BUILDING A SOLID STRUCTURE
ON THE SHIFTING SANDS OF MANDAMUS

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Building a Solid Structure on the Shifting Sands of Mandamus

> Writing a book I have found to be like building a house. A man forms a plan, and collects materials. He thinks he has enough to raise a large and stately edifice; but after he has arranged, compacted and polished, his work turns out to be a very small performance. The authour however like the builder, knows how much labour his work has cost him . . .
>
> *James Boswell*
> *An Account of Corisca*, Preface
> (3rd ed. corr. 1769)

I. INTRODUCTION

Mr. Boswell's sentiment translates rather well to appellate briefing, though in the context of mandamus, the process of "building a house" becomes more like a reality television project that must be finished in a unrealistically compressed time frame. (Think Extreme Home Makeover meets Boston Legal.) Moreover, your "house" must be built on a tenuous foundation. Think of it as Mandamus Beach. (More like Survivor meets L.A. Law.)

Although Mandamus Beach has never been the sturdiest place to build, the past year has seen the sands shift significantly. As we take stock of the new landscape and watch the dust settle, here are some construction tips for all you intrepid builders.

> ***Tip***: As this paper went to press, proposed amendments to the Texas Rules of Appellate Procedure were pending. The proposed amendments were scheduled to take effect September 1, 2008. This paper is based on the amendments as they were proposed – please double-check the Texas Supreme Court website (http://www.supreme.courts.state.tx.us) to verify that no changes in responses to comments were made to the proposed amendments before they took effect.

II. "A WHOLE NEW WORLD"

For quite some time now, mandamus practice has been guided by the basic principles expressed by the Texas Supreme Court in *Walker v. Packer*, 827 S.W.2d 833 (Tex. 1992). In particular, *Walker* instructed lawyers about the "adequate remedy by appeal" element. The Court rejected the abolition or relaxation of the requirement, and disapproved an alternative standard ("equally convenient, beneficial, and effective as mandamus"). *Id.* at 842. Instead, the Court clarified that:

> Mandamus is intended to be an extraordinary remedy, available only in limited circumstances. The writ will issue "only in situations involving manifest and urgent necessity and not for grievances that may be addressed by other remedies." The requirement that persons seeking mandamus relief establish the lack of an adequate appellate remedy is a "fundamental tenet" of mandamus practice.

Id. at 840 (internal citations omitted).

Despite their strict tone (and the fears of the dissenting justices), these statements did not spell the end of mandamus relief. As the majority opinion also stated, "There are many situations where a party will not have an adequate appellate remedy from a clearly erroneous ruling, and appellate courts will continue to issue the extraordinary writ." *Walker*, 827 S.W.2d at 843. In the discovery context, the Court named three non-exclusive examples: (1) when the appellate court would not be able to cure the trial court's discovery error;[1] (2) 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;[2] and/or (3) if the 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. *Id.* at 843-44. Thus, even after *Walker* issued, mandamus practice remained alive and well, though within relatively narrow "adequate remedy" boundaries.

A. The Sands Begin to Shift with *Prudential*

The sands began to shift in 2004, with the Texas Supreme Court's opinion *In re Prudential Ins. Co.*, 148 S.W.3d 124 (Tex. 2004). The majority widened the boundaries by noting that the 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." *Id.* at 136. The majority then reoriented the

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[1] Examples of this type of error included: (a) an erroneous order to disclose privileged information which will materially affect the rights of the aggrieved party; (b) an order to disclose trade secrets without adequate protections to maintain the confidentiality of the information; and (c) an order compelling the production of patently irrelevant or duplicative documents, such that it clearly constitutes harassment or imposes a burden on the producing party far out of proportion to any benefit that may obtain to the requesting party. *Id.* at 843.

[2] Examples of this type of error included: (a) erroneous death-penalty sanctions; and (b) a denial of discovery going to the heart of a party's case. *Id.*

"adequate remedy by appeal" inquiry to the following compass:

> 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.

Id.

The majority also qualified the Court's holding in *Walker* that "an appellate remedy is not inadequate merely because it may involve more expense or delay than obtaining an extraordinary writ" by focusing on the word "merely." *Prudential*, 148 S.W.3d at 136. Under the majority's analysis, the additional expense or delay of an appeal, when combined with the surrounding circumstances, *may* justify mandamus relief. *Id.* However, the necessity of this qualification was questionable, since it appears that *Prudential* actually involved a situation which fell within the established parameters for no adequate remedy by appeal. 148 S.W.3d at 138; *see also In re McAllen Med. Ctr., Inc.*, ____ S.W.3d ____, 2008 WL 2069837, *10 (Tex. May 16, 2008) (Wainwright, J., dissenting).

The relator in *Prudential* sought relief from a trial court order refusing to enforce a contractual jury waiver. 148 S.W.3d at 129. As the majority noted: (1) if Prudential obtained a favorable jury verdict, it would not appeal; and (2) if an unfavorable verdict were reached, Prudential would have to show that the refusal to enforce the jury waiver probably caused rendition of an improper judgment, which could present an insurmountable obstacle. *Id.* at 138. According to this analysis, even under the boundaries set by *Walker*, this case seemed a candidate for mandamus relief. Moreover, even if this analysis was not completely accurate (*see id.* at 141 (Phillips, J., dissenting), the majority also analogized the situation of being forced to jury trial despite a waiver to being forced to jury trial despite an arbitration clause, an error which is generally subject to mandamus relief. *Id.*

Nevertheless, the statements in *Prudential* signaled a shift in the application of the "adequate remedy by appeal" standard.

B. The Sands Shift Dramatically with *McAllen*

But, the most dramatic shift occurred earlier this year in *In re McAllen Med. Ctr., Inc.*, ___ S.W.3d ___, 2008 WL 2069837 (Tex. May 16, 2008). In examining the "adequate remedy by appeal" prong, the majority opinion instructed that:

> [w]hether a clear abuse of discretion can be adequately remedied by appeal depends on a careful analysis of costs and benefits of interlocutory review. As this balance depends heavily on circumstances, it must be guided by analysis of principles rather than simple rules that treat cases as categories.

Id. at *3. In effect, the majority opened up the boundaries of mandamus from the established categories of cases (with some room for expansion) to an amorphous and much broader scope, limited only by a balance of "the costs and benefits of interlocutory review." *Compare id.* at **3-6; *with Walker*, 827 S.W.2d at 840-43.

The majority referred back to the *Prudential* opinion as an attempt "to describe the public and private interest factors that courts should balance in deciding whether the benefits of mandamus outweighed the detriments in each particular case." *McAllen*, 2008 WL 2069837 at *6 & n.53. According to the majority, "[t]here is no reason this analysis should entangle appellate courts any more than *Walker*'s *ad hoc* categorical approach." *Id.*

The dissenting judges strongly disagreed. *See id.* at **7-8 (Wainwright, J., dissenting, joined by Jefferson, C.J., and O'Neill, J.). Opening with a song verse from the movie *Aladdin*,[3] the dissent bluntly stated that "[a] whole new world in mandamus practice, hinted by opinions in the last few years, is here." The dissent noted that the new standard for analyzing an "adequate remedy by appeal" differed from the previous incarnation, which determined whether waiting for an appeal "would deprive the aggrieved party of substantial rights or result in a legal error that the appellate court would be unable to correct." *McAllen*, 2008 WL 2069837 at *9 (dissent). As opposed to that previous standard, which had served as "a check on reviewing incidental trial rulings," the dissent characterized the new standard as permitting mandamus relief "when 'some calls are so important' and sufficiently incorrect that they move the Court to action," without regard for whether an appeal would be a technically "adequate" remedy. *Id.* at *10 (dissent).

Although *McAllen* certainly provides room for litigants to argue that mandamus should issue in cases that do not fit any of the established categories, it also provides a basis for litigants to argue that, even though a case fits an established category, mandamus should *not* issue based on the particular facts of the case. *See McAllen*, 2008 WL 2069837 at *6. However, it remains to be seen how comfortable trial courts will be straying from the established categories. Thus, despite the leeway afforded under *McAllen* and *Prudential*, it

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[3] Using a musical verse to herald a shift in the sands of mandamus seems to be a Supreme Court tradition. The dissent in *Walker* also marked the "radical change in philosophy" embodied in the majority with an opening verse, from *God Bless the Child*. *Walker*, 827 S.W.2d at 846 & n.1 (Doggett, J., dissenting).

remains useful to keep up with the types of cases and situations that justify mandamus, even under the newer formulation of "adequate remedy by appeal."

III. FORMING YOUR BUILDING PLAN

Contrary to popular belief and/or wishful thinking, the standard for mandamus relief is not "This ruling seems really, *really*, REALLY unfair." Mandamus will issue when a trial court commits a clear abuse of discretion for which there is no adequate remedy on appeal. *Walker*, 827 S.W.2d at 839. A trial court has no "discretion" in determining what the law is or applying the law to the facts. *Id.* at 840. Therefore, a trial court commits a clear abuse of discretion if it fails to analyze or apply the law correctly. *Id.* at 839. Moreover, a trial court's discretion regarding factual issues or other matters committed to its discretion is not unlimited, and a decision in these areas that is so arbitrary and unreasonable to amount to a clear and prejudicial error of law constitutes a clear abuse of discretion. *Id.* at 839-40.

Deciding whether to pursue mandamus relief involves analysis not only based on the legal standard, but also from a practical standpoint. And, once you have finished your analysis, the task becomes educating your client about the various aspects and making the final decision together.

A. Legal Aspects of the Decision

1. Applying the mandamus standard

Legally (or quasi-equitably, as the case may be), the question is: does your situation fit the mandamus standard? Was the trial court's action not only an abuse of discretion, but further a *clear* abuse? For example, if there is conflicting evidence and the court's ruling is fact-based or a mixed question of fact and law, it may be difficult to characterize any actual abuse as a clear one. But, on the other hand, an error in determining or applying the law is a clear abuse of discretion, even if the law is somewhat unsettled. *In re Jorden*, 249 S.W.3d 416, 424 (Tex. 2008).

Also, be aware that not every abuse-of-discretion review is identical. *Perry Homes v. Cull*, ___ S.W.3d _, 2008 WL 1922978, *9 (Tex. 2008); *see also In re Pirelli Tire, L.L.C.*, 247 S.W.3d 670, 682-83 (Tex. 2007) (Willett, J., concurring). For instance, reviewing a declaratory judgment fee award (which is subject to broad discretion) is not the same as reviewing the admission of hearsay evidence (which requires courts to follow detailed rules). *Perry Homes*, 2008 WL 1922978 at *9. Yet, the standard by which both are reviewed is "abuse of discretion." *Id.* Be aware of the type of discretion the court had in making its decision(s) as you evaluate the merits of a possible mandamus.

Even if you have a good-faith argument that a clear abuse of discretion occurred, can you establish the lack of an adequate remedy by appeal? As mentioned in the previous section, the applicable standard balances the costs and benefits of interlocutory review. If the costs of interlocutory review outweigh the benefits, then mandamus relief is not appropriate. If the benefits outweigh the costs, then a regular appeal *may* be inadequate. *Prudential*, 148 S.W.3d at 136.

What types of situations will push the balance toward inadequate remedy and mandamus relief? Here are two possible candidates:

- the erroneous order involves rights under a statute in connection with which the Legislature already has balanced all or most of the relevant costs and benefits [*McAllen*, 2008 WL 2069837 at *4];
- the erroneous order denies a party some right (*i.e.*, arbitration, the choice of an attorney, an expert report) to which it is entitled [*McAllen*, 2008 WL 2069837 at *4].

Moreover, despite the shift in jurisprudence from announcing mandamusable categories of cases to the use of a case-by-case standard, it appears that the previously identified categories remain generally susceptible to mandamus relief. *See McAllen*, 2008 WL 2069837 at *3; *Prudential*, 148 S.W.2d at 136, 138-39. These categories share a common theme: the parties are in danger of permanently losing substantial rights pending appeal. *In re Van Waters & Rogers, Inc.*, 145 S.W.3d 203, 211 (Tex. 2004). Examples of this type of danger are situations in which:

- the appellate court would not be able to cure the error;
- the party's ability to present a viable claim or defense is vitiated or severely compromised;
- the error radically skews the procedural dynamics of the case;
- the error cannot be made part of the appellate record;
- the order would disrupt the orderly processes of government; or
- the order would defeat a strong public policy.

In re Team Rocket, L.P., ____ S.W.3d ____, 2008 WL 2154092, *5 (Tex. May 23, 2008); *In re BP Prods. N. Am., Inc.*, 244 S.W.3d 840, 846, 849 (Tex. 2008); *In re Southwestern Bell Tel. Co., L.P.*, 235 S.W.3d 619, 624 (Tex. 2007); *Van Waters*, 145 S.W.3d at 211; *In re Entergy Corp.*, 142 S.W.3d 316, 320 (Tex. 2004); *Travelers Indem. Co. v. Mayfield*, 923 S.W.2d 590, 595 (Tex. 1996).

When a case falls within one of these categories, the "adequate remedy" analysis, like a good architect or designer, streamlines your building decisions. For

instance, some types of erroneous rulings are recognized as having no adequate remedy by appeal: (1) compelling the disclosure of privileged information that will materially affect the disclosing party's rights; (2) compelling the disclosure of trade secrets without adequate confidentiality protections; (3) compelling an apex deposition; (4) denying a motion to compel arbitration; (5) imposing death-penalty sanctions; (6) disallowing discovery without allowing the aggrieved party to make the discovery part of the appellate record; or (7) refusing to enforce a forum-selection clause or denying a forum *non conveniens* motion. *McAllen*, 2008 WL 2069837 at *3; *Pirelli Tire*, 247 S.W.3d at 679; *Jack B. Anglin Co, Inc. v. Tipps*, 842 S.W.2d 266, 272-73 (Tex. 1992); *Walker*, 827 S.W.2d at 843-44; *In re El Paso Healthcare Sys.*, 969 S.W.2d 68, 75 (Tex. App.—El Paso 1998, mand. denied).

In other situations, a relator may be absolved of having to show the lack of an adequate remedy. For instance, the erroneous refusal to enforce a mandatory venue provision (*i.e.*, a clear abuse of discretion) supports mandamus relief without more. *In re Texas Ass'n of Sch. Bds., Inc.*, 169 S.W.3d 653, 656 & n.11 (Tex. 2005); *In re Leder*, ___ S.W.3d _____, 2007 WL 1953877, *1 (Tex. App.—Houston [1st Dist.] 2007, mand. denied). As you analyze whether there is an adequate remedy by appeal, be sure to check and see whether your case fits into a recognized category or benefits from a statute that removes the "no adequate remedy" requirement.

Your initial analysis of the mandamus standard as applied to your case is the most critical step in the process. Mandamus is case-specific. Statistics are largely useless in guiding the decision of whether or not to file a mandamus petition. If you case is one that meets the standard, then the chances are better than average that you will prevail. If your case doesn't fit the standard, then the chances are practically nil, no matter what the statistics may be.

2. Written order vs. oral ruling

In the past, mandamus was not an option without a written order. Today, it is possible to mandamus an oral ruling if it is a clear, specific, and enforceable order that is adequately shown by the record. *In re Bledsoe*, 41 S.W.3d 807, 811 (Tex. App.—Fort Worth 2001, orig. proceeding); *see also In re Perritt*, 973 S.W.2d 776, 779-80 (Tex. App.—Texarkana 1998, orig. proceeding). The Fort Worth Court of Appeals examined changes to the mandamus procedural rule and noted that, although the former version expressly required a "certified or sworn copy of the order complained of," the current version allows either "a certified or sworn copy of any order complained of, *or any other document showing the matter complained of*." *Id.* (emphasis original); *see also* TEX. R. APP. P. 52.3(j)(1)(A).

Although the rule does not expressly require that the "document showing the matter complained of" be part of the trial court record, the Fort Worth Court of Appeals has indicated that this requirement exists. *Parker v. Parker*, 131 S.W.3d 524, 528-29 (Tex. App.—Fort Worth 2004, pet. denied). In *Parker*, the court was asked to take judicial notice of the records in a previous mandamus proceeding involving the same underlying case. *Id.* at 528. In the mandamus proceeding, the relator had filed a transcription and tape recording of a voicemail message in which the trial judge purportedly orally recused himself. *Id.* In the later appeal, the court of appeals refused to take judicial notice of the transcription or recording. *Id.* The court noted that the items had not been offered into evidence in the trial court or otherwise included in the trial court record. *Id.* Thus, the court opined that it would not have been able to consider the items in the prior mandamus. *Id.*

Because most oral rulings will be evidenced in a reporter's record (*see, e.g.*, *Perritt*, 973 S.W.2d at 779), the requirement that the oral ruling be contained in the trial court record generally should not be a problem. However, there are times when trial court hearings are not recorded by a court reporter (*e.g.*, when no evidence is being offered). Rule 52.7(a)(2) seems to absolve a relator of the responsibility of obtaining a reporter's record of a hearing where "no testimony was adduced in connection with the matter complained." If you suspect that you may need to pursue mandamus relief based on the outcome of a hearing, the safest practice would be to request a court reporter to record the hearing, even if it is non-evidentiary.

Courts do "not encourage parties to file mandamus actions based upon a court's oral pronouncements" (*Bledsoe*, 41 S.W.3d at 811), and the high standard keeps mandamus proceedings based on oral rulings relatively rare. Yet, this can provide a valuable option where the trial court has made a sufficient oral ruling and time does not permit you to wait (or to wait any longer, depending on how much time has passed) for a written order before seeking mandamus relief.

B. Practical Aspects of the Decision

In addition to the legal standard, there are practical considerations to take into account when deciding whether you want to proceed.

1. Impact on the underlying case

What effect would a mandamus have on the ongoing case in the trial court? Balance the time and expense you will have to divert to the ancillary proceeding against how much difference a successful

mandamus would make and the likelihood you will succeed in obtaining relief. Will you need a stay of the trial court proceedings in order to obtain meaningful relief? If so, is it worth staying the trial court matter, or will the added delay be so detrimental overall that a stay (or the mandamus as a whole) is not worth pursuing?

2. Expense vs. possible relief

Mandamus proceedings add expense. The attorney not only has to analyze, research, and draft a petition/brief and possibly a motion, but also has to act as a clerk and reporter in assembling the record. Weigh this additional expense and distraction not only against the chances of success, but also the value of success. What is the best/most relief that an appellate court could grant via mandamus in your case? Sometimes, the error lies with the manner in which the trial court ruled, not in the ruling itself. In such cases, the best you can hope for is an order compelling the trial court to vacate its ruling and hold another hearing or consider additional matters. At that point, the trial court has a blueprint by which to render the same ruling in a manner not susceptible to mandamus review. This relief may be worth the effort. Then again, it may not.

3. State of the record

Does your record support the mandamus relief you want, or are there gaps that undermine your position? Gaps do not equate with bad lawyering. In many mandamus situations, the underlying filings and hearings have taken place at breakneck speed, with attention focused on winning the issue in the trial court. In other cases, the ruling you are considering mandamusing came out of nowhere. No matter what the reason, now is the time to honestly evaluate your record from the standpoint of a mandamus. If you see gaps, can they be corrected before seeking mandamus relief? Is it possible or advisable to seek reconsideration or rehearing by the trial court? Is there time to wait for another hearing and another order?

The best case scenario is to plan for a possible mandamus when you are drafting your trial court papers, submitting evidence, and arguing your position. Real life seldom presents the best case scenario. Regardless, the state of the record is an important consideration in advising your client whether or not to pursue mandamus relief.

C. Managing Client Expectations

After you have identified the issues and reached a preliminary recommendation, the next step is educating your client. Whether your client has been through fifty mandamus proceedings or none, it is essential to walk the client through the issues – again, mandamus is a case-specific endeavor. Each construction project is different.

Here are some of the areas to cover with your client:

- Discuss the expense and the possible impact on the underlying case. Also, talk about any stay that might be needed, as well as the likelihood of obtaining one.
- Explain what type of relief is possible (or impossible).
- Describe the perspective of the court of appeals or the Texas Supreme Court. For example, if the Texas Supreme Court is not likely to be interested in the issues presented, the client show know that the court of appeals may be effectively the court of last resort. On the other hand, your mandamus may involve a novel legal issue on which a court of appeals is likely to defer to the Texas Supreme Court. In that case, you may need to explain that, even though relief in the court of appeals is unlikely, it is worth pursuing in order to give the Supreme Court a chance to take the petition.

The key is to be realistic with your client from the beginning. Certainly, you are just as unhappy with the trial court's ruling as your client. Of course, you will zealously pursue a good-faith mandamus if the decision is made to move forward. But, before the decision is made, your responsibility is to educate your client about the aspects – favorable and unfavorable – so that the decision is well-considered.

IV. GATHERING YOUR MATERIALS

Preparing the initial mandamus filings is like starring in one of the aforementioned reality shows In many instances, your case continues to move forward in the trial court – sometimes rapidly – while you pursue mandamus on a parallel track. Assembling the materials is easier if you have a step-by-step game plan.

A. "Deadline" to File

There is no official deadline for filing a petition for writ of mandamus. *See* TEX. R. APP. P. 52. The standard for timeliness in seeking this equitable-like remedy is laches. In equitable proceedings, laches requires a showing of both unreasonable delay and resulting prejudice. *Vickery v. Vickery*, 999 S.W.2d 342, 355 (Tex. 1999). However, in the mandamus context, some courts have dispensed with the prejudice prong of laches and look solely at whether any delay in filing the mandamus petition was justified. *See, e.g.*, *In re Lexington Ins. Co.*, 2004 WL 210576 (Tex. App.—Houston [14th Dist.] Feb. 2, 2004, mand. denied) (not designated for publication); *In re Wise*, 20 S.W.3d 894 (Tex. App.—Waco 2000, orig.

proceeding); *Quanto Int'l Co., Inc. v. Lloyd*, 897 S.W.2d 482 (Tex. App.—Houston [1st Dist.] 1995, orig. proceeding); *International Awards, Inc. v. Medina*, 900 S.W.2d 934 (Tex. App.—Amarillo 1995, orig. proceeding).[4] One court effectively imposes a standard for laches based solely on delay (*i.e.*, the passage of time), without regard for justification or prejudice. *See, e.g.*, *In re Harbrook Tool & Mfg. Co.*, 181 S.W.3d 551 (Tex. App.—El Paso 2005, mand. denied).

These cases appear to misinterpret *Rivercenter Assocs. v. Rivera*, 858 S.W.2d 366 (Tex. 1993). Under the circumstances presented in *Rivercenter*, the Texas Supreme Court focused only on part of the laches standard – unjustified delay – and quoted part of a sentence from an earlier opinion ("'Equity aids the diligent and not those who slumber on their rights'"). 858 S.W.2d at 367. However, in the earlier opinion from which the quote was taken, the Court made clear that equitable laches applies in full to mandamus proceedings. *Callahan v. Giles*, 137 Tex. 571, 575-76, 155 S.W.2d 793, 795-96 (1941). The Court reasoned, "The maxim that 'Equity aids the diligent and not those who slumber on their rights' is a fundamental principle of equity jurisprudence, resulting in a rule of practice which has made the defense of laches just as complete a bar to the assertion of an equitable right as the defense of limitation is a bar to the assertion of a legal right."

Some courts of appeals have read the partial quote in *Rivercenter* as reflecting an intent to dispense with prejudice and require only unjustified delay when applying the laches defense in mandamus proceedings. The misinterpretation has led to differing mandamus laches standards in different courts of appeals: some courts require both unjustified delay and prejudice, other courts require only unjustified delay, and at least one court requires only delay.

The Texas Supreme Court has not resolved the confusion, though it has confirmed that a justified delay does not, in itself, establish laches. *See Southwestern Bell*, 235 S.W.3d at 624. And, the Court has indicated that a mandamus petition filed at the same time as a related/companion appellate brief provides a reasonable explanation for "delay" in filing the petition. *In re SCI Tex. Funeral Servs., Inc.*, 236 S.W.3d 759, 761 (Tex. 2007).

The difference between the possible laches standards can have a huge impact on your mandamus proceeding. Until the Texas Supreme Court resolves the issue, pay particular attention to the standard used by the court you will be filing in. If your court of appeals uses a standard that does not require prejudice, plan to file your mandamus petition as soon as possible. If you are seeking relief in parallel proceedings – *e.g.*, a mandamus proceeding and an interlocutory appeal – do not assume that you can wait to file your mandamus petition on the same date you file your appellant's brief. That delay, even if it seems reasonable and does not prejudice the other party/ies, can result in the denial of your mandamus petition based on laches.

Perhaps to address this type of problem, at least one court has carved out an exception to the "no prejudice needed" rule in the context of arbitration appeals. Where it is unclear whether the Texas General Arbitration Act or the Federal Arbitration Act applies, parties generally seek relief from orders denying a motion to compel arbitration by parallel interlocutory appeal and mandamus proceedings. *See Jack B. Anglin*, 842 S.W.2d at 272. The usual practice is to file a combined appellant's brief/mandamus petition at the time when the appellant's brief is due. However, in courts that use the "no prejudice needed" laches standard, the "delay" in filing the mandamus petition could be considered laches. Therefore, the Houston 14th Court of Appeals has decided that, in "arbitration mandamus" proceedings, laches will require a showing of prejudice. *E.g.*, *AutoNation USA Corp. v. Leroy*, 105 S.W.3d 190, 202 (Tex. App.—Houston [14th Dist.] 2003, no pet.); *see also In re Delta Homes, Inc.*, 5 S.W.3d 237, 240 (Tex. App.—Tyler 1999, orig. proceeding) (using same standard).

B. Compiling the Record

Whereas the clerk and reporter are responsible for compiling and filing the record in a regular appeal, the relator is responsible for doing so in a mandamus proceeding. TEX. R. APP. P. 52.7. This process can be time-consuming and may require you to seek documents (*e.g.*, certified copies, reporter's record) from others. Because the process is not entirely within your control, it is best to start early, so that preparations move forward while you are drafting the petition.

The record must contain: (1) a certified or sworn copy of every document that is material to the relator's claim for relief and that was filed in any underlying proceeding; and (2) a properly authenticated transcript of any relevant testimony from any underlying proceeding, including any exhibits offered into evidence, or a statement that no testimony was adduced in connection with the matter complained. TEX. R. APP. P. 52.7(a). If your case involves hearings at which evidence was adduced, or other hearings you

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[4] *But see In re Hinterlong*, 109 S.W.3d 611 (Tex. App.—Fort Worth 2003, mand. denied) (requiring both unjustified delay and prejudice); *In re Hamel*, 180 S.W.3d 226 (Tex. App.—San Antonio 2003, orig. proceeding); *Sanchez v. Hester*, 911 S.W.2d 173 (Tex. App.—Corpus Christi 1995, mand. overr.).

want as part of the mandamus record for strategic reasons, contact the court reporter immediately to begin the process of getting reporter's records of those hearings.

> ***Tip***: If you experience delays in receiving the completed reporter's record(s), it is advisable to document the process with letters, or alternatively e-mails, to the court reporter. These letters are not meant to be accusatory; they should simply recite what is happening and reiterate the need to complete the records as soon as possible. This kind of documentation may be helpful later if the real party in interest asserts the defense of laches.

In most cases, documents from the trial court record can be authenticated by a verification by the attorney. A sample "record," including verification, is provided at Appendix A. There may be instances, however, where there are documents in the court's file that no one can authenticate through a verification. In that event, you should promptly obtain certified copies of those documents from the district or county clerk.

In addition to the required contents of the mandamus record, a party may supplement with "additional materials." TEX. R. APP. P. 52.7(b). Despite the breadth of this term, be aware that appellate courts generally do not consider any document that was not part of the record before the trial court – either in the clerk's record or recorded by a court reporter – even if included in a "mandamus record" filed by a party. *See, e.g.*, *Parker*, 131 S.W.3d at 528.

Also, as you decide what documents to include in the record, keep in mind that you are required to include in the record "every document that is material to the relator's claim for relief . . . ." TEX. R. APP. P. 52.7(a)(1). The test is whether the document is material to your request for mandamus, not whether the document is material to the specific ruling. This may require inclusion of documents that were not directly relied upon by the trial court in making the particular ruling, but that form part of the circumstances surrounding and informing the ruling. For example a document may not have been part of the motion-response-reply resulting in the trial court's order, but if it fleshes out or places in context those documents or the order, it likely should be included. Omitting documents that bear on whether or not your client is entitled to mandamus relief will, among other things, cost you credibility and be rectified as soon as the real party in interest files a supplemental record under Rule 52.7(b). Filing a record that is clearly misleading due to omission of "obviously important and material evidence or documents" also provides a basis for sanctions. TEX. R. APP. P. 52.11.

Once you're building momentum toward a completed reporter's record and any necessary certified copies, it's time to draft the "record." This includes: (1) a cover page, which is the same as the first page inside the cover; (2) table of contents; (3) signature block and certificate of service; and (4) verification. TEX. R. APP. P. 52.7(a)(1), (c)(1), (c)(2). Appendix A contains a sample of these portions of the record. Each element has some quirks:

Cover page. The cover page needs to contain a space for the clerk to write in the number assigned to the mandamus proceeding once it is filed.

Table of contents. Generally, you want to order the documents so that the order(s) of which you are complaining is the first document in the record. After that, you can arrange the documents in whatever manner best suits your case: chronologically, in order of importance, in order of most frequent reference, etc.

Certificate of service. Be aware that the Texas Rules of Appellate Procedure impose the requirements for certificates of service found in the Texas Rules of Civil Procedure ***plus*** an additional requirement: if the person served is a party's attorney, the certificate must state the name of the party represented by that attorney. TEX. R. APP. P. 9.5(c)(3). If you serve a document on my client through me, it is not enough to list my name and address in the certificate of service. You must also add: Attorney for {party}. Documents have been bounced for failure to comply with this rule.

Verification. The verification must establish the basis for the conclusion that the affiant has personal knowledge of the matters sworn to. In addition, the verification should be drafted to make clear which documents the affiant is authenticating.

> ***Tip***: If you have a multi-volume record and/or if your record contains many documents that would be helpful for the court to review, consider putting your record on CD-ROM. It is not necessary to make the entire CD searchable; it is usually enough to link the table of contents to the documents (*i.e.*, clicking on a document in the table jumps the user to the first page of that document). You will need enough copies to give the court several – so that more than one judge or staff attorney can access the electronic version simultaneously – and also to serve on respondent and at least one attorney for each real party in interest.

Do not underestimate the time it will take to assemble, finalize, copy, and bind the record. In most cases, you will have to revise and reorder the table of contents and verification several times before you finalize them. Once the verification is complete, it not only needs review and signing, but also notarization.

Build ample time into your schedule for tabbing, copying, and binding the record, as well. Unlike other mandamus documents, you are required only to file one copy of the record [TEX. R. APP. P. 9.3(c)], but you also will need a file copy, copies for the respondent and opposing counsel, and any additional copies for co-counsel and your client.

V. BUILDING THE FOUNDATION

A. Drafting the Petition

When you begin drafting the petition for writ of mandamus, take time to review Rule 9.4, which sets forth the required form for documents filed in the appellate courts. It is easiest to format your document properly at the outset, with 13 point font for text and the proper margins. If you do not, it will be more difficult to tell whether you are hitting page limits as you draft the brief.

The petition for writ of mandamus contains largely the same headings/required sections as a brief in a regular appeal, ***plus***: (1) a more detailed statement of the case; and (2) under the proposed amendments, a certification that every factual statement in the petition is supported by competent evidence in the record. TEX. R. APP. P. 52.3 (as amended). The required sections are the identity of parties and counsel, table of contents, index of authorities, statement of the case, statement of jurisdiction, issues presented, statement of facts, argument, prayer, verification, and appendix. *Id.* Some of these sections present unexpected elements you'll need to incorporate into your design:

1. Statement of the case

As with the statement in regular appellate briefs, the statement in a mandamus petition "should seldom exceed one page and should not discuss the facts" relevant to the issues. However, in a mandamus petition, the statement of the case is required to contain certain specific recitations:

- A concise description of the nature of the underlying proceeding. Examples are provided in the rule.
- If the respondent is a judge, the name of the judge, designation of the court in which the judge was sitting, and the county in which the court is located. If the respondent is not a judge, the designation and location of the office held by the respondent.
- A concise description of the respondent's action being mandamused.
- If habeas corpus is sought, a statement describing how and where the relator is being deprived of liberty.

If you are filing the petition in the Texas Supreme Court after seeking the same relief in a court of appeals additional recitations are required:

- The date the petition was filed in the court of appeals;
- The district of the court of appeals and the names of the justices who participated in the decision;
- The author of any opinion for the court of appeals and the author of any separate (*i.e.*, concurring, dissenting) opinion;
- The citation of the court's opinion; and
- The disposition of the case by the court of appeals, and the date of the court of appeals' order.

> ***Tip***: The statement of the case should not be overtly partisan, but at the same time, it is generally one of the first things that the court will read. Consider the manner in which you present the required information. Also, devote some time toward making this section reader-friendly, rather than a dry list of required elements.

2. Verification Replaced by Citation Requirement and Certification

Under the amended rules as proposed, you are no longer required to verify *the petition* (though you are still required to verify an unsworn/uncertified documents in the record). TEX. R. APP. P. 52.3 (as amended), 52.7(a)(1). However, to balance the removal of the second verification requirement, two new requirements have been added. First, "[e]very statement of fact in the petition must be supported by citation to competent evidence included in the appendix or record." TEX. R. APP. P. 52.3 (as amended). And second, "[t]he person filing the petition must certify that he or she has reviewed the petition and concluded that every factual statement in the petition is supported by competent evidence included in the appendix or record. *Id.*

3. Appendix

Many people think that the record and the appendix in a mandamus proceeding are the same. However, they are two different things, The record is the stand-alone volume or volumes that substitute for the clerk's and reporter's record one would find in a normal appeal. TEX. R. APP. P. 52.7(a). On the other hand, the appendix is ancillary to the petition (just like an appendix in a normal appeal is ancillary to the brief). TEX. R. APP. P. 52.3(j). The appendix is usually bound with the petition, but it may be a stand-alone document depending on its size once the required documents are inserted. Rule 52.3(j) sets forth the

necessary contents required to be included in the appendix, and also describes optional contents that may be added at the attorney's discretion. A sample appendix excerpt is attached at Appendix B.

> ***Tip***: For citation and reference purposes, it is easier to use in the appendix the same tab numbers or letters assigned to documents in your record. For instance, if you choose to include in your appendix the documents from tabs A, D, E, and G of your record, tab them the same way in the appendix. *See* Appendix B, *infra*. Alert the court in a footnote so that it's clear there's a method to your madness.[5]

When deciding what to include in the appendix, think about what documents the reader either needs to see or would be intensely curious to read for him/herself. If possible, however, you do not want to include so much in the appendix that you are put to the choice of filing a mammoth petition or a stand-alone appendix. The goal is to make your petition (with appendix) a complete yet portable container of everything the reader needs to know.

B. Drafting a Motion for Temporary Relief

In addition to the record and petition, you may need or want to draft a motion for temporary relief to file concurrently. Rule 52.10 sets forth the procedural requirements for a motion for temporary relief, which must also comply with the general requirements for appellate motions in Rules 9 and 10. A sample motion is provided at Appendix C.

The most common form of temporary relief sought in mandamus proceedings is a stay. In deciding whether to file a motion for temporary stay, several factors are worth considering:

What needs to be stayed? In many cases, it is both unlikely and unnecessary that all proceedings in the trial court be stayed. The preference of appellate courts is to effect the least intrusive stay needed to protect the court's jurisdiction (*i.e.*, ability to grant meaningful relief by mandamus). Often, a stay of the order at issue is sufficient to protect the parties while the appellate court decides whether mandamus relief is appropriate. Sometimes, a stay of the order with additional restrictions (such as, a stay of the order compelling production of documents from Company X's product development department and a stay of the deposition of the department head) is necessary in order to ensure that any mandamus would be meaningful. Brainstorm about what would happen if various aspects of the trial proceedings were or were not stayed. Craft your motion to request the narrowest stay necessary, or at least to suggest alternatives that are less restrictive but protective of your client's rights.

> ***Tip***: When the trial court makes a ruling that you intend to mandamus and that you want to have stayed pending review, consider asking the trial court to temporarily stay its own order. This sounds counterintuitive, but it actually makes a lot of sense. Courts generally do not take mandamus personally, and any ruling that is subject to a mandamus likely concerns a significant and hard-fought interim dispute. In addition, trial courts understand the value of resolving by mandamus an issue that could present reversible error later. A trial court may be willing to stay its own order until you have exhausted your mandamus options. Alternatively, the trial court may abate its order for a short period that allows you to prepare and file your mandamus along with a motion for the court of appeals to grant its own stay. *See, e.g.*, Appendix C at ¶3.

What impact will a stay have on the underlying case? Once you have determined the type of stay you need in order to make any future mandamus relief meaningful, analyze the impact such a stay will have on your case in the trial court. It may be that the contemplated stay would have more significant negative effects on the underlying case than possible benefits in the mandamus proceeding. In some instances, these negative effects can be countered by further tailoring the requested stay. In other cases, you and your client will face a decision of whether to request a stay at all. If you reach a decision not to request a stay, you may want to revise your petition to educate the appellate court about the need for expedited treatment of the mandamus.

Is it possible that the opposing party/ies would agree to the requested stay? It is rare, but there are times when a proposed stay would benefit both sides. Consider whether the opposing party might agree to the proposed stay. A proposed stay to which no one objects is more likely to be granted by the appellate court.

Once you have drafted the motion, remember to add the certificate of compliance with Rule 52.10. A relator is required to: (1) notify or make a diligent effort to notify all parties by expedited means (such as by telephone or fax) that a motion for temporary relief has or will be filed; and (2) certify compliance with these requirements. TEX. R. APP. P. 52.10(a). It also usually assists the appellate court in making a swift decision if you can state whether or not the real party in interest is opposed to the requested temporary relief.

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[5] Ex: "Portions of the Mandamus Record are attached to this Brief in the Appendix. For ease of reference, the Appendix tabs correspond to those in the Record. Thus, the Appendix contains only Tabs A, C, D, E, F, I, L, N, and T."

C. Completing the Roof (or, Filing and Service)

Before you experience the satisfaction that comes with building the framework of a mandamus, you have to double-check the plans. Among the things you should revisit:

Format: Make sure that your petition complies with the requirements of Rule 9.4, particularly regarding margins, spacing, font (text and footnotes), and cover color. Texas appellate courts do not assign particular colors to particular brief types, but covers cannot be plastic, red, black, or dark blue (in order to ensure the court's file-stamp will be legible).

Page limits. The length of your petition varies depending on the court. In the courts of appeals, your petition must not exceed fifty pages. In the Texas Supreme Court, your petition must not exceed fifteen pages. Page limits exclude those pages containing the identity of parties and counsel, table of contents, index of authorities, statement of the case, statement of jurisdiction, issues presented, signature, certificate of service, and appendix.

Number of copies. Check your court's local rules. If the local rules do not alter the regular number of copies (or if there are no local rules), Rule 9.3 sets forth the number of copies you must file. In the courts of appeals, you are required to file the original and three copies of all documents in mandamus proceedings, except for the record (one copy only). TEX. R. APP. P. 9.3(a)(1)(A), (c). In the Texas Supreme Court, you are required to file the original and 11 copies of all documents, except for the record (still one copy only). *Id.* at 9.3(b), (c). Don't forget to send an extra copy in order to get a file-stamped copy back. And, when in doubt, give the clerk's office a call to verify the proper number of copies.

> ***Tip***: Mandamus proceedings don't just strike fear in the hearts of attorneys; they can also terrorize appellate court clerks. You can reduce the trauma in certain cases by calling the clerk's office in advance to alert them that your mandamus is coming. For example, if circumstances are forcing you to file a mandamus on Friday regarding a trial court order requiring action by the following Tuesday, you may want to call the appellate court clerk in advance – even before you have everything ready to file – to let him/her know a short-fuse mandamus is coming. On the other hand, if you are about to file a mandamus on a Friday afternoon that is *not* an emergency, you may want to call the clerk and let him/her know that the mandamus about to be filed is not something that should cause alarm.

Fees. There are separate fees for filing the mandamus petition and for any motion for temporary relief. There is currently no fee for filing the mandamus record.

Service. Make sure the certificates of service in your documents include the name of the party represented by any attorneys who are listed. TEX. R. APP. P. 9.5(e); *see also* Section III(B), "Certificate of Service," *supra*. Also remember that, in addition to serving the opposing party/ies, you need to serve copies on the respondent whose ruling is at issue.

After you file the initial papers, remember to record the number assigned to the proceeding by the clerk, for use in future filings and correspondence. Also, make a note to visit the court's website in a few days to sign up for automatic e-notices in the newly docketed proceeding. *See* Section VIII(A), "E-notices," *infra*.

VI. CALLING THE BUILDING INSPECTOR

As the relator's attorney is enjoying the rush of having successfully initiated a mandamus proceeding, the real party in interest's attorney begins his/her own quest to dismantle it. A lot of the information and tips provided above in Section III will also be relevant and helpful in preparing a response to a petition. Below are some additional issues to keep an eye on.

A. Responding to Requests for Temporary Relief

The appellate courts may grant temporary relief without waiting or asking for a response from the real party in interest. *See* TEX. R. APP. P. 52.4. Therefore, if you want to respond to a motion for temporary relief, you will need to act quickly. Although the court is not required to wait for your response, it may be helpful to call the appellate court clerk's office and let them know that you intend to file a response to the motion for temporary relief. If you are not located in the court's area, ask whether the court will accept a response to the motion for temporary relief by facsimile, with a hard copy to follow by mail or overnight courier (as the court prefers). Alternatively, make arrangements for your filing package to be delivered by an overnight courier that has an early delivery option (such as 8:30 a.m.).

The most important aspect of your response, if you decide that one is needed, is to inform the court of additional circumstances or case law that undermine the utility or advisability of the requested temporary relief. A formal response is preferable, even if you do not have time to do much (or any) revising or editing. *See* TEX. R. APP. P. 9, 10. In a pinch, it is likely that a letter to the court, concisely setting forth your position, would be acceptable.

> ***Tip***: Do not forget to include the filing fee for responses (currently $10.00). In time-sensitive situations, it is important to avoid any omission that would slow the process down.

If you are unable to file a response before the appellate court grants temporary relief, Rule 52.10(c) permits any party to move the court at any time to reconsider a grant of temporary relief.

B. Deciding Whether to Respond Without a Request

One of the real party's first tasks is to decide whether to file a response or to wait and see whether the appellate court requests a response. Under Rule 52.4, a response is not mandatory. The appellate court must not grant relief (other than temporary relief) before a response has been filed or requested by the court. TEX. R. APP. P. 52.4. Therefore, the real party in interest has the option to sit back and enjoy the ride, doing nothing unless and until a response is requested.

The main reason to file a response without waiting for a request from the court is when: (1) the petition creates a strong impression that mandamus should issue; and (2) this impression can be easily and definitively destroyed. For example, if a petition omits a critical event or fact that basically precludes any showing that the trial court clearly abused its discretion, it may be useful to respond with that information right away. Or, if the petition does not cite a case that effectively disposes of the issues, providing the authority promptly may nip the proceeding in the bud. However, be unmercifully frank in your internal analysis of whether a response would directly contradict the petition. Most situations are nuanced and complicated. If the response would simply show a competing view of the facts or present additional authority – as opposed to decimating the position set forth in the petition – you gain little by filing a response before being asked to do so.

> ***Tip***: Some practitioners will alert the court by letter that they do not intend to file a response unless requested by the court. Be aware that, in the past, the Dallas Court of Appeals occasionally has considered such a letter as the equivalent to a response to the petition for writ of mandamus. Thus, once the letter was received, the court of appeals would not necessarily request a response to the petition before granting it, even though the letter specifically requested such an opportunity. *See* TEX. R. APP. P. 52.4 (requiring court to either receive or request a response to the petition before granting mandamus relief). No letter is required, and the usual practice is not to send a letter, but instead to wait and see what the court decides to do.

C. Assembling a Supplemental Record

When you receive your service copy of the record filed by the relator, compare it with your files (or the trial court's docket) to make sure that all the material and relevant filings and transcripts are included. If not, you will need to prepare a supplemental record in conjunction with any response. Also, as you draft your response, you may discover that additional documents from the trial court record are relevant to your response points.

If you are waiting to see whether the appellate court requests a response, you may want to begin the process of gathering any materials you will need for a supplemental record. If the court requests a response, it may set a very short deadline. To the extent that you need a reporter's record of an additional hearing, or certified copies of court documents, it may be worth the expense to obtain those items while you wait.

Once you decide or are asked to file a response, preparation of a supplemental record is much like assembly of the initial record. *See* TEX. R. APP. P. 52.7; *see also* Section III(B), "Compiling the Record," *supra*.

D. Drafting the Response

If the time comes to file a response,[6] your goal is to concisely and clearly rebut each of the grounds presented for the mandamus relief. In many situations, even under the newer standard, the weakest link will be the "no adequate remedy by appeal" element. It may be best to present the argument and authority on this issue first, even though it is the second prong of the mandamus standard. As you develop your response, evaluate and re-evaluate the clearest and most powerful way to present your case.

Rule 52.4 sets forth the required sections of a response: table of contents, index of authorities, argument, and prayer. *Id.* The remaining sections are "optional" under the rule, but in reality, some or all may need to be included:

1. List of parties and counsel

Review the list of parties and counsel in the petition. If there are additional parties or (more likely) counsel, you will need to include a supplemental list in your response. TEX. R. APP. P. 52.4(a).

[6] If the court requests a response, it will provide a deadline for the response in its request.

2. Statement of the case

If any of the factual information required by Rule 52.3(d) has been omitted, you should include a supplemental statement in the response. *See* TEX. R. APP. P. 52.4(b). Because Rule 52.3(d) provides a laundry list of required information, this is usually unnecessary.

3. Statement of jurisdiction

If the grounds for jurisdiction presented in the petition are not valid, you are required to state the reasons that the court lacks jurisdiction. TEX. R. APP. P. 52.4(c).

4. Issues presented

Although the real party is not required to draft its own issues, it is almost always useful to do so.

When the relator's issues simply recite the required elements. When the relator basically uses the mandamus standard as the issues (*i.e.*, "Issue 1: Did Respondent clearly abuse his discretion by signing the March 16, 2008 Order?"), the real party has a wonderful opportunity to frame the issues for the court. You are effectively starting from scratch, so draft the issues the way you would if yours was the first brief being filed.

To focus the court's attention on the flaws in relator's position. Even if the relator has drafted issues that refer to the particular situation, a real party can use its own issues to focus attention on the flaws in relator's case. Here is a rough example of such an issue:

> In order to obtain mandamus relief, a relator must show that the respondent clearly abused her discretion. To show a clear abuse of discretion in deciding a factual issue, the relator must establish that the trial court could reasonably have reached only one (different) decision. Relator contends that the compelled discovery was improper because the information constitutes a trade secret. However, an essential element of trade secret status is that the information enjoys a substantial element of secrecy. The parties presented, and Respondent heard, conflicting evidence on whether Relator had maintained the information in substantial secrecy. *Did Respondent clearly abuse her discretion by compelling the production of the information?*

To address additional issues. In some cases, the reasons for denying mandamus go beyond the relator's failure to meet the two main requirements. For instance, the relator may have presented an incomplete and inadequate record, or equitable defenses may apply. In such a situation, you will need to draft additional issues that raise these points. Here is an example:

> Equitable defenses such as unclean hands apply in mandamus proceedings. A party's obstruction of discovery may result in unclean hands barring equitable relief. In this case, Relator: (a) testified by verification in support of her request to dissolve the writ of attachment; and then (b) refused to testify at deposition regarding the same subjects, thus obstructing Real Party's attempt to defend against the dissolution. Relator also filed a verification in this Court, providing sworn statements on the very subjects she refused to testify about at deposition. *Is Relator barred by unclean hands from obtaining mandamus relief from Respondent's rulings?*

Particularly when the court has requested a response, the opportunity to present a new, redefined set of issues is a valuable tool for any real party.

5. Statement of facts

When deciding whether to include a statement of facts, there are several factors to consider. Would your statement largely be a rehash of the statement contained in the petition? If so, it is better not to waste the court's time or attention with your own statement of facts. Is the statement in the petition fairly confusing or difficult to read? If so, you have the opportunity to tell the story concisely and clearly, even if many of the same facts are involved. Does the statement in the petition omit relevant facts? If so, would it be more effective to provide a completely new statement of facts, or to draft a supplemental statement that focuses on the omitted items?

The overall question is whether your own statement of facts would provide any additional benefit to the court. If not, it may be best to skip the statement, even if you believe you would have done a better job. *See* TEX. R. APP. P. 52.4(b).

6. Appendix

The appendix to the response need not contain any item already contained in the petition's appendix. TEX. R. APP. P. 52.4(e). The court most likely will have both the petition and response together when it reads the response, so it is unnecessary to duplicate appendix documents. Evaluate whether there are additional documents in the record that the court might need or want to see. If there are statutes, regulations, unpublished opinions, or agency opinions that are important to your response arguments, consider including copies in your appendix. By absolving you of the responsibility to include the basic, required

documents, the rules provide you an excellent opportunity to attach other proper materials that will assist the court as it makes its decision.

E. Driving Home the Last Nail

Many of the same details applicable to a petition apply to filing and serving your response papers. *See* Section III(E), *supra*. In addition, be aware that some appellate courts require filing fees for responses to petitions for writ of mandamus. It is generally not possible to ascertain from the courts of appeals' websites whether they do or do not require filing fees for mandamus responses and replies (as opposed to responses and replies to motions), so the safest course is to call the clerk's office and ask.

VII. SHORING UP THE FOUNDATION

A relator is permitted to file a reply, but the court is not required to wait for a reply before it disposes of the petition. TEX. R. APP. P. 52.5. It may be useful to call the appellate court clerk's office and let them know that you intend to file a reply and your estimated filing time/date. Again, the court will not necessarily wait for your reply, but the court may choose to wait if it is made aware that you will be filing a reply promptly.

> ***Tip***: Under the proposed amendments, the Texas Supreme Court has corrected the anomalous page limits for replies in the courts of appeals. The amendment makes the page limit for mandamus replies in the courts of appeals 25 pages, while keeping the 8-page limit for replies in the Texas Supreme Court. TEX. R. APP. P. 52.6 (as amended).

Your reply should not attempt to respond to each and every fact and argument in the response that you believe is wrong. Instead, the goal of a reply is to address the key issues. Ask yourself: (1) what questions will the court have when it puts down the response; and (2) what is the point of greatest vulnerability in the legal arguments underlying the real party's position? *See* Mike A. Hatchell and Molly H. Hatchell, *"Reply! Don't Repeat" The Art of the Reply Brief*, 17th Annual Advanced Civil Appellate Practice Course (State Bar of Texas 2003).

Keep your reply straightforward and concise. Avoid emotional outbursts, indignation (even if you believe it is righteous), and hyperbole. If every third word is an adverb (*e.g.*, clearly, obviously, certainly, patently), some editing is likely in order. Editing is also important to eliminate repetition of statements already made in your petition. Despite the time constraints, revisions are essential. Take advantage of the opportunity to have the last word by making your reply clear and compelling.

VIII. REDRAWING THE PLANS

Once the appellate court issues its opinion, any party may file a motion for rehearing within fifteen days of the date of the opinion/order. TEX. R. APP. P. 52.9. The motion must "clearly state the points relied on for the rehearing." *Id.* A motion for rehearing should not be a restatement of arguments presented in the mandamus papers. Rather, it should identify for the court, in a respectful way, the aspects of the opinion that are contrary to the law or that misapprehended the underlying facts.

As with responses to petitions, no response to a motion for rehearing is required unless the court requests. TEX. R. APP. P. 52.9. Deciding whether to file a response before receiving a request is much the same here as with a response to a petition. *See* Section IV(B), "Deciding Whether to Respond Without a Request," *supra*. Because it is even more difficult to draft an effective motion for rehearing than to draft an effective petition for writ of mandamus, few situations call for a pre-request response.

Motions for rehearing and responses cannot exceed fifteen pages and must comply with the regular requirements for appellate motions. TEX. R. APP. P. 9, 10, 52.9.

IX. HOW THE STRUCTURE RELATES TO THE UNDERLYING PROPERTY

After the denial of a mandamus without discussion of the merits, some litigants have argued that the losing party is not entitled to raise those issues again in a subsequent mandamus or on appeal. *See Perry Homes*, 2008 WL 1922978 at *2; *Chambers v. O'Quinn*, 242 S.W.3d 30, 30 (Tex. 2007). The Texas Supreme Court has rejected this theory. *Perry Homes*, 2008 WL 1922978 at *2; *Chambers*, 242 S.W.3d at 30.

X. ADDITIONAL CONSTRUCTION ISSUES IN THE TEXAS SUPREME COURT

A. Seeking Further Mandamus Review

Though the guidelines and tips provided above also apply to a further mandamus in the Texas Supreme Court, there are additional considerations, as well. Your audience and its perspective is quite different than in the court of appeals. You may be on the other side of the argument now, having prevailed in the court of appeals. The importance of your issues to the jurisprudence of the state (or the un-importance, if you are the real party in interest) is a new issue to be addressed. Moreover, your page limits for the petition and response are radically reduced, from fifty to fifteen pages.

Accordingly, drafting the papers in a further mandamus to the Texas Supreme Court requires a significant amount of additional work. In discussing

any further mandamus with your client, take some time to educate him/her/it about the different tasks involved and why the additional work will be necessary.

B. Possible "Full" Briefing

Because Rule 52.6 limits (exclusive of certain portions) mandamus petitions and responses in the Texas Supreme Court to fifteen pages and replies to eight pages, the Court may request full mandamus briefing on the merits before making the ultimate decision of whether to grant or deny the mandamus petition. There is no provision in the rules for this optional procedure, but in practice, it mirrors the briefing procedures used by the Court in connection with petitions for review. *See* TEX. R. APP. P. 55. Of course, the Court is not required to request full briefing in a mandamus, so you cannot depend on it. Draft your petition and reply or your response as if they will be the only briefing in the proceeding.

Courts of appeals do not use any comparable procedure, since the page limit for petitions and responses already is 50 pages in those courts (and under the proposed amendments, the reply page limit has been officially increased to 25 pages).

XI. COMPUTER-AIDED DESIGN

Perhaps its payback after all the crashing and rebooting, but technology actually can make the mandamus process smoother and friendlier for all involved.

A. E-notices

The Texas appellate courts make their dockets available online. You can sign up to receive automatic notices by e-mail whenever the docket in a particular case is updated. These notices are not foolproof. Sometimes, automatic notices are generated when a minimal, technical, "housekeeping" kind of change is made. Also, as with any other computerized record, errors can be made and omissions can occur. That said, the automatic e-notices are a great tool to keep apprised of activity in pending mandamus proceedings.

1. Dallas Court of Appeals

The Dallas Court of Appeals was one of the first Texas appellate courts to develop a website, which is run through Courtstuff (http://courtstuff.com/5th/). In order to sign up for e-notices, open the docket for the particular case you are interested in (using the "Search" and "Search Case Information" features). Scroll down to the bottom of the docket information, where there are several listed options, including "Subscribe for vNotices! on this case (Must Register first! - see below)." If you already registered once, just click on the link and send the e-mail that pops up. If you are not registered, click on the link further down that says, "Register an email address so Subscribe for vNotices!" and follow the directions.

2. Other courts of appeals and Texas Supreme Court

The other Texas courts of appeals and the Texas Supreme Court use a unified system called CaseMail in order to provide e-notices. There is a "CaseMail" area on the right-hand side of these courts' homepages, from which you can launch various features. Alternatively, you can sign up for CaseMail via the docket page for the particular case you are interested in. At the top (right-hand side) of each docket page there is a "CaseMail" link. You have to register for CaseMail one time, but that registration will be good across the CaseMail system thereafter.

B. E-briefing

It is becoming more common to submit e-briefs in conjunction with the official hard-copy filings. E-briefs are not required in mandamus proceedings in any Texas appellate court, but the Texas Supreme Court, Waco Court of Appeals, and San Antonio Court of Appeals have some relevant guidelines.

1. Texas Supreme Court

In the Texas Supreme Court, parties are requested to submit e-briefs if and when briefing is requested on the merits. This applies in mandamus proceedings where the Court requests "full briefing." *See* Section VII(A), "Possible Full Briefing," *supra*. At that point, the parties are requested to prospectively submit e-copies of their briefs on the merits, and retrospectively submit e-copies of the earlier papers (*i.e.*, mandamus petition and reply, or response, depending on the party) that were filed. The Court then posts the e-briefs (and copies of petition-related papers) on the website.

For your reference, electronic briefs in both mandamus proceedings and regular causes can be found at http://www.supreme.courts.state.tx.us/ebriefs/ebriefs.asp. Briefs are stored by year/case number, so before visiting the electronic briefing page, jot down the case number of the cause(s) you'll want to find.

2. Waco Court of Appeals

In appeals, the Waco Court of Appeals requests parties to submit e-briefs in addition to filing hard copies. 10TH DIST. L. R. 12(g). There is no comparable rule for mandamus proceedings, but it may be helpful to submit your mandamus briefing in the same way (*i.e.*, both official hard copy and e-brief). For e-briefs, the court prefers searchable PDF format. *Id.* The e-brief may be submitted on CD-ROM or by e-mail. Additional format guidelines and the required certificate of compliance may be found on the court's

website (not in the local rules) at http://www.10thcoa.courts.state.tx.us/ebriefs/ebriefs.asp.

3. San Antonio Court of Appeals

The San Antonio Court of Appeals requests that parties follow certain guidelines if they choose to submit e-briefs for convenience or courtesy. The guidelines, including certificate of compliance, are similar to those in Waco, and can be found at http://www.4thcoa.courts.state.tx.us/ebriefs/ebriefs.asp.

XII. CONCLUSION

I hope that the information in this paper will help you traverse the shifting sands of mandamus!

APPENDIX A

Sample Mandamus Record

NO. ___________________

IN THE
COURT OF APPEALS FOR THE {number} JUDICIAL DISTRICT
OF TEXAS AT {city}

IN RE
{relator name}

From the {court}
{county} County, Texas
The Honorable {judge}, Presiding Judge

MANDAMUS RECORD

Kirsten M. Castañeda
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ATTORNEYS FOR RELATOR

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Respectfully submitted,

____

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Telephone: (214) 740-8533
Telecopier: (214) 740-8800

ATTORNEYS FOR RELATORS

CERTIFICATE OF SERVICE

I certify that, on March ___, 2008, a true and correct copy of this Mandamus Record was served on Respondent and Real Party in Interest in accordance with the Texas Rules of Civil and Appellate Procedure by first class U.S. mail, certified, return receipt requested, to:

Respondent:
The Honorable {judge}, Presiding Judge
{court}
{street address}
{city, state zip}

Attorneys for Real Party in Interest:
{attorney name}
{law firm}
{street address}
{city, state zip}

____

Attorney for Relator

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF {county} §

I, {attorney name}, am over 18 years of age, fully qualified and competent to make this verification, and would so testify if called upon to do so in a court of law.

I am an attorney representing Relator in this original appellate proceeding. I have been and continue to be counsel of record representing Relators in the proceedings in Cause No. {number} in {court}, {county} County, Texas (the "Lawsuit").

I am familiar with the papers filed in the Lawsuit and have reviewed the papers included in this Record. In addition, I attended the hearings held in the Lawsuit on February 14, 2008, and March 12, 2008.

I hereby certify that:

A. the March 16, 2008, Order ("Order") included in this Record is a true and correct copy of the Order signed in the Lawsuit;

B. Plaintiff's Original Petition and Request for Injunctive Relief ("Original Petition") included in this Record is a true and correct copy of the Original Petition filed in the Lawsuit;

C. Plaintiff's Motion to Compel Discovery Responses ("Motion to Compel") included in this Record is a true and correct copy of the Motion to Compel filed in the Lawsuit;

D. Defendant's Response to Plaintiff's Motion to Compel Discovery Responses and, in the Alternative, Motion for Protective Order ("Response") included in this Record is a true and correct copy of the Response filed in the Lawsuit;

E. Plaintiff's First Amended Petition included in this Record is a true and correct copy of Plaintiff's First Amended Petition filed in the Lawsuit;

F. Defendant's Special Exceptions to Plaintiff's First Amended Petition ("Special Exceptions") included in this Record is a true and correct copy of the Special Exceptions filed in the Lawsuit;

G. the Reporter's Record of February 14, 2008 Hearing included in this Record is a true and correct copy of the transcript of the February 14, 2008, hearing in the Lawsuit as transcribed by the court reporter;

H. Defendant's Supplemental Response to Plaintiff's Motion to Compel Discovery Responses ("Supplemental Response") included in this Record is a true and correct copy of the Supplemental Response filed in the Lawsuit;

I. the Notice of Filing Affidavit in Support of Response to Motion to Compel Discovery ("Notice of Affidavit") included in this Record is a true and correct copy of the Notice of Affidavit filed in the Lawsuit;

J. the Memorandum Brief in Support of Plaintiff's Motion to Compel the Identity of Fact Witnesses ("Memorandum Brief") included in this Record is a true and correct copy of the Memorandum Brief filed in the Lawsuit;

K. the Response to Memorandum Brief included in this Record is a true and correct copy of the Response to Memorandum Brief filed in the Lawsuit;

L. the Supplemental Memorandum Brief in Support of Plaintiff's Motion to Compel the Identity of Fact Witnesses ("Supplemental Memorandum Brief") included in this Record is a true and correct copy of the Supplemental Memorandum Brief filed in the Lawsuit;

M. the Response to Supplemental Memorandum Brief included in this Record is a true and correct copy of the Response to Supplemental Memorandum Brief filed in the Lawsuit;

N. the letter dated February 21, 2006 included in this Record is a true and correct copy of the letter in the Lawsuit from Respondent, faxed on February 20, 2008;

O. the Reporter's Record of March 12, 2008 Hearing included in this Record is a true and correct copy of the transcript of the March 12, 2008, hearing in the Lawsuit as transcribed by the court reporter;

P. the Notice of Filing Discovery Responses ("Notice"), marked Exhibit 1, included in this Record is a true and correct copy of the Notice tendered as an exhibit at the March 12, 2008, hearing and filed among the papers of the Lawsuit;

Q. the Letter dated June 1, 2008 ("June Letter"), marked Exhibit 2, included in this Record is a true and correct copy of the June Letter tendered as an exhibit at the March 12, 2008, hearing and filed among the papers of the Lawsuit;

R. the Email dated January 19, 2008 ("Email"), marked Exhibit 3, included in this Record is a true and correct copy of the Email tendered as an exhibit at the March 12, 2008, hearing and filed among the papers of the Lawsuit;

S. the Letter dated February 22, 2008 ("February Letter"), marked Exhibit 4, included in this Record is a true and correct copy of the February Letter tendered as an exhibit at the March 12, 2008, hearing and filed among the papers of the Lawsuit; and

T. The Notice of Filing Affidavit, marked Exhibit 5, included in this Record is a true and correct copy of the Notice of Filing Affidavit tendered as an exhibit at the March 12, 2008, hearing and filed among the papers of the Lawsuit.

____
{attorney name}

SUBSCRIBED AND SWORN TO BEFORE ME, the undersigned authority, this the ______ day of March, 2008.

____
Notary Public, State of Texas

[seal]

APPENDIX B

Sample Petition Appendix

NO. ____________________

IN THE
COURT OF APPEALS FOR THE {number} JUDICIAL DISTRICT
OF TEXAS AT {city}

IN RE
{relator name**}**

From the {court}
{county} County, Texas
The Honorable {judge}, Presiding Judge

APPENDIX TO PETITION FOR WRIT OF MANDAMUS

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Supplemental Memorandum Brief in Support of Plaintiff's Motion to Compel the Identity of Fact Witnesses L

February 21, 200[7] Letter from Court to Counsel .... N

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APPENDIX C

Sample Motion for Temporary Relief

NO. ____________________

IN THE
COURT OF APPEALS FOR THE {number} JUDICIAL DISTRICT
OF TEXAS AT {city}

IN RE
{relator name**}**

From the {court}
{county} County, Texas
The Honorable {judge}, Presiding Judge

MOTION FOR TEMPORARY RELIEF

TO THE HONORABLE {number} COURT OF APPEALS:

Relator hereby seeks a stay of the trial court's March 16, 2008 Order, which requires production of information on or before April 30, 2008, pending the Court's resolution of the above-captioned mandamus proceeding.

1. Concurrently with this Motion, on March 30, 2008, Relator has filed a Petition for Writ of Mandamus. Relator requests that the Court compel the trial court to vacate its March 16, 2008 Order ("Order").

2. The Order requires Relator to produce to Real Party in Interest ("Real Party") within thirty days the names and addresses of each customer who completed a transaction with Relator during the period from January 2002 through present.

Mandamus Record ("R."), Tab A at 1-2.

3. The Order also contains a provision abating the provisions requiring production for a period of fourteen days. *Id.* at 2. This brief stay afforded Relator time to prepare mandamus papers in order to seek relief in this Court. R. Tab O at 18. However, unless further stayed by this Court, the Order requires production of the described information on or before April 30, 2008. R. Tab A at 1-2.

4. Relator contends that the underlying request for production constitutes a "fishing expedition," and that the Order compels overly broad production well beyond the proper bounds of discovery. *See Petition*, *Argument and Authorities* at § A. Under Texas law, a trial court's order that compels overbroad discovery well outside the bounds of proper discovery constitutes a clear abuse of discretion for which mandamus is the proper remedy. *In re Graco*, 210 S.W.3d 598, 600 (Tex. 2006); *Dillard Dep't Stores, Inc. v. Hall*, 909 S.W.2d 491, 492 (Tex. 1995).

5. Pending consideration of a mandamus petition, it is proper to stay the discovery order below in order to preserve the appellate court's jurisdiction and the opportunity to afford meaningful relief. TEX. R. APP. P. 52.10.

6. Relator requests that the Court stay the date for production under the trial court's Order until twenty days after this Court's final disposition of a petition for writ of mandamus regarding the Order.

7. Relator has conferred by telephone with counsel for Real Party, and counsel for Real Party has informed Relator that Real Party is opposed to the temporary relief requested.

WHEREFORE, Relator respectfully requests that the Court stay the date for production under the trial court's March 16, 2008 Order until twenty days after the date of this Court's final disposition of a petition for writ of mandamus regarding the March 16, 2008 Order, and grant Relator all further relief to which it may be entitled at law or in equity.

Respectfully submitted,

Kirsten M. Castañeda
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2200 Ross Avenue, Suite 2200
Dallas, Texas 75201
Telephone: (214) 740-8533
Telecopier: (214) 740-8800

ATTORNEYS FOR RELATOR

CERTIFICATE OF COMPLIANCE WITH RULE 52.10

I certify that, on March 30, 2008, I conferred by telephone with counsel for Real Party in Interest ("Real Party"), and that counsel for Real Party informed me that Real Party is opposed to the temporary relief requested. I also certify that this Motion is served on all other parties by facsimile.

____
Attorney for Relator

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this Motion was served on Respondent and Real Parties in Interest by facsimile in accordance with the Texas Rules of Civil and Appellate Procedure on this the 30th day of March, 2008, as follows:

Respondent:
The Honorable {judge}, Presiding Judge
{court}
{street address}
{city, state zip}

Attorneys for Real Party in Interest:
{attorney name}
{law firm}
{street address}
{city, state zip}

____
Attorney for Relator