MANDAMUS BEFORE THE SECOND DISTRICT COURT OF APPEALS:

AN ANALYSIS OF MANDAMUS RULINGS, 2003 THROUGH 2005

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Presentations and Papers:

Oral Argument Before the Second District Court of Appeals: The Rules, and an Analysis of Fifty-Seven Cases by Steven K. Hayes © 2005 (http://www.cottenschmidt.com/hayesorarg%2057cases05.pdf), presented in earlier form as *Oral Argument: Four Tools to Make it More Predictable for You and the Court* to the following groups: Tarrant County Bench Bar Conference, 2003; Tarrant County Young Lawyers Association, 2003; Hood County Bar Association, 2003; Denton County Bar Association, 2003; Appellate Section of the Tarrant County Bar Association, 2003.

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2003 and 2004 by Steven K. Hayes © 2005 (http://www.cottenschmidt.com/papermandamus041228.pdf), presented to the following groups: Denton County Bar Association, 2005; Tarrant County Young Lawyers' Association, 2005; Appellate Section, Tarrant County Bar Association, 2005.

Issues Presented in Some Civil Cases Pending Before the Second Court of Appeals, by Steven K. Hayes © 2003 (http://www.cottenschmidt.com/SKH%20pending%20cases%20list%2001.pdf), compiled and updated monthly since March, 2003.

Hints and Invitations: Enticements from the Supreme Court of Texas? by Steven K. Hayes © 2006 (http://www.cottenschmidt.com/analysis051107.xls), compiled and updated monthly since January, 2006.

MANDAMUS BEFORE THE SECOND DISTRICT COURT OF APPEALS:
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[1] Paula T. Perkins, Senior Staff Attorney, Second Court of Appeals, *The Discovery Mandamus–To File or Not to File? Things to Consider Before Firing Up the Word Processor* (2004), pages 2-6, presented at "Discovery-Hot Topics" Brown Bag Seminar sponsored by the Tarrant County Bar Association, March 26, 2004.

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MANDAMUS BEFORE THE SECOND DISTRICT COURT OF APPEALS: AN ANALYSIS OF MANDAMUS RULINGS, 2003 THROUGH 2005.

By Steven K. Hayes

A. Introduction. Unlike *Mr. Bojangles*, This Paper Did Not First Start Taking Shape in the First Precinct Jail.

Jerry Jeff Walker once said that *Mr. Bojangles* started taking shape in the First Precinct Jail in New Orleans. Despite the fact that mandamus proceedings sometimes involve sanctions, and the predictions of some of my grade school teachers, this paper did not start taking shape in that, or any other, jail.[2]

Instead, this paper started taking shape on the return trip from a speech in which Justice Sue Walker and I had presented a talk about oral argument before the Second Court of Appeals. When our presentation turned to a question and answer session, one lawyer commented that the Second Court of Appeals (herein sometimes "the Court") had just denied a mandamus petition he filed, and had not written an opinion explaining why it had done so. He wanted to know how he could tell why the Court had denied the relief he sought. Justice Walker explained that the appropriate Rule of Appellate Procedure allows courts of appeal to deny mandamus relief without explaining their rationale,[3] and that the Second Court took advantage of that Rule to help manage its workload.[4]

That exchange prompted me to think that a review of the Court's mandamus docket might give some insight (over and above what appears in opinions granting mandamus relief) into the dynamics affecting mandamus practice before the Second Court of Appeals. Fortunately, during that time frame, Paula Perkins, Senior Staff Attorney for the Second Court, was scheduled to present a paper at a

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[2] According to Sgt. Paul J. Accardo, Asst. Cmdr., New Orleans Police Department Public Affairs Department, as of June 22, 2004, there is no "First Precinct Jail" in New Orleans, but there is a Central Lock-up at 2800 Perdido St. in New Orleans, La. JJW must have been confused or worse during his visit to the establishment.

[3] *See* Rule 52.8, T.R.A.P.

[4] Things have not changed much since Justice Walker gave that answer. In 2004, three times the Court noted it was denying a mandamus writ as Moot, and on one mandamus the Court mentioned it was denying the same because the Relator failed to show a lack of an appellate remedy. So sometimes, but very seldom, the Court will say why it is denying a mandamus writ.

Brown Bag Seminar of the Tarrant County Bar on mandamus proceedings before the Second Court in discovery matters.[5] I sent Paula Perkins a list of questions that I had heard practitioners voice concerning mandamus proceedings. She did a great job in the paper she drafted and the speech she made. You will find some of her comments and paper incorporated in this paper, along with our review of the Court's mandamus docket for 2003 through 2005.

B. Another Lawyer's Generalized Dire Warning to Those Seeking Mandamus Relief, and Why It Seems Applicable to Mandamus Proceedings in the Second Court of Appeals.

Before looking at mandamus practice before the Second Court of Appeals, consider the following practical aspects of deciding generally whether to pursue mandamus:

> A losing litigant has a 'right' to file a mandamus petition, but that does not mean the party has to do so. Costs of an ill-conceived filing can be high, both in terms of court good will and money. The appellate courts are busy places and the odds of success are generally low. A relator is asking an appellate court to interrupt its already full schedule to consider the relator's mandamus petition. Common sense dictates that any mandamus filing be an informed one, taken only after careful analysis of both the relevant law and the adequacy of appeal.

See Gregory T. Perkes, *Original Proceedings: The Writ of Mandamus*, Appellate Boot Camp 2003, Chapter 8, page 2 (2003).

Let's apply this generalization to the Second Court of Appeals and see how well it holds up:

1. "A losing litigant has a 'right' to file a mandamus petition, but that does not mean the party has to do so."

In his thoroughly funny, but somewhat crude, explanation of how his nickname became known to the New York Police Department, comedian Ron White describes an incident in which several bouncers in a New York City bar forcibly ejected him from the bar after he forgot to keep his cowboy hat off his head. The bar owners summoned a police officer to the scene. Upon confronting a somewhat inebriated Ron, the police officer informed him of his rights. Ron

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[5] Perkins, *supra*, note 1, at iv.

explains, “He told me I had the right to remain silent” Ron drawls, “But while I might have had the right, I didn’t have the ability.” Various developments ensued.

Rights are like that. Some, like the right possessed by Mr. White, would have been best exercised at that moment. Some, like the right to file a mandamus petition under the appropriate circumstances, are either best left unexercised, or at least best thoroughly scrutinized before pulling the trigger on them. Hopefully, the rest of this paper will help in determining when the right to file a mandamus in the Second Court of Appeals makes sense.

2. “The appellate courts are busy places....”

The Second Court of Appeals takes justifiable pride that the opinions it produces keep pace with the current filings. If you attended a seminar in the last three years at which any member of the Court spoke, you will have heard them confirm that statistic. Put in context, they dispose of over 1,000 appeals a year– the equivalent of three term papers a week.[6] Given this workload, I think all of us appreciate that, when each week begins, each Justice pretty much has lined out what they would like to accomplish, and what they think they can accomplish, by week’s end. I imagine all of us would approach that situation the same way.

3. “...and the odds of success are generally low.”

In terms of sheer numbers, we can categorize the Opinions/Memorandum Opinions regarding mandamus proceedings issued by the Second Court of Appeals in 2003 through 2005 as follows:

	2003	**2004**	**2005**
Total Opinions/ Memorandum Opinions	71	84	62
Pro Se Mandamus Proceedings	17*	31*	24

[6] Justice Anne Gardner, Remarks at a Meeting of the Appellate Law Section of the Tarrant County Bar Association Concerning Procedures for the Second Court of Appeals (September 26, 2002); Justice Sue Walker, Remarks concerning Oral Argument Before the Second Court of Appeals, made to the 2003 Tarrant County Bench Bar Conference, to a lunch meeting of the Tarrant County Young Lawyers’ Association in 2003, and in separate presentations to the Denton and Hood County Bar Associations in 2003.

Non Pro Se Mandamus Proceedings	54	53	38
Mandamus Denied	55	68**	31**
Mandamus Dismissed	10	5	2
Mandamus Withdrawn	1	1	1
Mandamus Granted (Conditionally or Otherwise)	5	10**	5**

* In 2003, the Court denied all Pro Se mandamus writs we are aware of, but in 2004 one of the mandamus writs granted by the Court was a Pro Se writ.

** In 2004 and 2005, one mandamus was denied in part and granted in part.

Doing the math, this means that the Second Court of Appeals granted non-Pros Se petitions for mandamus at the following rates:[7]

Year	**Mandamus Grant Rate**
2003	9.2%
2004	18.9%
2005	13.2%
Combined (2003-2005)	13.7%

To put this in context, that means that lawyers filing mandamus petitions with the Second Court of Appeals enjoyed a rate of success either slightly less or slightly greater than that experienced by those litigants submitting petitions for review to the Supreme Court of

[7] We will describe below how we surveyed the cases on which we base this estimate. *See* Section F of this paper, below. Unless specifically stated otherwise below, this study does not take into consideration any pro se mandamus petitions, on the assumption that lawyers will do a better job on mandamus proceedings than pro se litigants.

Texas, depending on whether you focus on 2003, 2004, 2005, or all three.[8] So Mr. Perkes' comment on this topic about "the odds of success are generally low" seem applicable to the Second Court of Appeals.

4. "A relator is asking an appellate court to interrupt its already full schedule to consider the relator's mandamus petition."

Remember a couple of paragraphs earlier when we discussed each Justice's workload, and how they probably approached each week with some set goals in mind, and how we would probably do the same thing if we were them? So we might also want to think about what we would do if we were in that situation and got hit with a mandamus proceeding.

So what does happen when we present our mandamus proceeding to the Second Court of Appeals? When we file, here is how at least one of the Court's panels will mobilize, often on an expedited basis:

– the members of the panel hearing that mandamus will interrupt their regular activities, and put aside the matters they had planned to spend time with;
– the panel members enlist the services of a deputy clerk and a staff attorney to assist them in dealing with our mandamus;
– they carefully consider the mandamus filings and an internally-generated substantive memorandum concerning the proceeding;[9]
– they reach a reasoned decision in a dispassionate way; and they issue an opinion or memorandum opinion.[10]

Once they have done all that, the members of the panel do not then go on vacation.

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[8] The Supreme Court of Texas granted: 12% of the Petitions for Review which were filed for the nine years ending in August, 2002; 10.9% of the petitions for review filed in fiscal year 2001; and 11.5% of the petitions filed in fiscal year 2002 . *See* Chief Justice Tom Phillips, *Thinking Inside the Box: A Review of the Supreme Court's Caseload Statistics and What Those Numbers Mean in Real Life*, Practice Before the Supreme Court of Texas, Chapter 1 (2002);and Richard R. Orsinger, *Texas Supreme Court Trends*, Practice Before the Supreme Court of Texas, Chapter 15 (2003).

[9] In an emergency which requires an immediate ruling, an oral presentation to the panel by the staff attorney takes the place of the written memorandum. Perkins, *supra*, note 1, at iv.

[10] Perkins, *supra*, page 1.

Instead, they return to the work they planned on doing before we barged in with our emergency– i.e., churning out the work necessary to dispose of over 1,000 appeals.[11]

And keep in mind, from the numbers we assimilated above, the Court went through this routine 71 times in 2003, 84 times in 2004, and 62 times in 2005, which figures out to about 1.4 times a week. So one and a half times every week you are on a mandamus panel, you get to blow about half a day on someone's petition for mandamus (assuming it is denied–if granted or needs study, it will take a lot more time than that), about which you knew nothing when your week started. And. This. Will. Happen. Every. Week. As. Long. As. You. Are. On. The. Court. Given all these dynamics, it should not surprise us that the Second Court of Appeals views original proceedings as "extra, unexpected work."[12]

But the members of the Court know how important each mandamus can be. In fact, at the 2004 Bench Bar Conference sponsored by the Tarrant County Bar Association, members of the Second Court of Appeals designated eleven cases which they considered as significant cases decided by the Second Court of Appeals in the last two years.[13] Two of these eleven cases – nearly twenty percent of the eleven selected cases – were cases in which the Court conditionally granted mandamus relief.[14] So the mandamus segment of the Court's docket–which represents only about six percent of the cases filed with the Court–produces nearly 20% of the decisions the Court considers significant, at least for the one year snapshot mentioned above. You must assume that the Court takes the mandamus process seriously.

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[11] Justice Anne Gardner, Remarks at a Meeting of the Appellate Law Section of the Tarrant County Bar Association concerning Procedures for the Second Court of Appeals (September 26, 2002); Justice Sue Walker, Remarks concerning Oral Argument Before the Second Court of Appeals, made to the 2003 Tarrant County Bench Bar Conference, to a lunch meeting of the Tarrant County Young Lawyers' Association in 2003, and in separate presentations to the Denton and Hood County Bar Associations in 2003.

[12] Perkins, *supra*, page 1.

[13] Chief Justice John Cayce, Justice Terrie Livingston, Justice Anne Gardner, Justice Sue Walker, *Significant Cases Decided by the Second Court of Appeals Within the Past Two Years*, presented at the Tarrant County Bar Association Bench Bar Conference, April 16-18, 2004.

[14] *In re Fort Worth Children's Hosp. d/b/a Cook Children's Med. Ctr.*, 100 S.W.3d 582 (Tex. App.–Fort Worth 2003, orig. proceeding); and *In re Matthew T. Hinterlong*, 109 S.W.3d 611 (Tex. App.–Fort Worth 2003, orig. proceeding).

5. "Common sense dictates that any mandamus filing be an informed one, taken only after careful analysis of both the relevant law and the adequacy of appeal."

In drafting and filing your mandamus, then, you have to realize that the Court will interrupt its planned schedule and workload to turn its attention to something it knows may result in the one of the most significant opinions it will issue. At the very least, for the Court's sake and for the benefit of our clients, we ought to do what we can to make sure our petitions fall into that category of cases which merit relief, and which we make as efficiently grasped as possible.

To put this last general comment in context with regard to mandamus proceedings before the Second Court of Appeals, one only has to consider the title of the truly excellent article concerning mandamus proceedings before the Second Court of Appeals, written by Paula Perkins, Senior Staff Attorney for the Second Court of Appeals:

The Discovery Mandamus–To File or Not to File? Things to Consider Before Firing Up the Word Processor.[15]

So let's see what we can find out from mandamus practice in front of the Second Court of Appeals over the last couple of years, and then use that to decide whether, when, and how to fire up the word processor.

C. First, Consider the Resources Available to Help You in Crafting Your Mandamus.

If, after considering the Court's point of view and the likelihood of failure, you still want to pursue a mandamus proceeding, you might want to take into consideration the really excellent articles dealing with mandamus proceedings. For purposes of this paper, the first, most directly on point, and most essential of those resources is Paula Perkins' article, mentioned above. You will find her guidance invaluable on your mandamus journey to the Second Court of Appeals. We have retyped and attached to this paper as Appendix Seven one thing from Paula Perkins' paper–the Clerk Screening Form used by the Clerk's Office of the Second Court of Appeals. The Clerk's office compares every mandamus petition (and every other original proceeding, as well) against this checklist to make sure that all i's have been dotted and t's crossed. If not, the petition does not even

[15] Perkins, *supra*, note 1, at iv.

make it to the Court's chambers.[16] For a more extensive form of this checklist, you should refer to the Original Proceeding Worksheet, found on the website for the Second Court of Appeals (go to the court's website, click on "Court Rules" and click on "Original Proceeding" or go directly to the following link: http://www.2ndcoa.courts.state.tx.us/ orig.htm). We have attached to this paper, as Appendix Eight, the form of that Worksheet which appeared on the Second Court of Appeals's website on October 30, 2004.

In addition to Paula Perkins' paper, you can find other very helpful resources dealing with mandamus proceedings in the above-mentioned articles by Mr. Perkes, and the following relatively recent papers: Cynthia S. Anderson, *Texas Mandamus Primer*, Appellate Boot Camp 2002, Chapter 9; D. Todd Smith, *The Emergency Appellate Practitioner*, Advanced Civil Appellate Practice Course 2002, Chapter 9, page 5, et seq (2002); and Jane M.N. Webre, *Succeeding in Mandamus Review*, Advance Civil Appellate Practice Course 2004. The Online Library at www.TexasBarCLE.com should have these articles available.

D. Second, Consider Why the Court Denies Petitions for Mandamus.

You can find no better rosetta stone for this exercise than Paula Perkins' paper, particularly pages 2 through 6 of that paper. We will not retype those pages here, but we will set forth the verbatim headings Paula Perkins used in her paper to aid lawyers in making an educated guess as to why the Court had denied their particular petition for mandamus. Take these to heart (all emphases are Paula Perkins', while you can blame us for all comments in brackets):

1. Did you clear all the technical/procedural hurdles? [See checklist (found as Appendices Seven and Eight to this paper)].
2. Did you clear all the substantive hurdles?
    a. Clear Abuse of Discretion **and** No Adequate Remedy at Law. Paula Perkins' Comment: **This is by far the most common reason mandamus relief is denied.**
    b. Laches [i.e., did you wait too long, do you have unclean hands].
    c. Successor Judge [i.e., if one trial judge made the decision you complain of, and another judge has since succeeded that judge in office, the successor judge has to have had a chance to decide the issue].

[16] Paula T. Perkins, Comments at "Discovery-Hot Topics" Brown Bag Seminar sponsored by the Tarrant County Bar Association, March 26, 2004.

d. Premature Request for Relief.
e. No Standing.
f. Final Order or Interlocutory Order.[17]

If your complaint cannot clear all these hurdles, then you should give serious consideration to not filing your mandamus proceeding.

And, in all candor, given the emotion that potential mandamus situations generate, maybe you need to enlist another lawyer to help you in this evaluation. You should look for someone who knows nothing about your case, whose judgment you trust, and who can dispassionately evaluate **the record**, as opposed to your pitch on why the trial judge has done you wrong. Sometimes, you will not have the luxury of time, money, or other resources to have this type of independent evaluation. As a matter of fact, if you wait until after the trial court rules on your issue to obtain this independent evaluation, most of the time you will not have a realistic opportunity for such an evaluation. This underscores the need to try to get this independent input even before the trial court rules, so that you have a chance to correct on the front end whatever you have overlooked in terms of procedure, the record, preserving error, or persuasion.

E. Third, Consider Whether the Court's Mandamus Opinions Give You Some Help.

As pointed out earlier, as a rule the Court does not address the merits on petitions for mandamus as to which it denies relief. The pertinent Rule of Appellate Procedure does not require an opinion addressing the merits of the mandamus proceeding in that situation,[18] and the Court typically refrains from addressing the merits in that situation as a workload management tool.[19]

But the Court does issue written opinions addressing the merits involved in petitions for mandamus which it grants. We decided to analyze the five opinions

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[17] Perkins, *supra*, at pages 2-6.

[18] *See* Rule 52.8, T.R.A.P.

[19] Perkins, *supra*, note 1, at iv. Justice Sue Walker also provided this insight in responding to a question propounded by a member of the Denton County Bar Association in a question and answer session, October 3, 2003, following a presentation concerning oral argument.

issued by the Court during 2003[20] and the ten it issued in 2004[21] to see if noticed any trends or themes.

1. Take Heed of The General Principles Governing Mandamus Proceedings Cited by the Second Court of Appeals.

In 2003, we found five opinions from the Second Court of Appeals which granted, in whole or in part, mandamus relief. Most of the opinions recited, using very similar language, the same general principles, and relied on the same authority from case to case to case in support of those general principles. Somewhat surprising was the fact that these opinions did not, as a rule, cite to other opinions emanating from the Second Court of Appeals as authority for those general principles–they tended to cite to authority from the Supreme Court of Texas. We did find it interesting that, in 2004, we did not see the same tendency of the Court to recite the same language and the same authority in support of general principles from case to case, though some Texas Supreme Court cases were cited fairly consistently, when applicable (i.e., *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992)(orig. proceeding); *In re Colonial Pipeline*, 968 S.W.2d 938 (Tex. 1998)(orig. proceeding); *Canadian Helicopters, Ltd. v. Wittig*, 876 S.W.2d 304 (Tex. 1994)(orig. proceeding); *In re Nitla S.A. de C.V.*, 92 S.W.3d 419 (Tex. 2002)(orig. proceeding); etc.). The Court continued to rely on Supreme Court

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[20] The five cases in 2003 were *In re Fort Worth Children's Hosp. d/b/a Cook Children's Med. Ctr.*, 100 S.W.3d 582 (Tex. App.–Fort Worth 2003, orig. proceeding); *In re Burlington Northern and Santa Fe Ry.*, 99 S.W.3d 323 (Tex. App.–Fort Worth 2003, orig. proceeding); *In re Matthew T. Hinterlong*, 109 S.W.3d 611 (Tex. App.–Fort Worth 2003, orig. proceeding); *In re Charles M. Noteboom and Charles M. Noteboom, P.C.*, 111 S.W.3d 794 (Tex. App.–Fort Worth 2003, orig. proceeding); and *In re Zachary C. Scott*, 100 S.W.3d 575 (Tex. App.–Fort Worth 2003, orig. proceeding).

[21] The ten cases in 2004 were *In re Jay Charles Bowen*, 2004 WL 541174 (Tex. App.–Fort Worth March 18, 2004, orig. proceeding); *In re Wirt M. Norris, Jr.*, 2004 WL 912664 (Tex. App.–Fort Worth April 29, 2004, orig. proceeding; denied as moot by later order, July 6, 2004); *In re J. Michael Fincher, P.C., et al*, 141 S.W.3d 255 (Tex. App.–Fort Worth July 8, 2004, orig. proceeding); *In re Donald K. Dennis*, 2004 WL 1535222(Tex. App.–Fort Worth July 8, 2004, orig. proceeding); *In re Gerald Harden*, 2004 WL 1597631(Tex. App.–Fort Worth July 15, 2004, orig. proceeding); *In re Wise Reg'l. Health Sys. f/k/a Decatur Comm. Hosp.*, 2004 WL 1597622 (Tex. App.–Fort Worth July 15, 2004, 2004, orig. proceeding); *In re Debra DuPont*, 142 S.W.3d 528 (Tex. App.–Fort Worth July 26, 2004, orig. proceeding); *In re Thomas R. Maher*, 143 S.W.3d 907 (Tex. App.–Fort Worth August 26, 2004, orig. proceeding); *In re Banc of Am. Inv. Servs., Inc., et al*, 2004 WL 2416561(Tex. App.–Fort Worth October 28, 2004, orig. proceeding); *In re Clarendon Ins. Co.*, 02-04-305-CV, (Tex. App.–Fort Worth December 23, 2004, orig. proceeding).

authority for the general principles it recited, though from time to time it referred to its own recent opinions as authority for those principles. If you will turn to Appendices Two and Three, you will see the general principles governing mandamus proceedings, and the authorities for those principles, which the Court cited in support of each of its opinions granting a petition for mandamus in 2003 and 2004.

While we have not recited any of the general principles or holdings of any of the five cases in which the Court granted mandamus relief in 2005,[22] the opinions in those cases generally recite the same general principles in the same fashion as did the cases in 2003 and 2004. What did interest us about the Court's recitation of general mandamus principles in a few opinions in which it denied mandamus relief. The Court does not usually explain its decisions to deny such relief–recall the exchange which prompted this paper, set out in Section A of this paper. But in 2005, the Court had this to say in denying mandamus relief in these five cases:

- a party who complains about a trial court's refusal to hear or rule on a motion must show that it brought the matter to the trial court's attention, and that the trial court refused to rule;[23]

- the Court of Appeals may not mandamus a district clerk unless the clerk interferes with the Court of Appeals' jurisdiction;[24]

- mandamus will only issue to correct a clear abuse of discretion or

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[22] *In re Stucki*, 2005 Tex. App. LEXIS 10411 (Tex. App.-Fort Worth Dec. 15, 2005, orig. proceeding), *In re Wymore*, 2005 Tex. App. LEXIS 2494 (Tex. App.-Fort Worth Mar. 31, 2005, orig. proceeding), *In re Delp*, 2005 Tex. App. LEXIS 3873 (Tex. App.-Fort Worth May 19, 2005, orig. proceeding), *In re Collins*, 172 S.W.3d 287 (Tex. App.-Fort Worth 2005, orig. proceeding), and *In re Tarrant County*, 2005 Tex. App. LEXIS 10426 (Tex. App.-Fort Worth Dec. 12, 2005, orig. proceeding).

[23] *In re Cozzi*, 2005 Tex. App. LEXIS 4728, *2 (Tex. App.-Fort Worth June 9, 2005, orig. proceeding); *In re Hernandez*, 2005 Tex. App. LEXIS 3653, *1-2 (Tex. App.-Fort Worth May 12, 2005, orig. proceeding).

[24] *In re White*, 2005 Tex. App. LEXIS 6206, *1 (Tex. App.-Fort Worth Aug. 3, 2005, orig. proceeding); *In re Sarringar*, 2005 Tex. App. LEXIS 4613, *1 (Tex. App.-Fort Worth June 10, 2005, orig. proceeding).

violation of a duty imposed by law;[25] and

- mandamus will not issue in the presence of an adequate remedy by appeal.[26]

We can only speculate on the reason for the Court to break with its practice of not usually informing the parties of its reasons for denying a petition for mandamus. But that speculation leads us to believe that either these specific parties, or other petitioners before the Court, keep ignoring these same principles, and the Court feels it worth its while to point out that doing so results in the denial of a petition–perhaps saving litigants and the Court the time and effort of dealing with such ill-fated petitions in the future. Take note.

Solely for the sake of brevity, we will not recite any of the general principles here. But Appendices Two and Three will let you review and select the general principles which you feel apply to your case, and apply them appropriately.

As you review the table in Appendices Two and Three, please do so by comparing those general principles against Paula Perkins' guidelines about why the Second Court of Appeals denies petitions for mandamus (*See* Section D. of this paper, above). What we think will become immediately evident to you is the practical importance of these general principles. Too many times we nickname general principles as "boilerplate," and then dismiss "boilerplate" as meaningless. In her paper, Paula Perkins made it clear, through emphasis, that "**by far the most common reason mandamus relief is denied**" sounds in a failure of a relator to clear those most basic of mandamus hurdles: the trial court's commission of a clear abuse of discretion, and the lack of an adequate appellate remedy.[27] Interestingly, of the 23 statements of "general principles" we identified in mandamus opinions written by the Second Court of Appeals in 2003, 13 of them either affirm the need to establish a clear abuse of discretion and/or a lack of adequate appellate remedy, or they discuss how you go about establishing those requirements. Five other statements of "general principles" either affirm the concept of laches barring mandamus relief, or discuss the types of situations which create laches barring such relief. While the statements of general principle contained in the Court's 2004 mandamus opinions did not allow us to so succinctly

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[25] *In re Watson*, 2005 Tex. App. LEXIS 8926, *2 (Tex. App. Fort Worth Oct. 27, 2005, orig. proceeding).

[26] *In re Cozzi*, at *2; *In re Watson*, at *2.

[27] Perkins, *supra*, pages 2-3.

make this comparison in tabular form, 37 of the statements of general principles made by the Court in its mandamus opinions in 2004 either affirm the need to establish a clear abuse of discretion and/or a lack of adequate appellate remedy, or they discuss how you go about establishing those requirements. The general principles matter.

Take the statements of general mandamus principles mentioned in these opinions of the Second Court of Appeals to heart–or fail to do so at your peril.

2. Take Note of the Specific Holdings of the Second Court of Appeals in Granting Petitions for Mandamus in 2003 and 2004.

Appendices Four and Five sets for these specific holdings, and the reasoning articulated by the Court in reaching those holdings.

You might note as you review the specific holdings that four of the five cases in which the Second Court of Appeals granted a petition for mandamus in 2003 involved discovery issues; in 2004, discovery issues predominated in three of the ten opinions granting mandamus. One of the 2003 cases affirmed the trial court's order compelling discovery,[28] one of the 2003 cases overruled the trial court's failure to quash a deposition,[29] and one 2003 case overruled a trial court's denial of a motion to compel discovery.[30] A fourth 2003 case had a discovery component which was mooted by actions taken after the trial court's ruling.[31] In 2004, one case overruled a claim of privilege,[32] one case reversed the trial-court ordered production of two doctors' credential files,[33] and the third case allowed a new co-counsel to see medical records which were subject to a prior protective

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[28] *In re Fort Worth Children's Hosp. d/b/a Cook Children's Med. Ctr.*, 100 S.W.3d 582 (Tex. App.–Fort Worth 2003, orig. proceeding).

[29] *In re Burlington Northern and Santa Fe Ry.*, 99 S.W.3d 323 (Tex. App.–Fort Worth 2003, orig. proceeding).

[30] *In re Matthew T. Hinterlong*, 109 S.W.3d 611 (Tex. App.–Fort Worth 2003, orig. proceeding).

[31] *In re Charles M. Noteboom and Charles M. Noteboom, P.C.*, 111 S.W.3d 794 (Tex. App.–Fort Worth 2003, orig. proceeding).

[32] *In re Maher*, 143 S.W.3d 907 (Tex. App.–Fort Worth 2004, orig. proceeding)

[33] *In re Wise Reg'l. Health Sys. f/k/a Decatur Comm. Hosp.*, 2004 WL 1597622 (Tex. App.–Fort Worth 2004, orig. proceeding).

order.[34]

You might also consider that two of the four above-mentioned 2003 cases were among the eleven cases which Justices on the Second Court of Appeals designated as significant cases decided by the Second Court of Appeals in the last two years.[35] At the Bench Bar Conference, Chief Justice Cayce noted that all the eleven cases which made the significant cases list (and that would include these two mandamus cases) had three things in common:

1) they addressed issues of first impression;
2) they were, in the opinion of the Second Court of Appeals, of significance to the jurisprudence of the State; and
3) they were unanimous decisions by the Second Court of Appeals panel which heard them.[36]

We do not think that means that, if your case does not have all these characteristics, your petition for writ of mandamus will not find success. But to the extent that your case involves an issue of first impression, or to the extent you can show that it involves issues of significance to the jurisprudence of the State, for goodness sake make sure that you emphasize those points.

3. Emulate the Fact Intensive Nature of the Opinions Granting a Petition for Writ of Mandamus.

One trend that impressed us about the opinions of the Court granting petitions for review in 2003 and 2004 had to do with their fact-intensive nature. Any study of court opinions that tries to allocate the bulk of the opinions between factual and legal analysis is inherently subjective and subject to critique. But it did strike us that virtually every opinion in which the Court granted petitions for writ

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[34] *In re: Wirt M. Norris, Jr.*, 2004 WL 912664 (Tex. App.–Fort Worth 2004, orig. proceeding; denied as moot by later order, July 6, 2004).

[35] *In re Hinterlong, supra*, and *In re Fort Worth Children's Hosp. d/b/a Cook Children's Med. Ctr., supra*; *See* Chief Justice John Cayce, Justice Terrie Livingston, Justice Anne Gardner, Justice Sue Walker, *Significant Cases Decided by the Second Court of Appeals Within the Past Two Years*, presented at the Tarrant County Bar Association Bench Bar Conference, April 16-18, 2004.

[36] Comments of Chief Justice John Cayce, *Significant Cases Decided by the Second Court of Appeals Within the Past Two Years*, presented at the Tarrant County Bar Association Bench Bar Conference, April 16-18, 2004.

of mandamus in 2003 and 2004 dedicated at least some part of a third of its paragraphs to the statement of or an analysis of the facts, largely uncluttered by a discussion of the applicable law. In some opinions, that dedication to developing and analyzing the facts consumed sixty or seventy percent of the opinion.

We do not know how this compares to opinions written by the Court on non-mandamus proceedings. But it does emphasize the importance of carefully and clearly setting forth the facts of your case. Let's face it–you are asking the Court of Appeals to hold that a trial court has abused its discretion in making a decision. The facts of the case have to clearly show that abuse of discretion. Furthermore, and we cannot overemphasize this dynamic: ***those facts must be undisputed***. The Second Court of Appeals will not resolve disputed fact issues in a mandamus proceeding (i.e., if there is a factual dispute, chances are the Court will not grant relief in the mandamus proceeding). *See In re Hinterlong, supra*, at 624, citing *In re Ford Motor Co.*, 988 S.W.2d 714, 722 (Tex. 1998) (orig. proceeding). So make sure the undisputed facts clearly tell your story, and lead to the inescapable conclusion that they justify the relief you seek.

F. Fourth, Consider Whether the Trends and Tendencies Give You Any Guidance

With the odds of success on mandamus so low, we wondered if we could identify any trends or tendencies which might provide us some guidance on future mandamus proceedings, over and above the guidance provided by the specific holdings of a given case.

So several times every week during 2003, 2004, and 2005, we visited the website of the Second Court of Appeals (you can find it at http://www.2ndcoa.courts.state.tx.us). We would print off all the memorandum opinions and opinions issued by the Court since our last visit and profile pertinent information about them in a database, such as the composition of the panel, the lawyers involved, the styles of cases, etc. We would then review those opinions and categorize them as appeals, mandamus proceedings, etc., and profile the Court's rulings. At the end of the year we performed several Westlaw searches to make sure we had found all the published opinions of the Second Court of Appeals involving mandamus proceedings. We then segregated all mandamus proceedings we had identified in a separate spreadsheet, and started analyzing the results. What follows gives you the results of that analysis, and an analysis of some of the statistics reported by Paula Perkins in her paper.

We also analyzed the "Case Events" section for each mandamus proceeding shown on the Court's website in which the Court issued an opinion in 2003, 2004,

and 2005. We did so to see if we could glean some idea of whether certain events might affect the granting or denial of a petition by the Court– e.g., the filing of a motion for temporary relief, the Court's request for a response to a petition for mandamus, or the filing of a response to a petition. In interpreting the data from the Court's website we made the following assumptions; they make sense to us, but you might disagree with them:

1) When the Court's website reflected that a relator filed a motion on the same day it filed its petition for writ of mandamus, we assumed that motion was a motion for temporary relief, filed pursuant to Rule 52.10, T.R.A.P.;

2) In a case in which (1), above, applied, we assumed that the first entry after the filing date which reflected "Motion Disposed" by the Court, we assumed the Court had decided the motion for temporary relief;

3) When the Case Events for a case recited an "Order Entered" by the Court, with no prior filing by either party necessitating an order (other than a "Motion Filed" entry followed by a "Motion Disposed" entry), we assumed the Court had ordered the Real Parties in Interest to file a response (with amazing regularity, a response was filed ten days to the day after an "Order Entered" notation).

Keep this caveat in mind regarding the methods we used: they are the best protocol we can think of for someone who (like us) does not have access to the Court's internal database. In all likelihood, we have missed a few rulings and misinterpreted some entries. To the extent the statistics you read here conflict with those reflected in the paper by Paula Perkins, rely on Paula's numbers (which are taken from the Court's internal database).

1. Consider the Trends and Tendencies Before Your Train Leaves The Station...

    a. The Second Court of Appeals Only Grants About One in Seven Petitions for Mandamus.

In the three years we studied, the Second Court of Appeals only granted about one in eight petitions for mandamus. In 2003, the Court granted about one in ten petitions; in 2004, the Court granted about one in seven petitions; and in 2005 it granted about one in eight petitions (not counting petitions filed by persons proceeding pro se). So the person filing a mandamus petition starts off at the bottom of a pretty steep hill.

b. With Regard to Mandamus Proceedings On Discovery Issues, the Grant Rate Rises to About One in Five

In her paper, Paula Perkins examined original proceedings involving discovery issues before the Second Court of Appeals during the 32-month period between July 30, 2001, and March 25, 2004.[37] With regard to these mandamus proceedings involving solely discovery disputes, the Court granted (in whole or in part) mandamus in six out of thirty cases–about a 20% grant rate, over double the grant rate noticed for mandamus proceedings as a whole in the cases decided by the Court in 2003, and slightly higher than the grant rate noted in 2004.

You might recall that four of the five cases in which the Court granted mandamus relief in 2003 at least started out involving discovery issues; three out of ten such cases in 2004 involved discovery issues; and one in five such cases in 2005 involved such issues. We do not know how many of the petitions for writ of mandamus denied by the Second Court of Appeals in 2003-2005 involved discovery issues. But the high percentage of cases involving discovery issues in which the Second Court of Appeals granted mandamus relief in 2003-2005 underscores the trend reflected in Paula Perkins' paper.

c. You Can Make an Educated Guess as To Which Justices Will Comprise Your Panel Before You File Your Petition....

Lawyers always salivate over trying to identify the composition of the Panel which might hear their cases before filing their petitions or briefs, in the hopes of structuring the briefs to appeal to the particular Panel members, or to evaluate the likelihood of a particular result based on past rulings by members of the Panel. Once you file your Petition, you can call the Clerk's office and they will inform you which Justices comprise the Panel which will hear your petition.

But if you want to predict your panel's composition before filing your Petition, you can go through a somewhat inexact exercise to do so, if you know when you will file your petition.[38] As we will discuss below, the Court tends to deny most petitions for mandamus, and those denials tend to occur relatively

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[37] Perkins, *supra*, Appendix entitled "Second Court of Appeals, Original Proceedings Involving Discovery Issues, 7/30/01-3/25/04."

[38] Keep in mind you have limited flexibility on this filing. Wait too long, and laches may bar your petition. Perkins, *supra*, note 1, at iv, and cases cited therein, including *Rivercenter Assocs. v. Rivera*, 858 S.W.2d 366, 367 (Tex. 1993); *Quanto Int'l Co. v. Lloyd*, 897 S.W.2d 482, 487-88 (Tex. App.–Houston [1st Dist.] 1995, orig. proceeding).

quickly after filing. Though Westlaw does not typically publish such denials (and neither does Lexis, to our knowledge), the Court does post such decisions on its website. The Court updates those postings every couple of days or so. So, to get a handle on which members of the Court will decide your mandamus, consider performing this exercise:

1) determine the date you will file your petition (or the date your opponent will file his or her petition);
2) from the Court's website, identify mandamus petitions filed and decided within a couple or so weeks of the date you determined in step (1);
3) open the opinions on the cases you identify in (3), and see which members of the Court decided those cases.

This sounds like a lot of trouble, and also sounds like a pretty inexact tool. We plead true on both charges; in fact, it appears clear to us that, for whatever reason, Judges trade off with each other on the original proceedings Panel on a not infrequent basis. But this exercise is the only way we know to identify members of the Court who might decide your mandamus, before you file your Petition.

d. ...But This Study Does Not Identify Any Granting or Denying Tendencies Related Solely to the Composition of the Panel Hearing the Mandamus.

It bears pointing out that, even if one knew which Justices would decide one's mandamus, trying to predict the likelihood of the success of that mandamus sheerly on the identity of the panel members does not seem particularly fruitful. Over the three years of this study, no currently serving Justice voted to grant more than about 14% of the mandamus petitions in non-Pro Se cases he or she heard; no currently serving Justice voted to grant fewer than 8% of such mandamus petitions. These percentages are barely different from the overall percentage of mandamus petitions granted by the Court in during the three years of this study. As you can see from the tables set forth in Appendix One, Ten, Eleven, and Twelve, some Justices did vote to grant a mandamus petition at a higher rate than others. There is no way to say that Justices with lower granting tendencies would not have reached the same decision as Justices with higher granting tendencies, and vice versa, if they had all sat on the same cases. But for those who would like to know what the various Justices did during the three years of this study, the tables in Appendix One to this paper reflect what we saw in that regard.

2. Once You Have Pulled Away From the Station, Keep Track of Events That Might Suggest a Re-evaluation of Whether You Want to

Keep Driving This Train, or Whether You Want to Sell It.

Sometimes, things transpire in an appellate trip which cause you to realize that your clients' odds of success have changed, either for the better or the worse. Here are some post-filing trends and tendencies which may want to make you check just how much water you have in the boiler and how much coal you have in the hopper.

a. If the Second Court of Appeals Requests a Response, the Grant Rate Increases to Nearly One in Three.

A court of appeals can deny a petition for writ of mandamus without requesting or receiving a response. However, if the court is of the tentative opinion that relator is entitled to the relief sought or that a serious question concerning the relief requires further consideration, the court must request a response if one has not been filed.[39] In her paper, Paula Perkins pointed out that, over the 32-month period of her study, the Second Court of Appeals requested a Response to a Petition for Writ of Mandamus in nineteen of the thirty discovery cases it dealt with. In a subsequent version of her paper, Mr. Perkins pointed out that, in the January 1-December 18, 2004, period, the Court had requested responses 20 times, and granted mandamus in seven of those.[40]

We do not know how many times in the thirty cases studied by Paula Perkins that parties filed responses without request by the Court. But the Court's requests for responses in those nineteen cases do speak volumes in a couple of respects:

1) concerning those nineteen cases, the Court granted the mandamus relief six times–meaning that, on discovery-oriented mandamus proceedings, the Court granted mandamus about one time for every three cases in which it requested a Response to the Petition for Writ of Mandamus. This equates to a grant rate three or four times as high as the overall rate on 2003 mandamus proceedings we examined, and over 50% greater than the grant rate on the 2004 mandamus proceedings we reviewed; and

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[39] Rule 52.8(b)(1), T.R.A.P.

[40] Perkins, *supra*, Appendix entitled "Second Court of Appeals, Original Proceedings Involving Discovery Issues, 7/30/01-3/25/04."and Perkins, subsequent paper, Exhibit B.

2) since the Court only granted mandamus relief in six discovery-oriented cases overall, by definition those were the same six cases out of the nineteen in which the Court requested responses. So the Court failing to ask for a Response does not seem to bode well for the success of the Petition.

We subsequently studied the filings and activity in cases in which the Court handed down opinions in mandamus proceedings in the 2003-2005 period. These filings and activities are generically described on the Court's website under the heading "Case Events." Our analysis of those Case Events leads us to believe that, when the Court requests a response in a mandamus proceeding (no matter what the subject matter of the mandamus), the 30% grant rate noted in Paula Perkins' study holds true (for the three year period of the study, of the 50 cases in which the Court apparently requested responses, it granted the petition 16 times).

So, if the Court requests a response to a petition for writ of mandamus, one has to assume that the sheen has started to dull at least a little on the ruling the winning party obtained in the trial court. The odds still disfavor the likelihood of mandamus relief, but the odds are closing. The closing of those odds take on greater significance when you consider two additional factors:

1) Paula Perkins' studied revealed that, of the nineteen cases in which the Court requested responses settled and one was removed to federal court. We do not know what result the Court would have reached on the four cases that settled if they had not settled, nor do we know what ruling the Court would have reached on the case removed to federal court; if the Court had granted mandamus in those cases, then the likelihood of a grant would have swung definitively toward the positive. As it is, the Court granted mandamus relief (6 times) nearly as many times in cases in which it requested a response as it denied mandamus relief (8 time).

2) When we analyzed the Case Events from the Court's website for mandamus opinions handed down in the 2003-2005 time frame, we noted that, of the 16 cases which were dismissed by agreement or on the motion of the relator, seven saw the Court request the filing of a response and the real parties in interest filed responses very quickly in six additional cases. Assuming for a moment some significant number of those 13 cases, if not settled, would have resulted in a grant, the grant rate in these cases in which the Court requested or received a response would begin to rise to the 50%+ level.

We noted one phenomenon in our study of the Case Events entries on the Court's website that we cannot explain. When the Court issued an Order requesting a response between ten and twenty days after the filing of the petition, it ended up granting the petition for mandamus in those cases more than half the time. This compares to a grant rate of about 42% percent if within five days of the filing of the petition the Court issued its order requesting a response, and an 8% percent grant rate if that order came out from the sixth through the ninth day after the filing of the petition. Since the Court usually issues its order requesting a response within ten days of the filing of the petition, the ten to twenty day time-frame tendency noted by this paragraph may not mean much, but it is an interesting phenomenon. Another interesting phenomenon related to the ordering of a response– if such an order issued more than twenty days after the filing of the petition, only twice did the Court grant the petition.

So once the Court orders a response, the calculus does begin to change. With the request by the Court for a response, all parties– certainly the real parties in interest – need to carefully evaluate the strength of their position in a reasoned manner. The odds still favor the Court denying the petition, but the odds are closing.

b. When the Second Court of Appeals Enters a Stay Order on a Discovery-Oriented Mandamus Proceeding, It Denies the Mandamus Less Than Half the Time.

As we know, a court of appeals can stay proceedings in the trial court or grant other temporary relief pending a ruling on a petition for writ of mandamus; it may stay proceedings below or grant temporary relief on its own motion or the motion of any party.[41] In the 32 month time frame she studied, Paula Perkins noted that the Second Court of Appeals entered nine stay orders; in four of those cases it eventually denied mandamus, and in three of the cases it eventually granted mandamus relief. Two of the cases settled. In a subsequent version of her paper, Mr. Perkins pointed out that, in the January 1-December 18, 2004, period, the Court entered stay orders seven times, and granted mandamus in three of those (with one case still pending) [42]

i. The Foregoing Tendency Does Not Mean That the

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[41] Rule 52.10(b), T.R.A.P.

[42] Perkins, *supra*, Appendix entitled "Second Court of Appeals, Original Proceedings Involving Discovery Issues, 7/30/01-3/25/04."

Mere Filing of a Motion for Temporary Relief
Increases the Odds of the Court Granting the Petition.

When we first heard the numbers Paula Perkins reported about the Court granting temporary relief, we became concerned that a real party in interest should avoid creating a situation in which the Court had to address whether to grant temporary relief – the idea being that, if the tendency noted by Paula Perkins meant that the Court denied mandamus relief less than half the time it was asked to grant temporary relief, the request for temporary relief might create some dynamic that a real party in interest might want to avoid.

A fuller consideration of the Case Events section of the Court's website on each of its mandamus cases in 2003-2004 mollified our concern. The grant rate on petitions accompanied by motions for temporary relief for the three year period is slightly higher than the overall grant rate for the period–17.8% for petitions combined with motions for temporary relief, as compared to an overall 13.7% grant rate. So do not file a motion for temporary relief absent a real need for the temporary relief you request.

Otherwise, we were not able to glean enough specific information from the Case Events section of the Court's website to enable us to confirm or deny whether the granting of temporary relief by the Court generally increased the odds of the Court granting a petition (though our instincts certainly lead us to believe that a grant of temporary relief should indicate a greater likelihood the Court will grant the petition). But our interpretation of the Case Events information from the Court's website makes us feel comfortable that motions for temporary relief were filed contemporaneously with the filing of the petition for mandamus in about 37% of the cases in which the Court either granted or denied mandamus relief in 2003-2005.

c. If the Court Doesn't Deny Your Petition in Thirty Days, You May Have Picked the Right Train and the Right Track.

Lawyers tend to want to know how quickly they can expect the Court to rule on their petitions for writ of mandamus. To cut to the chase, mandamus proceedings in 2003 through 2005 seemed to justify this rule of thumb:

> within thirty days of filing, the Court denies about 76% of the petitions for mandamus which it eventually denies .
>
> once the petition has survived thirty days post-filing, its odds of success improve to about 34% (i.e., the Court grants 34% of the

petitions which remain pending thirty days after filing);

once its survival extends to fifty days post-filing, the odds of granting go up to about 40% (i.e., the Court grants 40% of the petitions which remain pending fifty days after filing), and (taking into consideration the cases voluntarily dismissed by the parties) the likelihood the Court will grant a petition this age exactly matches the likelihood the Court will deny such a petition.

During the time frame of our study, there were a number of mandamus petitions which were dismissed on the motion of the party filing the same or by agreement of the parties (12 in all, about 12% of the total mandamus proceedings studied). Eight of those motions were filed and granted at least 60 days after the mandamus petition was filed, and six of those motions were filed and granted more than 140 days after the mandamus petition was filed. We can only speculate whether those proceedings might have resulted in a granting of the mandamus petitions. Perhaps these proceedings involved cases in which all parties recognized potential problems with their positions or their lawsuits as a whole, and decided to resolve them.

But the typically quick ruling of the Court on petitions it denies, and the fairly consistent granting of petitions by the Court when a petition has spent more than 50 days before the Court, is a tendency one should note, and advise one's clients appropriately.

If you would like to see the numbers concerning the age of various cases when the Second Court of Appeals granted or denied petitions for writ of mandamus, refer to the tables and chart in Appendix Nine to this paper.

G. Considering Petitions for Mandamus Denied by the Court Underscores the Need to Have Someone Not Invested in Your Case Review Your Work.

As mentioned above, typically the Court does not issue a written opinion discussing why it has denied a petition for mandamus. Any attempt by us, over and above pointing to Paula Perkins' paper (as we have done earlier), to speculate as to why a petition was denied would be just that–speculation. But we did wonder if we could glean anything from reviewing the petition and response in a sample of cases in which the Court denied a petition for mandamus. So we picked a month in 2003 in which the Court issued as many decisions as it did in any other month denying petitions for mandamus, and spent about 2 hours reviewing the petitions and responses in those cases.

We cannot claim to know why the Court denied the petitions we reviewed. But from a review of two hours or so, and without confirming record references or citations to authority, we know why we would have denied the petitions in the cases we reviewed. Half of the cases were filed by pro se petitioners, so we did not study them. Petitions in a third of the remaining cases did not comply with the procedural requisites of the Texas Rules of Appellate Procedure, one petition challenged the trial court on a point of law in which all applicable authority confirmed the trial court's ruling, and one petition presented a discovery dispute in which the petitioner's hands did not appear to be completely clean (one petition was withdrawn on the petitioner's motion). None of these petitions for writ of mandamus took the Court more than a month to deny from the date the petition was filed.

Given the more than competent level of the lawyers involved in these cases, this exercise convinced us of the importance of having an experienced, competent lawyer with no knowledge of the case to weigh in on the potential mandamus as early as possible, and to review the petition or response before filing those documents with the Court; a fresh set of eyes may see deficiencies or suggestions that will cure an otherwise fatal defect, or identify a potentially lost cause.

H. Conclusion

Experienced appellate practitioners at advanced appellate seminars in Texas consistently give testimonials about the benefits that come from having a fresh set of eyes judge their work before they file it. Researching and writing this paper– including taking to heart Paula Perkins' observations about why the Second Court of Appeals denies mandamus relief, and reviewing the unsuccessful petitions of others– has convinced us of the essential need to obtain, as early in the process as possible, the impartial insight of someone not emotionally involved in the fight. Such a person can certainly help make sure you do not gloss over something of importance, and they may help you come to grips with the fact that your particular case does not merit mandamus relief.

If you take note of the guidance provided by Paula Perkins' paper, read and believe, with all your heart, the general principles distilled from opinions of the Second Court of Appeals, become familiar with the trends and tendencies of the Second Court of Appeals in mandamus proceedings, and seek the insight of a dispassionate observer, then hopefully you will enhance the likelihood your mandamus petition will succeed. And, at the same time, you might just make the Court's job a little easier and more enjoyable.

Suggested Reading:

Rules 9 and 52, Texas Rules of Appellate Procedure (http://www.2ndcoa.courts.state.tx.us, click on “Court Rules” and then “Appellate Procedure”)

Rules 1 and 2, Second Court of Appeals Local Rules (http://www.2ndcoa.courts.state.tx.us, click on “Court Rules” and then “Local Rules”)

Cynthia S. Anderson, *Texas Mandamus Primer*, Appellate Boot Camp 2002, Chapter 9.

Gregory T. Perkes, *Original Proceedings: The Writ of Mandamus*, Appellate Boot Camp 2003, Chapter 8, page 2 (2003).

Paula T. Perkins, Senior Staff Attorney, Second Court of Appeals, *The Discovery Mandamus–To File or Not to File? Things to Consider Before Firing Up the Word Processor* (2004).

D. Todd Smith, *The Emergency Appellate Practitioner*, Advanced Civil Appellate Practice Course 2002, Chapter 9, page 5, et seq (2002).

The Online Library at www.TexasBarCLE.com should have these articles available.

Appendix One. Calendar Year 2003-2005:
Participation in Mandamus Proceedings, Grants, and Written Opinions, by Justice

Participation in Mandamus Proceedings, Grants, and Written Opinions, by Justice, Ranked by Number of Cases.

Calendar Year 2003:

Justice	Times on Panel Ruling on Mandamus	Times on Panel Granting Mandamus	Wrote Opinion Granting Mandamus	% of Times Panel Granted Mandamus
Holman	32	2	0	6.3%
Gardner	30	1	0	3.3%
Walker	28	1	1	3.6%
Day †	19	3	2	15.8%
Livingston	17	2	1	11.8%
Cayce	16	0	0	0.0%
Dauphinot	14	2	0	14.3%
Richards*	2	2	1	100.0%
Boyd*	1	0	0	0.0%
Cornelius*	1	0	0	0.0%

* Indicates Justice sitting by assignment
† Deceased.

Calendar Year 2004:

2004	Times on Panel Ruling on Mandamus	Times on Panel Granting Mandamus	Wrote Opinion Granting Mandamus	% of Times Panel Granted Mandamus
Livingston	32	6	2	18.8%
Dauphinot*	29	4	1	13.8%
Holman	24	3	0	12.5%
McCoy	23	4	1	17.4%
Walker	19	5	4	26.3%
Cayce**	18	3	1	16.7%
Gardner	14	2	0	14.3%

* Concurred in one case in which Court granted mandamus.
** Dissented in one case in which Court granted mandamus.

Calendar Year 2005:

Justice	Times on Panel Ruling on Mandamus	Times on Panel Granting Mandamus	Wrote Opinion Granting Mandamus	% of Times Panel Granted Mandamus
Livingston*	21	2	0	9.5%
Dauphinot	20	3	2	15.0%
Cayce**	17	3	1	17.6%
Holman	17	1	0	5.9%
Walker	14	2	1	14.3%
McCoy	12	2	0	16.7%
Gardner	11	2	1	18.2%

* Dissented in one case in which the Court granted mandamus.

** Concurred without opinion in one case in which Court granted mandamus.

Participation in Mandamus Proceedings, Grants, and Written Opinions, by Justice, Ranked by Percentage of Grants.

Calendar Year 2003:

Justice	Times on Panel Ruling on Mandamus	Times on Panel Granting Mandamus	Wrote Opinion Granting Mandamus	% of Times Panel Granted Mandamus
Day †	19	3	2	15.8%
Dauphinot	14	2	0	14.3%
Livingston	17	2	1	11.8%
Holman	32	2	0	6.3%
Walker	28	1	1	3.6%
Gardner	30	1	0	3.3%
Cayce	16	0	0	0.0%

† Deceased.

Calendar Year 2004:

Justice	Times on Panel Ruling on Mandamus	Times on Panel Granting Mandamus	Wrote Opinion Granting Mandamus	% of Times Panel Granted Mandamus
Walker	19	5	4	26.3%
Livingston	32	6	2	18.8%
McCoy	23	4	1	17.4%
Cayce**	18	3	1	16.7%
Gardner	14	2	0	14.3%
Dauphinot*	29	4	1	13.8%
Holman	24	3	0	12.5%

* Concurred in one case in which Court granted mandamus.
** Dissented in one case in which Court granted mandamus.

Calendar Year 2005:

Justice	Times on Panel Ruling on Mandamus	Times on Panel Granting Mandamus	Wrote Opinion Granting Mandamus	% of Times Panel Granted Mandamus
Gardner	11	2	1	18.2%
Cayce**	17	3	1	17.6%
McCoy	12	2	0	16.7%
Dauphinot	20	3	2	15.0%
Walker	14	2	1	14.3%
Livingston*	21	2	0	9.5%
Holman	17	1	0	5.9%

** Concurred without opinion in one case in which the Court granted mandamus.
* Dissented in on case in which the Court granted mandamus.

Overall (2003-2005):

Overall	Times on Panel Ruling on Mandamus	Times on Panel Granting Mandamus	Wrote Opinion Granting Mandamus	% of Times Panel Granted Mandamus
Day†	19	3	2	15.8%
Dauphinot	63	9	3	14.3%
Livingston	70	10	3	14.3%
McCoy	45	6	1	13.3%
Cayce	51	6	2	11.8%
Walker	61	7	6	11.5%
Gardner	55	5	1	9.1%
Holman	73	6	0	8.2%

† Deceased.

Appendix Two. Calendar Year 2003: General Principles Cited by Second Court of Appeals in Granting Mandamus Petitions

General Mandamus Requirement	BNSF	Scott	FWCH	Hinter-long	Noteboom

General Mandamus Requirement	BNSF	Scott	FWCH	Hinterlong	Noteboom
Mandamus will issue only to correct a clear abuse of discretion or the violation of a duty imposed by law when there is no other adequate remedy at law. *In re Daisy Mfg. Co.*, 17 S.W.3d 654, 658 (Tex. 2000)(orig. proceeding); *In re Alcatel USA, Inc.*, 11 S.W.3d 173, 175 (Tex. 2000)(orig. proceeding). **Hinterlong** introduced this statement by recognizing "Mandamus is an extraordinary remedy," structured the remaining phrase to read "will issue only if the trial court has committed a clear abuse of discretion and the relator has no adequate remedy at law.", and cited *Tilton v. Marshall*, 925 S.W.2d 672, 682 (Tex. 1996); *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding)" **Noteboom** prefaced its recitation of this requirement with the admonition that "Mandamus is an extraordinary remedy available only in limited circumstances..." and cited *In re Crow-Billingsley Air Park, Ltd.*, 98 S.W.3d 178, 179 (Tex. 2003)(orig. proceeding)(citing *Republican Party of Tex. v. Dietz*, 940 S.W.2d 86, 88 (Tex. 1997)(orig. proceeding)).	X		X	X	X (introduced this statement with a phrase re: the extraordi-nary nature of manda-mus)
A trial court clearly abuses its discretion when "it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law." *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding) **Hinterlong** also notes that *Walker* quotes *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985) (orig. proceeding)).	X		X	X ; adds that *Walker* quotes *Johnson*	

General Mandamus Requirement	BNSF	Scott	FWCH	Hinter-long	Noteboom
A trial court abuses its discretion if it acts in an arbitrary or unreasonable manner without reference to any guiding rules or principles. *See In re Nitla S.A. de C.V.*, 92 S.W.3d 419, 422 (Tex. 2002)(orig. proceeding)(citing *Down v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-242 (Tex. 1985), *Cert. denied*, 476 U.S. 1159 (1986)).					X
When reviewing matters committed to a trial court's discretion, an appellate court may not substitute its own judgment for the trial court's judgment. *See In re Nitla S.A. de C.V.*, 92 S.W.3d 419, 422 (Tex. 2002)(orig. proceeding)(citing *Down v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-242 (Tex. 1985), *Cert. denied*, 476 U.S. 1159 (1986)).					X
We may not substitute our judgment for that of the trial court unless the relator establishes that the trial court could reasonably have reached only one decision and that the trial court's decision is arbitrary and unreasonable. *Walker v. Packer*, 827 S.W.2d 833, 839-840 (Tex. 1992)			X		
This burden (see immediately above) is a heavy one. *Canadian Helicopters, Ltd. v. Wittig*, 876 S.W.2d 304, 305 (Tex. 1994)			X		
Our review is much less deferential with respect to a trial court's determination of the legal principles controlling its ruling because a trial court has no discretion in determining what the law is or in applying the law to the facts. *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992).			X	X	

General Mandamus Requirement	BNSF	Scott	FWCH	Hinter-long	Noteboom
Thus, a clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion and may result in mandamus. *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992). Or, as noted in **Hinterlong**, "may result in appellate reversal by extraordinary writ."			X	X	X
Mandamus will issue to correct a discovery order if the order constitutes a clear abuse of discretion and there is no adequate remedy by appeal. *In re Colonial Pipeline Co.*, 968 S.W.2d 938, 941 (Tex.1998) (orig. proceeding).			X		
In making the determination of whether the trial court abused its discretion, we are mindful that the purpose of discovery is to seek the truth so that disputes may be decided by what the facts reveal, not by what facts are concealed. *In re Colonial Pipeline Co.*, 968 S.W.2d 938, 941 (Tex.1998) (orig. proceeding).			X		
The rules governing discovery do not require as a prerequisite to discovery that the information sought be admissible evidence; it is enough that the information appears reasonably calculated to lead to the discovery of admissible evidence. *See* Tex.R. Civ. P. 192.3(a).			X		
However, this broad grant is limited by the legitimate interests of the opposing party to avoid overly broad requests, harassment, or disclosure of privileged information. *In re Am. Optical Corp.*, 988 S.W.2d 711, 713 (Tex.1998) (orig. proceeding).			X		
Appellate courts will not intervene to control incidental trial court rulings when an adequate remedy by appeal exists. *Walker*, 827 S.W.2d at 840.			X		

General Mandamus Requirement	BNSF	Scott	FWCH	Hinter-long	Noteboom
An appellate remedy is not inadequate merely because it might involve more expense or delay than obtaining a writ of mandamus. *In re Ford Motor Co.*, 988 S.W.2d 714, 722-23 (Tex.1998) (orig. proceeding); *Walker*, 827 S.W.2d at 842.			X		
We will not resolve disputed fact issues in a mandamus proceeding. *See In re Ford Motor Co.*, 988 S.W.2d 714, 722 (Tex. 1998)(orig. proceeding)				X	
Remedy by appeal in a discovery mandamus is not adequate where a party is required "to try his lawsuit, debilitated by the denial of proper discovery, only to have that lawsuit rendered a certain nullity on appeal." *Walker*, 827 S.W.2d at 841 (quoting *Jampole v. Touchy*, 673 S.W.2d 569, 576 (Tex. 1984)(orig. proceeding)).				X	
A party will not have an adequate remedy by appeal: (1) when the appellate court would not be able to cure the trial court's discovery error; (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; and (3) where the trial court disallows discovery and the missing discovery cannot be made a part of the appellate record or the trial court, after proper request, refuses to make it part of the record. *Ford*, 988 S.W.2d at 721; *Walker*, 827 S.W.2d at 843. (**Hinterlong** only recited subpart (3), citing *In re Colonial Pipeline Co.*, 968 S.W.2d 938, 941 (Tex. 1998) (orig. proceeding); *Walker*, 827 S.W.2d at 843-844).			X	X (just as to subpart (3) from quote).	

General Mandamus Requirement	BNSF	Scott	FWCH	Hinter-long	Noteboom
Remedy by appeal may also be inadequate when it is insufficient to protect a specific constitutional right asserted by relator. *See Tilton*, 925 S.W.2d at 682.				X	
Although mandamus is not an equitable remedy, its issuance is largely controlled by equitable principles. *In re Users Sys. Servs., Inc.*, 22 S.W.3d 331, 337 (Tex. 1999)(orig. proceeding); *Rivercenter Assocs. v. Rivera*, 858 S.W.2d 366, 367 (Tex. 1993)(orig. proceeding); *Bailey v. Baker*, 696 S.W.2d 255, 256 (Tex. App.–Houston [14th Dist] 1985, orig. proceeding)				X	
One such [equitable principle] is that "[e]quity aids the diligent and not those who slumber on their rights." *Rivercenter Assocs. v. Rivera*, 858 S.W.2d 366, 367 (Tex. 1993)(orig. proceeding) (quoting *Callahan V. Giles*, 137 Tex. 571, 155 S.W.2d 793, 795 (1941)(orig. proceeding).				X	
Thus, it is well-settled that mandamus relief may be denied where a party inexplicably delays asserting its rights. *See, e.g., Rivercenter Assocs.*, 858 S.W.2d at 367; *Bailey*, 696 S.W.2d at 256.				X	
In determining if a relator's dely in seeking a writ of mandamus is a barrier to the issuance of the writ, a court may analogize to the doctrine of laches, which bars equitable relief. *Sanchez v. Hester*, 911 S.W.2d 173, 177 (Tex. App.–Corpus Christi 1995, orig. proceeding).				X	

General Mandamus Requirement	BNSF	Scott	FWCH	Hinter-long	Noteboom
A party asserting the defense of laches must show both an unreasonable delay by the other party in asserting its rights and harm resulting to it because of the delay. *In re Bahn*, 13 S.W.3d 865, 871 (Tex. App.–Fort Worth 2000, orig. proceeding); *Sanchez*, 911 S.W.2d at 177 (citing *Rogers v. Ricane Enters.*, 772 S.W.2d 76, 80 (Tex. 1989)				X	

Appendix Three. Calendar Year 2004: General Principles Cited by Second Court of Appeals in Granting Mandamus Petitions

Second Court of Appeals
Opinions Conditionally Granting Mandamus, 2004
General Principles

Bowen 3/18/04	Norris 4/29/04; denied as moot by later order 7/6/04	Fincher 7/8/04	Dennis 7/8/04	Harden 7/15/04
During the pendency of a federal bankruptcy action, a state court has jurisdiction to hear matters pertaining to the dissolution of a marriage but not to hear matters relating to property that is part of the bankruptcy estate. *See In re Surgent*, No. 13-03-484-CV, 2003 WL 22512023, at *3 (Tex. App.-Corpus Christi Nov. 6, 2003, orig. proceeding	Mandamus will issue only to correct a clear abuse of discretion or the violation of a duty imposed by law when there is no other adequate remedy at law. *In re Daisy Mfg. Co.*, 17 S.W.3d 654, 658 (Tex. 2000) (orig. proceeding).	Mandamus relief is appropriate only if a trial court abuses its discretion and there is no adequate appellate remedy. *In re CSX Corp*., 124 S.W. 3d 149, 151 (Tex. 2003) (orig. proceeding).	To be entitled to mandamus relief, relator must establish that he has no other adequate remedy at law and that the act sought to be compelled is a clear and fixed duty imposed by law that is purely ministerial, as opposed to discretionary or judicial in nature. *Eubanks v. Mullin*, 909 S.W.2d 574, 576 (Tex. App.– Fort Worth 1995, orig. proceeding).	The Temporary Administrator's fiduciary obligation does not extend to nonprobate assets. *See Punts v. Wilson*, No. 06-03-144-CV, 2004 WL 1175489, at *3 (Tex. App.– Texarkana May 28, 2004, no pet.)
When a challenged order is void for lack of jurisdiction, relator is not required to establish that he has no adequate remedy at law. *In re S.W. Bell Tel. Co.*, 35 S.W.3d 602, 605 (Tex.2000).	A trial court clearly abuses its discretion when it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law. *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding).	A clear failure by the trial court to analyze or apply the law correctly constitutes an abuse of discretion. *Walker v. Packer*, 827 S.W. 2d 833, 840 (Tex. 1992); *In re Noteboom*, 111 S.W. 3d 794, 797 (Tex. App. – Fort Worth 2003, orig. proceeding)	When a motion is properly filed and pending before a trial court, the act of giving consideration to and ruling upon that motion is ministerial. *White v. Reiter*, 640 S.W.2d 586, 594 (Tex. Crim. App. 1982); *Barnes v. State*, 832 S.@.2d 424, 426 (Tex. App.–Houston [1st Dist] 1992, orig. proceeding).	
Thus, all issues in the underlying litigation related to property in the bankruptcy estate are stayed as a matter of law. *See* 11 U.S.C.A. § 362(a)(1); *see also In re Shock*, 37 B.R. 399, 400 (D.N.D.1984)	Appellate courts will not intervene to control incidental trail court rulings when an adequate remedy by appeal exists. *Id.* At 840.		The trial court has no discretion to refuse to act, but must consider and rule upon the motion within a reasonable time. *Barnes*, 832 S.W.2d at 426.	

Bowen 3/18/04	Norris 4/29/04; denied as moot by later order 7/6/04	Fincher 7/8/04	Dennis 7/8/04	Harden 7/15/04
	We have found no authority for the proposition that a trial court may enter an order to completely prevent disclosure of admittedly discoverable documents to co-counsel of record. *Cf.* TEX. R. CIV. P. 192.6 (allowing trial court, upon party's motion, to enter protective order to order, among other things, that requested discovery not be sought in whole or in part).		Thus, mandamus is available to compel a trial court to make a ruling within a reasonable time. *Id.; see also In re Christensen*, 39 S.@.3d 250, 251 (Tex. App.–Amarillo 2000, orig. proceeding).	
	The guiding principles in the area of attorney-client relationships require a lawyer to provide his client with an informed understanding of the client's legal rights and obligations, to explain the practical implications of the client's rights and obligations, and to zealously assert the client's position under the rules of the adversary system. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT preamble ¶ 2, *repri*nted in TEX. GOV'T CODE ANN., tit.2, subtit. G app. A (Vernon 1998) (TEX. STATE BAR R. Art. X,§ 9).		Mandamus will not lie, however, to compel a trial court to rule a certain way on a motion. *White*, 640 S.W.2d at 593-94; *Christensen*, 39 S.@.3d at 251.	

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General Principles

Wise Regional Health 7/15/04	DuPont 7/26/04	Maher 8/26/04	Bank of America 10/28/04	Clarendon 12/23/04
Mandamus will issue to correct a discovery order if the order constitutes a clear abuse of discretion and there is no adequate remedy by ordinary appeal. *In re Colonial Pipeline Co.*, 968 S.W.2d 938, 941 (Tex. 1998) (orig. proceeding); *Walker v. Packer*, 827 S.W.2d 833, 840-42 (Tex. 1992) (orig. Proceeding).	In deciding whether a writ of mandamus is appropriate, we recognize that mandamus will issue only to correct a clear abuse of discretion or the violation of a duty imposed by law when there is no other adequate remedy at law. *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding).	Mandamus is an extraordinary remedy that will issue to correct a clear abuse of discretion only if the relator lacks an adequate remedy by appeal. *In re Nitla S.A. de C.V.*, 92 S.W.3d 419, 422 (Tex. 2002).	To merit mandamus relief, relators must show that they have no adequate remedy at law and that the act they seek to compel is purely ministerial, as opposed to discretionary or judicial in nature. *Eubanks v. Mullin* 909 S.W.2d 574, 576 (Tex. App.–Fort Worth 1995, orig. proceeding.	Mandamus will issue only to correct a clear abuse of discretion or the violation of a duty imposed by law when there is no other adequate remedy at law. *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding).
A party does not have an adequate remedy by appeal when an appellate court cannot cure a trial court's erroneous discovery order. *Arlington Mem'l Hosp. Found., Inc. V. Barton*, 952 S.W.2d927, 929 (Tex. App.–Fort Worth 1997, orig. proceeding).	Mandamus will lie to compel a party chairperson to place an individual's name on a ballot if the individual is entitled to be placed on the ballot. *See* TEX. ELEC. CODE ANN.§§ 145.037(a), 161.009, 273.061.	A trial court clearly abuses its discretion if "it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law. *In re Hinterlong*, 109S.W.3d 611, 621 (Tex. App.–Fort Worth 2003, orig. proceeding) (quoting *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992).	Ruling upon a properly filed, pending motion is a ministerial act. *In re Bonds*, 57 S.W.3d 456, 457 (Tex. App.–San Antonio 2001, orig. proceeding); see also *Eli Lilly & Co. v. Marshall*, 829 S.W.2d 157, 158 (Tex. 1992) (orig. proceeding) (mandamus conditionally issued to compel trial court to conduct a hearing and render a decision on a discovery motion.	A trial court clearly abuses its discretion when it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law. *Id.*

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General Principles

Wise Regional Health 7/15/04	DuPont 7/26/04	Maher 8/26/04	Bank of America 10/28/04	Clarendon 12/23/04
An appellate court cannot cure the error when privileged information that materially affects the rights of the aggrieved party is produced pursuant to a trial court's erroneous order. *Walker*, 827 S.W.2d at 840; *Arlington Mem'l*, 952 S.W.2d at 929.	A party official who fails to carry out a duty under the election code is subject to mandamus as if the official were a public officer. TEX. ELEC. CODE ANN. §§ 161.009, 273.061.	A trial court has no discretion in determining what the law is or applying the law to the facts. *Id.*	But we do have the power to compel trial courts to rule on pending motions. *In re Mission Consol Indep. Sch. Dist.*, 990 S.W.2d 459, 461 (Tex. App.–Corpus Christi 1999, orig. proceeding).	With respect to the resolution of factual issues or matters committed to the trial court's discretion, we may not substitute our judgment for that of the trial court unless the relator establishes that the trial court could reasonably have reached only one decision and that the trial court's decision is arbitrary and unreasonable. *Id.* at 839-40. This burden is a heavy one.
A trial court has no discretion in determining what the law is or in applying the law to the facts; therefore, a clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion and may result in appellate reversal by extraordinary writ. *Walker*, 827 S.W.2d at 840.		Thus, a clear failure to analyze or apply the law correctly will constitute an abuse of discretion and may result in appellate reversal by extraordinary writ. *Walker*, 827 S.W.2d at 840; *see also In re Allstate County Mut. Ins. Co.*, 85 S.W.3d 193, 195-96 (Tex. 2002).	The trial court has no discretion to refuse to hear and rule on a properly filed, pending motion because a refusal to timely rule on a motion frustrates the judicial system and constitutes a denial of due course of law. *In re Ramirez*, 994 S.W.2d 682, 683-84 (Tex. App.–San Antonio 1998, orig. proceeding).	*Canadian Helicopters, Ltd. v. Wittig*, 876 S.W.2d 304, 305 (Tex. 1994) (orig. proceeding).

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General Principles

Wise Regional Health 7/15/04	DuPont 7/26/04	Maher 8/26/04	Bank of America 10/28/04	Clarendon 12/23/04
The medical peer review committee privilege protects records or determinations of, or communications to, a medical peer review committee unless they are made in the regular course of business or the privilege has been waived. TEX. OCC. CODE ANN. § 160.007(e); TEX. HEALTH & SAFETY CODE ANN. § 161.032(f) (Vernon Supp. 2004); *Arlington Mem'l*, 952 S.W.2d at 929.		In the discovery context, remedy by appeal is not adequate where a party is required "to try his lawsuit, debilitated by the denial of proper discovery, only to have that lawsuit rendered a certain nullity on appeal." *Walker*, 827 S.W.2d at 841 (quoting *Jampole v. Touchy*, 673 S.W.2d 569, 576 (Tex. 1984) (orig. proceeding)).	This requirement does not interfere with the trial court's discretion because a trial court has no discretion to refuse to rule. *See id*. At 684.	Our review is much less deferential with respect to a trial court's determination of the legal principles controlling its ruling because a trial court has no discretion in determining what the law is or in applying the law to the facts. *Walker*, 827 S.W.2d at 840.
The party asserting the privilege has the burden of proving that the privilege applies to the information sought. *Arlington Mem'l*, 952 S..2d at 929.		Remedy by appeal is likewise not adequate where the trial court's discovery order disallows discovery that cannot be made a part of the appellate record, thereby denying the reviewing court the ability to evaluate the effect of the trial court's error. *In re Colonial Pipeline Co.*, 968 S.W.2d 938, 941 (Tex. 1998) (orig. proceeding); *Walker*, 827 S.W.2d at 843-44.	But the trial court retains discretion to determine how to rule, and under no circumstances may we tell the trial court how to rule. *Womack v. Berry*, 156 Tex. 44, 291 S.W.2d 677, 682 (1956); *Ramirez*, 994 S.W.2d at 684.	Thus, a clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion and may result in mandamus. *Id.*

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Wise Regional Health 7/15/04	DuPont 7/26/04	Maher 8/26/04	Bank of America 10/28/04	Clarendon 12/23/04
Because the nature and extent of the medical peer review privilege is a question of law, *see Brownwood Reg'l Hosp. V. Eleventh court of Appeals*, 927 S.W.2d 24, 27 (Tex. 1996) (orig. proceeding), a clear failure by the trial court to apply the privilege correctly will constitute an abuse of discretion, *see Walker*, 827 S.W.2d at 840.		Under Texas law, evidence is presumed discoverable. *See In re E.I. DuPont de Nemours & Co.*, 136 S.W.218, 225 (Tex. 2004) (orig. proceeding).	This motion deals with the enforceability of arbitration provisions, which the trial court is supposed to "summarily determine." Tex. Civ. Prac. & Rem. Code Ann. § 171.021(b) (Vernon Supp. 2004-05).	Absent extraordinary circumstances, mandamus will not issue unless relator lacks an adequate appellate remedy. *In re Van Waters & Rogers, Inc.*, 145 S.W.3d 203, 210-11 (Tex. 2004) (citing *Walker*, 827 S.W.2d at 839).
The statute establishing the medical peer review committee privilege does not require live testimony; in fact, an affidavit is the usual device used by parties asserting the privilege to establish that it applies to the information sought. *See Arlington Mem'l*, 952 S.W2d at 929.		One exception to the rule that evidence is generally discoverable is that attorney "work product" is protected from disclosure by privilege.	"Summarily" means using summary procedure, but it also connotes "acting quickly, without delay." *In re MHI P'ship*, 7 S.W.3d 918, 922 (Tex. App.–Houston [1st dist] 1999, orig. proceeding).	An appeal is inadequate for mandamus purposes when parties are in danger of permanently losing substantial rights, such as when 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 the error cannot be made part of the appellate record. *Id.*; *Candian Helicopters Ltd.*, 876 S.W.2d at 306; *Walker*, 827 S.W.2d at 843-44.

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Wise Regional Health 7/15/04	DuPont 7/26/04	Maher 8/26/04	Bank of America 10/28/04	Clarendon 12/23/04
An affidavit that tracks statutory requirements, along with the submission of the documents at issue for *in camera* review, are sufficient to raise the medical peer review privilege. *See, e.g., Mem'l Hosp. The Woodlands v.McCown*, 927 S.W.2d 1, 11-12 (Tex. 1996) (orig. proceeding) (holding that submission of affidavits and documents for *in camera* review satisfied relators' burden of proving peer review privilege); *Arlington Mem'l.*, 952 S.W.2d at 930 (holding that affidavit tracking statutory language combined with submission of documents for *in camera* review established peer review privilege).		Work product, other than core work product, is discoverable only upon a showing that the party seeking discovery has a substantial need for the materials in the preparation of the party's case and the party is unable, without undue hardship, to obtain the substantial equivalent of the material by other means. Tex. R. Civ. P. 192.5(b)(2).	If the arbitration agreement is enforceable, it is inappropriate for the case to remain in the trial court. *See Pepe Int'l. Dev. Co. v. Pub Brewing Co.*, 915 S.W.2d 925, 292 (Tex. App.–Houston [1st Dist.] 1996, orig. proceeding).	In *Scottish Union & National Insurance Company v. Clancey*, the issue was whether compliance with the stipulations in the policy relating to the proof of loss by the assured and the demand for an appraisement of the damaged property were waived by the appellant. 18 S.W. 439, 440, 83 Tex. 113, 114 (1892).

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General Principles

Wise Regional Health 7/15/04	DuPont 7/26/04	Maher 8/26/04	Bank of America 10/28/04	Clarendon 12/23/04
But the medical peer review committee privilege covers "any communication made to a medical peer review committee," TEX. OCC. CODE ANN. § 160.007(a), not just communications made during the course of a specific investigation or an ongoing proceeding. *Irving Healthcare Sys. V. Brooks*, 927 S.W.2d 12, 19 (Tex. 1996) (orig. proceeding).		A document is not privileged simply because it was created by an attorney or is contained in an attorney's file. *Nat'l Union Fire Ins. Co. v. Valdez*, 863 S.W.2d 458, 460 (Tex. 1993).		The court held that [i]t is a well-known principle in this class of cases that the acts relied on as constituting a waiver should be such as are reasonably calculated to make the assured believe that a compliance on his part with the stipulations providing the mode of proof of loss, and regulating the appraisement of the damage done, is not desired, and that it would be of no effect if observed by him.

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General Principles

Wise Regional Health 7/15/04	DuPont 7/26/04	Maher 8/26/04	Bank of America 10/28/04	Clarendon 12/23/04
The medical peer review committee privilege applies to all communications with a peer review committee, even to unsolicited documents about a physician's qualifications that are submitted without direction from the committee. *See Irving Healthcare*, 927 S.W.2d at 19.		A document is prepared in actual anticipation of litigation if: (1) a reasonable person would have concluded from the totality of the circumstances that there was a substantial chance that litigation would ensue (the objective standard); and (2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and prepared the document(s) for the purposes of preparing for such litigation (the subjective standard). *Id.*		The Texas Supreme Court recently addressed this issue; that is, whether when a trial court abused its discretion by determining that the appraisal clause in an insurance policy was unenforceable, the relator had an adequate remedy at law. *In re Allstate*, 85 S.W.3d at 196. The Supreme Court held that the relator did not have an adequate remedy at law...
However, because all records of and communications to medical peer review committees are privileged, the source of any otherwise discoverable documents cannot be the peer review committee's files. *Irving Healthcare*, 927 S.W.2d at 18.		For the privilege to apply, preparation for litigation must be the primary motivating purpose underlying the creation of the document. *Flores*, 777 S.W.2d at 42; *Henry P. Roberts Invs. v. Kelton*, 881 S.W.2d 952, 955 (Tex. App. –Corpus Christi 1994, no writ).		The Supreme Court noted that the appraisals "go to the heart" of the plaintiff's breach of contract claim and held that, at a minimum, denying the appraisals would vitiate the insurance company's ability to defend the breach of contract claim. *Id.*

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		Because there is no presumption that documents are privileged, the party who seeks to limit discovery by asserting a privilege has the burden of proof. *DuPont*, 136 S.W.3d at 223.		Accordingly, it held that the insurance company had no adequate remedy at law. *Id.* The present facts are similar to the facts in *In re Allstate. Id*. At 195-96.
		The privilege log is not proof; a prima facie case for the privilege must be proved by evidence necessary to support the privilege. *In re Monsanto Co.*, 998 S.W.2d 917, 926, 929 (Tex. App.–Waco 1999, orig. proceeding).		
		"The prima facie standard requires only the 'minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true.'" *DuPont*, 136 S.W.3d at 223 (quoting *Tex. Tech Univ. Health Scis. Ctr. v. Apodaca*, 876 S.W.2d 402, 407 (Tex. App.–El Paso 1994, writ denied)).		

Appendix Four: Calendar Year 2003: Holdings of Second Court of Appeals Opinions Granting Mandamus Petitions

Burlington Northern Day, with Livingston and Dauphinot, 2/7/03	**Scott** Day, with Holman and Gardner, 2/27/03	**Cook Children's**, Livingston, with Day, Dauphinot, 2/28/03	**Hinterlong**, Walker, Holman; Richards, by assignment, 7/3/03	**Noteboom**, Richards, Cornelius, Boyd, sitting by assignment, 7/3/03
The trial court denied the motion of a corporate defendant to quash the deposition of its President. The Second Court ruled that the trial court abused its discretion in failing to quash the deposition.	The trial court denied a party's motion to compel arbitration. The Second Court ruled that the trial court erred by denying the motion to compel arbitration.	The trial court appointed a guardian ad litem for nonparty patients, and granted a party's motion to compel the production of a hospital's records showing which nonparty patients received a drug. The Second Court ruled the trial court abused its discretion in appointing the ad litem, but upheld the trial court's order compelling production of the records.	The trial court denied a motion to compel discovery of the identity of, and other information relating to, a student who provided a crime stoppers tip to a High School. The Second Court ruled that the trial court abused its discretion by refusing to declare the crime stoppers privilege unconstitutional as applied to movant in this case. The Second Court ordered an in camera inspection of certain materials, and a protocol for further disclosure, if warranted.	The trial court ordered petitioners to provide discovery and monetary security to the real parties in interest while the case is abated and pending arbitration. The Second Court ruled the trial court abused its discretion by requiring the nonmovant to post a deposit or bond without first hearing evidence on the validity of the underlying claims to which the bonds were directed.

Burlington Northern Day, with Livingston and Dauphinot, 2/7/03	**Scott** Day, with Holman and Gardner, 2/27/03	**Cook Children's**, Livingston, with Day, Dauphinot, 2/28/03	**Hinterlong**, Walker, Holman; Richards, by assignment, 7/3/03	**Noteboom**, Richards, Cornelius, Boyd, sitting by assignment, 7/3/03
We hold the trial court abused its discretion in denying BNSF's motion for protective order and motion to quash ...[the apex deponent's] deposition.	Because claims solely between associated persons are arbitrable (under rules of the National Association of Security Dealers) and Truelson's claims (for fraud and breach of the partnership agreement against Scott) are within the scope of the parties' arbitration agreement, the trial court erred by denying Scott's motion to compel arbitration.	...[w]e hold that the hospital has not shown that the information in the face sheets (requested by plaintiffs show-ing names and addresses of all non-party patients admini-stered E-Ferol) is subject to any privilege that it could assert (under either Tex.Health & Safety Code Ann. §241.152 or Tex.R.Evid. 509). §241.152 does not make information privileged; the hospital did not present any evidence that it is a physician or the face sheets are records created or maintained by a physician, it failed to carry its burden to prove that the documents are subject to the physician-patient privilege under either rule 509 or section 159.002; and the hospital had no standing to assert the privilege, which may only be asserted by the patient, the patient's representative, or the physician on behalf of the patient.	We hold that the trial court did not abuse its discretion in determining that the high school crime stoppers program meets the statutory definition of a crime stoppers organization. [The crime stoppers program is a public organization under Tex. Gov't. Code Ann. §414.001(2)(B)].	We hold that [before setting the security required of a litigant under the Texas General Arbitration Act, Tex. Civ. Prac. & Rem. Code §171.086] the trial court, at a minimum, is required to permit the nonmovant the opportunity at a hearing to introduce evidence addressing the probably validity of the underlying claims [of the movant]. *See Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 338-39, 89 S.Ct. 1820, 1821 (1969); *see also N. Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 606, 07, 95 S. Ct. 719, 722-23 (1975).

Burlington Northern Day, with Livingston and Dauphinot, 2/7/03	**Scott** Day, with Holman and Gardner, 2/27/03	**Cook Children's**, Livingston, with Day, Dauphinot, 2/28/03	**Hinterlong**, Walker, Holman; Richards, by assignment, 7/3/03	**Noteboom**, Richards, Cornelius, Boyd, sitting by assignment, 7/3/03
"If the party seeking the [apex] deposition cannot show that the official has any unique or superior personal knowledge of discoverable information, the trial court should" not allow the deposition to go forward without a showing, after a good faith effort to obtain the discovery through less intrusive means, "(1) that there is a reasonable indication that the official's deposition is calculated to lead to the discovery of admissible evidence, and (2) that the less intrusive methods of discovery are unsatisfactory, insufficient or inadequate." *Crown Central Petroleum v. Garcia*, 904 S.W.2d 125, 128 (Tex. 1995.*; see also In re Alcatel USA, Inc.*, 11 S.W.3d 173, 175-76 (Tex. 2000) (orig. proceeding).	Where the Federal Arbitration Act applies to an arbitration agreement, mandamus is the proper remedy when a party is erroneously denied the right to arbitration. *Prudential Secs., Inc. v. Marshall*, 909 S.W.2d 896, 900 (Tex. 1995)(orig. proceeding); *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 271 (Tex. 1992) (orig. proceeding).	...[w]e hold that the hospital has not shown that the trial court's order violates the nonparty patients' right to privacy [since the trial court ordered the ad litem to keep the information confidential, and the hospital does not contend that the trial court's order dos not so "restrict the discovery of the [nonparty patients'] identities as to preclude any risk of their disclosure of [their] identities ...to *third persons*." *Tarrant County Hosp. Dist. v. Hughes*, 734 S.W.2d 675, 685 (Tex. App.–Fort Worth 1987, original proceeding)(op. on reh'g)(emphasis added).]	...we hold that the trial court did not abuse its discretion in determining that the student informant made the tip to an appropriate school official, invoking section 414.008's crime stoppers privilege. [The faculty sponsor of the crime stopper program testified that any teacher is a person authorized to receive a crime stoppers report, thus creating a fact issue as to whether the information was properly reported, and the statute does not mandate reporting only to particularized persons to invoke the privilege.	[Because the nonmovant has complied with the portion of the trial court's order requiring the nonmovant to provide the movant a complete list of all pending cases on which their law firm was counsel of record], ...we hold that the complaint relating to that portion of the order is moot.

Burlington Northern Day, with Livingston and Dauphinot, 2/7/03	**Scott** Day, with Holman and Gardner, 2/27/03	**Cook Children's**, Livingston, with Day, Dauphinot, 2/28/03	**Hinterlong**, Walker, Holman; Richards, by assignment, 7/3/03	**Noteboom**, Richards, Cornelius, Boyd, sitting by assignment, 7/3/03
The party resisting the apex deposition moved for protection, and filed the target deponent's affidavit denying any knowledge of relevant facts. "Thus, the burden shifted to real parties to show that Rose had unique or superior personal knowledge of discoverable information. *See Alcatel*, 11 S.W.3d at 175-76; *AMR Corp. v. Enlow*, 926 S.W.2d 640, 643 (Tex. App.–Fort Worth 1996, orig. proceeding).	The Federal Arbitration Act governs a contract evidencing a transaction involving interstate commerce if the contract contains a written arbitration provision. 9 U.S.C.A. § 2 (West 1999).	We further hold that the face sheets are discoverable under these facts. [Non privileged information is discoverable if reasonably calculated to lead to the discovery of admissible evidence. Tex.R.Civ.P. 192.3(a); *In re Am. Home Assurance Co.*, 88 S.W.3d 370, 373 (Tex. App.– Texarkana 2002, orig. proceeding). Plaintiffs here claim that the hospital fraudulently concealed pharmacy gave E-Ferol to infants, that FDA recalled E-Ferol, and that the hospital breached duty to notify of recall. Whether the hospital notified nonparty patients about E-Ferol appears relevant to Plaintiffs' claims.]	We hold that the trial court did not abuse its discretion in determining that the report made by the student informant in this case constituted a crime stoppers tip, invoking the privilege [The crime stoppers committee did not have to create a file or maintain information related to the tip for the tip to qualify as a crime stoppers tip].]	We hold that the trial court abused its discretion when it required the nonmovant to deposit either a monetary amount into the registry of the court or post an equivalent bond in each case resolved during arbitration without affording Noteboom the opportunity to present evidence on the question of the validity of the underlying claims.

Burlington Northern Day, with Livingston and Dauphinot, 2/7/03	**Scott** Day, with Holman and Gardner, 2/27/03	**Cook Children's**, Livingston, with Day, Dauphinot, 2/28/03	**Hinterlong**, Walker, Holman; Richards, by assignment, 7/3/03	**Noteboom**, Richards, Cornelius, Boyd, sitting by assignment, 7/3/03
Real parties did not show in their response to the petition for writ of mandamus that...[the apex deponent] has unique or superior personal knowledge of discoverable information.	Scott's and Truelson's partnership agreement lacked an arbitration provision, but they both signed Forms U-4 to become "associate persons" of Prudential (a member of NASD), and the arbitration clauses in the Forms U-4 are enforceable under the FAA. *Williams v. CIGNA Fin. Advisors, Inc.*, 56 F.3d 656, 659-60 (5th Cir. 1995).	...we hold that the trial court abused its discretion in appointing Brender guardian ad litem of the nonparty patients for purpose set forth in the October 18, 2002, order, and order the trial court to vacate its October 18, 2002, and December 10, 2002, orders. [the nonpatient parties are not parties, they are no longer minor and there is no evidence they are incompetent. Neither TRCP 173 nor other law allows for the appointment of an ad litem for them].	The identity of a crime stoppers tipster is privileged and beyond the scope of relevant, nonprivileged discovery authorized by Tex. R. Civ. P. 192.3.	

Burlington Northern Day, with Livingston and Dauphinot, 2/7/03	**Scott** Day, with Holman and Gardner, 2/27/03	**Cook Children's**, Livingston, with Day, Dauphinot, 2/28/03	**Hinterlong**, Walker, Holman; Richards, by assignment, 7/3/03	**Noteboom**, Richards, Cornelius, Boyd, sitting by assignment, 7/3/03
The evidence [of the apex deponent's knowledge] presented by the real parties to the trial court and to this court does not show anything beyond mere relevance. To be unique or superior, "there must be some showing beyond mere relevance, such as evidence that a high-level executive is the only person with personal knowledge of the information sought *or* that the executive arguably possesses relevant knowledge greater in quality or quantity than other available sources. *See Alcatel*, 11 S.W.3d at 179.	When a party asserts a right to arbitration under the FAA, the question of whether a dispute is subject to arbitration is determined under federal law. *Prudential Secs., Inc. v. Marshall*, 909 S.W.2d 896, 899 (Tex. 1995)(orig. proceeding).		We hold that the evidence presented by the movant constitutes prima facie showing that his alleged injuries were caused by the wrongful acts of the tipster, the teacher to whom the tipster provided the tip and the persons who planted the bottle in movant's vehicle [i.e., the compelling evidence movant had been set up; evidence the keys to movant's vehicle had been stolen during a trespass at movant's house by fellow students; movant's parents pressing charges for the trespass against movant's fellow students; etc.]	

Burlington Northern Day, with Livingston and Dauphinot, 2/7/03	**Scott** Day, with Holman and Gardner, 2/27/03	**Cook Children's**, Livingston, with Day, Dauphinot, 2/28/03	**Hinterlong**, Walker, Holman; Richards, by assignment, 7/3/03	**Noteboom**, Richards, Cornelius, Boyd, sitting by assignment, 7/3/03
Having failed to show that Rose had unique or superior knowledge, real parties were required to make a good faith effort to obtain the discovery through less intrusive means. *See Alcatel* at 175-76; *AMR Corp.*, 926 S.W.2d at 644. Real parties did not demonstrate or allege that they made a good faith effort to obtain the discovery through less intrusive means. *See AMR Corp.*, 926 S.W.2d at 644.	The court is responsible for determining two issues: (1) whether a party can be compelled to arbitrate under the contract; and (2) what issues the party agreed to arbitrate. *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 207-09, 111 S.Ct. 2215, 2226, 115 L.Ed.2d 177 (1991); *Executone Info. Sys., Inc. v. Davis*, 26 F.3d 1314, 1321 (5th Cir.1994).		We further hold that movant, having been exonerated of the minor in possession charge and having come forward with prima facie evidence that his claimed injuries were caused by the wrongful acts of another, has satisfied his burden of showing that he possesses cognizable common law causes of action movant alleges against the tipster, the teacher to whom the tipster reported the tip, and the persons who planted the bottle in movant's vehicle.	

Burlington Northern Day, with Livingston and Dauphinot, 2/7/03	**Scott** Day, with Holman and Gardner, 2/27/03	**Cook Children's**, Livingston, with Day, Dauphinot, 2/28/03	**Hinterlong**, Walker, Holman; Richards, by assignment, 7/3/03	**Noteboom**, Richards, Cornelius, Boyd, sitting by assignment, 7/3/03

	The scant case law on this issue provides some support for (interpreting the NASD rule that the claims raised here are subject to arbitration, or are not subject to arbitration) (citing conflicting cases).		We hold that the purpose of the crime stoppers privilege does not justify, in the limited public school zero tolerance setting, the resultant almost total abrogation of Hinterlong's common law causes of action against the tipster and the persons who planted the water bottle or the partial abrogation of movant's common law causes of action against the teacher to whom the tip was reported. *See Lucas v. United States*, 757 S.W.2d 687, 691 (Tex. 1988); *Sax v. Votteler*, 648 S.W.2d 661, 665 (Tex. 1983).	

Burlington Northern Day, with Livingston and Dauphinot, 2/7/03	**Scott** Day, with Holman and Gardner, 2/27/03	**Cook Children's**, Livingston, with Day, Dauphinot, 2/28/03	**Hinterlong**, Walker, Holman; Richards, by assignment, 7/3/03	**Noteboom**, Richards, Cornelius, Boyd, sitting by assignment, 7/3/03

	If an agreement is governed by the FAA, any doubts concerning the scope of the arbitrable issues should be resolved in favor of arbitration, including doubts raised by the construction of the contractual language itself. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S.Ct. 927, 941, 74 L.Ed.2d 765 (1983); *Cantella & Co. v. Goodwin*, 924 S.W.2d 943, 944 (Tex.1996); *Prudential Secs.*, 909 S.W.2d at 899.		Because movant met his burden of establishing that the application of the crime stoppers privilege to him violates the Texas Constitution's open courts provision by restricting his recognized common law causes of action in a way that is arbitrary or unreasonable when balanced against the legislative purpose in enacting the statute,...we hold that the trial court abused its discretion by refusing to declare the absolute crime stoppers privilege set forth in Section 414.006 of the Texas Gov't. Code unconstitutional as applied to movant in the present case. *See, e.g., Walker v.* , 827 S.W.2d 833, 840 (Tex. 1992)(recognizing a trial court has no discretion in determining what the law is or applying the law to the facts).	

Burlington Northern Day, with Livingston and Dauphinot, 2/7/03	**Scott** Day, with Holman and Gardner, 2/27/03	**Cook Children's**, Livingston, with Day, Dauphinot, 2/28/03	**Hinterlong**, Walker, Holman; Richards, by assignment, 7/3/03	**Noteboom**, Richards, Cornelius, Boyd, sitting by assignment, 7/3/03

	"The policy in favor of enforcing arbitration agreements is so compelling that a court should not deny arbitration 'unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue.' " *Prudential Secs.*, 909 S.W.2d at 899 (citing *Neal v. Hardee's Food Sys., Inc.*, 918 F.2d 34, 37 (5th Cir.1990)).		Mandamus relief is appropriate for movant because he has no adequate remedy at law.	

Burlington Northern Day, with Livingston and Dauphinot, 2/7/03	**Scott** Day, with Holman and Gardner, 2/27/03	**Cook Children's**, Livingston, with Day, Dauphinot, 2/28/03	**Hinterlong**, Walker, Holman; Richards, by assignment, 7/3/03	**Noteboom**, Richards, Cornelius, Boyd, sitting by assignment, 7/3/03

	Further, when a court determines that an arbitration provision is ambiguous, the court must resolve the ambiguity in favor of arbitrability. *Mouton v. Metro. Life Ins. Co.*, 147 F.3d 453, 456 (5th Cir.1998).		That mandamus relief consists of ordering respondents to submit in camera an affidavit from the tipster showing how he or she learned of the alcohol in movant's vehicle. If based on personal knowledge, trial court may order disclosure of tipster information necessary to a fair determination of the material issue on the merits of movant's case, including the tipster's i.d.; if based on hearsay, the trial court shall order disclosure of the i.d. of the persons providing information to the tipster. If no affidavit submitted, the trial court shall order the tipster's i.d. disclosed. *See* Tex.R. Evid. 508(c)(2).	

Burlington Northern Day, with Livingston and Dauphinot, 2/7/03	**Scott** Day, with Holman and Gardner, 2/27/03	**Cook Children's**, Livingston, with Day, Dauphinot, 2/28/03	**Hinterlong**, Walker, Holman; Richards, by assignment, 7/3/03	**Noteboom**, Richards, Cornelius, Boyd, sitting by assignment, 7/3/03

	Here, we cannot say with positive assurance that disputes solely between associated persons are outside the scope of rule 10101(b). Far from it-when rule 10101(b) is read in conjunction with rule 10201(3), a logical interpretation is that disputes solely between associated persons are arbitrable.		We hold the [crime stoppers] statute[, and the privilege created therein] as applied in this case, violates the open courts provision of the Texas Constitution. [...we conclude the crime stoppers privilege, as applied to movant under the facts of this case, unreasonably and arbitrarily restricts his common law claims when those claims are balanced against the purpose of the statute.]	
	Because...[the NASD rule] is ambiguous, the ambiguity must be resolved in favor of arbitration. *Mouton*, 147 F.3d at 456. We therefore hold that Truelson can be compelled to arbitrate under the NASD rules.			

Burlington Northern Day, with Livingston and Dauphinot, 2/7/03	**Scott** Day, with Holman and Gardner, 2/27/03	**Cook Children's**, Livingston, with Day, Dauphinot, 2/28/03	**Hinterlong**, Walker, Holman; Richards, by assignment, 7/3/03	**Noteboom**, Richards, Cornelius, Boyd, sitting by assignment, 7/3/03

	In determining whether a claim falls within the scope of an arbitration agreement, we focus on the factual allegations in the complaint rather than the legal causes of action asserted. *Prudential Secs.*, 900 S.W.2d at 900.			
	The burden is on the party opposing arbitration to show that the claims at issue fall outside the scope of the arbitration agreement. *Prudential Secs.*, 900 S.W.2d at 900.			

Burlington Northern Day, with Livingston and Dauphinot, 2/7/03	**Scott** Day, with Holman and Gardner, 2/27/03	**Cook Children's**, Livingston, with Day, Dauphinot, 2/28/03	**Hinterlong**, Walker, Holman; Richards, by assignment, 7/3/03	**Noteboom**, Richards, Cornelius, Boyd, sitting by assignment, 7/3/03

	A partnership agreement to share stock transaction commissions is a matter arising out of or in connection with the business of a member of the NASD and is therefore within the scope of the arbitration clause in rule 10101. *McDonald,* 181 Ill.Dec. 519, 608 N.E.2d at 594-95.			
	Claims for breach of contract, breach of fiduciary duty, interference with contractual and business relations, unfair competition, and conspiracy connected with a member's business are also arbitrable under the NASD rules. *First Investors Corp. v. Am. Capital Fin. Servs., Inc.*, 823 F.2d 307, 309 (9th Cir.1987).			

	Truelson has not established that these claims ...[for fraud, and that Scott breached their partnership agreement to share clients and commissions] are outside the scope of the arbitration clause in...[the NASD rule]. Consequently, we hold the parties agreed to arbitrate these claims. *See Litton Fin. Printing Div.*, 501 U.S. at 207-209, 111 S.Ct. at 2226; *Executone Info. Sys.*, 26 F.3d at 1321.			

Appendix Five: Calendar Year 2004: Holdings of Second Court of Appeals Opinions Granting Mandamus Petitions

Second Court of Appeals
Opinions Conditionally Granting Mandamus, 2004
Holdings

Bowen 3/18/04	Norris 4/29/04; denied as moot by later order 7/6/04	Fincher 7/8/04	Dennis 7/8/04	Harden 7/15/04
Accordingly, the trial court's September 5 orders are void to the extent that they address issues regarding property in Relator's bankruptcy estate. *See Sanchez v. Hester*, 911 S.W.2d 173, 175-76 (Tex. App.-Corpus Christi 1995, orig. proceeding).	The issue in this original proceeding is whether a trial court abuses its discretion by ordering that relevant and discoverable documents provided to one of Relator's counsel of record may not be disclosed to Relator's co-counsel of record. We hold that the trial court abused its discretion, and we conditionally grant the writ.	Thus, because Wright nonsuited the Harris County case after the Harris County court determined that venue was proper in Jefferson County, venue as to Wright is fixed in Jefferson County, and Wright is collaterally estopped from asserting otherwise. Accordingly, we hold that the trial court abused its discretion in denying the motion to transfer venue as to Wright.	Because relator's motion has been filed and pending since March 2004, relator is entitled to a ruling on his motion.	Here, section 442 cannot be used to authorize payment of administration expenses of Ellen's estate from nonprobate assets–the North Dallas Bank & Trust pay-on-death accounts and the joint-tenancy-with-right-of-survivorship account as Charles Schwab–because the Temporary Administrator did not present evidence at the December 8, 2004 hearing of section 442's statutory requisites.

Bowen 3/18/04	Norris 4/29/04; denied as moot by later order 7/6/04	Fincher 7/8/04	Dennis 7/8/04	Harden 7/15/04
	The trial court's January 5, 2004 order prohibiting disclosure of admittedly relevant, admissible documents to Relator's co-counsel of record violates the fundamental principles underlying the attorney-client relationship and prevents Ware from discharging his attorney-client obligations to Relator. *See, e.g., Bradt v. West*, 892 S.W.2d56, 71 (Tex. App.–Houston [1st Dist.] 1994, writ denied) (stating attorney is charged with duty of zealously representing his clients within the bounds of the law).	Because Holloway had a interest in the MRCA separate and apart from his client's, we hold that Wright and Holloway were not in privity with each other in the Harris County suit. Thus Holloway is not bound by the Harris County court's determination of venue, and venue as to Holloway's claims is proper in Denton County.		Consequently, we hold that the trial court abused its discretion by invoking section 442 to require Relator to pay $50,000 in nonprobate assets to the Temporary Administrator.

Bowen 3/18/04	Norris 4/29/04; denied as moot by later order 7/6/04	Fincher 7/8/04	Dennis 7/8/04	Harden 7/15/04
	Because the trial court's January 5, 2004 order prohibiting disclosure of relevant, discoverable documents was entered without reference to and in violation of these fundamental principles of Ware's attorney-client relationship with Relator in the civil lawsuit, the trial court abused its discretion.	While on its face rule 87(5) appears to apply only to venue determinations by the same trial court in the same case, the same principle should apply to prohibit a subsequent trial court–in a case involving the same parties and claims–from making its own venue determination independently of the first court. *See id.* at 696-97.		We hold that the trial court abused its discretion by authorizing the Temporary Administrator to expend estate funds to obtain copies of Ellen's medical records to discharge a nonexistent fiduciary obligation concerning nonprobate assets.

Bowen 3/18/04	Norris 4/29/04; denied as moot by later order 7/6/04	Fincher 7/8/04	Dennis 7/8/04	Harden 7/15/04
	We hold that the trial court abused its discretion by prohibiting disclosure of admittedly discoverable, admissible documents to co-counsel of record and that a postjudgment appeal is inadequate to remedy this abuse of discretion.	Because we hold that the trial court did not comply with proper venue procedure in ruling on the Fincher Defendants' motion to transfer venue to Jefferson County in this case, we conclude that mandamus is proper to correct its ruling. *See Shell Oil Co.*, 128 S.W.3d 696-97.		By statute, specifically probate code section 439(a) and (b), the funds in the two North Dallas Bank & Trust pay-on-death accounts and in the joint-tenancy-with-right-of-survivorship account at Charles Schwab belong to Relator absent an adjudication otherwise.

Bowen 3/18/04	Norris 4/29/04; denied as moot by later order 7/6/04	Fincher 7/8/04	Dennis 7/8/04	Harden 7/15/04
				An after-the-fact trial or appellate remedy is inadequate to guard Relator's property interest in the $50,000 that the trial court has required him to pay to the Temporary Administrator–and which the trial court has authorized the Temporary Administrator to spend–because Relator is entitled to an adjudication concerning ownership before, not after, he is deprived of his property interest in the money. See *Tex. Const. Art. 1, § 19*; see also *Perry v. Del Rio*, 67 S.W.3d 85, 92 (Tex. 2001).

Second Court of Appeals
Opinions Conditionally Granting Mandamus, 2004
Holdings

Wise Regional 7/15/04	Dupont 7/26/04	Maher 8/26/04	Bank of America 10/28/04	Clarendon 12/23/04
Because we conclude that the Hospital adequately proved that the files are privileged and protected from discovery by section 160.007 of the occupations code, we conditionally grant the writ of mandamus.	Section 145.037 imposed a mandatory duty on Statham to properly certify Dupont's candidacy and file the certification in accordance with the will of the majority of the precinct chairs who were present at the May 4 meeting of the Parker County Republican Party Executive Committee. Statham failed to comply with that duty when she refused to certify Dupont's candidacy and file the certification with the Parker County Clerk by 3:00 -p.m. on May 14, 2004, as specifically directed by the Motion and Resolution.	Because we hold that the trial court abused its discretion by ruling that the withheld documents were privileged, we conditionally grant mandamus relief.	The trial court has held two hearings on the motion but has not issued a ruling. Meanwhile, the RPI's health continues to deteriorate, yet the parties cannot move forward with this case until the judge rules as to the appropriate forum–arbitration or litigation in state court. Under these circumstances, mandamus is appropriate as a means of compelling the trial court to rule on relators' motion. *See, e.g., Eli Lilly & Co.*, 829 S.W.2d at 158; *In re MHI P'ship*, 7 S.W.3d at 923. We hold that the trial court must either deny or grant relators' motion.	It cannot be said, in the face of the proof showing that proof of loss was insisted on by the company, and that it was endeavoring to ascertain the amount of damages done by the fire to the goods of the appellee, that this indicated an intention or desire to dispense with the very requirements inserted in the policy for the purpose of enabling the company to arrive at this loss.

Second Court of Appeals
Opinions Conditionally Granting Mandamus, 2004
Holdings

Wise Regional 7/15/04	Dupont 7/26/04	Maher 8/26/04	Bank of America 10/28/04	Clarendon 12/23/04
Because the Hospital timely severed its affidavit as required by rule 193.4(a), filed the affidavit with the trial court, and brought the affidavit to the court's attention at the hearing, Holt's affidavit provides competent evidence establishing the Hospital's claim of privilege. See *e.g.*, *In re Osteopathic Med. Ctr.*, 16 S.W.3d 881, 883 (Tex. App. – Fort Worth 2000, orig proceeding).	In this case, the facts relevant to our determination of whether Statham has complied with the Texas Election Code are established without dispute.	In this case, disregarding RPI's failure to provide Relator with a privilege log within the 15 days required by the rule, the privilege log RPI ultimately filed pursuant to the trial court's order does not begin to meet the requirements of Rule 193.3.		The facts in this case show that there was no waiver of the stipulations in the policy relating to proof of loss and appraisement of the property.
On the whole, Holt's affidavit establishes a prima facie showing that the credentialing files at issue are entitled to the claimed privileges, and RPIs have offered no evidence to the contrary.	The record conclusively shows that Statham declared that a quorum of the Parker County Republican Party Executive Committee was present at the May 4 meeting, and it is undisputed that a majority of the precinct chairs voted to place Dupont on the November 2, 2004 general election ballot as the party's replacement candidate for Parker County Court at Law.	Without any indication, at the very least, of the author and the date the records, logs, and notes were created, the privilege log does not allow Relator or the trial court to assess the applicability of the privilege. See, e.g., id.; *In re Toyota Motor Corp*., 94 S.W.3d 819, 823-24 (Tex. App. – San Antonio 2002, orig. proceeding); *Monsanto Co*., 998 S.W.2d at 925.		They show, on the other hand, that appellants, through their agents and adjuster, were endeavoring to ascertain the amount of damage, while the appellee declined to comply with the conditions in the policy, on which alone his right to recover depends. *Id.* at 440-41 (emphasis added).

Second Court of Appeals
Opinions Conditionally Granting Mandamus, 2004
Holdings

Wise Regional 7/15/04	Dupont 7/26/04	Maher 8/26/04	Bank of America 10/28/04	Clarendon 12/23/04
Furthermore, in *McCown*, 927 S.W.2d at 2, and *Brownwood Regional Hospital*, 927 S.W.2d at 27, the Texas Supreme Court held that the medical peer review committee privilege applied to physicians' credentialing files containing the same type of documents at issue in this case.	Under section 145.037 of the Texas Election Code, Statham had a nondiscretionary duty to properly certify Dupont based on this vote, whether she was satisfied that the vote was taken in accordance with every particular of parliamentary procedure or not. *See* TEX. ELEC. CODE ANN. § 145.037.	Without supporting evidence, July 9, 2001 does not appear to have any significance to the suit. See *Brotherton*, 851 S.W.2d at 195.		Clarendon's payment of Goff's invoices for four months likewise does not constitute a waiver of the demand-for-appraisal provision.
However, we do not construe any agreement by the Hospital to produce employment and compensation contracts as a waiver of the privilege over the whole of its credentialing files on both defendant doctors.	We hold that Dupont is entitled to mandamus relief against Statham, who shall comply instanter with section 145.037 of the election code in accordance with the Motion and Resolution.	Because RPI failed to satisfy the subjective requirement of whether it, in good faith, anticipated litigation–it has not filed affidavits, nor did it provide testimony at the hearing to support its claim of privilege–we do not reach the second prong of the test. See *id.*		An appraisal became necessary only when Goff refused Clarendon access to the damaged property. We hold that Clarendon did not waive the contract's demand-for–appraisal provision.

Wise Regional 7/15/04	Dupont 7/26/04	Maher 8/26/04	Bank of America 10/28/04	Clarendon 12/23/04
The Hospital's affidavit, which alleged and proved the medical peer review committee privilege, along with the *in camera* submission of the credentialing files, shifted the burden to RPIs to controvert the affidavit, show that the privilege was waived, or show that the documents were made in the ordinary course of business. *Arlington Mem'l*, 952 S.W.2d at 930.		Thus, RPI has not provided the trial court with prima facie proof that the documents were prepared in anticipation of litigation because it failed both to provide an adequate description of the documents in its privilege log as required by the Texas Rules of Procedure and to provide supporting evidence of the claimed privilege by testimony or affidavits. See *DuPont*, 136 S.W.3d at 223, 226; *Marathon*, 893 S.W.2d at 591.		Where an insurance contract like the one here mandates appraisal to resolve the parties' dispute regarding the value of a loss and where the appraisal provision has not been waived, a trial court abuses its discretion and misapplies the law by refusing to enforce the appraisal provision. See *Id.* (reversing and remanding for appraisal); *see also In re Allstate County Mut. Ins. Co.*, 85 S.W.3d 193, 195-96 (Tex. 2002) (orig. proceeding) (holding trial court abused its discretion by construing appraisal provision as arbitration agreement and refusing to enforce it); *Vanguard Underwriters Ins. Co. v. Smith*, 999 S.W.2d 448, 451 (Tex. App.–Amarillo 1999, orig. proceeding) (holding trial court abused its discretion by refusing to enforce appraisal provision).

Wise Regional 7/15/04	Dupont 7/26/04	Maher 8/26/04	Bank of America 10/28/04	Clarendon 12/23/04
Therefore, the Hospital's credentialing files are protected by the medical peer review committee privilege as a matter of law, and the trial court abused its discretion when it ordered the production of these privileged documents. *See Walker*, 827 S.W.2d at 840.		Because RPI failed to make a prima facie case of privilege, the burden never shifted to Relator to challenge the privilege, and we do not reach the propriety of the in camera inspection of the documents. See *Monsanto Co.*, 998 S.W.2d at 925.		We hold that the trial court abused its discretion by striking Clarendon's demand for appraisal in its September 24, 2004 order. C. No Adequate Remedy at Law. Goff argues that Clarendon is not entitled to mandamus relief because Clarendon has an adequate remedy at law. Specifically, Goff contends that the trial court's rulings do not "go to the heart" of Clarendon's case and that Clarendon may confirm the repair work performed through a request for inspection under Texas rule of Civil Procedure 196.

Wise Regional 7/15/04	Dupont 7/26/04	Maher 8/26/04	Bank of America 10/28/04	Clarendon 12/23/04
Because we hold that the trial court abused its discretion in ordering production of the Hospital's credentialing files, we conditionally grant the Hospital's petition for writ of mandamus and order the trial court to vacate its March 15, 2004 order requiring production of materials that were submitted to the trial court for *in camera* inspection.		Consequently, because RPI did not meet its burden or proof, the trial court abused its discretion by finding the documents privileged.		The trial court's striking of Clarendon's motion for appraisal prevents Clarendon from obtaining the independent valuations that could counter at least Goff's breach of contract claim. See *Id.* at 196. The appraisal here, as in *In re Allstate*, goes to the heart of the plaintiff Goff's breach of contract claim. Thus, *Clarendon*, like *Allstate*, does not possess an adequate remedy at law.
		Having held that RPI failed to prove the claimed privilege, we hold that the trial court abused its discretion by ruling that the documents were privileged.		Because Clarendon at this point seeks an appraisal, not the right to inspect the damaged property, Rule 196 does not provide an adequate remedy at law. Having already determined that the trial court abused its discretion by striking Clarendon's motion for appraisal, we further hold that Clarendon possesses no adequate remedy at law.

Second Court of Appeals
Opinions Conditionally Granting Mandamus, 2004
Holdings

Wise Regional 7/15/04	Dupont 7/26/04	Maher 8/26/04	Bank of America 10/28/04	Clarendon 12/23/04
				We hold that the trial court did not abuse its discretion by denying Clarendon's motion to abate. See *Id.*

Appendix Six. Mandamus Tools and Suggestions

MANDAMUS: TOOLS TO MAKE IT MORE EFFECTIVE
FOR YOUR CLIENT AND THE COURT

1. Review www.hatchellreports.com for cases pending before Supreme Court of Texas which might affect your case.

2. Review http://www.cottenschmidt.com/SKH%20pending%20cases%20list%2001.pdf to see if any cases pending before Second Court of Appeals might affect your case.

3. As early as possible, solicit the input and review of a dispassionate lawyer who knows nothing about your case as to the merits of your mandamus and how best to present it.

4. Review the applicable rules in the Texas Rules of Appellate Procedure and the Local Rules of the Second Court of Appeals.

   A. Texas Rules of Appellate Procedure

      i. Rule 9, Papers Generally

         9.1 Signing
         9.2 Filing
         9.3 Number of Copies
         9.4 Form
         9.5 Service
         9.6 Communications With the Court
         9.7 Adoption by Reference

      ii. Rule 52, Original Proceedings

         52.1 Commencement
         52.2 Designation of Parties
         52.3 Form and Contents of Petition
         52.4 Response
         52.5 Relator's Reply to Response
         52.6 Length of Petition, Response, and Reply
         52.7 Record

52.8 Action on Petition
52.9 Motion for Rehearing
52.10 Temporary Relief
52.11 Groundless Petition or Misleading Statement or Record

B. Local Rules of the Second Court of Appeals

i. Rule 1, Briefs
A. Cover.
B. Amended Briefs.
C. Motions for Leave to File Briefs.
D. Letter Briefs.
E. Number of Copies.
F. Signature.
G. Length.
H. Summary of the Argument.
I. Appendix.
J. Filing Dates.

ii. Rule 2, Original Proceedings
A. Number of Copies.
B. Notice.
....

5. Review Paula Perkins' List of Reasons on Why the Court Denies Petitions for Mandamus (*See* Section F of this paper).

6. Review the Clerk Screening Form, Second Court of Appeals, and the Second Court of Appeals' Original Proceeding Worksheet (Appendices Seven and Eight to this paper).

7. Review the General Principles Governing Mandamus Announced by the Second Court of Appeals (Appendices Two and Three)

8. Consider the Effect of a Request for Temporary Relief on the Mandamus Proceeding

A. A Relator may want the Court to make a quick decision without the benefit of briefing from the Real Party in Interest.

B. A Real Party in Interest may not want to force a situation in which the Court will have to pre-judge a case without the benefit of the Real Party's Response.

C. A Real Party in Interest should always consider filing a response before the Court decides on the necessity of temporary relief.

9. Emphasize in your Petition if:

A. Your case presents a case of first impression.

B. Your case is of significance to the jurisprudence of the State.

10. Avoid citing, or at least closely scrutinize, authority in your Petition which is an opinion on an appeal: make sure that opinion does not indicate that an adequate remedy on appeal exists.

11. Clearly discuss why the facts of your case either entitle your client to mandamus relief, or do not justify that relief for your opponent.

12. Take Notice of Post-Filing Events That May Reflect an Improvement in the Odds of a Petition's Success.

A. The Court grants temporary relief.

B. The Court requests a Response.

C. More than thirty days passes after the filing of a Petition, and the Court does not deny it.

D. More than fifty days passes after the filing of a Petition, and the Court does not deny it.

Appendix Seven. Clerk Screening Form
Second Court of Appeals

(Retyped from Paula T. Perkins, Senior Staff Attorney, Second Court of Appeals, ***The Discovery Mandamus–To File or Not to File? Things to Consider Before Firing Up the Word Processor*** **(2004))**

CLERK SCREENING FORM

(mandamus, injunction, prohibition, quo warranto, habeas corpus)

STYLE: In re

_____

DOCKET NO.:_____PANEL:

_____

DATE RECEIVED:_____REVIEWED BY:_____

CHECK LIST (*see* TEX. R. APP. P. 9.3-9.5, 20.1, & 52; Local Rules 1 & 2)

Please Indicate Y or N:

1. Is temporary relief requested? _____

2. Proof of service on all parties, including respondent (TEX. R. APP. P. 9.5(d)). If temporary relief requested, must certify that all parties were notified by expedited means before temp. relief can be granted (TRAP 52.10(a)) _____

3. Petition

   a. original and 4 copies _____
   b. affidavit verifying truth of factual allegations _____
   c. substantial compliance with proper form (except pro se)

      - 50 pages or less _____
      - white, 8 ½ x 11-inch paper _____
      - one-inch margins (top, bottom, sides) _____
      - double spaced (except footnotes, etc.) _____
      - stapled in top L-hand corner or bound _____
      - front and back covers _____

4. Appendix

   a. original and 4 copies _____
   b. certified or sworn copy of order complained of (or other documents showing matter complained of) _____
   c. proof that relator is being restrained (habeas only) _____

5. Record

   a. certified or sworn copies of exhibits (if any) _____
   b. reporter's record OR statement that no relevant testimony was given _____

6. Filing fee ($75) or affidavit of indigence (TEX. R. APP. P. 20.1(b)) _____

Appendix Eight.

Original Proceeding Worksheet
From Website of Second Court of Appeals
October 30, 2004

(http://www.2ndcoa.courts.state.tx.us/ orig.htm)

Original Proceeding Worksheet11/97 ORIGINAL PROCEEDING WORKSHEET
ORIGINAL PROCEEDINGS IN THE

COURT OF APPEALS FOR THE

SECOND DISTRICT OF TEXAS

This is a "worksheet" a practitioner may follow in preparing an Original Proceeding filed in this Court. It should help ensure that the tendered documents comply with the Appellate Rules and this Court's Local Rules. A hard copy is provided to those who file Original Proceedings in this Court. It is provided here as a courtesy to those who view this web page.

STYLE: In re

_____

REQUIREMENTS (see TEX. R. APP. P. 9.3-9.5, 20.1, & 52; 2D TEX. APP. (FORT WORTH)
LOC. R. 1 & 2):

1. Petition
   a. original and 4 copies

   b. complete list of all parties, plus names & addresses of all counsel

   c. table of contents

   d. index of authorities

   e. statement of the case:
   description of underlying proceeding

   name or designation of respondent & location of respondent's office
   description of respondent's action complained of

   description of how & where relator is being deprived of liberty
   habeas only

f. statement of jurisdiction

g. statement of issues presented

h. if requesting oral argument, a short statement of reasons why argument would be helpful

i. statement of facts (supported by refs. to appendix or record)

j. argument

k. affidavit verifying truth of factual allegations

l. prayer stating relief sought

m. form:
50 pages or less

white, 8 ½ x 11-inch paper

one-inch margins (top, bottom, sides)

double-spaced (except footnotes, etc.)

stapled in top L-hand corner or bound

front & back covers (lt. blue)

either 10-pt. courier nonproportional OR
13-pt. proportional typeface

n. is temporary relief requested?

o. proof of service (TEX. R. APP. P. 9.5(d)) If temporary relief requested,
must certify that all parties notified by expedited means before relief can be granted. (TEX. R. APP. P. 52.10(a))

2. Appendix
a. original and 4 copies

b. certified or sworn copy of order complained of (or other document showing matter complained of)

c. text of pertinent rules, statutes, etc. (should be listed in index)

d. proof that relator is being restrained (habeas only)

e. form:
stapled in top L-hand corner or bound
tabbed

indexed

front & back covers (lt. blue)

3. Record (may be included in Appendix)
a. certified or sworn copies of all exhibits that were filed in trial court
b. reporter's record OR statement that no relevant testimony was given

4. Filing fee(s) or affidavit of indigence (TEX. R. APP. P. 20.1(b))

5. Response & Appendix to Response
The response and its appendix must meet the requirements of parts 1 & 2, above, with the following exceptions:
a. no list of parties required except as necessary to supplementor correct list in petition
b. no statement of the case, statement of issues presented, or statement of facts required
unless dissatisfied with that portion of petition
c. omit statement of jurisdiction, except to challenge it
d. argument limited to issues raised in petition
e. front & back covers should be red
f. appendix need not include any item contained in relator's appendix

6. Reply

Relator may file a reply addressing any matter in response, but the court may consider and decide the case before a reply is filed.

Front & back covers should be gray.

Appendix Nine.

Tables and Chart Reflecting the Age of Petitions for Writ of Mandamus Granted or Denied by the Second Court of Appeals

The Court denied petitions for writ of mandamus in non-pro se cases: (1) 40 times in 2003; (2) 38 times in 2004; and 31 times in 2005.

The following table indicates the speed with which the Court denied those petitions, by showing the number of petitions denied within a certain time frame after the filing of petitions with the Court:

When the Court Denied the Petition This Long After *Filing*	**2003: Number of Petitions Denied**	**2004: Number of Petitions Denied**	**2005: Number of Petitions Denied**
Zero to 15 days post-filing	23	20	16
16-30 days post-filing	11	5	9
31 to 50 days post-filing	3	6	1
51 to 100 days post-filing	3	5	4
> 100 days post-filing	--	4	1

With regard to mandamus petitions which the Court granted or conditionally granted from 2003 through 2005, the story differs significantly. We found the following:

For Granted Petitions in non-Pro Se cases, Elapsed Time From:

	2003	**2004**	**2005**	**2003**	**2004**	**2005**
Average (# of Days)						
● Filing to Opinion	189	92	85			
● Submission to Opin.				128	92	71
Mean (# of Days)						
● Filing to Opinion	119	80	87			
● Submission to Opin.				49	80	57
Longest (# of Days)						
● Filing to Opinion	535	149	137			
● Submission to Opin.				476	149	137
Shortest (# of Days)						
● Filing to Opinion	49	50	51			
● Submission to Opin.				1	50	16

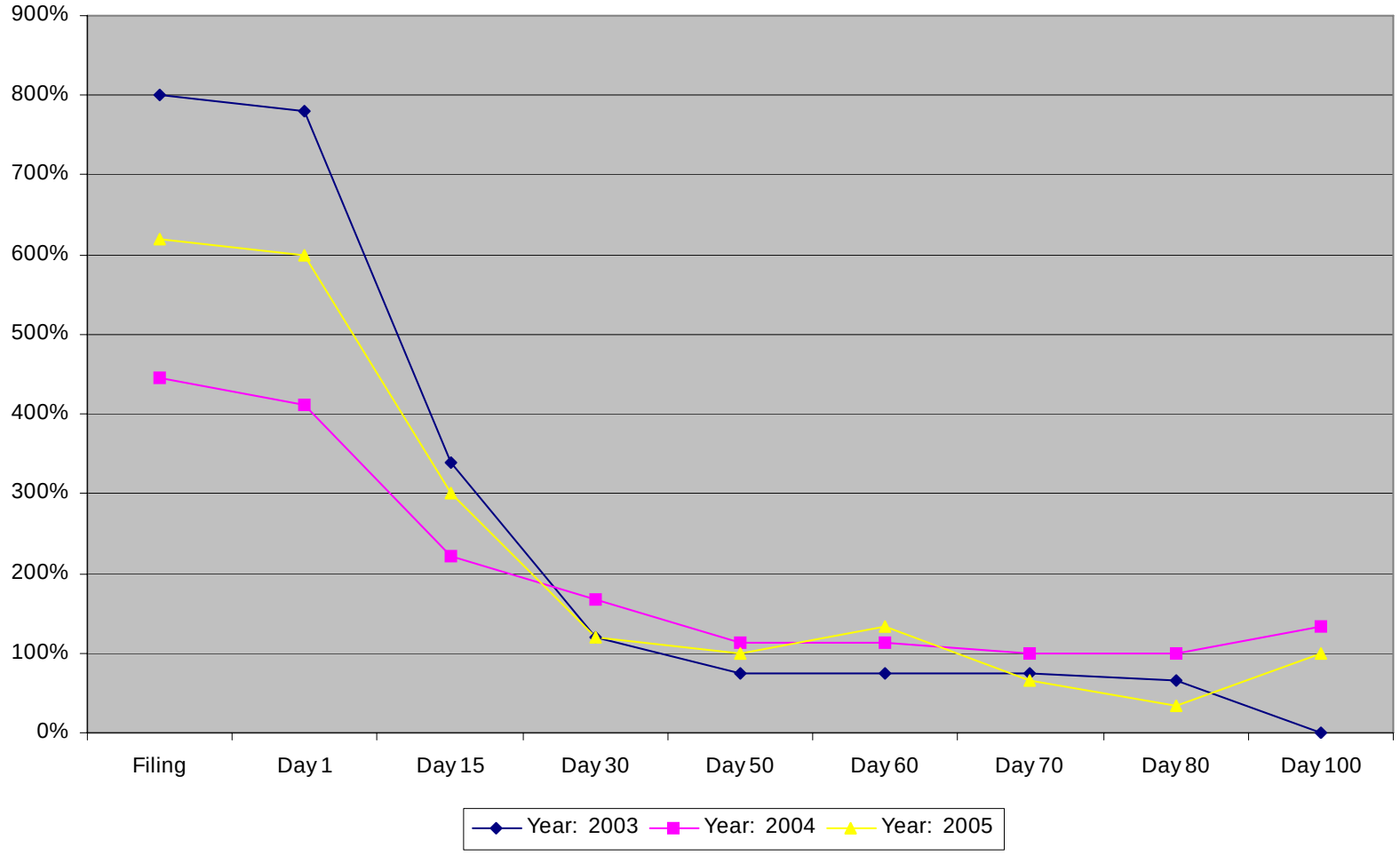
For Granted Petitions in non-Pro Se cases, Tendency of Court to Issue Opinion in a Certain Time Frame

	2003	2004	2005	2003	2004	2005
Opinions < 17 days from				2 (40%)	-0-	
● Filing to Opinion	0	0	0			
● Submission to Opinion				2 (40%)	0	1 (20%)
Opinions < 50 days from						
● Filing to Opinion	1 (20%)	0	0			
● Submission to Opinion				3 (60%)	0	0
Opinions 50-100 days from						
● Filing to Opinion	2 (40%)	4 (44%)	4 (80%)			
● Submission to Opinion				0	4 (44%)	3 (60%)
Opinions < 100 days from						
● Filing to Opinion	2 (40%)	5 (56%)	1 (20%)			
● Submission to Opinion				3 (60%)	5 (56%)	1 (20%)

On the Chart on the following page, we look at the number of petitions still pending before the Court a given period of time after filing, and we correlate the number of those petitions eventually denied by the Court with the number those petitions eventually granted by the Court. We perform this correlation by dividing the number of petitions eventually denied by the number of petitions eventually granted. The resulting percentage shows the extent to which the tendency of the Court to deny a petition pending a given number days after filing exceeds the Court's tendency to grant that petition. When the resulting percentage reaches 100%, the Court is equally likely to grant or deny the petition, based on its historical tendencies.

As an example shown on the Chart, in the Year 2005, at 50 days after filing, there was a 100% correlation between the pending petitions which the Court eventually granted and the pending petitions it eventually denied–i.e., at that point after filing, the Court was equally likely to grant or deny a petition for writ of mandamus.

2003-2005: Pending Petitions Denied Divided by Pending Petitions Granted at Various Stages
(100% Means Pending Petitions Eventually Denied = Pending Petitions Eventually Granted)



Appendix Ten. Calendar Year 2003:
Participation in Mandamus Proceedings, Grants, and Written Opinions, by Justice, and Issues Involved in Cases

Second Court of Appeals
Opinions Conditionally Granting Mandamus
Calendar Year 2003

Justice/Case ➡ ↓	BNSF 2/7/03	Scott 2/27/03	FWCH 2/28/03	Hinterlong 7/3/03	Noteboom 7/3/03
Cayce, CJ					
Dauphinot	X		X		
Day	Author	Author	X		
Gardner		X			
Holman		X		X	
Livingston	X		Author		
Walker				Author	
Richards				X	Author
Boyd					X
Cornelius					X

Case ➡	BNSF 2/7/03	Scott 2/27/03	FWCH 2/28/03	Hinterlong 7/3/03	Noteboom 7/3/03
Issue	Discovery– Apex Deposition	Motion to Compel Arbitration	Appointment of Ad Litem; Discovery– Production	Discovery– Privilege	Discovery– Security Bond and Production
Trial Court Ruling/Other Action at Issue	The trial court denied the motion of a corporate defendant to quash the deposition of its President.	The trial court denied a party's motion to compel arbitration.	The trial court appointed a guardian ad litem for nonparty patients, and granted a party's motion to compel the production of a hospital's records showing which nonparty patients received a drug.	The trial court denied a motion to compel discovery of the identity of, and other information relating to, a student who provided a crime stoppers tip to a High School.	The trial court ordered petitioners to provide discovery and monetary security to the real parties in interest while the case is abated and pending arbitration.

Appendix Eleven. Calendar Year 2004:
Participation in Mandamus Proceedings, Grants, and Written Opinions, by Justice, and Issues Involved in Cases

Second Court of Appeals
Opinions Conditionally Granting Mandamus
Calendar Year 2004

Justice/Case ➡ ↓	Bowen 3/18/04	Norris 4/29/04; denied as moot by later order 7/6/04	Fincher 7/8/04	Dennis 7/8/04 Pro Se	Harden 7/15/04	Wise Regional 7/15/04	DuPont 7/26/04	Maher 8/26/04	BoA 10/28/04	Clarendon 12/23/04
Cayce, CJ	X (Dissent)			X			Author		X	
Dauphinot		X	X			Concur		Author		
Gardner					X		X			
Holman					X		X			X
Livingston	X	X	Author	X		X		X	Author	
McCoy			X	X		Author		X		X
Walker	Author	Author			Author				X	Author

Second Court of Appeals
Opinions Conditionally Granting Mandamus
Calendar Year 2004

Case ➡	Bowen 3/18/04	Norris 4/29/04; denied, moot, order 7/6/04	Fincher 7/8/04	Dennis 7/8/04	Harden 7/15/04	Wise Regional 7/15/04	DuPont 7/26/04	Maher 8/26/04	BoA 10/28/04	Clarendon 12/23/04
Issue	Suit re: post-divorce breach of marital agree-ment	Disco-very – Protec-tive Order	Venue Chal-lenge	Request for free copy of record for habeas proceed-ing	Probate – Turnover of non-probate assets	Discovery – Privilege	Election Code	Disco-very – Privi-lege	Motion to Compel Arbitra-tion	Property Insurance Claim– dismissal and appraisal demand
Trial court ruling / Other Actio n at Issue	Trial Court orders mediatio n and schedu-ling deadlines and trial date, despite hus-band's pending bank-ruptcy	Trial Court prohibits later appearin g co-counsel from seeing records subject to a prior protec-tive order	Motion to transfer venue denied by trial court	Trial Court failed to rule on Motion for free record	Trial Court ordered turnover of non-probate assets from surviving spouse to Temporary Administrat or of Estate	Trial Court ordered produc-tion of credential files of two doctors	Republica n Party County Chairpers on refused to certify candi-date's name for placement on ballot	Trial Court ruled certain docume nts were privi-leged	Trial Court failed to rule on motion to compel arbitra-tion	Trial Court denied motion to dismiss and granted motion to strike demand for appraisal

Appendix Twelve. Calendar Year 2005:
Participation in Mandamus Proceedings, Grants, and Written Opinions, by Justice, and Issues Involved in Cases

Second Court of Appeals: Opinions Conditionally Granting Mandamus, Calendar Year 2005

Justice	Wymore 3/31/05	Delp 5/19/05	Collins 8/26/05	Tarrant County 12/12/05	Stucki 12/15/05
Cayce, CJ			Author	X	Concurs (w/o opinion)
Dauphinot	X	Author			Author
Gardner			X	Author	
Holman		X			
Livingston		X		Dissents	
McCoy	X				X
Walker	Author		X		

Analysis	Wymore 3/31/05	Delp 5/19/05	Collins 8/26/05	Tarrant County 12/12/05	Harden 12/15/05
Issue	Divorce	Jurisdiction of Trial Court to Deny Release of Registry Assets	Motion to Void Lis Pendens	Appoint ment of Assistant Surveyor to establish county boundary	Validity of Noncustodial Criminal Contempt Order Which Fails to Explain How Contemnor Violated Prior Court Order
Trial court ruling/ Other Action at Issue	Trial Court enters temporary orders requiring spousal support and interim attorneys fees	Trial Court released Registry Assets and compelled post judgment discovery	Trial Court voided Lis Pendens despite a fact issue regarding nature of property	Trial Court appointed assistant surveyor	Trial Court held contemnor in contempt for violating temporary injunction and imposed fine for same