

ORIGINAL PROCEEDINGS:

MANDAMUS IN TEXAS

DIANE M. GUARIGLIA
Cokinos, Bosien & Young
Four Houston Center
1221 Lamar Street, 16th Floor
Houston, Texas 77010-3039
(713) 535-5500
(713) 535-5533 (FX)
E-MAIL: dguariglia@cbylaw.com

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By: Diane M. Guariglia

I. INTRODUCTION

This paper will discuss the writ of mandamus practice as it has evolved to the present day. Emphasis is made on the procedural requirements for seeking and responding to mandamus under TRAP 52, as amended in 1997. Practical pointers are inserted throughout the paper to provide tips toward a more meaningful mandamus experience, especially where the rules end and reality begins.

II. NATURE OF MANDAMUS

A. Definition of Mandamus

Quite literally "mandamus" means "we command" in Latin. On a more practical level, it is a legal remedy that is curiously governed by equitable principles. On a practical plane, mandamus is an extraordinary remedy because it permits appellate review of trial court proceedings before the trial court loses jurisdiction over the matter. In essence, the litigants are allowed to test the trial court's rulings outside the ordinary appellate channels. Because mandamus affords an unusual remedy, generally inconsistent with the appellate process, it is available only in very limited circumstances.

B. Purpose of Mandamus

A petition for writ of mandamus is available to review orders of the trial court at any stage of the proceeding before the trial court loses jurisdiction. As a result, mandamus can be used to invoke appellate court jurisdiction to correct a trial court's discovery ruling. Due to the extraordinary nature of the writ, mandamus is closely regulated and is available only if:

1. The action or inaction of the respondent (usually a judge) constituted a clear abuse of discretion, *Liberty Nat'l Fire Ins. Co. v. Akin*, 927 S.W.2d 627, 630 (Tex. 1996); *Walker v. Packer*, 827 S.W.2d 833, 839-40 (Tex. 1992); and

2. No other adequate legal remedy (including appeal) exists to rectify the wrong, *In re Union Pac. Resources Co.*, 969 S.W.2d 427, 428-29 (Tex. 1998).

C. Clear Abuse of Discretion

In *Walker v. Packer*, the supreme court redefined "abuse of discretion" by summarizing the different standards used by the court to arrive at one definition. Whether a trial court abused its discretion in the determination of legal principles is reviewed separately from its resolution of factual disputes.

1. Factual disputes

In reviewing a trial court's decision on the facts, the appellate court cannot substitute its judgment for that of the trial court. *Walker*, 827 S.W.2d at 839-40. The relator must demonstrate that the trial court could reasonably have reached only one decision. *Akin*, 927 S.W.2d at 630.

2. Legal issues

In reviewing a trial court's determination of the law, the appellate court is not required to be as deferential as it is to the trial court's decisions on the facts. *Walker*, 829 S.W.2d at 840. The trial court has no discretion to misinterpret or misapply the law. *Id.* Thus, a clear failure to properly analyze or apply the law constitutes an abuse of discretion and is subject to reversal by mandamus. *Id.*

D. No Adequate Remedy

Mandamus relief is not authorized when the relator has an adequate remedy at law. *Holloway v. 5th Ct. of Appeals*, 767 S.W.2d 680, 684 (Tex. 1989). An appellate remedy is not inadequate, however, merely because it involves more expense or delay than a writ of mandamus. *Walker*, 827 S.W.2d at 842. Examples of instances where appeal is an inadequate remedy include the following:

1. When the appellate court will not be able to cure the trial court's discovery error, *Volkswagen, A.G. v. Valdez*, 909 S.W.2d 900, 903 (Tex. 1995) (disclosure of privileged information; harm impossible to undo once the documents are disclosed);

2. Where the party's ability to present a viable claim or defense at trial is eviscerated or severely compromised, *Able Supply Co. v. Moye*, 898 S.W.2d 766, 771-72 (Tex. 1995) (denial of discovery on crucial issues remedied by mandamus); *Remington Arms Co. v. Caldwell*, 850 S.W.2d 167, 171 (Tex. 1993) (death penalty sanctions preclude a determination on the merits);

3. Where the trial court disallows discovery and the missing discovery cannot be made a part of the appellate record or the trial court refuses to make the missing discovery part of the appellate record, *Walker*, 827 S.W.2d at 843-44; or

4. Where the trial court's refusal to grant the remedy will render the subject matter of the appeal moot, *In re Dickason*, No. 98-0140 (Tex. October 15, 1998) (mandamus granted to prevent retrial because order for new trial was void; appeal after retrial would have been needless); *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 271 (Tex. 1992) (mandamus issued to compel arbitration; if party required to go to trial and later appeal issue of refusal to send to arbitration, the purpose of arbitration would be defeated).

E. No Factual Disputes

The relator must demonstrate that there are no factual disputes about the relator's right or the respondent's duty. If there are factual disputes, mandamus is not appropriate. *Brady v. 14th Ct. of Appeals*, 795 S.W.2d 712, 714 (Tex. 1990).

****Practice Pointer:** Avoid any suggestion that the issues are "hotly contested" because that may lead the court to decide that there are fact issues to be resolved, in which case your mandamus will be denied. Similarly, be careful not to exaggerate when detailing the facts. Trying to shock the court with horrific facts can backfire on you. When the facts are exaggerated, the respondent can file a reply that appears to raise fact issues, thus dooming your mandamus request.

F. Mandamus in the Supreme Court

When mandamus relief is requested in the supreme court, the relator must additionally show that the error is of such importance to the jurisprudence of the state that it requires correction. *Walker*, 827 S.W.2d at 839 n.7.

III. JURISDICTION AND MANDAMUS POWER

The Texas Constitution and the Texas Government Code authorize the supreme court and the courts of appeals to issue writs of mandamus. TEX. CONST. art. V, §§ 3, 6; TEX. GOV'T CODE §§ 22.002, 22.221(a). The supreme court and the courts of appeals have concurrent mandamus jurisdiction over district, county and probate court judges. Even though this concurrent jurisdiction exists, TRAP 52.3(e) requires that any application for writ of mandamus be first directed to the appropriate court of appeals, unless there are compelling reasons to present it to the supreme court first. See *LaRouche v. Hannah*, 822 S.W.2d 632, 633 (Tex. 1992).

IV. GENERAL REQUIREMENTS FOR MANDAMUS

A. Request for Relief

The relator must show that it asked the court to grant relief to which it was clearly entitled, and that the court refused to act. In other words, for example, the mere failure of a party to respond to discovery does not warrant mandamus relief. Instead, the opponent must move to compel and base mandamus on the trial court's refusal to grant that motion.

The supreme court has built in a narrow exception to this rule. In two cases, the supreme court has indicated that where a demand would have been futile and the refusal little more than a formality, the demand is not a prerequisite to mandamus relief. *Axelson v. McIlhany*, 798 S.W.2d 550 (Tex. 1990); *Terrazas v. Ramirez*, 829 S.W.2d 712 (Tex. 1991).

****Practice Pointer:** Despite the language in *Axelson* and *Terrazas*, it is better to ask for a signed order formally denying the relief being sought. TRAP

52.3(j)(1)(A) requires that a "certified or sworn copy of any order complained of" be included in the appendix to the petition for writ of mandamus.

B. Clear Right to Relief

The relator must have a clear legal right to the performance of the act it seeks to compel by mandamus. *Tilton v. Marshall*, 925 S.W.2d 672, 682 (Tex. 1996). If the facts on which this right depend are doubtful or disputed, mandamus will not issue. *Dow Chem. Co. v. Garcia*, 909 S.W.2d 503, 505 (Tex. 1995).

C. Justiciable Interest

The relator must show it has a justiciable interest in the underlying proceeding. *Terrazas v. Ramirez*, 829 S.W.2d 712, 723 (Tex. 1991). A person need not be a party to the underlying litigation, however, to seek mandamus relief. *Id.* at 723.

V. WHICH REMEDY? MANDAMUS v. APPEAL

In some instances, counsel will be faced with a dilemma of whether to seek an immediate mandamus after an adverse ruling or await the outcome of the trial and seek review by regular appeal. Although mandamus is not the readily available remedy that it was prior to *Walker*, the best decision is to immediately seek mandamus when it is available. This conclusion is reached for the following reasons:

A. Identical Standards on Discovery

The standard of review in an application for a discovery writ of mandamus is whether the trial court "abused its discretion" in a discovery ruling. The standard on appeal is identical.

B. No Harmless Error Rule

There is an additional benefit to using mandamus. Mandamus will be decided before the case is tried. As a result, the only question on an application for writ of mandamus is whether the trial court abused its discretion. On the other hand, once a judgment is entered, the applicable standard on appeal is two-fold. First the appellate court must determine whether the

trial court abused its discretion and second, it must determine whether the error caused harm.

C. Two Bites of the Apple?

The supreme court has held that the decision not to pursue the extraordinary remedy of mandamus does not prejudice or waive a party's right to complain on appeal. *Pope v. Stephenson*, 774 S.W.2d 743 (Tex.App.—El Paso 1989), writ denied per curiam, 787 S.W.2d 953 (Tex. 1990). In its opinion, the supreme court disapproved of a suggestion in the appellate court's opinion that mandamus is the timely remedy for any wrongful denial of discovery. As a result, a party may have an opportunity at two bites of the apple by seeking writ of mandamus and later seeking to reverse an adverse judgment by appeal.

VI. TYPES OF MANDAMUS

The following is a non-exclusive list of the different types of mandamus that may be filed. Although discovery mandamus is the most common, it is by no means the exclusive area in which mandamus is utilized.

A. Discovery mandamus

Mandamus may be used to review discovery rulings under certain circumstances. See *In re American Optical Corp.*, No. 97-9872 (Tex. July 3, 1998) (mandamus granted to review overly broad discovery order); *Memorial Hosp. v. McCown*, 927 S.W.2d 1, 7-8 (Tex. 1996) (mandamus granted to review order on disclosure of records of medical peer review committee); *Owens-Corning Fiberglas Corp. v. Caldwell*, 818 S.W.2d 749, 749 (Tex. 1991) (mandamus granted to review the duration of the work product privilege).

B. Disqualification of judge

Mandamus is appropriate to review a trial court's erroneous rulings on motions to recuse or disqualify and objections to visiting judges. See *Blanchard v. Krueger*, 916 S.W.2d 15, 18 (Tex.App.—Houston [1st Dist.] 1995, orig. proceeding) (judge was disqualified to sit when he became a party in the case and asked for fees); *In re Perritt*, No. 98-0934 (Tex. April 22, 1999)

(objection to judge assigned to hear recusal should have been sustained). When disqualification of a judge is mandatory, the relator need not show an inadequate remedy at law. *In re Union Pac. Resources Co.*, 969 S.W.2d 427, 428 (Tex. 1998).

Mandamus is also appropriate when a trial judge refuses to recuse himself or refer the motion to the presiding judge for a hearing. *Jamilah v. Bass*, 862 S.W.2d 201, 203 (Tex.App.—Houston [14th Dist.] 1993, orig. proceeding).

C. Disqualification of Lawyer

Mandamus is appropriate to review orders granting or denying motions to disqualify counsel. *In re Epic Holdings, Inc.*, 985 S.W.2d 41, 52 (Tex. 1998) (disqualification of lawyers necessary because they represented same party in an earlier related matter); *In re Amer. Home Prods.*, 985 S.W.2d 68, 71 (Tex. 1998) (disqualification of firm was necessary because of legal assistant's earlier employment); *In re Meador*, 968 S.W.2d 346, 350 (Tex. 1998) (disqualification not necessary where lawyer did not directly violate disciplinary rules).

D. Void Order

Mandamus is appropriate to order a trial court to vacate a void order. *Hilliard v. Bennett*, 925 S.W.2d 338, 341 (Tex.App.—Corpus Christi 1996, orig. proceeding) (sanctions order void because court did not have jurisdiction); *South Main Bank v. Wittig*, 909 S.W.2d 243, 244 (Tex.App.—Houston [14th Dist.] 1995, orig. proceeding) (order of reinstatement was void because it was signed after expiration of plenary power). Some courts adhere to the position that the absence of an adequate remedy need not be shown; others require that showing. *Compare Geary v. Peavey*, 878 S.W.2d 602, 603 (Tex. 1994), with *In re Dickason*, No. 98-0141 (Tex. Oct. 15, 1998), and *Dikeman v. Snell*, 490 S.W.2d 183, 186 (Tex. 1973).

E. Motion to Transfer Venue

Mandamus is appropriate if the trial court refuses a transfer to a county of mandatory venue. TEX. CIV. PRAC. & REM. CODE § 15.0642; *In re Continental Airlines, Inc.*, No. 98-0598 (Tex. Sept. 24, 1998).

When a transfer is requested to a county of mandatory venue, it is not necessary for the relator to show an inadequate remedy at law. *In re Missouri Pac. R.R. Co.*, No. 98-0841 (Tex. July 1, 1999). See also *In re Masonite Corp.*, No. 97-0884 (Tex. June 17, 1999) (appeal is not an adequate remedy where the trial court transfers venue on its own motion).

F. Motion for Sanctions

Mandamus may be appropriate to review an order granting sanctions. *TransAmerican Nat. Gas v. Powell*, 811 S.W.2d 913, 920 (Tex. 1991; *Braden v. Downey*, 811 S.W.2d 922, 927 (Tex. 1991). However, mandamus may not be available unless the effect of the sanctions is to Preclude "a decision on the merits of a party's claims." *TransAmerican*, 811 S.W.2d at 920. See e.g., *In re Ford Motor Co.*, 41 Tex. Sup. Ct. J. 1283 (July 14, 1998) (denying mandamus relief from sanctions order striking expert report when there was no evidence that the excluded evidence was essential to defense of the case). Monetary sanctions may also be reviewable by mandamus if they are so large that they interfere with a party's ability to continue litigating and, thus, with his or her access to the court. *Braden*, 811 S.W.2d at 927; see *Prime Group, Inc. v. O'Neill*, 848 S.W.2d 376 (Tex.App.—Houston [14th Dist.] 1993, orig. proceeding) (mandamus not available in absence of allegation that prejudgment payment of sanctions would preclude litigation).

G. Motion for New Trial

Mandamus to review a trial court's grant of a new trial is appropriate in only two circumstances: (1) when the trial court signs the order after it has lost plenary power to do so, *In re Dickason*, No. 98-0141 (Tex. Oct. 15, 1998); and (2) when the trial court grants a new trial because it erroneously believed there was a conflict in the jury verdict, *Johnson v. 7th Ct. of Appeals*, 350 S.W.2d 330, 331 (Tex. 1961).

H. Alternative Dispute Resolution

Under certain circumstances, mediation orders may be reviewable by mandamus. *Decker v. Lindsay*, 824 S.W.2d 247 (Tex.App.—Houston [1st Dist.] 1992, orig. proceeding) (if order or referral compels parties to negotiate a settlement in good faith, over the

objection of one or both, mandamus relief may be available (pre-dates *Walker*).

I. Arbitration

Mandamus may be available to review certain arbitration orders. See *In re Louisiana Pac. Corp.*, 972 S.W.2d 63 (Tex. 1998) (mandamus was appropriate when party challenging trial court's naming of arbitrator had no adequate remedy by appeal because federal arbitration act did not provide for review of trial court's actions in state court and holding that corporation was entitled to name substitute arbitrator after withdrawing its originally designated arbitrator); *In re Valero Energy Corp.*, 968 S.W.2d 916 (Tex. 1998) (denying mandamus relief to party seeking to compel trial court to order arbitration because appeal had been perfected from order denying arbitration; advising courts of appeals in future cases that, when confronted with an interlocutory appeal and a mandamus proceeding seeking to compel arbitration, the court should ordinarily consolidate the two proceedings and render a decision disposing of both simultaneously); *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266 (Tex. 1992) (directing trial court to order arbitration under Federal Arbitration Act; given absence of interlocutory appeal available under the Texas General Arbitration Act).

J. Indigent Appeals

Although mandamus had been available to review a trial court's order sustaining a contest to an affidavit of indigence, the supreme court recently recognized that the new TRAPs provide an adequate remedy on appeal. *In re Arroyo*, No. 98-0152 (Tex. Oct. 15, 1998).

K. Mandamus against the Court of Appeals

Mandamus in the supreme court is appropriate to review the erroneous grant or denial of mandamus relief by the court of appeals. In either case, the supreme court's focus is on the propriety of the original actor (generally the trial judge). *In re Barber*, 982 S.W.2d 364, 368 (Tex. 1998); *Joachim v. Chambers*, 815 S.W.2d 234, 235 n.1 (Tex. 1991). Mandamus is also appropriate in the supreme court to review an erroneous ruling on a motion in the court of appeals. *Isern v. 9th Ct. of Appeals*, 925 S.W.2d 604,

606 (Tex. 1996) (court of appeals erroneously reversed trial court's order for alternative security for supersedeas); *Rios v. Calhoun*, 889 S.W.2d 257, 259 (Tex. 1994) (court of appeals erroneously denied motion to extend time to file appellate brief).

VII. PROCEDURAL REQUIREMENTS

Procedure for obtaining a writ of mandamus is contained in Texas Rule of Appellate Procedure 52 (hereinafter TRAP 52). It is important to follow these procedural rules TO THE LETTER. Over half the petitions for writ of mandamus are denied, not because of the merits of the claim, but because the relator has not followed the procedural rules for seeking mandamus relief.

****Practice Pointer:** Remember, when you file a petition for writ of mandamus, you are likely going to cause the court, the staff attorneys, and the briefing attorneys to stop what they're doing to attend to your request. Therefore, you had better make sure that all procedural requirements have been met. In other words, you've already got one strike against you, don't compound it.

**** Practice Pointer Follow Up:** Along the same lines, although not required by the rules, you should place a courtesy phone call to court clerk a day or two before filing to advise them that your mandamus petition is on its way. If the court is aware of a petition before it is filed, it can better prepare for its receipt. There is nothing the courts like less than a Friday afternoon mandamus, seeking emergency relief, where no prior "heads-up" notice is given. Also, give the clerk your phone number and be accessible throughout the pendency of the mandamus action. The clerk may need to confer with you or your opposition about a variety of matters.

A. Parties

In mandamus proceedings, the party seeking the issuance of the writ is the "relator." TRAP 3.1(f), 52.2. The party against whom the mandamus is sought (usually a judge) is called the "respondent." TRAP 52.2. The opposing party in a lawsuit is called the "real party in interest." TRAP 52.2. As a result of these confusing labels, it is important to identify which

party occupied which position in the trial court. Therefore, a short paragraph in the brief identifying every party in the lawsuit in a relative position is important.

****Practice Pointer:** Who is the Judge? In this day of visiting judges, a question arises as to who is the proper respondent in a mandamus proceeding. Is it the presiding judge or the judge who made the ruling? The answer is the proper respondent is the judge who issued the challenged order and can vacate it. However, in the instance where a visiting judge sat for a specific term that had ended, who is the respondent? TRAP 7.2(b) provides guidance in the situation of a successor judge. The rule provides that the court must abate the proceeding to allow a successor judge to reconsider the prior judge's decision. If you find yourself in this position, therefore, ask the successor judge to reconsider the ruling when he or she assumes the bench. If the change in judges occurs after the filing of the mandamus papers, ask the appellate court to abate the proceeding to allow the successor judge a chance to reconsider the actions of the predecessor judge.

B. Time -- Immediately

Although there is no specified deadline in the Rules, the supreme court has held that mandamus may be denied for failing to seek immediate relief. *Rivercenter Associates v. Rivera*, 858 S.W.2d 366, 367 (Tex. 1993) (S.Ct. denied petition for mandamus when relator delayed 4 months before seeking relief); *Bailey v. Baker*, 696 S.W.2d 255, 256 (Tex.App.—Houston [14th Dist.] 1985, orig. proceeding) (petition denied because relator waited until 2 weeks before trial, and 4 months after the trial court's ruling, to seek mandamus).

C. Where?

The courts of appeals and the supreme court have concurrent jurisdiction over the trial courts to issue writs of mandamus. *Johnson v. 4th Ct. of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985); TEX. GOV'T CODE §§ 22.002(a), 22.221(b). In 1995, the legislature expanded the jurisdiction of the Supreme Court to include statutory county and probate courts. TEX. GOV'T CODE § 22.002(a). TRAP 52.3(e) mandates

that a petition for mandamus be filed in the court of appeals before presentation to the supreme court, unless there is some compelling reason to present it to the supreme court first. In one case, the supreme court concluded that "some compelling reasons do exist for its acceptance of a petition for writ of mandamus." *LaRouche v. Hannah*, 822 S.W.2d 632, 633 (Tex. 1992) (holding that immediate filing with the Texas Supreme Court was justified when relator sought to have his name placed on presidential ballot and secretary of state was already preparing and printing the ballot).

The writ of mandamus should be filed in the court of appeals district where the lower court is located. In rare instances where all justices on the court of appeals are away from the district, it is appropriate to file at the court of appeals in the nearest court of appeals district.

D. Seeking Temporary Relief

1. Seek a stay from the trial court first.

If you have suffered an adverse ruling in the trial court and you subsequently apply to the appellate court for mandamus relief, you should ask the trial court to stay its proceedings until the court of appeals and possibly the supreme court have had an opportunity to evaluate your claim. Some trial judges will routinely grant a stay pending mandamus. However, trial courts are becoming increasingly unwilling to do this. Nevertheless, it is important to make the request of the trial court before making it to the court of appeals.

****Practice Pointer:** Even though you may know without a doubt that the trial court will deny your request for stay, ask the judge for one anyway. The court of appeals may be more inclined to help if it knows that you afforded the trial court the courtesy of staying its ruling first.

2. Request a stay from the appellate court.

A relator may file a motion in the court of appeals or the supreme court to stay the trial court proceedings or for other temporary relief pending the court's action on the petition. TRAP 52.10(a). The relator must notify or make a diligent effort to notify the other parties by

expedited means (phone or fax) that a request for emergency relief is being sought. TRAP 52.10(a). The motion must recite and certify that the relator complied with TRAP 52.10(a). The fee for filing the motion is \$10.00 both in the court of appeals and the supreme court.

****Practice Pointer:** If you need an emergency stay while the court considers your mandamus petition, it is best to file a separate motion rather than incorporate the request in the body of the petition. Specify the exact relief requested and the time by which relief is needed (such as the date for compliance with the trial court's order).

E. What to File -- Documents Required

The relator is no longer required to file a motion for leave to file along with the petition, as was required under former TRAP 121(a)(1).

1. The petition for writ of mandamus

a. General rules

Double-spaced. The petition must be double-spaced, except for the following which may be single-spaced: footnotes, block quotes, short lists, and the issues or points presented for relief. TRAP 9.4(d).

Margins. The petition must be printed with at least a 1 inch margin on the top, bottom and both sides. TRAP 9.4(c).

Typeface. The petition may be printed either in standard 10-character-per-inch nonproportionally spaced Courier typeface or in 13-point or larger proportionally spaced typeface. TRAP 9.4(e).

Length. The petition and response may not exceed 50 pages in the court of appeals, or 15 pages in the supreme court, excluding the following required information: (1) list of parties and counsel, (2) table of contents, (3) index of authorities, (4) statement of the case, (5) statement of jurisdiction, (6) issues presented, (7) signature block, (8) certificate of service, and (9) appendix. TRAP 52.6. The relator's reply cannot exceed 8 pages in both the court of appeals and the supreme court. *Id.*

Binding. The petition must be bound so that it lies flat when open, and won't fall apart in regular use. TRAP 9.4(f). Spiral binding works the best.

Number of copies. Although some courts of appeals have different requirements, the rules generally require the relator to file an original and 3 copies of the petition and 1 copy of the record. TRAP 9.3(a)(1)(A). Check the local rules for the particular court. TRAP 9.3(a)(2). The supreme court requires the relator to file an original plus 11 copies of the petition and 1 copy of the record. TRAP 9.3(b).

Cover. The petition must have a cover. TRAP 9.4(g). It must not be made of plastic or be in the colors red, black, or dark blue.

****Practice pointer:** Use a light grey or buff color for the cover and back of your petition. It is light enough to be reproduced, but does not get lost in the sea of orders, motions and other papers which are printed in standard white paper.

The cover must include the following information: (1) the caption of the petition: (*e.g.*, In re [Name of relator]), (2) case style and number, if one has been assigned. If no case number has been assigned, the cover should contain a blank (*e.g.*, No. _____), (3) the title of the document (*e.g.*, Petition for Writ of Mandamus), (4) name of the party filing the petition, and (5) the name of the lead counsel, mailing address, telephone and fax number, and state bar number. TRAP 9.4(g), 52.1.

Costs. The courts of appeals and the supreme court each charge fees for filing mandamus proceedings. The fee for filing a petition for writ of mandamus in the court of appeals is \$75.00. Responses and replies cost \$10.00 each. The fee for filing a petition in the supreme court is \$75.00, and if the court requests additional briefing on the merits, the charge is an additional \$75.00. Responses and replies cost \$10.00 each.

b. Contents of the petition.

TRAP 52.3 sets forth the elements required for a petition for writ of mandamus:

- (1) Identity of parties and counsel, TRAP 52.3(a);
- (2) Table of contents, TRAP 52.3(b);
- (3) Index of authorities, TRAP 52.3(c);
- (4) Statement of the case, TRAP 52.3(d);
- (5) Statement of jurisdiction, TRAP 52.3(e);
- (6) Issues presented, TRAP 52.3(f);
- (7) Statement of facts, TRAP 52.3(g);
- (8) Arguments, TRAP 52.3(h);
- (9) Prayer, TRAP 52.3(i);
- (10) Signature block, TRAP 9.1(a);
- (11) Affidavit, TRAP 52.3; and
- (12) Certificate of service, TRAP 9.5(d).

Consult TRAP 52.3 for specifics on each of these required sections, and use the rule as a checklist. Omission of any one of these sections is grounds for summary denial of relief.

****Practice Pointer:** Note the precise requirements for the statement of the case and the statement of jurisdiction. TRAP 52.3(d) and (e) contain their own checklists.

****Practice Pointer:** Be sure the petition is sworn, the record is sworn, and any accompanying motion is sworn. When in doubt, include a verification!

2. The appendix

An appendix must accompany the petition for writ of mandamus. TRAP 52.3(j). The appendix contains copies of critical documents including a certified or sworn copy of the order that shows the matter of which the relator complains, and any pleadings material to the relator's claim for relief. TRAP 52.3(j)(1)(A). If the petition is filed in the supreme court, the relator must include an order or opinion of the court of appeals.

TRAP 52.3(j)(1)(B). The appendix should also include the text of any rule, regulation, ordinance, statute, constitutional provision, or other law (excluding case law) on which the argument is based. TRAP 52.3(j)(1)(C).

On occasion, the written order about which the relator complains will not be available. In that event, the relator must produce other proof of the court's order. If, for example, the court made an oral ruling that the trial judge (for whatever reason) refuses to reduce to writing, the relator should obtain a copy of the reporter's record of the ruling. *In re Hamrick*, 979 S.W.2d 851, 852 n.3 (Tex.App.—Houston [14th Dist.] 1998, orig. proceeding). If the ruling was not made in the presence of a court reporter, and no written order is available, the relator may be able to prove the ruling by affidavits.

F. The Record

TRAP 52.7 requires that the relator file a record including important documents and, in most cases, a transcript of the hearing upon which the mandamus relief is sought.

1. Documents

TRAP 52.7(a) provides that the petition must be accompanied by a certified or sworn copy of every document that is material to the relator's claim for relief and that was filed in the underlying proceeding. It is much more expedient to include sworn copies of documents than to secure certified copies from the clerk's office. The relator can use its own file copies of the pleadings, but should include a signed copy of the order it is challenging. Remember, time is of the essence in all mandamus cases.

****Practice Pointer:** When claiming a privilege as to documents submitted in camera to the trial court, be sure to include copies of those documents to the appellate court with the mandamus petition.

2. Hearing transcript

If evidence was presented at a hearing in the trial court, TRAP 52.7(a)(2) also requires the relator to file an authenticated transcript of any relevant testimony,

including any exhibits offered in evidence. If no evidence was presented at a hearing in the trial court, the relator should file a statement that no testimony was received at a hearing. *Id.*

3. Supplementation

After the record is filed, any party to the proceeding may file additional materials for inclusion in the record. TRAP 52.7(b).

G. Response to the Petition for Writ of Mandamus

Any party may file a response to the petition for writ of mandamus, but it is not necessary. TRAP 52.4. The response should have a cover, but use a different color than the one used by the relator. Unless the responding party disagrees or is dissatisfied with the contents, he or she does not need to include any of the following sections: (1) identity of parties and counsel, (2) statement of the case, (3) statement of jurisdiction, (4) issues presented, and (5) statement of facts. TRAP 52.4(a)-(c). The responding party need not include an appendix if all relevant documents are already contained in the appendix filed by the relator. TRAP 52.4(e).

****Practice Pointer:** In the response, explain why mandamus should not issue. Point out why the relator did not meet its burden, Contest any misstatements of fact in the petition. State why an appeal is an adequate remedy. Raise waiver issues, and assert laches if the relator delayed in seeking relief.

****Practice Pointer:** Open the same communications line as the relator's counsel did. Advise the clerk that a response is coming and say when it will be filed.

H. Relator's Reply to the Response

The relator may, but is not required to, file a reply to another party's response. There is no deadline to file a reply, but should you decide to do so, file one as soon as possible as the court may decide the case before a reply is filed. TRAP 52.5.

****Practice Pointer:** Do not feel compelled to file a reply unless you need to rebut something in the response. Do not file a reply that merely reiterates what you already briefed in your petition.

I. Court Action on the Petition

When the court is of the initial opinion that the relator is entitled to the relief sought, it will do one or more of the following things. The court must request a response if no response has been filed. TRAP 52.8(b)(1). The court may set the case for argument, but can rule on the petition without oral argument. TRAP 52.8(b)(4), 52.8(c); *In re Oakwood Mobile Homes*, No. 98-0662 (Tex. Feb. 11, 1999). If the petition is filed in the supreme court, the court may ask for full briefing on the merits under TRAP 55. TRAP 52.8(b)(2).

When the court grants relief, it must hand down an opinion as in any other case. TRAP 52.8(d). If the court denies the petition, the court may hand down an opinion, but is not required to do so. TRAP 52.8(d). Usually, the court will send a one-page letter to all parties, stating in a sentence or two that the desired mandamus relief is denied.

J. Motions for Rehearing

TRAP 52.8 permits a motion for rehearing to be filed within 15 days after the final order is rendered. The motion must not exceed 15 pages, and there is no exclusion for pages containing the statement of issues, signature block, and the like. A motion for rehearing in the court of appeals is not a jurisdictional prerequisite to supreme court review of mandamus. *Mendoza v. 8th Ct. of Appeals*, 917 S.W.2d 787 (Tex. 1996).

****Practice Pointer:** A motion for rehearing of a denial of mandamus relief is exceptionally unlikely to succeed. If you still feel strongly about your position, your time would be better spent preparing to file the mandamus in the supreme court, rather than seeking a rehearing in the court of appeals.

K. Sanctions on Mandamus

The rules as amended in 1997 contain provisions for the award of sanctions for frivolous mandamus. TRAP 52.11. Grounds for sanctions include: (1) filing a petition that is clearly groundless, (2) bringing a petition solely for delay of the underlying proceedings, (3) filing a petition or response that grossly misstates or omits an obviously important and material fact, or (4) filing an appendix or record that is clearly misleading because it omits important and material evidence or documents. TRAP 52.11(a)-(d).