D. Rulings on Pretrial Matters

1. *Pretrial Rulings and Appellate Review*

Read CPRC § 51.012, § 51.014.

SAFETY-KLEEN CORP.
v.
GARCIA

945 S.W.2d 268
(Tex. App.—San Antonio 1997, orig. proceeding)

GREEN, JUSTICE.

Relator, Safety-Kleen Corp. ("Safety-Kleen"), seeks a writ of mandamus to require the Respondent, The Honorable Ricardo H. Garcia, to set a hearing on Safety-Kleen's motion to compel answers to interrogatories, which was filed on January 20, 1997.[1] We conditionally grant the writ to compel Judge Garcia to act.

PROCEDURAL HISTORY.

Safety-Kleen is one of 254 defendants originally sued by 72 plaintiffs for personal injuries allegedly caused by exposure to cement products. Safety-Kleen served the plaintiffs with its first set of interrogatories between November 14, 1996 and December 6, 1996. The plaintiffs filed a joint answer to the interrogatories on January 15, 1997. On or about January 20, 1997, Safety-Kleen filed a motion to compel contending the plaintiffs "refused to submit any of the information specifically requested by [certain] interrogatories."[2]

On January 27, 1997, Safety-Kleen sent a letter to the court coordinator requesting that a hearing be set on its motion. On February 11, 1997, Safety-Kleen forwarded a second written demand to the court coordinator to set the motion for hearing. The letter notes that Safety-Kleen previously contacted the court several times regarding its request. Safety-Kleen has also included in our record an affidavit from its attorney stating that the court coordinator refused to set the motion for a hearing. The last time the court coordinator was contacted, she informed Safety-Kleen's attorney that "no motions [would] be set for hearing until October of 1997."

DISCUSSION.

A trial court is required to consider and rule upon a motion within a reasonable time. "When a motion is properly filed and pending before a trial court, the act of giving consideration to and ruling upon that motion is a ministerial act," and mandamus may issue to compel the trial judge to act.

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[1] The real parties in interest did not file a written response and were not represented at oral argument.

[2] Safety-Kleen contends it is entitled to the discovery under the precedent established in Able Supply Co. v. Moye, 898 S.W.2d 766 (Tex. 1995). We are not called upon to address the merits of Safety-Kleen's motion in this proceeding.

Although Judge Garcia's refusal to act is evident in his failure to set Safety-Kleen's motion for hearing, Judge Garcia has also expressly indicated in recorded statements made at a preliminary hearing that he will refuse to act in regard to such motions:

> MR. EDWARDS [Plaintiffs' Attorney]: Your Honor, Don Edwards. As Mr. Gonzalez was stating earlier, we have conducted discovery towards the defendants in response to their motion for transfer, and I believe—roughly, it was five to ten percent of the defendants have responded to this discovery. So at this point until the defendant—
>
> THE COURT: I'm not responsible for the defendants not responding to your motions.
>
> MR. EDWARDS: Yes, sir.
>
> THE COURT: Now, don't ask me to participate in your pretrial discovery because I'm not. I don't have the time.
>
> * * *
>
> MR. KELLY [Plaintiffs' Attorney]: * * * But the frustration of the Plaintiff is that there's no response whatsoever. We're being asked to go forward and prove our venue facts when there's no corporation [sic] at all on the part of the defendants to give us those very venue facts. And that is why the motion to postpone was filed. It was filed in good faith to advise the Court that if we can have a sufficient period of time and the Court's help in obtaining the venue.
>
> THE COURT: No. Don't ask for my help. You're not going to get it. I'm not going to get involved in the discovery. That's your problem.
>
> MR. KELLY: All right. The second part of my statement, if we could have efficient [sic] time at which to obtain the venue facts, then we will be able to go forward.
>
> THE COURT: And supposedly [sic] they won't answer then what will you do?
>
> MR. KELLY: At that point we would have to use the Court's measures and motions to compel and have hearings before the court.
>
> THE COURT: No, no. That's exactly what I want to avoid. If you're going—Don't you even think for one minute that you're going to pretrial me to death in this case because it won't happen. I'm telling you it won't happen.
>
> * * *
>
> THE COURT: Okay. Anybody else? Okay. What else on this motion? Okay. Let me rule on this motion then. The Court is going to grant this motion. I'm going to give extended time for the hearing on the motion to transfer venue. It's set for when you say?
>
> MR. GONZALEZ: February 6.
>
> THE COURT: No. I'm going to set it. Don't tell me. Don't even suggest. You wanted a ruling from me, you're going to get it. This case is set for the motion to transfer for October the 14th. That'll give you enough time to complete everything. And if you haven't done it by then, by golly, you better get this case out of here.
>
> MS. HOUSTON: Your Honor, could you repeat that.
>
> THE COURT: October the 14th. That's going to be a Tuesday. Now, what other motion.
>
> MS. HOUSTON: Thank you, Your Honor.
>
> THE COURT: What other motion?

> MR. GONZALEZ: Clarification. What was the discovery limited to?
>
> THE COURT: I'm not going to limit any of the discovery. I'm not going to get involved in the discovery. That's up to you. Don't get me involved in that.

It is clear from the record before us that Judge Garcia simply does not want to be involved in this case:

> THE COURT: Well, now venue facts should have already been investigated before you filed suite [sic]. Why are you taking my time? Listen. I didn't ask for you guys—for the Plaintiffs to file in my Court. I didn't ask for this case. I didn't beg you to file it in my Court. My god. I don't want it take it out. And if there's any legal grounds of taking this case out of here, you bet you I'm going to grant it. You bet you I'm going to grant it. I don't want this case. I'm not begging for it so don't ask me to rule on your side just because you filed it here. You weren't doing me any favors.

Despite Judge Garcia's misgivings, he is the elected official assigned to hear this cause, and neither the case law previously cited nor the Texas Code of Judicial Conduct give Judge Garcia the discretion to refuse to hear or rule on Safety-Kleen's motion within a reasonable period of time. *See* TEX. CODE JUD. CONDUCT, Canon 3 (1994), reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G app. B (Vernon Supp. 1997) ("judge shall hear and decide matters;" "judge shall dispose of all judicial matters promptly, efficiently and fairly").

Safety-Kleen's right to discovery cannot be abated or otherwise affected by the pendency of a motion to transfer venue. TEX. R. CIV. P. 88. We therefore conditionally grant Safety-Kleen's petition for writ of mandamus. The writ shall issue only upon certification to this court that Judge Garcia has failed to hear and rule on Safety-Kleen's motion to compel by May 12, 1997.

Concurring opinion by JUSTICE RICKOFF omitted.

Notes & Questions

1. *Interlocutory Appeal.* Ordinarily, a party may not obtain immediate appellate review of a trial court's pretrial decision because courts of appeals generally have appellate jurisdiction only over final judgments.[1] A final judgment is a judgment that disposes of all parties and claims in a lawsuit. Therefore, review of pretrial rulings usually occurs only when the losing party appeals the judgment and points to an error that the trial judge made in a pretrial ruling that probably caused the rendition an improper judgment.[2]

However, if allowed by statute, immediate review may be available through an interlocutory appeal. The interlocutory appeal statute, § 51.014 of the Texas Civil Practice & Remedies Code, lists eight different orders that may be appealed immediately to the court of appeals. In this course, we will study two of those orders—orders ruling upon the special appearance[3] and the plea to the jurisdiction.[4] We will also study the interlocutory appeals currently available for venue

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1 CPRC § 51.012.

2 *See* TRAP 44.1.

3 *See* CPRC § 51.014(7).

4 *See* CPRC § 51.014(8).

rulings.[5] Remember, only those orders made subject to interlocutory appeal by statute can be appealed before final judgment.

2. *Mandamus*. If your order is not included in a statute allowing interlocutory appeals, you nevertheless may be able to obtain immediate review through the extraordinary writ of mandamus. Mandamus is an original proceeding in the appellate court that seeks an order compelling a state official, such as the trial judge, to refrain from acting contrary to law. To successfully obtain mandamus relief in the court of appeals when complaining about a trial court's interlocutory order, the party must show (1) a clear abuse of discretion or legal error, and (2) no adequate remedy by appeal. In this course you will read many mandamus opinions—when you do so, be sure to consider each of these requirements.

WALKER
v.
PACKER
827 S.W.2d 833
(Tex. 1992)(orig. proceeding)

PHILLIPS, CHIEF JUSTICE.

* * *

Having concluded that the trial court erred in denying the discovery . . . we now must determine whether the appropriate remedy lies by writ of mandamus. "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 by law." We therefore examine whether the trial court's error in the present case constituted a clear abuse of discretion and, if so, whether there is an adequate remedy by appeal.

1. Clear Abuse of Discretion

Traditionally, the writ of mandamus issued only to compel the performance of a ministerial act or duty.

Since the 1950's, however, this Court has used the writ to correct a "clear abuse of discretion" committed by the trial court.

A trial court clearly abuses its discretion if "it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law." This standard, however, has different applications in different circumstances.

With respect to resolution of factual issues or matters committed to the trial court's discretion, for example, the reviewing court may not substitute its judgment for that of the trial court. The relator must establish that the trial court could reasonably have reached only one decision. Even if the reviewing court would have decided the issue differently, it cannot disturb the trial court's decision unless it is shown to be arbitrary and unreasonable.

On the other hand, review of a trial court's determination of the legal principles controlling its ruling is much less deferential. A trial court has no "discretion" in determining what the law is or

[5] CPRC § 15.003(c).

applying the law to the facts. Thus, a clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion, and may result in appellate reversal by extraordinary writ.

In determining whether the trial court abused its discretion in the present case, we treat the trial court's erroneous denial of the requested discovery on the sole basis of *Russell* as a legal conclusion to be reviewed with limited deference to the trial court. This is consistent with our approach in previous mandamus proceedings arising out of the trial court's interpretation of legal rules. Under this analysis, the trial court's erroneous interpretation of the law constitutes a clear abuse of discretion.

2. Adequate Remedy by Appeal

In order to determine whether the writ should issue, however, we must further decide whether the Walkers have an adequate remedy by appeal.

Mandamus will not issue where there is "a clear and adequate remedy at law, such as a normal appeal." Mandamus is intended to be an extraordinary remedy, available only in limited circumstances. The writ will issue "only in situations involving manifest and urgent necessity and not for grievances that may be addressed by other remedies." The requirement that persons seeking mandamus relief establish the lack of an adequate appellate remedy is a "fundamental tenet" of mandamus practice.

* * *

The requirement that mandamus issue only where there is no adequate remedy by appeal is sound, and we reaffirm it today. No mandamus case has ever expressly rejected this requirement, or offered any explanation as to why mandamus review of discovery orders should be exempt from this "fundamental tenet" of mandamus practice. Without this limitation, appellate courts would "embroil themselves unnecessarily in incidental pre-trial rulings of the trial courts" and mandamus "would soon cease to be an extraordinary writ." . . .

We further hold that an appellate remedy is not inadequate merely because it may involve more expense or delay than obtaining an extraordinary writ. As we observed in *Iley v. Hughes,* the "delay in getting questions decided through the appellate process . . . will not justify intervention by appellate courts through the extraordinary writ of mandamus. Interference is justified only when parties stand to lose their substantial rights." 158 Tex. at 368, 311 S.W.2d at 652.

On some occasions, this Court has used, or at least mentioned, the more lenient standard first articulated in *Cleveland v. Ward,* 116 Tex. 1, 14, 285 S.W. 1063, 1068 (Tex. 1926), that the remedy by appeal must be "equally convenient, beneficial, and effective as mandamus." This standard, literally applied, would justify mandamus review whenever an appeal would arguably involve more cost or delay than mandamus. This is unworkable, both for individual cases and for the system as a whole. Mandamus disrupts the trial proceedings, forcing the parties to address in an appellate court issues that otherwise might have been resolved as discovery progressed and the evidence was developed at trial. Moreover, the delays and expense of mandamus proceedings may be substantial. This proceeding, for example, involving rulings on collateral discovery matters, has delayed the trial on the merits for over two years. The impact on the appellate courts must also be considered. . . . We therefore disapprove of *Cleveland, Crane, Jampole* and any other authorities to the extent that they imply that a remedy by appeal is inadequate merely because it might involve more delay or cost than mandamus.

* * *

For the above reasons, we conclude that the Walkers have not established their right to relief by mandamus on either discovery matter. Therefore, we deny the Walkers' petition for writ of mandamus.

DOGGETT, JUSTICE, dissenting.

Them that's got shall get

Them that's not shall lose

—God Bless The Child[1]

With a double standard, the majority strikes a devastating blow at the most direct method of curbing abuses of judicial power. Many judicial excesses far beyond the scope of anything alleged in this particular case will henceforth receive only an official nod and wink from the Texas Supreme Court.

Mandamus is the legal tool by which appellate courts can promptly correct arbitrary and capricious rulings by trial judges. Today's opinion announces that this remedy will be available to support concealment of the truth but not its disclosure. Mandamus is officially declared a one-way street in the Texas courts—our judiciary can help to hide but not to detect.

* * *

Today's opinion reflects the radical change in philosophy which has taken firm hold in this court—discovery is no longer a search for truth, it is merely a game of hide and seek. No longer may appellate courts intercede through mandamus even for the trial court's complete abuse of discretion in denying access to vital data; under the newly-announced double standard, intervention can, however, be accorded for those who persevere in evasion.

In re PRUDENTIAL INSURANCE COMPANY

148 S.W.3d 124
(Tex. 2004)

HECHT, JUSTICE.

* * *

III

Having concluded that the parties' contractual jury waiver is enforceable, we turn to whether Prudential is entitled to relief by mandamus. Prudential must meet two requirements. One is to show that the trial court clearly abused its discretion. We have concluded as a matter of law that Prudential was entitled to enforcement of the jury waiver. Since "[a] trial court has no 'discretion' in determining what the law is or applying the law to the facts," even when the law is unsettled, the trial court's refusal to enforce the jury waiver was a clear abuse of discretion. Thus, Prudential has met the first requirement.

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[1] Billie Holiday, *God Bless the Child* (Okeh Records 1941) (words and music by Arthur Herzog, Jr. & Billie Holiday).

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

This determination is not an abstract or formulaic one; it is practical and prudential. It resists categorization, as our own decisions demonstrate. Although this Court has tried to give more concrete direction for determining the availability of mandamus review, rigid rules are necessarily inconsistent with the flexibility that is the remedy's principal virtue. Thus, we wrote in *Walker v. Packer* that "an appellate remedy is not inadequate merely because it may involve more expense or delay than obtaining an extraordinary writ." While this is certainly true, the word "merely" carries heavy freight. . . . In *In re Masonite Corp.,* 997 S.W.2d 194, 195-196 (Tex. 1999), the trial court on its own motion and without any authority whatever, split two cases into sixteen and transferred venue of fourteen of them to other counties. We held that the defendants were not required to wait until appeal to complain:

> *Walker* does not require us to turn a blind eye to blatant injustice nor does it mandate that we be an accomplice to sixteen trials that will amount to little more than a fiction. Appeal may be adequate for a particular party, but it is no remedy at all for the irreversible waste of judicial and public resources that would be required here if mandamus does not issue.

These cases, among a great many others that could be cited, serve to illustrate that whether an appellate remedy is "adequate" so as to preclude mandamus review depends heavily on the circumstances presented and is better guided by general principles than by simple rules.[1]

* * *

Prudent mandamus relief is also preferable to legislative enlargement of interlocutory appeals.[2] The unavailability of mandamus relief increases the pressure for expanded interlocutory

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[1] *See also* 16 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3934.1, at 572, 574 (1996) (stating that "[w]rit review that responds to occasional special needs provides a valuable ad hoc relief valve for the pressures that are imperfectly contained by the statutes permitting appeals from final judgments and interlocutory orders", and that "[i]mportant questions of procedure often are difficult to review by appeal, and at times may demand appellate intervention to secure uniformity between different judges, or simply to bring the balancing perspective that appellate review is intended to provide in controlling the practices as well as the substantive decisions of trial courts.").

[2] *See also* George C. Pratt, *Extraordinary Writs,* in 19 MOORE'S FEDERAL PRACTICE § 204.01[2][b], at 204-7 (3d ed. 2004) ("In order to meet the demands of justice in individual cases, discretionary review is preferable

appeals. For example, when this Court refused to review venue decisions by mandamus, the Legislature responded by authorizing mandamus review of all decisions involving mandatory venue provisions. When we held that the denial of a special appearance would ordinarily not warrant mandamus review, the Legislature responded by creating an interlocutory appeal from the denial of a special appearance. . . . Interlocutory appeals lie as of right and must be decided on the merits, increasing the burden on the appellate system. "Mandamus," on the other hand, "is an extraordinary remedy, not issued as a matter of right, but at the discretion of the court. Although mandamus is not an equitable remedy, its issuance is largely controlled by equitable principles." As a selective procedure, mandamus can correct clear errors in exceptional cases and afford appropriate guidance to the law without the disruption and burden of interlocutory appeal. Appellate courts must be mindful, however, that the benefits of mandamus review are easily lost by overuse.

The issue before us in the present case—whether a pre-suit waiver of trial by jury is enforceable—fits well within the types of issues for which mandamus review is not only appropriate but necessary. It is an issue of law, one of first impression for us, but likely to recur (it has already arisen in another case in the court of appeals, also on petition for mandamus. [citation omitted]. It eludes answer by appeal. In no real sense can the trial court's denial of Prudential's contractual right to have the Secchis waive a jury ever be rectified on appeal. If Prudential were to obtain judgment on a favorable jury verdict, it could not appeal, and its contractual right would be lost forever. If Prudential suffered judgment on an unfavorable verdict, Prudential could not obtain reversal for the incorrect denial of its contractual right "unless the court of appeals concludes that the error complained of ... probably caused the rendition of an improper judgment". Even if Prudential could somehow obtain reversal based on the denial of its contractual right, it would already have lost a part of it by having been subject to the procedure it agreed to waive.

* * *

Finally, we note that other courts have granted mandamus relief to enforce contractual jury waivers, including the only other Texas court to have addressed the issue. We are not aware of a published decision denying such relief.

* * *

For these reasons, we direct respondent, the Honorable Sally Montgomery, to vacate her order of June 6, 2003, and the prior order of June 19, 2002, to grant Prudential's motion to quash the jury demand and payment of jury fee, and to return the case to the nonjury docket. We are confident she will promptly comply. Our writ will issue only if she does not.

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to enlarging by judicial interpretation the categories of interlocutory orders that are appealable as of right. General categories of orders that are appealable as of right often include many orders that should not be appealable at all. Review by extraordinary writ allows the circuit courts to retain the final judgment rule and avoid piecemeal appeals, yet be able to respond to the exceptional case that should be reviewed prior to final judgment. Thus, [mandamus] affords an avenue of relief to litigants and a tool for the courts to supervise the proper administration of justice.").

CHIEF JUSTICE PHILLIPS, joined by JUSTICE O'NEILL, JUSTICE JEFFERSON, and JUSTICE SCHNEIDER, dissenting.

Mandamus is an extraordinary remedy available "only in situations involving manifest and urgent necessity and not for grievances that may be addressed by other remedies." *Walker v. Packer,* 827 S.W.2d 833, 840 (Tex. 1992). . . . Although the Court's mandamus jurisprudence has not always strictly adhered to these tenets, we have endeavored to apply them more consistently since our decision in *Walker.* Because the Court retreats from that approach today, I respectfully dissent.

* * *

Admittedly, Prudential's appellate remedy is not as efficient or economical as mandamus, but that has never been the test.

* * *

But the Court now surprisingly suggests that the second prong of our mandamus standard has no fixed meaning. (The word " 'adequate' has no comprehensive definition."). Instead, the Court says we must weigh all the public and private interests implicated by the lower court ruling at issue and then decide on balance whether a remedy other than mandamus is adequate or not. . . .

I see no need to inject even greater uncertainty into an already difficult and frequently subjective process. In the past, we have emphasized that the writ of mandamus should not issue absent "compelling circumstances." But today, in circumstances far from compelling, the Court uses mandamus as a substitute for appeal, an approach rejected even by the federal procedure the Court purports to emulate. Whether today's ruling has fundamentally altered these traditional rules, or is merely an anomaly, remains to be seen.

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Notes & Questions

A trial judge's discretion. In *Walker*, the Supreme Court defined a "clear abuse of discretion" necessary for mandamus relief. The court distinguishes between the trial judge's factual decisions and the trial judge's application of law. A decision can be an abuse of discretion if the trial judge's view of the facts is wholly unsupported by the evidence, or if the trial judge does not correctly apply the law to the facts. Mandamus is available if the decision was a clear abuse of discretion and there is no adequate appellate remedy.

Appellate courts also often consider whether a trial judge abused discretion in ordinary appeals. Some of a trial judge's decisions are mandated by clear and inflexible rules that the trial court must apply as written, with no discretion in applying or modifying them. But in most situations, the law gives the trial judge discretion in interpreting and applying the legal rules. The judge committed error only if that discretion was abused.

Discretion means that within broad limits the judge has leeway or flexibility. Discretion means that on a given set of facts, one judge might rule one way and another judge another way, and either ruling would be affirmed on appeal as within the court's discretion. In this sense, legal discretion is much like the deference given to baseball referees: when the officials make a judgment call on the field, it will not be overruled on instant replay unless the video shows clearly

and indisputably that the wrong call was made. And like the baseball referee, the judgment call might be wrong because the referee made a mistake about the facts (the video replay shows that the runner's foot was on the base when tagged) or because the referee made a mistake about the applicable rule.

The field of trial court discretion is wide and broad. But it is not unlimited, and it may be abused. Still, trial court discretion is one of the pervasive realities of litigation. As you go through this course, remember to think about whether the trial court's decision is one of law (where there is only one correct ruling), of fact (which will be discussed in more detail later in the course) or of discretion (which can involve both law and fact).

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2. *Requesting Action from the Trial Court: Motions, Pleas and Other Requests*

Read Rules 4, 5, 8, 21, 21a, 21b, 74, 75; TRAP 33.1.

MICHIANA EASY LIVIN' COUNTRY, INC.
v.
HOLTEN
168 S.W.3d 777
(Tex. 2005)

[James Holten bought a recreational vehicle from Michiana, an outlet store that did business only in Indiana. He sued Michiana in Texas state court for fraud, and Michiana filed a special appearance contesting personal jurisdiction. The trial court denied the special appearance, holding that Michiana was subject to the jurisdiction of the Texas courts. The Texas Supreme Court disagreed, but first the court had to deal with the absence of a record of the proceedings in the special appearance hearing.]

JUSTICE BRISTER delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE HECHT, JUSTICE OWEN, and JUSTICE GREEN joined.

* * *

B. The Record in Pretrial Hearings

[T]he appellate record contains no reporter's record of the special appearance hearing. Though candidly conceding that no oral testimony or new exhibits were presented at that hearing, Holten nevertheless argues we must presume evidence was presented that supports the trial court's order.

It is difficult to state a bright-line rule regarding unrecorded pretrial proceedings, as they come in so many shapes and sizes. Many pretrial "hearings" take place entirely on paper, while others involve a personal appearance in court. In some the parties must file all evidence with the clerk; in others they must present it in open court; in most the manner of presentation is discretionary; in at least one the answer is unclear.

What is clear is that a reporter's record is required only if evidence is introduced in open court; for nonevidentiary hearings, it is superfluous. If all the evidence is filed with the clerk and only arguments by counsel are presented in open court, the appeal should be decided on the clerk's record alone.

The difficulty of course is that the absence of a reporter's record does not tell us whether a pretrial hearing was nonevidentiary, or evidentiary but not preserved. Presuming them all the former unfairly penalizes a party that presents evidence in open court that the other party does not bother to preserve. But presuming them all the latter would require *every* hearing to be recorded—whether evidentiary (to show what was presented) or not (to show nothing was). Besides being wasteful, this would frustrate the intent of our appellate rule requiring a reporter's record only "if necessary to the appeal."[13]

For some years now the trend has been away from full evidentiary hearings in open court for most pretrial matters. While we have generally encouraged oral hearings when arguments may be helpful, both the Legislature and this Court have discouraged oral presentation of testimony and evidence when they can be fairly submitted in writing. Counsel can almost always direct the trial court's attention to pertinent deposition excerpts, discovery responses, or affidavits in less time than it takes to recreate them in open court. Presuming that most pretrial proceedings are evidentiary would not only discourage this trend, but would encumber thousands of routine hearings by requiring formal proof that no proof was offered.

Accordingly, we have in the past presumed that pretrial hearings are nonevidentiary absent a specific indication or assertion to the contrary. If the proceeding's nature, the trial court's order, the party's briefs, or other indications show that an evidentiary hearing took place in open court, then a complaining party must present a record of that hearing to establish harmful error. But otherwise, appellate courts should presume that pretrial hearings are nonevidentiary, and that the trial court considered only the evidence filed with the clerk.

* * *

Either party, of course, may allege that a hearing was evidentiary, but that allegation must be specific. Merely asserting that the trial court "considered evidence at the hearing" is not enough—trial courts do that when a hearing is conducted entirely on paper, or based solely on affidavits and exhibits filed beforehand. Instead, there must be a specific indication that exhibits or testimony was presented in open court *beyond* that filed with the clerk. As the rules of professional conduct prohibit assertions that a hearing was evidentiary when it was not,[22] and as events in open court can usually be confirmed by many witnesses, there is no reason to expect that such assertions will be lightly fabricated.

Our appellate rules are designed to resolve appeals on the merits, and we must interpret and apply them whenever possible to achieve that aim. Accordingly, we decline to presume the special appearance hearing here was evidentiary when everyone concedes it was not.

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13 TEX.R.APP. P. 34.1.

22 Tex. Disciplinary R. Prof'l Conduct 3.03 (requiring candor toward tribunal); Tex. Lawyer's Creed: A Mandate for Professionalism IV(6) ("I will not knowingly misrepresent, mischaracterize, misquote or miscite facts or authorities to gain an advantage.").

Notes & Questions

1. *Record.* Parties request courts to act through pleadings, motions, and other requests, most of which are covered in the rules of procedure. Courts in turn act through orders, judgments, and other rulings. These requests, rulings, and all of the evidence and circumstances relevant to the decisions made are available to the appellate court only through the "record." Thus, it is very important to get everything needed for appellate review on the record, either through a writing that is filed in the trial court's records (which ultimately becomes the "clerk's record" on appeal), or orally in front of the court reporter, whose notes of the proceedings can be transcribed and put into the appellate record (called the "court reporter's record").[1] Appellate Rule 13.1(a) requires the court reporter to attend and record all proceedings unless a party expressly waives his or her right to have a court reporter record the proceedings.[2] However, GOV'T CODE §52.046(a) provides that the court reporter attends sessions of court and records the proceedings "on request." The courts of appeals disagree as to which controls.[3]

2. *Preserving error.* Generally, an appellate court may review a trial court's judgment only for errors that have been properly "preserved" in the trial court—the party has to have asked the trial court to make the correct ruling before it complain that the trial court's action was error. TRAP 33.1 governs preservation of error. It requires "as a prerequisite to presenting a complaint for appellate review" that "the record must show" that the complaining party presented the matter to the trial court by a "timely request, objection, or motion" that states "the grounds for the ruling" with "sufficient specificity to make the trial court aware of the complaint" and that the trial court ruled (or if there was no ruling, the party must object to the failure to rule). There are a few errors, called "fundamental errors," that do not require preservation. We have already addressed two important fundamental errors: subject matter jurisdiction and judicial disqualification.

3. *Reversible error.* Another general rule is that an appellate court may not reverse a trial court's judgment for an erroneous ruling unless "the error complained of … probably caused the rendition of an improper judgment." TRAP 44.1(a)(1). This is called the "harmless error rule" because it prevents reversals for harmless errors. A judgment may also be reversed if the error "probably prevented the appellant from properly presenting the case to the court of appeals." TRAP 44.1(a)(2). There are a few errors that require reversal without a showing of harm, such as venue, and others that require a lesser showing of harm, such as jury selection.

4. *Evidentiary Record.* Why was it important for the Supreme Court to determine whether there was evidence presented at the special appearance hearing in *Michiana*? In reviewing the trial court's decision, it had to determine what evidence was before the court and whether the decision was supported by that evidence. If there was no evidence presented at the hearing, the evidence before the court was limited to the written evidence presented with the defendant's special

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1 TRAP 34 governs the clerk's and court reporter's record.

2 *See* Rittenhouse v. Sabine Valley Ctr. Found., Inc., 161 S.W.3d 157, 161-62 (Tex.App.—Texarkana 2005, no pet.)(holding that duty is mandatory and noting disagreement among courts of appeals). *See also* Reyes v. Credit Based Asset Servicing and Securitization, 190 S.W.3d 736, 740 (Tex.App.—San Antonio 2005, no pet.); Palmer v. Espey Huston & Assocs., 84 S.W.3d 345, 351 (Tex.App.—Corpus Christi 2002, pet. denied)(agreeing that Appellate Rule 13.1(a) is mandatory).

3 Polaske v. State, 16 S.W.3d 82, 88-89 (Tex.App.—Houston [1st Dist.] 2000, pet. ref'd)(holding that statute controls, so objection must be made to the absence of a court reporter to preserve error).

appearance and the plaintiff's response, and the appellate court should limit its review to the clerk's record. If there had been an evidentiary hearing, but no court reporter's record was made of that hearing (or perhaps it was made, but the complaining party did not have it transcribed and sent to the appellate court), the reviewing court has to presume that the evidence presented at the hearing supported the trial court's decision.

5. *Filing Documents.* After drafting a motion, pleading, or other request, the party must properly *file* the document with the clerk so that it is included in the clerk's record—usually through electronic filing.[4] The clerk's record is public—Rule 21c provides for redaction of "sensitive data" in filed documents. Papers presented during a hearing or trial need not be filed with the clerk[5]—Rule 74 also allows the judge to accept papers for filing.

An electronically filed document is considered timely filed if it is filed any time before midnight in the court's time zone on the filing deadline, unless it must be filed by a certain time of day. An electronically filed document is deemed filed when transmitted to the filing party's electronic filing service provider, unless the document is transmitted on a Saturday, Sunday or legal holiday; if so, it is deemed filed on the next day that that is not a Saturday, Sunday or legal holiday.[6] If an electronically filed document is deemed untimely due to technical failure, a party may seek relief from the court, and if the missed deadline is one imposed by the Rules, the court must give the party a reasonable extension.[7]

If electronic filing is not mandated, filing can be accomplished by hand-delivery to the clerk's office or by mail[8] If the document is sent to the proper clerk by first-class U.S. mail, filing is complete on the date of mailing, so long as the clerk receives the document within 10 days after the date that the document must be filed.[9] The date shown on the postmark provides prima facie evidence of the date of mailing.[10] To facilitate proof, should the date of mailing be called into question, you might consider sending the document by certified mail, return receipt requested. This would enable you to receive a receipt with a postmark, and proof of the clerk's receipt within 10 days. The party filing a paper document should get a "file-marked copy" to keep in its own file for proof of the date of filing.

6. *Serving Documents.* Anything filed with a court under Rule 21, and any notice of a hearing must be served upon opposing parties.[11] (Note that this type of service is different from service of process, by which a defendant is notified of the initial filing of a lawsuit and ordered to respond.)

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4 Rule 21(a) & (f).

5 *Id.*

6 Rule 21(f)(5).

7 Rule 21(f)(6).

8 Rule 5. Note that the rule no longer allows fax filing, however, fax filing is available in a few counties in which the Supreme Court has approved local rules providing for such filing.

9 Rule 5. *See also* Stokes v. Aberdeen, 917 S.W.2d 267 (Tex. 1996) (mailing to proper court address is conditionally effective as mailing to proper court clerk's address if clerk receives a copy within 10 days). Texas Worker's Comp. Comm'n v. Hartford Accident and Indem. Co., 952 S.W.2d 949 (Tex. App.—Corpus Christi 1997, pet. denied) (mailbox rule is applicable to documents sent by first class mail only, and not those sent by private courier).

10 *Id*.

11 Rule 21(b), 21a(a).

If the party is represented by a lawyer, you should serve it on the lawyer.[12] Rule 21 requires all filed documents to contain a "Certificate of Service" certifying that you have served the document in accordance with the rule. You must serve notice of a hearing (and certify that you have done so) not less than three days before the hearing (unless otherwise ordered).[13] The failure to serve the other parties is a sanctionable offense.[14]

When documents are filed electronically, and the email address of the lawyer or party to be served is on file with the electronic filing manager, service must be made electronically through the electronic filing manager.[15] Where electronic service is unavailable, other methods of service are set forth in Rule 21a: in person, by mail, by commercial delivery service, by fax, by email, or by such other manner as the court . . . directs.[16] Electronic service is complete upon transmission; service by mail or commercial delivery is complete upon deposit in the mail or with the commercial delivery service; and fax service is complete upon receipt of the fax, except that receipt after 5:00 p.m. is complete the following day.[17] If the response date is calculated from the date of service, and service was provided by mail, Rule 21a(c) adds 3 days to the response time.[18]

7. *Responding to Filed and Served Documents.* The date of filing and service is important because the response date is calculated either from the date of service or the date of filing, depending upon the type of document to which the response is made. Other response dates are calculated from the date a court order is signed or other date as set forth in the rules. Often a late response is the equivalent of no response and can be devastating to your client's position. Thus, proper calculation of response dates is essential. Rule 4 sets out the rules for computation of time, and applies to *any* period of time prescribed by the rules of procedure.[19]

Under Rule 4, the day of the act or event from which you are calculating your response time *is not included* in the time you have to respond. Thus, the date of filing, service, or court order is always Day 0, not Day 1. *Do not count that day.* Then count the number of days to respond, and the last day *is included*, and is thus the day your response is due. For example, if you have 7 days from service to respond to a pleading, the date of service is Day 0, and Day 7 is the day you must respond. If the last day is a Saturday, Sunday or legal holiday, the time period runs until the next day that is not a Saturday, Sunday or legal holiday. A "legal holiday" is when the clerk's office is officially closed, regardless of whether it is an official holiday listed in a statute.[20]

Intervening Saturdays, Sundays and legal holidays are generally counted when calculating the response date. When the response time is 5 days or less, however, do not count intervening Saturdays, Sundays, or legal holidays, except Saturdays, Sundays, and legal holidays are counted

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12 Rule 8.

13 Rule 21(b). *See* Approximately $1,589.90 v. State, 230 S.W.3d 871, 873 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (holding that local rule may not alter time periods set by TRCP, so the trial court's 10-day notice requirement was invalid).

14 Rule 21b.

15 Rule 21a(a)(1).

16 Rule 21a(a)(2).

17 Rule 21a(b).

18 Rule 21a(c). Note that this three-day add-on is no longer available where service is by fax.

19 Lewis v. Blake, 876 S.W.2d 314 (Tex. 1994).

20 Miller Brewing Co. v. Villarreal, 829 S.W.2d 770 (Tex. 1992). *See also* Hernandez v. National Restoration Technologies, L.L.C., 211 S.W.3d 309 (Tex. 2006).

for the 3-day notice of hearing period provided for in Rule 21,[21] and the 3-day extension of time for service by mail provided for in Rule 21a.

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[21] *See* Rule 4.