A GUIDE TO MANDAMUS WITH A SPOTLIGHT ON DISCOVERY AND NEW TRIAL ORDERS

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Introduction: Lorien Whyte served as a Briefing Attorney to Justice Sandee Bryan Marion on the Fourth Court of Appeals from 2006 to 2007 and then as a Staff Attorney at the Court from 2008 to 2013. As a Staff Attorney, Lorien prepared draft opinions for the justices, attended oral arguments, and handled all aspects of mandamus proceedings and appeals for the justices on the Court. In June of 2013, Lorien joined the law firm of Brin & Brin, PC where she heads the appellate section. She focuses her practice on appeals, mandamus proceedings, and appellate litigation support in a variety of areas of the law, including civil litigation, commercial litigation, family law proceedings, medical malpractice litigation, and construction litigation.

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PUBLICATIONS & PRESENTATIONS

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A GUIDE TO MANDAMUS WITH A SPOTLIGHT ON DISCOVERY AND NEW TRIAL ORDERS

I. INTRODUCTION

Mandamus is an ever-evolving remedy. Over time, appellate courts have granted mandamus relief from a long list of trial court rulings. This article categorizes those rulings, with an emphasis on discovery and new trial orders. It also serves as a practical guide by supplying the requirements for a successful mandamus.[1]

II. REQUIREMENTS FOR A SUCCESSFUL PETITION FOR WRIT OF MANDAMUS

In order to obtain mandamus relief from a trial court's ruling, two requirements must be met:

1) the trial court must have clearly abused its discretion, and
2) as a result, the relator must have been left without an adequate remedy on appeal.

Walker v. Packer, 827 S.W.2d 833 (Tex. 1992) (orig. proceeding).[2] If both requirements are not met, an appellate court cannot grant mandamus relief.

A. Clear Abuse of Discretion

Establishing the trial court "clearly abused its discretion" is a high threshold to reach. A "reviewing court may not substitute its judgment for that of the trial court" with regard to resolving matters committed to the trial court's discretion. *Id.* The relator must establish there is only one result the trial court could have reasonably reached. *Id.* Because reasonable minds differ, the fact that one court would have decided the case differently will not give rise to an abuse of discretion unless the ruling is "arbitrary and unreasonable." *Id.* "A trial court has no 'discretion' in determining what the law is or applying the law to the facts." *Id.* Furthermore, the court abuses its discretion when the court misapplies the relevant law. *Id.*

B. Adequate Remedy at Law

Mandamus relief will not issue when "the law has provided another plain, adequate, and complete remedy." *Canadian Helicopters v. Wittig*, 876 S.W.2d 304, 305–06 (Tex. 1994) (orig. proceeding). It is a "'fundamental tenet' of mandamus practice" that an alternative remedy to mandamus must not exist. *In re State Bar of Tex.*, 113 S.W.3d 730, 734 (Tex. 2003) (orig. proceeding).

Mandamus relief is not available for every improper ruling a trial court makes. The general rule is that mandamus relief will not issue to correct a mere *incidental* trial court ruling when the relator has an adequate remedy by appeal. *In re Entergy Corp.*, 142 S.W.3d 316, 320–21 (Tex. 2004) (orig. proceeding). The Supreme Court distinguished between mandamus review of incidental interlocutory trial court rulings and significant rulings; the Court explained that mandamus review of incidental rulings:

> "unduly interferes with trial court proceedings, distracts appellate court attention to issues that are unimportant both to the ultimate disposition of the case at hand and to the uniform development of the law, and adds unproductively to the expense and delay of civil litigation."

In re Prudential Ins. Co. of Am., 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding). The Court has consistently maintained that mandamus relief seeks to avoid interlocutory appeals of harmless trial court errors. *See In re AIU Ins. Co.*, 148 S.W.3d 109, 118 (Tex. 2004) (orig. proceeding).

> "The reluctance to issue extraordinary writs to correct incidental trial court rulings can be traced to a desire to prevent parties from attempting to use the writ as a substitute for an authorized appeal."

In re Entergy, 142 S.W.3d at 320. The reasoning behind the rule is that courts want mandamus relief to be available to those parties who otherwise have no adequate remedy without the possibility of mandamus relief.

Previously, courts have employed a more categorized approach to determining whether mandamus relief is available. *See In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 464–69 (Tex. 2008) (orig. proceeding). Under this approach, the question of whether a trial court's ruling qualifies for mandamus relief depends on whether the ruling falls within a category identified by the Supreme Court as lacking an adequate appellate remedy. *See Walker*, 827 S.W.2d at 843.

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[1] This article includes excerpts from a more detailed law review article found at: Justice Marialyn Barnard, Lorien Whyte, and Emmanuel Garcia, *Is My Case Mandamusable?: A Guide to the Current State of Texas Mandamus Law*, 45 St. Mary's L.J. 143 (2014).

[2] There are a few rulings that do not require the "lack of an adequate remedy by appeal" to be met. For a more detailed analysis of those issues, see the above mentioned law review article, 45 St. Mary's L.J. 143 (2014).

In 2004, the Court issued *Prudential*, steering courts away from a categorical approach to determining whether mandamus relief should issue, and instead instituted a balancing test to determine whether a party has an adequate remedy by appeal. *See Prudential*, 148 S.W.3d at 136. The Court recognized that the adequacy of an appeal depends heavily on the facts involved in each case. *Id.* In conducting the balancing test, courts should look to a number of factors, including whether mandamus will:

1) preserve a relator's "substantive and procedural rights from impairment or loss[;]"
2) "allow the appellate courts to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgments[;]" and
3) prevent the waste of public and private resources invested in proceedings that would eventually be reversed.

Id.

The Supreme Court expressly rejected the application of rigid rules in deciding whether a remedy on appeal is adequate. *Id.* The Court reasoned that any formulaic rules or categorizations contradict the purpose of mandamus—to provide flexibility to parties and courts. *Id.* Overall, the message from *Prudential* is that the determination of whether an appellate remedy is adequate *depends heavily on the circumstances of each case*. *Id.* at 137.

The Supreme Court echoed this sentiment after *Prudential* when it provided:

> "There is no definitive list of when an appeal will be 'adequate,' as it depends on a careful balance of the case-specific benefits and detriments of delaying or interrupting a particular proceeding."

In re Gulf Exploration, LLC, 289 S.W.3d 836, 842 (Tex. 2009) (orig. proceeding). Thus, the Court has declined to provide a definitive explanation of what constitutes an adequate remedy by appeal. *In re Ford Motor Co.*, 165 S.W.3d 315, 317 (Tex. 2005) (orig. proceeding) (per curiam).

III. COMMON REASONS FOR THE DENIAL OF MANDAMUS RELIEF

A. Failure to Comply with Texas Rule of Appellate Procedure 52

TRAP 52 applies to original proceedings and sets out the procedural requirements that must be met when a relator files a petition for writ of mandamus. *See* TEX. R. APP. P. 52. Failure to comply with TRAP 52 can result in the denial of the petition. *In re 24R, Inc.*, 324 S.W.3d 564, 568 (Tex. 2010) (orig. proceeding) (per curiam).

1. Lack of an Adequate Record

The most common reason for a court to deny a petition based on a procedural defect is the failure to provide an adequate record. *See* TEX. R. APP. P. 52.3(k)(1)(A) (requiring a copy of the order at issue); TEX. R. APP. P. 52.7(a) (requiring a proper record be provided). The trial court clerk does not assemble the record in a mandamus proceeding like they do on appeal. Therefore, it is the lawyer's responsibility to assemble an adequate record in a timely fashion and submit it to the appellate court.

a. Trial Court's Order

First, the rules specifically require the relator to provide a copy of the order at issue. TEX. R. APP. P. 52.3(k)(1)(A) (stating that "a sworn copy of any order complained of, or any other document showing the matter complained of" is necessary for the petition). While there are some occasions in which it might be appropriate to review a trial court's oral ruling, the general rule is the relator must present the court with a signed order from the trial court. *See In re Bledsoe*, 41 S.W.3d 807, 811 (Tex. App.—Fort Worth 2001, orig. proceeding) (limiting mandamus relief when there is no written order provided to when the parties can show "the court's ruling is a clear, specific, and enforceable order that is adequately shown by the record"). The court of appeals in *In re Bledsoe* explained that while parties are not encouraged to file a petition for writ of mandamus based on a trial court's oral ruling, an oral ruling may be considered if the record reflects there was an enforceable order. *Id.*

b. Pleadings, Motions, and Other Documents

TRAP 52.7(a) requires a relator to file with the petition "a certified or sworn copy of every document that is material to the relator's claim for relief and that was filed in any underlying proceeding." TEX. R. APP. P. 52.7(a)(1). For practical purposes, this usually refers to pleadings, motions, orders, and other documents that are relied on or discussed in the petition for writ of mandamus. *Id.*

c. Reporter's Record

Also, TRAP 52.7(a)(2) requires the filing of "a properly authenticated transcript of any relevant testimony from any underlying proceeding, including any exhibits offered in evidence, or a statement that no testimony was adduced in connection with the matter complained." *Id.* Although this rule only specifically requires that a transcript be provided of "any relevant testimony," courts have relied upon this rule to impose sanctions when a reporter's record has not been filed in part or in whole, and a party has misled the court in the absence of the reporter's record. *See In re ADT Sec. Servs., S.A. de C.V.*, No. 04-08-00799-CV, 2009 WL 260577, at *4–5 (Tex. App.—San Antonio Feb. 4, 2009, orig. proceeding [mand. denied]) (per curiam) (mem. op., not designated for publication) (issuing sanctions when a party misled the court and did not include an appropriate transcript).

***TIP*:** Litigants should, at a minimum, include the reporter's record from the hearing complained of because this gives direct insight into the arguments made at the hearing and the trial court's concerns or reasoning for a ruling, even if testimony was not actually adduced at the hearing.

2. Lack of a Proper Certification

TRAP 52.3(j) requires a relator to file a separate certification indicating that the person filing the petition has reviewed the petition and established all factual statements are supported by competent evidence either in the appendix or the record. TEX. R. APP. P. 52.3(j) (requiring the relator to "review . . . the petition and conclude . . . that every factual statement in the petition is supported by competent evidence included in the appendix or record"). The relator must comply with the requirement of TRAP 52.3(j), or the petition can be denied on that basis alone. *See, e.g.*, *In re Jordan*, No. 05-12-00185-CV, 2012 WL 506579, at *1 (Tex. App.—Dallas Apr. 3, 2012, orig. proceeding) (mem. op.) (concluding that strict compliance with the rule is required or mandamus relief will be denied); *In re Butler*, 270 S.W.3d 757, 758 (Tex. App.—Dallas 2008, orig. proceeding).

B. Disputed Areas of Fact Exist

> "It is well established Texas law that an appellate court may not deal with disputed areas of fact in an original mandamus proceeding."

Brady v. Fourteenth Court of Appeals, 795 S.W.2d 712, 714 (Tex. 1990) (orig. proceeding). Therefore, mandamus relief will not issue if the right to relief turns on an issue of fact. *Dikeman v. Snell*, 490 S.W.2d 183, 186–87 (Tex. 1973) (orig. proceeding))); *see also In re Angelini*, 186 S.W.3d 558, 559 (Tex. 2006) (orig. proceeding) (denying mandamus relief due to the existence of issues of fact regarding a candidate's filings to run for a position on the Fourth Court of Appeals); *In re Ford Motor Co.*, 988 S.W.2d 714, 722 (Tex. 1998) (orig. proceeding) (finding issues of fact regarding "who is responsible for a car's changed condition that precluded mandamus relief").

However, appellate courts are not prevented from issuing mandamus relief if the existence of a question of fact is wholly irrelevant to any issue before the court or is a matter that cannot be litigated in the case. *See, e.g.*, *Jones v. Robison*, 104 Tex. 70, 133 S.W. 879, 881 (Tex. 1911) (issuing mandamus relief despite a possible fact question because "that question could not be litigated in this case . . . and would be wholly irrelevant to any issue before this court").

C. Lack of a Predicate Request to the Trial Court

A trial court must be given the opportunity to act on the relief a party requests before going to the appellate court with a petition for writ of mandamus. As a general rule, mandamus is not available to compel a trial court to act if the action has not first been requested and then refused by the trial court. *See In re Perritt*, 992 S.W.2d 444, 446 (Tex. 1999) (orig. proceeding) (per curiam). The trial court must be given the chance to act first. *Terrazas v. Ramirez*, 829 S.W.2d 712, 714 (Tex. 1991) (orig. proceeding); *Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 556 (Tex. 1990) (orig. proceeding). However, if the request for the trial court would be futile, parties are excused from this requirement because the refusal would be a mere formality. *See Terrazas*, 829 S.W.2d at 725.

D. Delay in Seeking Mandamus Relief

A litigant should not delay in filing a petition for writ of mandamus after the trial court's unfavorable ruling. A delay that is unexplained or not justified can result in a summary denial of a petition on that basis alone. *See Rivercenter Assocs. v. Rivera*, 858 S.W.2d 366, 367 (Tex. 1993) (orig. proceeding))). "Although mandamus is not an equitable remedy, its issuance is largely controlled by equitable principles." *Id.* An unexplained and/or lengthy delay can be the sole justification for denying a mandamus petition. *In re Whipple*, 373 S.W.3d 119, 119 (Tex. App.—San Antonio 2012, orig. proceeding).

There is no fixed period within which a petition must be filed. To determine whether relator's delay in seeking relief prevents mandamus from issuing, courts often analogize to the doctrine of laches. *See In re N. Natural Gas Co.*, 327 S.W.3d 181, 188 (Tex. App.—San Antonio 2010, orig. proceeding [mand. denied]) (looking to the common law doctrine of laches to

discuss waiver of mandamus relief as a result of the relator's delay); *In re Hinterlong*, 109 S.W.3d 611, 620 (Tex. App.—Fort Worth 2003, orig. proceeding [mand. denied]) ("In determining if a relator's delay in seeking a writ of mandamus is a barrier to issuance of the writ, a court may analogize to the doctrine of laches, which bars equitable relief.").

> "A party asserting the defense of laches must show:
>
> 1) unreasonable delay by the other party in asserting its rights, and
> 2) harm resulting to the party as a result of the delay."

In re Coronado Energy E & P Co., LLC, 341 S.W.3d 479, 483 (Tex. App.—San Antonio 2011, orig. proceeding [mand. denied]) (citations omitted) (applying the equitable doctrine of laches).

Even a seven-month delay has been found acceptable under the particular circumstances of that case. *Sanchez v. Hester*, 911 S.W.2d 173, 177 (Tex. App.—Corpus Christi 1995, orig. proceeding) (finding that the parties were not harmed by the seven-month delay).

However, mandamus relief has been denied where a litigant asked for the court to prohibit the disclosure of an agent's mental health records because the trial court had ordered the records to be produced approximately 17 months before the mandamus petition was filed. *In re Whipple*, 373 S.W.3d at 119.

TIP: First, do not wait until the eve of trial to seek mandamus relief. Secondly, if there has been a delay between the date the trial court entered the order complained of and the filing of the petition, a relator should explain why there was a delay.

E. Other Remedies Available

As previously mentioned, for a writ of mandamus to issue, a relator must have no other adequate remedy at law. *See, e.g., Hinterlong*, 109 S.W.3d at 620. Often, mandamus filings are denied because other remedies are available, such as filing an interlocutory appeal. *See, e.g., In re Hydro Mgmt. Sys., LLC*, No. 04-09-00808-CV, 2009 WL 5062320 at *1 (Tex. App.—San Antonio Dec. 23, 2009, orig. proceeding) (per curiam) (mem. op.) (denying mandamus because an interlocutory appeal is available from a trial court's denial of a motion to compel arbitration under the Federal Arbitration Act). Likewise, if the relator is responsible for the inadequacy of its appeal, mandamus relief will not be available. *In re Ford Motor Co.*, 988 S.W.2d 714, 722 (Tex. 1998) (orig. proceeding).

IV. WHEN IS MANDAMUS REVIEW APPROPRIATE?

There is no definitive or exhaustive list of rulings that are subject to mandamus relief because:

> "it depends on a careful balance of the case-specific benefits and detriments of delaying or interrupting a particular proceeding."

In re Gulf Exploration, LLC, 289 S.W.3d 836, 842 (Tex. 2009) (orig. proceeding). However, there are many categories of rulings that courts have determined warrant mandamus relief.

A. Categories of Rulings Subject to Mandamus Relief

The following is a non-exhaustive list of the categories of such rulings commonly subject to mandamus relief:

1) **Improper order granting or denying discovery**
2) **Setting Aside a Valid Discovery Agreement Without Good Cause**
3) **Order Abating All Discovery**
4) **Discovery Sanctions**
5) **Presuit Discovery**
6) **Disqualification of a trial court judge**
7) **An attorney's conflict of interest**
8) **Venue**
9) **Plea in abatement**
10) **Plea to the jurisdiction**
11) **Temporary restraining order**
12) **Temporary injunction**
13) **Motion for continuance**
14) **Gag order**
15) **Severance**
16) **Consolidation**
17) **Failure to rule on a pending motion**
18) **Void order**
19) **Arbitration**
20) **Motion for new trial**
21) **Elections**
22) **Contractual jury waiver provision**
23) **Binding forum-selection clause**
24) **Appointment of a guardian ad litem**
25) **Contempt**
26) **Certain family law orders**
27) **Certain criminal law orders**

For a detailed analysis of those rulings, see Justice Marialyn Barnard, Lorien Whyte, and Emmanuel Garcia, *Is My Case Mandamusable?: A Guide to the Current State of Texas Mandamus Law*, 45 St. Mary's L.J. 143 (2014).

While there are a number of rulings that are

typically subject to mandamus relief, two types are quite common: those regarding discovery and motions for new trial. A detailed analysis of each follows.

B. Discovery

1. Trial Court Improperly Orders or Denies Discovery

Discovery orders are commonly the subject of mandamus relief. Generally, the trial court has the discretion to determine the scope of discovery; however, the trial court must impose reasonable discovery limits. *See In re Deere & Co.*, 299 S.W.3d 819, 820 (Tex. 2009) (orig. proceeding) (per curiam). A trial court's discovery order that requires production beyond what the procedural rules permit is an abuse of discretion. *In re Dana Corp.*, 138 S.W.3d 298, 301 (Tex. 2004) (orig. proceeding) (per curiam) (clarifying that a "threshold showing of applicability must be made before a party can be ordered to produce multiple decades" worth of discovery); *see also* TEX. R. CIV. P. 192.3 (providing the scope of discovery for the district and county courts). In a discovery context, there are general categories of rulings that courts have found to lack an adequate remedy on appeal when the trial court abuses its discretion. *See Walker*, 827 S.W.2d at 843–44.

a. Inability to Cure the Trial Court's Discovery Error

The first category is when the appellate court is unable to correct a trial court's discovery error. *See id.* at 843; *see also Dana*, 138 S.W.3d at 301 (finding there to be no adequate remedy on appeal when a trial court commits error which cannot be corrected on appeal); *In re Colonial Pipeline Co.*, 968 S.W.2d 938, 941 (Tex. 1998) (orig. proceeding) (per curiam) (listing the reasons from *Walker* when an appellate court may not be able to cure the trial court's discovery errors).

i. Privileged or Confidential Documents

For instance, such relief is available when a trial court erroneously orders the discovery of trade secrets absent a showing of necessity. *See In re Cont'l Gen. Tire, Inc.*, 979 S.W.2d 609, 615 (Tex. 1998) (orig. proceeding). Additionally, "when the trial court erroneously allows the disclosure of privileged" documents that "materially affect the rights of the aggrieved party[,]" there is no adequate remedy on appeal. *Walker*, 827 S.W.2d at 843; *see also In re Living Ctrs. of Tex., Inc.*, 175 S.W.3d 253, 256 (Tex. 2005) (orig. proceeding) (holding mandamus relief is appropriate to protect confidential documents from discovery); *In re E.I. DuPont de Nemours*, 136 S.W.3d 218, 222–23 (Tex. 2004) (orig. proceeding) (per curiam) (granting mandamus relief to correct the abuse of discretion when the relevant documents are found to be privileged); *In re Bridgestone/Firestone, Inc.*, 106 S.W.3d 730, 734 (Tex. 2003) (orig. proceeding) (overturning the trial court's order to produce documents because the court found them to be privileged). Mandamus relief is warranted under those circumstances because once the protected documents are disclosed the error cannot later be repaired on appeal.

However, the Supreme Court has clarified that mandamus review may not be appropriate when the privileged or confidential information is "so innocuous or incidental that the burden of reviewing an order to produce them outweighs the benefits of such a review." *In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 469 (Tex. 2008) (orig. proceeding).

ii. Irrelevant Documents and Impermissible "Fishing Expeditions"

Likewise, an appellate court would not be able to cure the trial court's discovery order when the trial court orders the production of "patently irrelevant or duplicative documents[,]" which constitutes harassment or inflicts such a burden on the producing party that it far outweighs any benefit the requesting party may obtain by the discovery. *See In re CSX Corp.*, 124 S.W.3d 149, 153 (Tex. 2003) (orig. proceeding) (per curiam).

The Supreme Court has been clear that discovery that rises to the point of a "fishing expedition" will not be tolerated, and such an order is subject to mandamus relief. *In re Nat. Lloyds Ins. Co.*, 449 S.W.3d 486, 488 (Tex. 2014) (orig. proceeding) (per curiam) (issuing mandamus relief to prevent the discovery of claim files of third parties sought with respect to a plaintiff's claims of undervaluation of her insurance claim, and holding "Scouring claim files in hopes of finding similarly situation claimants whose claims were evaluated differently from Erving's is at best an 'impermissible fishing expedition.'").

iii. Overly Broad Request

Also, within this same category is an order compelling discovery that is overly broad. *See Dana*, 138 S.W.3d at 304 (ordering the trial court to modify its discovery order to limit the discovery of insurance policies from 1945 on instead of all policies from 1930 on); *CSX*, 124 S.W.3d at 153 (concluding that a discovery order requiring production of documents from an unreasonably long period of time is overbroad and subject to mandamus relief); *In re Am. Optical Corp.*, 988 S.W.2d 711, 713 (Tex. 1998) (orig. proceeding) (per curiam) (holding that a discovery order requiring production of "virtually all documents regarding its products" is overly broad). The Court has clearly recognized the need to minimize "undue expense" by curbing discovery abuse, and, therefore,

has authorized mandamus relief in those situations. *In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 180-81 (Tex. 1999) (orig. proceeding).

The Supreme Court recently issued mandamus relief to prevent the deposition of each of the corporate representatives of the expert's employer from being taken in order to explore bias. *In re Ford Motor Co.*, 427 S.W.3d 396, 396 (Tex. 2014) (orig. proceeding). The Court held, "Such a fishing expedition, seeking sensitive information covering twelve years, is just the type of overbroad discovery the rules are intended to prevent." *Id.* at 397. If, however, the trial court makes a proper effort to narrow discovery, mandamus relief will not issue. *In re Deere & Co.*, 299 S.W.3d 819, 820 (Tex. 2009) (orig. proceeding) (per curiam).

iv. Location of Deposition

Finally, some courts have permitted mandamus review of a trial court's ruling on the location of a deposition. *See Wal-Mart Stores, Inc. v. Street*, 754 S.W.2d 153, 155 (Tex. 1988). Courts have issued such relief when the trial court's order is in conflict with TRCP 192.2, *Grass v. Golden*, 153 S.W.3d 659, 663 (Tex. App.—Tyler 2004, orig. proceeding), and when the order is at odds with the rules regarding the location of a deposition . *In re Rogers*, 43 S.W.3d 20, 29 (Tex. App.—Amarillo 2001, orig. proceeding) (stating). But at least one court has declined to conduct mandamus review of a trial court's order regarding the location of a deposition because the relator failed to establish the trial court's ruling was more than an incidental ruling warranting mandamus relief. *In re N.E. Indep. Sch. Dist.*, No. 04-13-00248-CV, 2013 WL 2247485, at *1 (Tex. App.—San Antonio May 22, 2013, orig. proceeding) (per curiam) (mem. op.).

b. Party's Ability to Present a Viable Claim or Defense is Severely Compromised

The second category of mandamus relief in the discovery context is when a:

> "party's ability to present a viable claim or defense is severely compromised or vitiated by the [trial court's] erroneous discovery ruling."

In re Colonial Pipeline Co., 968 S.W.2d 938, 941 (Tex. 1998) (orig. proceeding); *see also Walker*, 827 S.W.2d at 843. This occurs when the party "is effectively denied the ability to develop the merits of its case." *Colonial Pipeline*, 968 S.W.2d at 941; *see also In re Allied Chem. Corp.*, 227 S.W.3d 652, 658 (Tex. 2007) (orig. proceeding) (summarizing the court's review of various discovery orders).

c. Discovery Will Not Be a Part of the Appellate Record

Finally, mandamus relief is available when the trial court denies a party discovery and the missing discovery is omitted from the appellate record. *See Colonial Pipeline*, 968 S.W.2d at 941. Such a ruling is subject to mandamus relief because without a record of what discovery was excluded, on appeal after the final judgment the appellate court will not be able to determine whether the trial court's error was harmful. *Id.*

2. Setting Aside a Valid Discovery Agreement Without Good Cause

When a trial court, without good cause, sets aside an agreement entered into by the parties and defines the scope of permissible discovery—limiting the cost and accountability of litigating a dispute—the court has abused its discretion. *See In re BP Prods. N. Am., Inc.*, 244 S.W.3d 840, 848 (Tex. 2008) (orig. proceeding) (finding that the trial court had "no valid basis for ignoring the parties' agreement"); *see also* TEX. R. CIV. P. 191.2 (recognizing that parties may conference over discovery matters). "Good cause" in this context means that the burdens and benefits should be weighed to determine if good cause exists to order production. *See generally In re Weekley Homes*, 295 S.W.3d 309, 317 (Tex. 2009) (orig. proceeding) (comparing the federal rule and the Texas rule and finding both require the balancing of relevant factors to determine whether there was good cause).

The Supreme Court has concluded that mandamus review is warranted in this situation because delaying review until appeal—when one party relied on the agreed discovery procedure and had partially performed its obligations—would defeat the purpose of the discovery agreement. *See BP Prods.*, 244 S.W.3d at 846 ("An easy disregard for partially performed agreements would discourage parties from committing to discovery agreements for fear that the other party would avail itself of the benefit of the bargain and then attempt to avoid its own obligations.").

In furtherance of its analysis of why mandamus relief is warranted in such a case, the Court relied on public policy interests such as encouraging parties to resolve discovery conflicts without court orders and concluded the benefits to mandamus relief outweigh the detriments. *See id.* at 848–49 (granting mandamus to further the general public policy idea that parties should amicably resolve disputes throughout litigation when possible).

3. Order Abating All Discovery

In *In re Van Waters & Rogers, Inc.*, the Supreme Court held that the trial court's order abating virtually all discovery in a seven-year-old mass tort case

warranted mandamus relief. *In re Van Waters & Rogers, Inc.*, 62 S.W.3d 197, 201 (Tex. 2001) (orig. proceeding) (per curiam). The Court concluded that the order denied the defendants "discovery that goes to the heart of the litigation," and the prolonged abatement of discovery threatened the loss of critical evidence. *Id.* Therefore, the Court held there was no adequate remedy by appeal from the order abating the discovery. *See id.* (finding no adequate remedy by appeal when the loss of evidence was at issue and the trial court abused its discretion in abating discovery).

4. Discovery Sanctions

Texas Rule of Civil Procedure 215.2 provides the situations in which courts can authorize sanctions for "failure to comply with [an] [o]rder or with [a] [d]iscovery request." TEX. R. CIV. P. 215.2.

> "Under [r]ule 215, the trial court must predicate its award of attorney's fees on a party's abuse of the discovery process or other sanctionable conduct."

In re Ford Motor Co., 988 S.W.2d 714, 722 (Tex. 1998) (orig. proceeding). A just discovery sanctions order (1) must be directed toward remedying the prejudice caused to the innocent party, and (2) "should fit the crime." *In re SCI Tex. Funeral Servs., Inc.*, 236 S.W.3d 759, 761 (Tex. 2007) (orig. proceeding) (per curiam). A trial court's sanctions order that goes beyond this is an abuse of discretion. *Id.*

Generally, a party has an adequate remedy by appeal from a trial court's order awarding attorney's fees or sanctions related to discovery because Texas Rule of Civil Procedure 215.2 provides that such an award is subject to review on appeal from a final judgment. *See* TEX. R. CIV. P. 215.2.

However, an appeal is not adequate when a trial court "imposes a monetary penalty on a party's prospective exercise of its legal rights." *In re Ford*, 988 S.W.2d at 723. In *In re Ford*, the Court held that Ford lacked an adequate remedy by appeal from an order imposing discovery sanctions against Ford for seeking mandamus relief." *Id.*

The Court concluded:

> A monetary penalty for seeking mandamus relief takes something that cannot be restored by appeal: the unfettered right to seek any relief that may be available by mandamus. The most [an] appeal can restore is the penalty improperly imposed; it cannot free the party of the chilling effect the penalty has on the exercise of the party's legal rights.

Id. at 722.

Further, mandamus relief may be available to parties when the trial court orders discovery sanctions to be paid prior to the final judgment. *See Braden v. Downey*, 811 S.W.2d 922, 929 (Tex. 1991) (orig. proceeding); *TransAm. Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991) (orig. proceeding) (deciding the relator had no adequate remedy by appeal because discovery sanctions were to be paid before the final judgment, thereby entitling the relator to mandamus relief). When parties must pay discovery sanctions prior to the final judgment, the cost might present a barrier to continuing the suit. *Id.* Therefore, mandamus may be warranted. *Id.*

Although, when the trial court defers payment of discovery sanctions until the final judgment in the case, mandamus relief is presumed to not be available. *See Braden*, 811 S.W.2d at 929. The party has an adequate remedy by appeal because the sanctions present no barrier to continuing the current suit since the final sanctions can be appealed with the final judgment prior to having to pay them. *Id.*

5. Presuit Discovery

Mandamus relief is available when a trial court orders a pre-suit deposition without making the findings required by TRCP 202.4. TEX. R. CIV. P. 202.4 (delineating the requirements for an order authorizing a pre-suit deposition); *In re Does*, 337 S.W.3d 862, 865 (Tex. 2011) (orig. proceeding) (per curiam) (finding that the trial court abused its discretion "in failing to follow [r]ule 202"); *see also In re CSX Corp.*, 124 S.W.3d 149, 152 (Tex. 1992) (orig. proceeding) (per curiam) (clarifying that when a trial court does not follow the rules of procedure, it constitutes an abuse of discretion, which can be remedied by a petition for writ of mandamus); *In re Univ. of Tex. Health Ctr. at Tyler*, 198 S.W.3d 392, 396 (Tex. App.—Texarkana 2006, orig. proceeding) (noting that departures from the rules of civil procedure amount to an abuse of discretion).

TRCP 202.4(a) requires the trial court to find that:

> (1) allowing the petitioner to take the requested deposition may prevent a failure or delay of justice in an anticipated suit; or
> (2) the likely benefit of allowing the petitioner to take the requested deposition to investigate a potential claim outweighs the burden or expense of the procedure.

TEX. R. CIV. P. 202.4(a).

If the trial court fails to make the required findings, it is an abuse of discretion to order the pre-suit deposition, and mandamus relief is available because the party to a Rule 202 proceeding has no remedy by appeal. *See In re Does*, 337 S.W.3d at 865.

Additionally, mandamus relief is available from an order authorizing a presuit deposition if which the potential plaintiff does not show the trial court has personal jurisdiction over the potential deponent. *In re Doe*, 444 S.W.3d 603, 610 (Tex. 2014) (orig. proceeding).

C. Motion for New Trial

In Texas, there has been a long-standing practice of trial courts maintaining significant authority to grant a new trial without the necessity of explaining the reason. *See In re Columbia Med. Ctr.*, 290 S.W.3d 204, 213 (Tex. 2009) (orig. proceeding). In 2009, the Court issued *In re Columbia*, the first opinion in a trilogy of Texas Supreme Court cases that began providing for mandamus relief from the grant of a motion for new trial following a jury trial. *See Columbia*, 290 S.W.3d at 213. For the "trilogy" of cases, as this article refers to them, see *In re Toyota Motor Sales, Inc.*, 407 S.W3d 746 (Tex. 2013) (orig. proceeding); *In re United Scaffolding Inc.*, 377 S.W.3d 685 (Tex. 2012) (orig. proceeding); *Columbia*, 290 S.W.3d at 204.

1. Specific Reasons for Granting a New Trial Must Be Provided- *In re Columbia*

For the first time in *Columbia*, the Supreme Court held that a trial court must specify the reasons for disregarding the jury's verdict in the order granting a motion for new trial and cannot simply grant on the basis that it is "in the interest of justice." *See Columbia*, 290 S.W.3d at 212–13. Specifically, the Court explained that "[t]he reasons should be clearly identified and reasonably specific. Broad statements such as 'in the interest of justice' are not sufficiently specific." *Id.* at 215. Accordingly, when a trial court fails to specify the reasons for granting a new trial in the order, mandamus relief is appropriate to require the trial court to do so. *Id.* at 213. However, the opinion stopped short of considering whether the merits of properly delineated reasons for granting a new trial are reviewable.

2. Reasons Must Be Legally Appropriate and Detailed- *In re United Scaffolding*

In 2012, the Supreme Court issued its second opinion in the trilogy. In *In re United Scaffolding, Inc.*, the Court analyzed its holding in *Columbia* and provided further guidance regarding the review of a trial court's order granting a new trial. *In re United Scaffolding*, 377 S.W.3d at 687-89. But again, the Court focused on the specificity of the order, not whether the substance of the trial court's reasons should be reviewed. *See id.* at 689.

The Court provided that in determining how detailed a trial court's order granting a new trial needs to be, in addition to the "level of review" to be used, "we must both afford jury verdicts appropriate regard and respect trial courts' significant discretion in these matters." *Id.* at 688–89. The Court noted that in *Columbia*, it

> "focused . . . not on the length or detail of the reasons a trial court gives, but on how well those reasons serve the general purpose of assuring the parties that the jury's decision was set aside only after careful thought and for valid reasons."

Id. at 688 (citing *Columbia*, 290 S.W.3d at 213).

The Court acknowledged *Columbia* only "touched on the substance of" the trial court's reason for ordering a new trial by explaining what that reason cannot be—the trial court's substitution of its "judgment for that of the jury." *Id.*

> "That purpose will be satisfied so long as the order provides a cogent and reasonably specific explanation of the reasoning that led the court to conclude that a new trial was warranted."

The Court continued:

> In light of these considerations, we hold that a trial court does not abuse its discretion so long as its stated reason for granting a new trial (1) is a reason for which a new trial is legally appropriate (such as a well-defined legal standard or a defect that probably resulted in an improper verdict); and (2) is specific enough to indicate that the trial court did not simply parrot a pro forma template, but rather derived the articulated reasons from the particular facts and circumstances of the case at hand.

Id. at 688–89.

The Court gave examples of when an order granting a new trial may rise to the level of an abuse of discretion:

a) "if the given reason, specific or not, is not one for which a new trial is legally valid,"
b) "if the articulated reasons plainly state that the trial court merely substituted its own judgment for the jury's," or
c) "if the order, though rubber-stamped with a valid new-trial rationale, provides little or no insight into the judge's reasoning."

Id. at 689.

The Court imposed a two-part test:

1) "The order must indicate that the trial judge considered the specific facts and circumstances of the case at hand", and
2) "explain how the evidence (or lack of evidence) undermines the jury's findings."

Id. The Court concluded that a new trial order will not be sufficient if it merely recites a legal standard, such as the statement that one of the jury's findings is against the great weight and preponderance of the evidence, or if it fails to provide "no more than a pro forma template rather than" an actual analysis. *Id.*

3. Merit-based Mandamus Review of New Trial Orders- *In re Toyota*

The Supreme Court recently decided the third case in the trilogy. *See In re Toyota Motor Sales, Inc.*, 407 S.W.3d 746, 749 (Tex. 2013) (orig. proceeding). *In re Toyota* addressed the issue of whether mandamus review should be extended to conduct a merit-based review of the trial court's reasons for granting a new trial. *Id.* The order granting a new trial contained facially-valid reasons for granting a new trial after the jury trial had concluded. *See id.*

Until the issuance of *Toyota*, courts had declined to conduct a merit-based review of new trial orders. The Court concluded,

> "[H]aving already decided that new trial orders must meet these requirements and that noncompliant orders will be subject to mandamus review, it would make little sense to conclude now that the correctness or validity of the orders' articulated reasons cannot also be evaluated."

Toyota, 407 S.W.3d at 758.

It determined that disallowing a merit-based review would work against the requirements in *Columbia* and render them "mere formalities, lacking any substantive 'checks' by appellate courts to ensure that the discretion to grant new trials has been exercised appropriately." *Id.* The Court concluded that even if the order complies with procedural requirements, the order cannot stand so long as the trial court's reasoning is not supported by the record. *Toyota*, 407 S.W.3d at 758–59. The decision in *Toyota* finalizes the trilogy regarding new trial orders after a jury trial—a merit-based review of such orders is now subject to mandamus review. *Id.* at 759.

4. Impact of *In re Toyota*

Since *Toyota*, the Supreme Court and courts of appeals have begun to review the merits of a trial court's order granting a new trial. *In re Whataburger Restaurants LP*, 429 S.W.3d 597, 599-600 (Tex. 2014) (orig. proceeding) (granting mandamus relief from the new trial granted due to allegations of juror misconduct); *In re City of Houston*, 418 S.W.3d 388, 393 (Tex. App.—Houston [1st Dist.] 2013, orig. proceeding) (granting mandamus relief from a new trial order granted based on "newly discovered evidence" and misconduct); *In re United Servs. Auto. Ass'n*, 446 S.W.3d 162, 173-180 (Tex. App.—Houston [1st Dist.] 2014, orig. proceeding) (issuing mandamus relief from a new trial order granted on the following bases: jury's failure to find breach of the policy; violation of the order in limine; jury's improper award of damages; failure to award appellate attorney fees; and failure to argue for a "knowingly" predicate to the mental anguish award).

TIP: Accordingly, for a new trial order to withstand scrutiny in a mandamus proceeding, it must: (1) give specific reasons for granting a new trial; (2) the reasons on their face must be legally sound; and (3) the reasonably specific and legally sound rationale must actually be true and supported by the law.

V. CHECKLIST

Since mandamus review is highly discretionary, depends on the facts of the case, and is ever-evolving, there sometimes is little predictability in whether mandamus relief is appropriate. However, what is predictable are defects that can lead to a summary denial of the petition. In order to survive an appellate court's initial review of a petition for writ of mandamus, the following must be complied with:

1) **Adequate record,** including a signed order, a reporter's record if one was taken, and all pleadings and motions referred to in the petition.
2) **TRAP 52.3(j) Certification**
3) **No disputed areas of fact** for the appellate court to determine.
4) **Predicate request** made to the trial court before seeking mandamus relief.
5) **No unexplained delay** in seeking mandamus relief.
6) **No other remedy available.**
7) **Clear abuse of the trial court's discretion** can be shown.

VI. CONCLUSION

While this Article attempts to categorize those rulings subject to mandamus relief, this remedy is continuously evolving. Courts have begun to look at the relief as less categorical and instead as a remedy that changes with the facts of each case and the ruling at issue. With the issuance of *In re Prudential*, Courts are now more likely to consider the availability of

mandamus relief instead of summarily denying it because it does not fit within an appropriate category. It is a fluid remedy that allows litigants to construct effective arguments for mandamus relief on issues a court previously would not grant relief on.