DERAILING THE RUNAWAY TRAIN: USING INTERLOCUTORY APPEALS AND ORIGINAL PROCEEDINGS TO PREVENT BAD RULINGS FROM BECOMING A BAD JUDGMENT

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I. INTRODUCTION

Even if you get an adverse discovery ruling or other damaging pretrial order, Texas law offers options for immediate appellate review that can potentially stem the tide of adverse consequences from these orders. Several types of interlocutory (*i.e.*, non-final) rulings can be immediately appealed by statute. Other interlocutory rulings, including many discovery rulings, can be reviewed immediately via mandamus. This paper will examine these pretrial remedies and the benefits they can provide in helping to prevent that ultimate adverse ruling or judgment.

Generally, appeals may be taken only from final judgments. *E.g., Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001). A final judgment is one that disposes of all pending parties and claims in the record and is appealable. *See id.*

Conversely, an order is non-final, or "interlocutory," if it only disposes of part of the case or less than all of the parties, or if it addresses a discrete pre-trial or post-trial issue, such as a discovery matter or a grant of new trial. These orders are not immediately appealable to the court of appeals. Interlocutory orders can include, for example, partial summary judgments,[1] orders dismissing one of multiple parties from the case,[2] orders setting aside a default judgment and granting a new trial,[3] orders compelling depositions,[4] and orders compelling arbitration.[5]

Interlocutory orders may be appealed only if permitted by statute. *E.g., Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266, 272 (Tex. 1992) (orig. proceeding). Section 51.014 of the Texas Civil Practice & Remedies Code provides the list of interlocutory orders that may be appealed. An interlocutory appeal proceeds on an accelerated basis to avoid, as much as possible, undue delay in the underlying litigation.

Interlocutory orders that cannot be appealed by statute may sometimes be reviewed by an appellate court in an original proceeding. The most common original proceeding involves the filing a petition for writ of mandamus, although a party may also seek a writ of prohibition, a writ of habeas corpus, a writ of injunction, a writ of quo warranto, and other writs.[6] In the context of mandamus, the Texas Supreme Court has allowed review of interlocutory orders involving a variety of discovery rulings,[7] the propriety of venue in a probate court,[8] the propriety of an order disqualifying counsel,[9] and the enforceability of arbitration agreements, contractual jury trial waivers, contractual forum selection clauses, and appraisal clauses in insurance policies,[10] among many others.

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1 *Parking Co. of Am. v. Wilson*, 58 S.W.3d 742, 742 (Tex. 2001).

2 *Webb v. Jorns*, 488 S.W.2d 407, 408-09 (Tex. 1973).

3 *Warren v. Walter*, 414 S.W.2d 423, 423 (Tex. 1967).

4 *Office Employees Int'l Union Local 277 v. S.W. Drug Corp.*, 391 S.W.2d 404, 406 (Tex. 1965).

5 *Citizens Nat'l Bank of Beaumont v. Callaway*, 597 S.W.2d 465, 466 (Tex. Civ. App.—Beaumont 1980, writ ref'd).

6 TEX. GOV'T CODE ANN. § 22.002 (Vernon 2004).

7 *E.g., In re Graco Children's Prods., Inc.*, 210 S.W.3d 598, 600-01 (Tex. 2006) (orig. proceeding) (reversing orders compelling production of documents under overbroad discovery requests); *In re Kuntz*, 124 S.W.3d 179, 184-85 (Tex. 2003) (orig. proceeding) (whether document in party's "physical possession" and, thus, subject to discovery); *In re University of Tex. Health Ctr. at Tyler*, 33 S.W.3d 822, 825-28 (Tex. 2000) (orig. proceeding) (alleged waiver of peer review privileges that would protect information from discovery).

8 *In re Reliant Energy, Inc.*, 159 S.W.3d 624, 626-27 (Tex. 2005) (orig. proceeding).

9 *In re Mitcham*, 133 S.W.3d 274, 275-77 (Tex. 2004) (orig. proceeding).

10 *E.g., In re AIU Ins. Co.*, 148 S.W.3d 109, 117-20 (Tex. 2004) (orig. proceeding) (enforcing contractual forum-selection clause via mandamus); *In re The Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136-40 (Tex. 2004) (enforcing contractual waiver of jury trial via mandamus); *In re J.D. Edwards World Solutions Co.*, 87 S.W.3d 546, 550-51 (Tex. 2002) (orig. proceeding) (whether trial court should have compelled arbitration under agreement governed by another state's law reviewable via mandamus); *In re Allstate County Mut. Ins. Co.*, 85 S.W.3d 193, 196 (Tex. 2002) (orig. proceeding) (involving auto policy provision requiring parties to submit to appraisal process to determine value of vehicle when declared a total loss).

This paper will review the procedural aspects of interlocutory appeals and original proceedings. It will also discuss the substantive law and requirements for obtaining relief in interlocutory appeals and original proceedings, as well as strategy for employing these tools.

II. INTERLOCUTORY APPEALS

A. Statutory Authority

As noted above, section 51.014 of the Texas Civil Practice & Remedies Code provides the primary statutory authority for interlocutory appeals. It contains a list of interlocutory orders that may be appealed.[11] These orders include:

- Order appointing a receiver or trustee, or order overruling a motion to vacate order appointing receiver or trustee
- Order certifying or refusing to certify a class in a class action lawsuit
- Order granting or refusing a temporary injunction, or overruling a motion to dissolve a temporary injunction
- Order denying a motion for summary judgment based on an assertion of immunity by a governmental employee
- Order denying a motion for summary judgment in a case involving electronic or print media and arising under the free speech or free press clauses of the federal or state constitutions
- Order granting or denying a special appearance of a defendant (which challenges the plaintiff's lack of jurisdiction over the defendant's person, asserted typically by out-of-state defendants)
- Order granting or denying a plea to the jurisdiction by a governmental unit (which typically asserts immunity from suit under Texas Tort Claims Act)
- Order denying a Chapter 74 motion to dismiss by health care provider, physician, and hospital defendants for absent or deficient medical expert report, but not an order granting a 30-day extension to submit a new report
- Order granting a defendant's objections to a Chapter 74 medical expert report
- Order denying a defendant's motion to dismiss for failure to provide a medical expert report in an asbestos or silica case

TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a) (Vernon 2008).

In addition to these interlocutory orders, section 51.014 authorizes an agreed appeal from an interlocutory order if the parties meet certain conditions. The trial court may issue a written order for interlocutory appeal in a civil action if:

a. the parties agree that the order involves a controlling question of law as to which there is a substantial ground for difference of opinion;

b. an immediate appeal from the order may materially advance the ultimate termination of the litigation; and

c. the parties agree to the order.

Id. § 51.014(d).

The statute provides that any interlocutory appeal under the section 51.014(a) laundry list (except for temporary injunction appeals) stays the commencement of the trial in the trial court pending resolution of the appeal. *Id.* at § 51.014(b). Some of the interlocutory appeals also stay all other proceedings in the trial court pending resolution of the appeal. *Id.* The parties may request the court of appeals issue a stay of the underlying proceedings in the appropriate circumstances. *See* TEX. R. APP. P. 29.

Most interlocutory appeals end in the intermediate courts of appeals because the Legislature limited the Texas Supreme Court's jurisdiction over interlocutory appeals. The judgment of the Court of Appeals is conclusive in an interlocutory appeal (that is, no Supreme Court review) unless (a) the justices of the court of appeals are divided (*i.e.*, one of the judges dissents) or (b) the opinion of the court of appeals holds differently from a prior decision of the Texas Supreme

[11] Particular statutes allow other interlocutory appeals. For example, section 26.051(b) of the Texas Civil Practice & Remedies Code authorizes an interlocutory appeal from a court order denying a class action defendant's plea to the jurisdiction based on an agency's primary or exclusive jurisdiction. Most of these statutes involve very specialized situations that we will not cover here.

Court or another court of appeals (known as "conflicts" jurisdiction). TEX. GOV'T CODE ANN § 22.225(b), (c) (Vernon Supp. 2008).

B. Appellate Procedures

Rule 28 of the Texas Rules of Appellate Procedure prescribes that appeals from interlocutory orders, when allowed, will be accelerated. TEX. R. APP. P. 28.1. This means not only less time to perfect appeal and brief the issues, but also that the courts of appeals give these cases priority for oral argument and opinions. *See* TEX. R. APP. P. 40.

In appeals from interlocutory orders, the filing of a motion for new trial will not extend the time to perfect the appeal.[12] Thus, the losing party must file the notice of appeal from the interlocutory order within 20 days of the date the trial court signs the order or partial judgment. TEX. R. APP. P. 26.1(b). The appeal record (consisting of the clerk's record and reporter's record) must be filed within 10 days after the losing party files the notice of appeal. TEX. R. APP. P. 35.1(b). The parties can forego the clerk's record and submit the appeal on the original papers forwarded by the trial court or on sworn copies. TEX. R. APP. P. 28.3.

The appellant's brief is due within 20 days of the date of filing of the appeal record (the later of the filing of the clerk's record or the reporter's record). TEX. R. APP. P. 38.6(a). The appellee's brief is due within 20 days of the filing of appellant's brief. *Id.* Any reply brief must be filed within 20 days after the filing of the appellee's brief. *Id.* However, the appellate court may allow the case to be submitted on the original trial papers, without briefs. TEX. R. APP. P. 28.3.

If the parties desire oral argument, they must request it on the front cover of their brief. TEX. R. APP. P. 39.7. The court of appeals has discretion, however, on whether to hear oral argument. TEX. R. APP. P. 39.8. If the court determines that oral argument would not significantly aid the court in determining the legal and factual issues presented, it may elect to submit the case on the briefs alone. *Id.*

The courts of appeals act initially in three-justice panels. *See* TEX. R. APP. P. 41. Thus, each of the 14 courts of appeals has at least three justices. The larger courts have multiple three-justice panels. If the members of the panel cannot agree, the case may be decided by the two remaining justices. *Id.* The disagreeing, or "dissenting," justice often writes a separate concurring and/or dissenting opinion.

The opinion of the court of appeals panel must be in writing and as brief as possible while addressing every issue raised and necessary to dispose of the appeal. TEX. R. APP. P. 47.1. All opinions are published now,[13] but the courts have the option to write a short "memorandum opinion" in cases where the issues are settled. If an opinion establishes a new rule of law, alters or modifies an existing rule, applies an existing rule to a novel fact situation likely to recur, involves issues of constitutional law or other issues important to the jurisprudence of the state, criticizes existing law, or resolves an apparent conflict of authority, the opinion may not be designated a "memorandum opinion" but rather must be designated an "opinion." TEX. R. APP. P. 47.4.

After the court of appeals panel issues its opinion,[14] the losing party has the right to file a motion for rehearing. TEX. R. APP. P. 49. The motion for rehearing is due within 15 days of the date of the opinion. *Id.* at 49.1. The prevailing party need not file a response to the motion for rehearing unless the court of appeals requests one. *Id.* at 49.2. The court of appeals cannot grant rehearing without first requesting a response. *Id.*

The losing party may also seek rehearing "en banc," or before the entire court of appeals, if the circumstances warrant (*e.g.*, the panel's opinion conflicts with another panel's prior opinion or an

[12] In an appeal from a final judgment, the filing of a motion for new trial extends the deadline to appeal from 30 days after the date of judgment to 90 days after the date of judgment. TEX. R. CIV. P. 329b.

[13] Prior to 2003, opinions were designated as either "publish" or "do not publish." Under the 2003 revisions to the appellate rules, unpublished opinions issued prior to January 1, 2003 may be cited by the parties but only with the parenthetical notation "not designated for publication." *See* Tex. Sup. Ct. Order, Misc. Docket No. 02-9237 (Dec. 23, 2002), eff. January 1, 2003. These unpublished opinions do not have precedential value but may be cited as persuasive authority. *See* Order 02-9237; TEX. R. APP. P. 47.7.

[14] The courts of appeals are under no time deadline to issue opinions, other than their own internal guidelines. As noted, however, accelerated appeals (involving interlocutory orders) are given precedence over other cases. TEX. R. APP. P. 40.

opinion of the Texas Supreme Court). TEX. R. APP. P. 41.2, 49.7. The courts of appeals "disfavor" en banc reconsideration. *Id.* at 41.2(c). According to the appellate rules, a motion for rehearing en banc should not be granted unless "necessary to secure or maintain uniformity of the court's decisions or unless extraordinary circumstances require en banc consideration." *Id.*

A motion for rehearing in the court of appeals is not a prerequisite to seeking review of the court of appeals' opinion in the Texas Supreme Court (assuming the interlocutory appeal involves either a dissenting opinion from one of the court of appeals justices or "conflicts" jurisdiction). The losing party may skip rehearing and instead file a petition for review in the Texas Supreme Court within 45 days of the date of the court of appeals' opinion. TEX. R. APP. P. 53.1, 53.7. Or, if the losing party did move for rehearing and the court of appeals denied the motion, the party may file a petition for review within 45 days of the order denying rehearing. *Id.* at 53.7(a).

In the Texas Supreme Court, the parties are denoted as petitioner and respondent (rather than appellant and appellee, as in the court of appeals). The petitioner only has 15 pages in the petition for review to convince the Texas Supreme Court that the case requires review.

The respondent does not have to file a response unless the Supreme Court requests one. TEX. R. APP. P. 53.3. The Supreme Court will not grant a petition for review (or, typically, will not even request briefs on the merits) without first requesting a response.[15] *Id*. If the respondent files a response, it is due within 30 days of the filing of the petition. *Id.* at 53.7(d). Any reply to the response is due from the petitioner within 15 days after filing of the response. *Id.* at 57.3(e).

Each of the nine Justices of the Texas Supreme Court considers the petition and any response and reply and then votes at a periodic conference on whether to deny the petition or to request briefs on the merits[16] and forwarding of the appeal record to the Texas Supreme Court. Briefs on the merits may be up to 50 pages long; they give the parties a second opportunity to persuade the Court to grant or deny review and to adopt their positions. *See* TEX. R. APP. P. 55.6.

After the filing of the briefs on the merits, the Justices vote a second time on whether to grant review or to deny the Petition. A minimum of four Justices must vote in favor of a grant before a petition can be granted and, thus, considered and ruled upon by the Court. As with the courts of appeals, oral argument is discretionary and is not granted in every case. TEX. R. APP. P. 59.2. However, the Court issues an opinion in every case in which it grants review. *See* TEX. R. APP. P. 63.

When the Court grants review but not oral argument, the Court typically issues a "per curiam" opinion, meaning an opinion "by the Court" as opposed to opinions authored by the individual Justices. Six Justices must vote to forego oral argument and to issue a per curiam opinion. TEX. R. APP. P. 59.1.

As with the courts of appeals, the losing party may file a motion for rehearing of the Supreme Court's ruling (including denial of a petition or the ruling in a granted case) within 15 days of the date of the Court's opinion. No response should be filed unless the Court requests one. *Id.* at 64.3.

Once the Texas Supreme Court's ruling is final, it will issue a "mandate" that must be enforced by the lower court to whom it is directed. *See* TEX. R. APP. P. 65.2. The mandate may also order the payment of trial and appellate costs in the appropriate case. *Id.* at 65.1, 65.2.

C. Strategy, Pros & Cons

Filing an appeal in the middle of a case may, at first glance, seem like an expensive proposition. In most interlocutory appeals, however, the upside of incurring the appeal expense is dismissal of the claim. In many situations, therefore, appellate lawyers recommend an interlocutory appeal to resolve the case early and definitively.

For example, in medical malpractice cases, if the claimant does not timely file an adequate medical expert report substantiating the key elements of his or her claim (standard of care, breach, and causation), the health care defendant can seek dismissal with prejudice under section 74.351 of the Civil Practice & Remedies

[15] Under the Supreme Court's internal operating procedures, it only takes a vote of one Justice to request a response to a Petition for Review.

[16] Under the Supreme Court's internal operating procedures, it takes a vote of two Justices to request Briefs on the Merits.

Code. If the trial court denies the motion to dismiss, the defendant can take an interlocutory appeal. If the defendant succeeds in persuading the court of appeals of the trial court's error, the case will be dismissed with prejudice. This interlocutory appeal process promotes the Legislature's goal (in enacting Chapter 74) of eliminating frivolous malpractice claims before a defendant expends significant time and money.

Similarly, a governmental unit defendant or a governmental employee defendant asserting it is immune from suit by virtue of the Texas Tort Claims Act may wish to appeal the denial of a plea to the jurisdiction or motion for summary judgment (not otherwise reviewable by an appellate court) because the end result could be dismissal with prejudice. The Legislature has waived (or eliminated) immunity from suit in very few situations; thus, most claims against the government are barred by statute. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.001-101.109 (Vernon 2005 and Supp. 2008) (Texas Tort Claims Act). The availability of an interlocutory appeal in such cases promotes the Legislature's desire to protect governmental entities from the time and financial drain of lawsuits.

Another common interlocutory appeal arises from an out-of-state defendant who makes a "special appearance" in a lawsuit, meaning he or she contests the plaintiff's ability to sue the defendant in the plaintiff's chosen state. Similar to immunity for governmental defendants, Texas and federal law provide certain protections to defendants who are sued in states where they do not reside or do business. Thus, the interlocutory appeal process from a special appearance furthers the goal of these protections and allows prompt resolution of the issue of whether the plaintiff can obtain personal jurisdiction over an out-of-state defendant. If so, the case proceeds; if not, the case ends for that defendant with (hopefully) a minimum expense.

Thus, the decision to take an interlocutory appeal should be carefully considered by the trial lawyer and the appellate lawyer. The potential benefits often outweigh the risks and expense. In fact, the expense of the interim interlocutory appeal frequently saves the person, the company, the insurer, the insured, or the governmental defendant thousands in future legal expenses to defend the lawsuit.

III. ORIGINAL PROCEEDINGS

A. Introduction

Although original proceedings may involve requests for numerous types of writs (as noted above), the most common is the writ of mandamus. Typically, a party files a petition for writ of mandamus to compel a judge to do something (*e.g.,* issue an order, vacate and set aside an order). *See* TEX. GOV'T CODE ANN. § 22.002(a). If an adverse ruling issues in the pretrial phase, such as an order compelling production of privileged documents, or an order compelling the CEO's deposition, a mandamus proceeding may provide the only protection from the adverse order leading to further adverse consequences, including considerable discovery expense or even an adverse verdict and judgment.

In most cases, petitions for writ of mandamus must first be filed in a court of appeals. TEX. R. APP. P. 52.3(e). If the court of appeals denies the petition, the moving party can re-file in the Texas Supreme Court. *See id.*

In a mandamus proceeding, the moving party is called the relator. The judge (or other person against whom the petition is filed) is called the respondent. The opposing party in the underlying litigation (or a party whose interest would be directly affected by the relief sought) is called the real party in interest. *See* TEX. R. APP. P. 52.2.

The name of the judge is no longer used in the style of the proceeding; instead, the petition is filed as "In re [name of relator]." *Id.* at 52.1. The respondent (the judge) does not file any papers in the original proceeding; typically, the real party in interest defends the respondent's ruling.

B. Legal Authority for Mandamus Relief

Texas courts generally consider mandamus relief to be an "extraordinary remedy." *E.g., In re Southwestern Bell Tel. Co.*, 235 S.W.3d 619, 623 (Tex. 2007) (orig. proceeding). A writ issues only on proof that (a) the respondent clearly abused its discretion, and (b) the relator has no adequate remedy by appeal. *E.g., In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135-36 (Tex. 2004) (orig. proceeding); *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding).

1. Abuse of Discretion

A trial court abuses its discretion when it acts without reference to any guiding rules or principles or acts arbitrarily or capriciously. *E.g., Downer v. Aquamarine Opers., Inc*., 701 S.W.2d 238, 241 (Tex. 1985) (orig. proceeding). To show a clear abuse of discretion, the relator must show that the facts and the law permitted the respondent to make only one decision. *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985) (orig. proceeding).

A trial court has no discretion to determine what the law is, or in applying the law to the facts, even if the law is unsettled. *Prudential*, 148 S.W.3d at 135. Thus, a clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion for which mandamus relief will lie. *Walker*, 827 S.W.2d at 840. Many mandamus proceedings involve the propriety of a lower court's interpretation of a statute or rule.

However, when the trial court's decision is discretionary or if it involves factual issues, the appellate court may not substitute its judgment for the trial court's judgment. *E.g., Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 52 (Tex. 2002) (per curiam); *Walker*, 827 S.W.2d at 839. Even if the reviewing court would have decided the issue differently, it cannot disturb the trial court's decision unless it is shown to be arbitrary and unreasonable. *Walker*, 827 S.W.2d at 840.

Abuses of discretion subject to mandamus review occur in a variety of settings. The most common (in terms of reported opinions) appear to involve discovery rulings and arbitration agreements. By way of example, however, the Texas Supreme Court has recently held the following acts were clear abuses of discretion that could be remedied by writ of mandamus:[17]

- denying the hospital defendant's former article 4590i, section 13.01 motions to dismiss when the medical expert proffered by each of the 224 patient-plaintiffs was not qualified to opine on the negligent credentialing claim alleged by the plaintiffs. *In re McAllen Med. Ctr.*, __ S.W.3d __, 2008 Tex. LEXIS 456 (Tex. 2008) (orig. proceeding).

- granting a new trial after its plenary power (jurisdiction) had expired; the losing party's second motion for new trial (filed after the trial court overruled the first motion for new trial) did not extend the court's plenary power; the trial court abused its discretion by failing to follow the plain language of civil procedure rule 329b (which governs motions for new trial). *In re Brookshire Groc. Co.*, 250 S.W.3d 66 (Tex. 2008) (orig. proceeding).

- compelling a pre-suit deposition of a health care liability claim defendant under civil procedure rule 202 when Chapter 74 (the medical malpractice statute) unambiguously stayed such depositions until the claimant served an expert report; the court of appeals' misinterpretation of the statute was a clear abuse of discretion. *In re Jorden*, 249 S.W.3d 416 (Tex. 2008) (orig. proceeding).

- denying a motion to dismiss on *forum non conveniens* grounds after the plaintiff (a Mexican resident who was not a legal resident of the United States) failed to demonstrate any significant connection between the incident and the state of Texas (where he filed suit); the trial court acted arbitrarily, unreasonably, and without reference to guiding principles. *In re Pirelli Tire, L.L.C.*, 247 S.W.3d 670 (Tex. 2007) (orig. proceeding).

- failing to place a candidate on the ballot; county party chairman could not impose penalties for a candidate's non-compliance with certain Election Code provisions when the Code itself imposed no penalties for the non-compliance. *In re Torry*, 244 S.W.3d 849 (Tex. 2008) (orig. proceeding).

- failing to enforce a forum selection clause in a covenant not to compete (which clause required any suit filed to be filed in Florida) and enjoining the first-filed Florida action; forum selection clause was enforceable even though it appeared in a covenant not to compete. *In re AutoNation, Inc.*, 228 S.W.3d 663 (Tex. 2007) (orig. proceeding).

- refusing to compel the return to defendant of inadvertently produced privileged documents and

[17] This list reflects a random sampling of recent mandamus opinions from the Texas Supreme Court and is by no means exhaustive or representative of the Court's mandamus jurisprudence over the years.

failing to apply the "snap-back" provision of discovery rules (applicable to inadvertent disclosures), as long as the defendant did not intend for expert who received privileged documents to testify at trial. *In re Christus Spohn Hosp. Kleberg*, 222 S.W.3d 434 (Tex. 2007) (orig. proceeding).

- denying a motion to disqualify defendant hospital's counsel, who was formerly a partner in a law firm with plaintiff's counsel and who would, in his zealous representation of the hospital, have to challenge the validity of the earlier representation by his former law partner. *In re Basco*, 221 S.W.3d 637 (Tex. 2007) (orig. proceeding).

As these cases show, the clear abuse of discretion prong of mandamus relief is highly fact-specific and does not lend itself to any general rule. A decision whether to seek mandamus against a judge for a pretrial ruling almost always will require evaluation of the particular circumstances of each case, as well as the ramifications of the ruling itself.

2. Adequate Remedy by Appeal

The second element of proof to obtain a writ of mandamus requires proof that the relator has no adequate remedy by appeal. The intent of this requirement is to limit interlocutory review, which interrupts and delays the litigation, if the issues can be addressed adequately on appeal after a trial.

This element has evolved through many changes in Supreme Court jurisprudence over the years, often depending on the makeup of the Court. Many Justices have been staunch defenders of the concept that mandamus relief should only be granted in "extraordinary circumstances"; otherwise, appellate courts would be flooded with proceedings challenging every pretrial ruling, whether innocuous or case-ending. Other Justices believed that particular cases presented those "exceptional circumstances"[18] and that no hard-and-fast rule could be applied with respect to when an appellate remedy is "adequate."

In 1992, in *Walker v. Packer*, the modern Supreme Court first sought to "prune" the ever-growing branches of mandamus relief[19] by surveying prior Texas law on the adequate remedy requirement. The Court noted that many cases had ignored the requirement, while others appeared to relax it. After considering the prior cases, the Court found the lack of adequate remedy by appeal element to be sound, and it reaffirmed it as a prerequisite to mandamus relief. *Walker*, 827 S.W.2d at 842.

The *Walker* Court announced that "an appellate remedy is not inadequate merely because it may involve more expense or delay than obtaining an extraordinary writ." *Id.* Interference is justified, the Court said, only when parties stand to lose their substantial rights. *Id.*

In 2004, the Supreme Court issued *In re Prudential Insurance Company of America*, in which it re-examined at length the adequate remedy prong for mandamus relief. Departing somewhat from the relatively formulaic approach expressed in *Walker v. Packer*, the *Prudential* court believed the analysis of whether an appeal remedy was "adequate" involved a "careful balance of jurisprudential considerations" that "implicate both public and private interests." *Prudential*, 148 S.W.3d at 136. This determination, the Court said, is not "abstract or formulaic" but "practical and prudential." *Id.* It resists categorization. *Id.* Ultimately, an appellate remedy is "adequate" when any benefits to mandamus review are outweighed by the detriments. *Id.*

Although the Court had tried to give concrete direction for determining the availability of mandamus review, "rigid rules are necessarily inconsistent with the flexibility that is the [mandamus] remedy's principal virtue." *Id.* Thus, after discussing a few of the more egregious cases, the Court said that whether an appellate remedy is "adequate," so as to preclude mandamus review, "depends heavily on the

[18] For example, in *In re Masonite Corp.*, 997 S.W.2d 194 (Tex. 1999) (orig. proceeding), the Court circumvented the *Walker v. Packer* "expense and delay" test for the adequacy of the appellate remedy based on the "blatant injustice" committed by the trial court in transferring cases to 16 courts on its own motion. *Id.* at 198. The *Masonite* court stated that *Walker* did not require it "to turn a blind eye to blatant injustice nor does it mandate that we be an accomplice to sixteen trials that will amount to little more than a fiction. Appeal may be adequate for a particular party, but it is no remedy at all for the irreversible waste of judicial and public resources that would be required here if mandamus does not issue." *Id.* Accordingly, the Court found the circumstances were "exceptional" and warranted mandamus relief. *Id.*

[19] *See McAllen*, 2008 Tex. LEXIS 456 at *21.

circumstances presented and is better guided by general principles than simple rules." *Id.* at 137.

This is just another way of saying the Court will know a proper mandamus proceeding when it sees it. The flexibility of the test, however, is not necessarily a bad thing. Some situations literally cry out for interlocutory intervention, while others do not. The application of balancing factors allows the appellate team to mold its particular fact scenario to fit the parameters for mandamus relief. In practice, however, in the opinions since *Prudential*, the Court has continued to apply a fairly stringent test to the adequate remedy element of mandamus relief.

The Court also stated in *Prudential* that it preferred prudent mandamus relief to legislative expansion of interlocutory appeals. Interlocutory appeals lie as of right and must be decided on the merits, thereby increasing the burden on the appellate system. *Id.* at 138. Mandamus, as a discretionary remedy, can be used to "correct clear errors in exceptional cases and afford appropriate guidance to the law without the disruption and burden of interlocutory appeal." *Id.*

In a 2008 opinion, *In re McAllen Medical Center*, the Supreme Court reaffirmed the principles it announced in *Prudential*. *McAllen* involved the expert report statute in the prior version of the Texas medical malpractice act (article 4590i) and whether the trial court abused its discretion in denying the defendant's motion to dismiss the claims of 224 patients because the expert reports they submitted (all from the same expert) were deficient. *McAllen*, 2008 Tex. LEXIS 456 at *5. Under article 4590i, defendants did not have a right to interlocutory appeal of an order denying a motion to dismiss, and the intermediate appellate courts were split on whether the defendant could obtain mandamus relief from such orders.

The *McAllen* Court looked back to the Civil War era and found cases stating mandamus was not limited to cases "where there was no 'other legal operative remedy,' but would issue when 'other modes of redress are inadequate or tedious' or when mandamus affords 'a more complete and effectual remedy.'" *Id.* at *21. Therefore, the Court recognized, it was not abandoning the more formulaic approach to the adequate remedy analysis that materialized in *Walker v. Packer* (*i.e.*, an appeal remedy is adequate even though it might involve more delay and expense than mandamus review) but rather applying some of the language from that very case. *McAllen*, 2008 Tex. LEXIS 456 at *21.

The *McAllen* Court noted that, in *Walker*, it had said there would be "many situations" in which an appeal would be inadequate and mandamus relief would be appropriate. *Id.* at *22 (citing *Walker*, 827 S.W.2d at 842, which primarily discussed discovery situations, such as compelled disclosure of privileged documents, undue burden of discovery, missing documents cannot be made part of the appeal record, or the discovery order severely compromises or vitiates a party's ability to prosecute or defend a claim). And, on review, the Court believed the *Prudential* balancing approach to determine adequacy of an appeal remedy may result in fewer mandamus cases than the "categorical" approach from *Walker*. *Id.* at *24.

Accordingly, following *Prudential* and *McAllen*, the adequacy of an appeal remedy in today's mandamus proceeding is likely to be judged on the facts and circumstances of each case (as with the abuse of discretion element). *McAllen*, 2008 Tex. LEXIS 456 at *24. The fact that an appeal remedy is "possible" does not necessarily mean it is "adequate" for purposes of mandamus relief.[20]

In determining the adequacy of the remedy, the *McAllen* Court considered not only the impact of the adverse order on the litigants and the legal system, but also the societal costs and benefits outside the legal system, which were embodied in the underlying medical malpractice statute.[21] The opinion also stressed the availability of mandamus as a review mechanism to boost the public's confidence in the Texas court system. *Id.* at *14-15.[22] Overall, the current Court appears to view prudent use of mandamus as a necessary

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[20] *See* Kurt H. Kuhn, *Mandamus is Not a Four-Letter Word*, 18th Annual Conference on State and Federal Appeals, at 3 (UT CLE 2008) (hereafter "Kuhn").

[21] Kuhn at 4.

[22] "[I]nsisting on a wasted trial simply so that it can be reversed and tried all over again creates the appearance not that the courts are doing justice, but that they don't know what they are doing. Sitting on our hands while unnecessary costs mount up contributes to public complaints that the civil justice system is expensive and outmoded." *McAllen*, 2008 Tex. LEXIS 456 at *15.

procedural tool for the efficient administration of justice.[23]

By way of example, the Supreme Court found an appeal was not an adequate remedy when it will mean:

- Forcing parties to trial in a case they contractually agreed to arbitrate. *In re D. Wilson Constr. Co.*, 196 S.W.3d 774, 780 (Tex. 2006) (orig. proceeding);
- Forcing parties to trial on an issue they contractually agreed to submit to an appraiser. *In re Allstate County Mut. Ins. Co.*, 85 S.W.3d 193, 196 (Tex. 2002) (orig. proceeding);
- Forcing parties to a jury trial when they contractually agreed to a bench trial. *In re Prudential*, 148 S.W.3d at 138;
- Forcing parties to trial with an attorney other than the one they properly chose. *In re Cerberus Capital Mgmt., L.P.*, 164 S.W.3d 379, 383 (Tex. 2005) (orig. proceeding);
- Forcing parties to trial with no chance for one party to prepare a defense. *In re Allied Chem. Corp.*, 227 S.W.3d 652, 658 (Tex. 2007) (orig. proceeding); *Able Supply Co. v. Moye*, 898 S.W.2d 766, 772 (Tex. 1995) (orig. proceeding); and
- Allowing a sanctions order to impose a monetary penalty on a party's prospective exercise of its legal rights. *In re Ford Motor Co.*, 988 S.W.2d 714, 723 (Tex. 1998) (orig. proceeding).

One side note about the adequate remedy element of mandamus relief: if the order complained of is a void order[24] (*e.g.*, an order signed outside plenary power, or without jurisdiction), the relator does not have to prove the lack of an adequate remedy by appeal. *E.g., In re Southwestern Bell Tel. Co.*, 35 S.W.3d 602, 605 (Tex. 2000) (orig. proceeding). When a trial court signs an order without jurisdiction, mandamus generally is the only method available to challenge the trial court's ruling. *See, e.g., Travelers Lloyds of Tex. Ins. Co.*, 2004 Tex. App. LEXIS 11913 (Tex. App.—San Antonio 2004, orig. proceeding) (mem. op.).

3. Examples of "Incidental" Pre-Trial Rulings that are Not "Mandamus-able"

Although every rule has its exception, particularly in the world of mandamus proceedings, mandamus review generally is not available for the following "incidental" pre-trial rulings:

- denial of a motion for summary judgment. *See Abor v. Black*, 695 S.W.2d 564, 566 (Tex. 1985) (orig. proceeding); *In re Lee*, 995 S.W.2d 774, 777 (Tex. App.—San Antonio 1999, orig. proceeding).
- denial of a motion to recuse the trial judge. *See In re Union Pac. Res. Co.*, 969 S.W.2d 427, 428-29 (Tex. 1998) (orig. proceeding);
- refusal of a trial court to abate an action based on the pendency of another action, *unless* one of the courts directly interferes with the other by issuing a conflicting order or injunction. *E.g., Hall v. Lawlis*, 907 S.W.2d 493, 494 (Tex. 1995) (orig. proceeding); *Curtis v. Gibbs*, 511 S.W.2d 263, 267 (Tex. 1974) (orig. proceeding);
- denial of a request for a jury trial or denial of a motion for continuance. *General Motors Corp. v. Gayle*, 951 S.W.2d 469, 477 (Tex. 1997) (orig. proceeding); and
- striking an expert witness, as long as it is not the sole expert for all claims or all defenses. *In re Thornton-Johnson*, 65 S.W.3d 137, 139-40 (Tex. App.—Amarillo 2001, orig. proceeding).

C. Appellate Procedures

Rule 52 of the Texas Rules of Appellate Procedure governs the filing of original proceedings, including petitions for writ of mandamus. Although the rule does not impose a deadline for filing a mandamus petition, it is wise to move for relief as soon after the objectionable order as possible. We certainly do not recommend waiting months to seek relief, particularly on the eve of trial.

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[23] Kuhn at 6. Surveying the mandamus filings since 2000, Kuhn notes the relatively significant increase in the percentage of mandamus petitions granted by the Texas Supreme Court, from 2% in 2000 to 9% in 2007. *Id.* at 7.

[24] Mandamus will lie to correct a void order (*i.e.*, an order the trial court had no power or jurisdiction to render). *Urbish v. 127th Jud. Dist. Ct.*, 708 S.W.2d 429, 431 (Tex. 1986) (orig. proceeding).

Appellate courts do not like to receive petitions for writ of mandamus at 4:30 p.m. on the Friday before a Monday trial setting – it likely ruins several people's evenings, if not weekends. Some courts have held that a multi-month delay and last-minute filing of a petition for writ of mandamus – which could reasonably have been filed sooner – to be barred by laches (an equitable defense meaning unreasonable delay in pursuing a right or claim that prejudices the party against whom relief is sought).[25]

The petition must contain certain components such as issues presented, jurisdictional statement, statement of facts, argument, etc. TEX. R. APP. P. 52.3. In a court of appeals, the petition may be up to 50 pages long; in the Texas Supreme Court, the page limit is 15 pages. *Id.* at 52.6. The respondent (through the real party in interest) may file a response but it is not mandatory. *Id.* at 52.4. The appellate court cannot grant mandamus relief without first requesting a response. *Id.*

The relator must file an appendix and record to support the petition for writ of mandamus. These will include the order complained of, sworn copies of all relevant pleadings and other documents, and any hearing transcript, plus any other documents the relator deems relevant. *See* TEX. R. APP. P. 52.3(j), 52.7.

If the relator needs immediate relief while the appellate court considers the petition – usually in the form of a stay of the trial court's order or a stay of the trial setting – it may file along with the petition a motion for temporary relief. *See* TEX. R. APP. P. 52.10. The relator must include a certificate of compliance in the motion stating he has notified the respondent and the real party in interest of the request for temporary relief. *Id.* The motion should explain the harm that will result if the order is not stayed and should summarize the request for mandamus relief urged in the petition.

As with appeals, the appellate court has discretion whether to hear oral argument on the petition. *See* TEX. R. APP. P. 52.8(b). Often, the petition is submitted on briefs alone.

Once the appellate court issues its ruling, the losing party may file a motion for rehearing within 15 days of the date of the opinion or ruling. TEX. R. APP. P. 52.9. As with any other motion for rehearing, the prevailing party need not file any response unless the appellate court requests one. *Id.*

If unsuccessful in the court of appeals, the relator may re-file the petition (after distilling it down to 15 pages) in the Texas Supreme Court. Again, the time frame should be a reasonable time, with no significant delay.

D. Strategy, Pros & Cons

Mandamus is a highly effective tool for preventing a bad ruling from becoming a bad judgment. This is particularly true with erroneous or unduly burdensome discovery orders.

For example, in *In re University of Tex. Health Ctr. at Tyler*, 33 S.W.3d 822 (Tex. 2000) (orig. proceeding), the trial court conducted an *in camera* inspection of allegedly privileged documents (certain infection control documents that had been prepared by one of the defendant hospital's peer review committees, the infection control committee) and then turned over the documents to the plaintiff. *Id.* at 824. Documents prepared by hospital peer review committees are protected from disclosure by statutory privileges in the Occupations Code and the Health & Safety Code, which privileges can only be waived in writing by the committee. The plaintiff argued that the privilege had been waived because the hospital had provided some information from the committee's evaluation in responses to interrogatories. *Id.* at 826.

Certainly, the conduct of a trial court in turning over to your adversary privileged documents (particularly if they contain harmful information) is a bad ruling that can lead to an adverse judgment. The mandamus proceeding in *UT Tyler* was effective to reverse the tide, as the Texas Supreme Court recognized

[25] *E.g., Tarrant County Hosp. Dist. v. Henry*, 52 S.W.3d 434, 452 (Tex. App.—Fort Worth 2001, orig. proceeding) (orders signed eight months and nineteen months before mandamus was filed); *In re Little*, 998 S.W.2d 287, 290 (Tex. App.—Houston [1st Dist.] 1999, orig. proceeding) (six months); *Int'l Awards, Inc. v. Medina*, 900 S.W.2d 934, 935-36 (Tex. App.—Amarillo 1995, orig. proceeding) (four months); *Furr's Supermarkets, Inc. v. Mulanax*, 897 S.W.2d 442, 443 (Tex. App.—El Paso 1995, orig. proceeding) (same); *but see Strickland v. Lake*, 163 Tex. 445, 448, 357 S.W.2d 383, 384 (Tex. 1962) (orig. proceeding) (no laches bar with two-month delay); *B.F. Goodrich Co. v. McCorkle*, 865 S.W.2d 618, 621 (Tex. App.--Houston [14th Dist.] 1993, orig. proceeding) (one-month delay reasonable, even where mandamus may have been used as tactical device to derail trial setting).

that voluntary disclosure of some information from the committee reports in response to discovery did not waive the statutory privilege that protects from discovery the actual documents received, maintained, or developed by a hospital peer review committee. *Id.* at 827. The statute required a written waiver from the committee; because the plaintiff did not have such a waiver, he was not entitled to the documents. *Id.*

Another example of using mandamus to preempt a bad order from leading to a bad judgment occurs in *In re General Agents Ins. Co. of Am.*, 254 S.W.3d 670 (Tex. App.—Houston [14th Dist.] 2008, orig. proceeding). The trial court had granted partial summary judgment to the plaintiff on a declaratory judgment claim, declaring that Gainsco's policy buy-back agreement with its insured was void as against public policy. *Id.* at 673.

Gainsco filed a motion to sever the partial summary judgment ruling so that it could be immediately appealed, and sought abatement of the remainder of the case while the appeal proceeded. *Id.* The trial court denied the motion to sever and abate. *Id.*

In Gainsco's opinion, the summary judgment ruling was legally incorrect. Also, it was clear to Gainsco that the plaintiffs were planning to use the summary judgment ruling against it at trial to show violations of the DTPA and the Insurance Code, to support their claims of fraudulent conveyance, tortious interference, and civil conspiracy, and to poison the jury against Gainsco from the start. Thus, to prevent this bad ruling from becoming a runaway train to a bad judgment, Gainsco sought mandamus review of the order denying severance and abatement.

The Court of Appeals in the original proceeding agreed with Gainsco. It held that Gainsco had established the elements required for severance and that the trial court abused its discretion in refusing to sever and abate the partial summary judgment ruling. *Id.* at 673-76. Therefore, under the Court of Appeals' opinion, the appeal will be allowed to proceed on the issue of whether the policy buy-back agreement violated Texas public policy and, therefore, was void.

These are just a few samples of how original proceedings are used to eradicate potentially bad rulings and prevent those rulings from turning into bad judgments. As noted above, however, each case likely turns on its own facts and circumstances and should be independently evaluated.