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Entering the Thicket - Mandamus Review of Texas District Court Witness Disclosure Orders.

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ENTERING THE THICKET? MANDAMUS REVIEW OF TEXAS DISTRICT COURT WITNESS DISCLOSURE ORDERS

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This article continues the exploration of the significance of the Texas witness disclosure rules that the authors began in David W. Holman & Byron C. Keeling, *Disclosure of Witnesses in Texas: The Evolution and Application of Rules 166b(6) and 215(5) of the Texas Rules of Civil Procedure*, 42 BAYLOR L. REV. 405 (1990).

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> There is sound reason why appellate courts should not have jurisdiction to issue writs of mandamus to control or to correct incidental rulings of a trial judge when there is an adequate remedy by appeal. Trials must be orderly; and constant interruption of the trial process by appellate courts would destroy all semblance of orderly trial proceedings. Moreover, with this type of intervention, the fundamental concept of all American judicial systems of trial and appeal would become outmoded. Having entered the thicket to control or correct one such trial court ruling, the appellate courts would soon be asked in direct proceedings to require by writs of mandamus that trial judges enter orders, or set aside orders.[1]

I. INTRODUCTION

The writ of mandamus, even with its long history in the state of Texas, has only recently reached its age of maturity. Mandamus has finally developed into one of the most effective procedural remedies against erroneous pre-trial orders and rulings. With success, however, comes popularity. In recent years, practitioners have attempted to invoke the mandamus remedy to resolve increasingly intricate and novel questions of law.[2] Amidst a chorus of voices warning that mandamus intervention endangers the traditional concept of trial and appeal,[3] practitioners in mandamus proceedings now have successfully challenged erroneous pre-trial witness disclosure orders.[4]

Mandamus, without question, is an important tool to challenge the rulings of a trial court. In the absence of statutory authorization of interlocutory appeal, the writ of mandamus usually is the sole convenient remedy for an egregious trial court decision prior to judgment.[5] The increasing number of mandamus petitions which annually invade the Texas appellate courts reflects the importance of the writ of mandamus. Often described as an "extraordinary" remedy, mandamus has become more ordinary each day.[6] The writ has been a particu-

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1. Pope v. Ferguson, 445 S.W.2d 950, 954 (Tex. 1969), *cert. denied*, 397 U.S. 997 (1970).

2. *See* C.L. Ray & M.R. Yogi McKelvey, *The Mandamus Explosion*, 28 S. TEX. L. REV. 413, 413-14 (1987).

3. *See, e.g.*, *Pope*, 445 S.W.2d at 954; Tim Gavin, Comment, *The Expanding Use of Mandamus to Review Texas District Court Discovery Orders: An Immediate Appeal is Available*, 32 SW. L.J. 1283, 1299-1300 (1979).

4. *See infra* text accompanying notes 227-33.

5. Helen A. Cassidy, *The Instant Freeze-Dried Guide to Mandamus Procedure in Texas Courts*, 31 S. TEX. L. REV. 509, 512 (1990).

6. *Id.* at 509. *See* C.L. Ray & M.R. Yogi McKelvey, *The Mandamus Explosion*, 28 S.

larly useful method to challenge trial court discovery orders.[7] It is not uncommon for proceedings in a trial court to cease while a party seeks mandamus review of a controversial discovery ruling.[8]

One type of discovery ruling that has not escaped mandamus review is the admission or exclusion of the testimony of witnesses whom a party has failed to disclose in response to a discovery request. In a recent decision, *Mother Frances Hospital v. Coats*,[9] a Texas court of appeals determined for the first time that, at least in some cases, mandamus is an appropriate remedy for an erroneous trial court witness disclosure order.[10] This opinion could offer litigants an escape valve from pre-trial witness disclosure orders that threaten the effective presentation of a claim or defense. On the other hand, this opinion could trigger another, even more powerful, wave of mandamus petitions on the appellate courts. As the Texas Supreme Court has cau-

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TEX. L. REV. 413, 413-14 (1987) (commenting on the "enormous growth in total mandamus filings"). Concerned that the writ of mandamus is becoming a common remedy for abusive discovery orders, some commentators have cautioned that the appellate courts eventually will be "deluged" with mandamus petitions and unable to dispose of their usual appellate matters. *See id.*; Tim Gavin, Comment, *The Expanding Use of Mandamus to Review Texas District Court Discovery Orders: An Immediate Appeal is Available*, 32 SW. L.J. 1283, 1299 (1979). However, the Texas appellate courts are not without authority to control the disruptive effect of a mandamus petition. If an appellate court concludes that the relator is not entitled to relief, the court may simply deny the relator's motion for leave to file the petition. TEX. R. APP. P. 121(c). If the Texas Supreme Court concludes that the trial court's action is contrary to the Constitution, a statute or rule, or prior supreme court precedent, the court may summarily grant the writ without hearing argument. TEX. R. APP. P. 122.

The disruptive effect of the writ of mandamus is more likely to fall upon the trial courts, not the appellate courts. "Trials must be orderly; and constant interruption of the trial process by appellate courts would destroy all semblance of orderly trial proceedings." *Pope*, 445 S.W.2d at 954. Some litigants undoubtedly will attempt to use the writ of mandamus to delay trials and frustrate the ends of justice. Nonetheless, some abuse of the availability of the writ of mandamus must be tolerated, in order that the duties of a judge may be strictly enforced. *See* Adair Melinsky, Note, *Civil Procedure—Writ of Mandamus Will Issue to Correct Abuse of Discretion by Trial Court in Ordering Discovery of Trade Secrets Without Inspection to Determine Necessity of Their Discovery*, 6 TEX. TECH L. REV. 1105, 1115 (1975).

7. *See infra* text accompanying notes 12-80.

8. *See supra* note 6.

9. 796 S.W.2d 566 (Tex. App.—Tyler 1990, orig. proceeding).

10. As a practical matter, mandamus is appropriate only if the trial court indicates *prior to trial* its intention to admit or exclude undisclosed testimony. For example, the trial court may act upon a pre-trial motion, *see Mother Frances Hosp.*, 796 S.W.2d at 568; Green v. Lerner, 786 S.W.2d 486, 487 (Tex. App.—Houston [1st Dist.] 1990, orig. proceeding), or the trial court may resolve witness disclosure disputes in a pre-trial conference. *See* TEX. R. CIV. P. 166; *see also* Forscan Corp. v. Touchy, 743 S.W.2d 722, 724 (Tex. App.—Houston [14th Dist.] 1987, orig. proceeding).

tioned, expansion of mandamus contributes to a "thicket" of review mechanisms that interrupts the trial process.[11]

This article will examine the evolution of the use of mandamus to correct erroneous trial court discovery orders. Relying upon the mandamus requirements that the Texas judiciary has developed, the article then will explore the availability of the mandamus remedy to correct erroneous pre-trial witness disclosure orders. Specifically, it will address the availability of a writ of mandamus to correct the improper admission or exclusion of undisclosed testimony. The article concludes that, if the writ of mandamus is available at all, it is limited to certain situations in which the trial court has improperly excluded critical witnesses.

II. HISTORY OF THE USE OF MANDAMUS TO REVIEW TRIAL COURT DISCOVERY ORDERS

Mandamus, at least conceptually, is available only in limited circumstances. The Texas courts have imposed two prerequisites to mandamus review of a trial court order or ruling: (1) a clear abuse of discretion or violation of a legal duty, and (2) the inadequacy of appellate review or other alternative forms of relief.[12] But, while its availability is limited, the writ of mandamus has become a powerful tool to ensure that trial courts operate the discovery process fairly. The use of mandamus as a discovery tool is a relatively recent phenomenon. At one time, the appellate courts in Texas used the writ of mandamus solely to correct a trial court's violation of a legal duty.[13] The discovery process, however, imposes few legal duties; its administration is largely discretionary with the trial court. Thus, before the Texas appellate courts could use mandamus to correct erroneous discovery rulings, they had to determine that mandamus could reach discretionary acts.

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11. Pope v. Ferguson, 445 S.W.2d 950, 954 (Tex. 1969), *cert. denied*, 397 U.S. 997 (1970).

12. Johnson v. The Honorable Fourth Court of Appeals, 700 S.W.2d 916, 917 (Tex. 1985); Zep Mfg. v. Anthony, 752 S.W.2d 687, 689 (Tex. App.—Houston [1st Dist.] 1988, orig. proceeding).

13. *See infra* text accompanying notes 93-95.

A. *The First Timid Steps Toward Mandamus Review of Discovery Orders*

Only as recently as 1959, in *Crane v. Tunks*,[14] did the Texas Supreme Court first authorize the use of mandamus to review a trial court's discovery orders.[15] Plaintiff D.J. Glenney, III initiated discovery in this action to recover title to 1409 acres of land in Harris County. The relator, Bess Burkitt Crane, petitioned the supreme court for a writ of mandamus to compel the district court to vacate, amend, and revise an order that permitted Glenney to discover and review Crane's 1950 income tax returns. The district judge did not personally inspect the tax returns, instead permitting their discovery merely on Glenney's affirmation that the returns would be relevant evidence at trial.[16] The supreme court concluded that the judge had "abused his discretion" and ordered the judge to inspect the tax returns "to determine what portions were relevant and material as to this cause."[17]

The court in *Crane* recognized that a traditional rule of appellate procedure barred the interlocutory review of trial court discovery orders.[18] However, the supreme court expressed concern that the avail-

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14. 160 Tex. 182, 182, 328 S.W.2d 434, 434 (1959).

15. There is at least some question concerning the validity of this statement. In the 1931 case of Southern Bag & Burlap v. Boyd, 120 Tex. 418, 38 S.W.2d 565 (Tex. Comm'n App. 1939, opinion adopted), the Texas Supreme Court adopted an opinion of the Texas Commission of Appeals that appeared to authorize the use of mandamus to correct an "abuse of discretion" in a discovery order. *Id.* at 568. At least one commentator has noted, however, that this case was "not in line with contemporaneous decisions concerning the use of mandamus to correct abuses of discretion." Tim Gavin, Comment, *The Expanding Use of Mandamus to Review Texas District Court Discovery Orders: An Immediate Appeal is Available*, 32 SW. L.J. 1283, 1291 n.60 (1979).

16. *Crane*, 328 S.W.2d at 438. Interestingly, Mrs. Crane's attorney refused to produce the income tax returns, and the trial judge sentenced the attorney to jail for contempt of court. In a magnaminous gesture, the judge stayed the execution of this order pending the outcome of the mandamus petition. *Id.* at 438-39.

17. *Id.* at 440.

18. *Id.* at 438-39. Interlocutory appeals share many characteristics with the mandamus remedy, but are subject to different requirements. *See* Helen A. Cassidy, *The Instant Freeze-Dried Guide to Mandamus Procedure in Texas Courts*, 31 S. TEX. L. REV. 509, 512 (1990). One commentator has argued that mandamus review is equivalent in fact, if not in law, to interlocutory appeals. Elizabeth G. Thornburg, *Interlocutory Review of Discovery Orders: An Idea Whose Time Has Come*, 44 SW. L.J. 1045, 1052 (1990). The traditional rule against interlocutory appeal of trial court discovery orders nonetheless remains effective. *See* North East Indep. School Dist. v. Aldridge, 400 S.W.2d 893, 897-98 (Tex. 1966); Itz v. Kunz, 511 S.W.2d 77, 77 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.); *see also* Bodnow Corp. v. City of Hondo, 721 S.W.2d 839, 840 (Tex. 1986) (per curiam) ("Discovery sanctions are not

able remedy of appeal might not afford Mrs. Crane effective relief from an erroneous trial court ruling. "After the returns had been inspected, examined and reproduced . . . a holding that the court had erroneously issued the order would be of small comfort to relators in protecting their papers."[19] Because an appeal would not be an adequate remedy, the supreme court reasoned that mandamus was an appropriate vehicle to correct the trial court's erroneous discovery order.[20]

While the supreme court in *Crane* authorized the use of mandamus to review discovery orders, the court cautioned that the availability of mandamus is limited. The court repeatedly emphasized that the writ of mandamus issued only to correct a "clear abuse of discretion," which in this case it found in the trial court's failure to inspect the tax returns.[21] In truth, the trial court's decision that it would not inspect

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appealable until the district court renders a final judgment"). A person may appeal an interlocutory order of a trial court in only four narrow circumstances: (1) the court appoints a receiver or trustee, or overrules a motion to vacate an order that appoints a receiver or trustee; (2) the court certifies or refuses to certify a class in a class action lawsuit; (3) the court grants or refuses a temporary injunction or grants or overrules a motion to dissolve a temporary injunction; or (4) the court denies a motion for summary judgment that is based on an assertion of immunity by an individual who is an officer or employee of the state or a political subdivision of the state. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014 (Vernon Supp. 1990). Outside of an appeal, the only remedy for an erroneous discovery order is mandamus. *Id.*

However, a request for a writ of mandamus is not a prerequisite to appeal of an erroneous trial court discovery order. "The decision not to pursue the extraordinary remedy of mandamus does not prejudice or waive a party's right to complain on appeal." Pope v. Stephenson, 787 S.W.2d 953, 954 (Tex. 1990) (per curiam) (denying the application for writ of error). The complaining party must wait until final judgment to appeal the erroneous order, but he still has the right to appeal. *Id.*

19. *Crane*, 328 S.W.2d at 439.

20. *Id.* at 440. As is the common practice, the supreme court did not actually issue the writ of mandamus, but rather threatened to do so if the trial judge did not comply with the supreme court's decision. The practical effect is the same. *See* Tim Gavin, Comment, *The Expanding Use of Mandamus to Review Texas District Court Discovery Orders: An Immediate Appeal is Available*, 32 SW. L.J. 1283, 1292 n.65 (1979).

21. *Crane*, 328 S.W.2d at 440. The supreme court reached a similar conclusion in another mandamus opinion, Automatic Drilling Machines v. Miller, 515 S.W.2d 256 (Tex. 1974). In *Automatic Drilling Machines*, the defendants in a business tort lawsuit sought to take the deposition of the plaintiff's expert witness, a pioneer in the field of automatic drilling machines. The defendants served on the witness a subpoena duces tecum requesting information on the witness' business relations with the plaintiff. The trial judge permitted discovery of the information, but did not conduct a preliminary review of the relevance of the documents. Without extensive discussion, the supreme court ruled that the trial judge abused his discretion. *Id.* at 260. Incidentally, *Automatic Drilling Machines* came shortly after the supreme court's determination in Ex parte Shepperd, 513 S.W.2d 813 (Tex. 1974), that the discovery of

the returns was less an abuse of discretion and more a complete failure to exercise any discretion. The significance of this fact, however, was not apparent at the time. The supreme court was less concerned with the trial court's actions than it was with the adequacy of Mrs. Crane's relief.[22]

The supreme court's next opportunity to examine the use of mandamus to review trial court discovery orders came three years later in *Maresca v. Marks*,[23] a case factually similar to *Crane* but containing subtle differences. In *Maresca*, the defendant in a fraudulent misrepresentation action sought an order requiring the plaintiffs to produce copies of their personal income tax returns. The trial judge examined the returns—pursuant to the direction in *Crane*—and ordered that the plaintiffs disclose them to the defendant, even though the returns listed unrelated and irrelevant charitable contributions and medical expenses. The supreme court concluded that the trial judge had abused his discretion in ordering the production of the tax returns without separation of the irrelevant portions.[24]

According to the supreme court in *Maresca*, the trial judge's error was not his discretionary determination of the relevance of the tax returns. The judge's error instead was the failure to conduct a simple administrative task: separation of the irrelevant portions of the returns from the remainder of the documents. In this sense, as in *Crane*, the trial judge seemingly failed to exercise *any* discretion. Authorizing mandamus, the *Maresca* court concluded that extraordinary relief is appropriate "when no discretion has been exercised."[25]

The court in *Maresca*, however, embraced a broad view of the term "absence of discretion." While one cannot argue that mandamus is appropriate if the trial court has failed to exercise discretion, the failure of the trial court in *Maresca* to exercise discretion was less appar-

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evidence to be used solely for the purpose of impeachment of an expert witness was permissible. *See infra* note 29.

22. In contrast, the dissent in *Crane* was quite aware of the nature of the trial court's actions. Although recognizing that the trial judge did not physically examine the tax returns, the dissent noted that the judge in fact heard "evidence at great length on the admissibility of the document. . . ." *Crane*, 328 S.W.2d at 443 (Smith, J., dissenting). Describing it as a "dangerous precedent," the dissent criticized the majority's opinion that mandamus could issue to correct a discretionary act—even if discretion were abused—as opposed to a ministerial act. *Id.* at 444.

23. 362 S.W.2d 299 (Tex. 1962).

24. *Id.* at 301.

25. *Id.*

ent than the failure of the trial court in *Crane*. The trial judge in *Maresca*, unlike his counterpart in *Crane*, reviewed the documents in question. Because he released the documents to the defendant, the judge in *Maresca* at least implicitly concluded that *all* of the contents of the documents were relevant. Examined in this light, the trial judge exercised, although perhaps abused, his discretionary authority to determine the relevance of evidence.[26]

The opinion in *Maresca* marked a turning point in the role of the Texas Supreme Court to review discovery orders. Prior to *Maresca*, the supreme court had not declared whether it could review the discretionary discovery decisions of a trial court. Even in *Maresca*, which at least arguably involved a discretionary discovery decision, the supreme court continued to suggest that its mandamus authority extended only to the trial court's failure to exercise discretion. But regardless whether the trial judge abused his discretion or failed to exercise his discretion, the impact of *Maresca* was clear: the supreme court was becoming more willing to use the extraordinary writ of mandamus to correct erroneous discovery orders.

B. *A Suddenly Swift Evolution Toward Comprehensive Mandamus Review of Discovery Orders*

The distinction between *absence* of discretion and *abuse* of discretion was less significant after *Russell v. Young*.[27] In this 1970 case, an insurance company sought discovery of the accounting and financial records of a medical doctor who was scheduled to testify at trial on behalf of a workman's compensation claimant. The insurance company intended to use these records to attack the doctor's credibility. Agreeing that the records were relevant, the trial judge permitted their discovery. However, without any discussion of abuse of discretion or adequacy of remedy,[28] the supreme court determined that dis-

26. While the supreme court characterized the trial judge's failure to separate the irrelevant portions of the returns as an absence of discretion, other commentators were skeptical. One commentator found the supreme court's reasoning "unconvincing," and concluded that the trial judge's action was at least an abuse of discretion. Tim Gavin, Comment, *The Expanding Use of Mandamus to Review Texas District Court Discovery Orders: An Immediate Appeal is Available*, 32 Sw. L.J. 1283, 1293 n.70 (1979).

27. 452 S.W.2d 434 (Tex. 1970).

28. The practice of threatening to grant a writ of mandamus without discussion of the traditional elements of abuse of discretion and adequacy of remedy was common in the supreme court mandamus cases of the 1970s. *See, e.g.*, Allen v. Humphreys, 559 S.W.2d 798

covery of the documents was impermissible if the insurance company intended to use the documents solely for the purpose of impeachment of a prospective expert witness.[29]

The court's resolution of the substantive issue—whether a party to litigation could use discovered documents solely for impeachment purposes—settled a previously unanswered question in Texas jurisprudence. For the time period, it was remarkable that the court chose to address this issue in a mandamus proceeding, rather than an appeal. In the absence of prior Texas precedent on the use of discovery for impeachment purposes, there was no established rule of law that would constrict the trial judge's exercise of discretion. The trial judge, following his understanding of the discovery rules, expressly authorized the discovery of the doctor's financial records. Thus, unlike *Crane* and *Maresca*, *Russell* presented a clear situation in which the judge exercised discretion, even if improperly. The supreme court's opinion in *Russell* marked the first real indication that mandamus could be premised upon a trial judge's *abuse* of discretion in permitting discovery.[30]

Russell, however, did not observe the usual conventions for a decision of its magnitude. It contained virtually no mention, much less discussion, of the dispositive issue in the decision—abuse of discretion. On the face of the opinion in *Russell*, it seemed almost that the supreme court, once quite niggardly in the exercise of its mandamus authority, had acquiesced to the generous authorization of pretrial appellate court relief under virtually any circumstances. In short, the opinion in *Russell* suggested that the supreme court had swiftly leaped from an abuse of discretion standard to an "erroneous deci-

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(Tex. 1977); Barker v. Dunham, 551 S.W.2d 41 (Tex. 1977); Houdaille Indus. v. Cunningham, 502 S.W.2d 544 (Tex. 1973).

29. Obviously, this article is less concerned with the substantive aspects of the mandamus opinions of the Texas appellate courts than with the procedural effect of these opinions on the operation of the writ of mandamus. Interestingly enough, however, the supreme court in *Ex parte* Shepperd, 513 S.W.2d 813 (Tex. 1974), retreated from its conclusion in *Russell* that the discovery of evidence intended only for the purpose of impeaching a prospective expert witness was impermissible.

30. Of course, *Russell* was not the first case to hold that the trial court's abuse of discretion is a prerequisite to a writ of mandamus. *See infra* text accompanying notes 96-118. For that matter, *Russell* did not explicitly hold that the abuse of discretion standard was applicable in a discovery context. Nonetheless, it did hold, at least implicitly, that trial court discretionary errors—not simply a complete failure to exercise discretion—could be remedied on mandamus review.

sion" standard. While the supreme court ostensibly premised *Maresca* upon the trial judge's failure to exercise any discretion, the court appeared to premise *Russell* upon the trial judge's simple failure to issue a correct discovery order.[31]

In the 1973 opinion of *Houdaille Industries v. Cunningham*,[32] the supreme court reasserted its ambiguous analysis of the abuse of discretion standard. In this action for negligent performance of a paving contract, the plaintiff sought discovery of the laboratory reports of several individuals, all of whom the defendant had revealed would not be called as expert witnesses during its case-in-chief and would only be used for purposes of consultation.[33] After *in camera* inspection of the laboratory reports,[34] the trial court ordered that the defendant produce specified portions of the reports. The defendant filed a petition for writ of mandamus, arguing that the consulting witness privilege protected the reports from discovery. The supreme court granted the defendant's requested relief,[35] except as to the reports of those individuals whom the defendant had reserved the right to introduce at trial in rebuttal.[36] Again, the supreme court did not specifically ad-

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31. *Russell*, 452 S.W.2d at 437.

32. 502 S.W.2d 544 (Tex. 1973).

33. *Id.* at 545.

34. The *in camera* inspection avoided the possibility of mandamus on the basis of Crane v. Tunks, 160 Tex. 182, 328 S.W.2d 434 (1959). *See supra* text accompanying notes 14-22.

35. Again, the supreme court needed only to threaten the use of mandamus if the trial court did not abide by the supreme court's determination of the law. *See supra* note 20.

36. *Houdaille Indus.*, 502 S.W.2d at 548 (the clear purpose of 1973 amendments to the Texas Rules of Civil Procedure "is to protect a party utilizing the assistance of experts from discovery of their reports only when they will not be used as a witness, whether in chief or otherwise"). This same conclusion remains valid under the present rules, which protect from disclosure by privilege:

> The identity, mental impressions and opinions of an expert who has been informally consulted or of an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial or any documents or *tangible things containing such information* if the expert will not be called as an expert witness, except that the identity, mental impressions and opinions of an expert who will not be called to testify as an expert and any documents or tangible things containing such impressions and opinions are discoverable if the consulting expert's opinion or impressions have been reviewed by a testifying expert.

TEX. R. CIV. P. 166b(3)(b) (emphasis added). If the need for a consulting witness' rebuttal testimony could not have been anticipated prior to trial, it would seem that *Russell* would not apply. In a related context, Texas courts have permitted the rebuttal testimony of undisclosed witnesses where the need for the testimony could not have been anticipated, on the basis that "good cause" exists for admission of the testimony. *See, e.g.*, Galvin v. Gulf Oil Corp., 759 S.W.2d 167, 172 (Tex. App.—Dallas 1988, writ denied); Walsh v. Mullane, 725 S.W.2d 263, 264-65 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.). The same reasoning permits

dress the abuse of discretion standard, leaving observers with the impression that a simple mistake in the allowance of discovery was sufficient to support mandamus relief.[37]

The supreme court in *Russell* and *Houdaille Industries* certainly gave short shrift to the traditional requirement that mandamus issues only to correct a clear abuse of discretion. Since the substantive sections of both opinions interpreted the discovery rules, but did not specifically address the prerequisites for mandamus relief, *Russell* and *Houdaille Industries* implied that the supreme court intended to scrap traditional mandamus procedure in favor of a wholly new approach to mandamus review of trial court discovery orders. While the court did not openly admit such a motive,[38] policy considerations supported a liberal use of mandamus to review discovery orders. Discovery law is, after all, a complex and rapidly evolving area of Texas civil procedure.[39] Intervening trials and settlement hearings often prevent the

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the use of the reports of a consulting expert who was unexpectedly required to testify in rebuttal, even though the expert's reports were undisclosed.

While the reports of an expert witness ordinarily are subject to discovery if the expert testifies at trial, the converse *may* not necessarily be true. One court has ruled that "the concept of discovering an 'expert who may be called to testify' [under Rule 166b(3)(b)], does not implicate the disclosure of nontestifying medical experts whose opinions and diagnoses are included in medical records which may be used or offered in evidence upon trial." National Standard Ins. v. Gayton, 773 S.W.2d 75, 77 (Tex. App.—Amarillo 1989, no writ). In other words, the fact that a consulting expert's reports are admitted at trial does not necessarily permit the discovery of the identity of the consulting expert. However, the 1990 amendments to the Texas Rules of Civil Procedure, which eliminate the consulting expert privilege if the expert's opinions are even reviewed by a testifying expert witness, probably limit *Gayton*'s precedential value. *See* TEX. R. CIV. P. 166b(2)(e)(1), (3)(b).

37. After *Russell* and *Houdaille Industries*, many commentators proclaimed the death of the abuse of discretion standard, at least as to the use of mandamus to review trial court discovery orders. *See, e.g.*, Tim Gavin, Comment, *The Expanding Use of Mandamus to Review Texas District Court Discovery Orders: An Immediate Appeal is Available*, 32 SW. L.J. 1283, 1288 (1979) (the abuse of discretion limitation "has become a meaningless standard that is cited perfunctorily, if at all"); David West, Note, *The Use of Mandamus to Review Discovery Orders in Texas: An Extraordinary Remedy*, 1 REV. LITIG. 325, 338 (1981) ("abuse of discretion has become an amorphous standard that the court applies as a *post hoc* justification for the issuance of mandamus").

38. One commentator urged the Texas Supreme Court to admit its intention to expand the use of mandamus in discovery cases. *See* David West, Note, *The Use of Mandamus to Review Discovery Orders in Texas: An Extraordinary Remedy*, 1 REV. LITIG. 325, 338 (1981) (supreme court "should provide expressly that unique question of discovery law is one standard the court will use in granting writs of mandamus").

39. For a general discussion of the evolution of discovery law under the Texas Rules of Civil Procedure, see David W. Holman & Byron C. Keeling, *Disclosure of Witnesses in Texas: The Evolution and Application of Rules 166b(6) and 215(5) of the Texas Rules of Civil Proce-*

appellate courts from reaching important discovery questions;[40] pretrial appellate review of such questions could lend critical guidance to the development of Texas discovery practice.

Subsequent opinions tended to confirm the view that the supreme court desired to increase the availability of mandamus review of discovery orders. Interestingly, these subsequent opinions had less effect on the abuse of discretion requirement than the inadequacy of remedy requirement. In the 1977 cases of *Barker v. Dunham*[41] and *Allen v. Humphreys*,[42] the Texas Supreme Court for the first time suggested that the writ of mandamus could correct the improper *denial* of discovery, as well as the improper granting of discovery. This suggestion was a significant change from the court's pronouncement on mandamus in *Crane*.[43]

In *Crane*, the supreme court based its authorization of a writ of mandamus on the litigant's inadequate remedy on appeal after documents have been improperly disclosed.[44] The court in *Crane* recognized that a trial court's erroneous allowance of discovery raises the possibility that a litigant's secrets will be irreversibly released to the public.[45] The erroneous denial of discovery, on the other hand, does not intrude upon any privacy or secrecy interests. While potentially

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dure, 42 BAYLOR L. REV. 405, 408-17 (1990); William W. Kilgarlin, et al., *Practicing Law in the "New Age": The 1988 Amendments to the Texas Rules of Civil Procedure*, 19 TEX. TECH L. REV. 881 (1988); Franklin Spears, *The Rules of Civil Procedure: 1981 Changes in Pre-Trial Discovery*, 12 ST. MARY'S L.J. 633 (1981); Robert L. Steely & Gibson Gayle, *Operation of the Discovery Rules*, 2 HOUS. L. REV. 222 (1964).

40. For a couple of reasons, this conclusion is correct. Principally, many cases are never appealed; the parties may settle prior to trial or the losing party after trial may decide that it will not appeal even though the judge issued arguably erroneous discovery orders. But in addition, many cases are appealed on entirely different grounds. Because of their pretrial disposition, discovery errors are less likely to affect the outcome of a trial than an error committed during the course of the trial. The "harmless error" rule may persuade counsel to appeal only on the more convincing trial errors. *See* TEX. R. APP. P. 81(b)(1) (no reversal unless the error "amounted to such a denial of the rights of the appellant as was reasonably calculated to cause and probably did cause rendition of an improper judgment in the case, or was such as probably prevented the appellant from making a proper presentation of the case to the appellate court").

41. 551 S.W.2d 41 (Tex. 1977).

42. 559 S.W.2d 798 (Tex. 1977).

43. *See supra* text accompanying notes 14-22.

44. *See Crane*, 160 Tex. at 189, 328 S.W.2d at 439.

45. *See* Tim Gavin, Comment, *The Expanding Use of Mandamus to Review Texas District Court Discovery Orders: An Immediate Appeal is Available*, 32 SW. L.J. 1283, 1300 (1979) ("When discovery has been denied, the court should seriously consider the adequacy of relief that is available by way of appeal. In almost all of these cases, forcing a party to await the

harmful to the requesting litigant's trial strategy, the denial of discovery in essence leaves the parties in the same position they occupied prior to the initiation of the lawsuit. In *Barker* and *Allen*, the supreme court nonetheless authorized the use of mandamus to review the improper denial of discovery. Curiously, neither *Barker* nor *Allen* expressly addressed the inadequacy of remedy requirement, much less explained the reasons for the apparent expansion of the use of mandamus to review trial court discovery orders.[46] It was apparent from the opinions in *Barker* and *Allen*, however, that the supreme court intended to subject virtually all discovery orders to mandamus review, whether or not the complaining party would be significantly injured if the resolution of its complaint were delayed until appeal.

Seven years later, the supreme court finally explained the rationale behind its opinions in *Barker* and *Allen*. In *Jampole v. Touchy*,[47] the court reiterated that mandamus may issue to correct an abuse of discretion in the *denial* of discovery. The plaintiff, Stanley Jampole, had initiated a products liability action against the General Motors Corporation to recover damages for the death of his wife, whose 1976 Chevrolet Vega exploded after being struck from the rear by another vehicle. The trial court denied Jampole the discovery of certain documents relating to fuel storage system designs on other automobiles. Jampole sought a writ of mandamus to compel discovery. There was little question that the fuel storage system design documents were relevant and should have been disclosed.[48] The supreme court accord-

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completion of the trial in order to seek appellate review will not endanger his substantial rights").

46. In this period, it seemed that the supreme court intended to relegate the inadequate remedy standard to a "consideration," in lieu of a "requirement." In West v. Solito, 563 S.W.2d 240 (Tex. 1978), the court stated that "a writ of mandamus may issue in a proper case to correct a clear abuse of discretion, *particularly where* the remedy by way of appeal is inadequate." *Id.* at 244 (emphasis added). Such language implied that an inadequate remedy by way of appeal was not a prerequisite to mandamus relief. Nonetheless, subsequent cases have clarified that the inadequate remedy standard remains a requirement to mandamus relief, even if more liberally interpreted. *See* Street v. The Second Court of Appeals, 715 S.W.2d 638, 639 (Tex. 1986) (per curiam); Jampole v. Touchy, 673 S.W.2d 569, 576 (Tex. 1984).

Yet, even though *Street* and *Jampole* have reaffirmed the inadequate remedy standard, a number of court of appeals cases have continued to imply that the adequacy of an appellate remedy is not a relevant consideration. *See, e.g.*, Velasco v. Haberman, 700 S.W.2d 729, 730 (Tex. App.—San Antonio 1985, orig. proceeding); Smith v. White, 695 S.W.2d 295, 296 (Tex. App.—Houston [1st Dist.] 1985, orig. proceeding).

47. 673 S.W.2d 569 (Tex. 1984).

48. *Id.* at 572. The supreme court concluded that the denial of discovery was an abuse of discretion, noting that the trial court, "in balancing the rights of the parties, took an unduly

ingly limited its focus to the issue whether Jampole had an adequate remedy by appeal.

The supreme court concluded that appeal would not be an adequate remedy, offering two reasons. First, the supreme court noted that the significance of the trial court's erroneous denial of Jampole's requested discovery could not be easily demonstrated on appeal: "[b]ecause the evidence exempted from discovery would not appear in the record, the appellate courts would find it impossible to determine whether denying the discovery was harmful."[49] Appellate courts will not reverse a trial court's actions in the absence of harmful error[50]—error that effectively leaves Jampole and similarly situated litigants without a remedy. Second, the court emphasized that even if Jampole could demonstrate harmful error, the remedy of appeal would require several additional years of effort in the quest for justice: "requiring a party to try his lawsuit, debilitated by the denial of proper discovery, only to have that lawsuit rendered a certain nullity on appeal, falls well short of a remedy by appeal that is 'equally convenient, beneficial, and effective as mandamus.' "[51]

In dissent, Justice Charles W. Barrow warned that the majority in *Jampole* had "entered the thicket" to constant interruption of the trial process,[52] and, to the extent that Justice Barrow feared the majority

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restrictive view of the degree of similarity necessary for tests on other vehicles to be relevant." *Id.* at 573. The *Jampole* court, as had other courts, emphasized the *erroneous* nature of the denial of discovery, and not the *abusive* aspect of the trial court's exercise of discretion. *See supra* text accompanying notes 31-40. To some extent, however, the supreme court withdrew from its earlier free-wheeling approach to the abuse of discretion requirement. The court rejected General Motors' assertion that the denial of discovery was not an abuse of discretion because the trial court heard argument from both sides. The supreme court emphasized that "[t]he issue . . . is not the degree of care exercised. Rather, the focus is on the effect of the trial court's action on the substantial rights of the parties." *Jampole*, 673 S.W.2d at 574.

49. *Id.* at 576.

50. *See* TEX. R. APP. P. 81(a).

51. *Jampole*, 673 S.W.2d at 576 (quoting Cleveland v. Ward, 116 Tex. 1, 5, 285 S.W. 1063, 1068 (1926)). The Texas Supreme Court in *Iley v. Hughes*, 158 Tex. 362, 365, 311 S.W.2d 648, 652 (1958), had previously rejected the *Cleveland* language that a litigant's remedy must be "equally convenient, beneficial, and effective as mandamus." *See* Tim Gavin, Comment, *The Expanding Use of Mandamus to Review Texas District Court Discovery Orders: An Immediate Appeal is Available*, 32 SW. L.J. 1283, 1287 (1979) ("The supreme court rejected the *Cleveland* 'inconvenience' dictum in *Iley v. Hughes*, stating unequivocally that the inconvenience caused by an otherwise adequate appeal would not justify the use of mandamus"). In effect, *Jampole* resurrected the criticized *Cleveland* language. *See infra* text accompanying notes 161-68.

52. *Jampole*, 673 S.W.2d at 578 (Barrow, J., dissenting). Justice Barrow asserted that "the discretionary nature of discovery and the amorphous notion of relevancy most often

opinion would liberalize the availability of mandamus review, he was correct. The majority clearly had revolutionized the use of mandamus to review trial court discovery orders—a large step in the continuing expansion of the availability of mandamus relief. Although criticized at the time,[53] *Jampole* became one of the cornerstone Texas mandamus cases. Despite Justice Barrow's cries of warning, the appellate courts have refused to retreat from their position that mandamus may issue not only when a trial court improperly grants discovery,[54] but also when a trial court improperly limits or denies discovery.[55]

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counsel against appellate court intervention into the discovery process." *Id.* at 577. This view of the proper place of mandamus has in part prevailed. The discretionary nature of discovery is a fact the appellate courts must seriously consider before granting the writ of mandamus, but it does not necessarily bar the exercise of mandamus review. *See infra* text accompanying notes 87-148.

53. In legal circles, individuals echoed Justice Barrow's opinion that *Jampole* would change the nature of the "extraordinary" mandamus remedy. Legal commentators continue to recognize that *Jampole* radically liberalized the availability of mandamus review of discovery orders. *See, e.g.*, W. Wendell Hall, *Standards of Appellate Review in Civil Appeals*, 21 ST. MARY'S L.J. 865, 878 (1990) (the court in *Jampole* "has relaxed the requirements for obtaining a writ of mandamus in the discovery context"); Helen A. Cassidy, *The Instant Freeze-Dried Guide to Mandamus Procedure in Texas Courts*, 31 S. TEX. L. REV. 509, 511 (1990) ("The exception began consuming the rule in *Jampole v. Touchy*").

54. *See, e.g.*, General Motors Corp. v. Lawrence, 651 S.W.2d 732 (Tex. 1983) (mandamus may issue where trial judge's discovery order is overly broad); Stewart v. McCain, 575 S.W.2d 509 (Tex. 1978) (mandamus may issue where trial judge improperly ordered production of banking examiner documents protected by the Texas Banking Code); Channel Two Television v. Dickerson, 725 S.W.2d 470 (Tex. App.—Houston [1st Dist.] 1987, orig. proceeding) (mandamus may issue where trial judge improperly ordered discovery of documents protected by First Amendment reporter's privilege); Dresser Indus. v. Solito, 668 S.W.2d 893 (Tex. App.—Houston [14th Dist.] 1984, orig. proceeding) (mandamus may issue where trial judge ordered depositions of numerous foreign witnesses without considering potential alternatives); Menton v. Lattimore, 667 S.W.2d 335 (Tex. App.—Fort Worth 1984, orig. proceeding) (mandamus may issue where trial judge ordered disclosure of attorney work product, notwithstanding attorney fraud); Jones & Laughlin Steel v. Schattman, 667 S.W.2d 352 (Tex. App.—Fort Worth 1984, orig. proceeding) (mandamus may issue where trial judge ordered disclosure of opinions of a purely consulting expert).

55. *See generally* Weisel Enterprises v. Curry, 718 S.W.2d 56 (Tex. 1986) (mandamus may issue where trial judge denies discovery—without an in camera hearing—of documents labeled as attorney work product); Reveal v. West, 764 S.W.2d 8 (Tex. App.—Houston [1st Dist.] 1988, orig. proceeding) (mandamus may issue where trial judge's order precluded *any* reference to a doctor report); Goodspeed v. Street, 747 S.W.2d 526 (Tex. App.—Fort Worth 1988, orig. proceeding) (mandamus may issue where trial judge barred discovery of hospital records without hearing evidence in support of the claims of privilege); McAllen State Bank v. Salinas, 738 S.W.2d 381 (Tex. App.—Corpus Christi 1987, orig. proceeding) (mandamus may issue where trial judge denied discovery of bank records without reviewing records in an *in camera* hearing); Estate of Jo Anne Gilbert v. Black, 722 S.W.2d 548 (Tex. App.—Austin

C. *Legislative Expansion of Mandamus Review*

Around the same period of time that the supreme court in *Jampole* expanded the availability of the mandamus remedy, the Texas legislature expanded the accessibility of the mandamus remedy. In 1983, the legislature granted the Texas courts of appeals general mandamus jurisdiction over district and county court judges. While the supreme court retained the sole authority to issue a writ of mandamus against the head of an executive department of the state government,[56] the new mandamus provisions authorized both the supreme court and the courts of appeals to issue a writ of mandamus "agreeable to the principles of law regulating those writs, against a judge of a district or county court."[57] Under these provisions, the courts of appeals, which formerly had no mandamus authority to review the rulings of a district court, received the same power as the supreme court to correct erroneous pretrial discovery decisions through a writ of mandamus. As a result, the writ of mandamus, once exercised only by the highest state court, became a much more convenient remedy.[58]

D. *Recent Judicial Examination of Mandamus Review*

In the mid-1980s, use of the mandamus remedy flourished.[59] With the expanded availability and accessability of the writ of mandamus, attorneys optimistically challenged pre-trial discovery orders literally

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1987, orig. proceeding) (mandamus may issue where trial judge denied discovery of accident report in insurance policy coverage dispute); Velasco v. Haberman, 700 S.W.2d 729 (Tex. App.—San Antonio 1985, orig. proceeding) (mandamus may issue where trial judge only allowed five questions on adultery in husband's deposition in divorce action); Hilliard v. Heard, 666 S.W.2d 584 (Tex. App.—Houston [1st Dist.] 1984, orig. proceeding) (mandamus may issue where trial judge quashed deposition for no reason listed on record); Zenith Radio Corp. v. Clark, 665 S.W.2d 804 (Tex. App.—Austin 1983, orig. proceeding) (mandamus may issue where trial judge refused to compel discovery of fire report, because judge failed to make *in camera* inspection of report).

56. *See* TEX. GOV'T CODE ANN. § 22.002(c) (Vernon 1988).

57. *Id.* § 22.221(b).

58. *See* Helen A. Cassidy, *The Instant Freeze-Dried Guide to Mandamus Procedure in Texas Courts*, 31 S. TEX. L. REV. 509, 512 (1990) ("The ability to file in the nearest court of appeals rather than in Austin has made mandamus a more convenient option").

59. The vesting of general mandamus authority in the courts of appeals was intended to remove some of the mandamus burden from the supreme court. Indeed, in 1984, the year following this grant of authority in the appellate courts, the number of mandamus filings in the supreme court decreased by twenty-nine. However, by 1986, the number of mandamus filings in the supreme court *alone* had grown back to 1983 levels. *See* C.L. Ray & M.R. Yogi McKelvey, *The Mandamus Explosion*, 28 S. TEX. L. REV. 413, 414 n.2 (1987).

within days of their issuance. The courts of appeals urged caution in the exercise of mandamus relief,[60] but could not calm the stampede of litigants who sought such relief. Itself in the midst of a deluge of mandamus petitions, the Texas Supreme Court reversed its position favoring the liberal exercise of mandamus review. The supreme court issued a series of opinions that applied the abuse of discretion standard more strictly.[61] The court also issued a series of cases that restricted mandamus review of discovery *sanction* orders. The most significant case in this latter series was *Street v. The Second Court of Appeals*,[62] a brief *per curiam* opinion which rejected the use of mandamus to correct a trial court's erroneous imposition of attorneys' fees as a discovery sanction.

The plaintiffs in *Street*, co-executors of the estate of Frederick L. Cremean, filed an action to recover life insurance benefits from the Lone Star Insurance Company. During pre-trial discovery, the plaintiffs served written interrogatories and requests for admissions on Lone Star. For over three months after they were due, Lone Star refused to send its answers to these discovery requests. The plaintiffs filed a motion to compel discovery and a motion for sanctions. On the day prior to the hearing on these motions, Lone Star finally returned its answers to the interrogatories and responses to the requests for admissions. Nonetheless, as a discovery sanction, the trial court ordered Lone Star to pay the plaintiffs' attorney's fees for preparation of the motion to compel discovery and the motion for sanctions. Lone Star sought mandamus review of this discovery sanction in the court of appeals, which conditionally granted the writ.[63] The trial

60. *See, e.g.*, Employers Mut. Cas. Co. v. Street, 702 S.W.2d 779, 780 (Tex. App.—Fort Worth 1986, orig. proceeding) ("Unless the law dictates 'an absolute and rigid duty of the trial court to follow a fixed and prescribed course not involving the exercise of judgment or discretion,' the court should be hesitant to grant relief by writ of mandamus"); Gordon v. Blackmon, 675 S.W.2d 790, 792 (Tex. App.—Corpus Christi 1984, orig. proceeding) ("Mandamus traditionally has been an extreme measure to be utilized only when there has been a violation of a clear legal right possessed by the relator"); W.W. Rodgers and Sons Produce v. Johnson, 673 S.W.2d 291, 293 (Tex. App.—Dallas 1984, orig. proceeding) ("we are cognizant of the potential for harm to the judicial system implicit in a broad exercise of the issuance of writ of mandamus"); *see also* Baluch v. O'Donnell, 763 S.W.2d 8, 13 (Tex. App.—Dallas 1988, orig. proceeding) (Thomas, J., dissenting) ("It is not our function to referee the constant and myriad decisions a trial court makes in proceeding from the filing of a cause of action to final judgment").

61. *See infra* text accompanying notes 128-37.

62. 715 S.W.2d 638 (Tex. 1986) (per curiam).

63. *See* Lone Star Life Ins. v. Street, 703 S.W.2d 426 (Tex. App.—Fort Worth 1986),

judge, as well as the original plaintiffs, sought review in the Texas Supreme Court.

In *Street*, the supreme court resurrected the dormant inadequate remedy requirement. Reversing the court of appeals, the supreme court ruled that Lone Star had no right to mandamus relief of the trial judge's discovery sanction order. The highest court, citing Texas Rule of Civil Procedure 215,[64] implied that sanction orders were unique from other discovery orders and, consequently, subject to review *only* after final judgment.[65] Thus, the supreme court, rather than hold that appeal was an adequate remedy, determined that Lone Star's *sole* remedy was appeal.

The crux of the *Street* opinion was its distinction between sanction orders and other discovery orders. The supreme court remarked that *Street* "was not a case where the trial court has sought to compel disclosure of privileged materials."[66] Presumably, the supreme court intended in this disclaimer that sanction orders, unlike discovery orders which require disclosure of information, cannot cause irreversible harm. Such reasoning was dubious: sanction orders are far more likely to cause irreversible harm than, for example, discovery orders that preclude disclosure of information.[67] Yet, the supreme court had previously determined in *Jampole v. Touchy* that it could exercise its mandamus authority to correct orders that improperly denied discovery. Interestingly, as if to deemphasize the significance of *Jampole*, the *Street* court did not attempt to compare sanction orders with discovery orders that preclude disclosure.[68] The court in *Street* ignored its apparent conclusion in *Jampole* that the convenience of an appellate remedy was equally as important a factor as irreversible harm in determining whether mandamus was an appropriate remedy.

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overruled sub nom., Street v. The Second Court of Appeals, 715 S.W.2d 638 (Tex. 1986) (per curiam).

64. Rule 215(1)(d), (2)(b)(8), and (3) each provide that certain particular sanctions for abuse of discovery "shall be subject to review on appeal from the final judgment." TEX. R. CIV. P. 215(1)(d), (2)(b)(8), & (3). *See infra* text accompanying notes 177-78.

65. *Street*, 715 S.W.2d at 639-40.

66. *Id.* at 640. The supreme court cited *Smith v. White*, 695 S.W.2d 295 (Tex. App.—Houston [1st Dist.] 1985, orig. proceeding), for this proposition. Interestingly, *Smith* itself discussed the propriety of a trial court discovery sanction order. The court in *Smith* authorized the use of mandamus to correct a sanction order that effectively compelled the disclosure of privileged materials. *Id.* at 297.

67. *See infra* text accompanying notes 73-78.

68. *See supra* text accompanying notes 47-55.

While ultimately concluding that Lone Star's *sole* remedy under Texas Rule of Civil Procedure 215 was appeal, the supreme court in *Street* nonetheless rejected Lone Star's argument that appeal was an *inadequate* remedy. Lone Star complained that, even if an appellate court reversed the sanctions order on appeal, Lone Star would be unlikely to recover the amount it paid in satisfaction of the sanction. The supreme court responded that "[t]he uncertainty of recovering the money on appeal . . . is simply not a sufficient reason for the appellate court's interference with the pre-trial stages of this action."[69] Since the supreme court had already determined that the rules of civil procedure relegated Lone Star to an appellate remedy, the court's observation that the uncertainty of satisfaction on appeal did not justify mandamus intervention was mere dicta. The court's analysis of the inadequate remedy requirement, however, marked a significant departure from the expansive analysis in *Jampole*.

Although the court adopted a conservative interpretation of the inadequate remedy requirement in *Street*, the essential nature of the mandamus remedy remained unchanged. Litigants continued to file mandamus petitions in large numbers, and the appellate courts continued to use the mandamus remedy to invalidate erroneous discovery orders. The subsequent opinion of the Texas Supreme Court in *Stringer v. The Eleventh Court of Appeals*[70] in part encouraged the continued proliferation of mandamus proceedings. The supreme court in *Stringer* reemphasized that appeal generally is an adequate remedy for an erroneous discovery sanction order.[71] Significantly, though, the court appeared to retreat from the comprehensive language in *Street*. In *Stringer*, as in *Street*, the trial court imposed an allegedly erroneous award of attorney's fees as a sanction against discovery abuse. While the supreme court in *Stringer* agreed that mandamus was unavailable to review the sanction, it suggested that its opinion in *Street* only prohibited mandamus review of an award of attorney's fees, not sanction orders in general.[72]

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69. Street v. The Second Court of Appeals, 715 S.W.2d 628, 639-40 (1986) (per curiam), *overruling sub. nom., Lone Star Life Ins.*, 703 S.W.2d 426.

70. 720 S.W.2d 801 (Tex. 1986) (per curiam).

71. *Id.* at 802.

72. *Id.* The facts in *Stringer* were virtually identical to the facts in *Street*. Accordingly, the court applied its decision in *Street*, which it described as a holding that "a court of appeals abused its discretion by granting mandamus relief from a trial court's *award of attorney's fees*

In *Braden v. Downey*,[73] the supreme court attempted to resolve the apparent inconsistency between *Street* and *Stringer*. The trial court in this case, as a sanction against discovery abuse, ordered that the offending attorney pay a $10,000 fine to the party seeking discovery and perform ten hours of community service.[74] The offending attorney sought mandamus relief in the supreme court. The supreme court again cautioned that the writ of mandamus is not simply a handy substitute for appeal:

> [T]he appeals courts [should] not embroil themselves unnecessarily in incidental pretrial rulings of the trial courts. If all monetary sanctions like the ones in [*Street* and *Stringer*] were reviewable by mandamus, it would soon cease to be an extraordinary writ. The judicial system cannot afford immediate review of every discovery sanction.[75]

The *Braden* court concluded, however, that *Street* and *Stringer* did not preclude mandamus review of *all* discovery sanction orders. The court reasoned that, if a sanction is so severe that it effectively adjudicates the dispute between the parties, appeal is an inadequate remedy.[76] In such a situation, if the sanction constitutes an abuse of discretion or clear violation of the law, mandamus is an appropriate alternative to appellate review.[77]

Unfortunately, *Braden* does not completely clarify the extent of mandamus review of discovery sanction orders. Important questions remain. For example, *Braden* does not purport to define all of the circumstances in which mandamus review of sanction orders is proper. *Braden* certainly recognizes that an appellate court can cor-

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as discovery sanctions, because such awards are reviewable on appeal after final judgment under TEX. R. CIV. P. 215(2)(b)(8) and 215(3)." *Id.* (emphasis added).

73. 34 Tex. Sup. Ct. J. 721 (June 19, 1991).

74. *Id.* at 721.

75. *Id.* at 724.

76. *Id.* *See* Transamerican Natural Gas Corp. v. Powell, 34 Tex. Sup. Ct. J. 701, 706 (June 19, 1991) ("Today we have held in *Braden v. Downey* . . . that sanctions should not be imposed in such a way that effective appellate review is thwarted. Whenever a trial court imposes sanctions which have the effect of adjudicating a dispute, whether by striking pleadings, dismissing an action or rendering a default judgment, but which do not result in rendition of an appealable judgment, then the eventual remedy by appeal is inadequate").

77. *Braden*, 34 Tex. Sup. Ct. J. at 726. The supreme court in *Braden* conditionally granted the writ of mandamus, but interestingly did not conclude that the sanctions the trial court imposed were improper. Rather, the supreme court reasoned that the trial court abused its discretion in ordering that the offending attorney complete the sanctions prior to appeal. The supreme court required that the trial court defer the time for performance until after an appellate court could determine the propriety of the sanction on appeal. *Id.*

rect, through a writ of mandamus, a sanction, such as the dismissal of a cause of action or the striking of pleadings, that debilitates a party's ability to achieve justice in the courts. However, *Braden* does not hint whether, under particular circumstances, a lesser sanction can ever be subject to mandamus review. Thus, *Street* notwithstanding, *Braden* does not indicate whether a court can ever exercise mandamus review of an award of attorney's fees, even if the award is so repressive it threatens the offending party's ability to continue litigation.[78]

This much is clear: trial judges have extremely broad discretion over the imposition of discovery sanctions.[79] In most cases, the "abuse of discretion" rubric will insulate sanction orders from mandamus review, regardless whether appeal is an adequate remedy. However, there is one type of discovery sanction over which the trial courts have little discretion: the exclusion of undisclosed witnesses.[80] Mandamus review of this type of discovery sanction presents special problems.

III. REQUIREMENTS FOR THE ISSUANCE OF MANDAMUS TO CORRECT TRIAL COURT DISCOVERY ORDERS

In recent years, the Texas Supreme Court has revolutionized the rules governing pre-trial discovery.[81] Change in this area has been swift. Just as the trial courts develop a working understanding of the discovery rules, the supreme court alters the rules to meet some perceived need. In the last two years, for example, the supreme court has restricted the availability of a privilege from discovery for consulting experts[82] and imposed the requirement that all discovery motions con-

78. Some language in *Braden* suggests that the court not only rejected the implication in *Street* that all sanction orders are immune from mandamus review, but also rejected the conclusion that all awards of attorney's fees are immune from mandamus review. *Id.* at 724.

79. *See* Jarrett v. Warhola, 695 S.W.2d 8, 10 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd). "The imposition of penalties or sanctions for the failure or refusal of a party to comply with discovery rules is within the sound discretion of the trial court." *Id.*

80. *See* David W. Holman & Byron C. Keeling, *Disclosure of Witnesses in Texas: The Evolution and Application of Rules 166b(6) and 215(5) of the Texas Rules of Civil Procedure*, 42 BAYLOR L. REV. 405, 417 (1990). "Thus, after *Morrow*, the trial courts no longer have the broad unfettered discretion to admit testimony despite the failure to disclose witnesses. The only vestige of discretion left in the trial court over such sanctions is the determination of good cause." *Id.*

81. *See* sources cited *supra* note 39.

82. TEX. R. CIV. P. 166b(2)(e)(1), (3)(b) (amended September 1, 1990). Under the old rule, a consulting expert was not privileged from disclosure if his work product formed a basis in whole or in part of the opinions of a testifying expert. The new rule further limits the

tain a certificate stating that the moving party has attempted to resolve the discovery dispute.[83] Erroneous interpretations of these changes are possible, and indeed are likely with the absence of prior significant precedent. Such erroneous interpretations could have a substantial effect on the subsequent course of a lawsuit. Mandamus offers an appealing method to correct erroneous interpretations of the discovery rules and yet avoid unnecessary delay and expense.

Texas appellate courts are reluctant to disturb the discretionary decisions of a trial court prior to final judgment. The appellate courts recognize that "constant interruption of the trial process . . . would destroy all semblance of orderly trial proceedings."[84] A trial court's actions must threaten the rights of a litigant with permanent and irreversible damage before an appellate court properly should intervene in an ongoing action.[85] Thus, the writ of mandamus is an extraordinary remedy granted in extreme circumstances: "Mandamus issues *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."[86]

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privilege against disclosure: a consulting expert is not privileged from disclosure if his opinions or impressions have even been reviewed by a testifying expert.

83. TEX. R. CIV. P. 166b(7) (amended September 1, 1990). Under the old rule, no certificate was required.

84. Pope v. Ferguson, 445 S.W.2d 950, 954 (Tex. 1969), *cert. denied*, 397 U.S. 997 (1970) ("with this type of intervention, the fundamental concept of all American judicial systems of trial and appeal would become outmoded")

85. *See* Iley v. Hughes, 158 Tex. 362, 367, 311 S.W.2d 648, 652 (1958).

86. Johnson v. The Honorable Fourth Court of Appeals, 700 S.W.2d 916, 917 (Tex. 1985) (emphasis added); *see also* Proffer v. Yates, 734 S.W.2d 671, 673 (Tex. 1987) ("Mandamus relief is available when under the circumstances of the case the facts and law permit the trial court to make but one decision—and the trial court has refused to make that decision—and remedy by appeal to correct the ruling is inadequate"); Jampole v. Touchy, 673 S.W.2d 569, 572-73 (Tex. 1984) ("In deciding whether a writ of mandamus is appropriate, we recognize that mandamus will not issue unless a clear abuse of discretion is shown. Furthermore, appellate courts will not intervene to control incidental trial court rulings when there is an adequate remedy by appeal"); Zep Mfg. v. Anthony, 752 S.W.2d 687, 689 (Tex. App.—Houston [1st Dist.] 1988, orig. proceeding) ("Generally, mandamus relief is available where there is a clear abuse of discretion or a clear violation of law and there is no adequate remedy by appeal"); Central Freight Line v. White, 731 S.W.2d 121, 122 (Tex. App.—Houston [14th Dist.] 1987, orig. proceeding) ("Mandamus issues only to correct a clear abuse of discretion or the violation of a duty imposed by law when there is no adequate remedy at law"); Essex Crane Rental v. Kitzman, 723 S.W.2d 241, 242 (Tex. App.—Houston [1st Dist.] 1986, orig. proceeding) ("The writ of mandamus is proper when the trial court has clearly abused its discretion in denying discovery of properly discoverable information and the party denied discovery does not have an adequate remedy by appeal")

A. *Abuse of Discretion or Violation of Law*

Few would now challenge the *authority* of an appellate court to issue a writ of mandamus to correct erroneous trial court discovery orders. Many, however, might challenge the exercise of this authority under a given set of circumstances. Discovery in Texas trial practice is a complicated process that may stretch over several years in some cases.[87] The Texas Rules of Civil Procedure govern the proper conduct of the discovery process,[88] but obviously cannot provide specific direction on every unusual situation that may—and often does—arise during discovery.[89] The rules thus confer broad discretion on Texas

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87. The current Texas Rules of Civil Procedure afford litigants broad rights of discovery. Absent an exemption, (defining exemption, *see* TEX. R. CIV. P. 166b(3) and TEX. R. CIV. EVID. 501-506) "[p]arties may obtain discovery regarding *any* matter which is relevant to the subject matter in the pending action whether it relates to the claim or defense of any other party." TEX. R. CIV. P. 166b(2)(a) (emphasis added). Even otherwise inadmissible information is discoverable, provided the information "appears reasonably calculated to lead to the discovery of admissible evidence." *Id.*

The Texas courts base these broad rights of discovery on two policy considerations. First, the discovery process must allow the parties a legitimate opportunity "to obtain the fullest knowledge of issues and facts prior to trial." West v. Solito, 563 S.W.2d 240, 243 (Tex. 1978). Second, the discovery process must operate "to prevent trials by ambush and to ensure that fairness would prevail." Gutierrez v. Dallas Indep. School Dist., 729 S.W.2d 691, 693 (Tex. 1987). Discovery in Texas state courts, rooted in these policies of fairness and full disclosure, attempts to ensure that all parties have an equal opportunity to prepare their case for trial. *See* Braniff, Inc. v. Lentz, 748 S.W.2d 297, 301 (Tex. App.—Fort Worth 1988, writ denied).

Undoubtedly, the broad rules of discovery have expanded the classifications and categories of material subject to disclosure. No longer may attorneys hide behind antiquated privileges and procedures that serve little purpose other than to conceal truth. Yet, even these broad modern discovery rules are susceptible to a variety of complicating factors: discovery abuse, good faith misinterpretation of the rules, unique and unprecedented discovery situations. Unless a party actively seeks judicial intervention, the trial court largely removes itself from direct involvement in the discovery process. As a consequence, the discovery process may endure routine delays and interruptions.

88. *See* TEX. R. CIV. P. 166b-168; 187-209.

89. If a trial court is faced with a complex discovery question that the rules of civil procedure do not expressly address, it of course may rely on an expanding body of appellate court opinions that have explored many of the ramifications of the Texas discovery requirements, from whether a judge may limit the number of deposition questions a wife in divorce proceedings may ask her husband concerning his adulterous activity, Velasco v. Haberman, 700 S.W.2d 729, 729 (Tex. App.—San Antonio 1985, orig. proceeding), to whether a hospital district must disclose the names of blood donors to a plaintiff who contracted AIDS from a blood transfusion, Tarrant County Hosp. Dist. v. Hughes, 734 S.W.2d 675, 676-77 (Tex. App.—Fort Worth 1987, orig. proceeding) (en banc). But in the event that there exists no pertinent precedent on a discovery question, a trial court is not without guidance. The controlling Texas Rule of Civil Procedure is Rule 1, which provides:

> The proper objective of rules of civil procedure is to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive

trial judges to tailor the scope of discovery.[90] Moreover, the rules confer broad discretion on Texas trial judges to punish litigants who abuse the discovery process.[91] The broad exercise of discretion over discovery matters counsels against unwarranted appellate court intervention;[92] the presumption must be that trial court discovery orders, if not arbitrary and without reason, do not pose the concerns that justify appellate intervention through mandamus review.

The writ of mandamus is, of course, an appropriate method to correct a lower court's violation of a legal duty. For example, if a trial court fails to perform a duty which it was obligated to perform, its omission is subject to mandamus review.[93] Similarly, if a trial court performs an act which it had no authority to perform, the court's

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law. To the end that this objective may be attained with as great expedition and dispatch and at the least expense both to the litigants and to the state as may be practicable, these rules shall be given a liberal construction.

TEX. R. CIV. P. 1. Thus, the trial court ultimately is directed by its own inherent sense of "what the law of a case ought to be." Gilmore v. O'Neil, 107 Tex. 18, 30, 173 S.W. 203, 208 (1915). In effect, Rule 1 requires that a court determine whether its interpretation of the discovery rules effects justice and fairness. "[T]he rules are but tools to be used in procedural conduct aimed at the objective of accomplishing justice. . . . If their application would effect injustice they are to be disregarded for that is the antithesis of their purpose." Brightwell v. Rabeck, 430 S.W.2d 252, 257 (Tex. Civ. App.—Fort Worth 1968, writ ref'd n.r.e.).

90. *See* Ginsberg v. The Fifth Court of Appeals, 686 S.W.2d 105, 108 (Tex. 1985) ("The admission of evidence and the scope of discovery largely rests within the discretion of the trial court"); *Hughes*, 734 S.W.2d at 677 ("The scope of discovery largely rests within the discretion of the trial court").

91. *See* Jarrett v. Warhola, 695 S.W.2d 8, 10 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd) ("The imposition of penalties or sanctions for the failure or refusal of a party to comply with discovery rules is within the sound discretion of the trial court")

92. *See* Gordon v. Blackmon, 675 S.W.2d 790, 793 (Tex. App.—Corpus Christi 1984, orig. proceeding); *see also* Jampole v. Touchy, 673 S.W.2d 569, 577-78 (Tex. 1984) (Barrow, J., dissenting).

93. The court's failure to perform an obligatory duty is a breach of a "ministerial" act or function. Since early common law, the courts have recognized the value of mandamus to require the performance of a ministerial act. If the law "prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment," then the duty is a ministerial act. Commissioner of the Gen. Land Office v. Smith, 5 Tex. 471, 479 (1849). By definition, a ministerial act is not the same as a discretionary act; however, ministerial acts and discretionary acts share perplexing similarities. The exercise of discretion, for instance, is itself a ministerial act. Thus, Texas courts have cautioned that while mandamus typically will not issue to require the exercise of discretion *in a particular manner*, mandamus may issue to *compel* the exercise of discretion. *See* King v. Guerra, 1 S.W.2d 373, 376 (Tex. Civ. App.—San Antonio 1927, writ ref'd); *cf.* Maresca v. Marks, 362 S.W.2d 299, 301 (Tex. 1962) (holding trial judge's refusal to exercise discretion in separating immaterial and irrelevant portions of income tax returns was abuse of discretion and subject to mandamus).

action is subject to mandamus review.[94] In this latter instance, "[i]t is not enough that the order of the court is erroneous; the order of the court must have been beyond the power of the court to enter."[95] If the trial court enters a discovery order that clearly and unmistakably exceeds the scope of the rules of civil procedure, the order is subject to mandamus review.

Courts have generally held that mandamus is an inappropriate method to correct discretionary acts. The Texas courts, however, have long recognized an exception to this general rule: mandamus may issue to correct a particularly offensive *abuse of discretion*. This exception has grown so large that it now almost swallows the general rule. But it was not always this large. In *Arberry v. Beavers*,[96] an 1851 opinion, the Texas Supreme Court first recognized that mandamus could issue to correct "so *gross an abuse of discretion* or such an evasion of positive duty as to amount to a virtual refusal to perform the duty enjoined or to act at all in contemplation of law."[97] The standard articulated in *Arberry*, while an expansion of the traditional view that mandamus review extends solely over ministerial acts, did not greatly expand the authority of appellate courts over trial judges and other state government officials. The *Arberry* standard, for all practical purposes, only permitted mandamus review of discretionary decisions that were so egregious they amounted to the violation of a legal duty. Indeed, the supreme court in *Arberry*, applying its strict standard, refused to issue a writ of mandamus to compel the chief justice of Cass County to tabulate returns from an election to determine the location of the county seat.[98]

For well over a century, the *Arberry* formulation laid dormant.[99] Courts recognized that mandamus could potentially issue to correct a "gross abuse of discretion," but in practice they declined to grant the writ in the absence of a clear violation of a legal duty. In 1927, for example, in *King v. Guerra*,[100] the San Antonio Court of Civil Appeals approved the potential use of mandamus to correct a govern-

94. State v. Ferguson, 133 Tex. 60, 63, 125 S.W.2d 272, 274 (1939).

95. Zep Mfg. v. Anthony, 752 S.W.2d 687, 689 (Tex. App.—Houston [1st Dist.] 1988, orig. proceeding); *see also Ex Parte* Rhodes, 163 Tex. 31, 34, 352 S.W.2d 249, 250 (1961).

96. 6 Tex. 457 (1851).

97. *Id.* at 472 (emphasis added).

98. *Arberry*, 6 Tex. at 458.

99. *See infra* text accompanying notes 106-22.

100. 1 S.W.2d 373 (Tex. Civ. App.—San Antonio 1927, writ dism'd).

ment official's gross abuse of discretion. The court determined that mandamus *could* be used to correct the discretionary decisions of officials who "acted wholly through fraud, caprice, or by a purely arbitrary decision, and without reason."[101] The *King* court cautioned, however, that mandamus *should not* often be used to displace a lower official's discretionary acts.[102] Accordingly, because there was no evidence that officials acted fraudulently or capriciously, the court in *King* refused to issue a writ of mandamus to compel the health officer and board of commissioners of the City of San Antonio to license the construction and operation of an undertaking establishment.[103]

The *King* formulation reflected a slightly more relaxed approach to the use of mandamus. Although the supreme court in *Arberry* authorized the use of mandamus only when an official's discretionary actions amounted to a "virtual refusal" to perform a prescribed duty, the *King* court determined that mandamus could correct any arbitrary or capricious discretionary action unsupported by facts or law.[104] Nonetheless, the standard recognized in *King* would not unleash a rash of mandamus petitions on the Texas courts. Even when faced with a rare petition, the Texas courts continued to define narrowly a litigant's right to mandamus review of discretionary acts.[105] The courts recognized the validity of the abuse of discretion standard, but they routinely refused to apply it.

Not until 1956 did the Texas Supreme Court finally employ the abuse of discretion standard as the basis upon which to grant a writ of mandamus. In *Womack v. Berry*,[106] the supreme court directed a district judge to set aside an order granting a stay of pending proceed-

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101. *Id.* at 376.

102. The *King* court recognized the general rule "that mandamus will not lie to control or review the exercise of the powers granted by law to 'any court, board or officer,' when the act complained of calls for and involves the exercise of discretion upon the part of the tribunal or officer." *Id.* The court explained that mandamus may issue to correct a gross abuse of discretion, but noted that "this exception is restricted in its application to cases in which the offending board acts in the absence of any fact or condition supporting or tending to support its conclusion in the matter acted upon." *Id.* at 376-77.

103. *King*, 1 S.W.2d at 377.

104. *Id.* at 376-77.

105. *See, e.g.*, Fuller v. Mitchell, 269 S.W.2d 517, 522-23 n.2 (Tex. Civ. App.—Dallas 1954, writ ref'd n.r.e.); Lewis v. Harris, 48 S.W.2d 730, 732-33 (Tex. Civ. App.—El Paso 1932, writ ref'd); City of San Antonio v. South Trunk Co., 13 S.W.2d 401, 404 (Tex. Civ. App.—San Antonio 1929, no writ).

106. 156 Tex. 44, 291 S.W.2d 677 (1956).

ings.[107] The plaintiff in *Womack* instituted an action to recover possession of property left under a trust created in his father's will, arguing that he was entitled to hold the property as a successor trustee.[108] The named trust beneficiaries, all of whom were entitled to receive a share of the property upon reaching majority, challenged the plaintiff's right to possession.[109] One of the trust beneficiaries had recently volunteered to serve as a naval aviation cadet; he moved that the judge stay the proceedings until the beneficiary had completed his four year term of service.[110] The plaintiff in response requested that the judge simply separate the claims against the naval cadet and allow the action otherwise to proceed. The district judge denied the plaintiff's motion and granted the stay.[111] The supreme court, however, granted a writ of mandamus, noting that "it was clearly the duty of the [district] court to order a separate trial."[112] The *Womack* court acknowledged that while trial courts have broad discretion to determine the necessity for a separate trial,[113] such discretion is not unlimited.[114] A trial court in Texas may be "required to exercise a sound and legal discretion within limits created by the circumstances of the particular case."[115] In *Womack*, the trial court's stay of the entire action effectively denied the plaintiff any relief for four years, even though a separate trial might have entitled the plaintiff to immediate—even if partial—relief. Because a separate trial was unlikely to seriously prejudice the legal rights of the naval cadet,[116] the supreme

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107. 291 S.W.2d at 683.

108. *Id.* at 680.

109. *Id.*

110. The beneficiary relied upon the Soldiers' and Sailors' Civil Relief Act of 1940, a federal statute which provided that in any action in which "a person in military service is involved, either as plaintiff or defendant, shall on application by such person be stayed as provided in the Act unless . . . the ability of such person to prosecute the action or conduct his defense is not materially affected by reason of his military service." *Womack*, 291 S.W.2d at 681.

111. *Id.* at 681.

112. *Id.* at 683.

113. The supreme court recited Rule 174(b), which at the time provided, and still today provides, that the "court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue." TEX. R. CIV. P. 174(b). The court emphasized that the permissive word "may" evidenced the breadth of the trial court's discretion. *Womack*, 291 S.W.2d at 683.

114. *Womack*, 291 S.W.2d at 683.

115. *Id.*

116. The supreme court noted that the plaintiff desired the trial court to dismiss with prejudice the portion of his action against the naval cadet. This dismissal in turn would not

court reasoned that the trial court's discretionary act effected a "manifest injustice."[117] Under these particular circumstances, the supreme court concluded that the trial court's stay of the proceedings was a "clear abuse of discretion" subject to mandamus review.[118]

The *Womack* court conceded that no prior Texas case had ever issued a writ of mandamus to correct a discretionary act, but it cited both *Arberry* and *King* for the proposition that the abuse of discretion rationale was a recognized exception to the general rule that mandamus lies only to enforce the performance of a ministerial act.[119] Curiously, the supreme court's understanding in *Womack* of the abuse of discretion standard differed strikingly from the apparent understanding in *Arberry* and *King*. The *Womack* court explained that the writ of mandamus "may issue in a proper case to correct a *clear* abuse of discretion."[120] This expression of the standard substituted the word "clear"—a word that in itself implies no extreme or flagrant wrong—for the word "gross" used by the *Arberry* and *King* courts.[121] After rephrasing the abuse of discretion standard, the supreme court in *Womack* applied the standard with little discussion. The court reasoned that the trial judge's failure to grant a separate trial produced a manifest injustice; it declined to discuss whether the trial judge's action amounted to "fraud, caprice, or . . . a purely arbitrary decision."[122]

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hinder the cadet's ability to pursue at a later time the counterclaims he asserted against the plaintiff. *Id.*

117. *Id.*

118. *Womack*, 291 S.W.2d at 683.

119. *Id.* at 682-83.

120. *Id.* at 682 (emphasis added).

121. *Compare Womack*, 291 S.W.2d at 682 (emphasis added) ("The rule denying mandamus with respect to matters of a discretionary character is not without limitation, however, and the writ may issue in a proper case to correct a *clear* abuse of discretion") *with King*, 1 S.W.2d at 376, (emphasis added) ("There exists this exception to the rule stated, that a mandamus will lie to correct a *gross* abuse of discretion") *and Arberry*, 6 Tex. at 472 (emphasis added) (mandamus may issue to correct "so *gross* an abuse of discretion or such an evasion of positive duty as to amount to a virtual refusal to perform the duty enjoined or to act at all in contemplation of law")

122. *King*, 1 S.W.2d at 376. The dissenting judges in *Womack* were unable to conclude that the trial court's decision not to award separate trials amounted to fraud or caprice. *See Womack*, 291 S.W.2d at 685 (Griffin, J., dissenting). The judges emphasized that the abuse of discretion exception in *King* was expressly limited to cases in which the trial court "act[ed] in the absence of any fact or condition supporting or tending to support its conclusion in the matter acted upon." *Id.* at 685 (quoting *King*). Noting that the naval cadet beneficiary easily could be viewed as a "necessary" party to the plaintiff's action, the dissent asserted that the trial court could not be said to have acted in the absence of any fact or condition supporting or tending to support its decision not to grant a separate trial. *Id.* at 685. Interestingly, the

The very fact that in *Womack* the supreme court for the first time actually used the abuse of discretion standard suggested that the court intended to open its doors to a wider variety of pending issues. But even more revealing was the court's apparent rejection of the strict formulation of the abuse of discretion standard in *Arberry* and *King*. Although citing both of these cases, the supreme court's embrace of the "clear" abuse of discretion standard signalled a significant expansion in the availability of mandamus review.

In the mandamus cases that immediately followed *Womack*, the Texas Supreme Court abandoned the traditional definition of abuse of discretion. The court continued to cite the abuse of discretion standard, but it did not limit application of the standard to cases in which the trial court acted fraudulently, capriciously or arbitrarily. Instead, particularly in discovery cases,[123] the court determined the propriety of a trial judge's decision and then recited the abuse of discretion standard as a justification for appellate intervention.[124] Of course, such an approach to mandamus authority placed the cart before the horse: whether a trial judge's decision is proper is a question for appeal, not mandamus.[125]

The court's backward approach to the use of mandamus in discovery cases prompted bitter criticism. Commentators complained, with some justification, that the abuse of discretion standard was useless and existed merely as a *post hoc* basis for mandamus review of unusual or novel discovery questions.[126] One commentator suggested that if a trial judge's improper disposition of a unique discovery question in itself supported mandamus relief, the supreme court should

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dissent did not quibble with the majority's formulation of the *King* exception as a "clear" abuse of discretion standard, rather than a "gross" abuse of discretion standard. *Id.*

123. *See supra* text accompanying notes 27-40.

124. *See* Helen A. Cassidy, *The Instant Freeze-Dried Guide to Mandamus Procedure in Texas Courts*, 31 S. TEX. L. REV. 509, 511-12 (1990).

> Although the supreme court usually recites clear abuse of discretion in its mandamus decisions involving discovery, the court actually appears to determine whether a discovery order is right or wrong. It is therefore not surprising that the most dramatic increase in mandamus practice has been in the area of discovery.

Id.

125. A mere error in judgment is not the equivalent of an abuse of discretion. *See* Johnson v. The Honorable Fourth Court of Appeals, 700 S.W.2d 916, 918 (Tex. 1985).

126. *See* Tim Gavin, Comment, *The Expanding Use of Mandamus to Review Texas District Court Discovery Orders: An Immediate Appeal is Available*, 32 SW. L.J. 1283, 1288 (1979); David West, Note, *The Use of Mandamus to Review Discovery Orders in Texas: An Extraordinary Remedy*, 1 REV. LITIG. 325, 338 (1981).

expressly state that this was a standard.[127]

Perhaps as a result of this criticism or perhaps as a result of the increased caseload engendered by the court's lax approach, the supreme court ultimately came full circle on the abuse of discretion standard. In 1985, the court issued two opinions which, after years of neglect, appeared to resurrect the abuse of discretion standard as a legitimate inquiry in mandamus cases. In the first case, *Downer v. Aquamarine Operators*,[128] the supreme court cautioned that "[t]he test for abuse of discretion is not whether, in the opinion of the reviewing court, the facts present an appropriate case for the trial court's action."[129] Instead, the court noted that the term "abuse of discretion" implies an arbitrary or unreasonable trial court decision—a decision made without reference to any guiding rules and principles. It recited that the "mere fact that a trial judge may decide a matter within his discretionary authority in a different manner than an appellate judge in a similar circumstance does not demonstrate that an abuse of discretion has occurred."[130]

Downer was not a mandamus proceeding,[131] but a supreme court justice suggested that *Downer* nonetheless "sheds some light" on the application of the abuse of discretion standard in mandamus proceedings.[132] If so, the opinion in *Downer* certainly represents a strong re-

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127. *See* David West, Note, *The Use of Mandamus to Review Discovery Orders in Texas-Texas: An Extraordinary Remedy*, 1 REV. LITIG. 325, 338 (1981). "The Texas Supreme Court should explicate better what constitutes an abuse of discretion and should provide expressly that a unique question of discovery law is one standard the court will use in granting writs of mandamus." *Id.*

128. 701 S.W.2d 238 (Tex. 1985).

129. *Id.* at 241.

130. *Id.* at 242.

131. In *Downer*, the plaintiff, the widow of a seaman who drowned while attempting to free a line that blocked the propeller of the Four Point IV, attempted to take the depositions of the crew of the vessel. *Downer*, 701 S.W.2d at 240. Twice the depositions were scheduled, and each time the crew failed to appear. *Id.* The plaintiff filed a motion for sanctions, but the defendant's counsel failed to appear at the hearing on the motion. *Id.* The district court finally granted the plaintiff an interlocutory default judgment as to liability. *Id.* at 241. A subsequent jury trial dealt only with the issue of damages. *Id.* On *direct appeal*, the defendant argued that the trial court abused its discretion in granting the default judgment. *Id.* at 240-41.

132. C.L. Ray & M.R. Yogi McKelvey, *The Mandamus Explosion*, 28 S. TEX. L. REV. 413, 418 (1987). C.L. Ray was a member of the Texas Supreme Court from November 1980 to January 1991.

It certainly would seem that there should be some difference between the abuse of discretion standard on mandamus review and the abuse of discretion standard on direct appeal. Mandamus is, after all, an extraordinary remedy imposed in extreme circumstances. If the abuse of

buke of the view that the abuse of discretion standard on mandamus review serves little purpose. At the very least, *Downer* recognizes that the abuse of discretion standard, wherever it applies, is a substantively significant barrier to the exercise of an appellate court's review.

Even more revealing is the opinion of the supreme court in *Johnson v. The Honorable Fourth Court of Appeals*.[133] In *Johnson*, a mandamus proceeding,[134] the court reasserted the strict formulation of the abuse of discretion standard, stating that a trial court "abuses its discretion when it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law."[135] Evoking memories of the once-forgotten *King* opinion, the supreme court in *Johnson* urged that mandamus should issue only when the combination of the facts and law permitted the trial court to make but one decision and the trial court has failed to make that decision. "A mere error in judgment is not an abuse of discretion."[136]

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discretion standard on mandamus review were interpreted no differently from a common standard of review on direct appeal, mandamus in many cases would be distinguished from appeal only by the "inadequacy of remedy" standard. In any event, if nothing else, *Downer* at least stands for the proposition that the abuse of discretion standard—wherever it appears—does not permit an appellate court merely to substitute its judgment for that of the trial court.

133. 700 S.W.2d 916 (Tex. 1985).

134. In *Johnson*, Sue Johnson sued a security guard and a security agency for their failure to prevent an assault. *Johnson*, 700 S.W.2d at 916. At trial, the jury found the security agency negligent, but it determined that the negligence was not a proximate cause of damages. *Id.* Because the damage issue was submitted conditionally, the jury did not answer it. *Id.* Johnson objected to the incomplete verdict, and the trial court granted her a mistrial. *Id.* The security agency sought mandamus in the court of appeals, which granted the writ. *Id.* at 917. Johnson then sought mandamus in the supreme court. *Id.* The principal issue facing the supreme court was the scope of its inquiry in a mandamus proceeding in which a court of appeals has already determined that the trial court abused its discretion. *Id.* The court declined the suggestion that it simply review the *decision of the court of appeals* for an abuse of discretion. *Id.* at 918 (emphasis added). Instead, the court reasoned that it could conduct an "independent inquiry whether the *trial court's order* is so arbitrary, unreasonable, or based upon so gross and prejudicial an error of law as to establish abuse of discretion." *Id.* (emphasis added).

135. *Johnson*, 700 S.W.2d at 917. The supreme court emphasized the conceptual difference between the term "abuse of discretion" when applied to the actions of a trial court and when applied to the review of an appellate court:

> The use of the phrase 'abuse of discretion' to describe the alleged misfeasance of both the trial court and the court of appeals is unfortunate because its meaning in each context is not the same. The discretion exercised by a trial court when ruling on an interlocutory matter is ordinarily quite broad, whereas the discretion exercised by an appellate court possessing mandamus power is much more confined.

Id.

136. *Id.* at 918.

The supreme court's opinion in *Johnson*, if not *Downer* as well, undoubtedly reemphasized the significance of the abuse of discretion standard in mandamus proceedings: mandamus is premised upon a trial court's arbitrary or unreasonable actions, not its erroneous decisions. Six years later, however, it remains unclear whether *Johnson* has materially affected the Texas courts' approach to mandamus review of trial court discovery orders. Even now, some appellate courts in mandamus proceedings still apply strict scrutiny to discovery orders. These courts have continued to grant mandamus relief from discovery orders with little discussion of the arbitrary or unreasonable nature of the trial court's objectionable exercise of discretion.[137]

The effect of the *Johnson* formulation of the abuse of discretion standard on the mandamus review of discovery *sanction* orders is equally difficult to gauge. The one court that has explicitly addressed the abuse of discretion standard on mandamus review of a discovery sanction order ignored the *Johnson* definition. In *Baluch v. O'Donnell*,[138] the Dallas Court of Appeals considered a petition for writ of mandamus from a trial court's sanction order in a divorce and child custody action. After the father, who had initiated a voluntary legitimation petition to obtain custody of his son, defied a court order to pay the mother's attorney's fees, the trial court entered an order under Texas Rule of Civil Procedure 215 striking the father's pleadings.[139] On mandamus review, the Dallas appellate court stated that a trial court "abuses its discretion if the sanction it imposes does not further one of the purposes that discovery sanctions were intended to further."[140] The Dallas court identified three purposes of discovery sanctions: (1) to secure compliance with the rules of discovery, (2) to deter other litigants from violating the discovery rules, and (3) to pun-

137. *See generally* Goodspeed v. Street, 747 S.W.2d 526 (Tex. App.—Fort Worth 1988, orig. proceeding); McAllen State Bank v. Salinas, 738 S.W.2d 381 (Tex. App.—Corpus Christi 1987, orig. proceeding); Channel Two Television v. Dickerson, 725 S.W.2d 470 (Tex. App.—Houston [1st Dist.] 1987, orig. proceeding).

138. 763 S.W.2d 8 (Tex. App.—Dallas 1988, orig. proceeding).

139. *Id.* at 9. The mother's attorneys applied for sanctions under Rule 215, which, among other items, permits: "An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing with or without prejudice the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party; . . ." TEX. R. CIV. P. 215(2)(b)(5). However, the very title of Rule 215 directs that the sanctions it authorizes are aimed only at discovery abuse.

140. *Baluch*, 763 S.W.2d at 10.

ish parties who violate the discovery rules.[141] Concluding that the striking of the father's pleadings failed to advance any of these purposes, the court authorized mandamus relief.

The court in *Baluch* ultimately reached the right decision, but not because it held that the trial court's sanction failed to advance one of the purposes of discovery. Whether a sanction secures compliance with the rules of discovery or effectively punishes a delinquent party does not dispose of the question of whether a trial court has abused its discretion.[142] The fact that a sanction fails to advance the purposes of

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141. *Id.* The purposes of discovery sanctions isolated by the court in *Baluch* are consistent with the purposes recognized by the Texas Supreme Court. *See* Dyson v. Olin Corp., 692 S.W.2d 456, 459 (Tex. 1985) (Kilgarlin, J., concurring) ("discovery sanctions should be invoked both to punish and to deter others from abusing the discovery process"); *see also Downer*, 701 S.W.2d at 242.

Until recent years, Texas courts reserved severe discovery sanctions for extreme circumstances in which a party intentionally and unjustifiably delayed the trial process. The courts reasoned that the sole purpose of discovery sanctions was remedial—to secure compliance with future discovery requests. In the mid-1980s, the view of the Texas courts shifted. Understandably concerned with maintaining manageable and orderly case dockets, the courts began to recognize that deterrence and punishment were valid considerations under the discovery rules.

Some commentators, including the authors of this article, have warned, however, that the Texas courts now emphasize the policies of deterrence and punishment to the detriment of a fair trial. *See* David W. Holman & Byron C. Keeling, *Disclosure of Witnesses in Texas: The Evolution and Application of Rules 166b(6) and 215(5) of the Texas Rules of Civil Procedure*, 42 BAYLOR L. REV. 405, 423, 447-48 (1990) (while sanctions must be strict to accomplish the legitimate interests of deterrence and punishment, they must not unjustly deprive a litigant of her rights to the fair disposition of her claims).

142. Of course, the fact that a sanction does not further the purposes of discovery is relevant, even significant—just *not dispositive*. *But cf.* Axelson, Inc. v. McIlhany, 798 S.W.2d 550, 555 (Tex. 1990); Tom L. Scott, Inc. v. McIlhany, 798 S.W.2d 556, 560 (Tex. 1990). In these companion cases, *Axelson, Inc.* and *Tom L. Scott, Inc.*, two defendants changed the designation of several of their expert witnesses from "testifying" experts to "consulting-only" experts after the defendants settled with some of the plaintiffs. The defendants admitted to the trial court that the settlement was conditioned on the requirement that their experts not be called to testify. The trial court, however, approved the redesignation and denied the remaining plaintiffs discovery of the expert witnesses. On mandamus review, the supreme court ruled that the redesignation was an *egregious violation of the policies underlying the discovery rules* and, consequently, that the denial of discovery was an abuse of discretion. *See Tom L. Scott, Inc.*, 798 S.W.2d at 560.

There is a significant difference between *Baluch* and *Axelson, Inc./Tom L. Scott, Inc.*, however. In *Baluch*, the *trial court*'s sanction failed to further the purposes of the discovery rules. Conversely, in *Axelson, Inc.* and *Tom L. Scott, Inc.*, the *defendants*' manipulation of discovery procedure violated the policies underlying the rules of discovery. In the latter instance, the trial court's implicit approval of the defendants' actions encouraged the parties to commit discovery abuses. *See id.* (" 'If we were to hold otherwise, nothing would preclude a party in a multi-party case from in effect auctioning off a witness' testimony to the highest bidder' ") (quoting Williamson v. Superior Court, 582 P.2d 126, 132 (1978)). Thus, the trial court's

discovery establishes only that the sanction is improper or simply ineffective; it does not necessarily establish that the sanction is so arbitrary and unreasonable as to amount to a clear and prejudicial error of law.[143] A sanction, for example, conceivably could have such an unobstrusive and insignificant impact that it fails to foster the purposes of discovery sanctions, but still is not an abuse of discretion.

In *Baluch*, the court of appeals need not have reached the abuse of discretion issue; the trial court's action under the circumstances was a clear violation of the law. As the court of appeals ultimately recognized, the trial court's order striking the father's pleadings had absolutely no relationship to discovery.[144] The trial court's order was a response to the father's failure to pay interim attorney's fees, not a response to an abuse of the discovery process. The trial court had no authority to grant sanctions under Rule 215 in the absence of discovery abuse.[145] Thus, assuming there was no adequate remedy at law, mandamus could properly issue to correct the trial court's sanction order.

A writ of mandamus may issue to correct a trial court's abuse of discretion, but it is not limited to such a situation. Mandamus lies as well to correct a trial court order that the court had no power to enter.[146] If a trial court's order exceeds the authority authorized in rule or statute, the trial court has committed a violation of the law and has not exercised any discretion. This distinction between "abuse of discretion" and "clear violation of the law" is particularly signifi-

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action constituted a "decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law." *Johnson*, 700 S.W.2d at 917. Unlike the court in *Baluch*, the supreme court in *Axelson, Inc.* and *Tom L. Scott, Inc.* did not suggest that an action of the trial court which does not further the purposes of discovery is *de facto* an abuse of discretion.

143. The dissent in *Baluch* properly noted the shortcomings of the majority's reliance on the purposes of discovery sanctions, stating that it is not the function of an appellate court "to referee the constant and myriad decisions a trial court makes in proceeding from the filing of a cause of action to final judgment." *Baluch*, 763 S.W.2d at 13 (Thomas, J., dissenting). The dissent failed to recognize, however, that the trial court's action represented a clear violation of the law. *See infra* text accompanying notes 144-45.

144. *Baluch*, 763 S.W.2d at 10 ("It is clear from the record before us that this case *does not involve the issue of any abuse of discovery*. . . . [T]he court ordered payment of $25,000 in interim attorney's fees to the spouse's attorney in a child custody case *without any relationship to discovery*") (emphasis in original).

145. TEX. R. CIV. P. 215(2)(b) ("If a party . . . *fails to comply with proper discovery requests or to obey an order to provide or permit discovery*, . . . the court in which the action is pending may, after notice and hearing, make such order in regard to the failure as are just") (emphasis added).

146. *See supra* text accompanying notes 93-95.

cant in mandamus proceedings on discovery sanctions. Trial courts are vested with enough discretion over discovery sanctions that mandamus commonly *should not* issue to correct a sanction order in the absence of a clear violation of the law.[147]

Texas appellate courts, however, continue to exercise their mandamus authority broadly. Even opinions concerning mandamus review of trial court discovery sanction orders persist in finding abuse of discretion despite scanty discussion of the arbitrary or unreasonable nature of the trial court's action.[148] Such opinions tend to cloud the already unclear nature of the abuse of discretion requirement. Some courts might follow the lead of the supreme court in *Downer* and *Johnson*, but other courts are likely to follow the recent opinions that continue to adopt a lenient approach to the abuse of discretion standard. Given the similarly contorted nature of the inadequacy of remedy requirement, mandamus review of discovery sanction orders—particularly those orders relating to witness disclosure—is subject to

147. In General Motors Corp. v. Lawrence, 651 S.W.2d 732 (Tex. 1983), for example, the Texas Supreme Court authorized the use of mandamus to correct the trial court's order that the relator answer overly broad interrogatories as a sanction for discovery delay. The supreme court noted that "[c]ompelling discovery of non-relevant material . . . is not one of the available sanctions under our rules." *Id.* at 734. The trial court exceeded its authority in requiring responses to improper discovery requests; thus, its order was a "clear violation" of the discovery rules. *Id.*

Similarly, in Zep Mfg. v. Anthony, 752 S.W.2d 687 (Tex. App.—Houston [1st Dist.] 1988, orig. proceeding), the First District Court of Appeals issued a writ of mandamus to correct the trial court's order striking the relator's pleadings *sua sponte* and without notice. The appellate court noted that it found "no authority for the proposition that a trial court may impose sanctions *sua sponte*." *Id.* at 689. This was not necessarily a case in which the trial court exercised its *discretion* improperly; the relator's actions during discovery may well have justified the trial court's imposition of severe sanctions. But, because the opposing party never requested sanctions, this was a case in which the trial court exercised its *authority* improperly. The *sua sponte* striking of the relator's pleadings was a "clear violation" of the rules governing the trial court's authority to issue sanctions. *Id.*

148. A prime example of this unreasoned approach to the abuse of discretion standard is Smith v. White, 695 S.W.2d 295 (Tex. App.—Houston [1st Dist.] 1985, orig. proceeding). In *Smith*, the trial court imposed on the relator a $100,000 cost bond as a sanction for the relator's refusal on fifth amendment grounds to answer written interrogatories. *Id.* at 296. The appellate court concluded that the information requested from the relator in the interrogatories was privileged, and, for that reason, the trial court's sanction was an abuse of discretion. *Id.* at 297.

The determination whether requested discovery information is privileged is a decision left largely to the trial court's sound judgment. The fact that the trial court may have exercised its judgment erroneously does not, in itself, establish an abuse of discretion. *See supra* text accompanying notes 133-36. Curiously, the Texas Supreme Court cited *Smith* favorably in Street v. The Second Court of Appeals, 715 S.W.2d 638, 640 (Tex. 1986) (per curiam).

various interpretations. In order to avoid awkward results, the courts must develop a common understanding of mandamus principles.

B. *Inadequacy of Remedy*

In addition to the abuse of discretion requirement—or, in some instances, the clear violation of law requirement—mandamus opinions impose an "inadequacy of remedy" requirement on the party seeking review: mandamus issues only when there is no other adequate remedy at law.[149] This inadequacy of remedy requirement has a surprisingly significant effect on mandamus review of trial court discovery orders. Although a discovery order is interlocutory and therefore not immediately appealable,[150] a party may wait until final judgment and appeal an erroneous discovery order.[151] If harmful error, the appellate court then may reverse the trial court's action and remand the case for new trial.[152] In many instances this procedure affords the complaining party an adequate remedy from the trial court's erroneous discovery ruling.

The Texas Supreme Court has long recognized that the existence of an adequate remedy by way of appeal precludes the use of the writ of

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149. *See, e.g.*, Proffer v. Yates, 734 S.W.2d 671, 673 (Tex. 1987) (mandamus may issue even where law provides remedy, but where usual procedure inadequate to protect rights of individual); Johnson v. The Honorable Fourth Court of Appeals, 700 S.W.2d 916, 917 (Tex. 1985) (mandamus may issue from appellate courts only to correct clear abuse of discretion, and where no adequate remedy available); Jampole v. Touchy, 673 S.W.2d 569, 573 (Tex. 1984) (denial by trial court to compel discovery subject to mandamus because no adequate remedy by appeal).

150. *See* North East Indep. School Dist. v. Aldridge, 400 S.W.2d 893, 897-98 (Tex. 1966); Itz v. Kunz, 511 S.W.2d 77, 77 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.).

151. *See* Pope v. Stephenson, 787 S.W.2d 953, 954 (Tex. 1990) (per curiam) (complaining party has burden to establish sufficient record of error).

152. *See* TEX. R. APP. P. 81(b)(1), which provides in pertinent part:

> No judgment shall be reversed on appeal and a new trial ordered in any cause on the ground that the trial court has committed an error of law in the course of the trial, unless the appellate court shall be of the opinion that the error complained of amounted to such a denial of the rights of the appellant as was reasonably calculated to cause and probably did cause rendition of an improper judgment in the case, or was such as probably prevented the appellant from making a proper presentation of the case to the appellate court.

Id.; *see also* McInnes v. Yamaha Motor Corp., 673 S.W.2d 185, 188 (Tex. 1984) (stating that harmful error presents grounds for new trial), *cert. denied*, 469 U.S. 1107 (1985); Dennis v. Hulse, 362 S.W.2d 308, 309 (Tex. 1962) (appealing party must show error caused improper judgment for appellate court to authorize reversal); Bridges v. City of Richardson, 354 S.W.2d 366, 368 (Tex. 1962) (determining reversible error dependent upon probability error caused improper judgment).

mandamus,[153] but it was not until 1926 that the supreme court first attempted to define the application of the inadequacy of remedy standard. In *Cleveland v. Ward*,[154] two parties on opposite sides of a title dispute initiated separate actions in different district courts alleging essentially the same complaints; each court asserted jurisdiction over the dispute. Ultimately, both parties requested that the supreme court issue a writ of mandamus to prohibit the further exercise of jurisdiction in one district court or the other. The supreme court, suggesting that mandamus offered an effective vehicle to easily counter procedural injustice, commented that, in order to supersede mandamus review, "there must exist, not only a remedy by appeal, but the appeal provided for must be competent to afford relief on the very subject matter of the application, *equally convenient, beneficial, and effective as mandamus*."[155] Noting that appeal would be "wholly inadequate" to untangle the judicial stalemate between the district courts, the supreme court agreed to issue a writ of mandamus prohibiting the exercise of jurisdiction in one of the district courts.[156]

The supreme court's understanding in *Cleveland* of the inadequacy of remedy requirement brought unintended consequences. By implying that mandamus could issue whenever appeal was not as "convenient, beneficial and effective" as mandamus, the court opened its doors to mandamus petitions in any case in which the appellate process would *delay* resolution of a significant dispute. In effect, *Cleveland* suggested that mandamus was a quicker and more expedient alternative to appeal. Naturally, litigants exploited this perceived advantage of the mandamus remedy.

Recognizing the burden a literal interpretation of the *Cleveland* "inconvenience" language would place on reviewing courts, the supreme court in 1958 attempted to narrow the inadequacy of remedy standard. In *Iley v. Hughes*,[157] the court rejected inconvenience as a basis for issuance of the writ of mandamus.[158] The court noted that

153. *See* Aycock v. Clark, 94 Tex. 375, 60 S.W. 665, 666 (1901) (stating mandamus not proper when appeal exists as adequate remedy); Screwmen's Beneficial Ass'n v. Benson, 76 Tex. 552, 13 S.W. 379 (1890) (stating mandamus remedy of last resort).

154. 116 Tex. 1, 285 S.W. 1063 (1926).

155. *Id.* at 1068 (emphasis added).

156. *Id.* at 1069.

157. 158 Tex. 362, 311 S.W.2d 648 (1958).

158. In *Iley*, plaintiff Guy Hancock sued J.M. Iley for damages resulting from rifle fire. *Iley*, 311 S.W.2d at 649. At trial, the jury returned a verdict in Hancock's favor on all of the liability issues, but was unable to agree on the answers to the damages issues. The trial court

the "delay in getting questions decided through the appellate process, or . . . [the] court costs [that] may thereby be increased, will not justify intervention by appellate courts through the extraordinary writ of mandamus."[159] As an alternative to the *Cleveland* formulation of the inadequacy of remedy standard, the *Iley* court commented that interference with the trial process through mandamus is justified "only when parties stand to lose their *substantial rights*."[160]

However, the supreme court's opinion in *Iley*, while a helpful policy statement, was hardly a lucid expression of the inadequacy of remedy standard. The court stated that the appellate process is inadequate only if the substantial rights of a party are threatened, but it declined to define the critical term "substantial rights." It left future courts to isolate and analyze the circumstances in which the substantial rights of a party required protection through the writ of mandamus. In a broad sense, therefore, the *Iley* opinion missed an excellent opportunity. The supreme court might have articulated a meaningful inadequacy of remedy standard that would have guided the direction of Texas mandamus proceedings for decades. Instead, *Iley* accomplished nothing more than expressing the intent that mandamus is a narrow remedy.

While the supreme court in *Iley* properly recognized that mandamus is an extraordinary remedy, the use of the writ of mandamus to control trial court decisions escalated in the years following *Iley*. Trial court discovery orders, which implicated sometimes critical rights and privileges of disclosure and secrecy, were popular targets of

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overruled Iley's motion for mistrial and granted Hancock's motion for an interlocutory judgment on the liability issues and a separate trial of the damages issues. Iley complained that the separate trial and subsequent appeal would be an impermissible delay and unnecessary expense. *Id.* The supreme court acknowledged that Iley's complaint was valid: "Our courts have always frowned upon piecemeal trials, deeming the public interest, the interests of litigants and the administration of justice to be better served by rules of trial which avoid a multiplicity of suits." *Id.* at 651. Nonetheless, the court denied Iley's mandamus petition. *Id.*

The dissent in *Iley* argued that "no necessity exists for compelling the relator to resort to appellate appeal from a void and useless act." *Id.* at 653 (Smith, J., dissenting). The dissent commented that the trial court's action was a clear violation of its duty under the law and not a discretionary decision, apparently suggesting that the inadequacy of remedy requirement for mandamus review only attaches if the trial court abuses its discretion. Recent supreme court opinions, however, impose the inadequacy of remedy requirement regardless of whether the trial court's action is an abuse of discretion or clear violation of the law. *See* Proffer v. Yates, 734 S.W.2d 671, 673 (Tex. 1987); *Johnson*, 700 S.W.2d at 917.

159. *Iley*, 311 S.W.2d at 652.

160. *Id.* (emphasis added).

the writ—and remain so today.[161] Perhaps because *Iley* failed to articulate a meaningful inadequacy of remedy standard, the supreme court in subsequent mandamus opinions often addressed the standard cursorily, if at all.[162] In one particularly notable opinion, *Jampole v. Touchy*,[163] the supreme court even appeared to resurrect the *Cleveland* "inconvenience" language it had ostensibly rejected in *Iley*.

The court in *Jampole v. Touchy* responded to criticism that its prior mandamus opinions had inexplicably expanded the use of mandamus to situations in which the trial court had erroneously denied discovery.[164] The supreme court commented that mandamus generally was the only adequate remedy for a trial court's abusive or improper denial of discovery, offering two reasons: (1) the aggrieved party could not easily demonstrate harmful error in the appellate process,[165] and (2) appeal was not a "convenient, beneficial and effective" remedy.[166] Although the second of these reasons was more direct, each of the court's reasons for issuing mandamus raised essentially the same complaint—the *inconvenience* of the appellate process. The supreme court in *Jampole* feared that appeal would cause unnecessary delay,[167] an irrelevant concern under *Iley v. Hughes*. Interestingly, the court offered no explanation of the apparent conflict between its language in *Jampole* and *Iley*. Indeed, the court in *Jampole* made absolutely no reference to the *Iley* opinion, much less did it attempt to demonstrate that appeal would endanger the complainant's "substantial rights."[168]

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161. *See supra* text accompanying notes 59-60.

162. *See generally* West v. Solito, 563 S.W.2d 240 (Tex. 1978); Allen v. Humphreys, 559 S.W.2d 798 (Tex. 1977); Barker v. Dunham, 551 S.W.2d 41 (Tex. 1977).

163. 673 S.W.2d 569 (Tex. 1984).

164. *See* Tim Gavin, Comment, *The Expanding Use of Mandamus to Review Texas District Court Discovery Orders: An Immediate Appeal is Available*, 32 SW. L.J. 1283, 1291 (1979) (use of mandamus to compel discovery "so far afield of the initial rationale for reviewing discovery orders that the supreme court has, in essence, sanctioned immediate appeal of questionable decisions on discovery motions"); David West, Note, *The Use of Mandamus to Review Discovery Orders in Texas: An Extraordinary Remedy*, 1 REV. LITIG. 325, 341 (1981) (appellate process affords adequate relief from the denial of discovery).

165. *Jampole*, 673 S.W.2d at 576.

166. *Id.* (quoting Cleveland v. Ward, 116 Tex. 1, 14, 285 S.W. 1063, 1068).

167. *See id.* (requiring a party to try his lawsuit, debilitated by the denial of proper discovery, only to have that lawsuit rendered a certain nullity on appeal, falls well short of a remedy by appeal that is 'equally convenient, beneficial, and effective as mandamus' ").

168. Although clearly inconsistent with *Iley*, the opinion in *Jampole* might not have been such a significant break with precedent. In Crane v. Tunks, 160 Tex. 182, 328 S.W.2d 434 (1959), a mandamus opinion decided only the year following *Iley*, the supreme court quoted the *Cleveland* "inconvenience" language as a basis for mandamus relief. *Id.* at 439. As in

While difficult to reconcile with *Iley's* rejection of appellate delay as a basis for mandamus intervention, the opinion in *Jampole* nonetheless remains the most salient expression of the inadequacy of remedy standard in mandamus proceedings concerning the erroneous denial of discovery.[169] *Jampole* and its progeny have opened the door to repeated pre-trial challenges of discovery orders in the appellate courts. Indeed, in these cases, the supreme court effectively authorized the immediate appellate review of many discovery orders.[170] Relying upon *Jampole*, Texas courts have granted writs of mandamus in a litany of cases involving complicated discovery questions.[171]

Only in mandamus proceedings involving discovery *sanctions* have the Texas courts shown reluctance to conclude that appeal is an inadequate remedy.[172] In two separate opinions, *Street v. The Second Court of Appeals*[173] and *Stringer v. The Eleventh Court of Appeals*,[174] the Texas Supreme Court declined to grant a writ of mandamus to correct a trial court's erroneous imposition of attorney's fees as a discovery sanction. In each case, the court, citing Texas Rule of Civil Procedure 215, determined that at least some sanction orders, includ-

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Jampole, the court in *Crane* declined to address the *Iley* "substantial rights" definition of the inadequacy of remedy. *See supra* text accompanying notes 14-22.

169. One court has even described *Jampole v. Touchy* as "the leading discovery mandamus case." Reveal v. West, 764 S.W.2d 8, 10 (Tex. App.—Houston [1st Dist.] 1988, orig. proceeding).

170. *See* Tim Gavin, Comment, *The Expanding Use of Mandamus to Review Texas District Court Discovery Orders: An Immediate Appeal is Available*, 32 Sw. L.J. 1283, 1291 (1979) (the supreme court has, "in essence, sanctioned immediate appeal of questionable decisions on discovery motions"); Elizabeth G. Thornburg, *Interlocutory Review of Discovery Orders: An Idea Whose Time Has Come*, 44 Sw. L.J. 1045, 1052 (1990) ("The Texas courts have moved from a system in which writs of mandamus were comparatively unavailable . . . to a system in which orders granting and denying discovery are immediately reviewable in the friendly neighborhood court of appeals").

171. *See supra* notes 54-55. Prior to *Jampole*, the supreme court already had recognized that appeal was an inadequate remedy for the erroneous authorization of discovery. *See* Crane v. Tunks, 160 Tex. 182, 191, 328 S.W.2d 434, 438 (1959). Of course, the release of secret or privileged information carries implications that are irreversible by the time of appeal. The same concerns do not necessarily pervade the erroneous denial of discovery. *See supra* text accompanying notes 44-46.

172. This section of this article principally details the adequacy of appeal as a remedy for improper discovery sanctions. *See infra* text accompanying notes 173-83. Although not particularly relevant to this discussion, it is interesting to note that at least one court has suggested that sanctions themselves may be an adequate remedy that would preclude mandamus review. Sutherland v. Moore, 716 S.W.2d 119, 121 (Tex. App.—El Paso 1986, orig. proceeding).

173. 715 S.W.2d 638 (Tex. 1986) (per curiam).

174. 720 S.W.2d 801 (Tex. 1986) (per curiam).

ing awards of attorney's fees, are subject to appellate review *only* after final judgment.[175] In the years immediately following these cases, several Texas courts interpreted *Street* and *Stringer* to preclude mandamus review of *all* trial court discovery sanction orders.[176]

The conclusion that Texas Rule of Civil Procedure 215 precludes mandamus review of all discovery sanction orders finds little support in the language of the rule. Rule 215 provides that certain particular

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175. The language of the opinions in *Street* and *Stringer* differs subtly. *Street* suggests that appeal is an adequate remedy for *all* discovery sanction orders, while *Stringer* suggests only that appeal is an adequate remedy for the imposition of attorney's fees as a discovery sanction. *See supra* text accompanying notes 62-72. One commentator has suggested that the differences between the language in *Street* and the language in *Stringer* caused needless confusion concerning the availability of mandamus to review sanction orders. William W. Kilgarlin, *Sanctions for Discovery Abuse: Is the Cure Worse than the Disease?*, 54 TEX. B.J. 658, 660 (1991) ("the Court is sending out mixed signals about what to do with the concept that sanctions can be addressed only on appeal, not on mandamus").

176. *See* Wal-Mart Stores v. Street, 761 S.W.2d 587, 589 (Tex. App.—Fort Worth 1988, orig. proceeding) (adequate remedy exists by appeal for daily monetary sanctions imposed on party's failure to produce a deposition witness); Central Freight Line v. White, 731 S.W.2d 121, 122 (Tex. App.—Houston [14th Dist.] 1987, orig. proceeding) (adequate remedy exists by appeal for trial court order striking defendant's pleadings and granting a default judgment on liability issues); *see also* Shirley v. Montgomery, 768 S.W.2d 430, 435 (Tex. App.—Houston [14th Dist.] 1989, orig. proceeding) (Ellis, J., dissenting) (adequate remedy exists by appeal for trial court threat to strike a parent's pleadings in custody dispute if parent did not pay costs of ad litem).

On the other hand, two appellate court mandamus opinions, Zep Mfg. v. Anthony, 752 S.W.2d 687 (Tex. App.—Houston [1st Dist.] 1988, orig. proceeding), and Shirley v. Montgomery, 768 S.W.2d 430 (Tex. App.—Houston [14th Dist.] 1989, orig. proceeding), offered a different interpretation of *Street* and *Stringer*. Each opinion limited *Street* and *Stringer* essentially to their similar factual scenarios—mandamus review of attorney's fees sanction orders. In *Zep*, the First District Court of Appeals in Houston concluded that *Street* and *Stringer* stood for nothing more than the ordinary proposition that mandamus will not issue if an adequate remedy exists at law. *Zep*, 752 S.W.2d at 689. The court of appeals declared that "[t]he holding in *Street* would not prohibit mandamus relief under the appropriate circumstances, e.g., where an appeal would not be an adequate remedy." *Id.* Finding that appeal would not adequately remedy the trial court's *sua sponte* imposition of sanctions, the court in *Zep* granted mandamus relief. *Id.*

In *Shirley v. Montgomery*, the Fourteenth District Court of Appeals in Houston also determined that the opinions in *Street* and *Stringer* represented nothing more than a general rule of non-reviewability, stating: "Ordinarily, mandamus will not lie if the relator has an adequate remedy on appeal." *Shirley*, 768 S.W.2d at 433-34. Like the court of appeals in *Zep*, the *Shirley* court recognized an exception to the general rule. Citing *Jampole v. Touchy*, the court in *Shirley* determined that "[t]here are instances . . . in which a party can be so prejudiced by discovery sanctions that appeal will not be adequate." *Id.* at 434. The court of appeals concluded that the trial court's threat to strike the relator's pleadings if the relator did not pay the costs of an ad litem in a custody dispute so prejudiced the relator's opportunity to present her claim of conservatorship that appeal was not an adequate remedy for the trial court's abuse of discretion. *Id.*

sanctions for abuse of discovery "shall be subject to review on appeal from the final judgment."[177] The rule does not expressly state, nor does it necessarily imply, that sanctions are subject to review *only* on appeal. If anything, Rule 215 acts as a prohibition against interlocutory appeals and not a proscription against writs of mandamus.[178] Thus, *Street* and *Stringer* notwithstanding, Rule 215 should have little effect on the availability of mandamus review.[179]

In a recent opinion, *Braden v. Downey*,[180] the Texas Supreme Court rejected the conclusion that all discovery sanction orders are immune from mandamus review. Interestingly, the supreme court neither abandoned the reasoning that Rule 215 limits the availability of mandamus review nor otherwise criticized its prior opinions in *Street* and *Stringer*.[181] Instead, the court in *Braden* recognized, as a practical matter, that a prophylactic rule against mandamus review of sanction orders strikes an unfair blow to litigants against whom a trial court imposes severe and undeserved sanctions. The supreme court, reasoning that appeal inadequately remedies a sanction so severe it "raises the real possibility that a party's willingness or ability to continue the litigation will be significantly impaired," concluded that mandamus in some cases provides an appropriate remedy against improper sanction orders.[182]

Unlike *Jampole v. Touchy*, *Braden* does not adopt an expansive view of the mandamus remedy. *Braden*, in fact, recognizes that mandamus usually is an inappropriate remedy to correct sanction orders. Basically, at least as to sanctions that do not involve awards of attor-

177. TEX. R. CIV. P. 215(1)(d), (2)(b)(8), (3).

178. Interlocutory appeals and writs of mandamus are entirely different vehicles, subject to different rules. Interlocutory appeals are limited by statutory requirements. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014 (Vernon Supp. 1990). Writs of mandamus are limited by common law requirements. *See supra* text accompanying notes 87-171.

179. Even if Rule 215 does limit mandamus review of sanction orders, this rule should not affect mandamus review of witness disclosure orders. In *Street*, the supreme court relied upon the provision that certain sanction orders "shall be subject to review on appeal from the final judgment." *Street*, 715 S.W.2d at 639. This language appears three separate times in various subsections of Rule 215. TEX. R. CIV. P. 215(1)(d), (2)(b)(8), (3). The language does not appear in subsection 5, however, which authorizes the sanctions for failure to supplement discovery responses.

180. 34 Tex. Sup. Ct. J. 721 (June 19, 1991).

181. Indeed, the supreme court commented that the opinions in *Street* and *Stringer* express a valid concern that "the appeals courts not embroil themselves unnecessarily in incidental pretrial rulings of the trial courts." *Id.* at 724.

182. *Id.*

neys' fees, the court in *Braden* has returned mandamus jurisprudence to the position it occupied prior to *Street*.[183] Mandamus review of discovery sanctions, therefore, is not improper under the appropriate circumstances: the trial court abused its discretion or committed a clear violation of the law and appeal is not an adequate remedy. Of course, the opinion in *Braden* posits yet another articulation of the conditions that render appeal an inadequate remedy. Under *Braden*, appeal is inadequate to remedy a sanction that is so severe it effectively adjudicates the dispute between the parties.

With the *Iley v. Hughes* and *Jampole v. Touchy* standards, and now the *Braden* standard, the inadequacy of remedy requirement, like the abuse of discretion requirement, continues to trouble the Texas courts. Each of these standards offers a different definition of the term "inadequacy of remedy." In circumstances that do not resemble the facts in *Iley*, *Jampole*, or *Braden*, the Texas courts may find it difficult to determine which standard applies. In particular, cases involving witness disclosure orders, which often encompass both normal discovery orders and exclusionary sanction orders, raise sticky questions concerning the appropriate inadequacy of remedy standard.

IV. APPLICATION OF THE MANDAMUS REQUIREMENTS TO WITNESS DISCLOSURE ORDERS

None of the Texas discovery rules have developed as quickly as the rules governing disclosure of witnesses. Such disclosure has only been assured since 1970, and even then no sanction was available to punish abuse of the disclosure requirements.[184] Only since the mid-1980s has a party's failure to disclose the identity of a witness in response to an appropriate discovery inquiry resulted in the severe and automatic sanction of exclusion of the undisclosed witness' testimony.[185]

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183. It is unclear whether *Braden* alters the rule in *Street* that awards of attorneys' fees are immune from mandamus review. *See supra* text accompanying note 78.

184. *See* William W. Kilgarlin & Don Jackson, *Sanctions for Discovery Abuse Under New Rule 215*, 15 ST. MARY'S L.J. 767, 817-18 (1984); Don C. Sherwood & Linda K. Duncan, *Discovery of Witnesses and Potential Parties in Texas*, 50 TEX. L. REV. 351, 354 & n.18 (1972).

185. *See* TEX. R. CIV. P. 215(5), which states:

> Failure To Respond To Or Supplement Discovery. A party who fails to respond to a request for discovery shall not be entitled to present evidence which the party was under a duty to provide in a response or supplemental response or to offer the testimony of an expert witness or of any other person having knowledge of discoverable matter, unless the trial court finds that good cause sufficient to require admission exists. The burden of

The current rules governing disclosure of witnesses are deceptively simple on their face. A party to litigation in a Texas court must fairly answer all specific discovery requests for the identity and location of expert witnesses and "persons having knowledge of relevant facts," a euphemism for fact witnesses.[186] Texas Rule of Civil Procedure 166b(6) requires that "a party . . . reasonably supplement" these discovery answers, if the party acquires information upon the basis of which he knows either of the following: (1) the answers were incorrect or incomplete when made; or (2) the answers, although correct and complete when made, are no longer true and complete and the failure to amend would mislead the questioning party.[187] In addition, the rules require supplementation of the identities and the substance of testimony of all expert witnesses a party has not previously disclosed in response to an appropriate discovery request.[188] Finally, the rules require that a party is under a duty to supplement discovery answers when an order of the court or agreement of the parties imposes such a duty.[189]

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establishing good cause is upon the party offering the evidence and good cause must be shown in the record.

Id. See generally E.F. Hutton & Co. v. Youngblood, 741 S.W.2d 363 (Tex. 1987); Gutierrez v. Dallas Indep. School Dist., 729 S.W.2d 691 (Tex. 1987); Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986) (per curiam); Yeldell v. Holiday Hills Retirement & Nursing Center, 701 S.W.2d 243 (Tex. 1985).

186. The Texas Rules of Civil Procedure do not specifically authorize the discovery of lay or fact witnesses. Texas case law has therefore determined that a party is not required to disclose the identities of those fact witnesses the party will call to testify at trial. *See* Employers Mutual Liability Ins. Co. v. Butler, 511 S.W.2d 323, 324-25 (Tex. Civ. App.—Texarkana 1974, writ ref'd n.r.e.). However, while the discovery of "witnesses who will be called to testify at trial" is not permitted, no such prohibition exists on the discovery of "persons having knowledge of relevant facts." *See* TEX. R. CIV. P. 166b(2)(d) ("A party may obtain discovery of the identity and location . . . of any potential party and of persons having knowledge of relevant facts"). Just as with undisclosed expert witnesses, a person having knowledge of relevant facts may not testify at trial if the person is not disclosed in response to an appropriate discovery request. *See* Clayton v. First State Bank, 777 S.W.2d 577, 580 (Tex. App.—Fort Worth 1989, writ denied) (finding that reputation witness should be disclosed as witness having knowledge of relevant facts); Farm Servs. v. Gonzales, 756 S.W.2d 747, 751 (Tex. App.—Corpus Christi 1988, writ denied) (stating that failure to disclose wife's knowledge of relevant facts should have disallowed testimony).

187. TEX. R. CIV. P. 166b(6)(a). Although there is no specific provision in the discovery rules that requires the disclosure of lay or fact witnesses, an attorney should provide their names and addresses in response to an appropriate request for the identity and location of persons with knowledge of relevant facts. *See supra* note 186. If the attorney's original response becomes incorrect or incomplete, Rule 166b(6)(a) may then require supplementation.

188. TEX. R. CIV. P. 166b(6)(b).

189. TEX. R. CIV. P. 166b(6)(c). The trial court has the discretion to order the parties to

Whenever Rule 166b(6) requires supplementation of the identities and locations of witnesses, the party must supplement its discovery responses in a timely fashion. In most situations, supplementation must occur no less than thirty days prior to trial, unless the court finds good cause for later supplementation.[190] However, with regard to supplementing the identities and locations of *expert* witnesses, Rule 166b(6) requires that the supplementing party furnish this information "as soon as is practical, but in no event less than thirty (30) days prior to the beginning of trial except on leave of court."[191]

The sanction for the failure to designate witnesses in a timely fashion is harsh. Texas Rule of Civil Procedure 215(5) provides that the trial court shall exclude the testimony of all witnesses who were not timely disclosed in response to an appropriate discovery request.[192] The only exception to this automatic sanction of exclusion arises if "the trial court finds that good cause sufficient to require admission exists."[193] The burden to establish good cause rests upon the party who intends to offer the undisclosed witness.[194]

As uncomplicated as the language of the witness disclosure rules appears, the rules certainly have not simplified the discovery process.

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limit the number of expert witnesses and to perform "[s]uch other matters as may aid in the disposition of the action," including the exchange of witness lists. TEX. R. CIV. P. 166.

The parties may agree to exchange witness lists without court intervention. Any such agreement, however, must comply with the strict requirements of the Texas Rules of Civil Procedure. "Unless otherwise provided in these rules, no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record." TEX. R. CIV. P. 11.

190. TEX. R. CIV. P. 166b(6).

191. TEX. R. CIV. P. 166b(6)(b). The language of this rule might suggest that the trial court may impose sanctions for the failure of a party to disclose experts even prior to thirty days before trial, if it would have been practical for the party to supplement earlier. The courts of appeals, however, have split over the question whether a trial court may exclude the testimony of an expert witness whom a party discloses thirty-one or more days prior to trial. *Compare* Mother Frances Hosp. v. Coats, 796 S.W.2d 566, 570-71 (Tex. App.—Tyler 1990, orig. proceeding) (generally no) *with* Builder's Equipment Co. v. Onion, 713 S.W.2d 786, 788 (Tex. App.—San Antonio 1986, orig. proceeding) (yes). *See infra* text accompanying notes 225-30.

192. TEX. R. CIV. P. 215(5). The language of Rule 215(5) appears to apply only to the complete failure to respond to or supplement discovery responses. However, courts have determined that the Rule 215(5) exclusionary sanction applies also to untimely discovery responses. *See* Texas Employers' Ins. Ass'n v. Garza, 687 S.W.2d 299, 299-300 (Tex. 1985) (per curiam) (refusing the application for writ of error, no reversible error).

193. TEX. R. CIV. P. 215(5).

194. *Id.*

A vast body of legal opinions has attempted to clarify the various angles of the witness disclosure rules, but difficult questions concerning the interpretation of these rules remain.[195] Misinterpretation of these rules could have a disastrous effect upon a party's claims or defenses. Thus, to the extent possible,[196] many litigants prefer the handy availability of a mandamus remedy to a trial court's erroneous decisions on witness disclosure.[197] This article will examine the availability of mandamus review on both ends of the spectrum of witness disclosure orders: (1) trial court admission of undisclosed witnesses, and (2) trial court exclusion of undisclosed witnesses.

A. *Trial Court Admission of Undisclosed Witnesses*

While the failure to disclose witnesses[198] ordinarily results in the exclusion of the undisclosed witnesses, a trial court may still agree to allow undisclosed testimony if the offering party demonstrates good cause sufficient to require admission.[199] The good cause exception affords the trial court a measure of latitude to permit undisclosed testimony if mitigating circumstances suggest that an exclusionary

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195. The Texas courts have yet to address several questions relating to the witness disclosure requirements. For example, may a party disclose witnesses through methods other than a signed and verified writing? *See* David W. Holman & Byron C. Keeling, *Disclosure of Witnesses in Texas: The Evolution and Application of Rules 166b(6) and 215(5) of the Texas Rules of Civil Procedure*, 42 BAYLOR L. REV. 405, 449-50 (1990) (recommending that disclosure may be in any form that informs opposing party of identity of witnesses, including deposition answers, summary judgment affidavits, personal letters and corroborated conversations between attorneys). Must a party disclose the identity of a person who will provide an affidavit in summary judgment proceedings? *See id.* at 435-36 (recommending that disclosure of a person who will only provide summary judgment affidavit should not be required). Is a co-defendant or co-plaintiff in multi-party litigation required to formally disclose the names of witnesses whom other parties on the same side of the docket have already disclosed? *See id.* at 436-37 (recommending that formal disclosure be required).

196. *See supra* note 10.

197. Mandamus review is even more desirable in light of the fact that ordinary appellate review of witness disclosure orders is limited. The erroneous admission or exclusion of undisclosed witness testimony is only reversible error on appeal when the error is harmful—the testimony has no tendency to affect the conclusions of the factfinder. *See* Gee v. Liberty Mutual Fire Ins. Co., 765 S.W.2d 394, 396 (Tex. 1989); *Clayton*, 777 S.W.2d at 580-81.

198. The authors' reference to "failure to disclose witnesses" encompasses both the complete failure to disclose and the failure to timely disclose. Similarly, the authors' reference to "undisclosed testimony" encompasses testimony that was never disclosed and testimony that was not disclosed in a timely manner. *See supra* note 192.

199. TEX. R. CIV. P. 215(5). *See also* Williams v. Union Carbide Corp., 734 S.W.2d 699, 701 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.) ("An evidentiary finding of good cause is the only basis for allowing the [undisclosed] testimony to be presented").

sanction would be unfair. For example, a claim of good cause for the failure to disclose a witness may include a reasonable allegation that the party could not have anticipated the need for the undisclosed witness[200] or that the party only discovered the existence of the witness shortly before trial.[201]

Appeal usually affords an adequate remedy to a trial court's conclusion that good cause supports the admission of undisclosed testimony. The standard of appellate review depends upon the evidentiary basis for the trial court's finding. If a party reasonably attempts to demonstrate in the record a good cause for its failure to disclose, an appellate court applies a deferential standard of review to the trial court's decision to allow the undisclosed testimony. The appellate court will reverse the trial court decision only if it determines that the trial court abused its discretion.[202] Conversely, if the party completely fails to demonstrate any good cause in the record or if the trial court fails to state the basis for its good cause finding in the record, the appellate courts deem the trial court's decision to allow the undisclosed testimony an *automatic* abuse of discretion.[203] In this latter case, the appellate courts need only determine if the admission of the undisclosed testimony was harmful error.[204]

Although a finding of good cause is reviewable on appeal, the appellate remedy is not necessarily a convenient remedy. The clogged dockets of the state appellate courts can delay justice for several years. If available, mandamus review of a finding of good cause would offer the desirable advantage of an immediate remedy against the admission of undisclosed testimony. The appellate courts, however, have

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200. *See, e.g.*, Smith v. Thornton, 765 S.W.2d 473, 478 (Tex. App.—Houston [14th Dist.] 1988, no writ); Galvin v. Gulf Oil Corp., 759 S.W.2d 167, 172 (Tex. App.—Dallas 1988, writ denied); Ellsworth v. Bishop Jewelry & Loan Co, 742 S.W.2d 533, 534 (Tex. App.—Dallas 1987, writ denied); Walsh v. Mullane, 725 S.W.2d 263, 264-65 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.); Gannett Outdoor Co. v. Kubeczka, 710 S.W.2d 79, 84 (Tex. App.—Houston [14th Dist.] 1986, no writ).

201. *See, e.g.*, Clark v. Trailways, Inc., 774 S.W.2d 644, 647 (Tex. 1989), *cert. denied*, __ U.S. __, 110 S. Ct. 1122, 107 L. Ed. 2d 1028 (1990); Johnson v. Gulf Coast Contracting Serv., 746 S.W.2d 327, 329 (Tex. App.—Beaumont 1988, writ denied).

202. *See* Gee v. Liberty Mutual Fire Ins. Co., 765 S.W.2d 394, 396 (Tex. 1989).

203. *See* Gutierrez v. Dallas Indep. School Dist., 729 S.W.2d 691, 693 (Tex. 1987); Brewer v. Isom, 704 S.W.2d 911, 912 (Tex. App.—Dallas 1986, no writ); Texas Indus. v. Lucas, 634 S.W.2d 748, 758 (Tex. App.—Houston [14th Dist.] 1982), *rev'd on other grounds*, 696 S.W.2d 372 (Tex. 1984).

204. *See Brewer*, 704 S.W.2d at 912. For an explanation of the harmless error concept, see *supra* note 197.

not authorized the use of the writ of mandamus to correct the trial court's admission of undisclosed testimony. And, in fact, the appellate courts need not do so. The standards for issuing a writ of mandamus do not support the exercise of an extraordinary remedy in this situation.

The application of the abuse of discretion standard on mandamus review is not substantially different from the application of the standard on appellate review.[205] If a party reasonably attempts to demonstrate in the record a good cause for the failure to disclose, an appellate court generally will acquiesce in the trial court's decision to permit the undisclosed testimony. The evidence of good cause that the party inserts in the record effectively precludes an appellate court's determination that the trial court's decision was "so arbitrary and unreasonable as to amount to a clear and prejudicial error of law."[206] On the other hand, if the party completely fails to demonstrate any good cause in the record, the trial court's decision to permit the undisclosed testimony is an abuse of discretion. The Texas Supreme Court has emphasized that the exclusionary sanction for the failure to disclose witnesses, unlike most discovery sanctions, is automatic unless the offering party demonstrates good cause for the failure to disclose.[207] The trial court's admission of undisclosed testimony in the absence of evidence of good cause is arbitrary and unreasonable, and indeed, comes dangerously close to a clear violation of the law.[208]

Even if a party can persuasively argue that the trial court abused its discretion, however, it is doubtful that the party could successfully demonstrate that appeal is an inadequate remedy for the trial court's admission of undisclosed testimony. This most significant opinion on this precise issue is the recent opinion of the Beaumont Court of Ap-

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205. As previously noted, some commentators have suggested that the abuse of discretion standard of appellate review has a similar application on mandamus review. *See supra* note 132 and accompanying text.

206. Johnson v. The Honorable Fourth Court of Appeals, 700 S.W.2d 916, 917 (Tex. 1985).

207. Morrow v. H.E.B., Inc., 714 S.W.2d 297, 297 (Tex. 1986) (per curiam).

208. *See supra* text accompanying notes 93-95. In a similar context, the Texas Supreme Court has held that the wrongful exemption from discovery of expert opinion evidence in the absence of proof that the evidence was shielded from discovery by the "consulting expert" privilege, *see supra* note 82, is an abuse of discretion. Lindsey v. O'Neill, 689 S.W.2d 400, 402 (Tex. 1985). Interestingly, however, *Lindsey* granted mandamus relief without discussion of the inadequacy of remedy requirement. *Id.* at 403.

peals in *Southwestern Bell Telephone v. Sanderson*.[209] The defendant, Southwestern Bell, sought a writ of mandamus to correct the trial court's denial of its motion to strike plaintiffs' expert witness Dr. Charles S. Petty. Southwestern Bell argued that the plaintiffs had failed to timely designate Dr. Petty.[210] The court of appeals refused to issue the writ of mandamus. It concluded that mandamus review was inappropriate because the defendant's argument "can and should be . . . reviewed in the regular course of an appeal."[211]

The decision of the court of appeals in *Southwestern Bell* is undoubtedly correct. Under either the *Iley v. Hughes* or *Jampole v. Touchy* standard, appeal is an adequate remedy for the improper admission of undisclosed testimony. The Texas Supreme Court in *Iley* commented that appeal is an inadequate remedy "only when parties stand to lose their substantial rights."[212] The admission of undisclosed testimony, however, does not offend any traditional notion of substantial rights. The admission of the testimony may surprise the unwary litigant, but it has no tendency to deprive the litigant of a fair trial.

Even the more liberal *Jampole* standard does not permit mandamus relief. In *Jampole*, the supreme court authorized mandamus review where (1) the aggrieved litigant could not easily demonstrate harmful error in the appellate process and (2) appeal was not a convenient, beneficial, and effective remedy.[213] While appeal might not be a convenient remedy for the erroneous admission of undisclosed testimony, the aggrieved litigant can easily demonstrate harmful error. After the trial court permits the introduction of the testimony, the aggrieved party has the opportunity to cross-examine the formerly undisclosed witness. If the witness' testimony is so critical that it would have a tendency to sway the opinion of the factfinder, the harmful effect of admission of the undisclosed testimony will be readily apparent in the record.

In sum, the admission of undisclosed testimony, though erroneous, does not raise the concerns that support the exercise of mandamus

209. 810 S.W.2d 485 (Tex. App.—Beaumont 1991, orig. proceeding).

210. *Id.* at 487. Specifically, Southwestern Bell alleged that "Dr. Petty, although designated more than 30 days before trial, was not designated 'as soon as practical.' " *Id.*; *see* TEX. R. CIV. P. 166b(6)(b); *see also supra* text accompanying notes 190-91.

211. *Southwestern Bell*, 810 S.W.2d at 487.

212. Iley v. Hughes, 158 Tex. 362, 311 S.W.2d 648, 652 (1958).

213. Jampole v. Touchy, 673 S.W.2d 569, 576 (Tex. 1984).

review. While the admission of undisclosed testimony undoubtedly complicates the aggrieved party's trial strategy, the aggrieved party retains the ability to attack the trial court's offensive ruling on appeal. In this situation, appeal is an adequate and even effective remedy, although perhaps not the most desirable or expedient remedy. A different conclusion prevails, however, in some situations in which the trial court erroneously excludes undisclosed witnesses.

B. *Trial Court Exclusion of Undisclosed Witnesses*

A trial court ordinarily should exclude the witnesses whom an offering party has failed to disclose in a timely manner. Nonetheless, there are situations in which the exclusionary sanction is inappropriate. A trial court, for example, should not exclude undisclosed witnesses for which "good cause sufficient to require admission exists."[214] Even if good cause exists for the admission of undisclosed witnesses, however, the improper exclusion of these witnesses does not necessarily warrant mandamus relief. Mandamus review is not predicated upon the impropriety of the trial court action. Before an appellate court may issue a writ of mandamus, the trial court's decision to exclude undisclosed witnesses must not simply be inappropriate but also either an abuse of discretion or a violation of the discovery rules.[215] This requirement preserves the writ of mandamus as an extraordinary remedy.

An appellate court should not generally exercise mandamus review of a trial court's determination that good cause does not support the admission of undisclosed witnesses. If the trial court follows the authorized procedure in the rules of civil procedure, its determination that good cause is absent—a discretionary decision—is not a violation of the discovery rules. The court's determination might constitute an abuse of discretion, but only if it is so "arbitrary and unreasonable as to amount to a clear and prejudicial error of law."[216] As a practical matter, however, the offering party will not be able to demonstrate that the determination that good cause is absent breaches this stan-

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214. TEX. R. CIV. P. 215(5).

215. *See supra* text accompanying note 86; *see also* Forscan Corp. v. Touchy, 743 S.W.2d 722, 724 (Tex. App.—Houston [14th Dist.] 1987, orig. proceeding); Ward v. Cornyn, 700 S.W.2d 281, 282 (Tex. App.—San Antonio 1985, orig. proceeding).

216. Johnson v. The Honorable Fourth Court of Appeals, 700 S.W.2d 916, 917 (Tex. 1985).

dard. Even on direct appeal, the Texas appellate courts have been unwilling to reverse a trial court's finding that good cause was absent.[217]

But while a trial court's refusal to find good cause does not typically amount to an abuse of discretion, the exclusion of undisclosed witnesses in certain circumstances might constitute a clear violation of the law. The rules of civil procedure prescribe certain prerequisites to imposing the harsh exclusionary sanction. If these prerequisites are not satisfied, the exclusion of undisclosed witnesses is a violation of the discovery rules.[218] The rules, for example, condition the duty to supplement the identity of an expert witness on an "appropriate inquiry."[219] Counsel seeking to obtain the identities of the opposing party's expert witnesses must "specifically request" this information.[220] In the absence of such a request, the trial court exceeds its lawful authority in excluding the testimony of the opposing party's undisclosed expert witnesses.

Likewise, the rules of civil procedure provide parties a period of time in which they can disclose their witnesses. The rules state that a party must designate its fact witnesses "no less than thirty days prior to the beginning of trial."[221] If a party properly designates its witnesses within this time period, then the trial court has no authority to exclude the testimony of the fact witnesses.[222] A trial court that excludes the testimony of a fact witness who was designated not less than thirty days prior to trial has violated the terms of the rules of civil procedure.

A similar analysis should govern the exclusion of expert witnesses. The rules of civil procedure state that a party must designate its expert witnesses "as soon as is practical" and not less than thirty days

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217. *See*, Gee v. Liberty Mutual Fire Ins. Co., 765 S.W.2d 394, 396 (Tex. 1989).

218. *See supra* text accompanying note 147.

219. TEX. R. CIV. P. 166b(6)(b).

220. Meyerland Co. v. Palais Royal of Houston, Inc., 557 S.W.2d 534, 537 (Tex. App.—Houston [1st Dist.] 1977, no writ).

221. TEX. R. CIV. P. 166b(6)(b).

222. However, if the trial court, under the exercise of its discretion, establishes a pretrial disclosure deadline, and the party does not disclose its witnesses within this deadline, an exclusionary sanction in fact might be appropriate. Because the trial court has wide discretion to set a reasonable deadline for disclosure, *see* TEX. R. CIV. P. 166b(2)(e)(3), the appellate courts generally will not use a writ of mandamus as a vehicle to nullify the exclusion of a witness whom a party does not disclose within the deadline. *See* Green v. Lerner, 786 S.W.2d 486, 490-91 (Tex. App.—Houston [1st Dist.], orig. proceeding).

prior to the beginning of trial.[223] This provision would not seem to impose a radically different time limit on the disclosure of expert witnesses than the rules impose on the disclosure of fact witnesses. As long as a party reasonably attempts to ascertain its expert witnesses and disclose their identity at least thirty days prior to trial, then in most cases the trial court should not have the authority to exclude the testimony of the expert witnesses.[224]

The Texas courts of appeals, however, have reached conflicting opinions whether a trial court violates the discovery rules if it excludes expert witnesses whom a party disclosed at least thirty days prior to trial. In *Builder's Equipment Co. v. Onion*,[225] the San Antonio Court of Appeals determined that a trial court does not violate the discovery rules in such a situation because the rules of civil procedure grant the court broad "discretion to determine whether [the offering party] used due diligence in seeking out and identifying . . . its expert witnesses."[226] On the other hand, in *Mother Frances Hospital v. Coats*,[227] the Tyler Court of Appeals ruled that a trial court can violate the discovery rules if it excludes expert witnesses whom a party disclosed at least thirty days prior to trial.[228] Empha-

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223. TEX. R. CIV. P. 166b(6)(b).

224. An exception to this rule might arise in cases in which the offering party has relied upon the expertise of an expert witness early in the pretrial process and the witness is clearly not a consulting expert. In such cases, the party should not be permitted to withhold the name of the witness until thirty days prior to trial. For instance, in Mother Frances Hosp. v. Coats, 796 S.W.2d 566 (Tex. App.—Tyler 1990, orig. proceeding), a case in which the court of appeals issued a writ of mandamus to preclude the trial court from excluding all of the hospital's expert witnesses, the court of appeals approved the trial court's exclusion of one of the hospital's experts, nurse June Murphy. *Id.* at 570. The hospital had used Murphy's testimony a year earlier in support of a motion for summary judgment. The court of appeals concluded that the hospital's designation, even though thirty-two days prior to trial, "was not 'as soon as practical' by any definition." *Id.*

225. 713 S.W.2d 786 (Tex. App.—San Antonio 1986, orig. proceeding).

226. *Id.* at 788. *See also* City of Port Arthur v. Sanderson, 810 S.W.2d 476, 477 (Tex. App.—Beaumont 1991, orig. proceeding).

227. 796 S.W.2d 566 (Tex. App.—Tyler 1990, orig. proceeding).

228. *Id.* at 570. The court of appeals in *Mother Frances Hosp.* properly recited that mandamus "is an extraordinary remedy and the writ will issue only to correct a clear abuse of discretion or a violation of a duty imposed by law where there is no adequate remedy at law." *Id.* at 569. Curiously, the court identified the trial court's actions as an "abuse of discretion" rather than a "violation of a duty imposed by law." From its discussion of the merits, however, it is apparent that the appellate court understood that the trial court had violated the discovery rules. The Tyler court rejected the notion that a trial court has discretion to determine whether a party has used due diligence to seek out its witnesses and, instead, remarked that a trial court possesses no authority to exclude expert witnesses whom a party has recently

sizing that the supreme court had never expressly required designation of experts prior to the thirtieth day before trial,[229] the court in *Mother Frances Hospital* reasoned that "there is nothing in the Rules which requires a party to 'seek out' its expert witnesses at any particular time during the pre-trial process."[230]

Of the two cases, the decision in *Mother Frances Hospital* states the better conclusion. The Texas Rules of Civil Procedure provide that consulting experts—experts who will not testify at trial and whose opinions have not been reviewed by a testifying expert—are privileged from disclosure.[231] As the Tyler court acknowledged, a rule imposing a potential exclusionary sanction against a party who fails to disclose expert witnesses at an indeterminate "practical" time before trial would unnecessarily intrude upon this privilege against disclosure of consulting experts.[232] Such a rule would force litigants into a Hobson's choice: either disclose their witnesses before they have determined which witnesses are privileged or risk trial court exclusion of their witnesses. The court in *Mother Frances Hospital* reasonably concluded that the drafters of the rules of civil procedure did not intend this absurd result. If anything, the "as soon as practical" language in the civil rules is designed to encourage the early disclosure of expert witnesses who clearly are not consulting experts.[233] It is not designed to force litigants to use due diligence to seek out and identify their trial experts.

As one of the first decisions to authorize the use of mandamus to correct a witness disclosure order, *Mother Frances Hospital* has blazed a trail in the mandamus wilderness.[234] However, as the court in

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identified and correctly designated at least thirty days prior to trial. *Id.* at 571. *But see id.* at 570 (acknowledging that a trial court might have some discretion to determine whether a party has designated "as soon as practical" expert witnesses whom the party had previously identified—but not formally disclosed—in papers filed with the trial court); *see also supra* note 224.

229. *Mother Frances Hosp.*, 796 S.W.2d at 570.

230. *Id.* at 571; *cf.* Williams v. Crier, 734 S.W.2d 190, 193 (Tex. App.—Dallas 1987, orig. proceeding) (concluding that trial court had abused its discretion in ruling that plaintiff had not disclosed expert witnesses "as soon as practical" because there was "no evidence of any kind" to support the trial court's finding that plaintiff had not used due diligence in searching for its expert witnesses).

231. TEX. R. CIV. P. 166b(2)(e)(1), (3)(b). *See supra* note 82.

232. *Mother Francis Hosp.*, 796 S.W.2d at 570-71.

233. *See supra* note 224.

234. An earlier decision, State Dep't of Highways & Pub. Transp. v. Ross, 718 S.W.2d 5 (Tex. App.—Tyler 1986, orig. proceeding), concluded that mandamus could correct a trial court's refusal to permit a party to supplement answers to interrogatories. *Id.* at 10. However,

Mother Frances Hospital recognized, an abuse of discretion or clear violation of the discovery rules in itself is insufficient to support mandamus review.[235] Before an appellate court may exercise mandamus review, the injured litigant must demonstrate that appeal cannot adequately redress the trial court's error. In the ordinary situation, the proper measure of the adequacy of remedy is the *Jampole v. Touchy* or *Iley v. Hughes* standard. The exclusion of witnesses, however, is a discovery sanction. Thus, the appropriate standard of the adequacy of remedy is the standard articulated in *Braden v. Downey*, the recent opinion that examines the use of mandamus to review discovery sanctions.

Under any of these standards, though, the same result ensues: an appellate court should exercise its mandamus authority to review the exclusion of undisclosed witnesses only if the potential harm to the litigant from the exclusion of the witnesses is significant. For instance, under the *Braden* standard, appeal adequately remedies an improper discovery sanction unless the sanction is so severe that it effectively adjudicates the dispute between the parties.[236] In most cases, the exclusion of a witness will not affect the outcome of a trial and, therefore, will not have a tendency to adjudicate the dispute between the parties. In other cases, however, the exclusion of a witness or witnesses will effectively adjudicate the dispute between the parties. Certain witnesses are extremely vital to the presentation of a persuasive claim or defense. If the trial court excludes these witnesses, the

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the significance of *Ross* is limited. First, the facts in *Ross* were unusual. The parties had previously tried the case to a hung jury. The trial court disallowed any additional discovery prior to the second trial because it concluded that the discovery deadline from the first trial remained in effect. Second, the application of the mandamus requirements in *Ross* was awkward. The Tyler Court of Appeals, after ruling that the trial court abused its discretion in maintaining the expired discovery deadline, determined that, because the case had already seen a long history, it would be unnecessarily inconvenient to require the supplementing party to wait for a favorable ruling on appeal. *Id.* In reaching this decision, the court of appeals emphasized the inconvenience aspect of the inadequacy of remedy test in *Jampole v. Touchy*, but ignored the requirement in *Jampole* that the aggrieved party not be able to demonstrate harmful error on appeal. *See supra* text accompanying notes 165-66. As the court of appeals conceded, the supplementing party in *Ross* could eventually "present the excluded evidence to the appellate court and successfully show error." *Ross*, 718 S.W.2d at 10.

In another earlier decision, Williams v. Crier, 734 S.W.2d 190 (Tex. App.—Dallas 1987, orig. proceeding), the Dallas Court of Appeals, like the court of appeals in *Ross*, also failed to address the inadequacy of remedy requirement. *See id.* at 193 (Enoch, C.J., dissenting).

235. *Mother Frances Hosp.*, 796 S.W.2d at 571.

236. Braden v. Downey, 34 Tex. Sup. Ct. J. 721, 724 (June 19, 1991). *See also* Transamerican Natural Gas Corp. v. Powell, 34 Tex. Sup. Ct. J. 701, 706 (June 19, 1991).

effect could be effectively to deny the party the ability to present its claim or defense. The exclusion of the witnesses, in essence, determines the outcome of a dispute—adjudicates the dispute—prior to trial. The appellate remedy is insufficient to redress the injury that such exclusion might cause.

Under the *Jampole* formulation of the inadequacy of remedy standard, mandamus review is appropriate if (1) the aggrieved litigant could not easily demonstrate harmful error in the appellate process and (2) appeal would not be a convenient, beneficial and effective remedy.[237] It often will be apparent to the court that an improperly designated witness is unimportant and would not have affected the outcome of a trial even if the witness had been admitted. In such a circumstance, the error in excluding the witness, if any, is clearly harmless and would not support the exercise of mandamus review. On the other hand, in many cases it will not be clear whether the undisclosed witness has any particular strategic or evidentiary value to the litigant. Since the exclusionary sanction completely eliminates the witness' testimony from the record, the litigant could not easily demonstrate harmful error on appeal. In this latter circumstance, rather than require a party to try a lawsuit debilitated by an erroneous exclusion of a potentially important witness, and then subject the lawsuit to the excruciatingly lengthy process of appeal, the *Jampole* standard appears to authorize mandamus relief.[238]

Finally, under the *Iley* formulation, appeal is inadequate "only when parties stand to lose their substantial rights."[239] Unquestionably, the exclusion of a witness who would not affect the outcome of the trial does not endanger a litigant's substantial rights—the litigant can still raise a valid claim or mount an adequate defense. If the witness is important, however, the effect of the exclusion is much more significant. The exclusion of an important witness effectively deprives a litigant of an opportunity to raise claims or defenses. In such a situation the erroneous exclusion of the witness, in essence, denies the litigant a fair trial. Although the term "substantial rights" is a nebulous concept, a fair trial under almost any definition is a substantial right.

This interpretation of the application of the inadequacy of remedy

237. *Jampole*, 673 S.W.2d at 576.
238. *Id.*
239. Iley v. Hughes, 158 Tex. 362, 365, 311 S.W.2d 648, 652 (1958).

standard—that appeal is an adequate remedy unless the excluded witnesses are necessary to a party's claim or defense—finds support in *Mother Frances Hospital v. Coats*. In *Mother Frances Hospital*, the defendant hospital designated all of its expert witnesses thirty-two days prior to trial. The trial court, reasoning that the hospital's disclosure was not "as soon as practical," excluded eight of the experts—those witnesses for whom the hospital could not demonstrate that it had good cause to disclose after the expiration of the ambiguous "as soon as practical" deadline.[240] The court of appeals emphasized that the wrongful exclusion of the hospital's expert witnesses would "emasculate" the hospital's defense.[241] Citing *Jampole*, the Tyler court concluded that to require the hospital to try a hopeless lawsuit that inevitably would be reversed on appeal would fall "well short of a remedy by appeal that is equally convenient, beneficial, and effective as mandamus."[242]

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240. *Mother Frances Hosp.*, 796 S.W.2d at 568-69.

241. *Id.* at 571.

242. *Id. Cf.* William W. Kilgarlin, *Sanctions for Discovery Abuse: Is the Cure Worse than the Disease*, 54 TEX. B.J., 658, 662 (1991) (Texas Supreme Court should use mandamus proceedings to review "extreme sanctions"). *But see* Humana Hosp. Corp. v. Casseb, 809 S.W.2d 543 (Tex. App.—San Antonio 1991, orig. proceeding); *Forscan Corp.*, 743 S.W.2d 722.

In *Humana Hosp. Corp.*, the defendant in a medical malpractice action sought to designate the plaintiff's former physician as a trial witness. The trial court struck the designation, ruling that the physician's testimony would violate the physician/patient privilege. The court of appeals conceded that the trial court's action was an abuse of discretion. However, the appellate court reasoned that appeal was an adequate remedy because the trial court order "does not deny the relator the discovery of anything necessary to preserve error, does not prevent the relator from taking the deposition of the doctors involved, and does not prevent the relator from preserving the alleged error for appeal by way of bill of exception." *Humana Hosp. Corp.*, 809 S.W.2d at 546. The court in *Humana Hosp. Corp.* perfunctorily addressed the *Jampole* standard for inadequacy of relief. Although properly noting that one factor in the *Jampole* standard is whether the aggrieved litigant can easily demonstrate harmful error on appeal, the court ignored the other *Jampole* factor—the convenience of appeal as compared to mandamus. *Id.* at 545.

In *Forscan Corp.*, relators sought mandamus review of the trial court's decision to exclude two expert witnesses designated after a court imposed deadline for discovery. The court of appeals, noting that the case had "languished" on the docket for five years, found no abuse of discretion in the enforcement of the discovery deadline. *Forscan Corp.*, 743 S.W.2d at 724. The appellate court emphasized, however, that the relators also had failed to demonstrate that appeal would be an inadequate remedy because "[t]he evidence that will be excluded by the trial court is still available to them and may be presented for appellate review by bill of exception." *Id.* This articulation of the standard misses the point. A bill of exception permits limited appellate review of otherwise dated cases, but does not guarantee that appeal will resolve pending issues satisfactorily. The question on mandamus review is not whether appeal is permissible but rather whether appeal is adequate. *Id.*

In sum, mandamus review of the erroneous exclusion of a witness in some instances depends on the importance of the testimony. Although a writ of mandamus usually is unavailable to correct a discretionary decision to exclude undisclosed testimony, mandamus might be available to correct a trial court's violation of the discovery rules. If the injured party can satisfactorily demonstrate that the excluded testimony is necessary to the party's claim or defense, then the appellate court may exercise its mandamus authority to correct the trial court's violation of the rules. However, if the injured party cannot demonstrate that the excluded testimony bears any particular strategic or evidentiary value, the exercise of mandamus review is a fruitless waste of judicial resources.

V. CONCLUSION

The writ of mandamus has become an essential procedural device to correct trial court abuses which cannot be adequately remedied on appeal. The development of the use of mandamus to correct erroneous Texas district court discovery orders, in particular, has been rapid. Practitioners have successfully sought mandamus review of some of the most complex questions of discovery practice. In recent months, practitioners have even used mandamus to answer challenging questions arising from the difficult Texas witness disclosure rules. This last development is significant because the witness disclosure rules have been the subject of a large number of Texas appellate decisions. If the courts approve the use of the writ of mandamus to correct erroneous witness disclosure orders, an enormous volume of mandamus petitions could flood the supreme court and courts of appeals.

Having "entered the thicket" to control or correct even one trial court witness disclosure order, the Texas appellate courts will soon be asked to review in mandamus proceedings more and more such orders.[243] Some mandamus petitions undoubtedly will attempt to implicate the appellate courts in routine questions of witness disclosure that are more appropriately left to the trial court's discretion. These meritless petitions are an unavoidable evil. Other mandamus petitions will seek appellate intervention in the erroneous exclusion of

243. *See* Pope v. Ferguson, 445 S.W.2d 950, 954 (Tex. 1969), *cert. denied*, 397 U.S. 997 (1970).

critical trial witnesses. In this latter circumstance, an exclusionary sanction may deprive a litigant of a fair trial and expedient justice. If a clear violation of the discovery rules, the appellate courts have a responsibility to ensure that the civil trial below is not a farce.

The expansion of mandamus review undoubtedly contributes to a "thicket" of easily abused review mechanisms. In limited circumstances, however, mandamus must be available to correct erroneous witness disclosure orders. The appellate courts accordingly must tolerate some abuse of mandamus procedure to assure that, in cases in which mandamus is necessary, trial proceedings are fair and equitable to all concerned parties. As the authors have previously warned in another context, "we must not sacrifice justice upon the altar of expediency."[244]

244. David W. Holman & Byron C. Keeling, *Disclosure of Witnesses in Texas: The Evolution and Application of Rules 166b(6) and 215(5) of the Texas Rules of Civil Procedure*, 42 BAYLOR L. REV. 405, 458 (1990).