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Survey of Recent Mandamus Decisions of the Texas Supreme Court

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SURVEY OF RECENT MANDAMUS DECISIONS OF THE TEXAS SUPREME COURT

*The Honorable Douglas S. Lang**
*Rachel A. Campbell***

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I. INTRODUCTION

Mandamus relief is “appropriate when a petitioner demonstrates a clear abuse of discretion and has no adequate remedy by appeal.”¹ However, mandamus is an “extraordinary” remedy and not a matter of right.²

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1. *In re Geomet Recycling LLC*, 578 S.W.3d 82, 91 (Tex. 2019) (orig. proceeding).

2. “Mandamus . . . is an extraordinary remedy, not issued as a matter of right, but at the discretion of the court. Although mandamus is not an equitable remedy, its issuance is largely controlled by equitable principles.” *In re Prudential Ins. Co. of Am.*, 148 S.W.3d

Although the Texas Supreme Court's mandamus opinions during the past year drew on previously recognized applications, mandamus relief in the supreme court remains, as always, dependent on the particular circumstances of each case. This article analyzes, summarizes, and categorizes the seven supreme court mandamus opinions³ delivered during the Survey period of December 1, 2018, through November 30, 2019, with particular focus on the supreme court's treatment of the element of lack of an adequate appellate remedy.

II. MANDAMUS FUNDAMENTALS

The Texas Supreme Court's jurisdiction over writs of mandamus stems from the Texas constitution.⁴ Specifically, section three of article five states, in part, (1) "under such regulations as may be prescribed by law," the supreme court and its justices "may issue the writs of mandamus . . . and such other writs, as may be necessary to enforce its jurisdiction"; and (2) the Texas Legislature may confer original jurisdiction on the supreme court to "issue writs of . . . mandamus in such cases as may be specified, except as against the Governor of the State."⁵

Consistent with those constitutional grants of authority, Section 22.002(a) of the Texas Government Code provides that the supreme court or a justice of that court

may issue . . . all writs of . . . mandamus agreeable to the principles of law regulating those writs, against a statutory county court judge, a statutory probate court judge, a district judge, a court of appeals or a justice of a court of appeals, or any officer of state government except the governor, the court of criminal appeals, or a judge of the court of criminal appeals.⁶

Further, Government Code Section 22.002 states, (1) "[t]he supreme court or, in vacation, a justice of the supreme court may issue a writ of mandamus to compel a statutory county court judge, a statutory probate court judge, or a district judge to proceed to trial and judgment in a case," and (2)

[o]nly the supreme court has the authority to issue a writ of mandamus . . . against any of the officers of the executive departments of

124, 138 n.61 (Tex. 2004) (orig. proceeding) (quoting *Rivercenter Assocs. v. Rivera*, 858 S.W.2d 366, 367 (Tex. 1993)).

3. See *In re Casey*, 589 S.W.3d 850 (Tex. 2019) (orig. proceeding) (per curiam); *In re Geomet Recycling*, 578 S.W.3d at 82; *In re Thetford*, 574 S.W.3d 362 (Tex. 2019) (orig. proceeding); *In re Sustainable Tex. Oyster Res. Mgmt., L.L.C.*, 575 S.W.3d 339 (Tex. 2019) (orig. proceeding); *In re RSR Corp.*, 568 S.W.3d 663 (Tex. 2019) (orig. proceeding) (per curiam); *In re City of Dickinson*, 568 S.W.3d 642 (Tex. 2019) (orig. proceeding); *In re Hous. Specialty Ins. Co.*, 569 S.W.3d 138 (Tex. 2019) (orig. proceeding) (per curiam).

4. See TEX. CONST. art. V, §§ 1, 3, 6.

5. *Id.* § 3. Also, section six of article five provides in part that the intermediate appellate courts of Texas shall have "appellate jurisdiction co-extensive with the limits of their respective districts" and "such other jurisdiction, original and appellate, as may be prescribed by law." *Id.* § 6.

6. TEX. GOV'T CODE ANN. § 22.002(a).

the government of this state to order or compel the performance of a judicial, ministerial, or discretionary act or duty that, by state law, the officer or officers are authorized to perform.⁷

Additionally, a number of Texas statutes and rules provide for mandamus proceedings in certain courts as to specifically identified matters.⁸

Texas Rule of Appellate Procedure 52 provides procedural requirements for mandamus proceedings in both the supreme court and the courts of appeals.⁹ When the supreme and appellate courts both have mandamus jurisdiction, a petitioner to the supreme court must explain a compelling reason in the petition why petitioner presented first to the supreme court.¹⁰ Further, failure to comply with the additional requirements of Rule 52 may result in denial of relief.¹¹

III. MANDAMUS STATISTICS

Statistics for the supreme court's five most recent fiscal years show that dispositions, year to year, have been close to or in excess of the petitions filed.¹² Further, the rate at which the petitions have been granted in that

7. *Id.* §§ 22.002(b)–(c). The mandamus jurisdiction of the Texas courts of appeals is less broad than that of the supreme court. Specifically, pursuant to Government Code Section 22.221, (1) each of the fourteen courts of appeals or a justice thereof “may issue a writ of mandamus and all other writs necessary to enforce the jurisdiction of the court”; and (2) each court of appeals may issue writs of mandamus against “a judge of a district, statutory county, statutory probate county, or county court in the court of appeals district” and certain magistrates and associate judges. *Id.* §§ 22.221(a)–(b).

8. *See, e.g.*, TEX. ELEC. CODE ANN. § 273.061 (“supreme court or court of appeals may issue writ of mandamus to compel the performance of any duty imposed by law in connection with the holding of an election or a political party convention, regardless of whether the person responsible for performing the duty is a public officer”); TEX. R. APP. P. 24.4(a) (a party may seek supreme court mandamus review of court of appeals’ ruling on a motion challenging a trial court’s determination of amount of security required to supersede judgment); *In re Occidental Chem. Corp.*, 561 S.W.3d 146, 153 (Tex. 2018) (orig. proceeding) (concluding statute gives Texas Supreme Court original jurisdiction to hear and determine certain suits involving imposition of ad valorem taxes by multiple taxing units on same property confers original mandamus jurisdiction in supreme court); *City of Hous. v. Hous. Mun. Emps. Pension Sys.*, 549 S.W.3d 566, 576, 583 (Tex. 2018) (affirming denial of city’s plea to jurisdiction where suit for mandamus was proper proceeding to compel disclosure of information pursuant to Texas Public Information Act and other nondiscretionary governmental action required by law); *In re Nestle USA, Inc.*, 387 S.W.3d 610, 617 (Tex. 2012) (orig. proceeding) (concluding statutory language allowed for Texas Supreme Court mandamus review of constitutionality of franchise tax statute).

9. *See* TEX. R. APP. P. 52.2. “The party seeking the relief in a mandamus proceeding is the relator. . . . [T]he person against whom relief is sought . . . is the respondent. A person whose interest would be directly affected by the relief sought is a real party in interest and a party to the case.” *Id.*

10. *See* TEX. R. APP. P. 52.3(e); *see also* *State v. Naylor*, 466 S.W.3d 783, 793–94 (Tex. 2015) (orig. proceeding) (“a party may not circumvent the court of appeals simply by arguing futility”).

11. *See, e.g.*, *In re Charboneau*, No. 05-18-00551-CV, 2018 WL 2276226, at *1 (Tex. App.—Dallas May 18, 2018, orig. proceeding) (mem. op.); *In re Phillips*, No. 05-18-00543-CV, 2018 WL 2213888, at *1 (Tex. App.—Dallas May 15, 2018, orig. proceeding) (mem. op.); *In re Wade*, No. 05-17-00046-CV, 2017 WL 462364, at *1 (Tex. App.—Dallas Feb. 2, 2017, orig. proceeding) (mem. op.).

12. *See* OFFICE OF COURT ADMINISTRATION, ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY FISCAL YEAR 2019, Detail 4 (2019), available at <https://>

period, in the range from 3.3% to 7.5%, demonstrates that mandamus is indeed an “extraordinary” remedy.¹³

Texas Supreme Court Mandamus Statistics: Past Five Fiscal Years

FISCAL YEAR	2019	2018	2017	2016	2015
New petitions filed	209	215	187	188	220
Total dispositions	214	217	181	194	225
Petitions denied	80%	76.5%	79%	79.8%	72%
Petitions granted	3.3%	6.9%	6.6%	6.7%	7.5%

IV. SUBJECT MATTER CATEGORIES OF RECENT TEXAS SUPREME COURT MANDAMUS CASES INVOLVING STANDARD OF ALLEGED ABUSE OF DISCRETION AND NO ADEQUATE REMEDY BY APPEAL

A. DENIAL OF RULE 91A MOTION TO DISMISS

*In re Houston Specialty Insurance Co.*¹⁴ involved the trial court’s improper denial of a motion to dismiss pursuant to Texas Rule of Civil Procedure 91a.1.¹⁵ A coal company was sued by property owners, the Carters, who alleged the company had mined coal under their property without authorization. The coal company’s insurer, Houston Specialty Insurance Co. (HSIC), denied the coal company’s request for a defense and coverage. The coal company filed third-party claims against HSIC in the Carters’ lawsuit, which eventually ended in a settlement.¹⁶

By letter, HSIC (1) accused its law firm, Thompson, Coe, Cousins, & Irons, LLP, of committing legal malpractice by advising HSIC that it did not owe a duty to defend the coal company against the Carters’ claims; and (2) demanded that Thompson Coe pay it more than \$2.8 million. Thompson Coe responded by filing a lawsuit against HSIC requesting declarations under the Uniform Declaratory Judgments Act (UDJA)¹⁷ pertaining to the law firm’s nonliability for legal malpractice regarding its coverage advice and the Carters’ settlement.¹⁸ HSIC moved to dismiss Thompson Coe’s lawsuit under Rule 91a, contending Thompson Coe’s

www.txcourts.gov/media/1445760/fy-19-annual-statistical-report.pdf [hereinafter ANNUAL STATISTICAL REPORT 2019]. The disposition totals in this chart include petitions for writs of mandamus dismissed, abated, struck, or withdrawn during the respective fiscal year. *Id.* Further, dispositions for a particular fiscal year can include pending petitions for writ of mandamus filed in previous fiscal years. *Id.*

13. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 138 (Tex. 2004) (orig. proceeding); ANNUAL STATISTICAL REPORT 2019, *supra* note 12, at Detail 4.

14. 569 S.W.3d 138 (Tex. 2019) (orig. proceeding) (per curiam).

15. See TEX. R. CIV. P. 91a.1 (“[A] party may move to dismiss a cause of action on the grounds that it has no basis in law or fact.”).

16. *In re Hous. Specialty Ins. Co.*, 569 S.W.3d at 139.

17. See TEX. CIV. PRAC. & REM. CODE ANN. §§ 37.001–.011.

18. *In re Hous. Specialty Ins. Co.*, 569 S.W.3d at 139.

claims had “no basis in law” because under *Abor v. Black*,¹⁹ a potential tort defendant cannot use the UDJA to obtain a declaration of nonliability in tort. The trial court denied HSIC’s dismissal motion. After being denied mandamus relief in the Fourteenth Houston Court of Appeals, HSIC sought mandamus relief in the Texas Supreme Court.

The supreme court stated (1) “each of Thompson Coe’s requested declarations are aimed at establishing a defense to a potential legal malpractice claim by HSIC”; and (2) therefore, the first required mandamus element—abuse of discretion by the trial court—“is easily met because the trial court’s denial of HSIC’s Rule 91a motion is a clear abuse of discretion under *Abor v. Black*.”²⁰ The supreme court specifically rejected Thompson Coe’s arguments that (1) “trial courts have discretionary jurisdiction over a declaratory judgment action seeking declarations of nonliability in tort”; and (2) “a trial court may retain such an action if the tortfeasor-plaintiff also requests declarations that do not expressly ask for a determination of liability.”²¹ In doing so, the supreme court disapproved of the case relied on by Thompson Coe, *Hernandez v. Abraham, Watkins, Nichols, Sorrels & Friend*.²² According to the supreme court, the Fourteenth Houston Court of Appeals in *Hernandez* wrongly characterized *Abor* “as ‘confirming’ that a trial court has jurisdiction to hear a declaratory judgment action seeking a declaration of nonliability in tort and as teaching that a ‘trial court [has only] limited discretion to refuse to hear [such] a declaratory judgment action.’”²³

Next, the supreme court noted it has “confirmed that ‘mandamus relief is appropriate to “spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings.””²⁴ The supreme court concluded that because “[a] legally invalid lawsuit that ‘deprive[s] the real plaintiff of the traditional right to choose the time and place of suit’ satisfies this test,” mandamus relief directing the trial court to grant HSIC’s Rule 91a motion to dismiss was appropriate.²⁵

B. ATTORNEY DISQUALIFICATION

In *In re RSR Corp.*, the Texas Supreme Court granted mandamus relief to prevent a “do-over” in an attorney-disqualification dispute.²⁶ In the underlying lawsuit, RSR Corp. (RSR) sued Inppamet Ltd. for misappropriation of trade secrets, theft, and breach of contract. “Inppamet moved

19. 695 S.W.2d 564 (Tex. 1985) (orig. proceeding).

20. *In re Hous. Specialty Ins. Co.*, 569 S.W.3d at 140–41.

21. *Id.*

22. See *Hernandez v. Abraham, Watkins, Nichols, Sorrels & Friend*, 451 S.W.3d 58 (Tex. App.—Houston [14th Dist.] 2014, pet. denied).

23. *In re Hous. Specialty Ins. Co.*, 569 S.W.3d at 141 (quoting *Hernandez*, 451 S.W.3d at 64).

24. *Id.* at 142 (quoting *In re Essex Ins. Co.*, 450 S.W.3d 524, 526 (Tex. 2014) (orig. proceeding)).

25. *Id.*

26. *In re RSR Corp.*, 568 S.W.3d 663 (Tex. 2019) (orig. proceeding) (per curiam).

to disqualify RSR's counsel," alleging "RSR and its counsel had obtained Inppamet's privileged and confidential information from a former Inppamet employee."²⁷ Inppamet contended in part that disqualification was required under the fact-intensive disqualification guidelines of *In re Meador*.²⁸ However, nearly two weeks after a hearing before a discovery special master, Inppamet filed a letter brief contending the presumption-based standard of *In re American Home Products Corp.*²⁹ "controlled the disqualification inquiry to the exclusion of consideration under [*In re*] *Meador*."³⁰

"[T]he special master denied Inppamet's sanctions motion."³¹ Inppamet then appealed "to the trial court for a de novo ruling" and "the trial court disqualified RSR's counsel"³² based on the presumptions in *In re American Home Products*. That disqualification ruling gave rise to a 2015 mandamus proceeding³³ in which the supreme court "reaffirmed that *American Home Products*' disqualification presumptions apply only to side-switching legal staff, while the factors articulated in *In re Meador* guide the disqualification inquiry when counsel obtains privileged and confidential information from fact witnesses who were neither legal staff nor supervised by lawyers for an opposing party."³⁴ The supreme court concluded that because the alleged violations involved employees who were neither legal staff nor supervised lawyers, "the trial court erred in applying *American Home Products*'s presumptions instead of the [*In re*] *Meador* factors."³⁵ The supreme court "direct[ed] the trial court to vacate its disqualification order, but declined to 'decide whether disqualification would have been proper under [*In re*] *Meador* because the trial court did not reach the issue and did not resolve all fact issues relevant to a [*In re*] *Meador* analysis.'"³⁶

The case returned to the trial court, where Inppamet filed motions to "reconsider disqualification under [*In re*] *Meador*" and to compel discovery necessary for "a [*In re*] *Meador*-based disqualification analysis."³⁷ After another hearing, the special master denied the discovery motion, stating that Inppamet "chose to forego" the same discovery before the prior hearing and thus its discovery motion was untimely.³⁸ The trial court adopted the special master's order and "denied the request for reconsideration as 'untimely, dilatory in nature, and/or waived.'"³⁹ Inp-

27. *Id.* at 664.

28. *See* 968 S.W.2d 346 (Tex. 1998) (orig. proceeding).

29. *See* 985 S.W.2d 68 (Tex. 1998) (orig. proceeding).

30. *In re RSR Corp.*, 568 S.W.3d at 665.

31. *Id.*

32. *Id.* (citing *In re Am. Home Prods. Corp.*, 985 S.W.3d at 68).

33. *See In re RSR Corp.*, 475 S.W.3d 775, 782 (Tex. 2015) (orig. proceeding) (per curiam).

34. *In re RSR Corp.*, 568 S.W.3d at 664.

35. *Id.* at 665.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

pamet sought and obtained mandamus relief in the Fifth Dallas Court of Appeals, which directed the trial court to “vacate its order and determine the motion to reconsider on its merits under [*In re*] *Meador*.”⁴⁰ RSR then petitioned for mandamus relief in the supreme court.

The supreme court concluded “[t]he trial court did not clearly abuse its discretion in concluding that Inppamet is not entitled to a do-over under these circumstances,”⁴¹ as courts must discourage the use of disqualification motions as a dilatory trial tactic.⁴² Here, (1) Inppamet “changed its legal strategy in the middle of the proceedings, unequivocally abandoning [*In re*] *Meador* and fervently dissuading the trial court from applying it”; and (2) there were no changes to the factual allegations or law between that abandonment and the later embrace.⁴³ Thus, the supreme court stated, “[t]his case lies at the intersection of dilatoriness and waiver.”⁴⁴ Further, the supreme court concluded an appellate remedy was inadequate because “another round of costly disqualification litigation would unduly and unjustly delay the trial and final disposition of this ten-year-old dispute.”⁴⁵ RSR’s mandamus petition was conditionally granted and the court of appeals was directed to “reinstate the trial court’s order denying Inppamet’s motion to reconsider disqualification under [*In re*] *Meador*.”⁴⁶

*In re Thetford*⁴⁷ addressed “whether the Texas Disciplinary Rules of Professional Conduct require that a lawyer be disqualified from representing one client who is applying to be appointed guardian for another current or former client.”⁴⁸ In 2015, eighty-four-year-old Verna Thetford executed a will and power of attorney prepared by attorney Alfred G. Allen, III. Verna designated her niece Jamie Rogers as her attorney-in-fact, preferred guardian, and sole beneficiary.⁴⁹ Three years earlier, Verna and her husband loaned Jamie \$350,000.00 to purchase real estate and Allen represented the Thetfords in preparing the five-year note and deed of trust pertaining to that transaction also.

In 2016, Verna’s mental state began to deteriorate. In 2017, the five-year note became due. At that time, Allen’s law firm employed Jamie.⁵⁰ Verna claimed Allen refused her request to write Jamie a demand letter, though Allen denied such a request was ever made. Verna hired another attorney, Stephen Crawford, and executed a revocation of her power of attorney.⁵¹ Two weeks later, “Jamie, represented by Allen, filed an appli-

40. *Id.*

41. *Id.* at 667.

42. *Id.* at 666.

43. *Id.*

44. *Id.*

45. *Id.* at 667.

46. *Id.*

47. 574 S.W.3d 362 (Tex. 2019) (orig. proceeding).

48. *Id.* at 365.

49. *Id.* at 366.

50. *Id.*

51. *Id.*

cation for temporary guardianship of Verna's person and a management trust for her estate."⁵²

Verna "moved to disqualify Allen as Jamie's counsel" because "Allen had 'obtained confidential information' during his representations of [Verna] that 'could be used to [her] disadvantage . . . in the current matter', and that she objected to his representation of Jamie in violation of his fiduciary duties to her."⁵³ According to Verna, Allen's representation of Jamie without her consent was a conflict of interest under Disciplinary Rules 1.06(a) and (b).⁵⁴ Attached to Verna's motion was a statement from her doctor in which he (1) concluded she did not meet the criteria for dementia; and (2) stated she had told him she believed Jamie had been prompted to have her deemed incompetent because the five-year note was due.⁵⁵

In response, Jamie argued (1) the note had been paid in full subsequent to Verna's motion to disqualify Allen; and (2) pursuant to Disciplinary Rule 1.02(g), Allen had "a mandatory duty . . . to secure the appointment of a guardian for the person and . . . estate of Mrs. Thetford due to his reasonable belief that she lacks legal competence."⁵⁶ The trial court denied Verna's motion to disqualify Allen and the court of appeals denied mandamus relief.

Verna was unsuccessful in her attempt to obtain mandamus relief in the Texas Supreme Court. That court's analysis focused on the interplay of Disciplinary Rules 1.02(g), 1.06, and 1.09.⁵⁷ The supreme court stated that

52. *Id.*

53. *Id.* at 368.

54. *Id.*; see TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.06, reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A, which states,

- (a) A lawyer shall not represent opposing parties to the same litigation.
- (b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:
 - (1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or
 - (2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.

55. *In re Thetford*, 574 S.W.3d at 368.

56. *Id.*

57. *Id.* at 372; see TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.02(g), reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A ("A lawyer shall take reasonable action to secure the appointment of a guardian or other legal representative for, or seek other protective orders with respect to, a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client."). See also TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.09, reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A, which states in part,

- (a) Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client:
 - (1) in which such other person questions the validity of the lawyer's services or work product for the former client
 - (2) if the representation in reasonable probability will involve a violation of Rule 1.05; or
 - (3) if it is the same or a substantially related matter.

even assuming Rule 1.02(g) was applicable, “it did not mandate that Allen initiate the guardianship but must be read together with the conflict-of-interest rules to determine whether filing the application for Jamie was ‘reasonable action.’”⁵⁸ The supreme court reasoned that “[t]o prevail in having Allen disqualified, Verna must show that (1) Allen’s representations of her are substantially related to the matters in the guardianship proceeding, and (2) the guardianship proceeding is adverse to her.”⁵⁹ The first requirement was not met because the record did not show “that Allen’s prior representations of [Verna] create[d] a genuine risk that he w[ould] reveal her confidences to Jamie.”⁶⁰ Additionally, the supreme court stated (1) “[f]or this guardianship proceeding to be adverse to Verna, Jamie’s interests would have to be adverse to Verna’s interests as seen by Verna before she became incapacitated”; and (2) “nothing in the record indicates that Jamie has interests adverse to Verna’s wellbeing.”⁶¹ Further, the supreme court observed that the trial court’s “careful decision” regarding disqualification “is not final,” as the trial court “can revisit the issue, change its mind later, and disqualify counsel at a later stage if other information comes to light.”⁶² The supreme court declined to “disturb the trial court’s discretion” and, accordingly, denied the petition for writ of mandamus without reaching the element of lack of an adequate appellate remedy.⁶³

C. IMPROPER LIFTING OF LEGISLATIVELY MANDATED STAY

In *In re Geomet Recycling LLC*,⁶⁴ the Texas Supreme Court concluded mandamus relief was proper where a court of appeals’ order erroneously purported to lift a legislatively mandated stay of trial court proceedings.⁶⁵ EMR, a scrap metal recycling business, sued Geomet Recycling, alleging, among other things, trade secret misappropriation and breach of fiduciary duty. Early on, the trial court signed a temporary restraining order prohibiting Geomet from using EMR’s trade secrets and confidential information. Geomet filed a motion to dismiss EMR’s claims pursuant to the Texas Citizens Participation Act (TCPA) and obtained an order allowing limited discovery on that motion.⁶⁶ EMR (1) moved for contempt based on alleged violation of the TRO; and (2) requested a temporary injunction. The parties signed an agreed scheduling order that provided for continuances of the contempt and temporary-injunction hearings in the event of an interlocutory appeal on the still-pending TCPA motion.

58. *In re Thetford*, 574 S.W.3d at 373.

59. *Id.* at 374.

60. *Id.* at 375.

61. *Id.* at 379–80.

62. *Id.* at 380.

63. *Id.* at 381.

64. 578 S.W.3d 82 (Tex. 2019) (orig. proceeding).

65. *Id.* at 85.

66. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 27.003).

Following the trial court's denial of the TCPA motion, Geomet filed an interlocutory appeal in the Fifth Dallas Court of Appeals, thus staying the commencement of trial and "all other proceedings in the trial court pending resolution of that appeal" pursuant to Texas Civil Practice and Remedies Code Section 51.014(b).⁶⁷ While the appeal was pending, EMR asked the court of appeals to lift the stay so the trial court could address its contempt and temporary-injunction motions. The court of appeals ordered the stay lifted "for the limited purpose of allowing the trial court to conduct a hearing on appellees' request for temporary injunction and motion for contempt."⁶⁸ Geomet then petitioned the supreme court for mandamus relief, challenging the court of appeals' order lifting the stay.

The supreme court observed that Section 51.014(b)'s text (1) contains no exceptions to the mandatory stay; and (2) "dictates that the stay lasts until 'resolution of th[e] appeal,' not until the court of appeals lifts the stay."⁶⁹ Further, the supreme court rejected EMR's argument that authority to lift the stay flowed from Texas Rules of Appellate Procedure 29.3⁷⁰ and 29.4,⁷¹ as "procedural rules cannot authorize courts to act contrary to a statute."⁷² EMR also argued that the constitution does not permit the statute "to be applied in a way that renders the courts powerless to prevent irreparable harm to a litigant."⁷³ The supreme court reasoned that EMR was not without recourse because it could have asked the court of appeals to protect it from irreparable harm, but instead chose to pursue "an unsuited procedural mechanism."⁷⁴ Finally, the supreme court stated "[t]here is generally no adequate remedy by appeal for an erroneous court order purporting to lift the stay."⁷⁵ The petition for writ of mandamus was conditionally granted and the court of appeals was directed to vacate its order.⁷⁶

D. DISCOVERY

In *In re City of Dickinson*,⁷⁷ the Texas Supreme Court concluded that a client testifying as an expert witness in its own case did not waive the attorney-client privilege as to that expert testimony.⁷⁸ The City of Dick-

67. *Id.* at 86 (quoting TEX. CIV. PRAC. & REM. CODE ANN. §§ 51.014(a)-(b)).

68. *Id.*

69. *Id.* at 87 (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(b)).

70. See TEX. R. APP. P. 29.3 ("When an appeal from an interlocutory order is perfected, the appellate court may make any temporary orders necessary to preserve the parties' rights until disposition of the appeal . . .").

71. See TEX. R. APP. P. 29.4 ("While an appeal from an interlocutory order is pending, only the appellate court in which the appeal is pending may enforce the order.").

72. *In re Geomet Recycling LLC*, 578 S.W.3d at 88.

73. *Id.* at 89.

74. *Id.*

75. *Id.* at 92 (citing *In re Univ. of the Incarnate Word*, 469 S.W.3d 255, 259 (Tex. App.—San Antonio 2015, orig. proceeding) ("This right [to the stay], once violated, cannot be recovered by appeal.")).

76. *Id.*

77. 568 S.W.3d 642 (Tex. 2019) (orig. proceeding).

78. *Id.* at 649–50.

inson sued Texas Windstorm Insurance Association (Texas Windstorm), contending Texas Windstorm did not pay the full amount owed to the City for hurricane damage under the City's insurance policy. The City moved for summary judgment as to causation. Texas Windstorm's summary judgment response included an "affidavit of its corporate representative and senior claims examiner, Paul Strickland," which contained "both factual and expert opinion testimony."⁷⁹ During depositions, the City learned Strickland's affidavit had previously been revised in email exchanges between Strickland and Texas Windstorm's counsel. The City moved to strike Strickland's affidavit unless Texas Windstorm produced those email exchanges and all other documents and data "provided to, reviewed by, or prepared by or for Strickland in anticipation of his testimony as an expert."⁸⁰ Texas Windstorm contended the emails were protected by attorney-client privilege, but also mistakenly e-filed fifty-five pages of the purportedly privileged emails. The next day, Texas Windstorm discovered the filing error and invoked Texas Rule of Civil Procedure 193.3(d)'s "snap-back" provision,⁸¹ requesting that the City delete or destroy the emails.

The trial court denied Texas Windstorm's "snap-back" motion and granted the City's motion to compel the emails and other requested items.⁸² Texas Windstorm obtained mandamus relief in the court of appeals, which concluded the email exchanges and affidavit drafts were privileged attorney-client communications notwithstanding Strickland's additional role as a testifying expert.⁸³ The City then filed a mandamus petition in the supreme court, contending the trial court did not abuse its discretion because "[the] discovery rules expressly authorize the production of all documents provided to Strickland in anticipation of his expert testimony."⁸⁴

In its opinion, the supreme court engaged in a lengthy analysis of the language and context of Texas Rule of Civil Procedure 194, which addresses the permissible content of requests for disclosure.⁸⁵ The supreme court observed that "nothing within [Rule 194] requires Texas Windstorm to turn over testifying expert materials"; rather, that the rule "merely allows the City to request them, subject to the other rules of discovery."⁸⁶ Further, the supreme court reasoned (1) without the attorney-client privilege, "attorneys would not be able to give their clients candid advice as is an attorney's professional duty"; and (2) "[a] lawyer's candid advice and counseling is no less important when a client also testifies as an expert."⁸⁷ The supreme court concluded that because the discovery rules "do not

79. *Id.* at 644.

80. *Id.*

81. *See* TEX. R. CIV. P. 193.3(d).

82. *In re City of Dickinson*, 568 S.W.3d at 644.

83. *Id.* 644-45.

84. *Id.* at 645.

85. *Id.* at 645-48; *see* TEX. R. CIV. P. 194.

86. *In re City of Dickinson*, 568 S.W.3d at 647.

87. *Id.* at 649.

operate to waive the attorney–client privilege whenever a client or its representative offers expert testimony,” the court of appeals properly overruled the trial court’s order compelling disclosure.⁸⁸ Additionally, as to the mistakenly-produced emails, the supreme court concluded that “[b]ecause the emails are privileged communications and Texas Windstorm complied with Rule 193.3(d),” the court of appeals correctly determined the trial court abused its discretion by denying the “snap-back” motion.⁸⁹ Consequently, the supreme court denied the City’s petition for writ of mandamus.⁹⁰

E. MONETARY SANCTIONS

In *In re Casey*,⁹¹ the Texas Supreme Court addressed whether trial courts are required to defer payment of monetary sanctions until an appealable judgment is rendered. Attorney Stephen Casey represented Chad Walker and Alisha Flood in a dispute over a personal loan made to them by a family member, Ann Coyle. Specifically, Walker and Flood sued Coyle, an attorney, “for abstracting a judgment fraudulently claiming they were in default” respecting satisfaction of a previous agreed judgment involving the same loan.⁹² Coyle filed counterclaims against Walker and Flood and initiated a third-party action against Casey for monetary, declaratory, and equitable relief.

Casey moved to dismiss Coyle’s claims as frivolous and designate her a vexatious litigant pursuant to Chapter 11 of the Texas Civil Practice and Remedies Code.⁹³ At the hearing on that motion, Casey argued that certain pro se matters commenced by Coyle during the preceding seven years “should count as separate litigation”⁹⁴ for Chapter 11 purposes, and thus, Chapter 11’s requisite number of pro se civil actions had been met. The trial court granted Casey’s motion to dismiss Coyle’s claims and declared her a vexatious litigant.

Casey moved for reconsideration of the vexatious litigant determination, arguing (1) several of the cases Casey had described as satisfying Chapter 11’s criteria did not actually do so; and (2) “sanctions were warranted because Casey had not disclosed directly adverse controlling precedent and had made groundless legal arguments.”⁹⁵ Casey responded: (1) his argument was entitled to a good faith presumption;⁹⁶ and (2) “he was not obligated to disclose [the] authority [in question] because it was not controlling, not directly adverse, or both.”⁹⁷ The trial court: (1)

88. *Id.*

89. *Id.*

90. *Id.* at 650.

91. 589 S.W.3d 850 (Tex. 2019) (orig. proceeding) (per curiam).

92. *Id.* at 852.

93. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. §§ 11.001–.104 (vexatious litigants), 37.001–.011 (declaratory judgments)).

94. *Id.* at 853.

95. *Id.*

96. *See* TEX. R. CIV. P. 13.

97. *In re Casey*, 589 S.W.3d at 853.

“granted Coyle’s [reconsideration] motion”; (2) “lifted the vexatious-litigant determination”; (3) “ordered Casey to reimburse Coyle \$8,521.50 for attorney’s fees,” with payment “required within ten business days”; and (4) issued findings that Casey had misrepresented the law as to whether certain proceedings constituted civil actions for Chapter 11 purposes.⁹⁸ Although Casey stated in a sworn declaration that deferring payment of the sanction was necessary to avoid precluding him and his clients access to the courts to continue the litigation and seek meaningful appellate review, the trial court declined to provide Casey any relief.

After an unsuccessful attempt to obtain mandamus relief in the Third Austin Court of Appeals, Casey filed a petition for writ of mandamus in the supreme court. The supreme court noted that in *Braden v. Downey*,⁹⁹ it “acknowledged that the magnitude of monetary sanctions made payable before rendition of an appealable order could have a ‘preclusive effect on the violating party’s access to the courts’ and ‘should not ordinarily be used to dispose of litigation.’”¹⁰⁰ Consequently, the supreme court concluded in *Braden* that:

Subject to good-faith pleading requirements, when a litigant, like Casey, “contends that a monetary sanction award precludes access to the court,” the court “must either (1) provide that the sanction is payable only at a date that coincides with or follows entry of a final order terminating the litigation; or (2) make[] express written findings, after a prompt hearing, as to why the award does not have a preclusive effect.”¹⁰¹

The supreme court reasoned that “Casey’s [sworn] declaration was sufficient to invoke *Braden*’s deferral requirement” and “also explains that an appeal is inadequate because he lacks the financial means to make an upfront sanctions payment while pursuing the merits.”¹⁰² Additionally, the supreme court rejected Coyle’s argument that *Braden* does not apply when sanctions do not exceed the amount necessary to compensate an opposing party, like the attorney’s fees sanctions in question.¹⁰³ According to the supreme court, “*Braden*’s focus is on the *effect* of a monetary sanction that must be paid before it can be superseded and appealed, not on a specific amount or purpose of the sanction.”¹⁰⁴ The supreme court concluded “deferral is required under *Braden*, and when satisfaction of the sanctions order is so deferred, an adequate appellate remedy exists.”¹⁰⁵ The supreme court thus declined to consider the propriety of the

98. *Id.* at 853–54.

99. 811 S.W.2d 922, 929 (Tex. 1991) (orig. proceeding).

100. *In re Casey*, 589 S.W.3d at 855 (quoting *Braden*, 811 S.W.2d at 929).

101. *Id.* (quoting *Braden*, 811 S.W.2d at 929).

102. *Id.* The supreme court noted, “[b]ecause Casey is not just an attorney in the case, but also a litigant, we need not explore the circumstances that might substantially impact a client’s access to the courts when monetary sanctions are imposed only on counsel.” *Id.*

103. *Id.* at 855–56.

104. *Id.* at 856.

105. *Id.* at 854.

underlying sanctions order.¹⁰⁶ The petition for writ of mandamus was conditionally granted.¹⁰⁷

F. NON-PARTY'S PARTICIPATION IN INTERLOCUTORY APPEAL

In *Chambers-Liberty Counties Navigation District v. State (In re Sustainable Texas Oyster Resources Management, L.L.C.)*,¹⁰⁸ the Texas Supreme Court denied a mandamus petition related to a non-party's attempted participation in the interlocutory appeal of a denial of a plea to the jurisdiction.¹⁰⁹ A government entity, the Chambers-Liberty Counties Navigation District (the District), leased submerged land to a private entity, Sustainable Texas Oyster Resources Management, L.L.C. (STORM), to cultivate, harvest, and store oysters. The State sued the District and STORM, contending the lease was void because the State, not the District, has "the sole power to decide who may . . . cultivate oysters in the [submerged,] disputed area."¹¹⁰ The State sought (1) a declaratory judgment that the District and its commissioners exceeded their lawful authority and thus acted *ultra vires* by entering into the lease; and (2) monetary damages from the District and STORM.¹¹¹ The District filed a plea to the jurisdiction, "asserting that [its] immunity from suit bar[red] the State's claims."¹¹² The trial court denied the plea and the District filed an interlocutory appeal in the Third Austin Court of Appeals.¹¹³ "The court of appeals reversed the portion of the trial court's order that permitted the State to pursue an *ultra vires* claim against the District itself" and "otherwise affirmed the denial of the plea to the jurisdiction."¹¹⁴ STORM did not participate in the interlocutory appeal as a party, request party status, or seek mandamus relief in the court of appeals, but it submitted an amicus curiae brief in support of the District's motion for rehearing.

The District filed a petition for review in the supreme court challenging the court of appeals' ruling. STORM filed: (1) a petition for review in that case, arguing "it should be allowed to participate . . . as a party under the virtual-representation doctrine";¹¹⁵ and (2) a petition for writ of man-

106. *Id.* (citing *City of Hous. v. Hous. Mun. Emps. Pension Sys.*, 549 S.W.3d 566, 577 (Tex. 2018)).

107. *Id.* at 856.

108. 575 S.W.3d 339 (Tex. 2019) (orig. proceeding).

109. *Id.* at 341-42.

110. *Id.* at 341.

111. *Id.* at 343.

112. *Id.*

113. *Id.* at 343-44; see TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(8) (allowing for interlocutory appeal of order granting or denying a plea to the jurisdiction by a governmental unit).

114. *In re Sustainable Tex. Oyster Res. Mgmt.*, 575 S.W.3d at 344.

115. *Id.* at 355 ("The virtual-representation doctrine is an equitable doctrine allowing a party to 'intervene' on appeal in circumstances where 'it will be bound by the judgment, its privity of interest appears from the record, and there is an identity of interest between the litigant and a named party to the judgment.'" (quoting *In re Lumbermens Mut. Cas. Co.*, 184 S.W.3d 718, 722 (Tex. 2006) (orig. proceeding)).

damus, asserting the same arguments regarding the lease's validity that it asserted in its petition for review. As to the District, the supreme court reversed the court of appeals' judgment in part and affirmed it in part, concluding immunity barred the State's claims for ultra vires and monetary relief against the District but not its ultra vires claim against the District's commissioners.¹¹⁶

Then, the supreme court addressed STORM's attempted participation.¹¹⁷ The supreme court stated that "[e]ven if STORM had made a good case for party status under the [equitable doctrine of] virtual-representation . . . STORM did not seek party status in the court of appeals" and thus had not timely invoked that doctrine.¹¹⁸ Nor were there otherwise any equitable considerations that compelled that doctrine's invocation. Further, the supreme court stated STORM's mandamus action "suffers from a similar infirmity."¹¹⁹ Specifically, "STORM d[id] not offer a compelling reason" for not seeking mandamus review in the court of appeals.¹²⁰ Additionally, "mandamus relief is reserved for extraordinary circumstances."¹²¹ The supreme court concluded it "need not take the unusual procedural steps of treating [STORM] as a party or formally taking up its mandamus petition in order to carefully consider its arguments," because "[t]reating STORM's briefing and the arguments of its counsel as those of an amicus curiae, we have understood the impact of our decision on STORM and have fully considered STORM's arguments in deciding this appeal."¹²²

116. *Id.* at 356.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*; see TEX. R. APP. P. 52.3(e).

121. *In re Sustainable Tex. Oyster Res. Mgmt.*, 575 S.W.3d at 356.

122. *Id.*

V. TEXAS SUPREME COURT'S APPROACH TO ADDRESSING ADEQUATE REMEDY

Appellate Remedy Treatment	Opinion	Subject Matter of Case & Trial Court Action Addressed	Mandamus Disposition
Specific discussion of adequacy of party's appellate remedy	<i>In re RSR Corp.</i> , 568 S.W.3d 663 (Tex. 2019) (orig. proceeding) (per curiam).	Attorney Disqualification: No "do-over" to change "legal strategy" on disqualification in middle of proceedings.	Granted
	<i>In re Hous. Specialty Ins. Co.</i> , 569 S.W.3d 138 (Tex. 2019) (orig. proceeding) (per curiam).	Denial of Rule 91a Motion to Dismiss: Mandamus is proper to "spare . . . the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings."	Granted
	<i>In re Casey</i> , 589 S.W.3d 850 (Tex. 2019) (orig. proceeding) (per curiam).	Payment of Monetary Sanctions: Payment deferred pending appeal of case in chief because payment "preclude[d] access to the court[s]."	Granted
Statement as to inadequacy of appellate remedy because of contravention of statute	<i>In re Geomet Recycling LLC</i> , 578 S.W.3d 82 (Tex. 2019) (orig. proceeding).	Improper Lifting of Legislatively Mandated Stay: Automatic stay of proceedings pending appeal of TCPA denial cannot be lifted until "resolution of th[e] appeal."	Granted

Appellate Remedy Treatment	Opinion	Subject Matter of Case & Trial Court Action Addressed	Mandamus Disposition
Adequacy of appellate remedy not directly addressed	<i>In re</i> City of Dickinson, 568 S.W.3d 642 (Tex. 2019) (orig. proceeding).	Discovery: Not allowed of privileged communications with party's employee acting as expert.	Denied
	<i>In re</i> Thetford, 574 S.W.3d 362 (Tex. 2019) (orig. proceeding).	Attorney Disqualification: "[A] lawyer may represent a third party seeking guardianship over his incapacitated client if the lawyer reasonably believes the representation is in his client's best interests as the client would have defined it when she had capacity."	Denied
	Chambers-Liberty Ctys. Navigation Dist. v. State (<i>In re</i> Sustainable Tex. Oyster Res. Mgmt. L.L.C.), 575 S.W.3d 339 (Tex. 2019) (orig. proceeding).	Interlocutory Appeal: Virtual representation doctrine cannot be invoked when entity seeking party status did not join issue in court of appeals and party with same interests has appeared and "remains an able advocate."	Denied

The chart above summarizes how the Texas Supreme Court has addressed the "lack of adequate appellate remedy" element in mandamus cases decided during the Survey period. The disparity in the supreme court's treatment of that critical element warrants a deeper look at that issue.

The "black letter law"¹²³ requires a party seeking mandamus relief to "meet two requirements."¹²⁴ As stated above, "[m]andamus relief is ap-

123. See *Mariner Fin. Grp. v. Bossley*, 79 S.W.3d 30, 34 (Tex. 2002) ("The black letter rules of law are sparse and analogous case law is difficult to locate.") (citing *Lifecare Int'l, Inc. v. CD Med., Inc.*, 68 F.3d 429, 435 (11th Cir. 1995)); see also *Collins v. Va.*, 138 S. Ct. 1663, 1670 (2019) (referring to the Fourth Amendment's protection of curtilage as long recognized "black letter law").

124. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135 (Tex. 2004) (orig. proceeding).

propriate when a petitioner demonstrates a clear abuse of discretion and has no adequate remedy by appeal.”¹²⁵ However, the meaning of “adequate” can be elusive. In order to appraise whether any appellate remedy is “adequate,” the supreme court devised a subjective, balancing test. That is, the benefits of granting mandamus regarding “significant rulings in exceptional cases” are to be weighed against the detriments of interfering with trial court proceedings and adding to litigation’s burdens.¹²⁶

The particular and complex language used by the supreme court to describe the intricacies of the test must be carefully digested:

The operative word, “adequate,” has no comprehensive definition; it is simply a proxy for the careful balance of jurisprudential considerations that determine when appellate courts will use original mandamus proceedings to review the actions of lower courts. These considerations implicate both public and private interests. Mandamus review of incidental, interlocutory rulings by the trial courts unduly interferes with trial court proceedings, distracts appellate court attention to issues that are unimportant both to the ultimate disposition of the case at hand and to the uniform development of the law, and adds unproductively to the expense and delay of civil litigation. Mandamus review of significant rulings in exceptional cases may be essential to preserve important substantive and procedural rights from impairment or loss, allow the appellate courts to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgments, and spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings. An appellate remedy is “adequate” when any benefits to mandamus review are outweighed by the detriments. When the benefits outweigh the detriments, appellate courts must consider whether the appellate remedy is adequate.¹²⁷

In light of the comprehensive directions provided in *In re Prudential* and its progeny, one might expect an appellate court to decide each mandamus case by providing a full analysis of the merits of the “two requirements,” clear abuse of discretion and whether any appellate remedy is adequate. However, a review of mandamus opinions issued in the last few years reveals that the supreme court does not always address that second critical issue of adequacy, or if it does, frequently, it does so in only a conclusory manner.¹²⁸ Specifically, some opinions regarding mandamus have addressed the “adequacy” element without discussion, using only

125. See *In re Geomet Recycling LLC*, 578 S.W.3d 82, 91 (Tex. 2019) (orig. proceeding).

126. *In re Prudential*, 148 S.W.3d at 136.

127. *Id.*

128. Texas Rule of Appellate Procedure 63 requires the supreme court to “hand down a written opinion in all cases in which it renders judgment.” TEX. R. APP. P. 63. However, a court of appeals is required to “address[] every issue raised and necessary to final disposition of the appeal.” See *id.*; TEX. R. APP. P. 47.1; *Sky Interests Corp. v. Moisdon*, No. 05-18-00160-CV, 2019 WL 3423279, at *6 (Tex. App.—Dallas July 30, 2019, no pet.) (mem. op.).

conclusory language.¹²⁹ In still other cases, the adequacy of the appellate remedy is not addressed, but cases are cited.¹³⁰ Yet, in other opinions, the supreme court has been completely silent as to the element of

129. To name only a few, see the following cases cited in Hon. Douglas S. Lang & Rachel A. Campbell, *Survey of Recent Mandamus Decisions of the Texas Supreme Court*, 66 SMU L. REV. 1155, 1177 (2013); *In re Frank Kent Motor Co.*, 361 S.W.3d 628 (Tex. 2012) (orig. proceeding); *In re Lopez*, 372 S.W.3d 174 (Tex. 2012) (orig. proceeding) (per curiam); *In re Cook*, 356 S.W.3d 493 (Tex. 2011) (orig. proceeding) (per curiam); *In re Does*, 337 S.W.3d 862 (Tex. 2011) (orig. proceeding) (per curiam); *In re Guar. Ins. Servs., Inc.*, 343 S.W.3d 130 (Tex. 2011) (orig. proceeding) (per curiam); *In re Rubiola*, 334 S.W.3d 220 (Tex. 2011) (orig. proceeding); *In re Serv. Corp. Int'l*, 355 S.W.3d 662 (Tex. 2011) (orig. proceeding) (per curiam); *In re Serv. Corp. Int'l*, 355 S.W.3d 655 (Tex. 2011) (orig. proceeding) (per curiam); *In re Universal Underwriters of Tex. Ins. Co.*, 345 S.W.3d 404 (Tex. 2011) (orig. proceeding). See also the following cases cited in Hon. Douglas S. Lang & Rachel A. Campbell, *Survey of Recent Mandamus Decisions of the Texas Supreme Court*, 2 SMU ANN. TEX. SURV. 261, 298 (2016); *In re Mem'l Hermann Hosp. Sys.*, 464 S.W.3d 686 (Tex. 2015) (orig. proceeding); *In re State Bar of Tex.*, 440 S.W.3d 621 (Tex. 2014) (orig. proceeding) (per curiam). See also the following cases cited in cited in Hon. Douglas S. Lang & Rachel A. Campbell, *Survey of Recent Mandamus Decisions of the Texas Supreme Court*, 3 SMU ANN. TEX. SURV. 265 (2017); *In re Keenan*, 501 S.W.3d 74 (Tex. 2016) (orig. proceeding) (per curiam); *In re M-I L.L.C.*, 505 S.W.3d 569 (Tex. 2016) (orig. proceeding); *In re Nat'l Lloyds Ins. Co.*, 507 S.W.3d 219 (Tex. 2016) (orig. proceeding) (per curiam); *In re RSR Corp.*, 475 S.W.3d 775 (Tex. 2015) (orig. proceeding). See also the following cases cited in Hon. Douglas S. Lang & Rachel A. Campbell, *Survey of Recent Mandamus Decisions of the Texas Supreme Court*, 5 SMU ANN. TEX. SURV. 407 (2019); *In re Mahindra, USA Inc.*, 549 S.W.3d 541 (Tex. 2018) (orig. proceeding); *In re Silver*, 540 S.W.3d 530 (Tex. 2018) (orig. proceeding); *In re Shipman*, 540 S.W.3d 562 (Tex. 2018) (orig. proceeding) (per curiam); *In re Red Dot Bldg. Sys., Inc.*, 504 S.W.3d 320 (Tex. 2016) (orig. proceeding) (per curiam).

130. For example, see the following mandamus cases cited in Hon. Douglas S. Lang & Rachel A. Campbell, *Survey of Recent Mandamus Decisions of the Texas Supreme Court*, 2 SMU ANN. TEX. SURV. 261, 298 (2016); *In re Bridgestone Ams. Tire Operations, LLC*, 459 S.W.3d 565 (Tex. 2015) (orig. proceeding); *In re Crawford & Co.*, 458 S.W.3d 920 (Tex. 2015) (orig. proceeding) (per curiam); *In re Dow*, 481 S.W.3d 215 (Tex. 2015) (orig. proceeding) (per curiam); *In re Lipsky*, 460 S.W.3d 579 (Tex. 2015) (orig. proceeding); *In re Longview Energy Co.*, 464 S.W.3d 353 (Tex. 2015) (orig. proceeding); *Royston, Rayzor, Vickery & Williams, LLP v. Lopez*, 467 S.W.3d 494 (Tex. 2015) (orig. proceeding); *State v. Naylor*, 466 S.W.3d 783 (Tex. 2015); *In re Fisher*, 433 S.W.3d 523 (Tex. 2014); *In re Ford Motor Co.*, 427 S.W.3d 396 (Tex. 2014) (orig. proceeding) (per curiam); *In re Health Care Unlimited, Inc.*, 429 S.W.3d 600 (Tex. 2014) (orig. proceeding) (per curiam); *In re Nat'l Lloyds Ins. Co.*, 449 S.W.3d 486 (Tex. 2014) (orig. proceeding) (per curiam); *In re Whataburger Rest. LP*, 429 S.W.3d 597 (Tex. 2014) (orig. proceeding) (per curiam); *In re Vaishangi*, 442 S.W.3d 256 (Tex. 2014) (orig. proceeding) (per curiam). See also the following cases cited in Hon. Douglas S. Lang & Rachel A. Campbell, *Survey of Recent Mandamus Decisions of the Texas Supreme Court*, 3 SMU ANN. TEX. SURV. 265 (2017); *In re Bent*, 487 S.W.3d 170 (Tex. 2016) (orig. proceeding); *In re City of Dall.*, 501 S.W.3d 71 (Tex. 2016) (orig. proceeding) (per curiam); *In re DePinho*, 505 S.W.3d 621 (Tex. 2016) (orig. proceeding) (per curiam); *In re Nationwide Ins. Co. of Am.*, 494 S.W.3d 708 (Tex. 2016) (orig. proceeding); *In re Oceanografia S.A. de C.V.*, 494 S.W.3d 728 (Tex. 2016) (orig. proceeding) (per curiam). See also the following cases cited in Hon. Douglas S. Lang & Rachel A. Campbell, *Survey of Recent Mandamus Decisions of the Texas Supreme Court*, 5 SMU ANN. TEX. SURV. 407, 430 (2019); *In re Elizondo*, 544 S.W.3d 824 (Tex. 2018) (orig. proceeding) (per curiam); *In re N. Cypress Med. Ctr. Operating Co., Ltd.*, 559 S.W.3d 128 (Tex. 2018) (orig. proceeding); *In re State*, 556 S.W.3d 821 (Tex. 2018) (orig. proceeding); *In re Xerox Corp.*, 555 S.W.3d 518 (Tex. 2018) (orig. proceeding); *In re Accident Fund Gen. Ins. Co.*, 543 S.W.3d 750 (Tex. 2017) (orig. proceeding) (per curiam); *In re Davenport*, 522 S.W.3d 452 (Tex. 2017) (orig. proceeding); *In re Nat'l Lloyds Ins. Co.*, 532 S.W.3d 794 (Tex. 2017) (orig. proceeding); *In re State Farm Lloyds*, 520 S.W.3d 595 (Tex. 2017) (orig. proceeding); *In re Turner*, 542 S.W.3d 553 (Tex. 2017) (orig. proceeding) (per curiam).

“adequacy.”¹³¹

Silence as to “adequacy” is understandable in a few situations where a party has a statutory, ministerial duty to act or when a statute expressly provides for mandamus relief.¹³² Nevertheless, in *In re Geomet Recycling*, the supreme court addressed adequacy of the appellate remedy even though there was a statutory issue where the very act of the trial court lifting a stay was in clear violation of a statute.¹³³

There is another notable element missing in many mandamus opinions, including three of the cases cited in this article. That is, besides silence as to the key element of “adequacy,” there is no mention of the seminal *In re Prudential* case regarding the “adequacy” element.¹³⁴ In the case of *In re Thetford*,¹³⁵ the majority’s conclusion made it clear that the trial court can “revisit” the disqualification of counsel issue if the facts change, but “adequacy” was not addressed. That opinion instructed: “The record reflects that the trial court was well aware of the issues, considered them thoughtfully, and made a careful decision. And it is not final. The court

131. See the following cases cited in Hon. Douglas S. Lang & Rachel A. Campbell, *Survey of Recent Mandamus Decisions of the Texas Supreme Court*, 66 SMU L. REV. 1155 (2013): *In re Dean*, 393 S.W.3d 741 (Tex. 2012) (orig. proceeding); *In re United Scaffolding, Inc.*, 377 S.W.3d 685 (Tex. 2012) (orig. proceeding); *In re XL Specialty Ins. Co.*, 373 S.W.3d 46 (Tex. 2012) (orig. proceeding); *In re Puig*, 351 S.W.3d 301 (Tex. 2011) (orig. proceeding) (per curiam); *In re Wolfe*, 341 S.W.3d 932 (Tex. 2011) (orig. proceeding) (per curiam). See also the following cases cited in Hon. Douglas S. Lang & Rachel A. Campbell, *Survey of Recent Mandamus Decisions of the Texas Supreme Court*, 2 SMU ANN. TEX. SURV. 261 (2016): *In re Office of the Att’y Gen.*, 456 S.W.3d 153 (Tex. 2015) (orig. proceeding) (per curiam); *In re Doe*, 444 S.W.3d 603 (Tex. 2014) (orig. proceeding). See also the following cases cited in Hon. Douglas S. Lang & Rachel A. Campbell, *Survey of Recent Mandamus Decisions of the Texas Supreme Court*, 3 SMU ANN. TEX. SURV. 265 (2017): *In re Heredia*, 501 S.W.3d 70 (Tex. 2016) (orig. proceeding) (per curiam); *In re Lazy W Dist. No. 1*, 493 S.W.3d 538 (Tex. 2016) (orig. proceeding); and these cases cited *infra*: *In re Thetford*, 574 S.W.3d 362, 380–381 (Tex. 2019) (orig. proceeding); *In re City of Dickinson*, 568 S.W.3d 642 (Tex. 2019) (orig. proceeding); *In re Sustainable Tex. Oyster Res. Mgmt., L.L.C.*, 575 S.W.3d 339 (Tex. 2019) (orig. proceeding).

132. See *Shamrock Psychiatric Clinic, P.A. v. Tex. Health & Hum. Servs.*, 540 S.W.3d 553, 560 (Tex. 2018) (per curiam) (“[T]his Court has a constitutional obligation to supervise and administer the judicial branch and is responsible for the orderly and efficient administration of justice.” (citing TEX. CONST. art. V, §§ 3, 31; then citing TEX. GOV’T CODE § 74.021; and then citing *In re Castillo*, 201 S.W.3d 682, 684 (Tex. 2006) (orig. proceeding)). In performing its designated functions, the supreme court may issue writs of mandamus or grant other relief as necessary to compel officials to perform nondiscretionary acts when the law so requires. TEX. GOV’T CODE ANN. § 22.002; *In re Castillo*, 201 S.W.3d at 684; see also *In re Phillips*, 496 S.W.3d 769, 770–71 (Tex. 2016) (orig. proceeding) (mandamus is available to compel performance of ministerial duty of Texas Comptroller); *In re Nestle USA, Inc.*, 387 S.W.3d 610, 617 (Tex. 2012) (orig. proceeding) (concluding statutory language allowed for supreme court mandamus review of constitutionality of franchise tax statute).

133. *In re Geomet Recycling*, 578 S.W.3d 82, 91–92 (Tex. 2019) (orig. proceeding) (“There is generally no adequate remedy by appeal for an erroneous court order purporting to lift the stay. See, e.g., *In re Univ. of the Incarnate Word*, 469 S.W.3d 255, 259 (Tex. App.—San Antonio 2015, orig. proceeding) (“This right [to the stay], once violated, cannot be recovered by appeal.”)).

134. See *In re Thetford*, 574 S.W.3d at 380–381; *In re City of Dickinson*, 568 S.W.3d at 642; *In re Sustainable Tex. Oyster Res. Mgmt.*, 575 S.W.3d at 339; see also *supra* note 129 and cases cited therein.

135. 574 S.W.3d at 380–81.

can revisit the issue, change its mind later, and disqualify counsel at a later stage if other information comes to light.”¹³⁶ Similarly, the majority in *In re City of Dickinson*¹³⁷ concluded the trial court abused its discretion by ordering privileged communications to be produced, yet there was no discussion or conclusion at all respecting whether the appellate remedy was adequate, nor was *In re Prudential* mentioned.¹³⁸ Finally, in the case of *In re Sustainable Texas Oyster Resource Management, L.L.C.*,¹³⁹ the supreme court did cite *In re Prudential*, but only for the proposition that mandamus is reserved for “extraordinary” circumstances.¹⁴⁰ The “adequacy” of any “appellate remedy” was not mentioned.

Because of the absence of discussion in many mandamus cases regarding the “adequacy” of any appellate remedy or, in some cases, the absence of any reference to *In re Prudential*, an academic and practical question arises: may intermediate appellate courts and practicing lawyers ignore the element of the adequacy of the remedy by appeal? The answer is “No.” Until the supreme court overrules¹⁴¹ *In re Prudential* or modifies its holding in some way, it would be potentially fatal to a mandamus petition to omit full treatment of the adequacy of the appellate remedy.¹⁴²

VI. CONCLUSION

Mandamus is an indispensable tool for litigants where “mid-course” error correction is required and interlocutory appeal is not available. While some supreme court opinions may not address the issue of whether there is an adequate remedy by appeal, the “black letter law” requires that a petitioner fully address the balancing test supplied by *In re Prudential* to demonstrate that lack of adequacy. The burden of proof for the relator bringing a petition has not changed since *In re Prudential* was issued.

136. *Id.*; see also *In re City of Dickinson*, 568 S.W.3d at 649 (concluding trial court abused its discretion in ordering privileged communication to be produced, but did not address whether the appellate remedy was adequate or mention the seminal case describing the longstanding standards for mandamus, *In re Prudential*); *In re Sustainable Tex. Oyster Res. Mgmt.*, 575 S.W.3d at 356 (citing *In re Prudential* for proposition that mandamus is reserved for “extraordinary” circumstances, but not mentioning the terms “adequacy” and any “appellate remedy”).

137. 568 S.W.3d at 642.

138. *Id.*

139. 575 S.W.3d at 356.

140. *Id.*

141. See *Robinson v. Home Owners Mgmt. Enters.*, 590 S.W.3d 518, 528 n.46 (Tex. 2019) (citing *ETC Mktg., Ltd. v. Harris Cty. Appraisal Dist.*, 528 S.W.3d 70, 77–78 (Tex. 2017) (“If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [the lower court] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.” (quoting *Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)))).

142. According to reputable electronic research tools, Texas appellate courts have cited *In re Prudential*, without question as to its authority, more than 2,600 times through the date of this article.

