UT LAW CLE | THE UNIVERSITY OF TEXAS SCHOOL OF LAW

PRESENTED AT

The University of Texas School of Law
31st Annual Conference on State and Federal Appeals

June 16-17, 2022
AT&T Conference Center, Austin, TX

Mandamus: A Look Behind the Curtain & the Adequate Remedy Prong

David M. Gunn
Nicholas M. Bruno

David M. Gunn
Nicholas M. Bruno
Beck Redden LLP
1221 McKinney, Suite 4500
Houston, TX 77010
dgunn@beckredden.com
nbruno@beckredden.com
713.951.3700

Table of Contents

I. INTRODUCTION

Mandamus practice has existed in Texas for as long as the state has had courts. This should not be surprising, because mandamus jurisdiction has roots in the Texas Constitution. *See* TEX. CONST. art V, § 3 ("The Legislature may confer original jurisdiction on the Supreme Court to issue writs of quo warranto and mandamus in such cases as may be specified, except as against the Governor of the State."); *id.* at § 6 (emphasis added) (the courts of appeals "shall have such other jurisdiction, ***original*** and appellate, as may be prescribed by law"). Nevertheless, the reality of mandamus practice has changed enormously over the past several decades.

When a practitioner encounters a situation that might justify pursuing relief by mandamus, it typically involves action by a trial court—most commonly a district court. Two questions are likely to come to mind: (1) "Is this order properly subject to review by mandamus?" and (2) "What do I do substantively and procedurally to get mandamus relief?" To make things a bit more concrete, suppose a district court, for example, strikes or refuses to strike the testimony of a particular expert witness. The disappointed trial lawyer will wonder to himself or herself, "If I pursue mandamus, do I really have a legitimate chance of winning?" and "Assuming that the answer is yes, how and when should I put together mandamus papers?"

The latter question has the simplest answer, because Texas Rule of Appellate Procedure 52 contains almost everything you need to know to file a proper mandamus petition. The idea behind Rule 52 is to create a single home for all the main procedural requirements, so that a competent practitioner can get a petition on file without stumbling over some minor technical defect. Prior to Rule 52, lawyers who knew what they were doing would keep copies of old mandamus petitions or rely on articles like Helen Cassidy's freeze-dried guide to mandamus. *See* Helen Cassidy, *The Instant Freeze-Dried Guide to Mandamus Procedure in Texas Courts*, 31 S. TEX. L. REV. 509 (1990). Today Rule 52 contains virtually everything, so you should start there for the technical aspect of mandamus practice.

But, perhaps ironically, as the technical part of mandamus practice has become pretty easy, it has become more difficult to know when courts will grant relief on the merits. There was once a day when a good lawyer could have confidence in telling a client, "The appellate court will never entertain mandamus relief in this kind of case." Until the early 1980s, lawyers could say things like, "That's a routine discovery ruling; mandamus just won't lie to assail such an order."

That day is gone. Very few orders nowadays are categorically off-limits to mandamus review. As a practical matter, mandamus has morphed into a parallel form of interlocutory appeal. If the case looks sufficiently compelling—if the error looks clear enough—mandamus might well be available. So be cautious about telling a client that the odds of mandamus are zero. Texas law has moved a long way in the direction of Cole Porter's 1934 classic composition, "*Anything Goes*."

Some of the evolution in the "adequate remedy" prong is just a fact of life. Anyone who has played or watched sports understands that the referees have a way of evolving in making calls. Was that a ball or a strike? Was that a balk? Did the batter check the swing in time or go too far? Was that a foul on the shooter—or a flagrant foul—or a flagrant 2 foul? Did the catcher impede the runner on the way to home plate? These judgment calls do not remain fixed.

Mandamus functions a bit like this. The stated requirements for mandamus relief have remained constant for years, with today's formal rules today looking almost identical to the formal rules from the nineteenth century. Yet practitioners know that we are living in an era of expansion. The fixed nature of the rules can be deceptive. State and federal courts have similar tests for mandamus relief, but the practical availability of the writ is quite different in the two systems. Likewise, the Texas courts have become more accommodating to requests for mandamus review.

This article will examine the "adequate remedy" prong of mandamus doctrine in the Texas courts—especially as it has played out after the groundbreaking decisions of *In re AIU Insurance Co.*, 148 S.W.3d 109 (Tex. 2004), and *In re Prudential Insurance Co. of. America*, 148 S.W.3d 124 (Tex. 2004).

Since those decisions in 2004, many authors have addressed this topic. *See, e.g.*, Karen S. Precella, *Mandamus Update*, in State Bar of Texas, 36th Annual Litigation Update Institute (2020); Lisa E. Hobbs, *The Seven Year Itch: Prudential & Expansion of Mandamus Powers*, in State Bar of Texas, 31st Annual Advanced Civil Appellate Practice (2017); Don R. Willett, *What Kind of Mandamuses Get Our Attention?*, in State Bar of Texas, Practice Before the Texas Supreme Court (2013). Jane M.N. Webre & Sara M. Wilder, *Mandamus: When is There an Adequate Remedy at Law?*, in State Bar of Texas, Practice Before the Texas Supreme Court (2007); *see also* David M. Gunn, *Mandamus*, in State Bar of Texas, 30th Annual Advanced Evidence & Discovery Course (2017).

Where are we today, and how did we get here?

II. HISTORIC ROOTS OF THE ADEQUATE REMEDY PRONG.

Start with some historical background. Everyone agrees that the writ of mandamus was never intended as a substitute for ordinary appeal. Yet exactly how and when the writ originated cannot be stated with perfect certainty.

The case most often mentioned as the progenitor of mandamus in English law is *James Bagg's Case*, 77 Eng. Rep. 1271, 11 Co. Rep. 93 b. (K.B. 1615), where the court issued a writ to restore an officeholder to municipal office. But the writ of mandamus expanded over time, with the adequate remedy prong slowly taking an indistinct shape. "In the seventeenth century, King's Bench began to express reservations in granting the writ when the party could seek his remedy elsewhere. And by the eighteenth century, the court routinely refused to grant mandamus if the party already had an adequate legal remedy." Audrey Davis, *A Return to the Traditional Use of the Writ of Mandamus*, 24 LEWIS & CLARK L. REV. 1527, 1535 (2000) (footnotes omitted).

"By the end of the eighteenth century, King's Bench had developed two elements required for a writ of mandamus: a clear right to relief and the lack of a specific remedy." *Id*. at 1533 (2000). Note this phrase—"specific remedy." English judges, such as Lord Mansfield, would often speak of a "specific" remedy. *Id*. at 1536 (citing *R v. Blooer* (1760) 97 Eng. Rep. 697, 698–99; 2 Burr. 1043 (KB); *see also R v. Bishop of Chester* (1786) 99 Eng. Rep. 1158, 1160; 1 T.R. 396 (KB); *R v. Governor of the Bank of Eng*. (1780) 99 Eng. Rep. 334, 335; 2 Dougl. 524 (KB)). What did Lord Mansfield mean by this? "By 'specific,' he meant that the party applying for mandamus must show a lack of a legal remedy that directly addressed the wrong committed." *Id.*

Title search: Mandamus: A Look Behind the Curtain

Also available as part of the eCourse
A Look Behind the Curtain: Mandamus Petitions, Applications for Prior Restraint, and Permissive Appeals

First appeared as part of the conference materials for the
32nd Annual Conference on State and Federal Appeals session
"Mandamus: A Look Behind the Curtain"