

MANDAMUS RELIEF IN THE DISCOVERY CONTEXT

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I. SCOPE OF ARTICLE/INTERESTING STATISTICS

This paper focuses on a review of mandamus cases relating to discovery disputes in Texas appellate courts. This paper will also discuss the substantive elements for obtaining mandamus relief, and will address practical considerations for the trial lawyer in seeking mandamus relief or in challenging mandamus relief—particularly in discovery disputes. Finally, this paper will include a section outlining the mechanics for seeking and challenging a petition for writ of mandamus, *i.e.*, a Rule 52 checklist.

Although Texas Courts have in recent years issued a plethora of mandamus opinions—granting mandamus relief in hitherto unimaginable circumstances—and although the law appears to be settled regarding the issuance of mandamus relief to correct erroneous discovery orders, statistics demonstrate that a litigant should never count on obtaining mandamus relief in any context. Indeed, anyone contemplating seeking mandamus relief should reconsider in view of the statistical likelihood that mandamus relief is unlikely to be granted. Although complete statistics are not available from all of the courts of appeals, John Adcock of our office contacted the 14 courts of appeal and obtained the following information.

Mandamuses Filed and Granted During the Period September 1, 1998 to August 31, 1999*

	<u>Court of Appeals</u>	<u>Mandamuses Filed</u>	<u>Mandamuses Granted</u>
1.	Houston [1st Dist.]	145	3
2.	Fort Worth	75	2
3.	Austin	77	6
4.	San Antonio	106	11
5.	Dallas	No Response	
6.	Texarkana	29	4
7.	Amarillo	37	4
8.	El Paso	29	0
9.	Beaumont	42	5
10.	Waco	54	9
11.	Eastland	25	0
12.	Tyler	30	2
13.	Corpus Christi	59	13
14.	Houston [14th Dist.]	115	12

* Note: Some courts have mandamuses that were filed during this period and are still pending.

In addition, Eugene A. Cook's article, Supreme Court Analysis, 17 THE APPELLATE ADVOC. 3, 5 (Aug. 1998), demonstrates that from 1987 – 1997, the highest percentage of mandamus relief granted in one year occurred in 1994 with 13%; the lowest was 7% in 1993. In fiscal year 1998 (September 1, 1997 through August 31, 1998), the Texas Supreme Court disposed of 320 mandamus petitions, but granted relief in only 23 of the cases. OFFICE OF CT.

ADMIN., TEX. JUD. SYS. ANN. REP. 54 (1998). Thus, only 7% of the litigants seeking review from the Texas Supreme Court obtained relief in fiscal year 1998.

Given these statistics, the prudent litigator should not only carefully reconsider seeking mandamus relief, but also should make certain that her petition for a writ of mandamus meets all the technical requirements of Rule 52 of the Texas Rules of Appellate Procedure and that “compelling circumstances” justify the seeking of this extraordinary writ. In addition, the careful litigator should make certain that she is not herself guilty of any discovery abuse and that she has satisfied all requisite burdens of proof.

II. WHAT IS A MANDAMUS?

A writ of mandamus is an order from a court of competent jurisdiction directing a person, usually a public official, or an inferior court to perform a duty required by law. State v. Westergren, 707 S.W.2d 260, 261 (Tex. App.—Corpus Christi 1986) (orig. proceeding). Historically, the writ issued only to correct actions that were ministerial in nature. See Wortham v. Walker, 128 S.W.2d 1138, 1150 (Tex. 1939) (orig. proceeding). As the Texas Supreme Court pointed out in Walker v. Packer, beginning in the 1950’s, however, Texas courts expanded the remedy to include discretionary rulings amounting to a clear abuse of discretion where there is no adequate remedy by appeal. Walker v. Packer, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding); Womack v. Berry, 291 S.W.2d 677, 682 (Tex. 1956) (orig. proceeding). With this expansion, the writ of mandamus has become increasingly important to litigants. In particular, practitioners now often use the writ to seek relief from a multitude of pretrial decisions, such as hotly contested discovery disputes.

III. MANDAMUS JURISDICTION

Mandamus is not an appeal, but rather is an original action filed in the district court, court of appeals, or the Texas Supreme Court petitioning the court to direct an official (including a judge) to perform a legal duty. Indeed, the authority to issue mandamus is separate and independent from the courts of appeals’ appellate jurisdiction. See Deloitte & Touche, L.L.P. v. Fourteenth Court of Appeals, 951 S.W.2d 394, 396 (Tex. 1997) (orig. proceeding) (concluding that, although the legislature expressly excluded class certification rulings from its appellate jurisdiction the legislature did not exclude class certification rulings from its separate and independent mandamus jurisdiction).

The courts of appeals’ jurisdiction to issue writs of mandamus is both constitutional and statutory. Article V, section 6 of the Texas Constitution allows the legislature to confer mandamus jurisdiction on the courts of appeals by providing the courts with appellate jurisdiction and “such other jurisdiction, original and appellate, as may be prescribed by law.” TEX. CONST. art. V, § 6. After a 1983 amendment to the Texas Government Code, courts of appeals acquired concurrent jurisdiction with the Texas Supreme Court to issue a writ of

mandamus to district courts.¹ See Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 917 (Tex. 1985) (orig. proceeding).

Note recent interesting case regarding the court’s mandamus jurisdiction: In re Nolo Press/Folk Law, Inc., 991 S.W.2d 768 (Tex. 1999) (orig. proceeding) (Author: Hecht, J.). There, the Court held that it does not have mandamus jurisdiction to order Unauthorized Practice of Law Committee to produce information or to clarify its 1986 order prohibiting disclosure of Committee records except for specific purposes. Nevertheless, as an administrative matter, the Court vacated the 1986 order concerning confidentiality of records of the Committee. The Court’s opinion examines all possible bases for mandamus jurisdiction. Enoch, J. concurrence calls the opinion “making a mountain out of a mole hill.” Id. at 782.

IV. ESSENTIAL ELEMENTS OF MANDAMUS RELIEF IN THE DISCOVERY CONTEXT

The decision to grant mandamus relief is entirely discretionary and the burden is on the “relator”—the party seeking the relief—to meet the heavy burden of establishing “compelling circumstances” justifying the issuance of this extraordinary writ. The relator must show:

1. Clear abuse of discretion (or that the lower court violated a duty imposed by law); AND
2. No adequate remedy at law or no adequate remedy by appeal.

See Walker v. Packer, 827 S.W.2d 833 (Tex. 1992) (orig. proceeding). Walker v. Packer, together with TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 919 (Tex. 1991) (orig. proceeding), are, of course, the definitive mandamus cases relating to discovery disputes and discovery sanctions.

A. Clear Abuse of Discretion

With respect to the first element, establishing a clear abuse of discretion, the Texas Supreme Court has explained that 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.”

¹ When the court of appeals and the Texas Supreme Court have concurrent jurisdiction, Texas Rule of Appellate Procedure 52.3(e) provides that “the petition must be presented first to the court of appeals unless there is a compelling reason not to do so.” TEX. R. APP. P. 52.3(e). There are few “compelling reasons” for bypassing the court of appeals. Such compelling reasons may include elections or party conventions. See, e.g., Republican Party of Texas v. Dietz, 940 S.W.2d 86 (Tex. 1997) and 924 S.W.2d 932 (Tex. 1996) (per curiam); LaRouche v. Hannah, 822 S.W.2d 632 (Tex. 1992) (orig. proceeding); Sears v. Bayoud, 786 S.W.2d 248 (Tex. 1990) (orig. proceeding).

Walker, 827 S.W.2d at 840 (citing Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 917 (Tex. 1985) (orig. proceeding)). The “clear abuse of discretion” standard has different applications in different circumstances.

With respect to resolution of factual issues or matters committed to the trial court’s discretion, for example, the reviewing court may not substitute its judgment for that of the trial court. Id. (citations omitted). A trial court decision based on conflicting evidence, some of which reasonably supports the trial court’s decision, will not constitute an abuse of discretion. See Davis v. Huey, 571 S.W.2d 859, 862 (Tex. 1978); see also National Med. Enters., Inc. v. Godbey, 924 S.W.2d 123, 135 (Tex. 1996) (orig. proceeding) (Baker, J., dissenting) (“An abuse of discretion does not exist if some evidence in the record shows the trial court followed guiding rules and principles.”). In essence, the relator must establish that the trial court could reasonably have reached only one conclusion, i.e., that the trial court’s order was arbitrary and unreasonable. Id. at 840 (citation omitted). Mere errors in judgment are not an abuse of discretion. Johnson, 700 S.W.2d at 918.

The “abuse of discretion” standard has a substantially different application when dealing with the trial court’s legal determinations. That is, although a trial court’s determination of factual disputes is given great deference by appellate courts, the trial court’s determination of legal principles is given very little, if any, deference on review. Walker, 827 S.W.2d at 840. A clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion and may result in mandamus. In re Speer, 965 S.W.2d 41, 45 (Tex. App.—Fort Worth 1998) (orig. proceeding). Indeed, the trial court is given so little deference in matters involving the determination of legal principles that a lower court’s legal conclusions, even if based on existing precedent, can be a clear abuse of discretion if the reviewing court decides to reconsider or clarify the precedent. See, e.g., In re Smith Barney, Inc., 975 S.W.2d 593, 598-99 (Tex. 1998) (orig. proceeding); see also Walker, 827 S.W.2d at 838-39 (trial court based its order denying requested pre-trial discovery on prior precedent—which Court distinguished—observing further that trial court failed to apply the applicable rules of civil procedure); Huie v. DeShazo, 922 S.W.2d 920, 927-28 (Tex. 1996) (clarifying applicable law).

B. No Adequate Remedy by Appeal (or No Adequate Remedy at Law)

The second element the relator must demonstrate before mandamus relief will issue is that the relator lacks an adequate remedy at law. “Mandamus is intended to be an extraordinary remedy, available only in limited circumstances.” Walker, 827 S.W.2d at 840. Without the “adequate remedy at law” limitation, appellate courts would “embroil themselves unnecessarily in incidental pre-trial rulings of the trial courts” and mandamus “would soon cease to be an extraordinary writ.” Id. (quoting Braden v. Downey, 811 S.W.2d 922, 928 (Tex. 1991)).

An appellate remedy is not inadequate merely because it may involve more expense or delay than obtaining a writ of mandamus. Walker, 827 S.W.2d at 842 (expressly disapproving the more lenient standard in Jampole v. Touchy, 673 S.W.2d 569, 576 (Tex. 1984) (remedy by appeal must be “equally convenient, beneficial, and effective as mandamus”), and Crane v. Tunks, 160 Tex. 182, 190, 328 S.W.2d 434, 439 (1959)). In expressly disapproving a more lenient standard, the Court in Walker observed that the Jampole and Crane standard is unworkable for the litigants and the system as a whole because mandamus disrupts the trial

proceedings; is sometimes extremely expensive; and often causes considerable delay. Walker, 827 S.W.2d at 842 (observing the mandamus proceedings at issue there had delayed trial on the merits for over two years). With respect to discovery disputes in particular, the Court observed that “[t]he judicial system cannot afford immediate review of every discovery sanction” or of every discovery order in general. Id. (quoting Braden, 811 S.W.2d at 928).

Note, however, that the Texas Supreme Court has arguably recently loosened the “adequate remedy by appeal” standard. For example, in In re Ford Motor Co., 988 S.W.2d 714, 722 (Tex. 1998) (orig. proceeding), the trial court had assessed \$10,000,000 discovery sanctions against defendant Ford, along with ordering Ford to pay the plaintiffs \$25,000 for appellate attorneys’ fees if Ford sought mandamus relief. The appellate attorneys’ fees award was not contingent on the outcome of the mandamus. Thus, even if Ford were vindicated, it was still required to pay the plaintiff \$25,000. The Texas Supreme Court concluded that “[a] party cannot be required to pay a penalty for obtaining relief by mandamus, even if the penalty is someday recoverable” on appeal. Id. Accordingly, the Texas Supreme Court held that in such a circumstance, there is no adequate remedy by appeal.

Another example is CSR Ltd. v. Link, 925 S.W.2d 591, 596 (Tex. 1996) (orig. proceeding). There, the Court granted mandamus relief in a personal appearance case even though, traditionally, a party has an adequate remedy by appeal. The Court reasoned: “While the question of personal jurisdiction is remediable by appeal in most cases, we hold that under the circumstances of this case, the concerns of judicial efficiency in mass tort litigation combined with the magnitude of the potential risk for mass tort actions against the defendant makes ordinary appeal inadequate.” Id. Similarly, the Court in Able Supply Co. v. Moye, 898 S.W.2d 766 (Tex. 1995) (orig. proceeding), granted mandamus relief because an appeal would have resulted in a “monumental waste of resources.” Id. at 771.

In the discovery context, an adequate remedy at law does not exist if the rights sought to be protected would be irretrievably lost or the appellate court would not be able to cure the trial court’s error. See, e.g., Walker, 827 S.W.2d at 843 (“This occurs when the trial court erroneously orders the disclosure of privileged information which will materially affect the rights of the aggrieved party . . . or trade secrets without adequate protections to maintain the confidentiality of the information.”); see also Arlington Mem’l Hosp. Found., Inc. v. Barton, 952 S.W.2d 927, 929 (Tex. App.—Fort Worth 1997) (orig. proceeding); In re Valero Energy Corp., 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998) (orig. proceeding) (per curiam).

The appellate court cannot cure the trial court’s discovery error in the following circumstances, among others:

- When the trial court’s order erroneously requires party to disclose privileged documents (see, e.g., West v. Solito, 563 S.W.2d 240 (Tex. 1978) (erroneous order to disclose trade secret information without adequate protections to maintain confidentiality of information));
- When the trial court’s erroneous discovery order vitiates or severely compromises a party’s ability to present a viable claim or defense at trial (see Walker, 827 S.W.2d at 843; see also TransAmerican Nat’l Gas Corp.

v. Powell, 811 S.W.2d 913, 919 (Tex. 1991) (death penalty sanctions); J.G. v. Murray, 915 S.W.2d 548, 549 (Tex. App.—Corpus Christi 1995, no writ) (erroneous pretrial striking of expert witness was subject to mandamus relief because party’s ability to present a defense was vitiated);

- When a discovery abuse sanction is a “death penalty” sanction (in a case where the court does not issue a final appealable judgment simultaneously with the sanctions); see, e.g., Walker, 827 S.W.2d at 843 (citing TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 919 (Tex. 1991) (orig. proceeding));
- When the sanction imposes large amounts of money or penalties that are required to be paid before the party has the opportunity to supersede the judgment and perfect an appeal (see, e.g., In re Ford Motor Co., 988 S.W.2d 714, 722 (Tex. 1998) (orig. proceeding); Braden v. Downey, 811 S.W.2d 922, 929 (Tex. 1991) (orig. proceeding));
- When the trial court’s erroneous discovery order compels the production of patently irrelevant or duplicative documents, such that it constitutes harassment or imposes an undue burden on the producing party (see, e.g., Sears, Roebuck, & Co. v. Ramirez, 824 S.W.2d 558,559 (Tex. 1992) (orig. proceeding) (demand for irrelevant tax returns); General Motors Corp. v. Lawrence, 651 S.W.2d 732 (Tex. 1983) (demand for information about all vehicles for all years);
- When a party is denied “discovery going to the heart of a party’s case”; (see Walker, 827 S.W.2d at 843) (see discussion infra); and
- When the trial court erroneously 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. In such situations, the appellate court is unable to evaluate the effect of the trial court’s error on the record before it. See, e.g., Walker, 827 S.W.2d at 843; In re Pack, 996 S.W.2d 4, 6 (Tex. App.—Fort Worth 1999) (orig. proceeding); see also Tom L. Scott, Inc. v. McIlhany, 798 S.W.2d 556, 558 (Tex. 1990) (mandamus was only remedy available for trial court’s protective order that shielded expert witnesses from deposition after experts, who had been originally designated by plaintiffs as testifying experts, were redesignated as consulting-only experts pursuant to settlement of plaintiffs’ claims; thus, the protective order prevented the evidence from being part of the record).

