce a written settlement agreement between the parties.[190] The plaintiff in *Mantas* had obtained a judgment against the defendant, which the defendant appealed.[191] The parties signed a settlement agreement at a mediation ordered by the court of appeals, but the plaintiff later withdrew his consent to the settlement agreement.[192] The defendant then filed suit in district court to enforce the settlement agreement and requested the court of appeals to abate the appeal pending the resolution of the enforcement suit.[193] The court of appeals, however, refused to do so; thus, the defendant sought mandamus against the appellate court in the supreme court.[194] The supreme court held that the court of appeals abused its discretion in refusing to abate the appeal and there was no adequate remedy by appeal for this abuse of discretion.[195] The court reasoned that, under the "unusual circumstances" of the case, if the agreement was ultimately upheld, the defendant would have lost much of the settlement's benefit if he was required to expend time and re-

188. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(4) (Vernon 1997) (indicating "[a] person may appeal from an interlocutory order of a district court, county court at law, or county court that . . . grants or refuses a temporary injunction or grants or overrules a motion to dissolve a temporary injunction . . . .").

189. 925 S.W.2d 656 (Tex. 1996).

190. *See Mantas*, 925 S.W.2d at 659.

191. *See id.* at 657.

192. *See id.* at 657–58.

193. *See id.* at 658.

194. *See* Mantas v. Fifth Court of Appeals, 925 S.W.2d 656, 658 (Tex. 1996).

195. *See id.* at 659.

sources prosecuting the appeal.[196] Therefore, as a general rule, when a lower court's order erroneously requires a party to expend time and resources litigating or appealing an action when the party has contracted for an expedited resolution of the dispute through either a settlement agreement or an arbitration provision, mandamus is available unless a statute provides for an immediate appeal of the order.

4. Disqualification of Counsel

Because an adequate remedy by appeal does not exist from an order granting or denying a motion to disqualify counsel, mandamus is available.[197] There is no adequate remedy by appeal if counsel is erroneously disqualified from a case because an appeal comes too late to rectify the error—the litigant would have to obtain new counsel to prosecute the case and appeal before a normal appellate ruling could be obtained. If an order to disqualify counsel is erroneously overruled, an appellate remedy cannot alleviate the damage done to the legal profession and the potential improper disclosure of client confidences.[198]

5. Interlocutory Appeals

While, in most instances, the availability of an interlocutory appeal from a trial court's order constitutes an adequate appellate remedy that precludes the issuance of mandamus relief, there are circumstances in which the extraordinary writ may still be available. The availability of the writ depends on whether the relator is challenging a class certification, temporary injunction, or special appearance order.

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196. *See id.*

197. *See* National Med. Enters. v. Godbey, 924 S.W.2d 123, 133 (Tex. 1996); Mendoza v. Eighth Court of Appeals, 917 S.W.2d 787, 789–90 (Tex. 1996); NCNB Tex. Nat'l Bank v. Coker, 765 S.W.2d 398, 400 (Tex. 1989); *see also* Texaco, Inc. v. Garcia, 891 S.W.2d 255, 257 (Tex. 1995) (granting mandamus after the trial court's failure to disqualify a former counsel now in a position to divulge confidences to the present adversary); Henderson v. Floyd, 891 S.W.2d 252, 254 (Tex. 1995) (noting that mandamus may issue from the failure to disqualify counsel possessing confidential information from previous representation even if counsel had not "personally and substantially participated" in previous matter); Grant v. Thirteenth Court of Appeals, 888 S.W.2d 466, 468 (Tex. 1994) (granting mandamus after the attorney was allowed to litigate cases previously handled by the same attorney while working for opposing counsel).

198. *See National Med. Enters.*, 924 S.W.2d at 133.

a. Class Certifications

In *Deloitte & Touche L.L.P. v. Fourteenth Court of Appeals*,[199] the Texas Supreme Court concluded that, while it could exercise mandamus jurisdiction over an interlocutory appeal of a class certification order despite the fact that the court did not have appellate jurisdiction over the cause,[200] mandamus should not issue because Deloitte & Touche had adequate legal remedies.[201] The court reasoned that the interlocutory appeal provided by the legislature for class certification orders and the subsequent availability of an appeal after a trial on the merits were adequate appellate remedies precluding the issuance of mandamus.[202]

Deloitte & Touche essentially urged that an interlocutory appellate remedy that concluded in the court of appeals was not adequate.[203] In addressing this contention, the supreme court noted that the arguments raised by Deloitte & Touche in its petition for writ of mandamus requested that the court review the legal conclusions of the court of appeals on the class certification issue.[204] However, according to the Texas Government Code, these legal conclusions were made final in the court of appeals.[205] Because there is no "right" to have a second court obtain jurisdiction over an appeal, the court determined that there was no basis to exercise mandamus jurisdiction over a class certification appeal, unless some extraordinary circumstance made the interlocutory appellate remedy inadequate.[206]

The court rejected the argument that the court of appeals' action in directing the class certification when the trial court had refused to certify the class constituted such an extraordinary circumstance because several other appellate courts had directed certification

199. 951 S.W.2d 394 (Tex. 1997).

200. *See supra* notes 26–37 and accompanying text.

201. *See Deloitte & Touche L.L.P.*, 951 S.W.2d at 397–98. The court initially reiterated the general principle that, because mandamus is an extraordinary proceeding seeking an extraordinary remedy, mandamus is not available if an ordinary appeal could rectify the erroneous order, even if substantial litigation costs could be forestalled with the extraordinary writ. *See id.* at 396.

202. *See id.* at 397.

203. *See id.*

204. *See* Deloitte & Touche L.L.P. v. Fourteenth Court of Appeals, 951 S.W.2d 394, 397 (Tex. 1997).

205. *See id.*

206. *See id.*

under similar circumstances.[207] Because there was no other potential extraordinary circumstance justifying mandamus, the court did not grant the requested relief.[208] However, the court did not preclude the possibility that it could issue mandamus against a court of appeals for procedural irregularities in deciding an interlocutory class certification appeal or for actions taken by the appellate court that were "so devoid of any basis in law as to be beyond its power."[209] In such a case, the court reasoned, it would not be reviewing the legal issues related to the interlocutory class certification appeal over which the court of appeals has final authority.[210] Instead, the court would be "reviewing extraordinary circumstances causing irreparable harm and precluding an adequate remedy by appeal."[211]

While the court did not delineate the situations in which mandamus relief would be available, merely arguing that the court of appeals reached the wrong conclusion on the merits of the class certification clearly will not entitle the relator to a writ of mandamus. Rather, it appears that the appellate court's action must constitute either an extraordinary procedural irregularity, or such an extraordinary departure by the court of appeals from the principles of law as to be beyond the court's power, before mandamus will issue.

b. Temporary Injunctions

The existence of an interlocutory appeal from an order granting or refusing to grant a temporary injunction constitutes an adequate appellate remedy that usually precludes the issuance of a writ of mandamus.[212] However, one exception has been recognized by Texas courts. If a temporary injunction infringes upon First Amendment rights, mandamus may be available on the ground

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207. *See id.*

208. *See id.* at 398.

209. Deloitte & Touche L.L.P. v. Fourteenth Court of Appeals, 951 S.W.2d 394, 398 (Tex. 1997).

210. *See id.*

211. *Id.*

212. *See, e.g.*, McLain v. Smith, 899 S.W.2d 412, 414 (Tex. App.—Amarillo 1995, orig. proceeding); Reynolds, Shannon, Miller, Blinn, White & Cook v. Flanary, 872 S.W.2d 248, 251 (Tex. App.—Dallas 1993, no writ).

that the relator is irreparably harmed by the very existence of an order restricting such fundamental rights.[213]

c. Special Appearance

During the 1997 legislative session, the legislature amended Section 51.014 of the Civil Practice and Remedies Code to provide for an interlocutory appeal of a district court, statutory county court, or constitutional county court order that grants or denies the special appearance of a defendant under Texas Rule of Civil Procedure 120a, unless the suit is brought under the Family Code.[214] The impetus behind this amendment is apparent after examining the tortured, brief history of the availability of mandamus from rulings on special appearances.

In *Canadian Helicopters Ltd. v. Wittig*,[215] the Texas Supreme Court held that mandamus would not ordinarily lie from the denial of a special appearance.[216] The court reasoned that, in most cases, the only harm to the relator from the improper denial of its special appearance resulted from the increased cost and delay of the trial and subsequent appeal, which was not sufficient to justify a writ of mandamus.[217] This rationale notwithstanding, the court recognized that in some instances an appeal at the end of a trial would not be adequate, such as: (1) when the case implicated issues of comity and foreign affairs;[218] (2) when the case concerned the rights of children and parents in family law situations;[219] or (3) when the trial court acted "with such disregard for guiding principles of law that the harm to the defendant becomes irreparable, exceeding mere increased cost and delay."[220] In a somewhat prophetic dis-

213. *See* Republican Party of Tex. v. Dietz, 940 S.W.2d 86, 94 (Tex. 1997) (noting that "mandamus jurisdiction may be properly invoked when First Amendment rights are at issue"); Corpus Christi Caller-Times v. Mancias, 794 S.W.2d 852, 854 (Tex. App.—Corpus Christi 1990, orig. proceeding) (holding that threat of censorship from an injunction was "not remediable by the normal appellate process" because of the continuing impact on "the fundamental constitutional right to speak freely"); *see also* Davenport v. Garcia, 834 S.W.2d 4, 11 (Tex. 1992) (issuing mandamus relief against the trial court's gag order infringing upon relator's free speech rights under the Texas Constitution).

214. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(7) (Vernon Supp. 1998).

215. 876 S.W.2d 304 (Tex. 1994).

216. *See Canadian Helicopters*, 876 S.W.2d at 306–08.

217. *See id.* at 306.

218. *See id.*

219. *See id.* at 307.

220. Canadian Helicopters Ltd. v. Wittig, 876 S.W.2d 304, 308–09 (Tex. 1994).

sent, Justice Hecht complained that the third exception for a "super-clear" abuse of discretion lacked clarity and would create difficulties.[221]

Soon after its decision in *Canadian Helicopters*, the supreme court had an opportunity to apply the exception allowing the issuance of mandamus when a case involves issues of comity and foreign affairs. In *K.D.F. v. Rex*,[222] the court determined that an appeal would not be an adequate remedy when a Texas trial court erroneously exercised jurisdiction over a "body corporate and instrumentality" of the state of Kansas.[223] The court reasoned that the risk of harm to interstate and international relationships from erroneously exercising jurisdiction over this sovereign went beyond the immediate interests of the parties to the suit.[224] This decision was rather uncontroversial with only Justice Doggett noting his dissent.[225]

The same day that the *K.D.F.* decision was issued, the court decided *Geary v. Peavy*.[226] In *Geary*, the court reviewed via mandamus a Texas court's jurisdiction to adjudicate child custody in a case in which a Minnesota court and a Texas court had issued conflicting child custody orders.[227] While the supreme court did not specifically state that it was relying on the second *Canadian Helicopters* exception whereby an appeal is not adequate in family law cases, an argument can be made that this case utilized this exception as the basis for determining that a remedy by appeal was inadequate.[228] The decision was not controversial; in fact, it was issued as a per curiam opinion without any dissent.

However, the subsequent case of *National Industrial Sand Ass'n v. Gibson*[229] was definitely controversial. The majority in *National Sand* applied the third *Canadian Helicopters* exception, concluding

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221. *See id.* at 310–11 (Hecht, J., dissenting). Justice Hecht urged that a better rule would be to allow the issuance of mandamus when a trial court clearly abused its discretion in overruling a special appearance. *See id.*

222. 878 S.W.2d 589 (Tex. 1994).

223. *K.D.F.*, 878 S.W.2d at 593.

224. *See id.*

225. *See id.* at 598.

226. 878 S.W.2d 602 (Tex. 1994).

227. *See Geary*, 878 S.W.2d at 603.

228. *See* Sharon Freytag & LaDawn H. Conway, *Appellate Practice and Procedure*, 48 SMU L. REV. 739, 744 (1995) (discussing the second *Canadian Helicopters* exception).

229. 897 S.W.2d 769 (Tex. 1995).

that the trial court's assertion of personal jurisdiction was "'with such disregard for guiding principles of law that the harm to the defendant was irreparable.'"[230] However, the court never explained what this meant, other than to state that, because the assertion of jurisdiction was "arbitrary and without regard to guiding principles," the total and inarguable absence of jurisdiction justified extraordinary relief.[231] The dissent maintained that the mere fact that the assertion of jurisdiction was without regard to guiding principles did not dispense with the requirement that an appeal be inadequate to correct the trial court's error and further urged that the case was indistinguishable from *Canadian Helicopters* in which the court held that an appellate remedy was adequate to correct the trial court's error.[232]

As both commentators and the author of the majority opinion in *National Sand* have recognized, the court's holdings in *Canadian Helicopters* and *National Sand* are irreconcilable.[233] Perhaps as a result of this conflict, the court tried a different approach in the next special appearance case it decided.

In *CSR Ltd. v. Link*,[234] the court concluded that extraordinary circumstances justified the issuance of mandamus relief when the trial court erroneously overruled the special appearance of a for-

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230. *National Indus. Sand*, 897 S.W.2d at 771 (quoting Canadian Helicopters Ltd. v. Wittig, 876 S.W.2d 304, 308 (Tex. 1994)).

231. *Id.* at 776.

232. *See id.* at 777 (Cornyn, J., dissenting). Justice Cornyn, joined by Chief Justice Phillips, Justice Gammage, and Justice Enoch, dissented. *See id.* at 776 (Cornyn, J., dissenting).

233. *See, e.g.*, CSR Ltd. v. Link, 925 S.W.2d 591, 598 (Tex. 1996) (Gonzalez, J., concurring) (stating that "[a]lthough the holdings in *Canadian Helicopters* and *National Industrial Sand* are superficially consistent . . . the application of the law to the facts in the two opinions is not reconcilable. The defendant in *Canadian Helicopters* had no more contacts with Texas than the defendant in *National Industrial Sand*."); Alan T. Copperman & Lanny D. Ray, Comment, *Mandamus Granted or Mandamus Denied? Confusing Standards to Remedy an Improperly Overruled Special Appearance*, 48 BAYLOR L. REV. 1175, 1185 (1996) (positing that "[t]he Texas Supreme Court's analysis [in *National Sand*] is conclusory, as it fails to explain why NISA did not have an adequate remedy by appeal. Further, the supreme court's analysis does not distinguish NISA's jurisdictional facts from those of the defendant in *Canadian Helicopters*."); Beth K. Neese, Comment, *Texas in the Wake of* Canadian Helicopters: *Are Nonresident Defendants' Due Process Rights Going Down in Flames?*, 34 HOUS. L. REV. 503, 507 (1997) (maintaining that "*Canadian Helicopters* and *National Sand* are inconsistent and create confusion for the nonresident defendant").

234. 925 S.W.2d 591 (Tex. 1996).

eign asbestos fiber manufacturer.[235] The circumstances found controlling in *CSR* stemmed from the nature of mass tort litigation, and included both a concern for the large number of potential claims that could be made against CSR and a concern that judicial resources were more prudently expended in deciding the jurisdiction issue at the earliest possible juncture in a mass tort case.[236] Thus, rather than focusing on whether the trial court's order constituted a "super-clear" abuse of discretion as in *National Sand*, the court returned to more well-established mandamus principles. The court determined that, under the facts of this particular case, with the multitude of claims that could be brought against CSR and the impact that these claims could have on the state's judicial resources, the appellate remedy was not adequate.[237] Only Justice Baker dissented from the granting of mandamus relief in *CSR*, arguing that the case departed from the court's decision in *Canadian Helicopters*.[238]

Thus, when the legislature amended Section 51.014 of the Texas Civil Practice and Remedies Code to provide for an interlocutory appeal of an order granting or denying a special appearance, the status of the law regarding whether mandamus was available from the denial of a special appearance was uncertain. Now that an interlocutory appeal is available, however, mandamus ordinarily should not lie from the denial of a special appearance, although there are a few exceptions. First, Section 51.014 does not allow an interlocutory appeal of an order granting or denying a special appearance in cases brought under the Family Code.[239] Thus, the second *Canadian Helicopters* exception allowing mandamus from the denial of a special appearance in family law cases appears to be valid because the remedy by an ordinary appeal in such a case is not adequate and an interlocutory appeal is not available.[240] Moreover, the *Deloitte & Touche* exception that mandamus may be

235. *See CSR*, 925 S.W.2d at 596.

236. *See id.* at 596–97.

237. *See id.*

238. *See id.* at 599 (Baker, J., dissenting).

239. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(7) (Vernon Supp. 1998).

240. The legislature probably intentionally excluded cases brought under the Family Code from the amendment to allow interlocutory appeals from orders on special appearances to allow courts to continue to review special appearances in family law cases by mandamus, which is often a more expedient remedy than even an interlocutory appeal.

available against a court of appeals for procedural irregularities in deciding an interlocutory class certification appeal or for actions taken by the appellate court that were "so devoid of any basis in law as to be beyond its power" will probably also be applied to interlocutory special appearance appeals.[241] It would also not be surprising if the supreme court reviewed an erroneous determination by a court of appeals on an interlocutory appeal of a special appearance order when issues of comity and foreign affairs were present. In such a case, the harm from the appellate court's erroneous ruling would not merely affect the parties to the case, but would also create a potential risk of harm to international and interstate relationships.[242]

6. Incidental Trial Court Rulings

Texas courts will not generally issue writs of mandamus to supervise or correct "incidental" rulings of the trial court when there is an adequate remedy by appeal. Such "incidental" rulings include: (1) pleas to the jurisdiction, (2) pleas of privilege, (3) pleas in abatement, (4) motions for summary judgment, (5) motions for instructed verdict, (6) motions for judgment non obstante veredicto, (7) motions for new trial, (8) motions for continuance, (9) the selection of plaintiffs for trial in a mass-plaintiff case, (10) venue determinations, (11) rulings on special exceptions, (12) choice of law determinations, and a myriad of other orders.[243] This general rule,

241. Deloitte & Touche L.L.P. v. Fourteenth Court of Appeals, 951 S.W.2d 394, 398 (Tex. 1997).

242. *See* K.D.F. v. Rex, 878 S.W.2d 589, 593 (Tex. 1994).

243. *See, e.g.*, General Motors Corp. v. Gayle, 951 S.W.2d 469, 477 (Tex. 1997) (holding that mandamus is generally not available to review the denial of a motion for continuance); Bridgestone/Firestone, Inc. v. Thirteenth Court of Appeals, 929 S.W.2d 440, 441 (Tex. 1996) (ruling that venue determinations are usually incidental trial rulings that are correctable on appeal); Polaris Inv. Management Corp. v. Abascal, 892 S.W.2d 860, 861 (Tex. 1995) (opining that the selection of trial plaintiffs is an incidental ruling and cannot be remedied by mandamus); Bell Helicopter Textron, Inc. v. Walker, 787 S.W.2d 954, 955 (Tex. 1990) (stating that pleas to the jurisdiction are considered incidental rulings); Abor v. Black, 695 S.W.2d 564, 567 (Tex. 1985) (listing pleas to the jurisdiction, pleas of privilege, pleas in abatement, motions for summary judgment, motions for instructed verdict, motions for judgment non obstante veredicto, and motions for new trial as incidental trial rulings); International Paper Co. v. Garza, 872 S.W.2d 18, 19 (Tex. App.—Corpus Christi 1994, orig. proceeding) (noting that a special exception is an incidental trial ruling); Transportes Aereos Nacionales, S.A. v. Downey, 817 S.W.2d 393, 394–95 (Tex. App.—Houston [1st Dist.] 1991, orig. proceeding) (concluding that writ of mandamus may not be used as a form of interlocutory appeal for a choice of law determination).

however, has exceptions, especially when the "incidental" ruling concerns a venue determination, a plea in abatement, or a motion for severance or consolidation.

a. Venue Determinations

Improper venue determinations are incidental trial court rulings that are generally correctable on appeal.[244] However, there are two exceptions. First, the legislature has provided by statute that a party may seek a writ of mandamus to enforce a mandatory venue provision.[245] If a trial court erroneously sustains venue in an improper county in contravention of one of the mandatory venue provisions, the aggrieved party is entitled to mandamus without the necessity of establishing the inadequacy of an appellate remedy.[246]

Second, mandamus relief is also available when a trial court fails to grant a party seeking a change of venue a reasonable opportunity to supplement the venue record with affidavits and discovery products before the venue hearing.[247] This situation, however, is an extremely limited exception, which was initially recognized in *Union Carbide Corp. v. Moye*.[248] Union Carbide had filed a motion to change venue on the ground that an impartial trial could

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244. *See Bridgestone/Firestone*, 929 S.W.2d at 441–42; Montalvo v. Fourth Court of Appeals, 917 S.W.2d 1, 2 (Tex. 1995); *Polaris*, 892 S.W.2d at 861.

245. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.0642 (Vernon Supp. 1998). The mandatory venue provisions are listed in Sections 15.011 through 15.019 of the Texas Civil Practice and Remedies Code, and provide mandatory venue requirements for actions involving real property, landlord-tenant disputes arising under a lease, actions to stay proceedings in a suit, actions to restrain execution of a judgment, mandamus actions against a head of a department of the state, actions against a county, actions against certain political subdivisions, defamation or invasion of privacy actions, actions brought under the federal Employers' Liability Act or the Jones Act, and inmate litigation. *See id.* §§ 15.011–.019.

246. *See* KJ Eastwood Inv., Inc. v. Enlow, 923 S.W.2d 255, 258 (Tex. App.—Fort Worth 1996, orig. proceeding). The court concluded that:

> [I]n the situation presented in this original proceeding-enforcement of a mandatory venue provision appropriately brought under Section 15.0642-we believe that the legislature, by enacting Section 15.0642, has obviated a relator's requirement to show that there is no adequate remedy by appeal. To hold otherwise would emasculate Section 15.0642.

Id.

247. *Compare Bridgestone/Firestone, Inc.*, 929 S.W.2d at 441 (holding that mandamus should not issue when party had a reasonable opportunity to obtain discovery on venue), *with* Union Carbide Corp. v. Moye, 798 S.W.2d 792, 793 (Tex. 1990) (granting mandamus when the trial court did not afford a reasonable opportunity to supplement the venue record after misleading the party about the form of proof available at the hearing).

248. 798 S.W.2d 792 (Tex. 1990).

not be had in the county in which the suit was pending.[249] The trial court led Union Carbide to believe that an evidentiary hearing would be held on the motion to change venue, but, on the day of the hearing, the trial court sustained the plaintiffs' motion seeking to bar any oral testimony.[250] Union Carbide moved for a continuance on the basis that it was taken by surprise and did not have all of its evidence immediately available in written form to present to the trial court.[251] Nevertheless, the trial court overruled the motion and required Union Carbide to present its evidence immediately.[252] The supreme court issued mandamus, concluding that under these circumstances, the trial court abused its discretion by denying the continuance because justice required that Union Carbide be afforded a reasonable opportunity to supplement the venue record with appropriate affidavits and discovery products.[253]

The supreme court emphasized the narrowness of its *Union Carbide* holding in *Bridgestone/Firestone, Inc. v. Thirteenth Court of Appeals*.[254] In that case, a party sought mandamus relief from a trial court's order transferring venue issued after the trial court denied the party's second motion for continuance.[255] The supreme court concluded that the case was not analogous to *Union Carbide*.[256] The court initially reasoned that the case did not involve a motion to change venue on the ground that an impartial trial could not be held; thus, *Union Carbide* was inapposite.[257] Further, the court explained that there were no extraordinary circumstances justifying relief, emphasizing that *Union Carbide* was an extremely narrow exception to the general rule that venue determinations are not reviewable by mandamus.[258]

249. *See Union Carbide*, 798 S.W.2d at 792.
250. *See id.* at 792–93.
251. *See id.* at 793.
252. *See id.*
253. *See* Union Carbide Corp. v. Moye, 798 S.W.2d 792, 793 (Tex. 1990).
254. 929 S.W.2d 440 (Tex. 1996).
255. *See Bridgestone/Firestone*, 929 S.W.2d at 441.
256. *See id.*
257. *See id.* at 442.
258. *See id.*

b. Pleas in Abatement

The refusal of a trial court to abate an action based on the pendency of another action is usually not reviewable by mandamus.[259] The supreme court has reasoned that, unless the courts directly interfere with each other by issuing conflicting orders or injunctions, the refusal to abate can be adequately reviewed on appeal because the only harm to the parties is the additional cost and expense of having two pending actions.[260]

However, if the courts are directly interfering with each other by issuing conflicting orders or injunctions, an appellate remedy is inadequate and mandamus is available.[261] An appellate remedy is not adequate in such a situation because the litigation often becomes deadlocked,[262] and, even worse, the parties may be faced with a Hobson's choice—in order to follow one court's order, they must often violate the other court's order.

c. Motions for Severance, Consolidation, and Separate Trials

Orders on motions for severance, consolidation, and separate trials logically appear to be "incidental" trial court rulings that could be adequately reviewed on appeal in the absence of some type of extraordinary or unusual circumstance. A few Texas courts have accordingly held that an appellate remedy is generally adequate such that mandamus is not available unless the relator establishes that irreparable harm will result in the absence of the extraordinary writ.[263]

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259. *See* Hall v. Lawlis, 907 S.W.2d 493, 494 (Tex. 1995); Abor v. Black, 695 S.W.2d 564, 567 (Tex. 1985); Morris v. Leggat, 877 S.W.2d 899, 901 (Tex. App.—Texarkana 1994, orig. proceeding); Texas Commerce Bank, N.A. v. Prohl, 824 S.W.2d 228, 228 (Tex. App.—San Antonio 1992, orig. proceeding).

260. *See Hall*, 907 S.W.2d at 494; Hooks v. Fourth Court of Appeals, 808 S.W.2d 56, 59–60 (Tex. 1991).

261. *See* Bigham v. Dempster, 901 S.W.2d 424, 428 (Tex. 1995); HCA Health Servs. of Tex., Inc. v. Salinas, 838 S.W.2d 246, 248 (Tex. 1992); Curtis v. Gibbs, 511 S.W.2d 263, 267 (Tex. 1974).

262. *See HCA*, 838 S.W.2d at 248.

263. *See, e.g.*, McLain v. Smith, 899 S.W.2d 412, 414 (Tex. App.—Amarillo 1995, orig. proceeding); Hayes v. Floyd, 881 S.W.2d 617, 619 (Tex. App.—Beaumont 1994, orig. proceeding); Low v. King, 867 S.W.2d 141, 142 (Tex. App.—Beaumont 1993, orig. proceeding).

Curiously, however, a greater number of cases have held or suggested that mandamus is available to correct such orders, many times without an explanation of the inadequacy of the appellate remedy.[264] In addition, some of the explanations proffered by those courts that have addressed the adequacy of the appellate remedy do not comport with the supreme court's admonition in *Walker* that an appellate remedy is not inadequate merely because it involves more expense or delay than seeking the extraordinary writ.[265]

Dal-Briar Corp. v. Baskette[266] provides a good example of an appellate court's disregard of this admonition. In *Dal-Briar*, the El Paso court of appeals concluded that the relator had no adequate remedy by appeal from a trial court's order consolidating for trial the claims of three plaintiffs alleging retaliatory discharge.[267] The court reasoned that once the consolidated trial was held, it would be impossible to determine on appeal whether the consolidation was harmful and whether prejudice and confusion infected the jury's deliberations.[268] However, this reasoning is clearly erroneous. Texas courts have frequently addressed whether a consolidation or severance order was proper via a regular appeal without any great difficulty in analyzing whether any error was harmful.[269]

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264. *See, e.g.*, Texas Farmers Ins. Co. v. Stem, 927 S.W.2d 76, 80 (Tex. App.—Waco 1996, orig. proceeding) (stating without analysis that "the trial court's failure to sever left Farmers without an adequate remedy by appeal"); Lusk v. Puryear, 896 S.W.2d 377, 379–81 (Tex. App.—Amarillo 1995, orig. proceeding) (issuing mandamus to compel the trial court to vacate its severance order without discussing the adequacy of an appellate remedy); Amanda v. Montgomery, 877 S.W.2d 482, 485 (Tex. App.—Houston [1st Dist.] 1994, orig. proceeding) (issuing mandamus for the trial court's failure to order severance without addressing the adequacy of an appellate remedy); Northwestern Nat'l Lloyds Ins. Co. v. Caldwell, 862 S.W.2d 44, 47 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding) (stating, without explanation, that a "trial of contractual claims, along with the bad faith claims, would not afford relator an adequate remedy by appeal"); State Farm Mut. Auto. Ins. Co. v. Wilborn, 835 S.W.2d 260, 261–62 (Tex. App.—Houston [14th Dist.] 1992, orig. proceeding) (issuing mandamus requiring the trial court to grant a motion for separate trials without addressing the adequacy of appellate remedy).

265. *See supra* note 127–30 and accompanying text.

266. 833 S.W.2d 612 (Tex. App.—El Paso 1992, orig. proceeding).

267. *See Dal-Briar*, 833 S.W.2d at 617.

268. *See id.*

269. *See, e.g.*, Kansas Univ. Endowment Ass'n v. King, 162 Tex. 599, 612, 350 S.W.2d 11, 19 (Tex. 1961) (finding that harm resulted from improper severance of the case); St. Paul Ins. Co. v. McPeak, 641 S.W.2d 284, 289 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.) (deciding that the trial court reversibly erred by denying the motion to sever).

Moreover, adopting the *Dal-Briar* rationale would basically dispense with the inadequate remedy by appeal requirement for the issuance of mandamus in consolidation cases, which is clearly contrary to the dictates of the supreme court in *Walker v. Packer.*

Two other appellate court decisions, *United States Fire Insurance Co. v. Millard*[270] and *F.A. Richard & Associates v. Millard*,[271] concluded that an appellate remedy was not adequate when an insurance company was improperly denied a severance of the bad faith claims from the contract claims.[272] Both courts held that the respective insurance companies had a substantial right not to have the settlement offers and negotiations they had made, which were relevant to the bad faith claims, introduced at the trial of the contract claims.[273] Once again, this reasoning does not seem to comport with *Walker.* These cases essentially concluded that a severance was required because of potential prejudice at a trial from the admission of evidence. If this rationale was taken to its logical conclusion, a party could have any prejudicial evidentiary ruling reviewed via mandamus, and mandamus would cease to be an extraordinary writ.

Thus, most of the opinions holding that mandamus is available to review a trial court's severance or consolidation order have not properly analyzed the *Walker* standards.[274] The supreme court has not, however, attempted to correct this aberration. In fact, in *Lib-*

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270. 847 S.W.2d 668 (Tex. App.—Houston [1st Dist.] 1993, orig. proceeding).

271. 856 S.W.2d 765 (Tex. App.—Houston [1st Dist.] 1993, orig. proceeding).

272. *See F.A. Richard*, 856 S.W.2d at 767; *United States Fire Ins.*, 847 S.W.2d at 675.

273. *See F.A. Richard*, 856 S.W.2d at 767; *United States Fire Ins.*, 847 S.W.2d at 675.

274. *See supra* notes 264–73 and accompanying text. *But see* Mid-Century Ins. Co. of Tex. v. Lerner, 901 S.W.2d 749, 752 (Tex. App.—Houston [14th Dist.] 1995, orig. proceeding) (reasoning properly that the insurance company was irreparably harmed when the trial court reconsolidated the contract and bad faith claims after the jury returned a verdict for the insured on the contract claim because the introduction of written evaluations of the contract claim in the bad faith suit would waive applicable privileges if there was a remand on appeal in the contract suit and because interest was continuing to accrue on the contract judgment); Jones v. Ray, 886 S.W.2d 817, 822 (Tex. App.—Houston [1st Dist.] 1994, orig. proceeding) (reasoning that the medical malpractice claimant was irreparably harmed by severance of the claims into two separate suits because the defendants in each suit would blame the defendants in the other suit for the plaintiff's injury, thus skewing the conduct of the entire litigation and appellate proceedings to such an extent as to constitute a waste of judicial resources).

erty National Fire Insurance Co. v. Akin,[275] the supreme court may have added to the confusion.

In *Liberty National*, the court denied an insurer's mandamus petition arising from the trial court's refusal to sever the insured's breach of contract claim from its bad faith claim.[276] The court, without analyzing whether the insurer had an adequate remedy by appeal, concluded that the trial court did not abuse its discretion under the circumstances of the case.[277] In the course of its discussion, the court noted that some appellate courts had concluded that a severance would be required under certain circumstances, such as when the insurer offered to settle the entire dispute, and the court expressly "concur[red] with these decisions."[278] Because four of the appellate court decisions on which the court relied were issued via mandamus,[279] and three of the four did so without an adequate explanation of the inadequacy of an appellate remedy,[280] the court inserted some additional uncertainty in this area.

Subsequently, in *Nationwide Mutual Insurance Co. v. Spears-Peterson*,[281] the supreme court was requested to review a trial court's order denying a severance via mandamus.[282] Instead of issuing mandamus, the court directed the trial court to reconsider the ruling in light of *Liberty National*.[283] The court also noted that it was overruling leave to file the petition "without prejudice to relator again requesting relief from the court of appeals and this Court."[284] Once again, the supreme court suggested the possibility that man-

275. 927 S.W.2d 627 (Tex. 1996).

276. *See Liberty Nat'l*, 927 S.W.2d at 628–29.

277. *See id.* at 630–31.

278. *Id.* at 630.

279. *See* Mid-Century Ins. Co. of Tex. v. Lerner, 901 S.W.2d 749, 752–53 (Tex. App.—Houston [14th Dist.] 1995, orig proceeding); Northwestern Nat'l Lloyds Ins. Co. v. Caldwell, 862 S.W.2d 44, 46–47 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding); F.A. Richard & Assocs. v. Millard, 856 S.W.2d 765, 767 (Tex. App.—Houston [1st Dist.] 1993, orig. proceeding); United States Fire Ins. Co. v. Millard, 847 S.W.2d 668, 673 (Tex. App.—Houston [1st Dist.] 1993, orig. proceeding).

280. Only in *Mid-Century*, 901 S.W.2d at 752–53, did the appellate court present an adequate explanation of the inadequacy of the appellate remedy. *See supra* note 274. In the other cases relied on by the supreme court, the courts of appeals did not properly analyze the adequacy of the appellate remedy. *See supra* notes 264–73 and accompanying text.

281. 940 S.W.2d 594 (Tex. 1996).

282. *See Nationwide Mut.*, 940 S.W.2d at 594.

283. *See id.*

284. *Id.*

damus would be available in such a case without explaining how the appellate remedy was inadequate.

Most recently, the supreme court has granted the motion for leave to file and heard oral argument in two cases, *Bristol-Myers Squibb Co. v. Marshall*[285] and *Ethyl Corp. v. Stone*.[286] In these cases, the relators complain of consolidation orders in a breast implant case and an asbestos case, respectively.[287] Additionally, the relators state that the trial courts' consolidation orders will prejudice them because the plaintiffs are dissimilar, have distinct medical histories, different exposure to defendants' products, and damages.[288] These cases may provide the court with the opportunity to delineate when an appellate remedy is inadequate to rectify a trial court's clear abuse of discretion in a consolidation or severance order.

7. Void Orders

In its 1973 opinion in *Dikeman v. Snell*,[289] the supreme court held that a void trial court judgment rendered without jurisdiction could be challenged by mandamus, even though the relator failed to pursue an alternate appellate remedy that was immediately available.[290] Of course, the *Dikeman* rule appears contrary to the court's subsequent holding in *Walker* that mandamus will not lie if

285. 40 Tex. Sup. Ct. J. 131, 135 (Dec. 13, 1996) (granting motion for leave to file the petition for writ of mandamus and setting oral argument for January 16, 1997).

286. 40 Tex. Sup. Ct. J. 131, 135 (Dec. 13, 1996) (granting motion for leave to file petition for writ of mandamus and setting oral argument for January 16, 1997).

287. Petition for Writ of Mandamus and Brief in Support Thereof at 4, *Bristol-Myers* (No. 96–0881) (on file with the *St. Mary's Law Journal*); Relators' Petition for Writ of Mandamus and Request for Temporary Relief at 3, *Ethyl Corp.* (No. 96–0931) (on file with the *St. Mary's Law Journal*).

288. Petition at 5–6, *Bristol-Myers* (No. 96–0881); Relators' Petition at 9–12, *Ethyl Corp.* (No. 96–0931).

289. 490 S.W.2d 183 (Tex. 1973).

290. *See Dikeman*, 490 S.W.2d at 186. The trial court rendered a purported judgment nunc pro tunc more than five months after the original judgment became final by operation of law. *See id.* at 184–85. The supreme court, however, held that the nunc pro tunc judgment was void because it attempted to correct a judicial error rather than a clerical error in the judgment. *See id.* at 186. The court then concluded that mandamus was available to set aside the void nunc pro tunc judgment despite the fact that the relator could have immediately appealed the nunc pro tunc judgment, but failed to do so. *See id.* The court reasoned that, because for the last decade it had been accepting and exercising mandamus jurisdiction in cases involving void judgments, the relator had every reason to expect relief from the void judgment without the necessity of attempting an appeal. *See id.*

there is an adequate remedy by appeal.[291] The supreme court has had two opportunities to address whether *Dikeman* survived *Walker*, but has declined to resolve the issue both times.

The first opportunity came in *Enis v. Smith*.[292] In its first *Enis* opinion, the court relied on *Dikeman* as support for its holding that mandamus was available to set aside a void trial court order without regard to the availability of an appeal.[293] The court reasoned that the "theory underlying this rule is that a void judgment needs no appellate action to proclaim its invalidity."[294] The court's first opinion in *Enis* appeared to make it clear that a void order could always be challenged via mandamus without regard to the adequacy of an appeal; yet, exactly three months later, the opinion was withdrawn and a new opinion substituted in its place.[295] In the new opinion, the court deleted the references to *Dikeman* and the availability of mandamus from void orders.[296] The court instead reasoned that, under the circumstances of the case, mandamus was appropriate because the relator had no adequate remedy by appeal from the trial court's turnover order against him after the foreign judgment on which the turnover order was based was declared void by the issuing court.[297] The supreme court expostulated that the incompatibility of the appellate timetables between the states could deprive litigants of an opportunity to file appeals of turnover orders, thereby rendering an appeal an inadequate remedy when a Texas trial court sought to enforce a void foreign judgment.[298] The court thus modified its focus in the second *Enis* opinion—rather than issuing a broad ruling that mandamus was always available to challenge a void judgment, the court concluded that the circumstances of the particular case justified mandamus.[299]

In its second opportunity to clarify the viability of *Dikeman*, the court in *Geary v. Peavy*[300] concluded that extraordinary circumstances justified mandamus relief, but refused to address the issue

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291. *See* Walker v. Packer, 827 S.W.2d 833, 840–42 (Tex. 1992).
292. 37 Tex. Sup. Ct. J. 1013 (June 15, 1994), *withdrawn*, 883 S.W.2d 662 (Tex. 1994).
293. *See id.* at 1014.
294. *Id.*
295. *See* Enis v. Smith, 883 S.W.2d 662, 663 (Tex. 1994).
296. *See Enis*, 883 S.W.2d at 662–63.
297. *See id.*
298. *See id.* at 663.
299. *See id.*
300. 878 S.W.2d 602 (Tex. 1994).

of whether *Dikeman* survived *Walker*.[301] In *Geary*, a jurisdictional dispute between a Minnesota state district court and a Texas state district court had led to conflicting child custody orders.[302] While the relator in *Geary* could clearly have appealed from the trial court's denial of her jurisdictional challenge, the court still granted mandamus relief.[303] However, the court declined to address the "broad issue" of whether "the *Dikeman* rule survives *Walker*;" instead, the court held that "the unique and compelling circumstances of [the] case dictate that . . . [mandamus] be applied here to resolve this jurisdictional dispute that has led to conflicting child custody orders."[304]

While the supreme court has side-stepped the issue of whether mandamus will generally issue against a void order when the order is immediately appealable, the court has shown a willingness to issue mandamus when a void order is not immediately appealable. For instance, mandamus is available to compel a visiting judge's mandatory disqualification upon a proper objection.[305] Despite the fact that an appeal after the trial could rectify the error,[306] mandamus will issue, in part because the judge's subsequent orders are void.[307] In *Dunn v. Street*,[308] the supreme court held that mandamus was also available to challenge a void show cause order issued after the trial court had properly sustained a visiting judge objection.[309] The court held that this was a "proper subject of mandamus when the show cause order is void as a result of a timely Section 74.053 objection."[310]

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301. *See Geary*, 878 S.W.2d at 603.

302. *See id.* at 602–03.

303. *See id.* at 603.

304. *Id.*; *see* Little v. Daggett, 858 S.W.2d 368, 369 (Tex. 1993) (declaring that mandamus was available to challenge a temporary order granting visitation rights issued without jurisdiction because the temporary order was not appealable).

305. *See, e.g.*, Mitchell Energy Corp. v. Ashworth, 943 S.W.2d 436, 437 (Tex. 1997); Amateur Athletic Found. v. Hoffman, 893 S.W.2d 602, 603 (Tex. App.—Dallas 1994, orig. proceeding); Rubin v. Hoffman, 843 S.W.2d 658, 659 (Tex. App.—Dallas 1992, orig. proceeding).

306. *See Mitchell*, 943 S.W.2d at 437 (noting that "[m]andamus is available . . . without a showing that the relator lacks an adequate remedy by appeal.").

307. *See* Flores v. Banner, 932 S.W.2d 500, 501 (Tex. 1996).

308. 938 S.W.2d 33 (Tex. 1997).

309. *See Dunn*, 938 S.W.2d at 35.

310. *Id.*

Similarly, mandamus is available when a trial court erroneously reinstates a case or grants a new trial after the expiration of the trial court's plenary jurisdiction, or when a trial court attempts to enter an order concerning the underlying claims after the plaintiff has taken a nonsuit.[311] These types of orders are void because the trial court is without jurisdiction to enter such orders.[312] While an appeal after the rendition of a final judgment in such a case is technically available, the appellate remedy is not adequate to rectify the harm of being forced to prosecute or defend a lawsuit when the trial court has no jurisdiction.[313]

Accordingly, mandamus apparently will lie to correct a void judgment or order if an immediate appeal is not available to correct the error.[314] Further, even in instances in which an appeal is available, courts have issued mandamus after *Walker* to rectify a void judgment or order when unusual or extraordinary circum-

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311. *See* Howley v. Haberman, 878 S.W.2d 139, 140 (Tex. 1994) (instructing that "[w]hen a trial court erroneously reinstates a case after the expiration of the court's plenary jurisdiction, mandamus will issue."); Zimmerman v. Ottis, 941 S.W.2d 259, 261–63 (Tex. App.—Corpus Christi 1996, orig. proceeding) (issuing mandamus against the trial court's attempt to transfer venue after the plaintiff took nonsuit because the order was void); Graham v. Fashing, 928 S.W.2d 567, 569 (Tex. App.—El Paso 1996, orig. proceeding) (acknowledging that mandamus is available to correct a void order of the trial court granting a new trial after plenary power expired); Gem Vending, Inc. v. Walker, 918 S.W.2d 656, 658 (Tex. App.—Fort Worth 1996, orig. proceeding) (affirming "[m]andamus is the appropriate remedy when a trial court enters a void order for new trial outside its plenary power."); South Main Bank v. Wittig, 909 S.W.2d 243, 244 (Tex. App.—Houston [14th Dist.] 1995, orig. proceeding) (allowing mandamus as an appropriate remedy to correct the trial court's abuse of discretion in entering an order of reinstatement after plenary power expired).

312. *Cf.* Mapco, Inc. v. Forrest, 795 S.W.2d 700, 703 (Tex. 1990) (explaining that "[a] judgment is void only when it is apparent that the court rendering the judgment had no jurisdiction of the parties, no jurisdiction of the subject matter, no jurisdiction to enter the judgment, or no capacity to act as a court.").

313. *Cf.* National Unity Ins. Co. v. Johnson, 926 S.W.2d 818, 822 (Tex. App.—San Antonio 1996, orig. proceeding) (finding that the trial court's alteration of the original judgment after the expiration of plenary power from a judgment dismissing both the defendants to a judgment dismissing only one defendant was void; defendant had no adequate remedy from being forced to defend the lawsuit over which the trial court had no jurisdiction). A few appellate courts have extended this rationale to hold that mandamus is available when a trial court enters a void order attempting to transfer a case to itself from another court. *See, e.g.*, Milton v. Herman, 947 S.W.2d 737, 742 (Tex. App.—Austin 1997, orig. proceeding); DB Entertainment, Inc. v. Windle, 927 S.W.2d 283, 289 (Tex. App.—Fort Worth 1996, orig. proceeding); Flores v. Peschel, 927 S.W.2d 209, 212 (Tex. App.—Corpus Christi 1996, orig. proceeding).

314. *See supra* notes 305–13 and accompanying text.

stances were present, similar to the supreme court's approach in *Enis*[315] and *Geary*.[316]

For instance, the supreme court has issued mandamus when a district court has attempted to enjoin grievance procedures of the State Bar, despite the fact that an appeal would be available from a temporary or permanent injunction, based on the court's conclusion that the lower court is without jurisdiction to issue such an injunction.[317] The supreme court has reasoned that it is not necessary to consider whether an adequate remedy at law exists because such an injunction impacts "the orderly processes of government."[318] Appellate courts have also issued mandamus against appealable trial court judgments rendered during the pendency of a bankruptcy stay.[319] An argument can be made that an appellate remedy is inadequate in such a situation because an appeal is too expensive and dilatory to enforce the strong federal policy underlying the mandatory bankruptcy stay.

Despite the supreme court's refusal to determine whether the *Dikeman* rule survived *Walker*, at least one court of appeals has issued mandamus when a void order was immediately appealable and no special circumstances existed, reasoning that an appellate remedy is simply not adequate to rectify the harm from an order issued without jurisdiction.[320] Yet, another appellate court apparently disagrees with this reasoning, declining to generally issue mandamus if a void order is immediately appealable.[321]

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315. *See* Enis v. Smith, 883 S.W.2d 662, 663 (Tex. 1994).

316. *See* Geary v. Peavy, 878 S.W.2d 602, 603 (Tex. 1994).

317. *See* State Bar of Tex. v. Jefferson, 942 S.W.2d 575, 575–76 (Tex. 1997); Board of Disciplinary Appeals v. McFall, 888 S.W.2d 471, 472–73 (Tex. 1994); State v. Sewell, 487 S.W.2d 716, 719 (Tex. 1972).

318. *Jefferson*, 942 S.W.2d at 576; *see McFall*, 888 S.W.2d at 472; *Sewell*, 487 S.W.2d at 719.

319. *See, e.g.,* Sanchez v. Hester, 911 S.W.2d 173, 175 (Tex. App.—Corpus Christi 1995, orig. proceeding); Thomas v. Miller, 906 S.W.2d 260, 263 (Tex. App.—Texarkana 1995, orig. proceeding).

320. *See* Miller v. Woods, 872 S.W.2d 343, 346 (Tex. App.—Beaumont 1994, orig. proceeding).

321. *See* Deborah G. Hankinson & James B. Spamer, *Mandamus—When Is It Available?*, *in* SECOND ANNUAL DISCOVERY PRACTICE CONFERENCE, SOUTH TEXAS COLLEGE OF LAW, L-8-9 (Nov. 1996). The authors comment that:

> [E]ven if a trial court's order is clearly void, the Dallas Court of Appeals will not ordinarily grant mandamus relief if the order results in a final judgment that can be appealed. . . . The question is one of policy: if an appeal is possible, the Dallas Court prefers to hear the controversy in that form.

This conflict creates a dilemma for practitioners attempting to challenge a void order. While mandamus is generally available to challenge a void order that is not immediately appealable, the cases are inconsistent on the availability of the extraordinary writ to review a void order that is immediately appealable.[322] Until this issue is definitively resolved by the supreme court, the best solution may be for a practitioner to file a petition for writ of mandamus with all possible haste and then, if the petition is denied or has not been ruled on by the deadline for perfecting an appeal, the practitioner should timely perfect an appeal from the void judgment or order.

8. Violations of the First Amendment

Mandamus jurisdiction is properly invoked when First Amendment rights are at issue.[323] For example, in *Tilton v. Marshall*, the supreme court granted mandamus relief to the defendant, televangelist Robert Tilton, as a result of the trial court's failure to dismiss the plaintiffs' intentional infliction of emotional distress and related conspiracy claims against him.[324] While mandamus relief is ordinarily not available from a lower court's failure to dismiss a claim, the court reasoned that the mere adjudication of these claims would necessarily require an inquiry into the truth of Tilton's religious beliefs and that such an inquiry was prohibited by the United States Constitution.[325] In other words, because the very conduct of a trial on these claims would violate Tilton's constitutional rights, an appellate remedy would come too late to rectify the harm and mandamus relief was appropriate.

Id.

322. *See supra* notes 315–21.

323. *See* Republican Party of Tex. v. Dietz, 940 S.W.2d 86, 94 (Tex. 1997) (noting that mandamus is available when First Amendment rights are at issue); *see also* Tilton v. Marshall, 925 S.W.2d 672, 681–82 (Tex. 1996) (conditionally issuing mandamus requiring the trial court to dismiss the plaintiffs' intentional infliction of emotional distress and related conspiracy claims on the ground that a trial of such claims would impinge upon religious liberty); Grigsby v. Coker, 904 S.W.2d 619, 621 (Tex. 1995) (conditionally issuing mandamus against gag order that chilled free speech rights); Star-Telegram, Inc. v. Walker, 834 S.W.2d 54, 58 (Tex. 1992) (conditionally issuing mandamus against protective order that violated the right to disseminate public information); Davenport v. Garcia, 834 S.W.2d 4, 11 (Tex. 1992) (conditionally issuing mandamus against gag order which violated free speech rights).

324. *See Tilton*, 925 S.W.2d at 681–82.

325. *See id.* at 682.

Similarly, Texas courts have concluded that mandamus may be available to prevent the irreparable harm stemming from an order infringing upon free speech rights.[326] A remedy by appeal, even if the appeal is accelerated, is not expedient enough to alleviate the irreparable harm caused by the very existence of an order chilling an individual's fundamental rights.[327]

9. Protecting Appellate Jurisdiction and Related Appellate Matters

Texas courts will issue mandamus to protect their appellate jurisdiction over a case.[328] For instance, if a court reporter fails to timely prepare and file a reporter's record necessary to the resolution of an appeal, a court of appeals can issue mandamus against the court reporter.[329] An appellate court can also issue a writ of mandamus to safeguard its jurisdiction and prevent the appeal from becoming moot.[330] In order to protect its jurisdiction, the supreme court has issued the extraordinary writ to require a court

326. *See, e.g., Grigsby*, 904 S.W.2d at 621 (conditionally issuing mandamus against gag order that violated free speech rights); Kennedy v. Eden, 837 S.W.2d 98, 98–99 (Tex. 1992) (conditionally issuing mandamus against the trial court order perpetually precluding the witness from communicating with anyone about litigation); Corpus Christi Caller-Times v. Mancias, 794 S.W.2d 852, 854 (Tex. App.—Corpus Christi 1990, orig. proceeding) (conditionally issuing mandamus against a temporary injunction infringing upon free speech rights).

327. *See Kennedy*, 837 S.W.2d at 99 (concluding that the harm suffered by restraining speech could not be repaired on appeal); *Corpus Christi Caller-Times*, 794 S.W.2d at 854 (stating that the threat of censorship "is not remediable by the normal appellate process because it is a continuing threat which concerns the fundamental constitutional right to speak freely which must be protected").

328. *See* Palacio v. Johnson, 663 S.W.2d 490, 491 (Tex. App.—Houston [1st Dist.] 1983, orig. proceeding); Texas Employment Comm'n v. Norris, 634 S.W.2d 85, 86 (Tex. App.—Beaumont 1982, no writ).

329. *See Palacio*, 663 S.W.2d at 491.

330. *See, e.g., Norris*, 634 S.W.2d at 86; General Tel. Co. v. City of Garland, 522 S.W.2d 732, 734 (Tex. Civ. App.—Dallas 1975, no writ); Madison v. Martinez, 42 S.W.2d 84, 86 (Tex. Civ. App.—Dallas 1931, writ ref'd).

of appeals to forward an application for writ of error[331] and to compel a court of appeals to rule on a motion for rehearing.[332]

Mandamus is also available to insure that a party can pursue an appeal. For example, in *Cantu v. Longoria*,[333] the supreme court issued mandamus when a trial court refused to hold a hearing to determine when the relator received notice of the trial court's judgment.[334] The court reasoned that the failure to determine the issue prevented the relator from pursuing an appeal.[335] Likewise, mandamus will issue to review a trial court's decision on a contest to an affidavit of inability to pay costs on appeal.[336] When such a contest is erroneously sustained, the relator is financially unable to pursue an appeal, rendering the appellate remedy inadequate.

Texas courts will also exercise mandamus jurisdiction over certain collateral appellate matters. In *Lee v. Downey*,[337] the supreme

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331. *See* Mapco, Inc. v. Forrest, 795 S.W.2d 700, 703 (Tex. 1990). However, under the new Texas Rules of Appellate Procedure, this situation will no longer occur. Under the new rules, the supreme court now reviews final judgments of the courts of appeals via a petition for review rather than an application for writ of error. *See* TEX. R. APP. P. 53.7. The petition for review is to be filed in the supreme court rather than the court of appeals. *See id.*

332. *See* Doctors Hosp. Facilities v. Fifth Court of Appeals, 750 S.W.2d 177, 179–80 (Tex. 1988). While under the new rules of appellate procedure a motion for rehearing is not a prerequisite to filing a petition for review in the supreme court, the supreme court will not act on a petition until the court of appeals has overruled all pending motions for rehearing in the cause. *See* TEX. R. APP. P. 49.9; TEX. R. APP. P. 53.7.

333. 878 S.W.2d 131 (Tex. 1994).

334. *See Cantu*, 878 S.W.2d at 132.

335. *See id.* If a party affected by a judgment has not received notice or does not have actual knowledge of the signing of the judgment within 20 days after the judgment was signed, the appellate timetables run from the date that the party receives notice or actual knowledge of the signing of the judgment. *See id.*(citing TEX. R. APP. P. 5(b)(4) (repealed), currently TEX. R. APP. P. 4.2(a)(1)). However, in order for a party to obtain relief under this provision, the trial court must sign a written order finding the date in which the party first received notice or actual knowledge. *See id.*(citing TEX. R. APP. P. 5(b)(5) (repealed), currently TEX. R. APP. P. 4.2(c)). Thus, the relator in *Cantu*, who alleged that she did not receive notice and that she lacked actual knowledge of the signing of the judgment until after the normal time for perfecting an appeal had expired, could not pursue any appeal without the trial court's finding. *See id.*

336. *See, e.g.*, Griffin Indus., Inc. v. Thirteenth Court of Appeals, 934 S.W.2d 349, 349 (Tex. 1996); Smith v. McCorkle, 895 S.W.2d 692, 693 (Tex. 1995); Rios v. Calhoon, 889 S.W.2d 257, 259 (Tex. 1994); Grossnickle v. Turner, 903 S.W.2d 362, 364 (Tex. App.—Texarkana 1995, orig. proceeding); Watson v. Hart, 871 S.W.2d 914, 919 (Tex. App.—Austin 1994, orig. proceeding); Lovall v. West, 859 S.W.2d 544, 545-46 (Tex. App.—Houston [1st Dist.] 1993, orig. proceeding).

337. 842 S.W.2d 646 (Tex. 1992).

court issued mandamus requiring the trial court to issue a judgment in accordance with the court's mandate.[338] In *Isern v. Ninth Court of Appeals*,[339] the supreme court held that there was no adequate remedy by appeal when the court of appeals set aside a trial court's order allowing a defendant to post alternate security to suspend execution on a judgment pending appeal.[340] The court expostulated that no adequate remedy by appeal existed because, absent immediate relief, the defendant could not supersede execution of the judgment, and the threat of execution was a "situation of manifest and urgent necessity which render[ed] any remedy by appeal inadequate."[341]

Moreover, in *National Union*, the supreme court conditionally issued mandamus relief requiring the court of appeals to grant a motion for extension of time to file a statement of facts and to allow the filing of same.[342] Despite the fact that the failure of the appellate court to grant the motion for extension could clearly have been reviewed upon an application for writ of error, the court concluded that there would be no "meaningful appellate review" by the court of appeals without the benefit of the statement of facts, thus making the appeal a "useless exercise" and a waste of judicial resources.[343]

10. A Unifying Principle?

Careful scrutiny of the preceding categories of orders reveals that the "no adequate remedy by appeal" requirement can be satisfied in one of two ways. First, the requirement can be met if no appellate remedy exists that can rectify the harm.[344] Second, the requirement can be satisfied in situations in which an appellate remedy exists that could eventually rectify the harm, but the appel-

338. *See Lee*, 842 S.W.2d at 648.

339. 925 S.W.2d 604 (Tex. 1996).

340. *See Isern*, 925 S.W.2d at 606.

341. *Id.*; *see also* Vineyard v. Irvin, 855 S.W.2d 208, 211 (Tex. App.—Corpus Christi 1993, orig. proceeding) (stating that the "trial court may be compelled by writ of mandamus to fix amount of supersedeas bond").

342. *See* National Union Fire Ins. Co. v. Ninth Court of Appeals, 864 S.W.2d 58, 61 (Tex. 1993).

343. *Id.* Chief Justice Phillips, joined by Justices Gonzalez and Enoch, dissented, arguing that the normal appellate process could rectify any error. *See id.* at 62–63 (Phillips, C.J., dissenting).

344. *See supra* notes Part III.B.1.–.9 and accompanying text.

late remedy is "inadequate," either because of the nature of the lower court's order or the special circumstances present in the case.[345]

Of course, if no appellate remedy exists that can rectify the harm, there is no adequate remedy by appeal, and mandamus is available. A perfect example of this principle is illustrated by *D'Unger v. De Pena*.[346] In *D'Unger*, the supreme court held that no adequate remedy by appeal existed when a probate court interfered with an independent executor's administration of a will because the probate code afforded no mechanism for appellate relief from such a clear abuse of discretion.[347] Stated differently, mandamus was available because there was no appellate remedy that could rectify the harm. Similarly, mandamus is available when a trial court compels the production of either privileged documents, confidential documents that are not relevant to the case, or overly broad discovery because no appellate remedy can undo the harm once the documents are produced.[348] Further, an appeal cannot rectify the immediate and irreparable harm stemming from an order improperly granting or denying a motion to disqualify counsel,[349] or from an order that precludes a party from appealing.[350] In all these situations, no serious argument can be made that the appellate remedy is adequate because no appellate remedy exists that can alleviate the harm.

The more difficult situation arises when an appellate remedy could eventually rectify the harm. The controlling issue then becomes whether the eventual appellate remedy is "adequate." The supreme court debated the "adequacy" of an appellate remedy in *Travelers Indemnity Co. v. Mayfield*.[351] In *Travelers*, a workers' compensation claimant requested that the court appoint an attorney for her to be paid by the workers' compensation carrier, which had sought judicial review of the Texas Workers' Compensation Commission decision awarding her benefits.[352] The trial court

345. *See supra* notes Part III.B.1.–.9 and accompanying text.
346. 931 S.W.2d 533 (Tex. 1996).
347. *See D'Unger*, 931 S.W.2d at 535.
348. *See supra* notes 132–46 and accompanying text.
349. *See supra* notes 197–98 and accompanying text.
350. *See supra* notes 333–36 and accompanying text.
351. 923 S.W.2d 590 (Tex. 1996).
352. *See Travelers*, 923 S.W.2d at 591.

granted the claimant's motion, requiring the carrier to pay the claimant's attorney's fees on a monthly basis during the pendency of the action.[353] The carrier sought leave to file a petition for writ of mandamus with the supreme court.[354] The court first concluded that the trial court's order requiring the carrier to pay the claimant's attorney's fees was an abuse of discretion.[355] The court then turned to the more difficult question—whether the carrier had an adequate remedy by appeal.

While noting that the carrier could challenge the order on regular appeal, the court held that a regular appeal was inadequate because the "unusual circumstances" requiring the carrier to fund its opponent's legal fees "radically skew[ed] the procedural dynamics of the case."[356] The court reasoned that the party receiving a "free ride" under such an order would have "little incentive to resolve the dispute economically and efficiently."[357] The court found support for its holding in *TransAmerican Natural Gas Corp. v. Powell*,[358] in which the court held that an eventual remedy by appeal from the trial court's death penalty sanction was inadequate because the entire conduct of the litigation had been skewed by the imposition of the sanction.[359] Justice Baker, joined by Justices Cornyn and Spector, dissented in *Travelers*, maintaining that the carrier could challenge the order by a regular appeal so that an adequate remedy by appeal existed.[360]

The two opinions in *Travelers* clash with respect to the proper method for determining whether an appeal is "adequate." In the majority opinion, the court concluded that an appeal was not "adequate" because of extraordinary or unusual circumstances that skewed the litigation process.[361] On the other hand, Justice Baker's dissent in *Travelers* urged that because an appeal was available that could correct the trial court's action, the appellate remedy

353. *See id.* at 592.

354. *See id.*

355. *See id.* at 593–94.

356. Travelers Indemnity Co. v. Mayfield, 923 S.W.2d 590, 595 (Tex. 1996).

357. *Id.*

358. 811 S.W.2d 913 (Tex. 1991).

359. *See Travelers*, 923 S.W.2d at 595 (citing *TransAmerican*, 811 S.W.2d at 919).

360. *See id.* (Baker, J., dissenting).

361. *See* Travelers Indemnity Co. v. Mayfield, 923 S.W.2d 590, 595 (Tex. 1996).

was "adequate" and mandamus should not lie, no matter how extraordinary or unusual the circumstances.[362]

Of course, it is an overstatement to argue that if an appeal is available it is "adequate." Texas courts have noted a number of situations in which an appeal was not adequate even if the appeal could eventually rectify the harm. A perfect example is the supreme court's decision in *TransAmerican* that death penalty sanctions could be reviewed via mandamus because the appellate remedy was not "effective."[363] This Article has also discussed several other situations in which courts have concluded that an appeal from a particular type of order at the conclusion of a trial is not adequate, such as void orders that are not immediately appealable[364] and the denial of discovery going to the heart of a party's case.[365]

The real difficulty is determining whether an available appellate remedy is "adequate" in a case in which no binding precedent exists to guide the court. For instance, in *Travelers*, no Texas court had ever addressed the adequacy of an appellate remedy from a trial court's order requiring one party to pay the other party's attorney's fees. Thus, the dilemma is whether the court should examine the circumstances of the case to determine if exceptional, extraordinary, special, or unusual circumstances justify mandamus relief, as the majority did in *Travelers*,[366] or whether the court should revert to a mechanical application of the *Walker* principles and conclude that the availability of an appeal makes the appellate remedy adequate, as the dissent argued in *Travelers*.[367]

This debate fuels the occasional inconsistencies in the supreme court's opinions on mandamus. *Walker* made it appear that the court was adopting a strict view that unless it had already recognized that an appeal from a certain type of order was inadequate, the availability of an appeal precluded the issuance of mandamus. However, on a number of occasions since *Walker*, five or more Justices have been of the view that, despite the eventual availability of

362. *See id.* (Baker, J., dissenting).

363. *See* TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 919–20 (Tex. 1991).

364. *See supra* notes 305–14 and accompanying text.

365. *See supra* notes 147–57 and accompanying text.

366. *See supra* notes 356–59, 361 and accompanying text.

367. *See supra* notes 360, 362 and accompanying text.

an appeal, the appellate remedy was inadequate in a particular case because of extraordinary, exceptional, unique, or compelling circumstances.[368] An advantage to using such a case-by-case analysis is that it allows the court greater freedom to do justice by expediently granting mandamus relief in egregious cases in which such relief is justified. The obvious drawback of a case-by-case analysis is that it precludes practitioners from predicting with any degree of certainty whether mandamus relief is available from a particular ruling of a lower court if an appeal is available that could eventually rectify the harm and there is no binding precedent on the adequacy of that appellate remedy.

As a consequence, a relator has the greatest chance of success if it can be established that an appeal cannot alleviate the harm or that binding precedent holds that the appellate remedy from such an order is inadequate. Otherwise, the relator must attempt to argue that the extraordinary, exceptional, unique, or compelling circumstances of the case make an available appellate remedy inadequate. In such a situation, the relator is really making a plea to the court that justice should be done immediately rather than upon an appeal from a final judgment, and the availability of mandamus is dependent on whether a majority of the reviewing court agrees with the relator's assessment.

C. *Equitable Considerations*

While mandamus is not an equitable remedy, its issuance is largely controlled by equitable principles.[369] One of these principles is that equity aids the diligent, not those who slumber on their rights.[370] A mandamus petition may accordingly be denied on the sole basis of an unjustified delay in seeking relief. In *Rivercenter Associates v. Rivera*,[371] the relator requested mandamus relief from the trial court's order overruling its motion to quash the real party in interest's jury demand.[372] The supreme court denied the writ

368. *See, e.g.*, Mantas v. Fifth Court of Appeals, 925 S.W.2d 656, 658 (Tex. 1996); CSR Ltd. v. Link, 925 S.W.2d 591, 596 (Tex. 1996); Travelers Indemnity Co. v. Mayfield, 923 S.W.2d 590, 595 (Tex. 1996); Geary v. Peavy, 878 S.W.2d 602, 603 (Tex. 1994).

369. *See* Rivercenter Assocs. v. Rivera, 858 S.W.2d 366, 367 (Tex. 1993); Callahan v. Giles, 137 Tex. 571, 575, 155 S.W.2d 793, 795 (1941).

370. *See Rivercenter*, 858 S.W.2d at 367; *Callahan*, 155 S.W.2d at 795–96.

371. 858 S.W.2d 366 (Tex. 1993).

372. *See Rivercenter*, 858 S.W.2d at 367.

because the record revealed no justification for the relator's delay in waiting over four months after the filing of the jury demand to file its motion to quash.[373] The court reasoned that, because the relator did not establish that it had diligently pursued its rights, mandamus would not lie.[374]

The *Rivercenter* rationale applies equally to cases in which a relator, without justification, fails to diligently pursue mandamus relief after the issuance of the trial court's order.[375] In *Bailey v. Baker*,[376] the court denied mandamus on the sole ground that four months had elapsed after the entry of the trial court's order before the petition for writ of mandamus was filed, and the trial was only two weeks away.[377] Similarly, in *International Awards, Inc. v. Medina*,[378] the court concluded that a relator's delay of four months in filing mandamus was alone "ample ground to deny leave to petition for mandamus relief."[379] Therefore, it is critical for the relator to provide explanations for any delays that may make it appear that the relator has not diligently pursued its rights.[380] This explanation is especially necessary in cases in which a party seeks disqualification of opposing counsel. A party that fails to timely seek disqualification waives the complaint.[381] The untimely urging of a disqualification motion lends support to any suspicion that the motion is merely being used as a tactical weapon.[382]

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373. *See id.* at 367–68.

374. *See id.* at 367.

375. *See id.* (citing Bailey v. Baker, 696 S.W.2d 255, 256 (Tex. App.—Houston [14th Dist.] 1985, orig. proceeding)).

376. 696 S.W.2d 255 (Tex. App.—Houston [14th Dist.] 1985, orig. proceeding).

377. *See Bailey*, 696 S.W.2d at 256.

378. 900 S.W.2d 934 (Tex. App.—Amarillo 1995, orig. proceeding).

379. *International Awards*, 900 S.W.2d at 935–36.

380. *See* Rivercenter Assocs. v. Rivera, 858 S.W.2d 366, 367 (Tex. 1993); *International Awards*, 900 S.W.2d 935–36; *Bailey*, 696 S.W.2d at 256. *But see* Shearson Lehman Hutton, Inc. v. McKay, 763 S.W.2d 934, 939 (Tex. App.—San Antonio 1989, orig. proceeding) (holding that a delay of over four months was not fatal because there was no showing that harm resulted from the delay). While the *Shearson* court held that the real party in interest had to show harm before a delay would preclude the issuance of mandamus, the supreme court in *Rivercenter* and the courts of appeals in *Bailey* and *International Awards* never considered whether the delay caused any harm; thus, relying on *Shearson* is risky.

381. *See* Grant v. Thirteenth Court of Appeals, 888 S.W.2d 466, 468 (Tex. 1994); Vaughan v. Walther, 875 S.W.2d 690, 690–91 (Tex. 1994).

382. *See Grant*, 888 S.W.2d at 468; *Vaughan*, 875 S.W.2d at 690–91.

However, there appears to be at least one exception to the *Rivercenter* rationale. In *EZ Pawn Corp. v. Mancias*,[383] the supreme court noted that a strong presumption existed against waiver or delay precluding the enforceability of an arbitration clause.[384] In fact, the court held that an arbitration clause would be enforced unless the facts demonstrate that the party seeking arbitration *intended* to waive its arbitration rights.[385] Waiver in cases in which litigation has commenced will only be found when the party seeking to enforce the agreement "substantially invokes the judicial process to the other party's detriment."[386] Consequently, in arbitration cases, a delay in seeking mandamus is apparently not a consideration unless the relator substantially invokes the judicial process, thereby harming the opposing party, before seeking mandamus relief. However, in all other cases, an unexplained delay can be fatal to a party's ability to obtain mandamus relief, even if the trial court clearly abused its discretion and there is no adequate remedy by appeal.

D. *Importance to the Jurisprudence of the State*

One final substantive hurdle exists if the relator files a petition for writ of mandamus in the supreme court. In *Walker*, the supreme court noted that it would not grant mandamus relief unless the error of the lower court was of such importance to the jurisprudence of the state as to require correction.[387] The court continued that it would decide whether the error was important in deciding whether to grant leave, but that the importance of the error would not be a factor in determining whether mandamus would issue after leave was granted.[388] In *Tilton*, the court reiterated that "a relator seeking mandamus must show . . . that the petition raises important issues for the state's jurisprudence."[389]

The new Texas Rules of Appellate Procedure provide some guidance on the types of factors the supreme court considers in deter-

383. 934 S.W.2d 87 (Tex. 1996).

384. *See EZ Pawn*, 934 S.W.2d at 89–90.

385. *See id.*

386. *Id.* at 89; *see* Prudential Sec. Inc. v. Marshall, 909 S.W.2d 896, 898–900 (Tex. 1995).

387. *See* Walker v. Packer, 827 S.W.2d 833, 839 n.7 (Tex. 1992).

388. *See id.*

389. Tilton v. Marshall, 925 S.W.2d 672, 682 (Tex. 1996).

mining whether an error is important to the state's jurisprudence. The supreme court will consider: (1) whether there is a conflict between the courts of appeals on an important legal issue raised in the petition; (2) whether the petition involves the construction or validity of a statute; (3) whether the petition raises a constitutional issue or an important question of state law that should be resolved by the supreme court; and (4) whether the supreme court can provide guidance for other controversies by correcting the error of the lower court.[390] In addressing a petition for writ of mandamus to the supreme court, it is imperative that the relator establish that the case is important to the state's jurisprudence for one of these reasons. Otherwise, the petition may be summarily denied, even if all the other substantive and procedural requirements of mandamus have been satisfied.

IV. Procedural Requirements Under the New Appellate Rules

Under the new appellate rules, former Texas Rules of Appellate Procedure 120, 121, and 122 have been merged into Rule 52, which now governs all original proceedings.[391] Under Rule 52, a relator no longer must file a separate motion for leave to file the petition for writ of mandamus.[392] Instead, the relator only files a petition with an appendix, a record, and, if necessary, a motion for temporary relief.[393]

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390. *See* Tex. R. App. P. 56.1(a). While Rule 56.1(a) governs considerations in granting a petition for review, it can be modified as in the text to be applicable to considerations in granting a petition for writ of mandamus because the requirement that mandamus petitions be important had its genesis in the jurisdictional requirement governing review of appellate court decisions. In *Walker*, when the supreme court first pronounced that it will not issue mandamus unless the error of the lower court is important enough to require correction, the court cited as support the Texas Government Code's requirement that the supreme court exercise jurisdiction only over cases in which the lower court made an error of such importance to the jurisprudence of the state as to require correction. *See* Tex. Gov't Code Ann. § 22.001(a)(6) (Vernon 1988); *Walker*, 827 S.W.2d at 839 n.7.

391. *See* Tex. R. App. P. 52 notes and cmts.

392. *See id.*

393. *See id.*

A. *The Petition and Appendix*

The petition must be captioned "*In re* [name of relator]" rather than "[name of relator] v. [name of respondent]."[394] All factual statements in the petition must be verified through an affidavit made on personal knowledge by a competent affiant.[395] A petition filed in the court of appeals must not exceed fifty pages, and a petition filed in the supreme court must not exceed fifteen pages.[396]

The petition must begin by identifying the parties and their counsel, and the petition must include a table of contents and an index of authorities.[397] The petition must then contain a statement of the case, a statement of jurisdiction, a statement of issues or points presented, a statement of facts, an argument, and a prayer for relief.[398] The statement of jurisdiction must state the compelling reason why the petition was not first presented to the court of appeals if the petition is initially filed in the supreme court when both the court of appeals and the supreme court have concurrent jurisdiction.[399]

An appendix must also be attached to the petition.[400] The appendix must include:

> (A) a certified or sworn copy of any order complained of, or any other document showing the matter complained of; (B) any order or opinion of the court of appeals, if the petition is filed in the [s]upreme [c]ourt; [and] (C) unless voluminous or impracticable, the text of any rule, regulation, ordinance, statute, constitutional provision, or other law (excluding case law) on which the argument is based. . . .[401]

The appendix may also contain any other pertinent item, including copies of relevant court opinions, statutes, constitutional provisions, documents, pleadings, and similar material.[402]

A certified or sworn copy of the order complained of must be contained in the appendix because mandamus will not issue unless

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394. TEX. R. APP. P. 52.1.
395. *See* TEX. R. APP. P. 52.3.
396. *See* TEX. R. APP. P. 52.6.
397. *See* TEX. R. APP. P. 52.3.
398. *See id.*
399. *See* TEX. R. APP. P. 52.3(e).
400. *See* TEX. R. APP. P. 52.3(j).
401. *Id.*
402. *See id.*

the relator establishes that the lower court issued an order refusing to act as the relator requested.[403] Absent extraordinary or unusual circumstances, the failure to attach an order in which the lower court refused the relator's request is fatal. However, if the request would have been futile and the refusal of the request a mere formality, Texas courts have excused the relator's failure to attach an order.[404]

B. *The Record*

The relator has the burden of providing the reviewing court with a sufficient record to establish its entitlement to mandamus relief.[405] If an evidentiary hearing was held, a relator must provide a statement of facts from the hearing to discharge this burden.[406] If no evidence was presented, a relator must file an affidavit with the appellate court stating that no evidence was adduced.[407] Therefore, in any mandamus proceeding, counsel must either present the reviewing court with a transcript from an evidentiary hearing or provide the court with an affidavit swearing that no evidence was adduced in connection with the challenged order; otherwise, the petition will be denied.[408]

Additionally, if documents were submitted for an in camera inspection, the relator should request that the documents be carried forward under seal to the reviewing court.[409] In the absence of

403. *See* Axelson, Inc. v. McIlhany, 798 S.W.2d 550, 556 (Tex. 1990); Doctors Hosp. Facilities v. Fifth Court of Appeals, 750 S.W.2d 177, 178 (Tex. 1988).

404. *See* Terrazas v. Ramirez, 829 S.W.2d 712, 723–24 (Tex. 1991) (indicating that the requirement of the certified or sworn copy of the order complained of may not be necessary if the request would have been futile and refusal would have been nothing more than a formality); Stoner v. Massey, 586 S.W.2d 843, 846 (Tex. 1979) (holding that the failure to file a third motion for rehearing was not fatal and the relator should not be penalized for obeying the court of appeals' orders).

405. *See* Walker v. Packer, 827 S.W.2d 833, 837 (Tex. 1992).

406. *See id.*

407. *See id.* at 837 n.3; Barnes v. Whittington, 751 S.W.2d 493, 495 (Tex. 1988).

408. *See* TEX. R. APP. P. 52.7(a)(2) (requiring that the relator file a record with "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").

409. *Cf.* Pope v. Stephenson, 787 S.W.2d 953, 954 (Tex. 1990) (holding that, in an ordinary appeal, the complaining party must request that exhibits submitted for in camera inspection be carried forward under seal to the appellate court so that the appellate court can evaluate this information).

such documents, the reviewing court will have no basis to determine whether the trial court clearly abused its discretion.

C. *Motion for Temporary Relief*

A relator may file a motion to stay any underlying proceedings or for any other temporary relief pending the court's action on the petition.[410] If such a motion is filed, the relator must notify or make a diligent effort to notify all parties by expedited means that a motion for temporary relief has been or will be filed, and the relator must certify to the court that this motion has been filed before temporary relief will be issued.[411]

The motion for temporary relief should be contained in a separate motion from the petition. Incorporating a request for temporary relief in the petition without filing it in a separate motion is a dangerous practice. For instance, under the unwritten internal procedures for the supreme court, there are currently two tracks for the consideration of mandamus petitions: an expedited track for mandamus petitions with requests for temporary relief and a normal track for other mandamus petitions. The normal track can take up to four weeks before some action is taken by the court. Thus, if a party needs some type of temporary relief in the four weeks after filing a mandamus petition, such relief should be specifically requested in a separate motion for temporary relief. If no temporary relief is separately requested, it is possible that any discussion of the need for temporary relief in the petition will be overlooked and the case will not be acted on in time.

V. Conclusion: Pitfalls to Avoid

Now that the jurisdictional, substantive, and procedural hurdles to obtaining the extraordinary writ of mandamus have been explained, this Article will conclude by addressing some of the most common errors made by practitioners when filing petitions for writ of mandamus. These errors can be subdivided into jurisdictional errors, substantive errors, and procedural errors.

While jurisdictional errors are relatively rare, they are almost always fatal. The supreme court does not have jurisdiction to issue

410. *See* Tex. R. App. P. 52.10(a).
411. *See id.*

mandamus against a constitutional county court or a justice of the peace.[412] Mandamus proceedings against trial judges must be filed in the court of appeals first unless there is a compelling reason not to do so.[413] The cases in which a "compelling reason" have been found are rare, and almost all have involved election and party disputes.[414]

Under Texas Rule of Appellate Procedure 52.3(e), a petition for writ of mandamus must contain a statement of jurisdiction.[415] While it is probably not fatal to misstate the basis for jurisdiction, such an error can damage counsel's credibility. Texas Rule of Appellate Procedure 52 is not a grant of mandamus jurisdiction. Instead, the correct bases for mandamus jurisdiction in the supreme court are Article V, Section 3 of the Texas Constitution and Section 22.002(a) of the Texas Government Code.[416] The correct bases for jurisdiction in the court of appeals are Sections 22.221(a) and (b) of the Texas Government Code.[417]

Practitioners often forget to address all of the substantive requirements for mandamus relief in the argument section of their petition for writ of mandamus. The best way to avoid this trap is to divide the argument into sections, one addressing the trial court's clear abuse of discretion, and the other explaining how the remedy by appeal is inadequate. In filing a petition to the supreme court, the practitioner should explain in another section how the lower court's error is important to the jurisprudence of the state. The section addressing the trial court's abuse of discretion should identify for the reviewing court the type of error made by the lower court (whether a legal error, an error in a matter committed to the trial court's discretion, or a purely factual error), clarify the appropriate application of the standard of review for that type of error, and then explain how the trial court's error is a clear abuse of discretion under the appropriate application of the standard of review. The section pertaining to no adequate remedy by appeal

412. *See supra* note 13.

413. *See* TEX. R. APP. P. 52.3(e).

414. *See supra* notes 21–25 and accompanying text.

415. *See* TEX. R. APP. P. 52.3(e).

416. *See* TEX. CONST. art. V, § 3; TEX. GOV'T CODE ANN. § 22.002 (Vernon 1988); *supra* notes 10–13 and accompanying text.

417. *See* TEX. GOV'T CODE ANN. § 22.221(a)–(b) (Vernon 1988); *supra* notes 14–17 and accompanying text.

should either explain how the case is similar to other types of cases in which the courts have determined that an appellate remedy is inadequate or explain why an appeal simply cannot cure the trial court's error.[418] If an appellate remedy could eventually cure the error and there are no similar cases holding that an appellate remedy in such a situation is "inadequate," this section should establish that the circumstances of the case are truly extraordinary, exceptional, or special.[419] Finally, because the supreme court is interested in mandamus primarily as a vehicle to establish guiding principles of law on issues that cannot or will not be resolved by the court via an ordinary appeal, one section of a petition filed in the supreme court should focus on the important principles of law presented in the proceeding.[420]

Strict compliance with the procedural requirements of Texas Rule of Appellate Procedure 52 is a necessity. If temporary relief is required, a separate motion should be filed that clearly explains the need for such relief and states the deadline for the issuance of such relief.[421] The petition and motion for temporary relief should be filed as far in advance of the deadline as possible, noting the reasons for any delays. As the Dallas court of appeals stated in *Wadley Research Institute & Blood Bank v. Whittington*,[422] appellate courts should not "be forced into a position where [they] must issue a stay precipitously, before [having] an opportunity to assess the merits of an original proceeding."[423] Before temporary relief will be issued, a relator must also certify that all parties have been notified or that a diligent effort has been made to notify all parties by expedited means of the filing of the motion.[424]

Careful attention must also be paid to the preparation of the record. The appendix to the petition must contain a certified or sworn copy of any order complained of *and* any order or opinion of the court of appeals if the petition is filed in the supreme court.[425] The record must contain "a properly authenticated transcript of any rel-

418. *See supra* notes 344–68 and accompanying text.
419. *See supra* notes 351–68 and accompanying text.
420. *See supra* notes 387–90 and accompanying text.
421. *See supra* notes 410–11 and accompanying text.
422. 843 S.W.2d 77 (Tex. App.—Dallas 1992, orig. proceeding).
423. *Wadley Research Inst. & Blood Bank*, 843 S.W.2d at 83.
424. *See* TEX. R. APP. P. 52.10(a).
425. *See* TEX. R. APP. P. 52.3(j)(1).

evant testimony from the underlying proceeding, including any exhibits offered in evidence, or a statement that no testimony was adduced in connection with the matter complained," along with all documents that are material to the claim for relief.[426] In compiling the record, practitioners should include all documents establishing preservation of error. If in camera documents were submitted to the trial court for review, the relator must request that the documents be forwarded to the reviewing court, preferably under seal.

While this Article has attempted to demystify the most extraordinary of proceedings, obtaining a writ of mandamus requires that practitioners pay careful attention to a number of jurisdictional, substantive, and procedural hurdles. Mandamus is never required to preserve a complaint for appellate review.[427] Therefore, it may be wise to perform an objective cost/benefit analysis to determine whether the potential of angering the trial judge is justified by the likelihood that the mandamus will be successful before undertaking such a perilous journey. An old adage is that you should aim well if you shoot at the King. This adage applies equally to interrupting trial court proceedings to seek an extraordinary writ from an appellate court on the basis that the judge clearly abused his or her discretion.

426. TEX. R. APP. P. 52.7.

427. *See* Walker v. Packer, 827 S.W.2d 833, 842 n.9 (Tex. 1992); Pope v. Stephenson, 787 S.W.2d 953, 954 (Tex. 1990).