

**APPELLATE REVIEW
OF DISCOVERY RULINGS
BY MANDAMUS**

**Karen S. Precella
Haynes and Boone, L.L.P.
Fort Worth, Texas**

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KAREN S. PRECELLA
HAYNES AND BOONE, L.L.P.
201 Main Street, Suite 2200
Fort Worth, Texas 76102
Telephone: 817.347.6600
Fax: 817.347.6650
email: karen.precella@haynesboone.com

EMPLOYMENT:

Haynes and Boone, L.L.P., Senior Counsel, Appellate Practice Group, Fort Worth, Texas, 2001-Present.

Jose, Henry, Brantley & Keltner, L.L.P., Fort Worth, Texas, 1996-2001.

Adjunct Professor, Legal Research and Writing, Texas Wesleyan University School of Law, 1998-1999, 2000-2001.

Haynes and Boone, L.L.P., Appellate Section, Fort Worth, Texas, 1991-1996.

BOARD CERTIFIED:

Civil Appellate Law, Texas Board of Legal Specialization (1996-Present).

PROFESSIONAL ASSOCIATIONS:

Admitted to Practice—Texas state courts; United States Supreme Court; United States Court of Appeals, Fifth Circuit; United States District Court, Northern District of Texas.

Member—State Bar of Texas; American Bar Association; Bar Association of the Fifth Federal Circuit; Tarrant County Bar Association; College of the State Bar of Texas; Fellow, Tarrant County Bar Foundation; Eldon B. Mahon Inn of Court, Barrister (1996-1997), Associate (1994-1996); Judicial Evaluation and CLE Committees, Tarrant County Bar Association; Pattern Jury Charge Committee (PJC4/Business, Consumer, and Employment) (June 2001-May 2004).

EDUCATION:

Southern Methodist University, J.D., with honors, May 1991.

University of Texas at Arlington, B.S., highest honors, 1979; M.B.A., 1983.

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Appellate Review of Discovery Rulings by Mandamus

The trial court's discovery ruling just gutted your case (or so you think!). Can you get immediate appellate relief before proceeding to trial or handing over that stack of privileged documents? Perhaps, if you follow the appropriate procedural steps, show your case to fall into certain categories of rulings, and convince the appellate court you deserve immediate relief from the order.

Courts (disinclined to take on the task of routinely reviewing discovery orders with which one of the parties will almost always disagree) frequently deny petitions for writ of mandamus. But the parties often never learn the exact reason for the petition's denial. "When denying relief, the court may hand down an opinion but is not required to do so. When granting relief, the court must hand down an opinion as in any other case." TEX. R. APP. P. 52.8(d). Similarly, a court may (but need not) hear oral argument. TEX. R. APP. P. 52.8(b)(4). Thus, a court may (and frequently does) deny a petition without argument and without opinion.

Denial of mandamus relief can occur for a variety of reasons—lack of appellate jurisdiction (e.g., you seek mandamus relief as to a party not within the court's jurisdiction), procedural deficiencies (e.g., you did not get the transcript of the hearing into the record), no showing of legal error (e.g., the trial court properly interpreted and applied the rule at issue), or an adequate remedy by appeal exists (e.g., a discovery death penalty disposed of the entire matter and resulted in a final, appealable judgment).

Courts strictly apply the jurisdictional, procedural, and substantive requirements. To maximize your chances for relief, carefully follow the mandamus procedural requirements, clearly show the trial court's abuse of discretion, and identify how your case fits into the categories of discovery orders for which there is no adequate remedy by appeal. Moreover, in the supreme court, you must convince the court why your issue is important to the jurisprudence of the state.

As a guide to meeting the minimum mandamus requirements, this paper first summarizes the common jurisdictional grounds

available to support a request for mandamus relief. The paper then discusses the mechanics of how to file: what, when, and where. Next, the paper discusses the basic requirements for mandamus relief from a discovery order. Finally, the paper summarizes recent mandamus decisions according to the inadequate remedy by appeal categories identified in *Walker*. An analysis of the types of cases in which the court grants relief aids in assessing a case and in drafting a petition to maximize the chances for relief.

I. Jurisdiction

The sources of jurisdiction most often used to support a writ of mandamus to the supreme court or court of appeals appear in the Government Code (as described in Section A). TEX. GOV'T CODE §§ 22.002, 22.221. Other statutory bases, however, also confer jurisdiction on the supreme court, the courts of appeals, and (sometimes) trial courts to grant writs of mandamus. Those statutory sources generally apply to very narrow circumstances, but when faced with a need to enforce certain statutory provisions or rights, a party should check the applicable statute for possible mandamus jurisdiction. Some of the statutory sources are listed in Section B below.

A. The Government Code

1. Supreme Court

The supreme court may issue writs of mandamus against a district judge, court of appeals, a justice of a court of appeals, officers of the state government (except the governor), the court of criminal appeals, and a justice of the court of criminal appeals. TEX. GOV'T CODE § 22.002(a). That list does not include court or county officials other than judges. *See HCA Health Servs. of Texas, Inc. v. Salinas*, 838 S.W.2d 246, 248 (Tex. 1992) (orig. proceeding) (granting leave to file against judge but denying leave to file against district clerk). But the court may issue writs against such officers to protect the court's jurisdiction. TEX. CONST. Art. V, § 3. The court may also compel a district judge to proceed to trial and judgment. TEX. GOV'T CODE § 22.002(b). And the court has exclusive jurisdiction to mandamus a member of the

executive branch to compel the performance certain judicial, ministerial, or discretionary acts or duties. *Id.* § 22.002(c). These provisions together grant the supreme court broad powers to issue writs of mandamus.

2. Courts of Appeals

Courts of appeals may issue writs (1) against a county or district court judge or (2) to enforce the jurisdiction of the court. TEX. GOV'T CODE § 22.221(a), (b). As a result, a court of appeals may not issue a writ of mandamus against the court officials who are not judges (such as a district clerk, court reporter, or master) unless necessary to enforce the court's jurisdiction. *See, e.g., In re Strickhausen*, 994 S.W.2d 936 (Tex. App.—Houston [1st Dist.] 1999, orig. proceeding) (denying leave to file petition against court reporter when not necessary to protect court's jurisdiction); *Click v. Tyra*, 867 S.W.2d 406 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding) (granting leave to file petition against district clerk to preclude clerk from interfering with court's jurisdiction).

3. Trial Courts

A district or county court has jurisdiction to grant writs necessary to the enforcement of its jurisdiction. TEX. GOV'T CODE §§ 24.011, 25.004, 26.051. Moreover, a party's statutory right to mandamus relief may begin with the trial court. *See, e.g., TEX. GOV'T CODE § 551.142(a)* (interested person, including member of media, can seek mandamus or injunction to stop or prevent violation or threatened violation of Open Meetings Act); § 552.321 (requestor or attorney general may seek mandamus to compel governmental body to make information available under Public Information Act); § 802.003 (party seeking to require governing body of public retirement system to comply with certain statutory requirements may seek mandamus relief in district court); § 2306.452 (interested party may seek mandamus relief to enforce public housing bond obligations); TEX. INS. CODE § 823.013 (person aggrieved by failure of commissioner to act may seek mandamus relief in Travis County district court). The attorney general may seek mandamus relief in additional circumstances. *See, e.g., TEX. HEALTH & SAFETY CODE § 433.086* (food and drug regulatory requirements).

B. Other Statutory Bases of Jurisdiction

Various statutory provisions confer mandamus jurisdiction on the supreme court or

the courts of appeals. Some of the more common provisions include the following:

1. Venue. Supreme court and courts of appeals may enforce mandatory venue provisions. TEX. CIV. PRAC. & REM. CODE § 15.0642. The "application for the writ of mandamus must be filed before the later of: (1) the 90th day before the date the trial starts; or (2) the 10th day after the date the party receives notice of the trial setting." *Id.* But "[a] court's ruling or decision to grant or deny a transfer [for the convenience of the parties or the witnesses] is not grounds for appeal or mandamus and is not reversible error." *Id.* § 15.002.
2. Elections. Supreme court and courts of appeals have jurisdiction to compel any duty imposed by law in connection with holding an election or a political party convention (even if the person responsible is not a public officer). TEX. ELEC. CODE § 273.061. The attorney general may seek a writ of mandamus to compel the filing of an annual voting system report. *Id.* § 123.065.
3. Open Meetings and Records/Public Information Act. Supreme court and courts of appeals may enforce certain requirements of the statutory provisions governing open meetings and open records. TEX. GOV'T CODE §§ 551.142, 552.321.
4. Governing boards. Supreme court and courts of appeals may enforce duties of certain governing boards, e.g., the housing authority, certain veteran assistance programs, the insurance commissioner. TEX. LOC. GOV'T CODE § 302.101 ; TEX. INS. CODE § 823.013; TEX. NAT. RES. CODE § 164.019.
5. State Bonds. Supreme court and courts of appeal may issue writs against officials not satisfying state bond obligations. TEX. AGRIC. CODE §§ 58.036, 252.062; TEX. LOC. GOV'T CODE § 325.089; TEX. TRANSP. CODE § 441.177; TEX. WATER CODE §§ 20.117, 65.513.
6. Injunctive Relief Under Natural Resources Code. The courts of appeals have jurisdiction to issue writs of mandamus to prevent enforcement of

injunctive relief granted without notice or hearing. TEX. NAT. RES. CODE §§ 85.258, 85.259.

7. Attorney Discipline. TEX. R. DISC. P. 3.09. Supreme court may enforce orders in disciplinary proceedings.

C. Concurrent Jurisdiction

As is evident from a review of the above jurisdictional bases, the supreme court and the courts of appeal often have concurrent jurisdiction, including original jurisdiction over district and statutory county judges. Texas Rule of Appellate Procedure 52.3(e), however, provides that “the petition must be presented first to the court of appeals unless there is a compelling reason not to do so. If the petition is filed in the Supreme Court without first being presented to the court of appeals, the petition must state the compelling reason why the petition was not first presented to the court of appeals.” TEX. R. APP. P. 52.3(e).

Election issues (usually in statewide elections) requiring immediate resolution represent the most common “compelling” context in which the supreme court will exercise its original jurisdiction prior to a court of appeals considering the issue. *See, e.g., In re Texas Senate*, 36 S.W.3d 119, 121 (Tex. 2000) (orig. proceeding) (Texas legislature scheduled to vote the day of the mandamus decision to select a lieutenant governor); *Republican Party of Texas v. Dietz*, 940 S.W.2d 86, 94 (Tex. 1997) (orig. proceeding) (statewide application and short time frame of constitutional controversy regarding refusal of convention space to particular group supported mandamus review by supreme court prior to review by court of appeals); *Sears v. Bayoud*, 786 S.W.2d 248, 249-50 (Tex. 1990) (orig. proceeding) (state-wide candidate’s eligibility for office). Usually, however, presentment first to a court of appeals is necessary to convince the supreme court to exercise its jurisdiction.

II. Mandamus does not act as a substitute for an ordinary (or interlocutory) appeal

A writ of mandamus and an interlocutory appeal are not interchangeable. If you seek a writ of mandamus when an interlocutory appeal would have been the appropriate remedy by which to challenge a ruling, you may lose your opportunity for pre-trial appellate review. *See Raymond Overseas Holding, Ltd. v. Curry*, 955 S.W.2d 470, 471-72 (Tex. App.—Fort Worth 1997, no pet.)

(interlocutory appeal provided adequate remedy by which to challenge special appearance and made mandamus relief inappropriate).¹ Thus, if you’re unsure which route to take (i.e., does the court have jurisdiction over your interlocutory appeal?) or you have different types or orders at issue, you may want (or need) to take both routes. *See In re Tarrant Co. Hosp. Dist.*, 52 S.W.3d 434 (Tex. App.—Fort Worth 2001, orig. proceeding) (party perfected interlocutory appeal of an order on a plea to the jurisdiction and petitioned for mandamus relief as to orders on discovery sanctions).

Effective September 2001, an interlocutory appeal may, in limited circumstances, be available as an alternative to a mandamus, even if the subject of the order is not listed in Section 51.014(a) of the Texas Civil Practice & Remedies Code. The legislature created a new category of interlocutory appeals—an appeal by agreement pursuant to a trial court order. TEX. CIV. PRAC. & REM. CODE § 51.014(d).

Such an appeal allows a court to enter an “order for interlocutory appeal.” *Id.* The order requires (1) “the parties agree that the order involves a controlling question of law as to which there is a substantial ground for difference of opinion; (2) an immediate appeal from the order may materially advance the ultimate termination of the litigation; and (3) the parties agree to the order.” *Id.* Such an order does not stay the proceedings unless the parties agree and a court enters a stay order. *Id.* § 51.014(e).

The “application” to the court of appeals must be filed “not later than the 10th day after the date of [the] interlocutory order under subsection (d).” *Id.* 51.014(f). Even then, the court of appeals need not but “may permit an appeal to be taken from that order.” *Id.*

While probably not frequently applicable to mere discovery rulings, if your order rises to the level of a “controlling question of law” that would “materially advance” the termination of the litigation, you may consider the agreed

¹ Similarly, a court will not generally construe an ordinary appeal as a petition for writ of mandamus. *See Pinnacle Gas Treating, Inc. v. Read*, 13 S.W.3d 126, 127 (Tex. App.—Waco 2000, no pet.) (mandamus relief governed by Rule 52 could not be sought as alternative relief to save improper interlocutory appeal from dismissal for want of jurisdiction); *Thomas v. Texas Dept. of Crim. Justice*, 3 S.W.3d 665, 667 (Tex. App.—Fort Worth 1999, no pet.) (finding pleading did not satisfy requirements of Rule 52 and did not save a case from dismissal for late-filed notice of appeal).

interlocutory appeal option. As always, issues of timing, expense, probable finality in the court of appeals, and law of the case should be considered in deciding whether to take an interlocutory appeal.

III. Decision not to seek mandamus review of discovery ruling does not waive error

Although the issue may sometimes become moot if the request for relief is delayed until the ordinary appeal, the decision not to seek mandamus review of a discovery ruling does not alone waive a right to raise the issue on appeal after trial. *See National Union Fire Ins. Co. v. Ninth Court of Appeals*, 864 S.W.2d 58, 62 (Tex. 1993) (orig. proceeding); *Walker v. Packer*, 827 S.W.2d 833, 856 n.9 (Tex. 1992) (orig. proceeding); *Pope v. Stephenson*, 787 S.W.2d 953, 954 (Tex. 1990) (per curiam); *Forward v. Housing Auth. of City of Grapeland*, 864 S.W.2d 167, 170 (Tex. App.-Tyler 1993, no pet.). So, when deciding whether to file a petition for writ of mandamus, remember (if it will not be moot) to consider whether an ordinary appeal will best preserve your client's rights.

IV. How to File

If you decided to file, Texas Rule of Appellate Procedure 52 governs original proceedings (such as writs of mandamus, habeas corpus, prohibition, injunction, or quo warranto) in the court of appeals and the supreme court. TEX. R. APP. P. 52.1. Even though the requirements of the rule are fairly straightforward, courts have denied, struck or ordered re-briefing on many petitions for writ of mandamus due to counsel's failure to follow the requirements set out in Rule 52. This section summarizes the Rule 52 requirements.

A. The Parties

Relator: The party seeking relief. TEX. R. APP. P. 52.2. The style of your petition must be "*In re [Relator]*." TEX. R. APP. P. 52.1.

Respondent: The party against whom relief is sought (e.g., a judge, court, tribunal, officer or other person). TEX. R. APP. P. 52.2.

Real Party In Interest: Person whose interest would be directly affected by the relief sought by the relator. *Id.*

B. What to File: The Petition, Appendix, Record and Motion for Temporary Relief

1. The Petition

a. General Rules

Follow the general rules (on font, margins, paper size, spacing, binding, covers, and numbers of copies) applicable to appellate briefs. TEX. R. APP. P. 9. In the court of appeals, the front cover a party's first brief should include any request for oral argument. TEX. R. APP. P. 9.3(g). NOTE: Rule 9 only requires the filing of one copy of the original record. TEX. R. APP. P. at 9.3(c). Although some question may exist as to whether service of the record is required under Rule 9.5(a), the better practice in keeping with the spirit of the mandamus rules is to serve the record (along with the petition, any motion for temporary relief, and the appendix) on all parties to the original proceeding.

b. Length

Court of appeals. ≤50 pages (excluding the identity of parties, table of contents, index of authorities, statement of the case, statement of jurisdiction, issues presented, signature, and proof of service). TEX. R. APP. P. 52.6.

Supreme Court. ≤15 pages (excluding the items listed above). TEX. R. APP. P. 52.6.

c. Contents

In the following order and with appropriate headings, the petition must contain the following:

Identity of Parties & Counsel. TEX. R. APP. P. 52.3(a).

Table of Contents. TEX. R. APP. P. 52.3(b). "The table of contents must indicate the subject matter of each issue or point, or group of issues or points." *Id.*

Index of Authorities. TEX. R. APP. P. 52.3(c).

Statement of the Case. TEX. R. APP. P. 52.3(d). Provide the court in a page the basics of your case, including each item listed. If filed in the supreme court after filing in the court of appeals, you must include the date the petition was filed in the court of appeals, the court and names of the justices who participated in the decision, the author of any opinion(s), the citation of any opinion, and the date and disposition of the court. TEX. R. APP. P. 52.3(d).

Statement of Jurisdiction. State concisely the jurisdictional grounds. TEX. R. APP. P. 52.3(e). If the petition is filed in the supreme court without first being filed in the court of appeals, the petition must state "the compelling reason why the petition was not first presented to the court of appeals." *Id.*; see also Section I.C.

Issues Presented. State the issues or points presented. TEX. R. APP. P. 52.3(f).

Statement of Facts. Include pertinent facts with references to the appendix or record. TEX. R. APP. P. 52.3(g).

Argument. Include argument with citations to legal authority and to the appendix or record. TEX. R. APP. P. 52.3(h). Note: Unlike the rules for ordinary briefs and petitions, TEX. R. APP. P. 38.1(g), 53.2(h), the rule does not provide for a “Summary of the Argument.” Within your page limitation, however, you may want to consider whether such a summary would be helpful to the court in quickly understanding what is at issue in your petition and how that issue is significant enough to require resolution by mandamus.

Prayer. Request the relief sought. TEX. R. APP. P. 52.3(i). You may want to include any request for temporary relief, but you should also file a separate motion for temporary relief pursuant to Rule 52.10.

Verification. “All factual statements in the petition must be verified by affidavit made on personal knowledge by an affiant competent to testify to the matters stated.” TEX. R. APP. P. 52.3.

Additionally, as discussed below, the appendix and record require certified or sworn copies. TEX. R. APP. P. 52.3(j), 52.7(a).

Certificate of Service. TEX. R. APP. P. 9.3(d).

2. The Appendix

Necessary Contents. The appendix should include (1) the order complained of, (2) opinion of the court of appeals (if filing in the supreme court), and (3) the text of any rule or statute at issue. TEX. R. APP. P. 52.3(j)(1). Make your appendix user-friendly for the court—an index, tabs, bound with or separately from the brief (depending upon its length), etc.

Optional Contents. Any other items pertinent to the issues or points presented. TEX. R. APP. P. 52.3(j)(2). NOTE: You don’t get to use this provision to avoid the page limit! TEX. R. APP. P. 52.3(j)(2). But many justices voice appreciation for a well-done appendix that eases their burden in reviewing the case.

3. The Record

The relator must file a record that includes the following:

- (1) a certified or sworn copy of every document that is material to the relator’s

claim for relief and that was filed in any underlying proceeding; and

- (2) 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 of.

TEX. R. APP. P. 52.7. Like the appendix, make the record user-friendly—an index, tabs, separately bound, etc. Authenticate your record by affidavit.

WARNING: (1) Even if no hearing or transcribed proceeding underlies your petition, you must certify as much. Failure to do so can result in denial of your petition on that ground. *Cf. In re Houseman*, 2001 WL 1440750 (Tex. App.—Beaumont 2001, orig. proceeding) (although relator failed to bring forward transcription of hearing, attachment of relevant portions of transcription to response to petition cured defect and motion to strike overruled). (2) If the petition concerns the privileged nature of documents, the relator must get the documents to the appellate court for review. You may get the documents to the appellate court by asking the trial court to order the documents sent to the court of appeals under seal, by asking the court of appeals to order the trial court to forward the documents under seal, or by filing the documents in the court of appeals under seal with a request for an order from the court of appeals authorizing the filing under seal. If another party is in possession of the documents, move the trial court or court of appeals to direct that party to file the documents under seal. (3) Make your record complete (if you want relief) and accurate (if you do not want to suffer sanctions).

4. Motion for Temporary Relief

To obtain a stay of the order underlying your petition, you must file a motion for temporary relief, and the court may require a bond as a prerequisite to such relief. TEX. R. APP. P. 52.10. Explicitly state the relief sought, e.g., a stay of an order to produce a party for an apex deposition or a stay of an order to produce documents to which a privilege is asserted. Explain the need for “emergency” relief—the impending depo, document production, trial, etc.

The relator must make a diligent effort to notify all parties by phone or fax that a such a motion has been or will be filed. The relator must certify to the court that relator complied with that requirement before the requested relief will be

granted. *Id.* In other words, no Friday afternoon stays without notice to the other side. Also, draw your request to the court's attention in the petition, the motion, and the filing letter.

Unless vacated or modified, any relief granted is effective until the case is decided.

5. Filing Fee

A petition for writ of mandamus requires a filing fee of \$75.00 (and \$10 for any separate motion for temporary relief) with an additional \$75.00 if the supreme court requires additional briefing.

C. Where to File

File the petition with the clerk of the appropriate appellate court. TEX. R. APP. P. 52.1.

D. When to File

Rule 52 does not contain a filing deadline. TEX. R. APP. P. 52. Some statutory provisions, however, may contain deadlines. For example, as noted above, when challenging a venue decision by mandamus, the "application for the writ of mandamus must be filed before the later of: (1) the 90th day before the date the trial starts; or (2) the 10th day after the date the party receives notice of the trial setting." TEX. CIV. PRAC. & REM. CODE § 15.0642. Check the statute on which you are relying for jurisdiction to determine if any deadline applies to your petition.

Even if the absence of a deadline, excessive delay should be avoided or a court may deny your petition on the basis of laches. *See, e.g., Rivercenter Assocs. v. Rivera*, 858 S.W.2d 366 (Tex. 1993) (orig. proceeding) (petition denied when party waited over four months before complaining of denial of motion to quash jury demand); *In re Tarrant Co. Hosp. Dist.*, 52 S.W.3d 434, 452 (Tex. App.—Fort Worth 2001, orig. proceeding) (mandamus relief barred by laches when relator waited one and two years from dates of trial court's orders).

E. The Response

"If the court is of the tentative opinion that relator is entitled to the relief sought or that a serious question concerning the relief requires further consideration, [] the court must request a response if one has not been filed." TEX. R. APP. P. 52.8(b)(1).

1. Length

Court of appeals. ≤50 pages (excluding the identity of parties, table of contents, index of authorities, statement of the case, statement of

jurisdiction, issues presented, signature, and proof of service). TEX. R. APP. P. 52.6.

Supreme Court. ≤15 pages (excluding the items listed above). TEX. R. APP. P. 52.6.

2. Contents

The Response must conform to the requirements of a petition in Rule 52.3, except it need not (but may) include a list of parties, a statement of the case, or a statement of jurisdiction. TEX. R. APP. P. 52.4. The argument must be confined to the issues raised by the relator. *Id.* The appendix need not duplicate items in the relator's appendix. TEX. R. APP. P. 52.4.

F. The Reply

A party may (but need not) file a reply (exclusive of the items listed above) of no more than 8 pages. TEX. R. APP. P. 52.5, 52.6. The court may consider the petition before the reply is filed.

G. Full Briefing/Supreme Court

"If the court is of the tentative opinion that relator is entitled to the relief sought or that a serious question concerning the relief requires further consideration, . . . the Supreme Court may request full briefing under Rule 55." TEX. R. APP. P. 52.8(b)(2).

H. Rehearing

A party may file a motion for rehearing (not to exceed 15 pages) within 15 days after the final order is rendered. TEX. R. APP. P. 52.9. No response is necessary unless requested by the court. *Id.* A motion for rehearing is not a prerequisite to proceeding from a court of appeals to the supreme court.

V. What is Required for Relief

Mandamus relief from a discovery order requires: (1) a clear abuse of discretion or the violation of a legal duty imposed by law and (2) an inadequate remedy by appeal. *See Walker v. Packer*, 827 S.W.2d 833, 839-41 (Tex. 1992) (orig. proceeding). Implicit in those requirements, however, is the need for an order—a seemingly easy requirement that sometimes causes problems. Moreover, in the supreme court, the relator must show the importance of the issue to the jurisprudence of the state. In the absence of any of these prerequisites, at least in a discovery context, mandamus will not issue.

A. An Order—Preferably Written

A trial court must have had an opportunity to consider and rule on a request. Thus, the complaint you make in the trial court should match the complaint you make on appeal. *See, e.g., In re United Supermarkets*, 36 S.W.2d 619, 621 (Tex. App.—Amarillo 2000, orig. proceeding) (complaint regarding order denying motion to strike designated attorney witness did not provide basis to decide newly raised issue on waiver of the attorney-client privilege by offensive use).

To preserve your complaint, you should obtain a written order (when possible) reflecting the trial court’s ruling. Indeed, Rule 52.3(j)(1)(A) requires that the appendix include “a certified or sworn copy of any order complained of, or any other document showing the matter complained of.”

Under the current version of the Rules, in some circumstances, a lack of written order may not be fatal to your petition. That is, some courts will consider the mandamus under the second half of Rule 52.3(j)(1)(A) in the absence of a written order if the ruling is “clear, specific, and enforceable.” *See In re Bledsoe*, 41 S.W.3d 807, 811 (Tex. App.—Fort Worth 2001, orig. proceeding); *see also In re Perritt*, 973 S.W.2d 776, 779-80 (Tex. App.—Texarkana 1998, orig. proceeding) (rule satisfied if reporter’s record adequately shows ruling), 992 S.W.2d 444, 446 (Tex. 1999) (presentation of objection and refusal of same not required if presentation would have been futile and no more than a formality). *Cf. In re Colony Ins.*, 978 S.W.2d 746, 747 (Tex. App.—Dallas 1998, orig. proceeding) (recognizing new language in Rule 52.3 but holding that oral statement of intent to change prior written ruling insufficient).

Or an appellate court may consider your mandamus if the trial court simply refuses to rule. *See In re Bonds*, 57 S.W.3d 456, 457 (Tex. App.—San Antonio 2001, orig. proceeding) (granting mandamus relief based on six-month delay in ruling on request to preserve evidence from destruction); *In re Taylor*, 28 S.W.3d 240, 248-50 (Tex. App.—Waco 2000, orig. proceeding) (granting mandamus relief when trial court refused to rule on prisoner’s request to appear in a civil proceeding personally or by other means). A written order, however, provides the clearest record for mandamus.

B. Abuse of Discretion/Violation of Duty Imposed by Law

“A trial court clearly abuses its discretion if ‘it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law.’” *Walker*, 827 S.W.2d at 839 (citation omitted).

Several considerations limit an appellate court’s review for abuse of discretion. For example, the appellate court focuses on the record that was before the trial court. *In re Bristol-Myers Squibb Co.*, 975 S.W.2d 601, 605 (Tex. 1998) (orig. proceeding). Thus, an insufficient record in the trial court or appellate court can defeat your petition.

Additionally, “[w]ith respect to resolution of factual issues or matters committed to a trial court’s discretion, for example, the reviewing court may not substitute its judgment for that of the trial court.” *Walker*, 827 S.W.2d at 840. Indeed, appellate courts do not resolve factual issues, so the existence of any factual disputes not resolved by the trial court can defeat a request for mandamus relief. *See, e.g., West v. Solito*, 563 S.W.2d 240, 245 (Tex. 1978) (orig. proceeding). Thus, the trial court’s resolution of (or failure to resolve) fact issues rarely supports mandamus relief.

“On the other hand, review of a trial court’s determination of the legal principles controlling its ruling is much less deferential. A trial court has no ‘discretion’ in determining what the law is or applying the law to the facts. Thus, a clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion” *Walker*, 827 S.W.2d at 840.

C. Inadequate Remedy by Appeal

“[A] party seeking review of a discovery order by mandamus must demonstrate the remedy offered by an ordinary appeal is inadequate.” *Id.* at 842.2 *Walker* listed some now well-recognized

² In some non-discovery contexts, mandamus can issue without showing an inadequate remedy by appeal. For example, mandamus will issue when a trial court enters a void order, one outside of its jurisdiction. *See In re Canales*, 52 S.W.3d 698 (Tex. 2001) (orig. proceeding) (void orders by assigned judge timely objected to); *In re Southwestern Bell Tel. Co.*, 35 S.W.3d 602 (Tex. 2000) (orig. proceeding) (void order entered after automatic bankruptcy stay); *In re Dickason*, 987 S.W.2d 570 (Tex. 1998) (orig. proceeding) (void orders entered after expiration of plenary power). The venue statute also does not incorporate an inadequate remedy by appeal

categories of discovery rulings that typify cases with an inadequate remedy by appeal. Those categories include the following:

1. Inability to cure discovery error. E.g., order to disclose privileged material (such as attorney-client or trade secret). Or, order to produce patently irrelevant or duplicative documents that clearly constitutes harassment or imposes a burden on the producing party far out of proportion to benefit to requesting party.
2. Vitiates or severely compromises a party's ability to present a viable claim or defense. A showing of delay, inconvenience or expense of an appeal does not suffice. Instead, the relator needs to show "denial of a reasonable opportunity to develop the merits of his or her case, so that the trial could be a waste of judicial resources." *Id.* at 843. E.g., death penalty sanctions.
3. Disallowed discovery and the missing discovery cannot be made part of the appellate record. E.g., protective order precluding deposition in which case evidence will not become part of the record.

Id. at 843-44.

In addition to the typical pre-trial rulings contemplated by those categories, mandamus relief may also be available in the context of post-judgment discovery in aid of enforcement of the judgment. In *In re Amaya*, 34 S.W.3d 354, 356 (Tex. App.—Waco 2001), the judgment creditor sought to depose the daughter of the judgment debtor who had fled the country. The trial court granted a motion for protection, allowed deposition on written questions related to two limited issues, and ordered the production of phone records. The appellate court noted that "it is unclear exactly what may constitute a 'final judgment' in the context of post judgment discovery order" but decided that supervision of such orders falls under the same procedures as pre-trial discovery proceedings. *Id.* As such, the trial court held mandamus was the appropriate mechanism by which to seek relief from such post-judgment discovery orders. *See id.*; *Collier*

requirement. *See* TEX. CIV. PRAC. & REM. CODE § 15.0642.

Services Corp. v. Salinas, 812 S.W.2d 372, 375 (Tex. App.—Corpus Christi 1991, orig. proceeding); *Parks v. Huffington*, 616 S.W.2d 641, 645 (Tex. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.); *see also Arndt v. Farris*, 633 S.W.2d 497, 500 n.5 (Tex. 1982) (orig. proceeding).

Section VII below discusses recent discovery mandamus rulings. Most, if not all, of the cases in which the courts grant mandamus relief fall within these three broad categories.

D. Importance to the Jurisprudence of the State/Supreme Court

The supreme court will not "grant mandamus relief unless [it] determine[s] that the error is of such importance to the jurisprudence of the state. *Walker*, 827 S.W.2d at 839 n.7. Thus, your petition to the supreme court must also demonstrate the significance of the issue to convince the court to grant extraordinary relief by mandamus.

Rule 56.1 sets out factors the supreme court considers in deciding whether an issue is important to the jurisprudence of the state. And, for an analysis of opinions from the supreme court on this point, see Elizabeth V. Rodd, "What is Important to the Jurisprudence of the State," 11th Annual Conference on State and Federal Appeals, University of Texas School of Law (2001). As the article points out, the court frequently finds procedure and statutory construction issues—two areas often at issue in discovery cases—important to the jurisprudence of the state. *Id.*

VI. Groundless Petitions and Misleading Records

If your case does not meet the jurisdictional, procedural, *Walker* or other substantive requirements, your decision is quite simple—don't file it. You don't get to squeeze it in the door by fudging on the facts or the law. And you don't get to prosecute such a proceeding just to delay the inevitable deposition or postpone a scheduled trial. The supreme court felt strongly enough about those self-evident propositions to include the following specific sanction authority in the mandamus rule:

On motion of any party or on its own initiative, the court may—after notice and a reasonable opportunity to respond—impose just sanctions on a party or attorney who is not acting in good faith as indicated by any of the following:

- (a) filing a petition that is clearly groundless;
- (b) bringing the petition solely for delay of an underlying proceeding;
- (c) grossly misstating or omitting an obviously important and material fact in the petition or response; or
- (d) filing an appendix or record that is clearly misleading because of the omission of obviously important and material evidence or documents.

TEX. R. APP. P. 52.11.

VII. Recent Mandamus Decisions

This section primarily reviews recent opinions issued in mandamus proceedings and categorizes the cases according to the three *Walker* “inadequate remedy by appeal” categories. Additionally, a few older cases are included to demonstrate other types of issues not addressed in the recent opinions. The list is by no means exhaustive but instead intended to demonstrate the types of cases in which courts granted mandamus relief in the discovery context.

A. Vitiates Claim or Defense

1. Abatement of Discovery

“A blanket abatement of discovery cannot be justified by the goal of an orderly trial process” *In re Van Waters & Rogers, Inc.*, 62 S.W.3d 197, 200 (Tex. 2001) (orig. proceeding). In that case, the trial court allowed designation of 25 of 448 toxic tort plaintiffs to proceed to trial while abating virtually all discovery. The case had been pending for seven years against various parties (including manufacturers, marketers, distributors, etc.) with little or no discovery. A threat therefore existed that evidence would be destroyed, witnesses would die or disappear, and memories would be impaired. *Id.* at 201.

Moreover, the supreme court noted that without such discovery the trial court did not have the evidence necessary to evaluate the factors set out in *In re Ethyl Corp.*, 975 S.W.2d 606 (Tex. 1998), and *In re Bristol-Myers Squibb Co.*, 975 S.W.2d 601 (Tex. 1998), to aid in deciding how to

consolidate the mass-tort claims for trial.³ The goal in selecting which plaintiffs to try first is to “ensure that the process remains fair to all.” *Id.* 201.

The court held that “[t]o abate discovery for years without justification is a clear abuse of discretion.” *Id.* The court also held that “the trial court’s discovery order *denie[d] defendants’ discovery that goes to the heart of the litigation.* Moreover, the continued abatement of the discovery process after seven years of litigation threaten[ed] that evidence critical to the claims made [would] become unavailable before discovery [could] be conducted. . . . [R]elators [did] not have an adequate remedy by appeal.” *Id.* (emphasis added); *see also In re R.R.*, 26 S.W.3d 569 (Tex. App.—Dallas 2000, orig. proceeding) (“blanket stoppage” of all discovery in a child custody modification hearing pending resolution of parallel criminal proceeding against one party abuse of discretion that severely compromised or vitiated ability to defend against modification). Thus, the blanket denial of discovery vitiated the defendants’ ability to defend against the plaintiffs’ claims.

2. Withdrawal of Deemed Admissions

Withdrawal or amendment of deemed admissions is permitted on a showing of (1) good cause, (2) lack of undue prejudice on party relying on deemed admissions, and (3) presentation on the merits of the action will be served thereby. *See In re Kellogg-Brown & Root, Inc.*, 45 S.W.3d 772, 775 (Tex. App.—Tyler 2001, orig. proceeding) (citing *Wal-Mart Stores, Inc. v. Deggs*, 968 S.W.2d 354, 356 (Tex. 1998)). In *Brown & Root*, the court found that when counsel responded to requests for admissions within four days of learning of the requests (although a month after the due date) and eight weeks before the trial setting, the trial court abused its discretion in denying the defendant’s motion to withdraw. *Id.* Moreover, the deemed admissions included admissions of a failure to warn, an element of the plaintiff’s negligence claim. The court found the trial court’s denial of the motion to strike “eliminated [the defendant’s] ability to present any viable defense at trial and acted as a death

³ Factors include whether plaintiffs worked in the same place, at similar jobs, and during similar time periods. Other factors include the similarity of injuries, whether alive or deceased, represented by counsel, and the status of discovery. *Id.* at 201.

penalty sanction.” *Id.* The court therefore found mandamus relief appropriate.

3. Death Penalty Sanctions

Under the well-recognized *TransAmerican* test, a death penalty sanction must meet the following: (1) a direct relationship must exist between the offensive conduct and the sanction, and (2) the sanction must not be excessive based on the offensive conduct. *In re Polaris Indus., Inc.*, 2001 WL 1517818 (Tex. App.—Beaumont 2001, orig. proceeding) (citing *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 917-20 (Tex. 1991) (orig. proceeding)). Moreover, for due process reasons, the sanction may not determine the merits of the case unless the offensive conduct justifies a presumption that the offending party’s claims or defenses lack merit. *Id.*

In the mandamus/inadequate remedy by appeal context, death penalties generally involve (1) striking a defendant’s pleadings or perhaps part of a plaintiff’s pleadings (when the case would proceed to trial with no defenses or on only part of the originally pleaded claims) or (2) the striking of all or key witnesses for the plaintiff or defendant (when the case will proceed to trial despite the precluded witnesses). *See, e.g., Polaris*, 2001 WL 1517818 (striking defendant’s pleadings); *Tarrant Co. Hosp. Dist.*, 52 S.W.3d at 453 (striking defendant’s pleadings).

Otherwise, an ordinary appeal provides an adequate remedy for such death penalty sanctions as a default judgment or dismissal of an entire cause. Likewise, monetary sanctions are not generally reviewable by mandamus unless the trial court orders payment prior to judgment or makes a finding that the sanctions will not preclude the ability to proceed to trial. *See Braden v. Downey*, 811 S.W.2d 922, 927 (Tex. 1991) (orig. proceeding).

Because many discovery rulings can or must be review by ordinary appeal, the first hurdle in your petition might be convincing the appellate court that the sanction rose to the level of a death penalty. For example, in *In Re Thornton-Johnson*, 2001 WL 639177 (Tex. App.—Amarillo 2001, orig. proceeding), the court held that striking a medical expert eliminated only one of three grounds of negligence and did not dispose of the case in its entirety; thus, the court held that the plaintiffs had an adequate remedy by appeal. *See also Adkins Servs., Inc. v. Tisdale Co.*, 2001 WL 992060 (Tex. App.—Texarkana 2001, no pet.) (death penalty is one that adjudicates a claim or that is case determinative); *Campos v. State Farm*

Gen. Ins. Co., 943 S.W.2d 52, 55 (Tex. App.—San Antonio 1997, writ denied) (striking of attorneys’ fee witness not death penalty sanction when breach of contract proceeded to trial and order only precluded recovery of fees). *But cf. In re Bledsoe*, 41 S.W.3d 807, 813 (Tex. App.—Fort Worth 2001, orig. proceeding) (excluding a defendant’s fact witnesses, exhibits, and proposed jury questions tantamount to striking the defendant’s pleadings and eliminated his affirmative defenses).

If the case does involve a death penalty sanction (but not a final or otherwise appealable judgment), the trial court’s granting of such sanctions when the *TransAmerican* requirements are not met constitutes an abuse of discretion. *Polaris*, 2001 WL 1517818 (failure to consider lesser sanctions did not support death penalty); *Tarrant Co. Hosp. Dist.*, 52 S.W.3d at 453 (presumption of lack of merit improper when record contained no evidence to support presumption but did contain evidence of meritorious defenses). *But see In re Dynamic Health, Inc.*, 32 S.W.3d 876 (Tex. App.—Texarkana 2000, orig. proceeding) (noting conditional monetary sanction not reviewable by mandamus and holding conduct sufficiently egregious to justify striking of defendant’s pleadings); *In re Lavernia Nursing Facility, Inc.*, 12 S.W.3d 566 (Tex. App.—San Antonio 1999, orig. proceeding) (immediately payable sanction improper without finding that payment would not impair ability to pursue litigation).

4. Withholding of Documents Critical to Trial

One court held that an order denying a motion to compel production of documents that are the product of or documentation of the mental impressions of a testifying expert constitutes an abuse of discretion. *In re Family Hospice, Ltd.*, 2001 WL 1513210 (Tex. App.—El Paso 2001, orig. proceeding) (citing Rule 192.3). The court held that, in that case, the denial of access to the documents compromised the defense of the case and vitiated the defense’s ability to prepare for trial. *Id.* As such, no adequate remedy by appeal existed.

B. Inability to Cure Discovery Error (Privileges and Undue Burdens)

1. Unlimited, Overbroad, or Harassing Requests

A request for production not limited as to time, place or subject matter is generally improperly overbroad and not reasonably tailored

to include only matters relevant to the case. *See In re American Optical Corp.*, 988 S.W.2d 711, 712-13 (Tex. 1998) (orig. proceeding) (discovery demand to turn over “virtually every document ever generated” related to defendant’s products too broad and denounced as improper fishing expedition); *In re Shipmon*, 2001 WL 1585076 (Tex. App.—Amarillo 2001, orig. proceeding) (citing *Texaco, Inc. v. Sanderson*, 898 S.W.2d 813, 815 (Tex. 1995), and holding request for production not limited in time overbroad); *In re Energas Co.*, 63 S.W.3d 50 (Tex. App.—Amarillo 2001, orig. proceeding) (holding request for production without any limitation as to time to be overbroad but request covering city’s entire pipeline system not overbroad).⁴

An order requiring a witness to be deposed far from the county of her residence violates rule 199.2(b)(2). One court found such violation to support mandamus relief (at least when combined with another error requiring disclosure of privileged information). *See In re Rogers*, 43 S.W.3d 20, 28 (Tex. App.—Amarillo 2001, orig. proceeding). On the other hand, allowing re-deposition in the face of new evidence did not abuse the trial court’s discretion. *Id.*

2. Improper Apex Depositions

To establish the need for an apex deposition, the requesting party must show: (1) the high-level official has unique or superior knowledge of discoverable information, or (2) a good faith effort to obtain the discovery through less intrusive means if (i) there is a reasonable indication that the official’s deposition is calculated to lead to the discovery of admissible evidence and (ii) the less-intrusive methods of discovery were or will be unsatisfactory, insufficient, or inadequate to obtain the information. *In re Daisy Mfg. Co.*, 17 S.W.3d 654, 656-57 (Tex. 2000) (orig. proceeding) (citing *Crown Central Pet. Corp. v. Garcia*, 904 S.W.2d 125, 128 (Tex. 1995)); *In re Alcatel USA, Inc.*, 11 S.W.3d 173, 177 (Tex. 1999) (orig. proceeding) (same).

Unique or superior knowledge requires a “showing beyond mere relevance, such as evidence that a high-level executive is the only person with personal knowledge of the information sought or that the executive arguably

possesses relevant knowledge greater in quality of quantity than other available sources.” *Alcatel*, 11 S.W.3d at 178. No presumption exists in a business dispute that a high-level executive possesses superior or unique information merely because such an official might be expected to participate in decisions relevant to the dispute. *Id.* Similarly, ultimate responsibility, access to information, and knowledge of corporate policies do not alone suffice to show that the apex deposition is reasonably calculated to lead to the discovery of admissible evidence. *Daisy Mfg.*, 17 S.W.3d at 659.

Ordering an apex deposition without satisfaction of either of the two *Crown Central* tests constitutes an abuse of discretion. *See Alcatel*, 11 S.W.3d 173, 181; *cf. Daisy Mfg.*, 17 S.W.2d at 65 (trial court did not abuse its discretion in denying deposition when *Crown Central* tests not met). A deponent holds a right of protection from undue burden and harassment. *Alcatel*, 11 S.W.3d at 181 (Enoch, J., dissenting). An ordinary appeal—after the undue burden, harassment and expense of being deposed—would therefore not provide an adequate remedy by appeal.

3. Physical Examination

Texas Rule of Civil Procedure 204.1(c) provides that a court may compel a party to submit to a physical or mental examination only (1) for good cause (2) when the condition is in controversy. TEX. R. CIV. P. 204.2(c). Good cause requires a showing that (1) the examination is relevant to an issue in controversy, (2) a reasonable nexus exists between the condition and the examination, and (3) the information is not available from less intrusive means. *In re Cabelloro*, 36 S.W.3d 143, 145 (Tex. App.—Corpus Christi 2000, orig. proceeding) (citing *Coates v. Whittington*, 758 S.W.2d 749, 751 (Tex. 1988)). An order of a physical exam before deposing the treating physician or reviewing medical records would not ordinarily satisfy the third-prong of the good cause requirement. *Id.* As with the apex deposition, an adequate remedy (i.e., protection from the exam) would not be available in an after-the-fact ordinary appeal. *Id.* (no adequate remedy by appeal when appellate court cannot cure trial court’s erroneous discovery order).

4. Disclosure of Privileged Materials by Production or Deposition

One of the most common bases for mandamus relief arises with orders that require

⁴ The court noted that, although not required by the Rules or by *Sanderson*, “it would be a good practice to state the reasons supporting an objection that the request is overbroad as to (1) time, (2) place, or (3) subject matter.” *Id.* n.4.

the disclosure of privileged information. As shown in the subsections below, those privileges can arise from various sources, including rules, statutes, or constitutional provisions. And, although discussed in a only few instances below, waiver is a predominant issue in many of those cases.

a. Attorney-Client, Work-Product, Attorney Disqualification

Mandamus relief is frequently invoked to protect documents, communications, and other materials arising from the attorney-client relationship or from the attorney's work in rendering legal advice. For example, recent cases involved the attorney-client privilege, the work-product doctrine, and the effect of attorney disqualification on privileged materials. See *In re George*, 28 S.W.3d 511, 518-20 (Tex. 2000) (orig. proceeding) (setting out rules for what documents substituted counsel can access from previously disqualified counsel); *In re Avila*, 22 S.W.3d 349 (Tex. 2000) (orig. proceeding) (Hecht., J., dissenting from denial of petition) (urging that court should address "whether the attorney-client privilege protects a party from being required to disclose that her attorney referred her to a physician for treatment"); *In re American Home Prods. Corp.*, 985 S.W.2d 68 (Tex. 1998) (orig. proceeding) (reviewing disqualification disputes arising from plaintiffs' hiring defendant's former consulting expert as testifying expert and from plaintiffs' hiring legal assistant formerly employed by defendant); *In re Cooper*, 47 S.W.3d 206, 208-09 (Tex. App.—Beaumont 2001, orig. proceeding) (personal injury defendant did not waive attorney-client privilege by assigning *Stowers* claim to personal injury plaintiff); *In re Bank of America, N.A.*, 45 S.W.3d 238, 243-45 (Tex. App.—Houston [1st Dist.] 2001, orig. proceeding) (attorney's extensive review of privileged documents erroneously handed over by trial court resulted in attorney's disqualification to continue representation of client); *In re Weeks Marine, Inc.*, 31 S.W.3d 389 (Tex. App.—San Antonio 2000, orig. proceeding) (holding Rule 192.5, not federal procedural law, governed whether documents were privileged work product prepared in anticipation of litigation in maritime case and finding abuse of discretion occurred when trial court ordered production of privileged documents).

b. Trade Secrets

A party invoking a trade secret privilege must establish that the information is a trade

secret. Then the burden shifts to the party seeking information to establish that disclosure of the trade secret is necessary to the fair adjudication of their claim. *In re Continental Gen. Tire, Inc.*, 979 S.W.2d 609, 613 (Tex. 1998) (orig. proceeding). When the requesting party fails to show need for the information, an order to disclose the information shown to be a trade secret constitutes an abuse of discretion for which no adequate remedy by appeal exists. *Id.*

c. Medical Peer Review

Another category of potentially privileged documents often at issue in mandamus petitions is the medical peer review committee privilege. As with other privileges, absent a waiver, the trial court abuses its discretion in ordering disclosure of documents encompassed within the medical peer review privilege and an ordinary appeal is inadequate to protect that privilege. See *Irving Health Care Sys. v. Brooks*, 927 S.W.2d 12 (Tex. 1996) (orig. proceeding) (analyzing peer-review privileges); *Memorial Hosp. v. McCown*, 927 S.W.2d 1 (Tex. 1996) (orig. proceeding) (same); *In re University of Texas Health Ctr. at Tyler*, 33 S.W.3d 822, 824-25 (Tex. 2001) (orig. proceeding);⁵ *In re Rogers*, 43 S.W.3d 20, 26 (Tex. App.—Amarillo 2001, orig. proceeding) (abuse of discretion to extent order compelled production of and allowed inquiry into with witnesses about documents or communications made to the Board of Nurse Examiners about the provision or failure to provide nursing services); *In re Ching*, 32 S.W.3d 306, 313 (Tex. App.—

⁵ In *University of Texas Health Center*, several interesting waiver issues arose. First, the plaintiffs claimed that the defendant had not objected to the second of three requests. The court held the objections had already been made clear and reiteration was not necessary. 33 S.W.3d at 826. Second, the plaintiffs argued that the failure to follow Rule 193 constituted a waiver. The court, however, held that a party's failure to comply with Rule 193 is not a waiver; instead, pursuant to Rule 193.2(f), the party must comply with Rule 193.3 when the error is pointed out. *Id.* Third, the plaintiffs claimed answers to another plaintiff's interrogatory waived the privilege. But the section of the act at issue required a written waiver by the committee. *Id.* at 827. Finally, plaintiffs argued that the privilege was waived when the trial court overruled the objections and handed the documents (tendered for an in camera inspection) over to the plaintiffs. The supreme court held that the trial court's "involuntary production" of the documents did not waive the privilege. *Id.*

Amarillo 2000, orig. proceeding) (abuse of discretion not to conduct in camera inspection of materials to determine if antitrust exception to peer review privilege applies).

d. Open Records/Open Meetings

Orders that compel disclosure pursuant to an open records or open meetings request may (when erroneous) result in mandamus relief. For example, in *In re City of Georgetown*, 53 S.W.3d 328, 331 (Tex. 2001) (orig. proceeding), the trial court ordered disclosure of the report of an expert consulting on litigation against the city. The report had been attached to a former city manager's performance evaluation. The supreme court held that the order compelled disclosure in violation of the Public Information Act, which excepts from disclosure a completed report "expressly made confidential under other law." The court held that Rule 192.3 of the Texas Rules of Civil Procedure was "other law" that expressly made the consulting expert report confidential. *Id.* at 334-35 (construing sections 552.103 and 552.022 of the Public Information Act). A trial court, thus, abuses its discretion in ordering disclosure of information or documents statutorily protected and only relief by mandamus could protect the governmental body from forced disclosure of the privileged information. *See also In re Jobe*, 42 S.W.3d 174, 177-81 (Tex. App.—Amarillo 2001, orig. proceeding) (construing section 143.089 of the Local Government Code and allowing mandamus relief based on order compelling production of items not within scope of public personnel file).⁶

e. Legislative Testimonial Privilege

A discovery order that would result in the violation of the legislative testimonial privilege may support mandamus relief. For example, in *In re Perry*, 60 S.W.3d 857 (Tex. 2001, orig. proceeding), a group of Texas residents sought to challenge as unconstitutional the senatorial and representative redistricting plans adopted by the

⁶ Consult the pertinent statutory section and rules of procedure to verify each step necessary to claim (or object to a claim of) confidentiality by a governmental entity. The process can involve various steps, including one or more of the following: an AG opinion, a mandamus against the governmental entity, declaratory judgment against the AG, a motion for protective order, an ordinary appeal or petition for writ of mandamus. *See, e.g., City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 355-58 (Tex. 2000); *Jobe*, 42 S.W.3d at 176.

Legislative Redistricting Board ("LRB"). In so doing, those plaintiffs sought to depose members (and aides) of the LRB, including the Attorney General, the Comptroller, and the Land Commissioner. The trial court denied the Governor's motion to quash the deposition notices on the basis of legislative immunity. The supreme court held that legislative immunity extended "beyond federal and state legislators to other individuals performing legitimate legislative functions." *Id.* at 860; *see also In re de la Garza*, 45 Tex. Sup. Ct. J. 125 (Oct. 15, 2001) (suggesting legislative privilege extends to mayor and city commissioners). Because LRB members were engaged in discretionary, policymaking decisions "in the shoes of" the legislature, the testimonial privilege applied to the board members and their aides. *Perry*, 60 S.W.3d at 860.7 The abuse of discretion in refusing to quash the LRB members' depositions left no adequate remedy by appeal when the order would have resulted in "the disclosure of privileged information." *Id.* at 862.

f. Settlement/Mediation information

Orders that require revelation of confidential settlement information might support mandamus relief. *See In re Union Pac. Res. Co.*, 22 S.W.3d 338, 339 (Tex. 2000) (orig. proceeding) (order erroneously required disclosure of internal accounting records irrelevant to settlement allocation when plaintiff received redacted copy of settlement agreement showing how payments to be allocated);⁸ *In re Lux*, 52 S.W.3d 369, 372-74 (Tex. App.—Texarkana 2001, orig. proceeding) (trial court did not abuse discretion in refusing to allow defendants to pierce attorney-client and work-product privileges to inquire into "mental processes and discussions" that led to settlement even though such information allegedly needed to establish sham transaction for settlement credit purposes under *Utts*); *In re Acceptance Ins. Co.*, 33 S.W.3d 443, 451-53 (Tex.

⁷ The court noted that the privilege might not be absolute; instead, the privilege might include a limited exception when "invidious legislative intent" is an element of a cause of action (and other available evidentiary sources have first been exhausted). *Id.* at 861.

⁸ The court also held that evidence required only when necessary to support an objection or assertion of privilege. *Id.* Unlike usual claim of privilege, claim of irrelevance at issue did not require supporting evidence. *Id.*

App.—Fort Worth 2000, orig. proceeding) (order allowing inquiry into whether negotiations conducted in good faith and other statutorily protected mediation information supported mandamus relief). *Cf. In re Learjet, Inc.*, 59 S.W.3d 842, 845-46 (Tex. App.—Texarkana 2001, orig. proceeding) (order compelling production of videotape made for mediation not abuse of discretion when information on tape independently discoverable and information not otherwise privileged); *In re Daley*, 29 S.W.3d 915 (Tex. App.—Beaumont 2000, orig. proceeding) (no abuse of discretion in allowing deposition on limited question of whether insurance representative left mediation with or without mediator’s permission, a matter not protected by Chapter 154).

g. Privacy Rights/Non-Party Records

Orders of discovery that will violate a party’s constitutional rights may qualify for mandamus relief. *See In re Bay Area Citizens Against Lawsuit Abuse*, 982 S.W.2d 371 (Tex. 1998) (requiring disclosure of donor list would violate First Amendment right to freedom of association); *see also In re Maurer*, 15 S.W.3d 256 (Tex. App.—Houston [14th Dist.] 2000, orig. proceeding) (requiring production of member list without a compelling state interest violates freedom of association).

In a pair of cases, the Corpus Christi court considered whether the redaction of personal information from non-party medical records sufficiently protected the non-party’s constitutional right to privacy. *See In re Columbia Valley Reg’l Med. Ctr.*, 41 S.W.3d 797 (Tex. App.—Corpus Christi 2001, orig. proceeding); *In re Diversicare Gen. Partner, Inc.*, 41 S.W.3d 788 (Tex. App.—Corpus Christi 2001, orig. proceeding).

Under the several Texas statutes and regulations, the personal and clinical information of elderly patients in nursing homes is confidential and protected from disclosure. *See Diversicare*, 41 S.W.3d at 792. Likewise, several statutes protect confidential physician-patient communications, records of identity, diagnosis, evaluation or treatment, and health care information found in hospital records. *See Columbia Valley*, 41 S.W.3d at 799. A party’s constitutional right to privacy might also preclude the disclosure of medical information. *Id.* at 802-03.

Does redaction protect the privileges? In *Diversicare*, a female nursing home resident filed a sexual assault case against a co-resident who

later passed away. 41 S.W.3d at 792. The plaintiff sought the personal and clinical records of the deceased male patient to gain access to information about the assault and to determine what the nursing home knew about and its response to the male patient’s behavior. *Id.* The trial court order production of the records with the personal identifying information redacted (and replaced with Mr. “A”). *Id.*

The appellate court first held that the trial court’s order did not constitute a written authorization of the resident or his or her legal representative to release medical records; otherwise, any order could gut the protections. *Id.* at 793. Moreover, the fact that the nursing home “possesses” the records as discussed in Rule 192.3(b) does not eliminate the patient’s privilege. And the exceptions from notice to a non-party in 196.1(c)(2)(B)-(C) do not eliminate the patient’s privilege explicitly retained by (c)(3). Instead, the documents remain confidential absent a showing of some exception. *Id.* at 794-95. Finally, the redaction of the identifying information would not suffice to protect the identity of the deceased patient—a long-time resident of the small community in which the case would be tried. *Id.*

The concurring justice agreed that redaction would not suffice in that case but refused to agree that redaction would not suffice in other cases. In *Columbia Valley*, the plaintiffs sought non-party records of all infant deliveries in which a particular nurse was present in the delivery room to determine whether that nurse, not a doctor, delivered the baby. 41 S.W.3d at 799. No one disagreed that the records were privileged. Instead, the plaintiffs asserted that redacting the records would protect patient identity and privacy rights.

Again, the court noted that the redaction provision of Rule 196.1(c) did not obviate the privilege but instead could only eliminate a need for notice to the non-party. *Id.* Moreover, the court noted that redacting identifying information does not protect the privileged medical information found in the records. *Id.* 800. Likewise, the court held that redacting *all* confidential information (i.e., personal and medical) to leave only any information about the nurse did not protect the privilege. *Id.* at 800-01. The court noted that the information was discoverable through other means. *Id.* To encourage full communication and to preclude disclosure of highly confidential information, the court held that, like with the attorney-client privilege, the privilege extends to the entire document (even if interwoven with factual

information). *Id.* The dissent would have held that the redaction of “the patient’s identification and of all other information reasonably necessary to conceal the patient’s identification would make [the] records fall outside the scope of the privilege.” *Id.* at 804-05.

The judges agreed on the need to protect the personal information. The judges, however, disagreed on the effectiveness of redaction in achieving the goal when balanced against the purpose of the confidentiality provisions. If faced with this situation, this pair of cases set out the considerations on both sides of the issue. Compare *In re Rezulin Prods. Liab. Litig.*, 178 F. Supp. 2d 412, 414-17 (S.D.N.Y. 2001) (distinguishing and refusing to follow the majority holding in *Diversicare* and *Columbia Valley* and ordering production of redacted records to be handled on confidential basis).

5. Deposition of Non-Party

When a trial court improperly orders the deposition of a non-party who will not be part of any subsequent appeal, no adequate remedy by appeal exists. See *In re Arras*, 24 S.W.3d 862, 864 (Tex. App.—El Paso 2000, orig. proceeding) (order of deposition of non-party abuse of discretion under Rule 192.4 when other less burdensome means available to obtain information)

6. Tax Returns

Absent a showing of relevance, the supreme court disfavors requests to produce tax returns. See, e.g., *Sears, Roebuck & Co. v. Ramirez*, 824 S.W.2d 558 (Tex. 1992).

C. Disallowed Discovery/Evades Appellate Review

1. Quashed Deposition/Non-Party

If not reviewable by mandamus, a trial court’s order to protect a witness from deposition could deny a party access to discoverable information yet evade appellate review based on the absence of the evidence from the record. In *In re Amaya*, 34 S.W.3d 354, 356 (Tex. App.—Waco 2001), the judgment creditor sought to depose the daughter of the judgment debtor who had fled the country. The trial court granted a motion for protection, allowed deposition on written questions related to two limited issues, and ordered the production of phone records. The record contained evidence that the daughter possessed relevant information and failed to show

any undue burden or expense arising from cooperating with the deposition.⁹ The appellate court found that the trial court abused its discretion in limiting the deposition of the daughter. *Id.*

2. Withheld Settlement Agreement

One court held that a party entitled to a settlement credit is entitled to discover a settlement agreement unless the resisting party shows that the “one satisfaction rule” is not applicable. See *In re Frank A. Smith Sales, Inc.*, 32 S.W.3d 871, 875 (Tex. App.—Corpus Christi 2000, orig. proceeding). The court found an appeal an inadequate remedy because the trial court’s order precluded the agreement from becoming part of the record and the unavailability of the agreement severely compromised or vitiated the defendant’s entitlement to a credit. *Id.* at 876.

VIII. Conclusion

A review of the recent cases discussed above (and listed in the table of authorities) reveals that certain types of petitions (in certain locations) are most likely to secure relief than others. First, a review of the table of authorities indicates that some courts of appeals are less likely to grant mandamus relief than other courts of appeals. Second, very few cases fall into the “denial of discovery” category for inadequate remedies by appeal. If you plan to raise that type of case, you may have to work harder to convince the court of the propriety and necessity of relief in your case. Third, the disclosure of privileged information, violation of privacy or constitutional rights, extraordinarily (and often unnecessarily) broad orders allowing (and sometimes denying) discovery, and death penalty sanctions represent the most frequent examples of cases in which courts grant mandamus relief. Your chances of relief thus increase if you fall in one of those categories.

If you decide to pursue mandamus relief, make sure you follow Rule 52 to avoid denial on a

⁹ The court noted that the proposed deponent had not introduced any evidence at the motion for protection hearing. Instead, she had only attached an affidavit to the motion. Based on its disposition, the court considered the contents of the affidavit. But the court warned that “[f]iling an affidavit is not adequate to have it considered as evidence by the trial court in support of an exemption from discovery.” *Id.* at 357 n.1.

procedural ground. Also, make sure you set up the petition to reflect clearly how the trial court abused its discretion and why an appeal provides an inadequate remedy. State the underlying facts clearly and succinctly and demonstrate the undisputed nature of the facts. Make sure you clearly set out the relief that you seek. Finally, draft a petition that clearly shows why the issue in your case is important and why you deserve the relief you seek.