CURRENT MANDAMUS TRENDS

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Mandamus relief, of course, requires both an abuse of discretion (or the violation of a legal duty imposed by law) and an inadequate remedy by appeal.[1] But when is a remedy by appeal inadequate for review of a trial court's incidental rulings? Never? That historically has been the general answer. Sometimes? That in recent years has been the answer under an "exceptional or compelling circumstances" test. Always? No, but the current balancing test for inadequate remedy by appeal used by the supreme court in the last several years provides a broader standard that will allow review of more incidental trial court rulings. That balancing test asks the following question:

> Do the benefits of mandamus review outweigh the detriments of mandamus review and render an appeal an inadequate remedy?

This test may not differ substantially or practically from the exceptional circumstances test of the past but does stress the case-specific analysis that the supreme court now embraces in the mandamus context.

Thus, as with the exceptional circumstances test, the answer under the balancing test is not always easy to predict. This paper summarizes the general categories of circumstances that have met the inadequate remedy by appeal standard for mandamus relief. The paper also provides a few of the current trends or hot topics in the mandamus area based upon opinions issued over the last year.

I. Overview of inadequate remedy by appeal standards.

The supreme court has (as have intermediate courts) repeatedly held that an inadequate remedy by appeal is not shown by (1) incidental trial rulings in the routine course of proceedings, or (2) "mere" delay and expense of enduring a trial.[2] Courts define incidental rulings to include "(1) pleas to the jurisdiction, (2) pleas of privilege, (3) pleas in abatement, (4) motions for summary judgment, (5) motions for instructed verdict, (6) motions for judgment non obstante verdicto, (7) motions for new trial, and [8] a myriad of interlocutory orders [including discovery orders]." *Abor v. Black*, 695 S.W.2d 564, 567 (Tex. 1985) (orig. proceeding); *see also Pope v. Ferguson*, 445 S.W.2d 950, 954 (Tex. 1969) (orig. proceeding).

The supreme has "consistently held that [it] we lack[s] jurisdiction to issue writs of mandamus to supervise or correct incidental rulings of a trial judge when there is an adequate remedy by appeal....[even if] it might logically be argued that the petitioner for the writ was entitled, as a matter of law, to the action sought to be compelled.'" *Bell Helicopter*, 787 S.W.2d at 955. Nevertheless, the supreme court has long-recognized that, at least, "exceptional circumstances" can sometimes overcome both the mere delay or expense and incidental ruling bars to mandamus review.

A. Exceptional circumstances test.

Mandamus relief, as an extraordinary writ, has always required an inadequate remedy by appeal. Although not clear for a time whether that prong applied to discovery orders, the supreme court clarified its applicability in 1992. *Walker*, 827 S.W.2d at 840. The court outlined three categories of discovery orders for which appeal is inadequate remedy. *Id.* But with other types of rulings the courts used an exceptional circumstances test. Most recently, the supreme court adopted a balancing test that either changed or refined those tests (depending upon your view). *In re Prudential Ins. Co. of America*, 148 S.W.3d 124 (Tex. 2004) (orig. proceeding).

1. *Walker* (discovery) categories of extraordinary circumstances.

In the discovery context, the supreme court recognized at least three categories of circumstances that are sufficiently "extraordinary" to justify mandamus relief:

(1) <u>inability to cure discovery error</u> (e.g., order to disclose privileged material or order to produce patently irrelevant or duplicative documents that clearly constitutes harassment or imposes a burden on the producing party far out of proportion to benefit to requesting party);

(2) <u>vitiates or severely compromises a party's ability to present a viable claim or defense</u> (e.g.,

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[1] *See, e.g., Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992, orig. proceeding).

[2] *See, e.g., Walker*, 827 S.W.2d at 840 ("appellate remedy not inadequate merely because it may involve more expense or delay than obtaining an extraordinary writ"); *Bell Helicopter Textron, Inc. v. Walker*, 787 S.W.2d 954, 955 (Tex. 1990, orig. proceeding) ("Generally, the cost and delay of pursuing an appeal will not, in themselves, render appeal an inadequate alternative to mandamus review."); *Canadian Helicopters Ltd. v. Wittig*, 876 S.W.2d 304, 306 (Tex. 1994) ("This requirement is met only when parties are in danger of permanently losing substantial rights. It is not satisfied by a mere showing that appeal would involve more expense or delay than obtaining a writ of mandamus."); *Iley v. Hughes*, 158 Tex. 362, 311 S.W.2d 648, 652 (1958) (same).

denial of a reasonable opportunity to develop the merits of his or her case, so that the trial could be a waste of judicial resources as with death penalty sanctions);

(3) disallowed discovery and the missing discovery cannot be made part of the appellate record (e.g., protective order precluding deposition in which case evidence will not become part of the record). *Walker*, 827 S.W.2d at 840.

In nondiscovery contexts, courts have analogized to these categories of circumstances to determine if an ordinary appeal would be an adequate remedy. *See, e.g., In re Allstate*, 85 S.W.3d 193 (Tex. 2002) (orig. proceeding) (lack of contractual right to appraisal vitiates insurers defense to contract claim); *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 141 (Tex. 2004) (orig. proceeding) (Phillips, C.J., dissenting) (appellate remedy is inadequate if it comes too late and permanently deprives a party of substantial rights). The second category—vitiates a claim or defense—often arises in broader contexts in which a party's rights are in jeopardy.

2. Other exceptional circumstances.

The supreme court has allowed review of other incidental rulings in what have been deemed exceptional, unique or compelling circumstances.

For example, in the context of incidental rulings on personal jurisdiction, the supreme court has found an appeal inadequate in such circumstances as voluminous claims being improperly tried to create undue pressure to settle or comity concerns with foreign defendants. *See, e.g., CSR Ltd. v. Link*, 925 S.W.2d 591, 596 (Tex. 1996) (orig. proceeding) (granting mandamus relief on overruling objection to jurisdiction when "[m]ass tort litigation…place[s] significant strain on a defendant's resources and create[d] considerable pressure to settle the case, regardless of the underlying merits….[and] large number of lawsuits to which [defendant] could potentially be exposed [was] significant to [the] determination that appeal [was] not an adequate remedy" in that case); *Nat'l Indus. Sand Ass'n v. Gibson*, 897 S.W.2d 769, 776 (Tex. 1995) (orig. proceeding) (mandamus granted for denial of special appearance when "erroneous assertion of jurisdiction was so arbitrary and without reference to guiding principles" that "the harm to the defendant [was] irreparable" by ordinary appeal; thus, the "total and inarguable absence of jurisdiction" justified extraordinary relief); *KDF v. Rex*, 878 S.W.2d 589, 593 (Tex. 1994) (comity and risk of harm to international relations for erroneous exercise of personal jurisdiction over another sovereign justified mandamus review).

When there was a permanent deprivation of rights—similar to the first *Walker* category—the court also found a compelling reason for review. *See, e.g, Tilton v. Marshall*, 925 S.W.2d 672 (Tex. 1996) (orig. proceeding) (patently irrelevant and highly sensitive and personal documents ordered produced, an irretrievable loss of personal privacy). Conversely, when there was no permanent deprivation of a substantial right, the court refused to find compelling circumstances that warranted mandamus relief. *Polaris Inv. Management Corp. v. Abascal*, 892 S.W.2d 860, 862 (Tex. 1995) (orig. proceeding) (venue subject to reversal and retrial on ordinary appeal).

There are a broad range of circumstances that could be compelling—often unique to the facts of a case—but some general categories (such as various public policies) have always recurred.

B. Balancing test (benefits > detriments).

In 2004, the Texas Supreme Court again discussed the applicable standard: "The operative word, 'adequate,' has no comprehensive definition; it is simply a proxy for the careful balance of jurisprudential considerations that determine when appellate courts will use original mandamus proceedings to review the actions of lower courts….An appellate remedy is 'adequate' when any benefits to mandamus review are outweighed by the detriments. When the benefits outweigh the detriments, appellate courts must consider whether the appellate remedy is adequate." *In re Prudential Ins. Co. of America*, 148 S.W.3d 124, 136-37 (Tex. 2004) (orig. proceeding). There is no longer a bright-line rule barring review of incidental rulings, and the "mere delay or expense bar" is perhaps more easily trumped by an "utter waste of resources" analysis. While there may no longer be an "exceptional circumstances" test, exceptional circumstances no doubt still play a role in the balancing of benefits and detriments. The question then is, where is the line at which the detriments outweigh the benefits of awaiting an ordinary appeal?

The detriments of mandamus review weigh against disrupting trial proceedings with interlocutory appellate intervention. Mandamus review (1) interferes with trial court proceedings, (2) distracts appellate court attention to issues that may be unimportant both to ultimate disposition of the case at hand and to the uniform development of law, and (3) adds unproductively to expense and delay of civil litigation. *Id.; Pope v. Ferguson*, 445 S.W.2d 950, 954 (Tex. 1969) (orig. proceeding). Traditionally those detriments have been presumed to carry more weight in the analysis unless a showing of exceptional circumstances tips the balance in favor of mandamus

review and relief. *See, e.g., Pope,* 445 S.W.2d at 954. The *Prudential* test does not necessarily begin from that point of deference, looking instead more heavily at the "utter waste of resources" caused by an unnecessary trial.

The benefits of mandamus vary. Although indicating that the balancing of the benefits and the detriments of an ordinary appeal "resists categorization," the supreme court noted that "mandamus review of **significant rulings** in **exceptional cases** may be essential to

[1] preserve **important 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] spare private parties and the public the **time and money utterly wasted** enduring eventual reversal of improperly conducted proceedings." *In re Prudential*, 148 S.W.3d at 136-37 (emphasis added).[3] Looking at the "utter waste of resources" is a trend that began before *Prudential*. *See, e.g., In re Masonite Corp.*, 997 S.W.2d 194 (Tex. 1998) (orig. proceeding) (irreversible waste of resources by trying hundreds of cases in improper forum).

"Effectively unreviewable" is a concept that federal courts have reviewed regularly under the collateral order doctrine and sometimes mandamus applications. The United States Supreme Court revisited the "effectively unreviewable" requirement, which mirrors to some extent the "elusive issue" or "preservation of rights" categories noted above in *Prudential*. *See Will v. Hallock*, 546 U.S. 345 (2006). The Court noted that the final order requirement is "meant to further: judicial efficiency and the sensible policy of avoiding the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise." *Id.* The Court noted that effectively unreviewable requires some "compelling public ends" or "some particular value of a high order that would imperil a public interest is necessary." *Id.* The Court concluded that a litigant's right to an early end to litigation is insufficient to meet the compelling public end requirement to support appeal of an interlocutory order. *Id.* Texas law is not dissimilar: it seeks to protect public interests but will not *generally* do so *merely* to avoid or delay trial. On the other hand, Texas does not restrict compelling circumstances to only those involving public interests.

In the mandamus context, the Fifth Circuit has held that a party must show not only clear and indisputable error but also that such error is "irremediable on appeal." *In re Occidental Pet. Corp.*, 217 F.3d 293, 295 (5th Cir. 2000). That court has noted: "Because it interposes an appellate court in a matter pending before a lower court, that is presumed to be more familiar with the circumstances of the case, a petitioner's right must be clear and undisputable. Although it may obviate the need for improper or unwarranted proceedings, it cannot be used as a substitute for appeal, even when hardship may result from delay or an unnecessary trial." *In re Ramu*, 903 F.3d 312 (5th Cir. 1990) (holding indefinite stay that deprived party of property including residence in matter not yet heard by court the circumstances were sufficiently extraordinary to warrant review). The Fifth Circuit also termed the "irremediable" prong as "effectively unreviewable." *In re Avantel, S.A.*, 343 F.3d 311 (5th Cir. 2003). Such a standard again suggests a permanent loss of rights. The Fifth Circuit's approach appears similar to what Texas had traditionally followed. With the focus in Texas on rights shifting from permanent deprivation to a broader "preservation" analysis, however, the "utter waste of resources" has grown in significance.

Four years after *Prudential*, again faced with a "mere delay and expense of trial" argument against mandamus, the Texas Supreme Court explained its preference for a benefits/detriment analysis rather than the former *ad hoc* approach. *See In re McAllen Med. Ctr.*, 275 S.W.3d 458, 464-69 (Tex. 2008) (orig. proceeding). The supreme court noted that it had previously granted mandamus relief in cases "in which the very act of proceeding to trial—regardless of the outcome—would defeat the substantive right involved." *Id*. at 465 (referring to various contractual, statutory or constitutional rights protected by mandamus). In *McAllen*, mandamus relief was granted where the trial court abused its discretion by ruling that plaintiffs' expert was qualified to offer an opinion in support of the plaintiffs' health care claims. *Id*. The court explained that the legislature had already "found that the cost of conducting plenary trials of claims as to which no supporting expert could be found was affecting the availability and affordability of health care—driving physicians from Texas and patients from medical care they need." *Id.* Although an evidentiary-type ruling, the statutory basis and public interest at issue tipped the benefits/cost in favor of mandamus relief. "The balancing analysis…merely recognizes that the adequacy of an appeal depends on the facts involved in each case." *Id.*

[3] The court also noted that mandamus review is preferable to enlargement of categories of interlocutory appeal. *Id.* at 137.

C. Exceptional circumstances revealed by balancing test.

Faced with the issue of whether a granting of new trial (at least, without a stated reason) could be reviewed by mandamus, the Texas Supreme Court stressed the "exceptional circumstances" test. *See In re Columbia Med. Ctr. of Las Colinas*, 290 S.W.3d 204, 207-09 (Tex. 2009) (orig. proceeding) ("On balance, the significance of the issue—protection of the right to trial by jury—convinces us that the circumstances are exceptional and mandamus review is justified."). The court then discussed inadequate remedy by appeal, relying on *Prudential*. *Id.* at 209-10 (losing "the benefit of a final judgment based on the first jury verdict without ever knowing why" and having to endure "the time, trouble, and expense of the second trial" results in an inadequate remedy by appeal from the second trial); *see also In re United Scaffolding, Inc.*, 301 S.W.3d 661 (Tex. 2010) (orig. proceeding) (relying on *Columbia*); *In re E.I du Pont de Nemours & Co.*, 289 S.W.3d 861 (Tex. 2009) (orig. proceeding) (relying on *Columbia*); *In re Baylor Med. Ctr.*, 289 S.W.3d 859 (Tex. 2009) (orig. proceeding) (relying on *Columbia*). As such, there was a two-prong approach that reached the same result.

Similarly, in *In re United Services Automobile Association*, the court noted that "extraordinary circumstances…warrant extraordinary relief." 307 S.W.3d 299, 313-14 (Tex. 2010) (orig. proceeding). Citing to *McAllen* and *Prudential*, the court again repeated: "Deciding whether the benefits of mandamus outweigh the detriments requires us to weigh public and private interests, recognizing that—rather than categorical determinations—the adequacy of an appeal depends on the facts involved in each case." *Id.* The court stressed that having endured one trial in a forum that lacked jurisdiction and facing a second trial on a claim barred by limitations is not "the most efficient use of the state's judicial resources." *Id.* (citing to *CSR*, a pre-*Prudential* case). Moreover, the court noted that denial of mandamus relief would "thwart the legislative intent that non-tolled TCHRA claims be brought within two years." *Id.*

Citing *Prudential* and/or *McAllen*, the supreme court and courts of appeals, although not always expressly, refer to or use a balancing test. *See, e.g., In re Weekley Homes, L.P.*, 295 S.W.3d 309, 322-23 (Tex. 2009) (orig. proceeding) (citing *Prudential* and holding "[i]ntrusive discovery measures…require, at a minimum, that the benefits of the discovery measure outweigh the burden imposed upon the discovered party"); *In re Schmitz*, 295 S.W.3d 451 (Tex. 2009) (orig. proceeding) (citing both and noting that allowing case to proceed to trial without meeting derivative suit requirements would defeat the substantive rights the legislature sought to protect); *In re Global Sante Fe Corp.*, 275 S.W.3d 477 (Tex. 2008) (orig. proceeding) (citing both and holding legislature had balanced the relevant interests in adopting silicosis MDL procedures); *In re Union Carbide*, 273 S.W.3d 152 (Tex. 2008) (orig. proceeding) (citing *Prudential* and weighing benefits of protecting integrity of random assignment); *In re Islamorada Fish Co. Tex., LLC*, No. 05-10-344-CV, 2010 Tex. App. LEXIS 6309 (Tex. App.—Dallas Aug. 5, 2010, orig. proceeding) (citing *Prudential* and *McAllen* and deciding that benefits of legal issue of availability of punitive damages outweighed detriments of mandamus proceeding); *In re Behringer Harvard Tic Mgt. Servs., LP*, No. 05-10-00624-CV, 2010 Tex. App. LEXIS 5706 (Tex. App.—Dallas July 21, 2010, orig. proceeding) (citing *Prudential* and *Walker* and holding no adequate remedy by appeal without discussion for appointment of master to review documents in camera); *In re Cameron County Judge Carlos Cascos*, No. 13-10-00016-CV, 2010 Tex. App. LEXIS 5543 (Tex. App.—Corpus Christi July 15, 2010, orig. proceeding) (citing a series of supreme court cases and holding refusal to suspend enforcement during interlocutory appeal left no adequate remedy); *In re Int'l Marine, LLC*, No. 13-10-00195-CV, 2010 Tex. App. LEXIS 3957 (Tex. App.—Corpus Christi May 25, 2010, orig. proceeding) (citing *Prudential* and *McAllen* and referring to balancing test); *In re Samson Lone Star, LLC*, 06-10-00050-CV 2010, Tex. App. LEXIS 6464 (Tex. App.—Texarkana Aug. 3, 2010, orig. proceeding) (citing *Prudential* and *Walker* in trade secret discovery case as supporting mandamus relief); *In re Brokers Logistics, Ltd.*, No. 08-09-00086-CV, 2010 Tex. App. LEXIS 3743 (Tex. App.—El Paso May 19, 2010, orig. proceeding) (citing *Prudential* and holding that denying right to submission of responsible third party denies statutory right and mandamus relief allows court to provide guidance on law and avoid potential to skew litigation).

Thus, particularly when faced with novel legal issues or fact patterns, courts may be more likely to undertake an express balancing but the weighing process still harks to the fundamental principle underlying mandamus review—exceptional or extraordinary circumstances that require extraordinary relief.

D. Previously recognized categories or obvious lack of inadequate remedy by appeal.

At times, courts merely cite to the category of cases on which mandamus has been routinely allowed with notation to the interest being protected. *See, e.g., See In re John G. & Marie Stella Kenedy Mem.*

Foundation, 315 S.W.3d 519 (Tex. 2010) (orig. proceeding) (in a **void order** case, "mandamus relief is appropriate without a showing that the relators lack an adequate appellate remedy"); *In re Lisa Laser USA, Inc.*, 310 S.W.3d 880, 883 (Tex. 2010) (orig. proceeding) ("Further, an appellate remedy is inadequate when a trial court improperly refuses to enforce a **forum-selection clause** because allowing the trial to go forward will 'vitiate and render illusory the subject matter of the appeal'—i.e., the trial in the proper forum."); *In re Laibe Corp.*, 307 S.W.3d 314, 316 (Tex. 2010) (orig. proceeding) (quoting *ADM*); *In re ADM Investor Servs., Inc.*, 304 S.W.3d 371, 373-74, 376 (Tex. 2010) (orig. proceeding) ("We have consistently granted petitions for writ of mandamus to enforce **forum-selection clauses** because a trial court that improperly refuses to enforce such a clause has clearly abused its discretion….There is no adequate remedy by appeal when a trial court refuses to enforce a forum-selection clause."); *In re Golden Peanut Co.*, 298 S.W.3d 629 (Tex. 2009) (orig. proceeding) (citing *L&L Kempwood* and holding that "[a] party denied the **right to arbitrate pursuant to an agreement subject to the FAA** does not have an adequate remedy by appeal and is entitled to mandamus relief to correct a clear abuse of discretion");[4] *In re Liberty Mut. Fire Ins. Co.*, 295 S.W.3d 327 (Tex. 2009) (orig. proceeding) (citing *SW Bell* and *Entergy* and holding that failure to dismiss in **absence of jurisdiction from administrative proceedings** "is correctable by mandamus to prevent a disruption of the orderly processes of government"); *In re Greater Houston Orthopedic Specialists, Inc.*, 295 S.W.3d 323, 326 (Tex. 2009) (orig. proceeding) ("Mandamus relief is appropriate when a trial judge refuses to grant a **nonsuit** in the absence of a pending claim for affirmative relief."); *In re Int'l Profit Assocs., Inc.*, 286 S.W.3d 921 (Tex. 2009) (orig. proceeding) (citing without discussion to prior mandamus opinion on forum selection clauses); *In re Houstonian Campus, LLC*, 312 S.W.3d 178 (Tex. App.—Houston [14th Dist.] 2010, orig. proceeding) (citing to *Walker* and *Weekley* in holding appeal inadequate to remedy **overbroad discovery order** requiring disclosure of personal information of club members).

A pure categorical approach alone, however, is less likely to be persuasive in obtaining extraordinary relief. *In re Ensco Offshore Int'l*, 311 S.W.3d 921 (Tex. May 7, 2010) (orig. proceeding) (citing *Gen. Elec.* And holding that "[a]n appeal is not adequate when a motion to dismiss on forum non conveniens grounds is erroneously denied, so mandamus relief is available, *if it is otherwise warranted*."). In *McAllen*, the court noted the balancing analysis is preferable to *ad hoc* categorical approach and explained that even in certain *Walker* categories the balance may not tip in favor of review. 275 S.W.3d at 464-69 ("For example, some privileged or confidential matters may be so innocuous or incidental that the burden of reviewing an order to produce them outweighs the benefits of such review."). As such, not even the long-recognized discovery categories should be considered automatically subject to mandamus review.

II. Role of jurisdiction source in inadequacy of remedy analysis.

The sources of jurisdiction most often used to support a writ of mandamus to the supreme court or to a court of appeals appear in the Government Code. Other statutory bases also confer jurisdiction on the supreme court, the courts of appeals, and (sometimes) trial courts to grant writs of mandamus. Those statutory sources generally apply to very narrow circumstances, but when faced with a need to enforce certain statutory provisions or rights, a party should check the applicable statute for possible mandamus jurisdiction. Some of the statutory sources are listed in Section B below. Where mandamus jurisdiction is specifically conferred, the likelihood of mandamus relief increases either because the inadequate remedy prong is statutorily eliminated or the public policy underlying the statute is a circumstance supporting an inadequate remedy by appeal. *See* Section IV.

A. The Government Code.

1. Supreme Court.

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

[4] For a discussion of changes to review of orders regarding agreements subject to the FAA, see Section V.

2. Courts of Appeals

Courts of appeals may issue writs (1) against a county or district court judge or (2) to enforce the jurisdiction of the court. TEX. GOV'T CODE § 22.221(a), (b). As a result, a court of appeals may not issue a writ of mandamus against the court officials who are not judges (such as a district clerk, court reporter, or master) unless necessary to enforce the court's jurisdiction. *See, e.g.*, *In re Nubine*, No. 13-08-00507-CV, 2008 Tex. App. LEXIS 8942 (Tex. App.—Corpus Christi Nov. 20, 2008, orig. proceeding) (dismissing mandamus petition for want of jurisdiction where writ against a district clerk not necessary to protect court's jurisdiction); *Click v. Tyra*, 867 S.W.2d 406 (Tex. App.–Houston [14th Dist.] 1993, orig. proceeding) (granting leave to file petition against district clerk to preclude clerk from interfering with court's jurisdiction).

3. Trial Courts

A district or county court has jurisdiction to grant writs necessary to the enforcement of its jurisdiction. TEX. GOV'T CODE §§ 24.011, 25.0004, 26.051. Moreover, a party's statutory right to mandamus relief may begin with the trial court. *See, e.g.*, TEX. GOV'T CODE § 551.142(a) (interested person, including member of media, can seek mandamus or injunction to stop or prevent violation or threatened violation of Open Meetings Act); § 552.321 (requestor or attorney general may seek mandamus to compel governmental body to make information available under Public Information Act); § 802.003 (party seeking to require governing body of public retirement system to comply with certain statutory requirements may seek mandamus relief in district court); § 2306.452 (interested party may seek mandamus relief to enforce public housing bond obligations); TEX. INS. CODE § 823.013 (person aggrieved by failure of commissioner to act may seek mandamus relief in Travis County district court). The attorney general may seek mandamus relief in additional circumstances. *See, e.g.*, TEX. HEALTH & SAFETY CODE § 433.086 (food and drug regulatory requirements).

B. Other Statutory Bases of Jurisdiction.

Various statutory provisions confer mandamus jurisdiction on the supreme court or the courts of appeals. These express jurisdictional grounds often expressly or implicitly play a role in the inadequate remedy analysis. Some of the more common provisions include the following:

1. Venue.

The supreme court and courts of appeals may enforce mandatory venue provisions. TEX. CIV. PRAC. & REM. CODE § 15.0642. The "application for the writ of mandamus must be filed before the later of: (1) the 90th day before the date the trial starts; or (2) the 10th day after the date the party receives notice of the trial setting." *Id.* Review of mandatory venue by mandamus under section 15.0642 (1995) dispenses with the inadequate remedy requirement. *In re Transcontinental Realty Investors, Inc.*, 271 S.W.3d 270 (Tex. 2008) (orig. proceeding); *In re Missouri Pac. RR Co.*, 998 S.W.2d 212 (Tex. 1999) (orig. proceeding). Otherwise, the statutory right to mandamus would be largely illusory or undermine the purpose of the immediate review. *Id. Cf. In re Rivera*, No. 13-10-006-CV, 2010 Tex. App. LEXIS 828 (Tex. App.—Corpus Christi Feb. 2, 2010, orig. proceeding) (reviewing failure to transfer pursuant to a mandatory ministerial duty under Family Code by mandamus). On the other hand, "[a] court's ruling or decision to grant or deny a transfer [for the convenience of the parties or the witnesses] is not grounds for appeal or mandamus and is not reversible error." TEX. CIV. PRAC. & REM. CODE § 15.002.

2. Elections.

The supreme court and courts of appeals have jurisdiction to compel any duty imposed by law in connection with holding an election or a political party convention (even if the person responsible is not a public officer). TEX. ELEC. CODE § 273.061. The attorney general may seek a writ of mandamus to compel the filing of an annual voting system report. *Id.* § 123.065.

3. Open Meetings and Records/Public Information Act.

The supreme court and courts of appeals may enforce certain requirements of the statutory provisions governing open meetings and open records. TEX. GOV'T CODE §§ 551.142, 552.321.

4. Governing boards.

The supreme court and courts of appeals may enforce duties of certain governing boards, e.g., the housing authority, certain veteran assistance programs, and the insurance commissioner. TEX. LOC. GOV'T CODE § 392.101; TEX. INS. CODE § 823.013; TEX. NAT. RES. CODE § 164.019.

5. State bonds.

The supreme court and courts of appeal may issue writs against officials not satisfying state bond obligations. TEX. AGRIC. CODE § 58.036; TEX. LOC. GOV'T CODE § 325.089; TEX. TRANSP. CODE § 441.177; TEX. WATER CODE §§ 20.117, 65.513.

6. Injunctive Relief under Natural Resources Code.

The courts of appeals have jurisdiction to issue writs of mandamus to prevent enforcement of injunctive relief granted without notice or hearing. TEX. NAT. RES. CODE §§ 85.258, 85.259.

7. Attorney Discipline.

The supreme court may enforce orders in disciplinary proceedings. TEX. R. DISC. P. 3.09.

C. Concurrent Jurisdiction.

As is evident from a review of the above jurisdictional bases, the supreme court and the courts of appeals often have concurrent jurisdiction, including original jurisdiction over district and statutory county judges. Texas Rule of Appellate Procedure 52.3(e), however, provides that "the petition must be presented first to the court of appeals unless there is a compelling reason not to do so. If the petition is filed in the Supreme Court without first being presented to the court of appeals, the petition must state the compelling reason why the petition was not first presented to the court of appeals." TEX. R. APP. P. 52.3(e). Failure to do so would implicitly weigh in the balance of whether the supreme court would or should take a matter on extraordinary writ.

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

III. Other general mandamus principles may weigh in the inadequate remedy balance.

In addition to jurisdiction principles, several general mandamus principles may play some role in the analysis of the adequacy of a remedy by appeal.

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

A writ of mandamus and an interlocutory appeal are not interchangeable. If you seek a writ of mandamus when an interlocutory appeal would have been the appropriate remedy by which to challenge a ruling, you may lose your opportunity for pre-trial appellate review. *See In re Watkins*, 279 S.W.3d 633 (Tex. 2009); *Raymond Overseas Holding, Ltd. v. Curry*, 955 S.W.2d 470, 471-72 (Tex. App.–Fort Worth 1997, no pet.) (interlocutory appeal provided adequate remedy by which to challenge special appearance and made mandamus relief inappropriate).[5] In other words, an adequate appellate remedy existed.

If it is unclear which route to take (i.e., does the court have jurisdiction over the interlocutory appeal?) or different types or orders at issue, a party may want (or need) to take both routes. *See, e.g., In re Wachovia Sec., LLC*, 312 S.W.3d 243 (Tex. App.—Dallas 2010, orig. proceeding) (party filed mandamus petition and interlocutory appeal related to order denying its motion to compel arbitration); *In re Tarrant Co. Hosp. Dist.*, 52 S.W.3d 434 (Tex. App.–Fort Worth 2001, orig. proceeding) (party perfected interlocutory appeal of an order on a plea to the jurisdiction and petitioned for mandamus relief as to orders on discovery sanctions). The supreme court confirmed that such dual track approaches may be necessary. *See In re D. Wilson Constr. Co.*, 196 S.W.3d 774, 779-80 & n.4 (Tex. 2006) (unclear whether Texas or Federal Arbitration Act applied requiring dual approach).

An agreed interlocutory appeal may, in limited circumstances, be available as an alternative to a mandamus, even if the subject of the order is not listed in Section 51.014(a) of the Texas Civil Practice & Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(d). However, such an appeal allows a court

[5] Similarly, a court will not generally construe an ordinary appeal as a petition for writ of mandamus. *See Pinnacle Gas Treating, Inc. v. Read*, 13 S.W.3d 126, 127 (Tex. App.–Waco 2000, no pet.) (mandamus relief governed by Rule 52 could not be sought as alternative relief to save improper interlocutory appeal from dismissal for want of jurisdiction); *Thomas v. Texas Dept. of Crim. Justice*, 3 S.W.3d 665, 667 (Tex. App.–Fort Worth 1999, no pet.) (finding pleading did not satisfy requirements of Rule 52 and did not save a case from dismissal for late-filed notice of appeal). Justice Brister recently expressed his disfavor with a dual track practice, instead preferring in the face of uncertainty that a party could file either and an appellate court treat is as appropriate. *See In re D. Wilson Constr. Co.*, 196 S.W.3d 774, 784 (Tex. 2006) (unclear whether Texas or Federal Arbitration Act applied requiring dual approach).

to enter an "order for interlocutory appeal" that requires (1) "the parties agree that the order involves a controlling question of law as to which there is a substantial ground for difference of opinion; (2) an immediate appeal from the order may materially advance the ultimate termination of the litigation; and (3) the parties agree to the order." *Id.* In the face of its limited scope and difficult procedural hurdles, the agreed interlocutory appeal does not appear to play a role in the inadequate remedy by appeal analysis (although a showing that one was denied or refused might in some circumstances carry some weight).

B. Mandamus review not prerequisite to later review.

Although the issue may sometimes become moot if the request for relief is delayed until the ordinary appeal, the decision not to seek mandamus review of a ruling does not alone waive a right to raise the issue on appeal after trial. *See National Union Fire Ins. Co. v. Ninth Court of Appeals*, 864 S.W.2d 58, 62 (Tex. 1993) (orig. proceeding); *Walker v. Packer*, 827 S.W.2d 833, 856 n.9 (Tex. 1992) (orig. proceeding); *Pope v. Stephenson*, 787 S.W.2d 953, 954 (Tex. 1990) (per curiam); *Forward v. Housing Auth. of City of Grapeland*, 864 S.W.2d 167, 170 (Tex. App.-Tyler 1993, no pet.). As a result, refusing review because an appeal is inadequate does not automatically result in a loss of rights or affect a party's right to ultimate review. *Perry v. Cull*, 258 S.W.3d 580, 586 (Tex. 2008) (recognizing "general rule that parties waive nothing by foregoing interlocutory review and awaiting a final judgment to appeal"); *City of San Benito v. Rio Grande Valley Gas Co.*, 109 S.W.3d 750, 756 (Tex. 2003) ("filing a request for an extraordinary writ is not a prerequisite to an appeal").

C. Importance to jurisprudence of state may overlap or support showing of inadequate remedy by appeal.

Although not expressly or uniformly followed, the supreme court has noted it will not "grant mandamus relief unless [it] determine[s] that the error is of such importance to the jurisprudence of the state as to require correction." *Walker*, 827 S.W.2d at 839 n.7. Rule 56.1 (although not specifically addressing petitions for writs of mandamus) sets out factors the supreme court considers in deciding whether an issue is important to the jurisprudence of the state. The listed factors include the following:

> (1) whether the justices of the court of appeals disagree on an important point of law;
> (2) whether there is a conflict between the courts of appeals on an important point of law;
> (3) whether a case involves the construction or validity of a statute;
> (4) whether a case involves constitutional issues;
> (5) whether the court of appeals appears to have committed an error of law of such importance to the state's jurisprudence that it should be corrected; and
> (6) whether the court of appeals has decided an important question of state law that should be, but has not been, resolved by the Supreme Court.

TEX. R. APP. P. 56.1(a).

For an analysis of opinions from the supreme court on this point, see Elizabeth V. Rodd, "What is Important to the Jurisprudence of the State," Practice Before the Texas Supreme Court, State Bar of Texas (2003). As the article points out, the court frequently determines statutory construction issues (an area which is often the basis for mandamus review of public policy issues) to be important to the jurisprudence of the state. *Id.* As a result, the two propositions overlap and may support each other in the inadequate remedy by appeal analysis.

D. Fact issues, insufficient record or failure to comply with the Government Code or Rule 52 could preclude review by mandamus.

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

Additionally, "[w]ith respect to resolution of factual issues or matters committed to a trial court's discretion, for example, the reviewing court may not substitute its judgment for that of the trial court." *Walker*, 827 S.W.2d at 840. Indeed, appellate courts do not resolve factual issues, so the existence of any factual disputes not resolved by the trial court can defeat a request for mandamus relief. *See, e.g., West v. Solito*, 563 S.W.2d 240, 245 (Tex. 1978) (orig. proceeding). Even in the context of an election case in which inadequate remedy by appeal is a fairly low hurdle, fact issues will preclude review by mandamus. *See In re Angelini*, 186 S.W.3d 558 (Tex. 2006) (orig. proceeding). Thus, the trial court's resolution of (or failure to resolve) fact issues rarely supports mandamus relief.

"On the other hand, review of a trial court's determination of the legal principles controlling its ruling is much less deferential. A trial court has no 'discretion' in determining what the law is or applying the law to the facts. Thus, a clear failure by the trial

court to analyze or apply the law correctly will constitute an abuse of discretion . . . ." *Walker*, 827 S.W.2d at 840. But legions of cases demonstrate that failure to fall within the jurisdiction conferred by the Government Code or to follow the requirements of Texas Rule of Appellate Procedure 52 will result in denial of what might otherwise be a viable petition for writ of mandamus.

IV. General categories where appeal may be inadequate remedy.

From a review of primarily supreme court, incidental-ruling and *Prudential*- or *McAllen*-citing cases, the following general categories seem to recur commonly as circumstances in which appeal is an inadequate remedy.[6] One should note that most cases involve more than one category, and indeed, the more of these fundamental propositions that are applicable to a case, the more likely that relief might be granted. Rarely is there one circumstance that tips the balance from the detriments of disrupting trial court proceedings.

A. Public interest or policy.

As in federal court, public interests or policy provide the largest, overarching category. The supreme court has noted that "[t]hese considerations [of balancing jurisprudential considerations] implicate both public and private interests." *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136-37 (Tex. 2004) (orig. proceeding). "[T]he consideration whether to grant mandamus review [is not] confined to private concerns." *Id.; see also In re Ford Motor Co.,* 165 S.W.3d 315, 317 (Tex. 2005) (orig. proceeding) (noting "we have explained that determining whether a party has an adequate remedy by appeal requires a 'careful balance of jurisprudential considerations' that 'implicate both public and private interests'"). Thus, "[g]ranting mandamus relief…is entirely consistent with the decisions of [the supreme court] that hold irreversible harm to the public's interest makes a remedy by appeal inadequate." *In re Woman's Hosp. of Texas, Inc*., 141 S.W.3d 144, 149 (Tex. 2004) (orig. proceeding) (Owen, J., dissenting from denial of writs). A broad range of public policies or interests can be implicated as shown below.

1. Public interest or policy set out in legislatively mandated scheme.

Showing inadequate remedy by appeal may be made easier if the legislature has already agreed that the circumstance at hand should be addressed in a certain manner as a matter of public policy or to protect public interests. The following examples describe legislatively mandated schemes (along with other reasons in some instances) that supported mandamus relief:

- Hardship of forcing party to endure full blown trial and enduring postponed appellate review despite **administrative agency's exclusive jurisdiction** combined with fact "permitting a trial to go forward would interfere with the important **legislatively mandated function and purpose of the PUC**" justified mandamus review. *In re Entergy Corporation, et al.*, 142 S.W.3d 316 (Tex. 2004) (orig. proceeding) (emphasis added). In essence, a disruption of **orderly processes of government**. *Id.; see also In re Liberty Mut. Fire Ins. Co.*, 295 S.W.3d 327 (Tex. 2009) (orig. proceeding) (citing *SW Bell* and *Entergy* and holding that failure to dismiss in absence of jurisdiction from administrative proceedings "is correctable by mandamus to prevent a disruption of the orderly processes of government"); *In re S.W. Bell Tel. Co*., 235 S.W.3d 619 (Tex. 2007) (orig. proceeding); *Tex. Water Comm'n v. Dellana*, 849 S.W.2d 808, 810 (Tex. 1993) (orig. proceeding) (failure to exhaust administrative remedies); *In re State of Texas*, No. 03-10-260-CV, 2010 Tex. App. LEXIS 9044 (Tex. App.—Austin Nov. 12, 2010, orig. proceeding) (trial court's order requiring production of documents interfered with legislative scheme to provide quick resolution to eminent domain proceedings; *In re Tex. Mut. Ins. Co.*, No. 05-05-00944-CV, 2005 Tex. App. LEXIS 5823 (Tex. App.—Dallas July 27, 2005, orig. proceeding) (interference with Workforce Commission's exclusive jurisdiction).

- **Statutory/legislative policy provides condemnors substantial right to expedited hearing** and possession of easement immediately after commissioners file findings such that refusal to grant 60 day continuance review by appeal inadequate. *In re Gulf Energy Pipeline Co.*, 884 S.W.2d 821 (Tex. App.—San Antonio 1994, orig. proceeding). Failure to stay **vitiated and rendered**

[6] **CAVEAT:** Innumerable mandamus opinions exist from the last decades of petitions. This section does not attempt to catalog every case, particularly the voluminous opinions on discovery disputes. Instead, the section synthesizes opinions from the supreme court, discussing incidental rulings, or applying the *Prudential/McAllen* test into a series of fairly consistent themes and categories of circumstances when remedy by appeal may be inadequate.

illusory right to a rapid, inexpensive alternative to traditional litigation. *Id.*

- **Injunction barring grievance proceedings** that **interfered** with State Bar Act and disturbing "the **orderly processes of government**" justified mandamus review. *State v. Sewell*, 487 S.W.2d 716, 719 (Tex. 1972) (orig. proceeding) (emphasis added); *see also State Bar of Texas v. Jefferson*, 942 S.W.2d 575, 575-76 (Tex. 1997) (orig. proceeding) (granting mandamus relief when court had no jurisdiction to enter temporary restraining order to interfere with and stay administrative grievance proceedings).

- Refusing to review unpreserved charge error in family law case, in part, because the **legislature has established a public policy of speedy resolution of matters affecting the child's best interest**. *In re B.L.D.*, 113 S.W.3d 340, 353 (Tex. 2003) (orig. proceeding) (emphasizing that the Texas Family Code requires dismissal of parental-termination proceedings within one year subject to a single 180-day extension and therefore concluding that "judicial economy is not just a policy – it is a statutory mandate").

- Dissenting justice argued mandamus appropriate when "injury to public that cannot be remedied by appeal [for failure to dismiss as legislatively mandated under article 4590i when expert report requirements not met] is the adverse impact on the cost and availability of health care to patients in Texas….When suits continue to proceed through the system…the **costs of those proceedings unalterably add to the overall cost of defending health care claims. This is precisely the evil that the Legislature sought to eliminate** when it mandated dismissal…." *In re Woman's Hosp. of Texas, Inc.*, 141 S.W.3d 144, 149 (Tex. 2004) (orig. proceeding) (Owen, J., dissenting from denial of writs) (emphasis added).

- **"Considering the legislative intent evident in the statutes sanctioning and encouraging the professional-review process and the public interest served by an efficient and expeditious determination of whether [the defendant doctor's] professional conduct negatively affects the quality of medical care at the hospital**—a question that lies within the peculiar expertise of those participating in the process, the court clearly abused its discretion when it…interfer[ed] in the professional-review proceedings prior to their exhaustion under the bylaws. … **Governmental policy not only favors but promotes the professional-review process as a means of advancing the public interest in quality health care**.…Without mandamus relief, Relators and **the public will be deprived of the benefits of the professional-review process and, most importantly, the public interest served by an efficient and expeditious review process will be defeated**." *Walls Regional Hosp. v. Altaras*, 903 S.W.2d 36, 43-44 (Tex. App.—Waco 1994, orig. proceeding) (citations omitted and emphasis added).

- **Public policy embodied in section 74.052(c)** of the Civil Practice and Remedies Code "**to provide health care liability defendants with an informal, expedited means of evaluating the merits of a health care claimant's claims**" demonstrates no adequate remedy by appeal of an order that precludes oral communications with nonliability-defendant physicians. *See In re Collins*, 296 SW.W.3d 911, 920 (Tex. 2009) (orig. proceeding).

- Denial of mandamus relief would "**thwart the legislative intent that non-tolled TCHRA claims be brought within two years.**" *In re United Services Automobile Association*, 307 S.W.3d 299, 313-14 (Tex. 2010) (orig. proceeding).

- Public policy embodied in rules and statutes that **practice of law reserved to those of good moral character** and giving **continuing jurisdiction to BODA** supporting mandamus relief. *In re State Bar of Tex.* 113 S.W.3d 730 (Tex. 2003) (orig. proceeding); *State Bar of Texas v. Heard*, 603 S.W.2d 829 (Tex. 1980) (orig. proceeding).

- **Interference with appraisal district and appraisal review board functions**, combined with unnecessary burden of **expense and delay** from trial supported mandamus relief. *In re ExxonMobil Corp*., 153 S.W.3d 605 (Tex. App.—Amarillo 2004, orig. proceeding). **Number of other cases** involving common questions (36 similar

questions in other district courts) further justified resolution by mandamus. *Id.*

2. Public interest in best interests of child.

The best interests of a child is another public interest routinely protected through mandamus relief. *See, e.g., In re Dept. of Family & Prot. Services*, 273 S.W.3d 637 (Tex. 2009) (failure to dismiss temporary conservatorship proceeding was abuse of discretion that violated public interest in speedy resolution of child custody issues); *Powell v. Stover*, 168 S.W.3d 322 (Tex. 2005) (orig. proceeding) (proper remedy to resolve jurisdiction under UCCJEA); *In re Mays-Hooper*, 189 S.W.3d 777 (Tex. 2006) (orig. proceeding) (parties agreed best interests of child in grandparent visitation case made ordinary appeal inadequate); *Geary v. Peavy*, 878 S.W.2d 602, 603 (Tex. 1994) (public interest in best interest in child often justifies mandamus relief); *In re Gray Law, LLP*, No. 2-05-379-CV, 2006 Tex. App. LEXIS 3176 (Tex. App.—Fort Worth, Apr. 20, 2006, orig. proceeding) (funds deposited in registry of court deprived father of funds used in generating support for child); *In re Oliver*, No. 10-05-00213-CV, 2005 Tex. App. LEXIS 5040 (Tex. App.—Waco Jun. 29, 2005, orig. proceeding) (best interests of child one factor in deciding inadequate remedy by appeal).

3. Public interest in federal funding.

Another example of a public interest to be protected is federal funding, particularly when combined with protection of the bests interests of a child. In *In re Office of Attorney Gen.*, 257 S.W.3d 695 (Tex. 2008), the court held that the TRO that required the AG to remit child support payments to a private company violated rules of procedure was not appealable but put at risk federal funding for violation of federal law. Thus, given the lack of appeal and public interest, review by mandamus was allowed.

4. Public interest of comity and international relations.

Risk of harm to international relations may justify mandamus relief in context of erroneous exercise of personal jurisdiction over another sovereign. *KDF v. Rex*, 878 S.W.2d 589, 593 (Tex. 1994) (orig. proceeding); *In re BP Oil Supply Co.*, 317 S.W.3d 915 (Tex. App.—Houston [14th Dist.] 2010, orig. proceeding) (granting mandamus relief for stay in favor of suit in Delaware as a matter of comity that advances Texas first-filed public policy).

5. Public policy of encouraging service as legislator through legislative continuance.

The supreme court summarized the purpose and importance of a legislative continuance and why mandamus relief is appropriate as follows:

> As our sister court summarized, a mandatory legislative continuance usually serves a dual purpose of encouraging good men and women to sacrifice their time in the interest of good government and of protecting a party to a law suit whose attorney may be serving in the Legislature. Without such a device, a lawyer-legislator could be forced to decide between fulfilling the duty owed to a client and the duty owed to constituents to participate in a legislative session. The consequences of that decision--possibly nonparticipation in a legislative session--could not be remedied on appeal. **To give full effect to the Legislature's policy decision regarding legislative continuances**, we conclude that a party has no adequate remedy by appeal when a trial court abuses its discretion by denying a motion for legislative continuance.

In re Ford Motor Co., 165 S.W.3d 315, 321-22 (Tex. 2005) (orig. proceeding) (quotation marks and citations omitted).

6. Fundamental public interest of confidence in the administration of justice.

"[J]ustice should not only be done, but should manifestly and undoubtedly be seen to be done.'" *See In re Chavez*, 130 S.W.3d 107, 115 (Tex. App.-El Paso 2003, orig. proceeding) (citations omitted). As such, mandamus relief was appropriate to review of an order denying a motion to recuse without referral to the presiding judge and thereby preserve public trust in justice system.

7. Public interest in orderly administration of justice and comity.

The following are examples of when mandamus relief may preserve the orderly administration of justice:

- **One court interfering with the jurisdiction of another court by transfer or otherwise**. *See, e.g., In re Reliant Energy, Inc.*, 159 S.W.3d 624 (Tex. 2005) (orig. proceeding); *In re U.S. Silica* 157 S.W.2d 434 (Tex. 2005) (orig. proceeding); *In re The John G. & Marie Stella Kenedy Mem. Found.*, 159 S.W.3d 133 (Tex. App.—Corpus Christi 2004, orig.

proceeding) (citing *In re Swepi*, 85 S.W.3d 800 (Tex. 2002) (orig. proceeding)).

- **Denial of statutory right to assignment of statutory probate court judge.** *In re Lewis*, 185 S.W.3d 615 (Tex. App.—Waco 2006, orig. proceeding [mand. denied]).

- **Refusal to stay dominant proceeding in another state**. *In re State Farm Mut. Auto. Ins. Co.*, 192 S.W.3d 897 (Tex. App.—Tyler 2006, orig. proceeding); *see* also *In re Chenault*, No. 04-09-00303-CV, 2009 Tex. App. LEXIS 6419 (Tex. App.—San Antonio Aug. 19, 2009, orig. proceeding [mand. denied]) (ordering court to dismiss a wrongful death lawsuit brought as next friend of decedent's daughter by person who had been ruled unfit to represent decedent's daughter in parallel Michigan proceedings).

- **Transfer when motion to recuse pending** *In re Kiefer*, No. 05-10-00452-CV, 2010 Tex. App. LEXIS 4268 (Tex. App.—Dallas June 4, 2010, orig. proceeding); *In re Guilbot*, No. 14-09-00595-CV, 2009 Tex. App. LEXIS 8419 (Tex. App.—Houston [14th Dist.] Nov. 3, 2009, orig. proceeding).

- **Indefinite abatements**/arbitrary suspension of trial court proceedings. *In re Sims*, 88 S.W.3d 297 (Tex. App.—San Antonio 2002, orig. proceeding).

- **Refusal of continuances for designation of experts or cure late jury fee** provides judicial economy and favors jury trials and fair proceedings. *See, e.g., Gen. Motors Corp. v. Gayle*, 951 S.W.2d 469 (Tex. 1997) (orig. proceeding); *In re Oliver*, No. 10-05-00213-CV, 2005 Tex. App. LEXIS 5040 (Tex. App.—Waco Jun. 29, 2005, orig. proceeding).

- **Forum non conveniens rulings.** *In re Ensco Offshore Int'l Co.*, 311 S.W.3d 921 (Tex. 2010) (orig. proceeding); *In re Gen. Elec. Co.*, 271 S.W.3d 681, 685 (Tex. 2008) (orig. proceeding); *In re Pirelli*, 247 S.W.3d 670, 679 (Tex. 2007) (orig. proceeding).

8. Public interest in conserving judicial resources.

As noted above, the "utter waste of private and public" resources has grown as a theme for inadequate remedies by appeal. Initially, the sheer magnitude of cases involved would tip the balance; later cases look to absolute error particularly combined with loss or curtailing of statutory or contractual rights. The following are examples of cases where the waste of resources heavily weighed in favor of mandamus:

- "[A] trial in a forum other than that contractually agreed upon will be a **meaningless waste of judicial resources**" and justified review by mandamus. *In re AIU Ins. Co.*, 148 S.W.3d 109, 118 (Tex. 2004) (orig. proceeding) (emphasis added) (contractual **forum selection clause**); *see also In re Laibe Corp.*, 307 S.W.3d 314, 316 (Tex. 2010) (orig. proceeding); *In re ADM Investor Servs., Inc.*, 304 S.W.3d 371, 373-74 (Tex. 2010) (orig. proceeding); *In re Int'l Profit Assocs., Inc.*, 286 S.W.3d 921 (Tex. 2009) (orig. proceeding); *In re Lyon Fin. Servs., Inc.*, 257 S.W.3d 228 (Tex. 2008) (orig. proceeding); *In re Automated Collection Tech., Inc.*, 156 S.W.3d 557 (Tex. 2004) (orig. proceeding); *In re Talent Tree Crystal*, No. 01-05-00686-CV, 2006 Tex. App. LEXIS 1134 (Tex. App.—Houston [1st Dist.] Feb. 9, 2006, orig. proceeding) (vitiates and renders illusory any subsequent appeal).

- Appeal of denial of special appearance not adequate when defending the claims of more than **8,000 plaintiffs** in litigation that would last for years was not *mere* expense and delay. *In re E.I. duPont de Nemours & Co.*, 92 S.W.3d 517, 523-24 (Tex. 2002) (orig. proceeding).

- Sua sponte improper transfer of venue of **hundreds of cases to sixteen counties** rather than county requested by defendant, although an incidental pretrial ruling, done with complete lack of authority justified mandamus where appeal after trial would be "an irreversible waste of judicial and public resources." *In re Masonite*, 997 S.W.2d 194, 199 (Tex. 1999) (orig. proceeding) (emphasis added).

- "Concerns of judicial efficiency in **mass tort litigation** combined with the magnitude of the potential risk for mass tort actions against the defendant make ordinary appeal inadequate." *CSR Ltd. v. Link*, 925 S.W.2d 591, 596 (Tex. 1996) (orig. proceeding) ("[m]ass tort litigation … place[d] significant strain on a

defendant's resources and create[d] **considerable pressure to settle** the case, regardless of the underlying merits").

- "'[E]rroneous assertion of jurisdiction was so arbitrary and without reference to guiding principles' that 'the harm to the defendant [was] irreparable' by ordinary appeal; thus, the '**total and inarguable absence of jurisdiction**'" justified extraordinary relief. *Nat'l Indus. Sand Ass'n v. Gibson*, 897 S.W.2d 769, 776 (Tex. 1995) (orig. proceeding) (**mass tort litigation**).

- Party "lacks an *adequate* remedy by appeal of the trial court's denial of her motion for continuance…[because] [o]n a practical and prudential level, a trial of [the mother's] claim for increased child support without a necessary expert, given the facts alleged, would be an **irreversible waste of private and public resources.** No sound principle or practicality that we can fathom would be served by requiring [the mother] to try her **claim for increased child support** now without a necessary expert and thus likely not prevail, and then appeal and try the case a second time on remand—when the child whose support is at issue will probably have reached majority—because the trial court should have granted her motion for continuance before the first trial." *In re Oliver*, No. 10-05-00213-CV, 2005 Tex. App. LEXIS 5040, *7-8 (Tex. App.—Waco, Jun. 29, 2005 orig. proceeding); *see also In re Kings Ridge Homeowners Ass'n*, 303 S.W.3d 773 (Tex. App.—Fort Worth 2010, orig. proceeding) (allowing mandamus relief when homeowner's association's expert improperly struck and noting that continuing to trial without an expert would be an empty exercise).

- "'[R]equiring a defendant to go to trial without having his recusal motion ruled upon in compliance with Rule 18a is **patently unfair, as well as inefficient and wasteful of judicial resources**....Sometimes a remedy at law that exists may nevertheless be so uncertain, tedious, burdensome, slow, inconvenient, inappropriate, or ineffective as to be deemed inadequate.'…[S]uch circumstances will also needlessly burden our state prosecutorial resources and will cause defendants and crime victims to endure yet another trip through the criminal justice system, which all parties could have avoided through the availability of appropriate mandamus relief." *In re Chavez*, 130 S.W.3d 107, 115 (Tex. App.-El Paso 2003, orig. proceeding) (citations omitted).

- **Nonsuit after transfer of venue.** *In re Rocket*, 256 S.W.3d 257 (Tex. 2008) (orig. proceeding) (holding that important substantive right to single request to transfer venue lost without review, need to provide guidance in law, and **utter waste of resources** supported mandamus relief).

- **Refusal to allow or striking designation of responsible third party.** *Compare In re Unitec Elevator Servs. Co.*, 178 S.W.3d 53, 65-66 (Tex. App.—Houston [1st Dist.] 2005, orig. proceeding) ("Thus, while we may consider the additional expense and effort of preparing for and participating in another subsequent trial, this factor does not, standing alone, justify mandamus relief if there is an adequate remedy by appeal.") *with In re Brokers Logistics, Ltd.*, No. 08-09-00086-CV, 2010 Tex. App. LEXIS 3743 (Tex. App.—El Paso May 19, 2010, orig. proceeding) (directing trial court to set aside order striking responsible third party).

- **Bifurcation rather than severance.** *See In re United Fire Lloyds*, No. 04-10-00094, 2010 Tex. App. LEXIS 5454 (Tex. App.—San Antonio July 14, 2010, orig. proceeding).

9. Public interest in encouraging timely resolution of litigation.

In *In re BP Prods.*, 244 S.W.3d 840 (Tex. 2008) (orig. proceeding), the supreme court granted mandamus relief when the parties' discovery agreement regarding apex depositions was set aside by trial court. The court reasoned that the parties had already acted in reliance on the agreement meant to resolve an ongoing discovery dispute and honoring the agreement encouraged parties to resolve discovery disputes and the timely resolution of the litigation. *Id.*

B. Substantial procedural or substantive rights of parties.

1. Integrity of the judicial system/procedural rights.

In the following cases, the overarching theme is to protect the integrity of the system (although arguably a public interest as well) while ensuring a party's procedural and due process right to a fair trial.

- **Consolidation.** "Whatever advantage may be gained in judicial economy or avoidance of repetitive costs [by consolidating twenty plaintiffs' claims] is **overwhelmed by the greater danger an unfair trial would pose to the integrity of the judicial process**." *In re Van Waters & Rogers, Inc.*, 145 S.W.3d 203, 210-12 (Tex. 2004) (orig. proceeding) ("Given the totally unrelated claims of plaintiffs exposed to entirely different chemicals produced by different defendants, consolidation risks the jury finding against a defendant based on sheer numbers, on evidence regarding a different plaintiff, or out of reluctance to find against a defendant with regard to one plaintiff and not another. The defensive theories as too many of these plaintiffs may also differ given the varying sources of exposure. The confusion created by multiple defensive theories is augmented in this case because there are fifty-five original defendants and at least nine remaining defendants. Similarly, confusion and prejudice could subsume the valid claim of a plaintiff based on an unrelated flaw or defense applicable to a different plaintiff's claim. **Juror confusion and prejudice**, under these facts, is almost certain, and it would be impossible for an appellate court to untangle the confusion or prejudice on appeal.").

- **Refusal to strike of intervention**. *In re Union Carbide*, 273 S.W.3d 152 (Tex. 2008) (orig. proceeding) (severance before ruling on motion strike unrelated party's intervention abuse of discretion that improperly circumvented the random assignment of cases mechanism designed to prevent forum-shopping). "On balance, mandamus review is warranted because the benefits of establishing the priority that trial courts must give to ruling on motions to strike interventions and re-emphasizing the importance of both appearance and practice in maintaining integrity of random assignment rules outweigh any detriment to mandamus review in this instance." *Id.*; *see also In re Int'l Marine, LLC*, No. 13-10-00195-CV, 2010 Tex. App. LEXIS 3957 (Tex. App.—Corpus Christi May 25, 2010, orig. proceeding) (suggesting sixteen co-workers failed to establish right to intervene but holding employer failed to make any effort to meet burden to show inadequate remedy by appeal).

- **Severance/Bifurcation**. When a trial court bifurcates rather than severs certain issues, mandamus relief may be proper. *See In re United Fire Lloyds*, No. 04-10-00094, 2010 Tex. App. LEXIS 5454 (Tex. App.—San Antonio July 14, 2010, orig. proceeding) (bifurcation of bad faith issues from coverage improper when severance proper to avoid potential waste of resources and loss of rights under policy if forced defend issue that may be moot); *see also In re Hochheim Prairie Farm Mut. Ins. Ass'n*, 296 S.W.3d 907 (Tex. App.—Corpus Christi 2009, orig. proceeding) (three property damage claims under three policies not properly tried together and mandamus relief granted to order severance).

- **"Directed" liability.** *See, e.g., In re Spooner*, 01-10-953-CV, 2010 Tex. App. LEXIS 9545 (Tex. App.—Houston [1st Dist.] Nov. 30, 2010, orig. proceeding) (improper ruling that judicially admitted liability precluded presented defense, would result in utter waste of resources, and impact ability to present appeal); *In re Park Memorial Condo. Ass'n*, 322 S.W.3d 447 (Tex. App.—Houston [14th Dist.] 2010, orig. proceeding) (resolution of right to funds in registry of court without motion for summary judgment or trial void and an abuse of discretion).

- **Fee order.** Mandamus review allowed of order requiring a insurer to pay the plaintiff's attorney fees as incurred in a compensation case because the order not only cost the carrier money but "**radically skew[ed] the procedural dynamics** of the case." *Travelers Indemnity Co. v. Mayfield,* 923 S.W.2d 590, 595 (Tex.1996).

- **Preservation of appellate rights** (via doctrine of virtual representation). *In re Lumbermens Mut. Cas. Co.*, 184 S.W.3d 718 (Tex. 2006) (orig. proceeding).

2. Loss of constitutional rights.

- **Denial of right to trial by jury.** In addition to the improper application of invalid jury waiver clauses discussed elsewhere, the denial of a constitutional (or statutory) right to trial by jury is sometimes reviewed by mandamus

in other contexts. *See, e.g., In re Reiter*,, No. 01-10-641-CV, 2010 Tex. App. LEXIS 9801 (Tex. App.—Houston [1st Dist.] Dec. 9, 2010, orig. proceeding) (denial of jury trial in child conservatorship proceeding).

- **Reasons for granting new trial**. *In re Columbia Med. Ctr. of Las Colinas*, 290 S.W.3d 204, 213 (Tex. 2009) (orig. proceeding) (trial court must state reasons for granting new trial); *see also In re United Scaffolding, Inc.*, 301 S.W.3d 661 (Tex. 2010) (orig. proceeding) (same); *In re E.I du Pont de Nemours & Co.*, 289 S.W.3d 861 (Tex. 2009) (orig. proceeding); *In re Baylor Med. Ctr.*, 289 S.W.3d 859 (Tex. 2009) (orig. proceeding) (same). In reaching that conclusion, the court relied on the constitutional right to trial by jury. The court concluded that "the parties and the public are entitled to an understandable, reasonably specific explanation why their expectations are frustrated by a jury verdict being disregarded or set aside, the trial process being nullified, and the case having to be retried." *Columbia Med. Ctr.*, 290 S.W.3d at 213. The development of subsequent cases is discussed below in Section V.

- **First Amendment rights.** *See, e.g., In re Godwin*, 293 S.W.3d 742 (Tex. App.—San Antonio 2009, orig. proceeding) (ordering trial court to dismiss suit under ecclesiastical abstention doctrine, which is grounded in First Amendment right to free exercise of religious beliefs).

3. Loss of statutory or rule-based procedural rights.

- **Improper remand from MDL court.** *In re Global Sante Fe Corp.*, 275 S.W.3d 477 (Tex. 2008) (orig. proceeding) (improper remand in contravention of legislative scheme defeats the purposes for which it was enacted).

- **Improper written demand notice for shareholder derivative suit**. *In re Schmitz*, 295 S.W.3d 451 (Tex. 2009) (orig. proceeding) (failure to make written demand with required particularity reviewable by mandamus when proceeding to trial would deny the very right of corporation to decide whether to sue for damages itself as the legislature intended by the demand provision). The court noted that, in some circumstances, the "prosecution without reasonable cause" expense provision of article 5.14 of the Texas Business Corporation Act might sufficiently protect the interests at issue. *Id.* at 458-59; *see also See also In re Denbury Res., Inc.*, No. 05-09-01206-CV, 2009 Tex. App. LEXIS 9173 (Tex. App.—Dallas Dec. 1, 2009, orig. proceeding) (granting relief when shareholders failed to meet requirements for demand futility).

- **Right to nonsuit in the absence of pending claim for affirmative relief.** *In re Greater Houston Orthopedic Specialists, Inc.*, 295 S.W.3d 323, 326 (Tex. 2009) (orig. proceeding); *In re Riggs*, No. 02-10-075-CV, 2010 Tex. App. LEXIS 3779 (Tex. App.—Fort Worth May 19, 2010, orig. proceeding); *In re Hanby*, No. 14-09-00896-CV, 2010 Tex. App. LEXIS 2626 (Tex. App.—Houston [14th Dist.] Apr. 15, 2010, orig. proceeding).

- **Nonsuit after transfer of venue.** *In re Rocket*, 256 S.W.3d 257 (Tex. 2008) (orig. proceeding) (holding that important substantive right to single request to transfer venue lost without review, need to provide guidance in law, and utter waste of resources supported mandamus relief).

- **Order requiring affirmative statements on disputed issues not proper under Rule 93**. *See In re Shelby*, 297 S.W.3d 494 (Tex. App.—Dallas 2009, orig. proceeding) (order requiring defendant to verify that "they have made such statements that a form of a partnership interest exists" mandates admission on disputed issue and no adequate remedy by appeal from such order).

- **Denial of statutory right under Residential Construction Liability Act** to inspect homes, make reasonable settlement offers and present defense to damages. *In re Kimball Homes Texas, Inc.*, 969 S.W.2d 522 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding). **Defense of suit compromised or vitiated**. *Id.*

4. Loss of procedural rights contractually agreed to.

One category (that includes the following several subsections as well) that has grown after *Prudential* is

a loss of procedural or substantive rights, including those acquired by contract.

- **Denial of arbitration/FAA.** Historically, lack of mandamus relief for refusal to enforce arbitration agreement falling under Federal Arbitration Act would deprive the party "of the benefits of the arbitration clause contracted for, and the purposes of providing a rapid, inexpensive alternative to traditional litigation would be defeated." *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 272 (Tex. 1992) (orig. proceeding);[7] *see also In re Odyssey Healthcare, Inc.*, 310 S.W.3d 419 (Tex. 2010) (orig. proceeding); *In re Golden Peanut Co.*, 298 S.W.3d 629 (Tex. 2009) (orig. proceeding); *In re Polymerica, LLC*, 296 S.W.3d 74 (Tex. 2009); *In re Macy's Texas, Inc.*, 291 S.W.3d 418 (Tex. 2009) (orig. proceeding); *In re Poly-America, LP*, 262 S.W.3d 337 (Tex. 2008) (orig. proceeding); *In re Peterbilt, Ltd.*, 196 S.W.3d 161 (Tex. 2006) (orig. proceeding); *In re Dillard Dept. Stores*, 186 S.W.3d 514 (Tex. 2006) (orig. proceeding); *In re Nexion Health at Humble, Inc.*, 173 S.W.3d 67 (Tex. 2005) (orig. proceeding); *In re McKinney*, 167 S.W.3d 833 (Tex. 2005) (orig. proceeding); *In re Wood*, 140 S.W.3d 367 (Tex. 2004) (orig. proceeding); *EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87 (Tex. 1996); *In re Autotainment Partners Ltd. P'ship*, 183 S.W.3d 532 (Tex. App.—Houston [14th Dist.] 2006, orig. proceeding); *In re Heritage Bldg. Sys., Inc.*, 185 S.W.3d 539 (Tex. App.—Beaumont 2006, orig. proceeding); *In re People's Choice Home Loan, Inc.*, 225 S.W.3d 35 (Tex. App.—El Paso 2005, orig. proceeding).

- **Denial of arbitration for nonsignatory or affiliated entities.** *In re Merrill Lynch & Co.*, 315 S.W.3d 888 (Tex. 2010) (orig. proceeding); *In re Labatt Food Serv., LP*, 279 S.W.3d 640 (Tex. 2009) (orig. proceeding); *In re Merrill Lynch Trust Co.*, 235 S.W.3d 185 (Tex. 2007) (orig. proceeding); *In re Vesta Ins. Group, Inc.*, 192 S.W.3d 759 (Tex. 2006) (orig. proceeding); *In re Palm Harbor Homes, Inc.*, 195 S.W.3d 672 (Tex. 2006) (orig. proceeding); *In re Weekley Homes, L.P.*, 180 S.W.3d 127 (Tex. 2005) (orig. proceeding); *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732 (Tex. 2005) (orig. proceeding).

- **Compelling arbitration rarely allowed.** For a discussion, see *In re Gulf Exploration, LLC*, 289 S.W.3d 836 (Tex. 2009) (orig. proceeding). For an example, see *In re Villanueva*, 311 S.W.3d 475 (Tex. App.—El Paso 2009, orig. proceeding [mand. pending]), *reh'g denied by* 2009 Tex. App. LEXIS 8302 (Tex. App.—El Paso Oct. 28, 2009) (setting aside an order compelling arbitration).

- **Award of fees or costs in violation of arbitration clause.** *In re Kelley Bros., Inc.*, No. 09-04-462-CV, 2004 Tex. App. LEXIS 10775 (Tex. App.—Beaumont Dec. 2, 2004, orig. proceeding).

- Denial of benefit **of jury waiver right contracted for** (analogized to arbitration clause). If the defendant wins, no appeal is likely. A loss of the right harmless only if no material fact issues were submitted to the jury. Thus, a separate lawsuit for breach is inadequate remedy; a party could not collaterally attack any adverse judgment. *Prudential*, 148 S.W.3d at 136 (additional reasons provided in "evades review" section below); *see also In re Bank of Am.*, 278 S.W.3d 342 (Tex. 2009) (orig. proceeding); *In re Frost Nat'l Bank*, 324 S.W.3d 320 (Tex. App.—Dallas 2010, orig. proceeding); *In re Wells Fargo Bank Minn. N.A.*, 115 S.W.3d 600 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding). On the other hand, the denial of a constitutional right to trial by jury through enforcement of inapplicable jury waiver clause likewise reviewed by mandamus. *In re Professional Pharmacy*, No. 02-10-163-CV, 2010 Tex. App. LEXIS 7798 (Tex. App.—Fort Worth Sept. 23, 2010, orig. proceeding) (arbitration clause construed as jury waiver clause would improperly deny right to trial by jury); *In re Go Colorado 2007 Revocable Trust*, No. 02-10-182-CV, 2010 Tex. App. LEXIS 5626 (Tex. App.—Fort Worth July 15, 2010, orig. proceeding)

[7] As noted in *In re Merrill Lynch*, effective September 1, 2009, the legislature added section 51.016 to the Civil Practice and Remedies Code to allow "appeal or writ of error to the court of appeals from the judgment or interlocutory order of a district court…under the same circumstances that an appeal from a federal district court's order or decision would be permitted by 9 U.S.C. § 16." 315 S.W.3d 888 (Tex. 2010) (orig. proceeding) (citing Tex. Civ. Prac. & Rem. Code § 51.016). This section is discussed below in Section V.

(granting relief from enforcement of jury when clause entered before creation of trust against whom invoked).

- **Denial of forum contractually agreed to (**analogized to arbitration clause). *In re Laibe Corp.*, 307 S.W.3d 314, 316 (Tex. 2010) (orig. proceeding); *In re ADM Investor Servs., Inc.*, 304 S.W.3d 371, 373-74 (Tex. 2010) (orig. proceeding); *In re Int'l Profit Assocs., Inc.*, 286 S.W.3d 921 (Tex. 2009) (orig. proceeding); *In re Lyon Fin. Servs., Inc.*, 257 S.W.3d 228 (Tex. 2008) (orig. proceeding); *In re Automated Collection Tech., Inc.*, 156 S.W.3d 557 (Tex. 2004) (orig. proceeding); *In re AIU Ins. Co.*, 148 S.W.3d 109, 118 (Tex. 2004) (orig. proceeding) (emphasis added); *In re Masonite Corp.*, 997 S.W.2d 194 (Tex. 1998) (orig. proceeding); *In re Talent Tree Crystal*, No. 01-05-00686-CV, 2006 Tex. App. LEXIS 1134 (Tex. App.—Houston [1st Dist.] Feb. 9, 2006, orig. proceeding).

- Denial of abatement despite **Examination Under Oath (EUO) clause in insurance policy** denied important procedural right. *In re Foremost County Mut. Ins. Co.*, 172 S.W.3d 128 (Tex. App.—Beaumont 2005, orig. proceeding) (quoting *Prudential*). "Spare the private parties and the public the **time and money utterly wasted** enduring eventual reversal of improperly conducted proceedings." *Id.* (emphasis added).

5. Loss of substantive rights contractually agreed to.

- Employer **denied rights established in workers' compensation statute** if forced to try suit (rather than stay) prior to resolution of course and scope issue in carrier's suit. *In re Tyler Asphalt & Gravel Co.*, 107 S.W.3d 832 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding).

- Lack of appraisal (which would determine whether breach occurred) **vitiates insurer's defense** and trying without stay **denied contractual right of appraisal.** *In re Allstate*, 85 S.W.3d 193 (Tex. 2002) (orig. proceeding). Again equated to arbitration clause. *Id.*; *see also In re Continental Casual Co.*, No. 14-10-709-CV, 2010 Tex. App. LEXIS 7781 (Tex. App.—Houston [14th Dist.] Sept. 23, 2010, orig. proceeding) (improperly refusing to stay trial proceedings pending appraisal process); *In re Slavonic Mut. Fire Ins. Ass'n*, 308 S.W.3d 556 (Tex. App.—Houston [14th Dist.] 2010, orig. proceeding) (holding mandamus relief appropriate when trial court denied abatement pending appraisal process as condition precedent to suit).

6. Loss of other substantive rights/attorney of choice.

- **Deprived of counsel of choice/motion to disqualify.** *See, e.g., In re Guidry*, No. 14-10-00464-CV, 2010 Tex. App. LEXIS 5003 (Tex. App.—Houston [14th Dist.] July 1, 2010, orig. proceeding); *In re Seven-O Corp.*, 289 S.W.3d 384 (Tex. App.—Waco 2009, orig. proceeding); *In re Hilliard*, No. 13-05-223-CV, 2006 Tex. App. LEXIS 3514 (Tex. App.—Corpus Christi Apr. 27, 2006, orig. proceeding); *In re Harrell*, No. 07-00-0251-CV, 2000 Tex. App. LEXIS 5005 (Tex. App.—Amarillo July 26, 2000, orig. proceeding [mand. denied]) (n.d.p.); *see also In re Columbia Valley Healthcare Sys., LP*, 320 S.W.3d 819 (Tex. 2010) (orig. proceeding) (disqualification); *In re Cerberus Capital Mgt., L.P.*, 164 S.W.3d 379 (Tex. 2005) (orig. proceeding) (disqualification); *In re Sanders*, 153 S.W.3d 54, 56 (Tex. 2004) (orig. proceeding) (nondisqualification).

- **Deprived of counsel of choice/local counsel rule.** *In re El Paso Healthcare Sys., Ltd.*, 225 S.W.3d 146 (Tex. App.—El Paso 2005, orig. proceeding).

- **Denial of attorney access to documents not remediable on appeal when attorney of choice unable to perform duties for client at trial**. *In re Norris*, No. 2-04-047-CV, 2004 Tex. App. LEXIS 3810 (Tex. App.—Fort Worth 2004, orig. proceeding).

- **Filing suit with authority**. *In re Salazar*, No. 02-09-405-CV, 2010 Tex. App. LEXIS 4887 (Tex. App.—Fort Worth June 25, 2010, orig. proceeding) (reviewing refusal to strike pleadings when not shown counsel authorized to act on behalf of plaintiffs).

7. Loss of property rights/enforcement issues.

Orders that deny funds necessary for personal or business or governmental operations—through a variety of mechanisms including premature enforcement, deposits into the registry of the court, garnishment, or the like—often qualify as orders for which an appeal is not an adequate remedy. It comes too late, and the deprivation often skews the trial process, affects another interest (such as those of a child), or implicates some right recognized by statute or rule. *See, e.g.*, *In re Smith*, 192 S.W.2d 564 (Tex. 2006) (orig. proceeding); *In re Burlington Coat Factory*, 167 S.W.3d 827 (Tex. 2005) (orig. proceeding); *Traveler's Indem. Co. v. Mayfield*, 923 S.W.2d 590 (Tex. 1996) (orig. proceeding); *In re Reveille Resources (Texas), Inc.*, No. 04-10-742-CV, 2011 Tex. App. LEXIS 331 (Tex. App.—San Antonio Jan. 19, 2011, orig. proceeding) (order to deposit money into registry of court did not satisfy statute and no evidence supported finding of need for deposit); *In re Park Memorial Condo. Ass'n*, 322 S.W.3d 447 (Tex. App.—Houston [14th Dist.] 2010, orig. proceeding) (resolution of right to funds in registry of court without motion for summary judgment or trial void and an abuse of discretion); *In re Cameron County Judge Carlos Cascos*, No. 13-10-00016-CV, 2010 Tex. App. LEXIS 5543 (Tex. App.—Corpus Christi July 15, 2010, orig. proceeding); *Behringer Harvard Royal Island, LLC v. Skokos*, No. 05-09-00332-CV, 2009 Tex. App. LEXIS 9456 (Tex. App.—Dallas Dec. 14, 2009, orig. proceeding) (setting aside injunction that ordered defendant to place $10 million in registry pending trial on merits as invalid attachment); *North Cypress Med. Ctr. Operating Co.*, 296 S.W.3d 171, 178-80 (Tex. App.—Houston [14th Dist.] 2009, orig. proceeding) (overturning order to deposit funds into court registry); *In re Gray Law, LLP*, No. 2-05-379-CV, 2006 Tex. App. LEXIS 3176 (Tex. App.—Fort Worth, Apr. 20, 2006, orig. proceeding); *In re State*, 175 S.W.3d 532 (Tex. App.—Tyler 2005, orig. proceeding); *In re Deponte Investments, Inc.*, No. 05-04-01781-CV, 2005 Tex. App. LEXIS 898 (Tex. App.—Dallas Feb. 3, 2005, orig. proceeding); *In re Kroupa-Williams*, No. 05-05-00375-CV, 2005 Tex. App. LEXIS 4495 (Tex. App.—Dallas Jun. 10, 2005, orig. proceeding); *In re Tex. Am. Express, Inc.*, 190 S.W.3d 720 (Tex. App.—Dallas 2005, orig. proceeding).

8. Loss of election rights of voters or candidates.

Election cases—whether it is an issue of a stay, redistricting, place on the ballot or free speech in campaigning—frequently present the circumstances that require mandamus relief—an impending election with potential loss of voter or candidate rights. *See, e.g.*, *In re Barnett*, 207 S.W.3d 326 (Tex. 2006) (orig. proceeding); *In re Carlisle*, 209 S.W.3d 93 (Tex. 2006) (orig. proceeding); *In re Sharp*, 186 S.W.3d 556 (Tex. 2006) (orig. proceeding); *In re Holcomb*, 186 S.W.3d 553 (Tex. 2006) (orig. proceeding); *In re Francis*, 186 S.W.3d 534 (Tex. 2006) (orig. proceeding); *In re Perry*, 66 S.W.3d 239 (Tex. 2001) (orig. proceeding).

C. Enforcement of court's order or mandate.

The supreme court has held that it may issue mandamus relief to enforce its orders. *See, e.g.*, *Lee v. Downey*, 842 S.W.2d 646, 648 (Tex. 1992). Recently, the court further noted when faced with a reformation of judgment on remand issue that "[b]ecause this issue arises in connection with a final judgment following an appeal to this Court, we conclude that [the defendant] now has no other adequate remedy by appeal." *In re Columbia Med. Ctr. of Las Colinas*, 306 S.W.3d 246, 247-28 (Tex. 2010) (orig. proceeding); *see also In re Richardson*, 327 S.W.3d 848 (Tex. App—Fort Worth 2010, orig. proceeding) (failure to follow court of appeals mandate); *In re Assurances Generales Banque Nationale*, No. 05-10-1078-CV, 2010 Tex. App. LEXIS 8728 (Tex. App.—Dallas Oct. 29, 2010, orig. proceeding) (failure to follow court of appeals mandate).

D. Review of recurring legal issue that would otherwise evade review.

1. Refusal to quash jury waived by contract.

"The issue before us in the present case—whether a pre-suit waiver of trial by jury is enforceable—fits well within the types of issues for which mandamus review is not only appropriate but necessary. It is an issue of law, one of first impression for us, but likely to recur (it has already arisen in another case in the court of appeals, also on petition for mandamus). It eludes answer by appeal. In no real sense can the trial court's denial of [defendant's] contractual right to have the [plaintiff's] waive a jury ever be rectified on appeal. If [defendant] were to obtain judgment on a favorable jury verdict, it could not appeal, and its contractual right would be lost forever. If [defendant] suffered judgment on an unfavorable verdict, [defendant] could not obtain reversal for the incorrect denial of its contractual right 'unless the court of appeals concludes that the error complained of ... probably caused the rendition of an improper judgment.' Even if [defendant] could somehow obtain reversal based on the denial of its contractual right, it would already have lost a part of it by having been subject to the procedure it agreed to waive." *Prudential*, 148 S.W.3d at 136-37.

2. Local procedural rules affecting large quantities of cases and counties.

"The issue—whether the local rules allowing transfer of cases from district courts to statutory county courts—fits well within the types of issues for which mandamus review is not only appropriate but necessary. It is **an issue of law, one of first impression** for this Court, but likely to recur. All cases pending in Dallas County are governed by the local rules and potentially affected by this decision. In addition, other Texas counties may have the same or similar local rules and may face a similar issue. Because the trial court's erroneous ruling has a **far-reaching and imminent impact on the operation of courts in Dallas County and beyond**, we conclude mandamus relief is appropriate." *In re Siemens Corp*., 153 S.W.3d 694, 699 (Tex. App.—Dallas 2005, orig. proceeding) (citations omitted).

E. Void orders.

Void orders, such as those entered after expiration of plenary power or without jurisdiction at least in family or probate law matters, are reviewable by mandamus. *See, e.g., In re Canales*, 52 S.W.3d 698 (Tex. 2001) (orig. proceeding); *In re S.W. Bell Tel. Co*., 35 S.W.3d 602, 605 (Tex. 2000) (orig. proceeding); *In re Dickason*, 987 S.W.2d 570 (Tex. 1998) (orig. proceeding): *In re JP Morgan Chase Bank, N.A.*, No. 14-10-1124-CV, 2011 Tex. App. LEXIS 414 (Tex. App.—Houston [14th Dist.] Jan. 20, 2011, orig. proceeding) (order entered after expiration of plenary power void); *In re Cameron County Judge Carlos Cascos*, No. 13-10-00016-CV, 2010 Tex. App. LEXIS 5543 (Tex. App.—Corpus Christi July 15, 2010, orig. proceeding) (order essentially refusing government right to suspend enforcement of orders during interlocutory appeal); *In re Victor Enters., Inc*., 308 S.W.3d 455 (Tex. App.—Dallas 2010, orig. proceeding) (setting aside orders suspending/enjoining forcible detainer actions in justice court where county court lacked jurisdiction over non-appealed orders); *In re Fry*, No. 02-09-00195-CV, 2010 Tex. App. LEXIS 1981 (Tex. App.—Fort Worth Mar. 17, 2010, orig. proceeding) (vacating court order declaring child support order void where initial order (signed nine years ago) was entered within court's plenary period); *In re Certain Underwriters at Lloyd's London*, No. 01-09-00851-CV, 2010 Tex. App. LEXIS 393 (Tex. App.—Houston [1st Dist.] Jan. 15, 2010, orig. proceeding) (vacating order setting aside summary judgment granted 15 months earlier where SJ order was final order and plenary power had expired); *In re Kamstra*, No. 12-09-00017-CV, 2010 Tex. App. LEXIS 1478 (Tex. App.—Tyler Mar. 2, 2010, orig. proceeding) (trial court lacked jurisdiction to enter emergency orders under either Hague Convention or Family Code); *In re Rhodes*, No. 02-09-447-CV, 2010 Tex. App. LEXIS 305 (Tex. App.—Fort Worth Jan. 11, 2010, orig. proceeding) (setting aside clarification order that contained substantive changes); *In re Green Oaks Hosp. Subsidiary L.P.*, 297 S.W.3d 452 (Tex. App.—Dallas 2009, orig. proceeding) (setting aside judgments awarding costs/fees for involuntary commitment proceedings against hospital where hospital was not a party before the court).

Not only is the court devoid of authority or jurisdiction but proceeding to trial would waste everyone's time if forced to needlessly relitigate issues and add nothing that could change the result on subsequent appeal. *See In re John G. & Marie Stella Kenedy Mem. Foundation*, 315 S.W.3d 519 (Tex. 2010) (orig. proceeding) ("[M]andamus relief is appropriate without a showing that the relators lack an adequate appellate remedy….We have recognized that mandamus relief is appropriate to 'spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings."); *In re Dallas Morning News*, 10 S.W.3d 298, 304 (Tex. 1999) (orig. proceeding) (Gonzales, J., concurring).

F. Discovery errors that meet the balancing test.

As noted above, *Walker*, 827 S.W.2d at 843-44, established three categories of discovery rulings that fall within the purview of mandamus review:

"First, a party will not have an adequate remedy by appeal when the appellate court would not be able to cure the trial court's discovery error. …

Second, an appeal will not be an adequate remedy where the party's ability to present a viable claim or defense at trial is vitiated or severely compromised by the trial court's discovery error. …

Finally, the remedy by appeal may be inadequate where the trial court disallows discovery and the missing discovery cannot be made part of the appellate record, or the trial court after proper request refuses to make it part of the record, and the reviewing court is unable to evaluate the effect of the trial court's error on the record before it."

Recent cases indicate that the Texas Supreme Court continues to review erroneous disclosure orders by mandamus. *See, e.g., In re Houston Pipe Line Co.*, 311 S.W.3d 449 (Tex. 2009) (orig. proceeding) (discovery order overbroad when sought information regarding ultimate liability rather than scope of the arbitration clause); *In re Deere & Co.*, 299 S.W.3d 819, 821 (Tex. 2009) (orig. proceeding) (providing relief from overly broad discovery order entered without a reasonable time limit); *In re Weekley Homes, L.P.*, 295 S.W.3d 309 (Tex. 2009) (orig. proceeding) (harm from order to produce hard drives for forensic search for deleted emails could not be

remedied on appeal); *In re Union Pac. RR Co.*, 294 S.W.2d 589, 593 (Tex. 2009) (orig. proceeding) (harm from order to disclose trade secrets); *In re Jorden*, 249 S.W.3d 416 (Tex. 2008) (orig. proceeding) (depositions precluded by statute cannot be "untaken" or cured on appeal); *In re Ford Motor Co.*, 211 S.W.3d 295, 298 (Tex. 2006) (orig. proceeding) ("[W]e have repeatedly held [an] appeal is inadequate when a trial court erroneously orders the production of confidential information or privileged documents").

Courts of appeals also continue to review discovery orders, although as previously noted generally under a *Walker* test. *See, e.g. In re K.L.*, No. 04-10-70-CV, 2010 Tex. App. LEXIS 9846 (Tex. App.—San Antonio Dec. 10, 2010, orig. proceeding [mand. denied] (order to answer questions regarding social security number not abuse of discretion when necessary to investigate and adequately defend claims); *In re Samson Lone Star, LLC*, 06-10-00050-CV, 2010 Tex. App. LEXIS 6464 (Tex. App.—Texarkana Aug. 3, 2010, orig. proceeding) (granting relief from overbroad discovery order); *In re Stern*, No. 01-09-00438-CV, 2010 Tex. App. LEXIS 5580 (Tex. App.—Houston [1st Dist.] July 12, 2010, orig. proceeding) (order to produce hard drives, particularly prior to ruling on special appearance, overbroad, relying upon *Weekley*); *In re Harco Nat'l Ins. Co.*, No. 02-09-351-CV, 2010 Tex. App. LEXIS 4899 (Tex. App.—Fort Worth June 24, 2010, orig. proceeding) (granting relief from order to produce privileged documents); *In re Spence*, No. 02-09-392-CV, 2010 Tex. App. LEXIS 4884 (Tex. App.—Fort Worth June 21, 2010, orig. proceeding) (granting relief from order of monetary sanctions that risked continuation or vitiation of proceedings).

Note that in *McAllen* the court indicated that review is not always available in those categories under the benefits/detriments weighing test. *See In re McAllen Med. Ctr.*, 275 S.W.3d 458, 464-69 (Tex. 2008) (orig. proceeding). But review might sometimes be broader than under a strict *Walker* categorical test. *See, e.g., In re Empire Pipeline Corp.*, 323 S.W.3d 308 (Tex. App.—Dallas 2010, orig. proceeding) (discovery of privileged mediation proceedings information would materially affect aggrieved party's rights); *In re Williams*, 328 S.W.3d 103 (Tex. App.—Corpus Christi 2010, orig. proceeding) (order to produce individual tax returns but not other financial records an abuse of discretion despite implicit control or alter ego finding in post-judgment context); *In re Croft*, No. 14-10-106-CV, 2010 Tex. App. LEXIS 7778 (Tex. App.—Houston [14th Dist.] Sept. 22, 2010, orig. proceeding) (memo op.) (order to produce individual tax returns but not other financial records an abuse of discretion); *In re Guniganti*, No. 12-10-199-CV, 2010 Tex. App. LEXIS 6624 (Tex. App.—Tyler Aug. 17, 2010, orig. proceeding) (memo op.) (order to produce portions of individual tax returns not relevant to dispute improper); *In re Islamorada Fish Co. Tex., LLC*, No. 05-10-344-CV, 2010 Tex. App. LEXIS 6309 (Tex. App.—Dallas Aug. 5, 2010, orig. proceeding) (deciding that discovery of net worth information not available because chapter 41 barred recovery of punitive damages);[8] *In re Behringer Harvard Tic Mgt. Servs., LP*, 316 S.W.3d 831(Tex. App.—Dallas 2010, orig. proceeding) (no adequate remedy for trial court's appointment of special master to review documents in camera); *In re Stern*, No. 01-09-00438-CV, 2010 Tex. App. LEXIS 5580 (Tex. App.—Houston [1st Dist.] July 12, 2010, orig. proceeding) (same); *In re Glassman*, No. 05-10-00254-CV, 2010 Tex. App. LEXIS 2726 (Tex. App.—Dallas April 2, 2010, orig. proceeding) (granting mandamus relief for denial of motion to compel attorney's deposition); *In re Ameriplan Corp.*, No. 05-09-01407-CV, 2010 Tex. App. LEXIS 31 (Tex. App.—Dallas Jan. 6, 2010, orig. proceeding) (holding order to produce net worth information overbroad by including income statements and old balance sheets); *In re Jacobs*, 300 S.W.3d 35 (Tex. App.—Houston [14th Dist.] 2009, orig. proceeding [mand. denied]) (rejecting argument that net worth discovery not allowed until prima facie case of gross negligence but holding only current net worth be produced and deposition inquiries be similarly limited).

V. Current topics and trends in mandamus practice.

A few trends have evolved over the last year based on application of the *Prudential/McAllen* balancing test (and statutory changes) that may allow for broader review of what have been classically considered incidental trial rulings by mandamus or interlocutory appeal.

A. FAA arbitration orders by interlocutory appeal.

Effective September 1, 2009, the legislature added section 51.016 to the Civil Practice and Remedies Code to allow "appeal or writ of error to the court of appeals from the judgment or interlocutory

[8] *Cf. In re Martinez*, No. 13-589-CV, 2010 Tex. App. LEXIS 10245 (Tex. App.—Corpus Christi Dec. 22, 2010, orig. proceeding [mand. denied]) (memo op.) (prima facie or preliminary showing of factual support for punitive damages not required prior to net worth discovery); *In re Shaw*, No-13-487-CV, 2010 Tex. App. LEXIS 8744 (Tex. App.—Corpus Christi Oct. 27, 2010, orig. proceeding [mand. denied]) (memo op.) (same).

order of a district court…under the same circumstances that an appeal from a federal district court's order or decision would be permitted by 9 U.S.C. § 16." *In re Merrill Lynch & Co.*, 315 S.W.3d 888 (Tex. 2010) (orig. proceeding) (citing Tex. Civ. Prac. & Rem. Code § 51.016); *see also In re Olshan Found. Repair Co.*, 54 Tex. Sup. J. 300 (Tex. Dec. 3. 2010) (orig. proceeding) (involving actions before effective date).

Section 51.016 applies to actions filed or pending on or after September 1, 2009, unless the appeal of the order was initiated prior to the effective date. *See, e.g., In re H.D. Vest, Inc.*, No. 08-10-337-CV, 2010 Tex. App. LEXIS 9373 (Tex. App.—El Paso Nov. 29, 2010, orig. proceeding [mand. denied]) (denying mandamus petition based adequate remedy by interlocutory appeal available under 51.016); *In re Atlas Gulf-Coast, Inc.*, No. 14-10-660-CV, 2010 Tex. App. LEXIS 6025 (Tex. App.—Houston [14th Dist.], July 29, 2010, orig. proceeding) (memo op.) (denying mandamus petition based on jurisdiction over concurrently filed interlocutory appeal available under 51.016 because filed after the Act's effective date); *In re Unit Tex. Drilling*, No. 13-10-00267-CV, 2010 Tex. App. LEXIS 5320 (Tex. App.—Corpus Christi July 6, 2010, orig. proceeding) (same); *In re GM Oil Props.*, No. 10-00001-CV, 2010 Tex. App. LEXIS 5115 (Tex. App.—Houston [1st Dist.] July 1, 2010, orig. proceeding) (noting mandamus relief not available when interlocutory appeal allowed); *In re Chestnut Energy Partners, Inc.*, 300 S.W.3d 386, 394-95 n.4 (Tex. App.—Dallas 2009, pet. denied) (reviewing arbitration order by mandamus because petition filed before effective date). Although some cases discuss the date of the order, those cases often involved petitions filed before the effective date. *See, e.g., In re Helix Energy Solutions Group, Inc.*, 303 S.W.3d 386 (Tex. App.—Houston [14th Dist.] 2010, orig. proceeding). *But cf. In re 24R, Inc.*, 324 S.W.3d 564 (Tex. 2010) (orig. proceeding) ("The Legislature amended section 51.016 of the Texas Civil Practice and Remedies Code effective September 1, 2009 to allow interlocutory appeal of an order denying a motion to compel arbitration under the Federal Arbitration Act. Tex. Civ. Prac. & Rem. Code § 51.016. Because the trial court denied the motion to compel arbitration before the amendment took effect, section 51.016 does not apply."); *Caballero v. Contreras*, No. 13-10-125-CV, 2010 Tex. App. LEXIS 7176 (Tex. App.—Corpus Christi Aug. 21, 2010, orig. proceeding) (same).

Care must be taken to ensure that appeal "would be permitted by 9 U.S.C. § 16." *See CMH Homes, Inc. v. Perez*, No. 04-10-00259-CV, 2010 Tex. App. LEXIS 5924 (Tex. App.—San Antonio July 28, 2010, orig. proceeding) (holding court had no jurisdiction over interlocutory appeal of order appointing a particular arbitrator); *HEB Grocery Co. v. Kirksey*, No. 14-10-00217-CV, 2010 Tex. App. LEXIS 3385 (Tex. App.—Houston May 6, 2010, no pet.) (memo op.) ("We find no authority permitting an interlocutory appeal of an order granting recusal of an arbitrator or appointing a substitute arbitrator.").

Likewise, care must be taken to perfect a timely interlocutory appeal—mandamus will likely not operate to save an untimely appeal. *See In re Nabors Well Servs., Co.*, No. 06-10-00049-CV, 2010 Tex. App. LEXIS 5650 (Tex. App.—Texarkana July 20, 2010, orig. proceeding) (denying mandamus because interlocutory appeal available for appeal under TAA and noting interlocutory appeal previously dismissed as untimely); *Hydro Mgmt. Sys., LLC v. Jalin, Ltd.*, No. 04-09-00813-CV, 2010 LEXIS 3353 (Tex. App.—San Antonio May 5, 2010, no pet.) (mem. op.) (holding motion to reconsider arbitration order did not extend time to perfect interlocutory appeal and dismissing for want of jurisdiction.).

Finally, as with other interlocutory appeals, section 22.225 of the Government Code should be reviewed to determine if conflict, dissent or other jurisdiction over the appeal exists in the supreme court. *See, e.g., Forest Oil Corp. v. McAllen*, 268 S.W.3d 51 55 n.8 (Tex. 2008) ("We have jurisdiction to hear an appeal from an interlocutory order denying arbitration if the court of appeals' decision conflicts with our precedent. *See* Tex. Gov't Code §§ 22.001(A)(2), 22.225(C); Tex. Civ. Prac & Rem. Code § 171.098; *Certain Underwriters at Lloyd's of London v. Celebrity, Inc.*, 988 S.W.2d 731, 733 (Tex. 1998).").

B. Review of new trial orders by mandamus.

As noted above, *In re Columbia Med. Ctr. of Las Colinas*, 290 S.W.3d 204, 213 (Tex. 2009) (orig. proceeding), the supreme court ruled that a trial court must state its reasons for granting new trial. *See also In re United Scaffolding, Inc.*, 301 S.W.3d 661 (Tex. 2010) (orig. proceeding) (same); *In re E.I du Pont de Nemours & Co.*, 289 S.W.3d 861 (Tex. 2009) (orig. proceeding); *In re Baylor Med. Ctr.*, 289 S.W.3d 859 (Tex. 2009) (orig. proceeding) (same). The court concluded that "the parties and the public are entitled to an understandable, reasonably specific explanation why their expectations are frustrated by a jury verdict being disregarded or set aside, the trial process being nullified, and the case having to be retried." *Columbia Med. Ctr.*, 290 S.W.3d at 213.

Subsequently, courts of appeals began granting relief where reasons were not stated. *In re Gladney Center*, No. 2-10-107-CV, 2010 Tex. App. LEXIS 3935 (Tex. App.—Fort Worth May 20, 2010, orig.

proceeding) (granting mandamus setting aside new trial order where basis for granting new trial was contradicted by evidence); *In re Hunter*, 306 S.W.3d 422 (Tex. App.—Dallas 2010, orig. proceeding) (ordering court to specify reasons for new trial order issued without any reason for grant); *In re C.R.S.*, 310 S.W.3d 897 (Tex. App.—San Antonio 2010, orig. proceeding [mand. denied]) (same, where new trial granted in the interests of justice); *In re Carrizo Oil & Gas Co.*, 292 S.W.3d 763 (Tex. App.—Beaumont 2009, orig. proceeding) (same); c*f. In re Northern Natural Gas Co.*, No. 04-09-00284-CV, 2010 Tex. App. LEXIS 1531 (Tex. App.—San Antonio Mar. 3, 2010, orig. proceeding [mand. denied]) (concluding conditional new trial order not sufficiently explicit, express, and specific as required by Rule 329b(c)).

Notably, the supreme court refused to reach the issue of whether the new trial order should be vacated in the absence of stated grounds. But it did so, at least in three cases, without prejudice and left open the door that new trial orders will be reviewable by mandamus. *Cf. In re Smith*, No. 06-11-3-CV, 2011 Tex. App. LEXIS 843 (Tex. App.—Texarkana Feb. 4, 2011, orig. proceeding [mand. denied]) (explaining *Lufkin* reasoning and holding that trial court's order that stated specific reasons sufficed to meet *Columbia* but not reaching the propriety of the reasons); *In re Whataburger Restaurants, LP*, No. 08-10-250-CV, 2010 Tex. App. LEXIS 9673 (Tex. App.—El Paso Dec. 8, 2010, orig. proceeding [mand. denied) (refusing to review whether stated reasons were "proper" or "valid"); *In re Toyota Motor Sales, USA, Inc.*, 327 S.W.3d 302 (Tex. App.—El Paso 2010, orig. proceeding [mand. denied]) (same); *In re Lufkin Indus. Inc.*, No. 06-10-00038-CV, 2010 Tex. App. LEXIS 5415 (Tex. App.—Texarkana July 8, 2010, orig. proceeding [mand. denied) (refusing mandamus relief when at least one stated ground was within trial court's discretion).

C. Transfer, severance, intervention and nonsuit orders.

Under the *Prudential*/*McAllen* test, more pretrial docket control-type orders might obtain mandamus review. The combination of the "utter waste of resources" concern and the rules- or statutory-based source of the right at issue puts these type rulings in line with the benefits/detriments test—although the concept of "exceptional" reasons may still come into play directly or indirectly. A few examples from the list above include the following:

Severance/Intervention/Bifurcation. *See, e.g., In re Union Carbide*, 273 S.W.3d 152 (Tex. 2008) (orig. proceeding) (severance before ruling on motion strike unrelated party's intervention abuse of discretion that improperly circumvented the random assignment of cases mechanism designed to prevent forum-shopping); *In re State of Texas*, No. 05-09-1170-CV, 2010 Tex. App. LEXIS 9635 (Tex. App.—Dallas Aug. 31, 2010, orig. proceeding) (striking of intervention improper); *In re Devon*, 321 S.W.3d 778 (Tex. App.—Tyler Aug. 17, 2010, orig. proceeding) (refusal to strike intervention improper when parties had no interest in mineral lease at issue); *In re United Fire Lloyds*, No. 04-10-00094, 2010 Tex. App. LEXIS 5454 (Tex. App.—San Antonio July 14, 2010, orig. proceeding) (bifurcation of bad faith issues from coverage improper when severance proper to avoid potential waste of resources and loss of rights under policy if forced defend issue that may be moot); *In re Int'l Marine, LLC*, No. 13-10-00195-CV, 2010 Tex. App. LEXIS 3957 (Tex. App.—Corpus Christi May 25, 2010, orig. proceeding) (suggesting sixteen co-workers failed to establish right to intervene but holding employer failed to make any effort to meet burden to show inadequate remedy by appeal); *In re Hochheim Prairie Farm Mut. Ins. Ass'n*, 296 S.W.3d 907 (Tex. App.—Corpus Christi Sept. 29, 2009, orig. proceeding) (three property damage claims under three policies not properly tried together and mandamus relief granted to order severance).

Nonsuit. *See, e.g., In re Greater Houston Orthopedic Specialists, Inc.*, 295 S.W.3d 323, 326 (Tex. 2009) (orig. proceeding); *In re Rocket*, 256 S.W.3d 257 (Tex. 2008) (orig. proceeding); *In re Riggs*, No. 02-10-075-CV, 2010 Tex. App. LEXIS 3779 (Tex. App.—Fort Worth May 19, 2010, orig. proceeding); *In re Hanby*, No. 14-09-00896-CV, 2010 Tex. App. LEXIS 2626 (Tex. App.—Houston [14th Dist.] Apr. 15, 2010, orig. proceeding).

D. Responsible third parties.

Another area that may receive increased review involves designations of responsible third parties under Chapter 33 of the Civil Practice and Remedies Code. While one court shortly after *Prudential* refused to review the issue by mandamus, its discussion is instructive:

> In conducting our balance of jurisprudential considerations, we note that it is true that relators, under chapter 33 of the Civil Practice and Remedies Code, have a right to have one jury apportion liability among all responsible parties. It is also true that, in certain circumstances, a regular appeal of a trial court's order denying a defendant its rights afforded under chapter 33 may be inadequate and that mandamus relief may be appropriate. We recognize that if relators eventually have to appeal the trial court's ultimate judgment, conducting a second trial may result in a **waste of judicial resources**,

> compounded by the fact that **the only available remedy will likely be to order a new trial, *as to all parties and all issues,*** so that the jury may apportion responsibility among all persons who should have been designated under the rules. However, we also have to recognize that, in spite of any error committed by the trial court, it is entirely possible that relators, and not the plaintiffs and intervenors, may ultimately prevail at trial. Moreover, it is entirely possible that other errors presented on appeal may necessitate the order of a new trial. Thus, **while we may consider the additional expense and effort of preparing for and participating in another subsequent trial, this factor does not, standing alone, justify mandamus relief if there is an adequate remedy by appeal**. As instructed by the supreme court in *In re Prudential*, we are mindful that mandamus relief should be used selectively and that the benefits of mandamus review are easily lost by overuse. Although the trial court's order denying relators their right to designate responsible third parties is not a mere 'incidental' ruling, the instant case, a relatively straightforward personal injury action, is not '**exceptional**.' We conclude that granting mandamus relief in this case would encourage litigants to seek mandamus review of all trial court rulings under chapter 33, even in cases, like here, that do not present extraordinary circumstances like those presented in *In re Arthur Andersen.* This would have the effect of adding unproductively to the expense and delay of civil litigation by enabling parties to seek extraordinary relief from appellate courts on rulings related to a trial court's management of all kinds of cases, whether exceptional or not. …As emphasized by the supreme court, whether mandamus relief is appropriate 'depends heavily on the circumstances presented.' Here, any benefits to mandamus review are outweighed by the detriments.

In re Unitec Elevator Servs. Co., 178 S.W.3d 53, 65-66 (Tex. App.—Houston [1st Dist.] 2005, orig. proceeding) (citations omitted and emphasis added).

Two other courts reached the opposite conclusion under the facts of those cases. *See In re Brokers Logistics, Ltd.*, No. 08-09-00086-CV, 2010 Tex. App. LEXIS 3743 (Tex. App.—El Paso May 19, 2010, orig. proceeding) (directing trial court in mandamus proceeding to set aside order striking responsible third party); *In re Arthur Andersen*, 121 S.W.3d 471, 478 n.20 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding) (reviewing by mandamus refusal to join banks as RTPs to avoid waste of resources that would be necessitated by re-trial). As with other issues, an added element to demonstrate "exceptional" circumstances my tip the balance.

E. Contrast of state court discovery order review with federal court.

Practitioners in Texas take for granted the longstanding practice of mandamus review of an order to disclose privileged information. The federal practice differs. Last year, in *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 606 (2009), the Supreme Court concluded that "collateral order appeals are not necessary to ensure effective review of orders adverse to the attorney-client privilege." *Id*. at 606. In so doing, the Court acknowledged the importance of the privilege, but gave greater attention to the "crucial question": whether deferred review "so imperils the interest as to justify the cost" of immediate appeal. *Id*.

Circuit courts have sometimes extended the *Mohawk* analysis to other privileges. *See, e.g., Hernandez v. Tanninen*, 604 F.3d 1095, 1099 (9th Cir. 2010) ("The reasoning of *Mohawk*…likewise to appeals of disclosure orders adverse to the attorney work product privilege."). Other courts question whether the *Mohawk* bar to collateral order appeal applies to constitutional-based rights or privilege. *See Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 879 (1994) ("Where statutory and constitutional rights are concerned, 'irretrievabl[e] los[s]' can hardly be trivial, and the collateral order doctrine might therefore be understood as reflecting the familiar principle of statutory construction that, when possible, courts should construe statutes (here § 1291) to foster harmony with other statutory and constitutional law.").

At least one court recognized that *Mohawk* left an open question in the First Amendment privilege context but relied on its mandamus jurisdiction to resolve the issue. *See Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010) (noting that some of *Mohawk*'s reasoning carries over to First Amendment privileges but citing several differences such as its constitutional grounding). Another court recently noted "a division in the circuits on the question of a nonparty's right to immediately appeal a discovery order. It is unclear whether our circuit's approach to this question [that allows immediate review]. . . survives the holding and rationale of *Mohawk Industries*." *Sandra T.E. v. S. Berwyn Sch. Dist.*, 600 F.3d 612, 618 (7th Cir. 2010) (involving attorney-

client privilege and work-product doctrine as to nonparty).

While mandamus review might in some circumstances be allowed to review privilege orders that fall under the *Mohawk* analysis, the unavailability of a collateral order appeal may not lessen the mandamus standards. *See In re Whirlpool Corp.*, 597 F.3d 858 (7th Cir. 2010) (mandamus standards not lessened merely because collateral order appeal unavailable after *Mohawk*). Instead, a "clear and indisputable error" that is "irremediable on ordinary appeal" is required. the *In re Occidental Petroleum Corp.*, 217 F.3d 293, 295-96 (5th Cir. 2000).

As a result, practitioners in federal court should make careful use of protective and nonwaiver orders in the district court, and appellate practitioners should bear in mind the distinctions in state and federal practice when assessing the availability of or crafting briefing in an interlocutory appeal of disclosure orders or when making a record of harm for ordinary appeal to complain of the erroneous production of privileged information.

F. Experts.

The *Prudential*/*McAllen* test may allow review by mandamus of rulings that strike experts or refuse continuances to allow for expert designations. One rejected such a request for review. *In re Pilgrim's Pride Corp.*, No. 06-08-00109-CV, 2008 Tex. App. LEXIS 8619, at *4-8 (Tex. App.—Texarkana Nov. 17, 2008, orig. proceeding), a personal injury case in which the relator sought mandamus relief from the exclusion of its expert's scientific testimony under *Robinson*. Relying on *McAllen*, the Relator argued that an appellate remedy was inadequate because the exclusion of its expert effectively eviscerated Relator's only defense—that the plaintiff proximately caused his own injuries. In rejecting the Relator's inadequate remedy by appeal argument, the court of appeals held that the Relator could still proffer other evidence of the plaintiff's actions at trial, find another expert who could offer scientifically reliable testimony, and appeal the trial court's ruling on the admissibility of expert testimony on post-trial direct appeal. In that case, the court noted that "[t]o the extent *McAllen* extended the availability of mandamus relief," its holding was limited to healthcare liability cases and did not expand the reach of extraordinary relief in that ordinary personal injury case. *Id*. at *7.

Other courts have not viewed mandamus as strictly. *See In re Kings Ridge Homeowners Ass'n*, 303 S.W.3d 773 (Tex. App.—Fort Worth 2010, orig. proceeding) (allowing mandamus relief when homeowner's association's expert improperly struck with net effect of dismissing association's claims); *In re Oliver*, No. 10-05-00213-CV, 2005 Tex. App. LEXIS 5040, *7-8 (Tex. App.-Waco, Jun. 29, 2005 orig. proceeding) (granting relief from refusal to grant continuance and denial of parent opportunity to secure expert in child support trial). Note that *Walker*'s vitiate a claim or defense standard also might support the same result. *See Kings Ridge*, 303 S.W.3d at 785. And the overlay of another public interest may be necessary to tip the balance.

G. Forensic computer discovery.

Another area that may see some increase in mandamus review is "e-discovery" areas that may be particularly invasive to a party's privacy rights and often beyond the scope of the issues or timeframe involved in the suit. *See, e.g., In re Weekley Homes, L.P.*, 295 S.W.3d 309 (Tex. 2009) (orig. proceeding) (harm from order to produce hard drives for forensic search for deleted emails could not be remedied on appeal); *In re Harris*, 315 S.W.3d 685 (Tex. App.—Houston [1st Dist.] 2010, orig. proceeding) (order to produce hard drive, particularly without specific request and no showing benefit outweighed the burden, an abuse of discretion); *In re Stern*, No. 01-09-00438-CV, 2010 Tex. App. LEXIS 5580 (Tex. App.—Houston [1st Dist.] July 12, 2010, orig. proceeding) (order to produce hard drives, particularly prior to ruling on special appearance, overbroad, relying upon *Weekley*).

H. Net worth discovery issues.

Several cases this year have concerned net worth discovery. One case addressed the availability of punitive damages as a matter of law as a predicate to discovery. *In re Islamorada Fish Co. Tex., LLC*, No. 05-10-344-CV, 2010 Tex. App. LEXIS 6309 (Tex. App.—Dallas Aug. 5, 2010, orig. proceeding) (deciding that discovery of net worth information not available *because* chapter 41 barred recovery of punitive damages under criminal exception). Another case refused to delve into the factual underpinnings of exemplary damages before allowing discovery. *In re Jacobs*, 300 S.W.3d 35 (Tex. App.—Houston [14th Dist.] 2009, orig. proceeding [mand. denied]) (rejecting argument that net worth discovery not allowed until prima facie case of gross negligence but holding only current net worth be produced and deposition inquiries be similarly limited). Consistently, however, each case allowed only narrow discovery into current net worth. *In re Ameriplan Corp.*, No. 05-09-01407-CV, 2010 Tex. App. LEXIS 31 (Tex. App.—Dallas Jan. 6, 2010, orig. proceeding) (holding order to produce net worth information overbroad by including income statements and old balance sheets).

I. Utter waste of resources and preservation of rights as overarching considerations.

As detailed above, in successful mandamus petitions, the utter waste of resources is a common theme and particularly powerful when combined with a constitutional, statutory or rule-based right that embodies a public interest or policy. *See* Section IV.A.8.

VI. Summary

No matter the test used, some expansion of the scope of mandamus review has occurred over the years—partially to preserve scarce judicial resources, partially to reach issues important for resolution, and partially due to changing court compositions. The "utter waste of judicial resources" appears to trump the "mere delay or expense" bar of the past on a fairly regular basis, and the permanent deprivation of rights appears to have changed to a somewhat broader preservation of rights combined with an unnecessary trial—the rights are not necessarily permanently lost in the event of a retrial.

On the other hand, the floodgate argument always hovers over any request to review an incidental pre-trial ruling—if mandamus were used to review every such ruling, it would consume vast appellate court judicial resources under the guise of conserving trial court judicial resources. Further, not even litigants would truly want *every* incidental ruling reviewable in the midst of trial proceedings.

If a party decides to seek mandamus review, the challenge is to understand the tension between the detriments and the benefits of a mandamus proceeding. With that understanding, one must demonstrate both a clear abuse of discretion and as many of the above inadequate-remedy-by-appeal themes or categories as possible to show the ruling at hand is truly one worthy of extraordinary relief.