



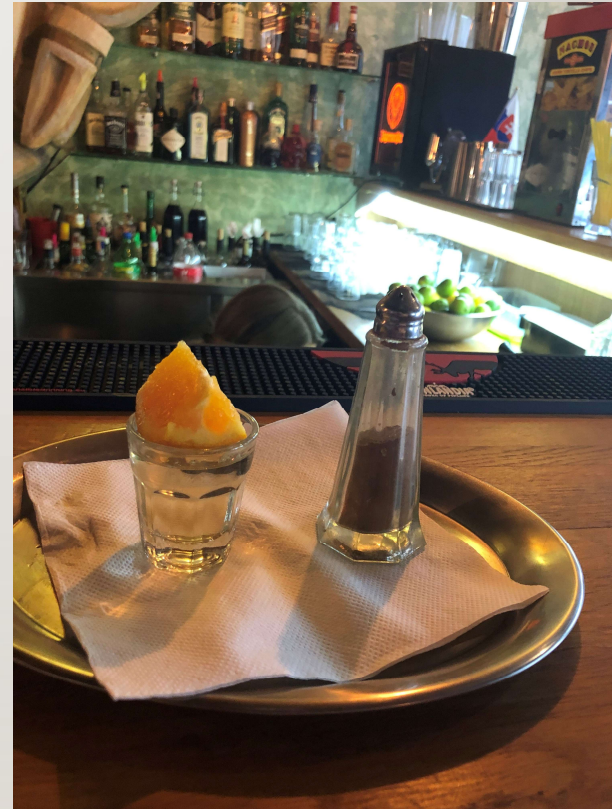
MANDAMUS

HON. DAVID M. GUNN



2

TEQUILA AND MANDAMUS RELIEF



~6% SUCCESS IN THE INTERMEDIATE COURTS? MANDAMUS STATS FROM MY COURT

Fiscal Year	Total Pets per Year	Granted	Percentage
FY22-23	121	5	4.1%
FY23-24	134	22	16.4%
FY24-25	149	14	9.4%
FY25-26 *	100	6	6.0%
Total	504	47	9.3%

4 RESOURCES TO HAVE HANDY

- TRAP 52
- Patricia Askew, “*Click Bait*” for the Courts & Other Mandamus Practice Tips, in State Bar of Texas, Advanced Trial Strategies Course (2026)
- The Government Code

5

DETERMINING THE SCOPE OF MANDAMUS PETITION

6 SOURCES AND BOUNDARIES OF MANDAMUS JURISDICTION?

- Roots in the Constitution, statutes, and judicial tradition
- See Tex. Gov't Code § 22.002 (supreme court), § 22.221 (court of appeals)
- *E.g.*, § 22.002(a) (“The supreme court or a justice of the supreme court may issue writs of procedendo and certiorari and all writs of quo warranto and mandamus agreeable to the principles of law regulating those writs, against a statutory county court judge, a statutory probate court judge, a district judge, a court of appeals or a justice of a court of appeals, or any officer of state government except the governor ...”)
- § 22.221(a) (“Each court of appeals or a justice of a court of appeals may issue a writ of mandamus and all other writs necessary to enforce the jurisdiction of the court.”)
- There are many other special statutes, such as for elections and other specific situations



7 HOW DOES MANDAMUS DIFFER FROM APPEAL?

- You build your own record from scratch
- You don't wait for an appealable order
- The appellate court doesn't owe you a hearing or an explanation
- Fact disputes can poison the chance for relief

8

HOW DOES TEXAS MANDAMUS PRACTICE DIFFER FROM FEDERAL?

- Federal mandamus is extremely narrow and restrictive
- Texas mandamus has been broadening since the 1980s

9 WHAT “ELEMENTS” SHOULD THE RELATOR SHOW?

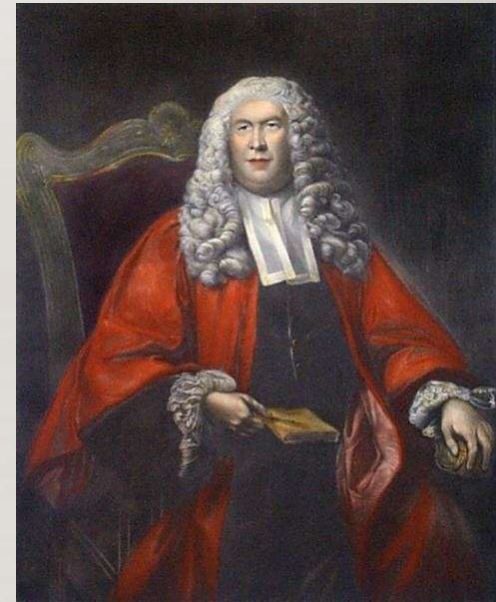
- Clear abuse of discretion
 - Note: there is no “discretion” to get the law wrong
- No adequate remedy by appeal
- Importance (for supreme court cases)

10

MANDAMUS – WHAT MAKES A REMEDY ADEQUATE?

II BLACKSTONE – THE TEDIOUS REMEDY PRONG

- It is a high prerogative writ, of a most extensively remedial nature: and may be issued in some cases where the injured party has also another more tedious method of redress
- III William Blackstone, Commentaries on the Law of England 110 (1768)



EXTRAORDINARY REMEDIES

PERCY BORDWELL,
B. L. (University of California)
Ph. D. (Columbia University)
LL. B., LL. M. (Columbia University)

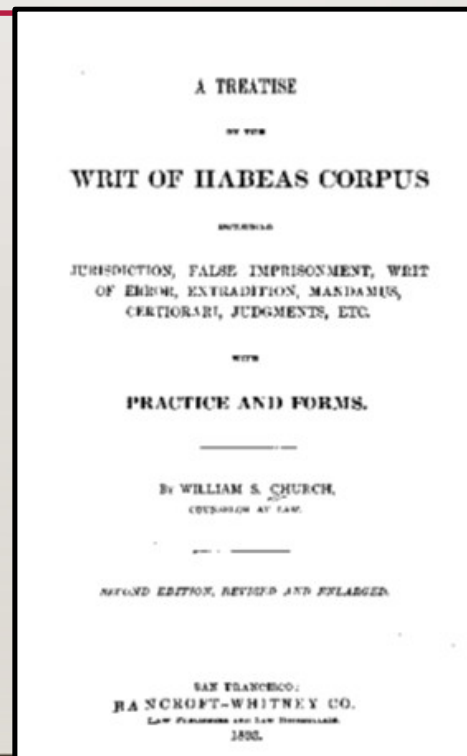
UNIVERSITY OF
MINNESOTA
LIBRARY

LaSALLE EXTENSION UNIVERSITY
CHICAGO
1914

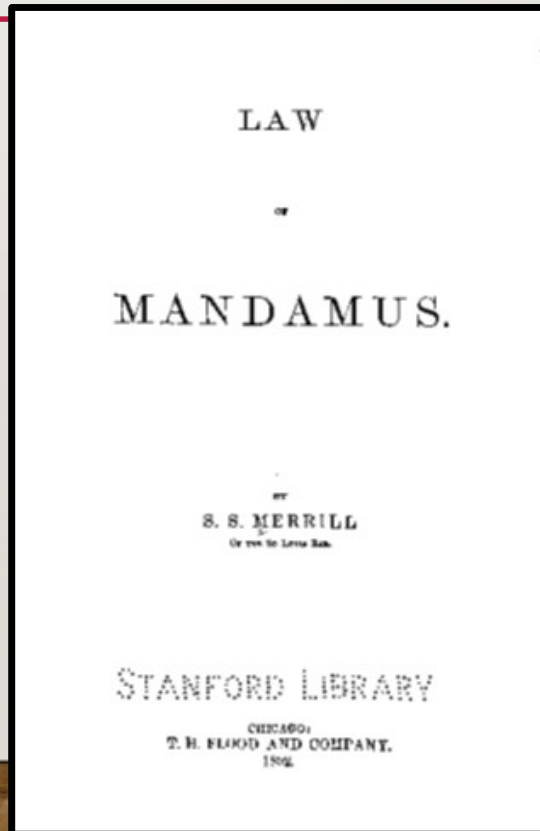
13 BORDWELL ON EXTRAORDINARY REMEDIES (1910)

§ 5. Absence of other adequate legal remedy necessary.
As an extraordinary remedy, mandamus is only granted when there is no other adequate legal remedy. Thus, in *State v. Megown* (5) mandamus was asked to compel the probate court to grant certain letters testamentary, but the court said: “Mandamus will not lie in this instance because relator has other and specific remedy by appeal. The existence of such a remedy bars the exercise of jurisdiction by mandamus; for such a writ is not to usurp the functions of a writ of error or appeal, or to correct errors that may be corrected in that way.”

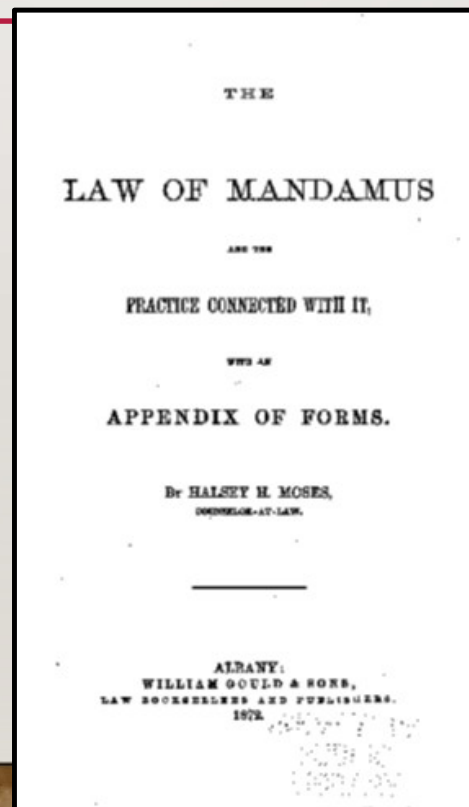
14 CHURCH'S TREATISE



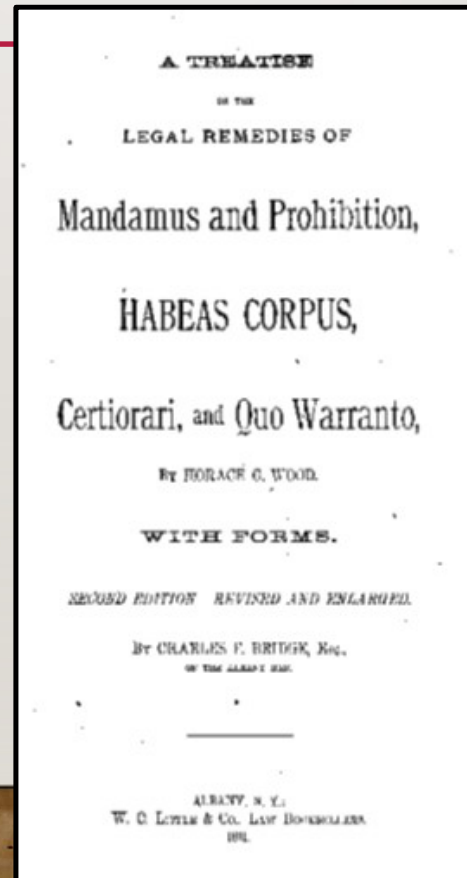
15 MERRILL'S TREATISE

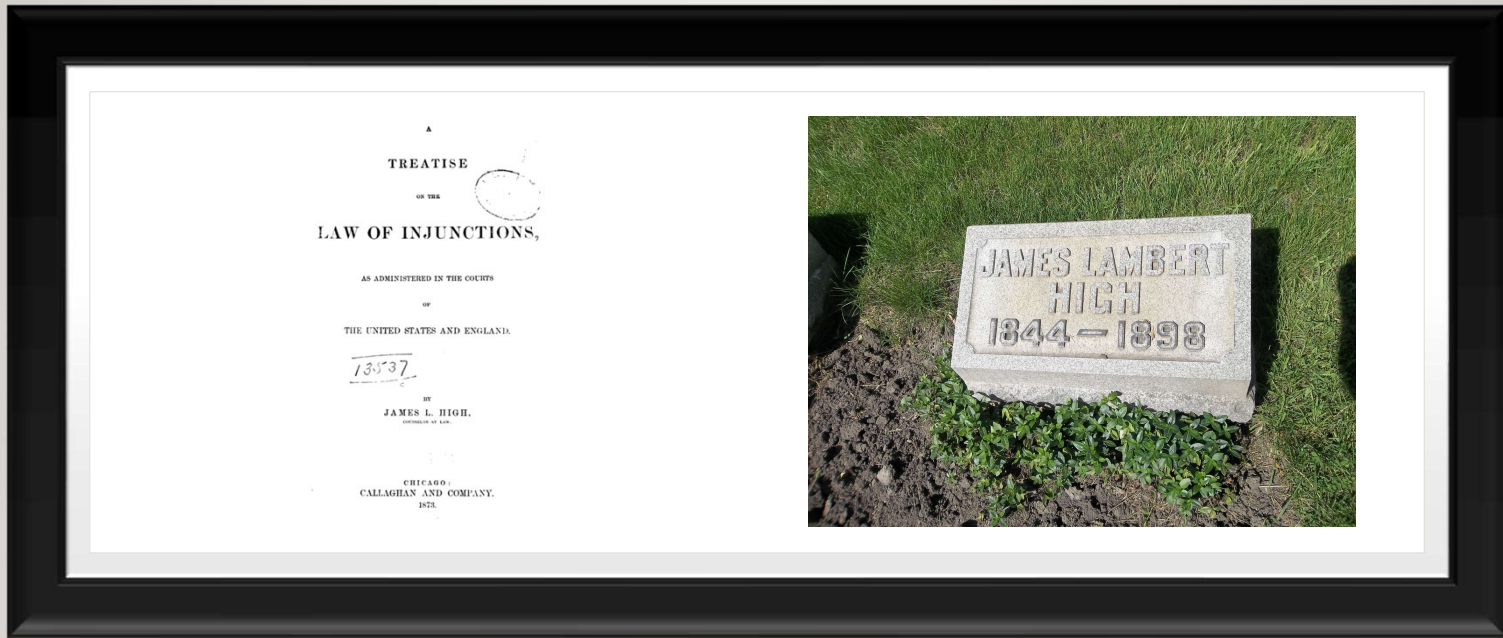


16 MOSES'S TREATISE



17 WOOD'S TREATISE





JAMES LAMBERT HIGH

19 HIGH ON EXTRAORDINARY LEGAL REMEDIES

CONTENTS.

THE REFERENCES ARE TO THE SECTIONS.

PART FIRST.

THE LAW OF MANDAMUS.

CHAPTER I.

	<small>SECTION.</small>
<u>OF THE ORIGIN AND NATURE OF THE WRIT OF MAN-</u>	
<u>DAMUS,</u>	<u>1-30</u>

20 HIGH ON INJUNCTIONS

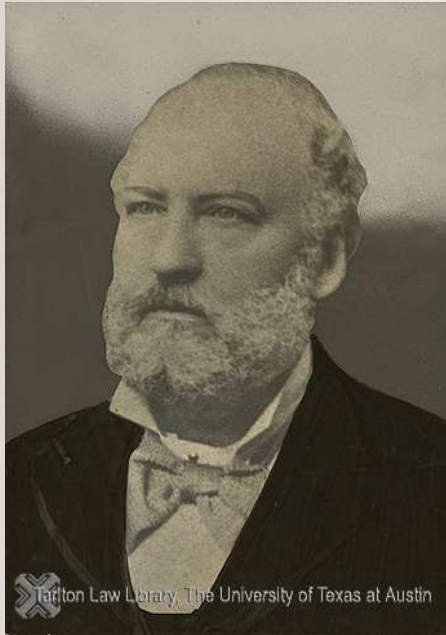
- The Lost Maxims of Equity
- Equity is not for the squeamish.
- Equity can be grumpy before its first cup of coffee.
- Equity abhors a buzzkill.
- Equity inhales.

21 HIGH ON EXTRAORDINARY LEGAL REMEDIES

- It may, therefore, be laid down as the universal rule, prevailing both in England and America, that the existence of another remedy adequate to correct the action of the inferior court, will ***prevent relief by mandamus.***

22 RAINS V. SIMPSON, 50 TEX. 495 (1878)

Justice Micajah Hubbard Bonner



Mr. High, in his work upon Extraordinary Legal Remedies, says:

“But the most important legal principle to be observed in the exercise of the jurisdiction by mandamus, and one which lies at the very foundation of the entire system of rules and principles regulating the use of this extraordinary remedy, is that which fixes the distinction between duties of a peremptory or mandatory nature and those which are discretionary in their character.”

23 *GULF, C. & S. F. RY. CO. V. MUSE*, 109 TEX. 352, 207 S.W. 897 (1919) – TEDIOUS REMEDIES WON'T DO!

- “Not only would the remedy to defendant of appeal and writ of error, after another trial, be **manifestly tedious**, but such remedy would also be inadequate; for it is the very essence of defendant’s right that it is entitled not to have to respond further to plaintiff’s cause of action than by payment of his judgment.” *Muse*, 207 S.W. at 900.

24 *CLEVELAND V. WARD*, 116 TEX. 1, 285 S.W. 1063 (1926)

- “[M]andamus does not ordinarily issue when an adequate remedy by appeal exists. In this case, however, no appeal was possible from the action of Judge Ward in refusing to go forward with the trial in his court. The right of appeal from the adverse order on the pleas in abatement and the injunction in the Dallas district court is inadequate...” *Cleveland*, 285 S.W. at 1068.
- “To supersede the remedy by mandamus authorized by the organic law, and specially provided by statute (Vernon’s Ann. Civ. St. 1925, art. 1734), there must exist, not only a remedy by appeal, but the appeal provided for must be competent to afford relief on the very subject-matter of the application, **equally convenient, beneficial, and effective as mandamus.**” *Id.* at 1069 (citing High on Extraordinary Legal Remedies).

25 TEDIOUS IS NOT ADEQUATE!

No tedium!

“[W]here the other modes of redress are inadequate or **tedious** the writ will be awarded.”

Bradley v. McCrabb, Dallam 504, 506 (Tex. 1843)

“In some cases, a remedy at law may technically exist; however, it may nevertheless be so uncertain, **tedious**, burdensome, slow, inconvenient, inappropriate or ineffective as to be deemed inadequate...”

In re Lufkin Indus. Inc., 317 S.W.3d 516, 519 (Tex. App.--Texarkana 2010) (quoting *State ex rel. Holmes*)

No tedium!

“A technically available legal remedy will not defeat a petitioner’s entitlement to mandamus relief when the remedy is ‘so uncertain, **tedious**, burdensome, slow, inconvenient, inappropriate or ineffective as to be deemed inadequate.’”

State ex rel. Holmes v. Court of Appeals, 885 S.W.2d 389, 394 (Tex. Crim. App. 1994) (quoting *Smith v. Flack*, 728 S.W.2d 784, 792 (Tex. Crim. App. 1987)).

26 *IN RE MCALLEN MED. CTR.*, 275 S.W.3D 458
(TEX. 2008)

NO CATEGORIES!!

“Whether 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.” *In re McAllen Med. Ctr.*, 275 S.W.3d at 464.

The Q was whether mandamus should issue in a med-mal case with deficient expert reports.

27 *IN RE MCALLEN MED. CTR.*, 275 S.W.3D 458
(TEX. 2008)

“[W]e acknowledge that mandamus review should not be granted in every pre–2003 case. The statute was intended to preclude extensive discovery and prolonged litigation in frivolous cases; review by mandamus may actually defeat those goals if discovery is complete, trial is imminent, or the existing expert reports show a case is not frivolous.

But if the legislative purposes behind the statute are still attainable through mandamus review, Texas courts should not frustrate those purposes by a too-strict application of our own procedural devices.” *In re McAllen Med. Ctr.*, 275 S.W.3d at 467.

28 THE “CATEGORIES” PROBLEM.

After *McAllen*, the Court also showed a resistance to categorization in *Union Carbide*:

“Regardless of the other benefits claimed by Union Carbide, there is significant benefit from mandamus relief in regard to the random-assignment-of-cases question. Random assignment of cases is designed to prevent forum-shopping. Practices that subvert random assignment procedures breed ‘disrespect for and [threaten] the integrity of our judicial system.’ See *In re Bennett*, 960 S.W.2d 35, 40 (Tex. 1997). We need not consider whether the intervention was intended to circumvent Galveston County’s local rule requiring random assignment of cases because regardless of the Halls’ intent, the intervention and the trial court’s abuse of discretion in failing to rule on and grant the motion to strike resulted in circumvention of the random assignment rule. In regard to any detriment to the parties, the Halls’ claims have now been filed as a separate lawsuit that is pending in Galveston County. There will be insignificant detriment to either party or the judicial system if mandamus relief is granted. 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. Thus, Union Carbide does not have an adequate remedy by appeal.”

29 BUT CATEGORIES CONTINUE TO EXIST.

- For every reported opinion that shuns categories, another decision or line of decisions would seem to create categories.
- There is a category of cases for the legislative continuance. *See In re Ford Motor Co.*, 165 S.W.3d 315, 322 (Tex. 2005) (“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.”).
- There seems to be a category of cases for rulings about designation of a responsible third party. *See In re Dawson*, 550 S.W.3d 625, 631 (Tex. 2018).
- *Discovery of confidential documents.* *See In re Living Ctrs. of Tex., Inc.*, 175 S.W.3d 253, 256 (Tex. 2005)

30 CATEGORIES MAY NOT BE AVOIDABLE.

- Perhaps it is simply inevitable that, no matter how vigorous a commitment to eschewing a categorical approach to the inadequate remedy prong, some categorization will occur.
- Sometimes the creation of categories is justified as necessary to protect important policies.
- In some cases, the court expressly references “important public policies” as demonstrating that there is no adequate remedy by appeal. *See In re Collins*, 286 S.W.3d 911, 920 (Tex. 2009) (“If the Legislature intended to provide health care liability defendants with an informal, expedited means of evaluating the merits of a health care claimant’s claims, then the order here undermines that purpose. Consequently, we hold that Collins has no adequate remedy by appeal.”).

31 SOMETIMES, THE CATEGORIES ARE HARD TO EXPLAIN.

- Everyone agrees that courts will not grant mandamus to spare a party from ***spending time and money***.
- Instead, they will grant it to spare a party from an ***utter waste*** of resources.
- “Mandamus review of significant rulings in exceptional cases may be essential to preserve important substantive and procedural rights from impairment or loss, allow the appellate courts to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgments, and spare private parties and the public the time and money ***utterly wasted*** enduring eventual reversal of improperly conducted proceedings.” *In re Acad., Ltd.*, 625 S.W.3d 19 (Tex. 2021) (quoting *Prudential*, 148 S.W.3d at 136) (emphasis added).

32 ARBITRATION

- A party lacks an adequate remedy by appeal when there is a failure to compel arbitration. *In re Olshan Found. Repair Co., LLC*, 328 S.W.3d 883, 888 (Tex. 2010).
- Yet mandamus is usually unavailable when the error is the opposite, namely an order that erroneously grants arbitration instead of erroneously denying it. *See In re Gulf Expl., LLC*, 289 S.W.3d 836, 843 (Tex. 2009); *In re Palacios*, 221 S.W.3d 564, 566 (Tex. 2006).

33

WHERE AND HOW IS A MANDAMUS PROCEEDING FILED?

34 HOW DOES THE PARTICULAR APPELLATE COURT PROCESS MANDAMUS FILINGS?

- Every appellate court has its own customs, so educate yourself
- The court might have a “mandamus attorney”
- Always call ahead if you need accelerated action

TIPS FROM (ONE) CLERK

Emergency Matters and Original Proceedings

- Call and inform the court of your intent to file;
- Don't exaggerate the nature of the emergency
- Don't wait until the last minute;
- When an emergency request for relief and/or original proceeding is filed the clerk must:
- notify the attorney assigned to screen original proceedings;
- while the attorney's initial review is going on, call the assigned judge and panel members;
- arrange for any staff to stay after 5:00, closing time, until the attorney/judge determines if an order or opinion must be prepared.
- TIP: FILE AS SOON AS POSSIBLE -Document size slows down the filing process. You may submit a petition and emergency motion at 4:45 pm, but it may not be transmitted to the court's efile portal until after 5:00

MORE TIPS



Don't mandamus the judge who didn't issue the order



If you have trial starting on Monday, calling the clerk's office before filing an emergency mandamus on Friday goes a long way



If the abuse of discretion is clear, it probably should not take 100 pages to explain



Include relevant pleadings (current live petition!) and exclude irrelevant filings

MORE TIPS

DO: Always bookmark the appendix and the record.

(We see many without bookmarking and makes it more time consuming to locate documents.)

DO: Read Rules 52.3 and 52.7. They provided a checklist for everything required to be in the petition.

DON'T: Wait until the last minute to file petition and motion to stay as a strategy to obtain a stay when the petition could have been filed earlier.

DO: Ask the trial court for the relief you are requesting in your motion to stay and petition *before* seeking relief in court of appeals.

DO: Completely redact all sensitive information under Rule 9.9.

DON'T: Submit documents with petition that were not before the trial court when it made ruling being challenged on mandamus.

DO: provide complete relevant background.
(We should not hear about relevant proceedings/facts for first time from the real party in interest.)

DO: Provide a copy of the repealed statute or rule when it is at issue in case.

38 WHAT ARE THE MECHANICS FOR THE MANDAMUS PETITION?

- Rule 52 collects most of the mechanical requirements
- Serve the parties and respondent under TRAP 9
- Find a few successful petitions from good counsel and follow form

PETITION FOR WRIT OF MANDAMUS

REQUIRED CONTENTS (TRAP 52.3)

The petition must, under appropriate headings and in the order here indicated, contain the following:

(see TRAP 52.3 for complete details)

- (a) Identity of Parties and Counsel.
- (b) Table of Contents.
- (c) Index of Authorities.
- (d) Statement of the Case.
- (e) Statement of Jurisdiction.
- (f) Issues Presented.
- (g) Statement of Facts.
- (h) Argument.
- (i) Prayer.
- (j) Certification.
- (k) Appendix.

MANDAMUS RECORD

REQUIRED CONTENTS (TRAP 52.7)

- (a) Filing by Relator Required. Relator must file with the petition:
 - (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 in evidence, or a statement that no testimony was adduced in connection with the matter complained.
- (b) Supplementation Permitted. After the record is filed, relator or any other party to the proceeding may file additional materials for inclusion in the record.
- (c) Service of Record on All Parties. Relator and any party who files materials for inclusion in the record must at the same time – serve on each party:
 - (1) those materials not previously served on that party as part of the record in another original appellate proceeding in the same or another court; and
 - (2) an index listing the materials filed and describing them in sufficient detail to identify them.

TIPS ON PREPARING MANDAMUS RECORD

- **Pleadings/documents (including exhibits) should be:**
 - File-stamped copies
 - certified copies not necessary
 - compile PDF of documents in chronological order using a naming convention: **22-01-01 Plaintiff's Original Petition** (this name will be repeated in bookmark when PDFs are combined)
 - OCR searchable
 - OCR individual PDFs before combining them into one PDF
 - Reduce the file-size of individual PDFs **before combining** into one PDF using the *Optimize PDF* feature in Adobe.
 - Select “apply to multiple files” and reduce all documents at the same time for efficiency.
 - Redaction of personal information
- **Combine the documents using the Combine Files feature in Adobe.**
 - Make sure the bookmarking feature is enabled before combining the documents.
 - Then spot check it for searchability.
 - You may have to OCR the document again.
- **Bates-label the single, compiled PDF using the Edit PDF > Add Bates Label feature in Adobe.**
 - Change the bates number font color to RED to make it stand out.
 - Position it in the lower right-hand corner but review before saving to make sure it is not overlapping with original text.
- **Conform to e-filing size requirements.**
 - Once the record is compiled into a single PDF and bates-labeled, check the PDF file size under Properties.
 - If it exceeds **25mb**, then the document needs to be split using the Organize Pages feature in Adobe.
 - Choose “Split by FILE SIZE” and set the limit to **25mb** then Split the document.
- **Create a table of Contents (see examples next slide)**

42 CREATE A TABLE OF CONTENTS (EXAMPLES).

- One Volume

TABLE OF CONTENTS	
DESCRIPTION	PAGES
Defendants' Motion to Appoint a Special Master	MR0862 – MR0871

- Multiple Volumes

TABLE OF CONTENTS	
VOLUME 1	
DESCRIPTION	PAGES
Defendants' Motion to Appoint a Special Master	MR0862 – MR0871
Transcript of Motion to Compel Hearing	MR0872 – MR0988
VOLUME 2	
Transcript of Hearing on Motion for Continuance and Motion to Compel	MR0989 – MR1094

- **Draft a verification.**

- The verification must be included in each volume of the MR and placed between the index and signature block.

43 WHAT ABOUT TEMPORARY RELIEF?

- Prepare the motion and petition and record.
- You can't just file the motion without the mandamus petition.
- Tell the other side: *“The relator must 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 been or will be filed and must certify to the court that the relator has complied with this paragraph before temporary relief will be granted.”* TRAP 52.10(a).